ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

JOHN E. MARTIN ......................... Attorney General
JAMES WARD RECTOR .................. Deputy Attorney General
MORTIMER LEVITAN .................... 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 .................... Assistant Attorney General
STEWART G. HONECK, JR. ............. Assistant Attorney General

*On military leave.
Corporations — Finance Companies — Person, firm or corporation previously licensed as "sales finance company" under sec. 218.01, Stats., having no activity other than liquidation of contracts previously acquired and not acquiring any new contracts, is not required to be licensed under sec. 218.01.

January 8, 1943.

ROBERT K. HENRY,
Commissioner of Banking.

You have requested our opinion upon the following question:

"Is a sales finance company required to renew its license in order to liquidate outstanding balances on retail installment contracts purchased or discounted by it under the provisions of section 218.01 of the Wisconsin statutes?"

Assuming a sales finance company as defined in sec. 218.01, Wis. Stats., is only liquidating outstanding balances and performing no other function whatever, our answer to this question is "No".

Sec. 218.01, subsec. (1), par. (d), Stats., defines a sales finance company as follows:
"'Sales finance company' means and includes any person, firm or corporation engaging in this state in the business, in whole or in part, of acquiring by purchase or by loan on the security thereof, or otherwise, retail instalment contracts from retail sellers in this state, including any motor vehicle dealer who shall carry or retain for more than thirty days any retail instalment contracts acquired by him in his retail sales of motor vehicles."

Sec. 218.01 (2) (a), Stats., provides in part:

"No * * * sales finance company shall engage in business as such in this state without a license therefor as provided in this section. * * *"

If a person, firm or corporation is no longer doing the business described in sec. 218.01 (1) (d), it is apparent that no license is required. We believe this is clear beyond doubt from the language used.

RHL

Automobiles — Law of Road — Suspended Licenses — What constitutes serious property damage within meaning of sec. 85.08, subsec. (27), par. (a), Stats., is question of fact depending upon circumstances in each particular case and includes damage to all vehicles or property involved in accident.

Suspension of operator's license under sec. 85.08 (27) (a), Stats., is mandatory only where traffic offense for which conviction is had is direct contributing cause of accident which results in serious property damage. Right to hearing before motor vehicle department in such case under sec. 85.08 (28) may be denied where department is satisfied from records and information that no hearing is warranted.

January 14, 1943.

HUGH M. JONES, Commissioner,

Motor Vehicle Department.

You have called our attention to sec. 85.08, subsec. (27), par. (a), Stats., which reads:
“(27) 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;”

In administering this statute you have asked for our advice on the following questions:

1. What amount of property damage should be considered serious property damage?

2. Should total damage to both vehicles or vehicle and other object be considered, or only the damage done to property of the person against whom no conviction was entered?

3. (a) Is it mandatory that the commissioner suspend the operating privileges of every person convicted of any traffic offense involving an accident which resulted in serious property damage or personal injury; or (b) is suspension mandatory only in those cases where the traffic offense, for which conviction was made, was a direct contributing cause of the accident?

4. If your answer to question 3 is “yes” and the commissioner is therefore performing only a mandatory administrative duty in suspending under section 85.08 (27) (a) of the Wisconsin statutes is the person whose driving privileges have been suspended entitled to a hearing under section 85.08 (28)?

It is evident, in attempting to answer these question, that the statute is very loosely drawn and difficult to administer. It is practically impossible for us to give you any very definite help in determining what amount of property damage should be considered serious property damage. Such a question cannot be answered in dollars and cents, since, for instance, in an accident resulting in the complete demolition of a car of ancient vintage worth only $50, the property damage might be only $50. Yet no one would deny that there had been serious property damage, particularly in times like these when almost any sort of an automobile is irreplaceable. On the other hand but very slight damage to
the fenders or radiator grille of a new Cadillac might well result in a repair bill of $50 or more, yet this would hardly be considered serious damage so far as the functioning of the car is concerned.

We call attention to the provisions of sec. 85.141 (6) (a), which makes it the duty of a driver of a vehicle involved in an accident resulting in total property damage to an apparent extent of $50 or more to report such accident to the local authorities and to the state motor vehicle department. However, we are not prepared to say that this amounts to a legislative definition of "serious property damage" within the meaning of sec. 85.08 (27) (a), as constituting any property damage to an apparent extent of $50 or more. It may nevertheless furnish some help in passing upon the question.

The answer to this problem must depend upon the facts and circumstances of the particular case. In interpreting the statutes words are to be construed and understood according to the common and approved usage of the language, although technical words and phrases and such other as may have acquired a peculiar and appropriate meaning in the law are to be construed and understood according to such peculiar and appropriate meaning. Sec. 370.01 (1), Stats. The meaning of the word "serious", according to Webster's New International Dictionary, is "important; weighty; not trifling; grave", and we take it that such is the meaning to be applied here, since the word "serious" has no fixed or technical meaning in the law, but is rather general and indeterminate in its signification. *State v. Rowe*, 155 N. C. 436, 71 S. E. 332, 336.

We appreciate that the foregoing constitutes no particularly close or helpful guide and that in the last analysis in any particular case the answer to the question rests in the sound discretion of the commissioner within the rather broad limits attaching to the term "serious".

The second question is whether total damage to all vehicles or property should be considered or only the damage to the property of the person against whom no conviction was had. The language of the statute contains no restrictions. It says "any accident resulting in * * * serious property damage". This is all-inclusive and affords no basis for
limiting the application of the statute to damage to any particular car or particular property. The sole question, so far as property is concerned, is whether or not there has been "serious property damage" and not whether there has been serious damage to the property of this person or that person.

Your third question as to whether there must be a direct causal connection between the offense and the accident resulting in the serious property damage to make suspension mandatory is also a very difficult one. Here again the statute is somewhat ambiguous. It may mean one of two things. It may mean that if serious property damage results from the accident there should be a suspension of the license of the operator convicted of an offense occurring at the time of the accident, even though such offense was in no way the cause of the accident. On the other hand, it may mean that to justify suspension the damage must arise out of an accident resulting from the offense committed by one of the persons involved.

Let us assume that A and B are involved in an auto accident resulting in serious property damage and that the accident was caused entirely through B's negligence, although B has committed no criminal offense. Let us assume further that in investigating the accident the police officers discover that A has in his possession a fraudulently altered operator's license in violation of sec. 85.08 (35) (a) for which offense he is duly convicted. Obviously such offense could not have been the proximate cause of the accident, since there is an intervening cause, namely B's negligence.

Having a situation such as this in mind, it would seem to us that of the two alternative constructions suggested above the second is to be favored for the reason that we believe the language of the statute in question at least carries the implication that there must be a causal connection between the offense and the accident. The statute says, "has been convicted as an operator in any accident". The two are definitely linked together in such a way as to suggest a legislative intent to deprive an operator of driving privileges where he had not merely violated the law but where such violation resulted in an accident causing serious property damage.
If the intention of the legislature had been otherwise it would doubtless have left out reference to "any accident resulting in * * * serious property damage" and would have made the suspension mandatory merely upon conviction of violation of ch. 85 irrespective of whether it occurred "in any accident". If the element of an accident resulting in serious property damage is to be injected into the picture at all, the only apparent reason for doing so is because it resulted from the offense in question and that thereby the operator has demonstrated *prima facie* that his driving is a hazard to public safety and that his privileges should be withdrawn until such time as he can demonstrate his ability to satisfactorily operate a motor vehicle and furnish proper proof of financial responsibility. See sec. 85.08 (29).

In effect the legislature has said that a violation of ch. 85 resulting in a serious accident calls for more stringent treatment than a violation that does not result in such an accident, which is perfectly reasonable.

Hence you are advised that suspension is mandatory only where the traffic offense for which conviction was had was a direct, contributing cause of the accident. Here again the statute may be difficult to administer because the record of conviction will not necessarily indicate whether the offense was the proximate cause of the accident resulting in serious property damage, and indeed this question may never be judicially determined if there is a settlement out of court for the damages arising out of the accident. Thus you will have to determine this question in each particular case as best you can from your own study of the facts reported to you.

Your last question relates to the right of a hearing under sec. 85.08 (28) of a suspension order issued under the circumstances discussed above. The answer to this question is found in that part of sec. 85.08 (28) which reads:

"* * * The department may refuse to hold a hearing if satisfied that the records and information in its possession do not warrant such hearing. * * *"

Sec. 85.08 (34a) also makes provision for a circuit court review of a suspension order, but by its terms this does not apply to a mandatory suspension order, and we deem a suspension order issued under sec. 85.08 (27) to be mandatory for the reason that the statute says “the commissioner shall suspend the license of such operator”. The word “shall” when used in a statute is generally mandatory in its legal acceptance. Mau v. Stoner, 14 Wyo. 183, 83 P. 218, 219. Also statutes which impose a duty and give the means of performing it are to be regarded as mandatory. Wendel v. Durbin, 26 Wis. 390.

WHR

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Public Officers — Lieutenant governor is entitled to receive compensation of office of governor when he succeeds to powers and duties of that office by reason of death of governor.

January 18, 1943.

HONORABLE WALTER S. GOODLAND,
Governor.

You have submitted the following request to me for my opinion thereon:

“The question has arisen whether as lieutenant governor succeeding to the powers and duties of the office of governor, as decided by the supreme court on December 29, 1942, I am entitled to the emoluments of the office including the statutory compensation of the governor while performing the duties and functions of that office.”

On December 18, 1905, Op. Atty. Gen. for 1906, 602, the Honorable Robert M. LaFollette, being then about to relinquish the office of governor through resignation following his election to the United States senate, inquired of L. M. Sturdevant, attorney general, first, as to the status of the
lieutenant governor following the governor’s resignation and, second, the amount of compensation to which the lieutenant governor would be entitled in event of the governor’s resignation.

The attorney general informed Governor LaFollette that in his opinion the lieutenant governor would not succeed to the office of governor upon the governor’s resignation but that he would continue to hold the office of lieutenant governor. Mr. Sturdevant stated that the lieutenant governor in such a case would exercise all the powers and duties of the office of governor and that he might properly be termed either acting governor or governor.

Mr. Sturdevant’s opinion in this respect is in accord with the decision of the supreme court in the case of State ex rel. John E. Martin v. Julius P. Heil and Walter S. Goodland, in which it was held that the office of governor is now vacant and that you succeed to the powers and duties of the office by virtue of your office as lieutenant governor.

In response to Governor LaFollette’s second question, Attorney General Sturdevant advised him that the lieutenant governor would succeed to the emoluments attached to the office of governor. I am advised that shortly thereafter Governor LaFollette resigned and that James O. Davidson, the lieutenant governor, succeeded to the powers and duties of the office and received the governor’s compensation during the remainder of the term for which he was elected.

A search of the Wisconsin constitution and statutes indicates that there has been no change since the opinion by Attorney General Sturdevant that would warrant a different conclusion from that which he reached, assuming that it was the proper one at the time.

The only judicial authority which I have been able to find directly in point is the case of State v. LaGrave, (Nev.) 45 P. 243. In that case, under constitutional and statutory provisions very similar to those existing in this state, it was held that in case of a vacancy in the office of governor, whether the lieutenant governor became governor or whether as lieutenant governor he succeeded to the powers and duties of the office of governor, he was nevertheless entitled to the compensation of the office of governor. The case contains an interesting discussion of two vacancies created in the
office of governor in the state of New York, one occasioned by the death of DeWitt Clinton in 1828, and the other by the resignation of Martin Van Buren in 1829. In both cases the lieutenant governor was held by the comptroller of the state of New York to be entitled to the compensation of the governor upon his assumption of the powers and duties of the office. Many years afterward the court of appeals of New York referred to the comptroller's decision with approval in discussing a related question.

The administrative interpretation made in the state of New York is persuasive here in view of the closely related development of the constitution and the law of this state with that of the state of New York.

I have found nothing in the way of an adjudicated case or an administrative interpretation under any of the state constitutions comparable with ours pointing toward a conclusion that you would not be entitled to receive the compensation of governor under the present circumstances. Any opinion which I might give to that effect, therefore, would be not only lacking in precedent but would be, as well, contrary to precedent.

Accordingly, I am of the view that you should certify yourself upon the pay roll as being entitled to the compensation of the office of governor.

JEM
Indigent, Insane, etc. — Poor Relief — Old-age Assistance — Property acquired by wife upon death of her husband, through assignment of her dower and homestead rights, is subject upon her death to claim under sec. 49.25, Stats., for old-age assistance given her, except for her homestead rights when such rights are limited to life estate.

Lien given by sec. 49.26, subsec. (4), for old-age assistance paid by county attaches to consummate dower right of widow but not to inchoate dower right of wife during her husband's life.

Lien given by sec. 49.26 (4) is not enforceable against husband's curtesy right in realty unless he attempts to transfer such right during his lifetime.

January 22, 1943.

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

You have made several inquiries with respect to the recovery of the amount paid as old-age assistance from the property of a beneficiary.

I.

The first question is:

"With reference to the situation discussed in XXXI Op. Atty. Gen. 151, is it necessary to distinguish between a widow's homestead and dower rights in later probating her estate?"

The answer is: Yes, if the widow's homestead rights are limited to a life estate; otherwise no.

The opinion in XXXI Op. Atty. Gen. 151 held that assistance furnished to a wife could not be recovered from the separate estate of her husband, though both were pensioners. Where the wife receives property upon her husband's death through her dower and homestead rights, you wish to know whether that property will be subject at her death to the claim under section 49.25, Stats. for old-age assistance furnished her.
Under sec. 49.25 the amount of old-age assistance made to any person is to be allowed as a claim "against the estate of such person". The question determining whether any particular property is subject to the claim under that section is whether that property is a part of the beneficiary's estate upon his death.

Under sec. 233.01, Stats., property which a wife receives as dower becomes hers absolutely, and, if not transferred during her life, is a part of her estate at her death. Under sec. 237.02, Stats., the same is true of homestead property provided the husband had no descendants. If, however, the husband had issue, the widow's homestead rights are limited to a life estate. In such case the homestead is not a part of the widow's estate upon her death, and is not subject under sec. 49.25 to the claims for old-age assistance paid to her.

II.

Your second question is whether the old-age assistance lien under sec. 49.26 (4) attaches under the inchoate dower right of a wife during the life of her husband or to her consummated dower right after his death.

A. As to the inchoate dower right, the answer is no. The lien under sec. 49.26 (4) extends to "any and all real property of the beneficiary presently owned or subsequently acquired, including joint tenancy". An inchoate right of dower cannot be classed as real property owned by the beneficiary. As said in 28 C. J. S. 108-109, sec. 42:

"* * * It is generally held that the inchoate right of dower is not an estate, or title, or interest in land, and that it confers upon the wife no right of possession or control of the land to which it attaches, but instead is rather a contingent claim or right, or chose in action, or expectancy, which will ripen into an estate in case the husband dies first, but which will be lost if she dies before the husband. * * *"

The Wisconsin supreme court held in Munger v. Perkins and another, 62 Wis. 499, that the inchoate right of dower does not constitute a future estate within the meaning of sec. 2034, R. S. 1878 (now sec. 230.10), saying (p. 504):

"* * * The wife's interest is contingent, does not become vested until the death of her husband, and cannot be
conveyed or relinquished except in the manner pointed out by the statute. * * *"

Of course, if the property is subsequently acquired by the widow through perfection of the inchoate dower right, the lien given under sec. 49.26 (4), accrues upon the title so acquired.

B. With respect to a consummate dower right, the answer is yes.

A consummate dower right, that is, the right of the wife upon the death of her husband, has been held in Wisconsin not to constitute an estate in land until it has been perfected by admeasurement and assignment of the dower. See Estate of Johnson, 175 Wis. 248, 185 N. W. 180; Farnsworth v. Cole, Adm'r., 42 Wis. 403; Howe and others v. McGivern and another, 25 Wis. 525. In the more recent case of Pollock v. Columbia Bank, 193 Wis. 389, however, it was held that regardless of whether a consummate dower right may be classed as an estate in realty before an assignment of dower, the right is an interest which may be assigned or mortgaged by the widow, and the assignee or mortgagee may maintain action to enforce its rights.

It was pointed out by the supreme court in Goff v. Yau-

man, 237 Wis. 643, 298 N. W. 179, 134 A. L. R. 952, that the lien given by sec. 49.26 (4) was intended to cover all property which could have been required to be transferred under the law as it existed prior to 1937. The court said (p. 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. * * *"
Since the Wisconsin court has held that the widow's consummate dower rights are assignable, she could, prior to 1937, have been required to assign such right as a condition of receiving old-age assistance. If that be true, it follows that under the law as amended in 1937, that right is subject to the lien given by sec. 49.26 (4).

III.

Your third question is whether such a lien would ever attach to a husband's curtesy right in realty.

The lien of sec. 49.26 (4) could attach against a husband's curtesy right in realty, so as to be enforceable, only in the event he transferred such right during his lifetime.

Under sec. 233.23 of the statutes, a husband's right of curtesy is limited to a life interest.

If we follow the test suggested in Goff v Yauman, supra, it would appear that an estate by curtesy would be subject to the lien of sec. 49.26 (4) because a life interest in land is an estate in real property which is transferable. The question with respect to this particular statute, however, is affected by the fact that the lien given by sec. 49.26 (4) is enforceable only "after transfer of title of the real property by sale, succession, inheritance, or will." If the holder of the life estate by the curtesy should transfer title during his life by sale there appears to be no reason why the lien could not be enforced against the interest in the land so transferred. A lien, however, can be no greater than the interest of the person against whose title it operates. Since a tenant by curtesy holds only for his life, the title upon his death does not vest in the next owner by succession, inheritance or devise from him. The title of the succeeding owner, not being derived from the tenant by the curtesy, is not subject to liens against his interests.

BL
Taxation — Tax Sales — There is no provision in statutes for county to charge back to village tax certificates held by county and canceled by it because lands were not subject to taxation.

January 29, 1943.

H. W. ESLIEN,

District Attorney,

Oconto, Wisconsin.

In 1923 Oconto county took a tax deed to certain real estate in the village of Gillett. On June 18, 1935, pursuant to a resolution of the county board, a written land contract in the usual form was entered into by the county clerk in the name of the county for the sale of this property for $12,500.00, payable $1,000.00 upon the execution of the contract and the balance in monthly payments of $200.00 each, with interest payable annually February 1st at 5% per annum on the unpaid balance. This contract contained the usual provision whereby the vendee agreed that he would "pay when due and payable all taxes and assessments that shall become due on this property after this date." The village of Gillett assessed this property for taxation in the years involved, through and including 1940. The vendee paid the taxes up to 1937, but did not pay them for 1937, 1938 and 1939. The land was sold for the nonpayment thereof, the county bidding it in and holding the certificates therefor.

On January 16, 1941, the county board adopted a resolution reciting the entry into the contract, the payment of $7,000.00 on the purchase price, leaving a balance of $7,532.75 principal and interest unpaid, the payment by the vendee of taxes of approximately $2,000.00 and that such taxes were illegally assessed, and directing the county clerk to execute a quitclaim deed to the vendee upon payment to the county treasurer of $5,500.00 and presentation of proof of payment of the 1940 taxes assessed against the premises. Immediately following the county board then adopted another resolution declaring that the 1937, 1938 and 1939 taxes against the property were illegal because the property was county-owned at the time of the assessment thereof,
canceling the tax sale certificates therefor held by the county, and charging the amounts thereof back to the village of Gillett in the 1941 tax levy. The village and its clerk have refused to recognize this charge-back maintaining that the county had no right to cancel these tax certificates and charge them back.

Our opinion is requested as to whether the lands were tax exempt during the years in question, and also as to whether the county had the right to cancel the certificates and charge the same back to the village and, if so, what is the appropriate action for the county to compel the village to pay the amount so charged back.

At the time of making the land contract the 1935 statutes which are applicable provided as follows:

"75.35 Terms of sale. The county board may, by an order to be entered in its records prescribing the terms of sale, authorize the county clerk * * * to sell and convey by quitclaim deed, duly executed and delivered by such clerk under his hand and the county seal of such county, any such lands for which a deed has been executed to such county as provided in the next section.

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

"(1) * * *

"(2) Make such leases, contracts or other conveyances in relation to lands acquired for such purposes as in their discretion are in the interest of the public welfare."

"59.67 Property of county; how held and conveyed.

"(2) 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, * * * any real estate of the county, * * * not donated and required to be held for a special purpose, * * *.

Presently sec. 59.08 (42), Wis. Stats. 1941, expressly authorizes the making of land contracts for the sale of county-owned land acquired by tax deed, such provision having been enacted by ch. 225, Laws 1941. Sec. 59.67 (2), Stats. 1941, likewise now authorizes the county to make land con-
tracts for the sale of any real estate that it owns, it having been so amended by ch. 5, Laws 1941, which also removed from the present sec. 75.35, Wis. Stats. 1941, the language previously therein relating to authorization of the county clerk to sell and convey tax deed lands. The validity of the land contract in question, however, depends upon whether or not the above quoted provisions of the 1935 statutes authorized a county to enter into a land contract for the sale of tax deed lands.

If the land contract was valid as being within the power of the county then the vendee was the owner of the property for tax exemption purposes under the rule of Ritchie v. Green Bay, (1934) 215 Wis. 433, 254 N. W. 113, the property was subject to taxation and the county had no right to cancel the certificates.

On the other hand, the language of the court in Smith v. Board of Supervisors of Barron County, (1878) 44 Wis. 686, 693, which has been made the basis, at least in part, of our opinions in XXII Op. Atty. Gen. 484, XXVI Op. Atty. Gen. 177 and XXVII Op. Atty. Gen. 348, is pertinent to the provisions of secs. 75.35 and 59.67 (2), Stats. 1935, quoted above, and points to the conclusion that under those statutes the county had no power in 1935 to enter into a land contract for the sale of county-owned tax deed lands. In view of the specific provisions of sec. 75.35 covering the sale of tax deed lands it is arguable that the general power granted by sec. 59.07 (2), Stats. 1935, was not intended to include tax deed lands and is restricted to lands other than those acquired by tax deed. But, even though the county board had no power to enter into the land contract and therefore it is void with the result that, as the county continued to be the owner of the land, it would be exempt from taxation in the years involved and the tax certificates were thus properly canceled, we are unable to find any provision in the statutes authorizing a charge-back by the county to the local municipality where tax certificates are canceled under such circumstances.

It is therefore our opinion that the charge-back to the village of Gillett is unauthorized and without validity.

HHP
Taxation — Personal Property Tax — Words and Phrases — “Nonresident” in sec. 70.13, subsec. (4), Wis. Stats., means nonresident of state. Corporation organized under laws of Delaware but having its principal office and place of business in this state, by sec. 70.14, Stats., is treated as resident of this state for purposes of taxation of personal property in this state.

January 29, 1943.

RALPH W. STELLAR,
District Attorney,
Hayward, Wisconsin.

You state that on April 1, 1942, there were three million feet of decked logs in the town of Draper in Sawyer county owned by a corporation that is incorporated under the laws of Delaware but has a lumber mill and its principal place of business at the city of Park Falls in Price county. The assessor of the town of Draper assessed said logs as personal property of the corporation in that town claiming sec. 70.13, subsec. (4), Wis. Stats., as authority therefor. By May 1st these logs had been transported to the mill at Park Falls and a substantial portion, if not all, thereof had been manufactured into lumber. The assessment by the assessor of Park Falls of the personal property of the corporation there located on May 1st included such lumber and any of the logs remaining. Our opinion is requested as to whether the assessment by the town of Draper is valid.

Sec. 70.10, Stats. 1941, provides:

“The assessor shall begin as soon as practicable after the April election, if he is elected at such election, otherwise as soon as practicable after January first to assess all the real and personal property as of the close of the first day of May in each year. * * *”

Sec. 70.13, Stats. 1941, so far as material, provides:

“(1) All personal property shall be assessed in the assessment district where the same is located or customarily kept except as otherwise specifically provided. Personal property in transit within the state on the first day of May shall be
assessed in the district in which the same is intended to be kept or located, and personal property having no fixed location shall be assessed in the district where the owner or the person in charge or possession thereof resides, except as provided in subsection (5) of this section.

"(2) Saw logs or timber in transit, which are to be sawed or manufactured in any mill in this state, shall be deemed located and shall be assessed in the district in which such mill is located. Saw logs or timber shall be deemed in transit when the same are being transported either by water or rail, but when such logs or timber are banked, decked, piled or otherwise temporarily stored for transportation in any district, they shall be deemed located, and shall be assessed in such district.

"(3) On or before the tenth day of May in each year the owner of such logs or timber shall furnish the assessor of the district in which such mill is located a verified statement of the amount, character and value of all such logs and timber in transit on the first day of May preceding, and to the assessor of the district in which any such logs and timber were located on the first day of May preceding, he shall furnish a like verified statement of the amount, character and value thereof.

"(4) It shall be the duty of the assessor of the assessment district in which any saw logs, timber, railroad ties, or telegraph poles owned by nonresidents may be located to ascertain at any time during the month of April in each year the amount of such property in his assessment district, by actual view as far as practicable, fix the value of said property, and assess the same to said owners as other personal property is valued and assessed.

"(5) As between school districts, the location of personal property for taxation shall be determined by the same rules as between assessment districts; provided, that whenever the owner or occupant shall reside upon any contiguous tracts or parcels of land which shall lie in two or more assessment districts, then the farm implements, live stock, and farm products of such owner or occupant used, kept, or being upon such contiguous tracts or parcels of land, shall be assessed in the assessment district where such personal property is customarily kept.

"(6) No change of location or sale of any personal property after the first day of May in any year shall affect the assessment made in such year."

Sec. 70.14, Stats. 1941, provides:

"The residence of an incorporated company, for the purposes of the preceding section, shall be held to be in the as-
sessment district where the principal office or place of business of such company shall be.”

The inclusion in the Park Falls assessment of the logs in question and the lumber manufactured therefrom that were at the mill in that city on May 1, 1942, is predicated upon the provisions of sec. 70.13 (1), Stats., that personal property shall be assessed where located and of sec. 70.10, Stats., that it is to be assessed as of May 1st. On the other hand the inclusion of the logs in the town of Draper assessment is based upon the language of sec. 70.13 (4), Stats., that it is the duty of the assessor of the district in which any saw logs, etc. “owned by nonresidents may be located to ascertain at any time during the month of April in each year” the amount, fix the value and assess the same to the “owners as other personal property is valued and assessed.” The situation thus is that the same owner has been assessed twice in this state in one year for the same personal property.

Taxation of logs of nonresidents pursuant to the provisions of sec. 70.13 (4), Stats., is valid, notwithstanding that such property is again subjected to taxation by the state of the owner to which removed. C. N. Nelson Lbr. Co. v. Town of Loraine, (1884) 22 Fed. 54; Coe v. Errol, (1886) 116 U. S. 517. Not only do these cases not pass upon the validity of double taxation of property by the same state, but that question is not here involved. As was said in State ex rel. Holt Lbr. Co. v. Bellew, (1893) 86 Wis. 189, 196, 56 N. W. 782, it would be unreasonable to construe our statutes as providing for such duplicate assessment. To be given that effect there would have to be clear and unambiguous language evidencing such an intent.

It is the rule that a tax cannot be imposed without clear and express language to that effect and where ambiguity and doubt exist it must be resolved against taxability. Wadham Oil Co. v. State, (1933) 210 Wis. 448, 460, 246 N. W. 687, 688. An intent to impose double taxation is not to be ascribed to statutes in the absence of clear and unambiguous expression thereof. First National Bank of City of Superior v. Douglas County, (1905) 124 Wis. 15, 102 N. W. 315. There is a presumption against an intention to impose double taxation which exists until overcome by express lan-
20  

**Opinions of the Attorney General**

...guage. *Milw. Elect. Ry. & Lt. Co. v. Tax Comm.*, (1932) 207 Wis. 523, 544, 242 N. W. 312. Upon a careful and extended study of the kaleidoscopic history of these statutes we do not find anything that indicates any such legislative intent.

Furthermore, if possible statutes are to be so construed and applied as to avoid a conflict. Thus, although it might appear on the face that the provisions of sec. 70.10 that personal property shall be assessed as of May 1st, the provisions of sec. 70.13 (1) that it shall be assessed where located, and the provisions of sec. 70.13 (2) that saw logs etc. which are banked, decked, piled or otherwise temporarily stored for transportation in a district are deemed located therein, conflict with the provisions of sec. 70.13 (4), it is possible to construe and apply them so as to avoid conflict.

Therefore it is our conclusion that these statutes are not designed for the purpose of assessing this corporation twice in the same year on the same property and that the inclusion of the logs in question is proper in only one of the assessments.

These statutes all proceed upon the same basic thesis that personal property is to be taxed in this state at the place of its location on May 1st. Because of the movability of personal property and that it may be tangible or intangible, problems exist as to where it is located and these statutes proceed to deal with and resolve them. If in transit on May 1st its location is stated to be where it is intended to be kept or located. Then, personal property generally which has no fixed location of its own is given location at the place of residence of the owner or person in charge or possession of it. As to logs or timber in transit on May 1st which are to be sawed or manufactured in a mill in this state their location is that of said mill. What is meant by logs or timber in transit is then defined as including those that are actually being transported by water or rail on May 1st, but not those banked, decked, piled or otherwise temporarily stored on that date for transportation, they being deemed located where so banked, etc. Then comes subsec. (4) of sec. 70.13, which likewise proceeds upon the same thesis of taxation at the place of location, but relates only to saw logs etc. owned by nonresidents that may be located in an assessment district during the month of April.
It is perfectly clear that the logs in question were actually and physically located on May 1st at the mill at Park Falls, that they were not in transit, or banked etc. in some other place, on that date, and whether owned by a resident or non-resident of this state, individual or corporate, they would be taxable at Park Falls under the provisions of sec. 70.13 exclusive of subsec. (4).

Is the intended application of subsec. (4) that, although the logs are otherwise assessable under the other provisions of sec. 70.13 to the owner at the place where they were located in this state on May 1st, just because he is a non-resident of a district in which such logs were located at any time in the month of April they are not to be assessed under said other provisions but in the said district where they were during April? It is our opinion that it is not.

The word "nonresident" in our opinion refers to a non-resident of the state and not of the assessment district. This provision of subsec. (4) came into the statutes as sec. 2 of ch. 258, Laws 1882 and as so enacted read "nonresidents as aforesaid." The reference is to sec. 1 thereof which expressly covered the assessment of logs etc. "owned by any person or corporation not residing in this state." This was at a time when the statutes provided that the place of assessment of personal property was at the residence of the owner, and provided that if the owner was a nonresident of the state and had an agent in the state in charge thereof then at the residence of said agent, but if there was no such agent then at the place where the property was located. It was subsequently deleted and then later restored to the statutes by ch. 179, Laws 1893. The words "as aforesaid" remained until sec. 1040 R.S. was overhauled by ch. 497, Laws 1913, but it is clear from a reading of the provisions of the entire section, as so re-created, that the word "nonresident" therein meant one not residing in the state. This subsec. (4) of sec. 70.13 has remained unchanged since and there is nothing in the subsequent history of these statutes which even suggests that this word "nonresident" is to have a different reference from that which it then had.

It appears that the corporation here is organized under the laws of Delaware and thus might be deemed a nonresident of this state. Sec. 70.14, Stats., which has been in the
Opinions of the Attorney General

Statutes since 1878 and remained unchanged during all the other varied changes in the statutes relating to assessment of personal property, provides that for the purposes of sec. 70.13, Stats., the residence of a corporation is in the district where its principal office or place of business is located. It is stated that this corporation has its principal office and place of business at Park Falls. We are fully cognizant of the decision in Newport Co. v. Tax Comm., (1935) 219 Wis. 293, 261 N. W. 884, that a state may not by statute domesticate a foreign corporation having its principal place of business in the state so as to bring into its taxing jurisdiction intangible personal property whose tax situs is that of the domicile of the corporation. Nevertheless, that decision does not preclude the provision of sec. 70.14, Stats., from being valid in the instant case because the tangible personal property here involved clearly had a location of its own in this state so that it is within its taxing jurisdiction and all that this statute does in this situation is define in which of the districts of the state it shall be assessed. See also Milwaukee Steamship Co. v. City of Milwaukee, (1892) 83 Wis. 590, 53 N.W. 839.

It is, therefore, our opinion that the logs in question were improperly included in the assessment for the town of Draper.

HHP
Courts — Garnishment — Public Officers — State Employees — Deductions required to be made by state from employees' wages or salaries for federal victory tax will operate to reduce amount judgment creditors filing judgments under sec. 304.21, Wis. Stats., will receive and will not reduce amount of wages or salary to which employee is entitled under sec. 272.18, subsec. (15).

February 1, 1943.

FRED R. ZIMMERMAN,
Secretary of State.

You have requested our opinion as to the effect of federal victory tax deductions from salaries of state officers and employees with respect to the exemption provided by sec. 272.18, subsec. (15), Wis. Stats., in cases where judgments are filed pursuant to sec. 304.21. You ask whether the victory tax will be deducted from that portion of the debtor-employee's salary which is exempt by virtue of sec. 272.18 (15) or whether the deduction of the victory tax will operate to reduce the amount of the debtor-employee's salary which otherwise would be payable to the judgment creditor.

The victory tax provisions of the federal law comprise subchapter D of the Internal Revenue Code found in 26 U. S. C. A., secs. 450 to 456, inclusive, secs. 465 to 470, inclusive, and secs. 475 to 476, inclusive. Under 26 U. S. C. A. sec. 466 (a), it is provided:

"There shall be withheld, collected, and paid upon all wages of every person, to the extent that such wages are includible in gross income, a tax equal to 5 per centum of the excess of each payment of such wages over the withholding deduction allowable under this part. * * *

Sec. 467 (a) of 26 U. S. C. A. provides:

"The tax required to be withheld by section 466 shall be collected by the person having control of the payment of such wages by deducting such amount from such wages as and when paid. * * *

Sec. 467 (b) of 26 U. S. C. A. provides:
"Every person required to withhold and collect any tax under this part shall be liable for the payment of such tax, and shall not be liable to any person for the amount of any such payment."

By express provisions of the law the wages of state employees are made subject thereto.

Assuming the complete validity of the victory tax law as applied to the state in its capacity as an employer, it is seen that the state is required to withhold the tax and becomes liable for its payment. The law evidences an intention to make such taxes prior claims against wages due employees, particularly in view of the fact that the employer is made directly liable for the payment thereof. The employer is by law required to withhold the tax and is by law precluded from paying to the employee such part of the employee's wages as must be withheld and it would follow that judgment creditors of the employee could reach only that portion of the employee's salary which becomes due him after the victory tax has been withheld and after the exemptions provided by sec. 272.18 (15) have been accorded to the employee.

It is thus our opinion that the victory tax due on state employees' salaries will operate to reduce the amount otherwise payable to judgment creditors filing judgments under sec. 304.21 and that the employee will remain entitled to the payment to him of the full amount of his wages or salary allowed under the exemption statutes.

RHL
Social Security Act — Poor Relief — Old-age Assistance — Combined property of husband and wife must be considered in determining eligibility for relief under sec. 49.23, Stats., even though they may be living separately.

February 4, 1943.

DEPARTMENT OF PUBLIC WELFARE.

You have asked for an interpretation of the following provision of sec. 49.23, Stats.

"Old-age assistance shall not be granted or paid to a person:

"(1) * * *

"(2) If the value of his property or the value of the combined property of husband and wife living, together exceeds five thousand dollars."

You state that the state pension department since February 1937 has construed the words "living" and "together" as a single phrase, that is, as "living together" with the comma removed, with the result that if a husband and wife are living apart their property is considered separately in determining eligibility for assistance under the above provision.

While it is true that the courts of this state give weight to the interpretation placed upon a statute by administrative officers such as the state pension department, such an interpretation may be considered by the courts only when the law is ambiguous. Travelers' Ins. Co. v. Fricke, 94 Wis. 258, 68 N. W. 958; Van Dyke v. Milwaukee, 159 Wis. 460, 150 N. W. 509, aff'd. on rehearing 1914, 159 Wis. 469, 146 N. W. 812; Smith v. State, 161 Wis. 588, 155 N. W. 109; Waldum v. Lake Superior T. & T. R. Co., 169 Wis. 137, 170 N. W. 729; State ex rel. Time Ins. Co. v. Smith, 184 Wis. 455, 200 N. W. 65; Chicago & N. W. R. Co. v. Tax Comm., 199 Wis. 368, 226 N. W. 293; Byram v. Tax Comm., 199 Wis. 378, 226 N. W. 296; City of Milwaukee v. Milwaukee County, 236 Wis. 7, 294 N. W. 51.

It is also true that the supreme court of this state has said that in giving construction to a statute the punctuation is
entitled to small consideration (*Morrill v. The State*, 38 Wis. 428, 434, 20 Am. Rep. 12), and that punctuation or the lack of it cannot be allowed to override plain rules of construction. (*Jorgenson and another v. City of Superior*, 111 Wis. 561, 566, 87 N. W. 565.) On the other hand, the use of a comma was considered in the case of *Service Investment Co. v. Dorst*, 232 Wis. 574, 288 N. W. 169, in determining the meaning of a legislative provision where the question was similar to that raised by the interpretation of the provision here involved, that is, whether the words following the comma should be applied only to the last preceding antecedent or to other preceding terms or clauses. The court stressed the fact that there would be no need for the comma if the legislature had intended the term following it to modify only the last preceding antecedent, saying, p. 577:

"* * * If the modifying clause had been intended to modify only the last antecedent clause, there would have been no occasion for the comma and it would have been omitted."

The rule of the Wisconsin cases respecting punctuation appears to accord with the following general summarization contained in 59 C. J. pp. 989-991, sec. 590:

"Punctuation is not part of a statute and cannot control its construction against the manifest intent of the legislature, and the court will punctuate or disregard punctuation as may be necessary to ascertain and give effect to the real intent. Punctuation may, when the meaning of the statute is uncertain, be looked to in ascertaining the real meaning, or, if the punctuation gives the statute a reasonable meaning apparently in accord with the legislative intent, it may be used as an additional argument for adopting the literal meaning of the words of the statute thus punctuated. It will not be disregarded unless it is necessary to do so, and a statute which is clear and grammatical will not be extended by repunctuation. Punctuation as a means of interpretation will be resorted to only when all other means have failed."

The only purpose for placing a comma between the words "living" and "together" in the statutory provision here involved would be to indicate that the word "together" does
not modify the term "living.". To construe the word "together" as modifying only the word "living", it is necessary not only to disregard the comma but actually to remove it in order to give the provision a different meaning than it would otherwise have. That might be permissible if there were something in the words of the statute to create an ambiguity or to indicate that the legislature intended to reach the result attained by removing the comma. If the statute as written is susceptible of an interpretation which does not conflict with any other manifestation of legislative intent there is no ambiguity which would permit a resort to construction.

The statute as written is susceptible of the meaning that if husband and wife are both living and the value of their combined property considered together equals $5,000.00, neither is eligible to receive old-age assistance. It may be argued that the use of the word "living" to modify the words "husband and wife" is superfluous and therefore creates an ambiguity, since the words "husband and wife" themselves imply the existence of a living spouse. It is entirely conceivable, however, that word "husband" might sometimes be used in place of the term "widower," or "wife" instead of "widow," in common parlance. The word "living" might have been used in the statute, therefore, to make it clear that the words were used in their strict sense. Likewise, it might be argued that the use of both the words "combined" and "together" with relation to the property of a husband and wife is surplusage which creates an ambiguity. Any number of statutes could be cited which contain more words than would be absolutely essential to establish their meaning. The fact that the same meaning could be expressed in briefer language does not of itself create an ambiguity.

It appears to us that since the statute as written is susceptible of the meaning that if husband and wife are both living, neither is entitled to assistance if the value of their combined property equals $5,000, and since such a meaning does not conflict with any legislative policy manifest in other parts of the law, we are not privileged to assume that the punctuation is erroneous in order to arrive at a different meaning, even though it might be considered wiser and more just.
If a married couple has been divorced, they are no longer husband and wife, so that their property would be considered separately in determining eligibility for assistance under sec. 49.23; otherwise, we believe that if both husband and wife are living their property must be considered together for that purpose.

BL

Intoxicating Liquors — Winery license under sec. 176.05, subsec. (1f), Stats., authorizes holder to rectify wine without also having rectifier's permit under sec. 176.05 (1a), Stats.

John M. Smith,
State Treasurer.

February 19, 1943.

Our opinion has been requested upon the question of whether the holder of a winery license under sec. 176.05, subsec. (1f), Stats., may blend several wines and add flavoring thereto producing a product known as "May Wine" without obtaining a rectifier's permit pursuant to sec. 176.05 (1a), Stats.

Sec. 176.05 (1f) provides as follows:

"There shall also be issued by the state treasurer a license which shall be called a winery license. The annual fee for said license shall be one hundred dollars paid into the state treasury and credited to the general fund, and shall permit the licensee to wholesale or to manufacture and bottle wine on the premises so licensed for sale at wholesale to other licensees. A manufacturer, rectifier or wholesaler holding a permit issued under subsection (1a) may manufacture, rectify, bottle or wholesale wine, pursuant to the terms of the permit without procuring a winery license.

There may be some question whether the process of blending and adding flavoring utilized by the particular winery licensee in question, which has not been detailed as it is a
trade secret, constitutes rectification. Sec. 176.01 (10) defines a "rectifier" as "a person, firm or corporation that rectifies, purifies or refines distilled spirits or wines" under certain circumstances, but nowhere in the statutes is the word "rectify" defined. But, in view of our conclusion herein, we assume for the purposes of this opinion that these operations constitute rectification.

A reading of sec. 176.05 (1f), Stats., without any consideration to its history would tend to attach significance to the language used, in that the second sentence says the holder of a winery license is authorized "to wholesale or to manufacture and bottle wine" whereas the last sentence allows the holder of a permit under subsec. (1a) to "manufacture, rectify, bottle or wholesale wine" pursuant to the terms of such permit without procuring a winery license. As the second sentence contains only "wholesale", "manufacture" and "bottle", three things, and the last sentence mentions them and in addition uses the word "rectify", a total of four things, the interpretation would be suggested that the absence of the word "rectify" in the second sentence means that a winery licensee could not "rectify" wine. However, the history of this subsection throws an entirely different light upon the interpretation to be given to it.

Prior to the enactment of ch. 217, Laws 1935, the only provisions of the statutes relating to permits for manufacturing, rectifying or wholesaling of wine were those which related to permits for manufacturing, rectifying and wholesaling of intoxicating liquors in general, wine being classified under the statutes as intoxicating liquor. Said ch. 217, Laws 1935, which took effect upon its publication July 3, 1935, greatly reduced the tax on wines and provided for the first time for a winery license by creating subsec. (1f) of sec. 176.05, Stats. As so created said subsec. (1f) contained only the first two sentences of this subsection as it now appears in the 1941 statutes. So far as it related to wine, the purpose behind the enactment of ch. 217, Laws 1935, was to render wine less expensive by not subjecting it to as high a tax as other intoxicating liquors and by providing for a winery license for the production and wholesaling of wine at a much smaller fee than for permits relating to other intoxicating liquors.
Shortly thereafter the question arose of whether the holder of a manufacturer's or rectifier's permit could manufacture or bottle wine, or the holder of a wholesaler's permit could bottle wine, as he had in the past, without also obtaining a winery license under this new subsec. (1f), which was submitted to our office. An opinion was issued August 29, 1935 (later withdrawn and not published because of the amendment made by ch. 503, Laws 1935, and the issuance of an opinion on September 30, 1935, XXIV Op. Atty. Gen. 636, as to the effect thereof), that it was necessary that he obtain a winery license therefor. This conclusion was reached by invoking the rule of construction that special provisions prevail over general statutory provisions. However, in our opinion, due consideration for the above recited objectives of ch. 217, Laws 1935, should have produced the opposite conclusion as to the intended scope and effect of subsec. (1f).

To meet this situation and effect the intended result the last sentence in present subsec. (1f) was added by the enactment of ch. 503, Laws 1935, effective on its publication on September 25, 1935. The use of the word "rectify" in this amendment, instead of bearing the implication previously suggested, demonstrates rather that it was necessary, otherwise a winery license under subsec. (1f) would be necessary for one to rectify wine. This constitutes a legislative interpretation of subsec. (1f) that a winery license issued thereunder authorizes the holder thereof to rectify wine. Any other interpretation would be contrary to and inconsistent with the very purpose in providing for such winery license at a reduced fee.

It is therefore our opinion that a winery license under sec. 176.05 (1f) Stats. 1941, authorizes the holder thereof to rectify wine and without the necessity of also possessing a rectifier's permit under sec. 176.05 (1a).

HHP
Automobiles — Law of Road — In order to stay suspension of driving privileges under sec. 85.08, subsec. (27k), and sec. 85.135 (5) (d), Stats., of person against whom judgment is had in civil court for Milwaukee county for damages arising out of negligent operation of motor vehicle, pending appeal to circuit court from such judgment, there must be filed with motor vehicle department certified copy of notice of appeal and certified copy of undertaking to stay execution.

February 26, 1943.

HUGH M. JONES, Commissioner,
Motor Vehicle Department.

You have asked for our advice as to the correct procedure to follow in suspension of driving privileges pending appeal from a judgment arising out of the negligent operation of a motor vehicle.

Sec. 85.08, subsec. (27k), par. (a), Stats., which provides for suspension of driving privileges in such cases, also contains the following provision:

"* * * No such judgment shall be stayed in so far as it operates to cause a suspension of license or registration certificate unless proof of ability to respond in damages for any future accidents is made as provided in section 85.09. * * *"

However, sec. 85.08 (27k) (b), formerly sec. 85.08 (11) (b), clearly implies that no filing of proof of financial responsibility is required where there is a stay of execution. Note the following language:

"* * * If, however, the enforcement of such judgment shall be stayed so as to excuse the filing of such security * * *"

Thus, paragraphs (a) and (b) of subsec. (27k) of sec. 85.08 gave rise to an apparent conflict which we should endeavor to reconcile if possible. Effect can be given to both paragraphs by holding that in the absence of the filing of proof of financial responsibility referred to in paragraph
(a) there must be a stay of execution of the judgment as indicated under paragraph (b) in order to excuse the filing of proof of financial responsibility in those cases where the operator desires to stay suspension of his driving privileges. To rule that there must be a filing of proof of financial responsibility in all cases regardless of appeal or stay of execution would emasculate and render meaningless the phraseology of paragraph (a) above quoted, as well as sec. 85.135 (5) (d) hereinafter mentioned.

Sec. 85.135 (1) provides:

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

Sec. 85.135 (5) (d) provides:

"The right to drive shall not be suspended pending appeal from said judgment if the judgment is stayed pending such appeal."

Since each of the above sections prescribes the legal consequences of a judgment for damages resulting from the negligent operation of an automobile they are in pari materia for purposes of construction. XXVIII Op. Atty. Gen. 146, 147.

You state that it has been the policy of the department to require filing of proof of financial responsibility during the appeal period and to insist that copies of the notice of appeal, affidavit of good faith, undertaking on appeal and stay of execution on appeal be filed with your department as evidence of appeal and of the stay of execution. Objections to such requirements have been made in Milwaukee county in the case of appeals from civil court to circuit court, it being contended on the strength of Jefferson Gardens, Inc., v. Terzan, 216 Wis. 230, that no undertaking on appeal or stay of execution is required.
It is true that the above case holds that no bond on appeal from civil court to the circuit court is required, the procedure being covered by the statutory provisions for appeal from justice court to circuit court. But the court indicates that a bond would be required to stay execution pending appeal as provided by sec. 306.04 in the case of appeals from justice court.

Since the procedure of appeal from justice court to circuit court applies in appeals from the civil court of Milwaukee county to the circuit court, as indicated in the above case, we set forth here the statutory provisions relating to justice court appeals and stay of execution:

Sec. 306.02. "The appellant or some person authorized by him must, in all actions in which the adverse party shall have appeared, within 20 days after receiving written notice that judgment has been rendered, make and present to the justice before whom the action was tried, or his successor in office, or any other justice then lawfully having custody of the docket containing such judgment, a notice of appeal, together with an affidavit that the appeal is made in good faith and not for the purpose of delay; and the appellant must, at the time of presenting such notice and affidavit to the justice, pay him his fees in the action, together with $1 for his return and $1 for state tax and $2 for clerk’s fees for the clerk of the court appealed to. In no case shall an appeal be taken after the expiration of 2 years after the entry of the judgment."

Sec. 306.04. "If the appellant desires a stay of execution of the judgment, except in actions of replevin, a written undertaking must be executed on the part of the appellant, by one or more sufficient sureties, to be approved by the judge of the appellate court or by the justice, to the effect that if the appeal shall be dismissed or if judgment be rendered against the appellant and execution on the judgment be returned unsatisfied in whole or in part the sureties will pay the amount unsatisfied."

Sec. 306.06. "The delivery of the undertaking to the court below shall stay the issuing of execution; or if it have been issued, then service of a copy of the undertaking, certified by the court below, upon the officer holding the execution shall stay further proceedings thereon."
The statutes relating to the suspension of driving privileges do not specify what papers must be filed with your department so as to constitute sufficient evidence or notice of the appeal and stay of execution.

As to the appeal, it would seem that a certified copy of the notice of appeal should suffice. If the appeal is defective either as to the form of notice, the sufficiency of the affidavit or the payment of fees, the adverse party may raise such questions on motion to dismiss. These are judicial questions and it is doubtful that the legislature ever intended to have them decided by an administrative agency such as the motor vehicle department.

It is to be noted that the matter of stay of execution under sec. 306.04 and sec. 306.06, above quoted, is accomplished automatically by the filing of the undertaking. Hence for your purposes a certified copy of the undertaking filed with the civil court should serve the same purpose as a formal stay order and no certified copy of order staying execution is necessary.

WHR
Opinions of the Attorney General

Counties — Liability — Industry Regulation — Safe-place Statutes — Words and Phrases — Own — Terms “own” and “owner” when used in statutes have no technical meaning, may be satisfied by less than absolute and entire ownership and must be construed with reference to object sought to be reached by statute.

As used in safe-place statutes, term “owner” is defined by sec. 101.01, subsec. (13), as including person having “ownership, custody or control”, but it does not follow that mere legal title to “public building” is sufficient to fix liability for personal injuries caused by failure to conform to requirements of statute.

Where “public building” is in possession and control of person other than holder of fee title, test as to liability for personal injuries caused by defects of maintenance or repair is whether fee owner has right to present possession, control or dominion necessary lawfully to enter premises in order to perform duties fixed by statute. But as to injuries caused by unsafe original construction, it would seem that liability may rest upon party who erected building or his successors in interest, regardless of present custody or control.

It must be assumed for present that counties may be held liable for injuries caused by failure to conform to requirements of safe-place statutes. XXXI Op. Atty. Gen. 176.

Where county has title to twenty acres of county fairgrounds and fair association, nonprofit corporation, has title to remaining six acres and also custody and control of entire fairgrounds, county board having no connection therewith except to make annual appropriation for maintenance under sec. 59.86, county would not be liable for injuries to members of public, employees of lessees or other frequenters of fairgrounds during either annual fair or rest of year, caused by defects of repair or maintenance of fair buildings. Neither would county be liable for injuries caused by defective original construction of such buildings on six acres belonging to fair association nor of buildings belonging to fair association although standing on county's twenty acres, latter buildings being in nature of trade fixtures under sec. 59.69, subsec. (2), Stats. But as to buildings owned by county and standing on its own twenty acres, it may well be
that county would be liable for injuries caused by defects of original construction.

John A. Moore,  
District Attorney,  
Oshkosh, Wisconsin.

You request an opinion with reference to the possible liability of Winnebago county under the following circumstances:

The Winnebago county fair grounds comprise approximately 26 acres totally fenced in. The fee title to approximately 20 acres is in Winnebago county and to the balance of approximately six acres, in the Winnebago county fair association, a nonprofit corporation. The fairgrounds contain the type of buildings usually found in such places, some of which are on the 20 acres of land belonging to the county and some on the six acres belonging to the association. The Winnebago county fair is held for a period of four days annually in the early part of September and during that time all the buildings are in use by the general public and exhibitors. During the rest of the year certain of the buildings are rented out to individuals and corporations for the storage of merchandise, keeping of saddle horses, a rollerskating rink and the like.

The county board has for a number of years made an appropriation under sec. 59.86, Stats., for the maintenance of the fairgrounds but, aside from this and the ownership of the 20 acres of land the county has no connection with the fairgrounds. The county board has no control in any manner over the grounds, the buildings, the operation of the fair or the use of the fairgrounds either during the annual fair or during the rest of the year.

Under the foregoing circumstances you inquire whether Winnebago county might be liable for injuries to members of the public, employees of lessees, and other frequenters under the safe-place statute, referring specifically (a) to the buildings located on the 20 acres belonging to Winnebago county, (b) to the buildings located on the six acres
belonging to the association and (c) with reference to the
time of the annual fair and to the rest of the year. The ap-
icable statutes are the following:

Sec. 101.01. "The following terms as used in sections
101.01 to 101.29 of the statutes, shall be construed as
follows:

"(13) The term 'owner' shall mean and include every
person, firm, corporation, state, county, town, city, village,
school district, sewer district, drainage district and other
public or quasi-public corporations as well as any manager,
representative, officer, or other person having ownership,
control or custody of any place of employment or public
building, or of the construction, repair or maintenance of
any place of employment or public building, or who pre-
pares plans for the construction of any place of employment
or public building. Said sections 101.01 to 101.29, inclusive,
shall apply, so far as consistent, to all architects and
builders."

Sec. 101.06. "Every employer shall furnish employment
which shall be safe for the employes therein and shall fur-
nish a place of employment which shall be safe for employes
therein and for frequenters thereof and shall furnish and
use safety devices and safeguards, and shall adopt and use
methods and processes reasonably adequate to render such
employment and places of employment safe, and shall do
every other thing reasonably necessary to protect the life,
health, safety and welfare of such employes and frequenters.
Every employer and every owner of a place of employment
or a public building now or hereinafter constructed shall so
construct, repair or maintain such place of employment or
public building, and every architect shall so prepare the
plans for the construction of such place of employment or
public building, as to render the same safe."

Sec. 59.69. "Land upon which to hold agricultural and in-
dustrial fairs and exhibitions may be acquired by county
boards and improvements made thereon as follows:

"(1) * * *

"(2) In counties containing more than fifty thousand and
less than three hundred thousand population, by gift, pur-
chase or land contract, but the purchase price of the land
shall not exceed one thousand dollars for each one thousand
of population within the county, and expenditures for the
construction of buildings, fences and other improvements
on said land shall not exceed one thousand dollars for each one thousand of population within the county, unless the expenditures in either case shall be first approved by the electors of the county as provided in this subsection; and the board may grant the use thereof from time to time to agricultural and other societies of similar nature for agricultural and industrial fairs and exhibitions, and such other purposes as tend to promote the public welfare, and may receive donations of money, material or labor from any person, town, city or village for the improvement or purchase of such land. All fences, buildings and sheds constructed and other improvements made on such lands by societies using the same may be removed by such societies at any time within six months after the right of such societies to use such land shall terminate, unless otherwise agreed in writing by and between such societies and the county at the time of the construction of such fences, buildings and sheds and the making of other improvements. A sum in excess of one thousand dollars for each one thousand population within the county may be expended for such land and a sum in excess of one thousand dollars for each one thousand of population within the county for the construction of buildings, fences and other improvements on said land, if the question whether such expenditure shall or shall not be made is submitted to a vote of the qualified electors of the county and a majority of those voting on the question vote in favor of making such expenditure. Such election shall be noticed and conducted and the votes thereat counted, canvassed and returned in the manner provided in section 67.14.”

Sec. 59.86. “The county board of any county having a population of thirty thousand or more by the last federal census may vote an amount not exceeding twenty thousand dollars and in all other counties the county board may vote an amount not exceeding five thousand dollars in the aggregate for all societies in the county in any one year to aid in the purchase of, or to make improvements upon the fairgrounds for any organized agricultural society, or to aid any organized agricultural society or any incorporated poultry association in any of its public exhibitions held or to be held; and any amount so voted shall be paid upon demand by the county treasurer to the the treasurer of such organized agricultural society, who shall keep an accurate record of the expenditure thereof by such society, and file a verified copy of such record with the county clerk within one year after the receipt of such amount from the county treasurer.”
The status of the law with reference to the liability of municipalities for personal injuries caused by defects of construction, repair or maintenance of public buildings is discussed in XXXI Op. Atty. Gen. 176, where it is pointed out that it must be assumed that municipalities are liable the same as private individuals and corporations. The question raised by your letter is whether under the circumstances the county may he held to be the "owner" of the fairground buildings in the meaning of sec. 101.01 (13) and sec. 101.06, Stats.

The term "owner", when used in statutes, has no fixed or technical meaning.

"In every case where construction is necessary to determine the sense in which the word ['own'] is used, the object sought to be reached by the statute is the most important consideration." State ex rel. Marshall & Ilsley Bank v. Leuch, (1914) 155 Wis. 500, 502; U. S. Nat. Bank v. Lake Superior T. & T. R. Co., (1920) 170 Wis. 539, 541.

The Wisconsin supreme court has held that a bailee of logs is the "owner" entitled to compensation for driving the logs of another which had become inextricably mixed with his own in the river, under R. S. sec. 3337, stating,

"* * * the word 'owner' is often used to designate a person having an interest in property under a special title * * *." Wisconsin River Log Driving Ass'n v. D. F. Comstock Lumber Co., (1888) 72 Wis. 464 467.

In Merrill R. & L. Co. v. Merrill, (1903) 119 Wis. 249, 254, the court said:

"* * * The instances where the word 'own' has been held satisfied by something less than absolute and entire ownership are far too numerous to permit citation. * * * Thus it appears very clearly that the word 'owned' is not a technical term; that it is a general expression to describe a great variety of interests, and may vary in significance according to context and subject matter."

See also Ritchie v. Green Bay, (1934) 215 Wis. 433, holding that the vendee in possession under a land contract is
the "owner" in the meaning of a statute exempting from taxation land owned by fraternal societies.

In *Peterson v. Johnson*, (1907) 132 Wis. 280, the court held that "owner" means "occupant" in a statute depriving the owner of farm lands of his right to damages for trespasses by animals belonging to adjoining owners unless partition fences have been maintained and kept in repair.

Sec. 101.01 (13) defines "owner" as a person who has "ownership, control or custody." This section has come before the court for construction in a number of cases from which it appears that although these three words are set out in the disjunctive, mere "ownership" of the building, standing alone, is not enough to impose liability.

In *Freimann v. Cumming*, (1924) 185 Wis. 88, 91, the court held that the vendor under a land contract was not liable for injuries caused by a defective stairway in a building in the vendee's possession. In *Kinney v. Luebkeman*, (1934) 214 Wis. 1, 5, the court held that the owner of a building in the possession of a lessee was not liable to a frequenter for injuries caused by the lessee's failure to have an electric light burning at the head of a stairway. In both these cases the court indicated that in order for an owner of a building to be liable for injuries caused by a defect of repair or maintenance, "there must exist in such person the right to present possession or present control or dominion thereover so that such person may lawfully exercise the rights necessary to permit him to properly enter upon the premises in order to perform such an everpresent duty as is fixed by this statute."

*Criswell v. Seaman Body Corp.*, (1940) 233 Wis. 606, 617, involved an injury to an employee of a subcontractor. It appeared that new construction was being performed on lands belonging to the defendant in a place near some high-tension electric wires which should, in order to render the place of employment safe, have been either removed or shut off. In that case the owner of the premises was held liable under sec. 101.06, rather than the contractor or the electric company, the court saying: "As such an employer and owner in possession, custody, and control of a place of employment, it was its duty," etc. (italics ours). The court
further held that this duty could not be delegated to the contractor.

On the other hand, where a farmer sold a barn for $50 by a contract providing that the buyer should remove it within two weeks, the buyer agreeing to assume full charge of the razing and removal operations, the court held that the farmer was not the "owner" and had no right of control so as to be liable under sec. 101.06 to a frequenter injured by the collapse of a wall during razing operations. Mahar v. Uihlein, (1942) 240 Wis. 469.

From the facts which you state it appears that the county does not have either control, custody or possession of any of the buildings on the fairground, whatever may be the fact as to title to those buildings. This being the case, it seems apparent from the foregoing decisions that it does not have any duty with reference to the repair and maintenance of the buildings, so far as the safe-place statute is concerned. For that purpose the "owner" is the fair association, which has the custody and control of all of the buildings. (The money appropriated by the county for maintenance of the fairground is expended by the association, not by the county, being in the nature of a grant in aid. Sec. 59.86, supra.)

As to injuries caused by structural defects, it may be that the foregoing decisions are not applicable. That is, the court has striven to fasten liability on the party responsible for the unsafe condition. Where it is a question of repair or maintenance, liability has been fixed upon the party responsible for keeping the building in good repair. It seems probable that the court would say that regardless of any question of custody or control, injuries caused by unsafe construction would result in liability on the part of the party who erected the building or his successors in interest. Such a ruling is suggested in Holcomb v. Szymczyk, (1925) 186 Wis. 99, 105. If any of the buildings on the county's 20 acres of the fairgrounds were erected by the county or are now owned by it and are structurally unsafe, it may be that the county would be liable for injuries caused thereby under those circumstances.

But there is another element in this case with reference particularly to the buildings located on the county's 20
acres. Any buildings erected thereon by the fair association are not in any sense the property of the county even though physically attached to the soil. Sec. 59.69 (2) gives the association the right to remove such buildings "at any time within six months after the right of such societies to use such land shall terminate, unless otherwise agreed in writing." Your letter does not indicate that there is any such agreement in writing between the association and the county, so that it is apparent that the buildings constructed by the association are in the nature of trade fixtures and are not a part of the real estate. They are therefore to be regarded as chattels of which the fair association and not the county is the owner. See Dougan v. H. J. Grell Co., (1921) 174 Wis. 17, 24; Hanson v. Ryan, (1925) 185 Wis. 566; Old Line Life Ins. Co. v. Hawn, (1937) 225 Wis. 627. As to such buildings the county is in no sense the "owner", having neither title, custody nor control. Hence there can be no liability under the safe-place statutes arising out of either defects of maintenance or structural defects. Cf. Mahar v. Uihlein, (1942) 240 Wis. 469, discussed supra.

You are therefore advised that Winnebago county is not liable for injuries to members of the public, employees of lessees, or other frequenters arising out of defects of repair or maintenance in any of the buildings on the fairgrounds, whether occurring during the fair or at any other time. It is not liable for injuries caused by structural defects in any of the buildings located on the six acres belonging to the fair association or in any of the buildings located on the county's 20 acres but which were constructed by the fair association. It may very well be held that the county would be liable for injuries caused by structural defects in buildings owned by the county on its own 20 acres.

WAP
Indigent, Insane, etc. — Poor Relief — Legal Settlement — School Districts — Tuition — Sec. 40.21, subsec. (2), Stats. 1939, relating to recovery of tuition for indigent pupils is limited to instances where such pupils reside in district making claim.

Where nonresident-indigent pupils are admitted to high school such district must file its claim for tuition under sec. 40.47 (5), Stats. 1939, with clerk of municipality from which such pupils were admitted, regardless of fact that their legal settlement is elsewhere. Statutes make no provision for reimbursement to municipality of residence.

February 26, 1943.

DONALD C. O’MELIA,
District Attorney,
Rhinelander, Wisconsin.

You have inquired as to the liability for tuition of indigent high school pupils where the parents have no legal settlement in the municipality wherein they reside within the meaning of sec. 49.02, subsec. (4), Stats., and such pupils are attending high school in a district not within the municipality of residence.

We are not entirely clear as to all of the facts, but we infer from your inquiry that the situation is substantially as follows: The county system of poor relief is in effect in your county, and these high school pupils are not residents of the district where they are attending high school nor do they have a legal settlement in that municipality. Neither do they have a legal settlement in the municipality of the district where they reside. However, we gather that they do have a legal settlement in some municipality in Wisconsin, although it is not indicated whether this municipality is in your county or elsewhere and neither is it indicated whether the municipality of their residence is in your county or elsewhere. The claims arose during the period when sec. 40.21 (2), Stats., as amended by ch. 333, Laws 1939, was in effect and prior to the 1941 amendments of this section.

You have taken the position that the county is not liable for this tuition and that the municipality of “ultimate resi-
ence” is. We assume by this that you mean the munici-
pality wherein such pupils have a legal settlement, since you
also speak of the municipality of “immediate origin” by
which we infer that you mean the municipality wherein
such pupils reside as distinguished from the municipality of
legal settlement.

In approaching this problem you refer us to the following
portions of sec. 40.21 (2) and sec. 40.47 (5), 1939 Stats.:

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

40.47 (5) “* * * Before July in each year the school
clerk shall file with the clerk of each municipality from
which any tuition pupil was admitted, except pupils defined
by subsections (2) and (2a) of section 40.21, the claim for
which indigent pupils shall be filed as provided for under
those subsections, a sworn statement of claim against the
municipality * * *.”

If you will refer to XXXI Op. Atty. Gen. 262, 263, you
will find that sec. 40.21 (2), Stats. 1939, has no application
since as we stated there,

* * * “Sec. 40.21 (2), statutes 1939, gives the district
the right to recover only in connection with pupils who re-
sided in the district during the period of school attendance.”

Under the facts, as we understand them here, the pupils
did not reside in the high school district which is making
the indigent tuition claim.

Neither does the italicized portion of sec. 40.47 (5), Stats.
1939, quoted above, have any application, since these are not
pupils “defined by subsections (2) and (2a) of section
40.21.” We have pointed out above that sec. 40.21 (2) does
not apply for the reason that the pupils do not reside in the
district making the claim, and subsec. (2a) does not apply for the reason that it relates to tuition in the case of children from children's homes, which situation is not involved here.

Since the statutory provisions above discussed relating to tuition for indigent pupils have no application, solution of the problem, if there is any, must be sought elsewhere in the statutes for the reason that the right to recover tuition in the case of indigent pupils is purely statutory and may be enforced only in strict accordance with the terms of the statutes. See XXXI Op. Atty. Gen. 262, 263.

Sec. 40.47, Stats. 1939 sets up provisions relating to high school tuition.

Subsec. (3), relating to nonresidents, provides that the board shall admit to the high school, when facilities will warrant, any person of school age who resides in the state, but not within any high school district, and who meets the entrance requirements set up in subsec. (2).

Subsec. (4) provides that every high school shall be free to all persons of school age resident in the district and the board may charge tuition for each nonresident pupil excepting nonresident pupils having a legal settlement in the high school district.

Subsec. (5) sets up the basis for computing the tuition and provides for the filing of claims. The italicized portion of sec. 40.47 (5), above quoted, relating to indigent tuition claims, must be disregarded here for the reasons hereinafter set forth, and consequently the remainder of the provisions of subsec. (5) regarding the filing of claims for nonresident high school tuition are to be followed since these are nonresident cases not falling within the exception relating to indigents provided for in subsec. (2) and subsec. (2a) of sec. 40.21.

Reading the relevant portion of subsec. (5), without the exception which does not apply here, the statutory direction for filing claims is as follows:

"* * * Before July in each year the school clerk shall file with the clerk of each municipality from which any tuition pupil was admitted, * * * a sworn statement of claim against the municipality setting forth the residence, name, age, date of entrance and the number of weeks' attendance, during the preceding school year, of each person
admitted from such municipality, the average daily attendance of the high school for the year, the statement of the cost of operation and maintenance of the high school as computed in accordance with the provisions of this section, the amount of tuition which the district is entitled to for each pupil, and the aggregate sum for tuition due the district from the municipality.

Subsec. (6) specifies in considerable detail how the tuition claim is to be paid, the substance of it being that the municipal clerk shall enter upon the next tax roll such sums as may be due for such tuition from his municipality, and the amount so entered shall be collected when and as other taxes are collected. For this purpose the municipal clerk is the agent of the school district to which the tuitions are due and failure to comply with the provisions of this section renders the clerk and his bondsmen liable for the amount of the tuition and constitutes cause for removal from office.

However, we do not find that subsec. (6) or any other statute makes provision whereby the municipality of residence of indigent pupils whose legal settlement is elsewhere may be reimbursed for the nonresident high school tuition paid to school districts on behalf of such pupils. Thus the burden falls upon the municipality of actual residence rather than upon the municipality of legal settlement or the county wherein such municipality of legal settlement is located if the county system of poor relief is in effect.

WHR
Opinions of the Attorney General

Education — Vocational Education — Aliens are not denied benefits of sec. 41.71, Wis. Stats., if otherwise eligible.

February 27, 1943.

Geo. P. Hambrecht, State Director, Vocational and Adult Education.

You have submitted the following question for my opinion:

"Can a person who is not a citizen of the United States but who has acquired residence (or domicile) in Wisconsin be eligible for rehabilitation aids as are prescribed under the state statute 41.71?"

Sec. 41.71, Wis. Stats., relates to the rehabilitation of a "physically handicapped person". A physically handicapped person is defined as "any person who, by reason of a physical defect or infirmity; whether congenital or acquired by accident, injury or disease, is or may be expected to be totally or partially incapacitated for remunerative occupation, and who may reasonably be expected to be fit to engage in a remunerative occupation after completing a vocational rehabilitation course."

Sec. 41.71, subsec. (5), Stats., reads:

"Any physically handicapped person who has been domiciled within the state for one year or more, or who resides in the state and shall so reside at the time of becoming physically handicapped, may apply to the board for advice and assistance relative to his rehabilitation."

You will note that neither of the quoted provisions requires that a physically handicapped person be a citizen in order to obtain the benefits of the section. Nor have we been able to find any other provision in the section making citizenship a condition of receiving benefits. Sec. 41.71 was enacted pursuant to the provisions of 29 USCA 31, et seq., providing for federal appropriations to states enacting required types of legislation for rehabilitation of physically handicapped persons. We do not find in the federal law, any
more than we find in sec. 41.71, any indication that the benefits of rehabilitation are to be limited to citizens of the United States.

As a matter of fact, the intention of the law would appear to be that of contributing to the welfare of the states and the federal government through making it possible for physically handicapped persons to support themselves. By rehabilitating such persons it becomes unnecessary to support them as public charges. It is as much within the intent of the law to escape the cost incident to supporting aliens as public charges as it is to escape the cost of supporting citizens. We are of the opinion that an alien otherwise eligible may receive the benefits provided by sec. 41.71, Stats.

JWR

Intoxicating Liquors — Trade Regulation — Beverage Tax — Fermented malt beverages containing 71/2% of alcohol by volume or 6.01% of alcohol by weight are not taxable as intoxicating liquors under ch. 139, Stats., but sale of such beverages is subject to provisions of ch. 176, regulating sale of intoxicating liquors.

February 27, 1943.

JOHN M. SMITH,
State Treasurer.

You have requested our opinion as to whether or not fermented malt beverages containing alcoholic content of 71/2% by volume or 6.01% by weight are (1) taxable as intoxicating liquors and (2) subject to regulation as intoxicating liquors.

Your questions are clearly answered by the statutes. Sec. 66.05, subsec. (10) (a) 10, Wis. Stats., defines fermented malt beverages as "any liquor or liquid capable of being used for beverage purposes, made by the alcoholic fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and derog-
minated grains or sugar containing one-half of one percentum or more of alcohol by volume."

The taxation of fermented malt beverages and intoxicating liquor is covered by ch. 139, Wis. Stats. Secs. 139.01 and 139.02 impose a tax upon fermented malt beverages as defined by sec. 66.05 (10), the definition to which we have just referred.

Sec. 139.25, et seq., imposes a tax upon "intoxicating liquors". As defined by sec. 139.25 (1), "intoxicating liquors" does not include "fermented malt beverages" as defined in subsec. (10) of sec. 66.05.

Fermented malt beverages are not therefore taxed as intoxicating liquors, and it is not material as to what the alcoholic content of such beverages might be.

Ch. 176, Wis. Stats., relating to regulation of intoxicating liquors is to be considered apart from the taxing provisions of ch. 139. Sec. 176.01 (2) specifically provides that, as used in the chapter, "intoxicating liquors" shall include "fermented malt beverages" as defined in sec. 66.05 (10) which contain five per cent of alcohol or more by weight. In view of this clear provision, the fermented malt beverages referred to in the request are subject to those provisions of ch. 176 regulating the sale of intoxicating liquor. As stated above, however, they are not subject to taxation as intoxicating liquors under the provisions of ch. 139.

JWR
Corporations — Small Loans — Trade Regulation — Money and Interest — Lenders operating under sec. 115.07, subsec. (3a), sec. 115.09 or ch. 214, Stats., may, upon taking or sale of property securing loans made thereunder, recover necessary costs of taking and keeping such property as provided by sec. 241.13, either in event of redemption by mortgagor before sale or in event of foreclosure and sale.

March 1, 1943.

Banking Commission.

Attention Robert K. Henry.

You request our opinion as to whether permit holders under sec. 115.07, subsec. (3a), or licensees under sec. 115.09 or ch. 214 of the Wisconsin statutes would be permitted to charge borrowers the actual and necessary costs of taking and keeping mortgaged property in the event such property is taken or repossessed under the provisions of sec. 241.13, Stats.

We have previously held with respect to permit holders and licensees under sec. 115.07 (3a) and under sec. 115.09 and ch. 214 that such laws do not preclude lenders operating thereunder from recovering taxable costs and disbursements upon the securing of a judgment where the recovery of such costs and disbursements is expressly provided for by law. See XXVIII Op. Atty. Gen. 723; XXIX Op. Atty. Gen. 10.

It is our opinion that similar considerations will apply in the present instance and that where a mortgagee has proceeded under sec. 241.13 he may recover the necessary costs and expenses of taking the property as provided therein either in the event that the mortgagor redeems the property in accordance with that statute or in the event that the property is foreclosed and sold without redemption. We do not believe there is any essential conflict between either of these small loan laws and the provisions of sec. 241.13 and that there is nothing in any of these laws which either impliedly or expressly repeals sec. 241.13 with respect to mortgages which may be given to secure loans of money made by lenders operating under sec. 115.07 (3a), sec. 115.09 or ch. 214.

RHL
Constitutional Law — Counties — County Officers —
Legislature may authorize county boards to increase salaries of elective county officials during terms of office for which they are elected. Art. IV, sec. 26, Wisconsin constitution, is not applicable to county officials.

March 2, 1943.

The Honorable The Senate.

You have requested my opinion as to whether it is within the constitutional power of the legislature to authorize county boards to increase the salaries of elective county officials during the terms for which such officials are elected. You doubt such legislative authority by reason of the provisions of article IV, section 26 of the Wisconsin constitution, which reads:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

It has been held by the Wisconsin supreme court from a very early period in the history of the state that the quoted provision applies only to public officers whose salaries are paid out of the state treasury. It does not apply to officials of the political subdivisions of the state, such as county and city officials. State ex rel. Sommer v. Erickson, 120 Wis. 435; Sieb v. Racine, 176 Wis. 617.

Your question is answered in the affirmative.

The resolution requesting this opinion refers to Bill 52, S., as a measure now before the senate, which proposes to vest the authority in question in county boards for the duration of the present war and for six months thereafter. I have read the bill, and while you have not asked for any comment thereon except with respect to its constitutionality, I feel that it is not improper for me to suggest that there are at least two possible defects in the language as the measure now stands. It provides that "notwithstanding any other provision of the law to the contrary, the county board
may increase the salary of any elective county officer”. This authority is to extend “during such period of time as the United States is at war and for six months thereafter”.

The county board may, under the statutes as they now exist, increase the salary of any elective county officer provided the increase is made at an annual meeting preceding the year during which the officer is to be elected. The county board may not, as the law now stands, increase or diminish that officer’s salary during his term. It is possible that if Bill 52, S., were to be enacted, it might fail to accomplish its purpose in that it does not specifically authorize the board to increase the salary of an elective officer during his term. It is true that if it were not so construed, it would not add anything to the statutes as they now stand, but at the same time it is difficult to see how a court could read into the bill if it became law language which is not there, either expressly or by implication. I therefore suggest that the words “during his term of office” be inserted after the word “officer” and before the period in line 4 of the bill.

I think it would also be well to specify more particularly the time during which the proposed law is to remain effective. By its terms it is to remain in effect for six months after the war. In popular understanding a war usually terminates with the cessation of actual hostilities but legally such is not the case. Confusion may arise in the minds of county board members as to the circumstance which in fact terminates the war and as a consequence it would appear to be advisable to settle this matter beyond controversy. The bill could be changed to provide that the authority is to continue until the existing war is terminated pursuant to the terms of a treaty of peace with enemy nations, and for six months thereafter.

JWR
Opinions of the Attorney General 53

Social Security Act — Poor Relief — Old-age Assistance — State department of public welfare may adopt rule under sec. 49.50, subsec. (2), Stats., as to what may be regarded as prima facie showing of need for old-age assistance provided rule does not preclude exercise of discretion in individual cases.

March 6, 1943.

Department of Public Welfare.

You have asked whether it would be within the power of the state department of public welfare to adopt a rule to the effect that, for the purpose of state supervision, if an applicant for old-age assistance, blind pension, or aid to dependent children has more than $300 in cash or readily liquidable assets there is a prima facie presumption of ineligibility on the basis of need, but if such applicant has less than $300, there is a prima facie presumption of eligibility on the basis of need.

With respect to relief of a poor and indigent person under sec. 49.01, Stats., our court has held in The Town of Rhine v. The City of Sheboygan, 82 Wis. 352, that support may not be given to a person having any means or resources which are available to him and that the word “poor” in the statute has a restricted meaning practically synonymous with “destitute”. That case deals with assistance given as “support” to indigent persons, as distinguished from “relief” such as medical aid in an emergency, which the court held in Coffeen v. Preble, 142 Wis. 183, might be given even though the beneficiary has other property which is not available for that purpose.

The law relating to old-age assistance, blind pensions, and aid to dependent children contemplates that the assistance, except for such items as medical, surgical and funeral expenses shall be given for the support of the beneficiaries. However, regardless of whether the legislature intended such assistance to be classed as a form of poor relief, it has in each case provided a separate standard for determination of eligibility.

Neither the word “poor” nor “indigent” is used in connection with the designation of persons who shall be enti-
tied to old-age assistance. Under sec. 49.20 the persons entitled to assistance are described as "aged, dependent persons". The standards of eligibility with respect to age and residence are fixed rigidly by the statute, but the term "dependent" is nowhere precisely defined. Under sec. 49.23, the legislature has fixed the maximum property limitation for a beneficiary of old-age assistance at $5000, and in sec. 49.21 it has fixed the maximum income limitation at $40 per month. The legislature apparently intended that there should be no other hard and fast property or income limitations but that, within the boundaries fixed, the determination of eligibility should be a matter for the discretion of administrative officials "with due regard to the conditions in each case". Exercise of discretion in individual cases could not be obviated by any arbitrary rule or standard other than that set by the legislature. You cite the case of State, Department of Social Security, Division of Social Welfare et al. v. Big Stone County, (Minn.) 1 N. W. 2d 396. In that case a rule by the administrative agency stating that persons having in excess of $300 in cash or liquid assets were not eligible for assistance, was declared by the attorney general to be invalid on the ground that it was "arbitrary, unreasonable and inconsistent with the provisions of the old age assistance act because it ignores the facts and circumstances of each particular case." The court commented with respect to the opinion of the attorney general, p. 398:

"Certainly that opinion was required by the law as it existed prior to 1941 when the act was amended to declare ineligible any person having liquid assets in excess of $300

* * *

".

The rule which you propose, however, appears to us to differ fundamentally from the rule discussed in the above case. A rule which purports to establish merely a prima facie rule of evidence to guide administrative officials as to what should be required as an initial showing but which does not preclude consideration of other conditions which might override the prima facie showing would not necessarily be objectionable as fixing a standard other than that
prescribed by the legislature. We believe such a rule would be within the powers of the state department of public welfare under sec. 49.50 (2).

If, of course, an applicant for old-age assistance receives income from his assets, that fact would necessarily have to be considered in relation to the amount of the grant under sec. 49.21 which limits the total income to $40 per month.

You have suggested that in case an applicant for old-age assistance has a small amount of liquid assets, most counties granting aid require that such assets be set aside to be applied under the supervision of the county agency to the needs of the last sickness and burial. Since sec. 49.31 contemplates that medical and surgical assistance may be given over and above old-age assistance, we do not believe it would be contrary to the spirit of the statute to permit the application of limited funds belonging to the beneficiary to such purposes, even though he may be receiving aid for ordinary expenses. Sec. 49.30 limits the amount of funeral expense paid as old-age assistance to $100. It might seem, on the face, inconsistent that some recipients of old-age assistance should be subject to that limitation while others are not. Sec. 49.30, however, applies only when “the estate of the deceased is insufficient to defray these expenses”. The quoted words indicate a legislative intent that if the recipient has an estate it shall be liable for the payment of funeral expense. Under sec. 49.23 the legislature has provided that a recipient of old-age assistance may have up to $5000 in property. The setting aside of certain assets of a beneficiary for payment of funeral expenses does not violate any of the restrictions expressed in the statutes. Any such funds in the hands of an applicant for old-age assistance would, of course, be subject to the provisions of sec. 49.26, Stats., regardless of the amount.

It is also true with respect to aid to dependent children that the standard of eligibility under sec. 48.33, Stats., differs from the standard fixed for determination of eligibility for poor relief. The age requirements and the requirements with respect to residence are fixed, but the standard with respect to need is covered by the provision that the child must be dependent, the latter term not being precisely de-
fined. The question of determining eligibility on that basis is left to the administrative officer "as the best interest of such child requires."

The standards with respect to eligibility of persons for blind pensions are also fixed definitely with respect to residence. With respect to the financial status of the individual the statute specifies that he shall be "needy", which is not precisely defined. One who has relatives legally responsible for his support may not receive a blind pension, and subsec. (1) of sec. 47.08 fixes an income limitation which would necessarily include income from any assets of the individual which might be used for his support. Neither in the case of blind pensions nor in the case of aid to dependent children has the legislature fixed any rule with respect to the amount of property which would prevent an individual from being eligible for assistance. That is apparently one of the questions left to the administrative discretion to be determined upon the conditions in each individual case.

With respect to all three forms of assistance we are of the opinion that the state department of public welfare might adopt a rule of evidence under sec. 49.50 (2), Stats., as an aid to the exercise of administrative discretion in individual cases, so long as the rule does not attempt to preclude the exercise of such discretion upon full consideration of each individual case.

BL
Public Health — Wisconsin General Hospital — Neither expenses incurred by physician under sec. 142.03, Stats., expenses of conveyance to or from hospital under secs. 142.05 and 142.06, nor expenses to county judge as fees under sec. 253.15 can be recovered by county under sec. 142.08. There is no other statutory section granting recovery for said expenses.

March 8, 1943.

A. W. Bayley, Executive Secretary,
Department of Public Welfare.

You have asked whether a county under sec. 142.08, Stats., or any other section, can recover, in addition to the charges set forth in sec. 142.07, the expenses incurred by the physician under sec. 142.03 or the expenses of conveyance to or from the hospital under secs. 142.05 or 142.06, or the expenses to the county judge as fees under sec. 253.15. We are advised that you refer exclusively to recovery from the individual certified as a patient to the Wisconsin general hospital or from any other individuals liable for the expenses.

In rendering our opinion it is essential, in the first place, to point out that the right of recovery in matters of this nature is a statutory right. The statutory requirement to support the poor is a mandatory duty. Meyer v. Town of Prairie du Chien, 9 Wis. 233 (1859). And on the other hand, the right to recover for public maintenance and support furnished is purely statutory. The latter proposition is clearly discernable in Estate of Pelishek, 216 Wis. 176, 256 N. W. 700 (1934), and is further brought out by XXI Op. Atty. Gen. 596 at 599, to the effect that "the rights and liabilities, of the municipality or county on the one hand and the needy person on the other, are fixed by statute." Although the latter citation refers to chapter 49, Stats., it may also be applied to the instant question regarding chapter 142, since the nature of the two chapters involves the same general subject. Therefore, if the right of recovery for the expenses concerned is not provided by statute, it cannot be considered to exist, in the absence of adjudication to the contrary.
For the purposes of aligning the statutory sections affecting the problem, we shall state the pertinent parts of the sections involved:

Sec. 142.08 "(1) The net cost of caring for a patient certified, within the quota fixed for any county by section 142.04, to the Wisconsin general hospital shall be paid one-half by the state and one-half by the county of his legal settlement. * * * The county board may in its own name collect from such patient the total net cost of such care, and after deducting its share of the cost of such care pay the balance so collected to the state."

Sec. 142.07 "(1) The Wisconsin general hospital shall treat patients so admitted at rates based on actual cost * * * but not in excess of four dollars and ninety cents per day for each certified patient; * * *. Payments made by such patients shall be credited to their accounts. Patients may be admitted without certificate, but the cost of their care shall not be a joint charge * * *"

Sec. 142.03 "(2) The judge if satisfied that the required facts exist, shall appoint a physician personally to examine the person. * * * The physician shall be paid by the county, five dollars, and actual and necessary expenses. * * *"

Sec. 142.05 "(1) If the patient is unable to bear his expense to the place of treatment, and the county court shall so order, the county treasurer shall advance to the patient the necessary transportation and expenses out of the county treasury. Likewise, upon the patient's discharge from the place of treatment, the county judge may order transportation and expenses for the patient's return to his residence. If the patient is unable to travel alone to the place of treatment, the court may appoint a suitable person to accompany him, and such person shall receive actual and necessary expenses * * *, and the same shall be paid by the county."

Transportation and necessary expenses are to be paid as in sec. 142.05 in the situations provided for in sec. 142.06. Sec. 253.15 merely refers to salary, fees, per diem and other compensation payable to county judges.

It will be noted that none of the other sections above refer expressly, or even by implication, with the exception of
sec. 142.07, to sec. 142.08, nor does sec. 142.08 refer to them. There is no provision in these other sections which provides a right of recovery as considered for the purposes of this opinion. Chapter 49, Stats., relief and support of the poor, fails to provide for any right of recovery with regard to the expenses in question. The right granted by virtue of sec. 49.10 is expressly restricted to recovery for relief, support or maintenance under chapter 49, or where the individual receives relief as an inmate of any county or municipal institution in which the state is not chargeable with all or a part of an inmate’s maintenance, as a patient under chapter 50, or sec. 58.06 (2). These later provisions negative recovery, by virtue of sec. 49.10, of the maintenance granted by chapter 142. It seems there would be no purpose in specifically granting certain rights of action in chapter 142 if the situation were covered by sec. 49.10.

Again, the right of recovery granted by virtue of the various subsections of sec. 46.10, Stats., refers only to “maintenance” furnished, and does not, expressly or by implication, extend beyond the limitation of per capita cost or maintenance at an institution. Beyond that, it is a question whether sec. 46.10 would apply to the situations for which provisions are made by chapter 142. It is apparent that chapter 50 is not applicable. Note also the implied restriction of sec. 231.11 (8). To further enumerate statutory chapters or sections dealing with relief of the poor, and which do not concern the question at hand, would be pointless. Suffice it to say, for the purposes of this opinion, that there is no statutory section other than sec. 142.08 under which there is provision for recovery of expenses involved in the poor relief provided in chapter 142 of the statutes. On this tangent the limited scope of chapter 142, treatment in the state hospitals, can well be noted.

The issue thus narrows down to whether or not the expenses listed in your query may be recovered by virtue of sec. 142.08, and more particularly whether “care” as used in subsec. (1) of that section may be interpreted to include the expenses incurred by the physician under sec. 142.03, the expenses of conveyance to or from the hospital under secs. 142.05 or 142.06, or the expenses as judges’ fees under sec. 253.15. In considering this question, it may be seen that
the expenses provided for in sec. 142.07 are charges only of maintenance and care actually at the hospitals. This is significant in determining the expenses recoverable under sec. 142.08, and is highly indicative of legislative intent to restrict the right of recovery.

In ascertaining the scope of "care" for the purposes of this discussion, its meaning can be readily ascertained and its proper limitations determined by merely turning to sec. 142.08. While the primary consideration in a statute is to determine the legislative intent, such intent is to be primarily determined from the language of the statute itself. State ex rel. United States Fidelity & Guaranty Co. v. Smith, 184 Wis. 309, 316, 199 N. W. 954 (1924). In construing statutes the legislative purpose must prevail so far as it can be gathered from the language of the law by any reasonable construction thereof. Pfingsten v. Pfingsten, 164 Wis. 308, 313, 159 N. W. 921 (1916). And the words must be taken in their ordinary grammatical sense, unless such construction would lead to absurdity or be repugnant to the intent of the legislature. Battis v. Hamlin, 22 Wis. 669 (1868).

Proceeding, then, to determine the meaning of "care" as used in sec. 142.08, an analysis of the section clearly and unquestionably shows its limited use. Subsec. (1) of sec. 142.08 provides that the net cost of caring for a patient certified is to be paid one-half by the state and one-half by the county of his legal settlement. It further provides that the county board may collect from such patient the total net cost of such care, and after deducting its share of the cost of such care pay the balance to the state. Obviously the same "care", referred to throughout the section, is that for which the state is to pay one half and the county the other half. Further considering sec. 142.08, it follows that the restricted meaning of "care" in subsec. (1m) must also be applied to its use in subsec. (1), in other words, must be limited to the care actually rendered at the hospital concerned, for the cost of that care, and for nothing in addition thereto. By statute, the county must pay the expenses of conveyance to and from the hospital and the examining physician's fees; cf. secs. 142.03 (2), 142.05 (1) and 142.06. If one-half of the cost of care referred to in sec. 142.08, and
for which the county can recover, also included these latter above expenses, the state would be chargeable with one-half thereof; and clearly the statutes make no provision for such charge against the state. By a mere reading of the statute it may be ascertained that the cost of care as referred to in sec. 142.08 is thus applicable only to the cost of actual maintenance at the hospital.

Therefore, on the basis of the foregoing considerations, it is our opinion that none of the expenses enumerated by you in your request, referring to secs. 142.03, 142.05, 142.06 and 253.15, are recoverable by a county under sec. 142.08. There is no other statutory section which provides a right of recovery to the county for said expenses.

VDH

Police Regulations — Dogs — Words and Phrases — Domestic Animals — Rabbit of variety not found in wild state and developed and used by man for purposes of food is domestic animal within meaning of sec. 174.11, Stats. Section does not impose absolute liability upon owners of dogs injuring such animal, but makes provision for payment of claims by counties for injuries to animals in cases where owners of dogs causing such injuries are otherwise liable therefor.

Oscar J. Schmiege, District Attorney, Appleton, Wisconsin.

You have inquired as to whether, in our opinion, domesticated rabbits are "domestic animals" within the meaning of sec. 174.11, Wis. Stats. We understand that the rabbits to which you refer are of a variety widely differing from the wild rabbits found in this part of the country, that they are domesticated in the sense that their rearing and propagation are controlled, that they are accustomed to the association of man and are utilized for purposes of food.

March 8, 1943.
As a matter of common knowledge, there are types of rabbits which have been developed to the point where their characteristics such as size differ greatly from those of rabbits found in the wild state and which are used as food and clothing in the same manner that other animals such as sheep are used. It is rabbits of this variety that you have in mind, as we understand your request.

Sec. 174.11, subsec. (1), Stats., provides in part:

"The owner of any domestic animals (including poultry) attacked, chased, worried, injured or killed by a dog or dogs may within ten days after the owner shall have knowledge or notice thereof, file a written claim for damages with the clerk of the town, village or city in which the damage occurred. * * *

The section further provides for the presentation, investigation and audit of such claims by the county board and for their allowance out of the "dog license fund". Sec. 174.12, Stats., provides that the allowance by the county of any such claims shall work an assignment to the county of the cause of the action of the claimant for which the claim is filed and that the county may recover from the owner of the dogs for the amount of the damage.

It is provided that all words and phrases used in the Wisconsin statutes shall be construed according to the common and approved usage of the language. Sec. 370.01, (1), Stats. It is, of course, true that such a rule of construction is not an exclusive one and that, the prime objective in construing any statute being to determine the legislative intent, other rules of construction which in common reason throw light upon such intent must likewise be considered in some instances. For example, at one time sec. 174.11 (4), Stats., as you point out, provided that "The amount allowed by the county board upon any such claim shall in no case exceed one hundred dollars for each horse, mule or bovine or thirty dollars for each sheep, goat or swine, or three dollars for each fowl." This office expressed the view in XVIII Op. Atty. Gen. 116 that the limitation in subsec. (4) to the payment of claims for horses, mules, bovines, sheep, goats, swine and fowl necessarily limited the presentation of
claims to those animals. See also XVIII Op. Atty. Gen. 207. Thus, the broad general meaning of the term "domestic animals" was necessarily limited. You have pointed out, in submitting this request, that the provisions of subsec. (4) above set out were repealed by ch. 79, Laws 1939, and that there is no longer any basis in subsec. (4) for limiting the general meaning of the term "domestic animals" as used in subsec. (1). We agree with your suggestion in this respect.

We are also of the view that there is no such relationship between sec. 174.11 and other sections in ch. 174 that would necessitate a restrictive construction of the phrase "domestic animals". Assuming that rabbits might not be included within the class of "other domestic animals" in sec. 174.01, the fact remains that sec. 174.01 was on the books for many years prior to the enactment of sec. 174.11 in 1919. The statutes do not seem to be complementary in any respect. Their purposes are not the same, and the history of the two pieces of legislation is not such as would indicate any necessity for harmonizing the definition of the two phrases. The purpose of sec. 174.11 is obviously that of compensating the owners of domestic animals for damage done to their property. It was held in Matthews v. Scannell, 201 Wis. 381, that the owner of a dog was liable in damages to the owner of some chinchilla rabbits by reason of the dog's killing the rabbits while trespassing upon the real estate of their owner. Since such liability exists in law, there is no reason why it should not fall within the purview of sec. 174.11.

Webster's Dictionary defines "domestic animal":

"Any of various animals, as the horse, ox, or sheep, which have been domesticated by man so as to live and breed in a tame condition."

It defines "domesticate":

"To make domestic; to habituate to home life.
"* * *
"To tame; to reclaim (an animal or plant) from a wild state;—usually implying also the bringing of its growth and propagation under control, and the conversion of its products or services to the advantage and purposes of man."
The rabbits to which you refer are clearly domestic animals within the accepted meaning of the words, and we think that the rule of construction in sec. 370.01 requires that they be held domestic animals within the meaning of sec. 174.11.

There is one other question which probably does not arise in this case, but since it may arise in subsequent cases, we think it should be mentioned here. Sec. 174.02 provides that the owner or keeper of a dog which shall have injured "any person or property or killed, wounded or worried any horses, cattle, sheep or lambs" shall be liable for the damage done without proving notice to the owner of the dog's tendencies to do these things. This statutory rule changes the common law rule that the owner was not liable for damage in the absence of proof of knowledge on his part of his dog's tendencies or vicious propensities. It is not necessary to prove knowledge, however, in the case of a trespass. *Chunot v. Larson*, 43 Wis. 536. And even if it were, the natural propensities of a dog to kill rabbits should be sufficient in the present case. *Matthews v. Scannell*, 201 Wis. 381. A case might arise, however, where no questions of natural propensity or trespass were involved and where the injured animal was not one of those enumerated by sec. 174.02. In such a case it is probable that the owner would not be entitled to damages under sec. 174.11 unless he could show the dog had propensities for injuring animals which were known to its owner. Sec. 174.12, in so far as it provides for recovery over by the county against the owner of a dog, presupposes that the owner of the injured animal must have a cause of action against the owner of a dog because it provides for the assignment of the cause of action upon which the claim against the county was based. If there were no cause of action against the owner of the dog, it seems to follow that there could be no claim against the county within the meaning of sec. 174.11. Thus considered, sec. 174.11 does not impose an absolute liability against the owners of dogs which injure domestic animals but only provides for the payment of claims where such liability otherwise exists.

JWR
Public Officers — Banking Commission — Director of Bank — Director of Building and Loan Association — Members of banking commission may at same time be officers or directors of banks or building and loan associations or other corporations subject to supervision of banking commission, or may be officers or directors in corporations not subject to commission's supervision or may hold other positions of trust or responsibility and have other interests, provided holding of such positions or maintenance of such interests does not prevent commissioners from devoting their full time to duties of their office within meaning of that term as discussed.

March 11, 1943.

Banking Commission.

You request our opinion as to whether the holding by a member of the banking commission of the position of director in a state chartered building and loan association would in any way result in disqualification for membership on the banking commission. You also ask our opinion as to whether the holding of office in corporations not in any way subject to the supervision of the banking commission or the holding of other positions of trust or responsibility would affect eligibility for membership on the banking commission.

There is nothing that we have been able to find in the statutes which would indicate that the legislature in any way intended that a member of the banking commission might not, during the term of such membership, be a director of a state chartered building and loan association or hold a position as an officer or a director of a bank or other institution subject to the supervision of the banking commission.

There is no question of incompatibility here such as frequently arises between the holding of two public offices, and it would appear that the question must be answered solely by reference to the statutes. Various provisions of the statutes which provide for the creation and functions of the banking commission appear to expressly recognize that a member of the banking commission may hold office in corporations supervised by the banking commission. For example, in sec. 220.06, subsec. (1), Stats., it is provided:
"No commissioner of banking, deputy, assistant deputy or examiner shall examine a bank in which he is interested as a stockholder, officer, employe or otherwise"

and that

"* * * No commissioner of banking, deputy, assistant deputy or examiner shall examine a bank located in the same village, city or county with any bank in which he is interested as stockholder, officer, employe, or otherwise".

An analogous situation is found in subsec. (2) of sec. 220.035, Stats., which provides for the creation of the banking review board and defines its functions which are quasi-judicial in nature. It is there provided:

"* * * No member of such board shall be qualified to act in any matter involving a bank in which he is an officer, director or stockholder or to which he is indebted".

In subsec. (4) of sec. 215.48, Stats., which creates the building and loan advisory committee of the banking department, which committee exercises quasi-judicial and advisory and supervisory functions, it is provided:

"* * * No member of the committee shall be qualified to act in any matter involving the association of which he is an officer or director".

These various provisions of law are extremely persuasive that the legislature contemplated that members thereof might at the same time be officers or directors of building and loan associations or banks supervised by the banking commission. The fact that the commission is a three-man body would seem to be consistent with such legislative intent.

Situations where members of governmental bodies have interests in matters subject to their control are frequent and it is the general rule, in the absence of any statute, that a member of such a body, at least where the body acts in a quasi-judicial capacity, is disqualified from acting on matters affecting his private interests. Board of Supervisors of Oconto Co. v. Hall, 47 Wis. 208; Annotation, 133 A. L. R. 1258.
It may be noted that for a substantial number of years both before and after the creation of the present three-man commission (created by chapter 374, Laws 1933), members of the banking commission have at the same time been officers and directors of building and loan associations and officers and directors of banks subject to the supervision of the commission. This is disclosed by the annual reports of the banking commission. If there were any reasonable doubt with respect to the construction of the statutes as affects this question, which we believe there is not, it would appear that such a well known and uniform practical construction of the statutes over a substantial period of years would be entitled to great weight and would probably be controlling. *Wright v. Forrestal, 65 Wis. 341; State ex rel. Bashford v. Frear, 138 Wis. 536.* The various provisions of the statutes above referred to and the practice thereunder indicate quite clearly that the legislature considered, both in creating the office of banking commissioner and later in creating the present three-man commission, that, inasmuch as technical and specialized knowledge on the part of the banking commissioners would be required in order that banks, building and loan associations and other special types of corporations affected with a public interest might be adequately supervised, officers and directors of such corporations should logically become members of the commission and that their availability for such purpose should not be reduced by a requirement that they sever all connection with such institutions as a condition to membership on the commission.

The provisions of subsec. (1) of sec. 220.02, Stats., which was enacted by chapter 374, Laws 1933, may have a bearing on the questions which you ask. It is therein provided:

"* * * All of the members shall devote full time to the duties of their office and one of said members shall be a person who has had at least five years of experience as an executive of a building and loan association of this state*."

In considering what positions or interests in addition to membership on the banking commission which commissioners of banking may have, either in corporations supervised by the banking commission or otherwise, regard should be had to the effect of such position or interests un-
under the particular circumstances upon the devotion of the commissioners' full time to the duties of their office. The term "full time" as used in subsec. (1) of sec. 220.02, Stats., is not self-explanatory and it is obvious that it would be impossible to obtain absolutely literal compliance with this language. It is our view that this language must be reasonably construed so as to effect the purpose of the law creating the banking commission, that is, that each of the commissioners should devote substantially all of his time to his duties as commissioner, so that the numerous and important functions of the office may be effectively exercised. In Johnson v. Stoughton Wagon Co., 118 Wis. 438, the supreme court construed the meaning of an agreement whereby an individual was "to give his full time to the company's service". The court held that such an agreement is in its nature ambiguous, saying, pp. 446-447:

"* * * It certainly does not require twenty-four hours a day of an employee's time, nor, indeed, every moment of his waking hours. [Citing] On the other hand, it undoubtedly does require that he shall make that employment his business, to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager's time or attention. We cannot think, however, that the business man who undertakes to make the affairs of a corporation or of a firm his business, and to give to it his full time, absolutely excludes himself from everything else. Usually such men have some private affairs or interests of their own, which they are not expected to entirely abandon. They may seek and make investments of their private funds, so that they do not trespass substantially upon the ordinary business hours; and, in analogy, it certainly is recognized as customary that they may give the benefit of their judgment and supervision to the care of moneys of relatives not able to protect their own interests. It is also certainly customary that men who consider themselves engrossed in active business do not hesitate to occupy places on the directory of banks, or even more important offices in such institutions. It would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions. * * *"

We think this language is especially apposite here and may well serve as a guide in the absence of any other.
It is our opinion, then, that members of the banking commission may at the same time be officers or directors of banks or building and loan associations or other corporations subject to the supervision of the banking commission, or may be officers or directors in corporations not subject to the commission's supervision or may hold other positions of trust or responsibility and have other interests, provided the holding of such positions or the maintenance of such interests do not prevent the commissioners from devoting their full time to the duties of their office within the meaning of that term as above discussed.

RHL

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Insurance — State Insurance — School Districts — In case of school consolidation where absorbing district is not insured in state insurance fund and absorbed district is so insured, insurance in force on property of absorbed district remains in force until expiration.

Liability of state insurance fund under policies in force at time of consolidation would remain in effect until such policies expire according to their terms.

March 11, 1943.

Morvin Duel,
Commissioner of Insurance.

You have submitted the following questions for my opinion:

"1. If a school district insured in the fund is absorbed by another district not insured in the fund should the insurance in force on the property of the absorbed district remain in force until expiration?

"1a. If so, should the insurable interest of the former absorbed district be transferred to the absorbing district even though the latter has not authorized the insurance of their other property in the fund in accordance with section 210.04 (1) ?
"2. Does the absorbing district not insured in the fund have any authority to cancel the insurance in force on the property of the former absorbed district; reference section 210.04, subsection (8)?

"3. When would liability of the fund under policy in force on property of absorbed district cease?"

Your questions arise out of the consolidation of school districts under the provisions of chapter 40 of the statutes. You point out that sec. 40.35, relating to consolidation of schools by referendum, provides that where there has been a consolidation the districts out of which the consolidated district is formed shall cease to exist and the title to their property and assets shall vest in the new district and the new district in addition shall succeed to claims, obligations and contracts of the dissolved districts. We call your attention to the fact that other provisions of the statutes provide for consolidation. Sec. 40.30 contains rather extensive provisions and it is under that section that the greater number of consolidations have taken place in the past few years. In 1939 sec. 40.30 was amended to permit the state superintendent of public instruction on his own motion to attach districts with valuation of less than $100,000 to contiguous districts. Under the authority vested in him the state superintendent has effectuated many consolidations. There is no provision in sec. 40.30 comparable to that in sec. 40.35, dealing with the status of the attached district and with the question of succession to assets, liabilities and contractual rights and obligations. But the same rule applies irrespective of the fact that it is not provided for by statute. Stroud v. Stevens Point, 37 Wis. 367; Conway v. Joint School District, 150 Wis. 267; 56 Corpus Juris 271.

The absorbing district, since it succeeds to the contracts of the dissolved district, necessarily succeeds to contract rights arising out of insurance contracts. We find nothing in ch. 210 nor in any other statute which would indicate that insurance contracts in such a case should not be carried out according to their terms in the same way that other contracts are to be performed. So far as insurable interest is concerned, the absorbing district succeeds to the property of the dissolved district and necessarily succeeds to the in-
surable interest in that property which was vested in the dissolved district.

The fact that the absorbing district has not voted to insure its property in the state insurance fund is not important in determining the questions presented. It does not insure property when it succeeds by operation of law to an insurance contract already in force. If the absorbed district prior to insuring its property in the state fund authorized such insurance, it was properly placed in the state fund and, as we have said, we find nothing in the law which would indicate that the contract is terminated by the dissolution of the absorbed district and the transfer of its property to a district which had not authorized insurance in the state fund.

Since in our opinion the contract would continue until terminated according to its provisions, there is no necessity for determining whether the absorbing district may discontinue the insurance in force under the provisions of sec. 210.04 (8). That subsection permits an insuring district to discontinue insurance in the state fund upon the expiration of existing contracts. There would be no object in the absorbing district taking such action since in any event the insurance contracts in force would expire at the same time irrespective of any vote of the governing body to discontinue them. Thereafter, the officials of the absorbing district would not be required to insure in the state fund since the district would not have voted to insure in that fund. It is only where a district has voted to insure in the fund that subsec. (8) has meaning. In such a case those in charge of placing insurance on its property must continue to do so until the governing body has voted to discontinue such insurance.

JWR
National Guard — Sec. 21.69, Stats., applies only to educational institutions incorporated under ch. 180 or ch. 187, Stats., and not to public high schools.

March 11, 1943.

A. A. Kuechenmeister, Brigadier General,
The Adjutant General.

You state that an ROTC course is given at the senior high school, Beloit, Wisconsin, for which instructors are detailed by the United States army. The principal of the high school inquires whether or not the school comes within the provisions of sec. 21.69, Stats., subsec. (1) of which provides as follows:

"Any university, college or academy or other educational institution either endowed or operated without profit and regularly incorporated under and by authority of the state of Wisconsin and wherein there is given annually by an officer or officers duly appointed by the United States army or navy or both a course of instruction in military or naval science and tactics, may, by application signed by the chancellor, president or other presiding officer and under the seal of the institution, be declared a post of the Wisconsin national guard, provided that such institution shall offer free instruction in military science and tactics and the art of war to such officers of the national guard of the state of Wisconsin as the adjutant general may designate to attend such school."

It is quite apparent from a reading of the foregoing statute that it applies only to educational institutions incorporated under ch. 180 or ch. 187, Stats., and not to public high schools. In the first place, the statute specifically mentions academies, which are a class of schools much less numerous than public high schools, so that it may properly be inferred that had the legislature intended to include the latter they would also have been specifically mentioned.

In the second place, the statute refers to educational institutions "either endowed or operated without profit and regularly incorporated under and by authority of the state of Wisconsin." Such language is highly inappropriate to de-
scribe a public high school, since such institutions are never endowed and the question of operating them for profit does not come up, nor are they incorporated.

In the third place, the application for designation of a school as a post of the national guard must be "signed by the chancellor, president or other presiding officer and under the seal of the institution." Public high schools are always in charge of a principal, but he can scarcely be said to be the presiding officer, being merely the administrative head of the school subject to the orders of the superintendent of schools and the board of education. Moreover, public high schools do not have seals.

Accordingly, you are advised that the Beloit senior high School does not come within the provisions of sec. 21.69, Stats.

WAP

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Public Health — Slaughterhouses — Sec. 146.11, Stats., relating to location and operation of slaughterhouses, does not apply to slaughterhouse erected by county at county home and asylum for sole use of said institution, although it may not be so operated as to result in nuisance.

March 11, 1943.

Carl N. Neupert, M. D., State Health Officer,
Board of Health.

You state that a county proposes to construct a slaughterhouse at its county home and asylum for the purpose of preparing meat for the inmates and help. It is planned to locate the slaughterhouse in the vicinity of the county asylum buildings so as to facilitate the providing of plumbing and heating. We are asked whether sec. 146.11, Stats., and regulations adopted by the state board of health pursuant to such section, are applicable here.

Sec. 146.11 (1) provides in part:
"No person shall erect or maintain any slaughterhouse, or conduct the business of slaughtering, upon the bank of a watercourse; nor, unless under federal inspection, within one-eighth mile of a public highway, dwelling, or business building. * * * Violation of this subsection shall be punished by fine of not less than ten nor more than one hundred dollars, or by imprisonment not exceeding six months."

Sec. 146.11 (2) provides in part:

"Slaughterhouses not subject to federal inspection and supervision shall be inspected and supervised, as to location, construction and operation, by the state board of health, and said board shall cause each such slaughterhouse to be inspected at least once a year. * * * Violation of the rules and regulations of the state board shall be promptly reported by the local health officer. * * *"

The problem of what constitutes a "slaughterhouse" or "the business of slaughtering" within the meaning of sec. 146.11 is by no means free from doubt. See XXVIII Op. Atty. Gen. 566, 567. However, as near as we are able to determine, these terms are frequently, if not generally, applied where animals are butchered for sale or the market. Webster's New International Dictionary defines "slaughterhouse" as "a building where beasts are butchered for the market". Both Webster and Funk & Wagnall's new standard dictionary of the English language define the word "slaughter" to mean "to kill for the market". See also IX Op. Atty. Gen. 604, citing Thibaut v. Hebert, (La.) 12 So. 931.

In the construction of statutes words and phrases are to be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law are to be construed and understood according to such peculiar and appropriate meaning. Sec. 370.01 (1), Stats. Having this in mind in connection with the definitions discussed above, it would seem that the legislature may well have intended to limit the application of the slaughterhouse law, sec. 146.11, to commercial enterprises where the butchering is for the market, rather than to extend its application to individuals or
institutions butchering exclusively for their own use. An additional reason for so limiting the application of the statute is that sec. 146.11 (1) is a penal statute and comes within the rule that such statutes are to be strictly construed against the state. IX Op. Atty. Gen. 604.

We understand that the proposed building in this case is to be of the most modern and sanitary design and will be connected with the institution’s water, steam and sewage systems in such a way that no nuisance should arise if it is properly operated, and in ruling that sec. 146.11 does not apply we do not mean to intimate in any way that such undertaking may be so operated as to endanger the health or comfort of the inmates or as to otherwise result in a nuisance; nor do we wish to indicate that in such event either the county or those in charge of the institution would be absolved from any or all of the legal consequences which might flow from the improper operation of such a facility.

WHR
Social Security Act — Poor Relief — Old-age Assistance — Liens to secure repayment of old-age assistance grants provided by amendments to sec. 49.26, Stats., by ch. 7, Laws Special Session 1937, are not applicable to Wisconsin real estate of old-age assistance beneficiaries for aid theretofore granted where there had been no transfer of such real estate, prior to amendments, to secure repayment of such assistance. Lien was intended to cover prior assistance only in cases where there had been transfer of Wisconsin real estate. It was intended as substitute for security theretofore required and was not intended to require security where none had been required, as related to assistance rendered prior to amendments.

March 15, 1943.

DEPARTMENT OF PUBLIC WELFARE.

You request our opinion as to whether liens under sec. 49.26, Stats., should be construed to secure old-age assistance grants made prior to the effective date of ch. 7, Laws Special Session 1937, creating the section, where:

(1) payment of assistance was terminated prior to such effective date but the county had obtained a transfer of the beneficiary's realty under the statute before amendment;

(2) payment of assistance was terminated prior to such effective date but the county had not obtained a transfer of the beneficiary's realty under the statute before amendment;

(3) payment of assistance continued after such effective date and the county had obtained a transfer of the beneficiary's realty under the statute before amendment;

(4) payment of assistance continued after such effective date but the county had not obtained a transfer of the beneficiary's realty under the statute before amendment.

Prior to the enactment of ch. 7 there was no statutory lien securing old-age assistance grants such as that provided for by sec. 49.26. A somewhat comparable provision was made, however, by authorizing the pension administrator to "require as a condition to the grant of a certificate
[entitling an applicant to a pension], that all or any part of
the property of an applicant for old-age assistance be trans-
ferred” to the agency administering old-age assistance.
Provision with respect to management of the property so
transferred not material here was made, and it was also
provided that if assistance was discontinued during the life-
time of the beneficiary, the property was to be returned less
such amount as would be sufficient to repay the amount of
assistance with simple interest at three per cent and, in the
event of death of the beneficiary, a like deduction was to be
made and the remainder returned to his estate. Sec. 49.26,
Wis. Stats. 1937.

Ch. 7, Laws Special Session 1937, amended sec. 49.26 to
provide for a statutory lien in lieu of a transfer of property
in certain cases. The transfer of property provision was re-
tained, but real estate situated in the state of Wisconsin was
specifically excepted. Subsec. (4), providing for a lien
against Wisconsin real estate in lieu of the transfer there-
tofores provided by subsec. (1), was added.

Subsec. (4) provided, as it now provides, that when old-
age assistance is granted certain data shall be entered upon
a certificate and the certificate filed in the office of the regis-
ter of deeds in every county in the state in which real prop-
erty of the beneficiary may be situated. It is further pro-
vided that from the time of such filing a lien “shall attach
to any and all real property of the beneficiary presently
owned or subsequently acquired, including joint tenancy in-
terests, in any county in which such certificate is filed for
any amounts paid or which thereafter may be paid
* * *
and shall remain such lien until it is satisfied.”

Further provision not material here is made for filing, fore-
closing and releasing the lien.

Sec. 49.26 (5) was also added by ch. 7. It provided that
all real property previously transferred to pension authori-
ties under the provisions of the section as it had theretofore
existed and in the possession of those authorities, should be
returned forthwith. A lien was thereupon to be acquired by
the county in the manner provided in subsec. (4) for any
amounts previously paid or which might thereafter be paid.

It was the clear intention of the legislature in amending
sec. 49.26 to provide a lien in the case of all assistance
granted after the amendment and to substitute the lien for the security which had been obtained for such assistance by transfers theretofore made. We find no intention evidenced to provide for a lien in the case of assistance theretofore granted where security had not been obtained by a transfer of property. The only possible basis upon which it could be argued that a retroactive lien was intended to cover such cases would be that portion of subsec. (4) which provides that when the required certificate is filed a lien shall attach "for any amounts paid or which thereafter may be paid". This language, however, must be read in connection with the preceding language of subsec. (4) and with the provisions of subsec. (5). The preceding language of subsec. (4) provides for issuance of the certificate when aid is granted. Therefore, the reference in the quoted language that it shall cover amounts paid when filed obviously refers to the aid granted at the time the certificate is issued. The whole sense of subsec. (4) is that it refers prospectively, that is, to aid thereafter granted, because the provision for issuance of the certificate in the form there provided for, the provision for its filing and the effect of its filing, had not theretofore existed and could only be applicable prospectively where related to the granting of aid.

Subsec. (5), on the other hand, specifically related to applying the lien to aid theretofore granted, and we must assume that the legislature there intended to cover all such cases. Where the matter of retroactive application was thus specifically covered, an omission can hardly be dragged in by the heels under another subsection which by any fair construction is purely prospective in application.

In addition, we might say that, to put it conservatively, a serious constitutional question would arise if sec. 49.26 as amended by ch. 7 were to be construed as providing for a lien upon the Wisconsin real estate of old-age assistance beneficiaries who had theretofore been granted aid without the requirement that their property be transferred to secure repayment. As the law existed prior to the amendment the pension authorities had considerable discretion in determining whether or not security would be required. Possibly some applicants would have refused aid if security were required. Where applications were made and granted without
requiring security it would be, to say the least, very doubt-
ful that the legislature could thereafter subject the property
of those receiving the aid to a lien for the aid which had
been granted them. If there were any doubt about the mat-
ter, if the amendments were ambiguous, contrary to our
view, the constitutional question that would be raised would
necessitate a construction which would avoid it.

Our conclusions are that your first question should be an-
swered in the affirmative, assuming that the property trans-
ferred to the county authorities had not been retransferred
at the time of amendment. The second question should be
answered in the negative. The third question should be an-
swered in the affirmative, and the fourth should be answered
in the negative.

JWR

Constitutional Law — Taxation — Income Taxes — Leg-
islation proposed by Bill 137, S., would be unconstitutional as
denying equal protection of law in violation of art. I, sec. 1,
Wisconsin constitution, and 14th Amendment of federal
constitution. State cannot refuse to recognize gains and
losses, for income tax purposes, resulting from condemna-
tion of lands by federal government while continuing to
recognize such gains and losses in case of other condemna-
tions.

March 18, 1943.

THE HONORABLE, THE SENATE.

Bill No. 137, S., now pending before the senate proposes
to create a section of the statutes to read:

"71.046 GAINS AND LOSSES NOT TO BE RECOGNIZED IN
CERTAIN CASES. In determining gross income under this
chapter, no gain or loss shall be recognized in the compen-
sation received by owners of lands acquired by United
States for war purposes by condemnation, or by threat or
imminence thereof, subsequent to December 7, 1941, and
prior to December 31, 1943."

March 18, 1943.
Amendment No. 1, S., would amend the bill by restricting its application to owners of farm lands. Another proposed amendment, which has not been introduced or printed, would restrict the application of the measures to owners of lands situated in one county only.

You have requested my opinion as to whether the proposed enactment, exclusive of the amendments, is constitutional and if so, as to whether it would be rendered unconstitutional by adoption of the amendments or either of them.

It is my opinion that the proposed statute, exclusive of the amendments, violates the provisions of article I, section 1 of the Wisconsin constitution and the 14th Amendment to the federal constitution. The constitutional provisions in question provide in substance that the state shall deny to no person within its jurisdiction the equal protection of its laws. The object of these constitutional limitations is that men shall stand upon the basis of equality and that no men or group of men shall be singled out for special privilege or special burdens. *Black v. State*, 113 Wis. 205.

The state is not, however, under the constitutional principle in question, required to treat everyone precisely alike. It may treat persons or classes of persons differently where there are such substantial distinctions relating to the status of such persons as justify such differing treatment.

The vice of the proposed enactment, as regards exemption of gains, is that it singles out a special group of land owners and confers upon them a special privilege not conferred upon other land owners similarly situated. It may be said that it proposes to rectify an unjust situation created by the large scale condemnation of lands by the federal government, for war purposes. Persons whose land is thus condemned are forced against their will to part with their property and to convert it into cash. The involuntary conversion may well result in a gain taxable as income under the income tax law. The owners of such lands are denied the option of determining whether they will realize such a gain and it may be said that they should not be taxed upon it. This may well be true, but the difficulty is that the situation of the owners is no different than the situation of any owner whose lands are condemned or who sells under threat
of condemnation. Whether lands are taken from an owner by the federal government for war purposes or by the state government or any of its subdivisions or by a private corporation exercising the power of eminent domain, for other purposes, would seem to be immaterial so far as the injustice of requiring the owners of the lands to pay income taxes on gains is concerned. The injustice is no greater nor no less in the one case than it is in the other.

Since the proposed principal enactment is in my opinion unconstitutional, you are perhaps not interested in any expression of opinion as to the constitutionality of the amendments. I shall therefore not discuss them in detail, except to point out that for obvious reasons they violate the constitutional principle of equality to which I have called attention. The owners of farm lands would not be entitled to the special privilege denied other owners of lands and it would be even more unequal to confer such a privilege upon the owners of lands in one county only.

The present bill and the amendments would be objectionable if restricted solely to losses as distinguished from gains, upon the basis of the same reasoning applied above, except that special burdens would be imposed instead of special privileges conferred. The fact that both burdens and privileges are included does not, in my opinion, constitute a counterbalancing treatment which justifies such special legislation. Whether restricted to gains or losses, or both, the legislation is discriminatory and would result in arbitrary and unequal treatment of persons subject to the jurisdiction of the state.

JWR
Intoxicating Liquors — Proof that minors, unaccompanied by parent or guardian, enter barroom on licensed premises where they are not residents, employees, lodgers or boarders, and which premises are not hotel, restaurant, grocery store or bowling alley, and (a) remain for period of thirty minutes, during which time they dance to music from juke box and purchase and consume several soft drinks, or (b) remain for period of twenty minutes, during which time they purchase and consume several bottles of beer, or (c) remain for period of thirty minutes, during which time they play two games of pool, probably would not be sufficient in itself for successful prosecution of tavern keeper under sec. 176.32, subsec. (1), Stats., for permitting minor to loiter.

Sec. 176.32, subsec. (1), provides penalty for minor convicted of loitering thereunder.

Sec. 176.32, subsec. (2), provides penalty for person who enters place where liquor is sold after sale of liquor to him has been forbidden in manner specified in sec. 176.26.

March 23, 1943.

JOHN M. SMITH,
State Treasurer.

You inquire whether the following acts constitute lingering or loitering under the provisions of section 176.32, subsec. (1), Wisconsin statutes, and, if so, whether the minor persons involved would be liable to a prosecution for having committed a misdemeanor under the provisions of sec. 176.32, subsec. (2), Wis. Stats.

“(a) Two couples, 18 years of age, unaccompanied by parent or guardian, enter a place licensed for the sale of intoxicating liquor. None of them are residents, employees, lodgers or boarders on said licensed premises. They remain for a period of 30 minutes, during which time they dance to music from a juke box and purchase and consume several soft drinks.

“(b) Three persons, each 19 years of age, unaccompanied by parent or guardian, enter a place licensed for the sale of intoxicating liquor. None of them are residents, employees, lodgers or boarders on said licensed premises. They remain
for a period of 20 minutes, during which time they purchase and consume several bottles of beer.

“(c) Two minor persons, each 16 years of age, enter a place licensed for the sale of intoxicating liquors which has on the premises several billiard and pool tables. They have written permission from their parents to play pool or billiards. They remain on said premises for a period of 30 minutes, during which time they play two games of pool.”

Section 176.32, subsec. (1), provides in part:

“Every keeper of any place * * * for the sale of any intoxicating liquor, who shall * * * suffer or permit any person of either sex under the age of twenty-one years, unaccompanied by his or her parent or guardian, * * * who is not a resident, employee, or a bona fide lodger or boarder on the premises of such licensed person, to linger or loiter in or about any bar room or other room in such premises in which such liquor is sold or dispensed, shall * * * be liable to a penalty * * *; and any such person so lingering or loitering as aforesaid, * * * shall also be liable to a penalty of not more than twenty dollars, besides costs, or imprisonment not exceeding thirty days in the county jail or house of correction. This section shall not apply to hotels, restaurants, grocery stores, and bowling alleys.”

Section 176.32, subsec. (2) provides:

“Any person to whom the sale of any such liquors has been forbidden in the manner provided by law who shall enter any place of any nature or character whatsoever for the sale of such liquors shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than fifty dollars or by imprisonment in the county jail or house of correction not less than ten days nor more than sixty days or by both such fine and imprisonment.”

It is assumed that these acts were committed either in a bar room or other room in which liquor is sold and not in a hotel, restaurant, grocery store or bowling alley.

“The word ‘loitering’ means to be slow in moving; to delay; to hinder; to be dilatory; to spend time idly; to saun-
ter; to lag behind. * * *." * People v. Berger, 163 N. Y. S. 319, 320.

To the same effect is State v. Starr, (Ariz.) 113 Pac. (2d) 356, 357.

"* * * The verb 'loiter' means 'to linger idly by the way, to idle' * * *." * Phillips v. Municipal Court of Los Angeles, (Cal.) 75 Pac. (2d) 548, 549.

To the same effect is State v. Jasmin, (Vt.) 168 Atl. 545.

"* * * The word 'loiter' does not signify anything bad or criminal except when given that significance in a criminal ordinance or statute." * State v. Starr, supra, p. 357.

The word "loiterer", in addition to having no offensive or opprobrious significance, may correctly be used to designate those who simply wait around. * Cates v. Jones, Tex. Civ. App. 129 S. W. (2d) 476, 477.

The amount and type of evidence necessary to constitute proof of loitering varies greatly with the individual case. * People v. Berger, supra; Stephens v. District of Columbia, 16 App. D. C. 279.

It was held in the case of Malhoit v. Burns, (Mass.) 127 N. E. 333:

"* * * Pouliot testified that * * when they obtained liquor there they generally stayed in the defendant's saloon about 'two hours or two and one-half hours.' This evidence, if believed, warranted a finding that the plaintiff's son was allowed by the defendant to loiter on the premises * * *".

The case of State v. Tobin, (Conn.) 96 A. 312, involved a prosecution for allowing women to loiter on premises where liquors were kept for sale. The evidence indicated that disreputable women resorted to the saloons and remained there "for protracted periods of time."

The supreme court upheld the following instructions given to the jury by the lower court, p. 313:
"Now, loitering, to loiter, means to be dilatory, to stand idly around, to spend time idly. It is for you to say whether the fact of these women going into that place on those nights and being in there for the length of time that they were were spending their time idly or not. If they were spending their time idly, they were loitering; they were doing what the law says means to loiter, to spend time idly; and it is for you to say, gentlemen, you are the judges of the fact, whether these women, going in there on those occasions and staying there the length of time they did, were loitering or not."

In each of the three cases described by you the minors remained upon the premises only a relatively short period of time. In each case also it appears that they went upon the premises to enjoy, and did enjoy, specific types of amusement, to wit: dancing, consuming soft drinks, consuming beer, and playing pool. The statements of fact do not indicate that the minors spent any time simply idling or "killing time." Although as indicated above, the question of whether a person is guilty of lingering or loitering is one of fact, it is our opinion that none of the three sets of facts stated, in and of themselves, constitute sufficient grounds for a successful prosecution of the keeper of the tavern under section 176.32, subsec. (1), for permitting a minor to linger or loiter on the premises.

Even if the tavern keeper were convicted under section 176.32, subsec. (1), of permitting loitering as a result of proving any one of the three sets of facts given above, it would not follow that any of the minors could be convicted under section 176.32, subsec. (2). That subsection provides a penalty for a person who enters a place for the sale of liquor; after the sale of liquor to him has been forbidden "* * * in the manner provided by law * * *." The manner provided by law for forbidding the sale of liquor is that referred to in section 176.26, which specifies that certain persons may, by written notice, forbid the sale of liquor to some other persons, and not section 176.30, which absolutely forbids the sale of liquor to a minor.

The penalty which may be imposed upon a minor for lingering or loitering in a bar room is found in the latter part of section 176.32 (1).

JRW
Public Printing — Exception contained in sec. 35.01, Stats., extends from word “except” to word “university”, both inclusive.

Bookmaking for state historical society is public printing within meaning of sec. 35.01 and must be done through state printer even though paid for from income of funds donated or bequeathed to such society by individuals.

March 25, 1943.

STATE HISTORICAL SOCIETY.

Attention Edward P. Alexander, Superintendent.

Since its incorporation in 1853, the state historical society of Wisconsin has issued a great many publications which, with the exception of a very few, have been printed through the state printing system. This system is entirely satisfactory for all of your publications except the books. In general, good bookmaking is expensive, and when it is done under a competitive state contract, the quality of the binding and printing has not been satisfactory from the point of view of either appearance or permanence. There is also some question whether the ultimate cost to the state may not be greater for the printing of books through the state printer than through some other apparently more expensive printer, when it is considered that the editor or assistant editor of the state historical society must spend five or six times more work in connection with the printing of a book by the state printer than would be necessary if the same book were printed by a first grade book publisher.

From time to time the state historical society has received gifts or bequests for specific purposes which usually include the publication of historical material. The cost of publishing many books is paid for from the income from the funds which the society received by gift or bequest.

You inquire whether the law compels you to use the state printer in the printing of books which are paid for exclusively from the income from these so-called private funds.

Section 35.01, Stats., provides in part:

“The public printing is all the printing and binding except all binding, not an integral part in the completion of a
printing order, and rebinding necessary to preserve books, documents, manuscripts, periodicals and other material collected by any state officer or department or by the state historical society, state institutions, normal schools and the state university for which payment may lawfully be made out of the state treasury. It is divided into seven classes: First. Second. Third. all books not otherwise classified. Fourth. All job printing and all printing not otherwise classified. Fifth. Sixth. Seventh.

There is a question in your mind as to the extent of the exception in the foregoing statute. From a reference to chapter 281, Laws 1937, which inserted the exception in sec. 35.01, and which created sec. 35.555, it is our opinion that the exception in sec. 35.01 extends from, and including, the word "except" to, and including, the word "university".

The books to which you refer would be included in either the third or fourth class of public printing.

Sec. 35.02, subsec. (2), provides:

"State printers are the persons under contract to do public printing, other than printing of the fifth, sixth or seventh class. Wherever in this chapter the words 'the state printer' are used, they are intended to designate the person who by contract is required to do the particular printing there considered."

Sec. 35.33, subsec. (1), provides in part:

"Upon receiving printers' copy and the necessary requisitions from the requisitioning officer of the state historical society, the director of purchases shall order the state printer to do all book printing which is required for the use of the state historical society;"

Sec. 35.42 provides in part:

"Each of the four classes of printing furnished by the state printers shall be furnished under a separate contract, or all of them under a single contract as shall be determined by said director of purchases to be most advantageous to the state."
Under sec. 35.45 the director of purchases is instructed to advertise for proposals for furnishing "the printing included in the several classes of printing required by law to be furnished by state printers * * *

Substantially the same sections of chapter 35 which apply to printing for the state historical society also refer to printing for the university. In VIII Op. Atty. Gen. 566 it was held that the contract of the state with the public printer covers the printing by the university of books written in a foreign language, and that no special contracts could be made or let for such printing. In discussing the foregoing statutes it was there stated, pp. 567-568:

"It is plain from these statutes that the third or fourth class of public printing covers the contemplated printing, and it is to be ordered by the state printing board and done by the state printer."

"Furthermore, there is a necessary implication contained in the language of sec. 35.42 that all printing belonging to classes three and four shall be done by the public printer."

"Of course, this does not prevent the state printer, if he sees fit, to sublet the job. Your board, however, and the university have contractual relations only with the state printer in this matter."

Since the foregoing opinion was written the statutes have been amended, of course, to provide that, in general, the director of purchases shall perform the duties which were formerly to be discharged by the printing board.

Sec. 20.16 of the statutes makes appropriations from the general fund to the state historical society.

Sec. 44.01 provides in part:

"* * * Said [state historical] society shall be the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; * * *"


Sec. 20.78 provides in part:
All appropriations made by law from state revenues for the state historical society, are made on the express conditions that such society pays all moneys received by it into the state treasury within one week of receipt, and conforms with the provisions of sections 14.31, 14.32 and 20.77 of the statutes, both as to appropriations of its own receipts, and as to appropriations made by the state from state revenues. Upon failure to comply with the above conditions, the secretary of state shall refuse to draw his warrant, and the state treasurer shall refuse to pay any moneys appropriated to any such society, from state revenues, until compliance is made with said conditions; and upon failure or refusal to so comply, after due notice received from the secretary of state, any appropriation made by law from state revenues to such society shall permanently revert to the fund from which appropriated.

Sec. 20.785 appropriates to the state historical society all moneys paid by it into the state treasury pursuant to section 20.78. Sec. 20.80 provides that all moneys received by the state historical society as income on the principal of funds received by it as gifts, legacies and devises, shall be expended through an audit by the secretary of state.

From the foregoing it will appear that all of the funds of the state historical society, whether received by state appropriation or from private gifts or bequests, must be placed in the state treasury, and that the society is not unrestricted in its expenditure of any of its funds.

A consideration of secs. 20.16, 20.78, 20.785, 20.80 and 44.01 leads to the conclusion that payment of the cost of printing the books to which you refer not only may lawfully be made out of the state treasury but also must be so made, whether from state appropriations or from other income of the society.

It is our conclusion that the book printing to which you refer is public printing within the meaning of sec. 35.01 of the statutes and must be done by the state printer.

However, your attention is called to the provisions of sec. 35.44, subsec. (8), which provides, in respect to state printing:

"* * * all workmanship must be good and fit, and be satisfactory to the director of purchases; and in case of any
substantial failure to comply with these provisions, the director of purchases may refuse to receive such defective printing, and procure what was ordered elsewhere, charging the state printer with the difference between the actual cost and the contract price thereof.

As indicated in the opinion in VIII Op. Atty. Gen. 566, it is possible that the state printer might be open to the suggestion that this type of printing be sublet if he cannot do a satisfactory job.

JRW

Banks and Banking — National banks may be subjected to regulatory laws adopted in exercise of police power of state and, unless such exercise of police power directly conflicts with federal statutes governing creation and operation of national banks, such laws are valid.

By weight of authority national bank may not be subjected to civil penalties for violation of state usury law, remedy provided by national banking act being exclusive.

Conviction of national bank for violation of state usury law has been sustained, although in absence of decision by supreme court of this state or of United States, question would be open here.

March 30, 1943.

HONORABLE CONRAD SHEARER,

President pro Tempore of the Senate.

There has been transmitted to this office by the chief clerk of the senate, Senate Resolution No. 10, S., requesting our opinion on the question whether any regulatory state legislation or any rule promulgated by the Wisconsin banking commission can legally (a) apply to, limit or qualify the power of a national bank in Wisconsin, or (b) fix the penalty to be imposed on a national bank in Wisconsin for charging a usurious rate of interest.
The answer to your question (a) must be in somewhat general terms, since the resolution does not describe any particular legislation concerning which the question is asked. It is a general rule that national banks are subject and amenable to all state laws provided that those laws do not interfere with the purpose for which national banks are created, impair their efficiency as agencies of the federal government, or conflict with the laws of the United States. It may be said that national banks are governed in their daily course of business far more by the laws of the state than of the nation. Thus, national banks may be subjected to regulatory laws adopted in the exercise of the police power of the state and, unless such exercise of the police power directly conflicts with the federal statutes governing the creation and operation of national banks, such laws are valid. The line which divides the field of legislative control of national banks occupied by congress and that left to the states is indistinct, and it would not be possible to lay down a general rule to govern in all cases. However, your question (a) may be safely answered in the affirmative, since there is no question that there is a large field for the exercise of the state's powers over national banks by legislation or rules promulgated by state boards or commissions in the exercise of legislatively conferred power.

Question (b) of the resolution would relate, as we understand it, to both civil and criminal penalties which might be imposed upon national banks by state laws for charging usurious rates of interest. The national banking act provides that national banks may charge interest at the rate allowed by the laws of the state where the bank is located, and no more. 12 USCA, sec. 85. The national banking act also provides a penalty for the charging of usurious interest by a national bank, it being provided that in the case of the charging of usurious interest, when knowingly done, the bank forfeits the entire interest and, in case the usurious interest has been paid, twice the amount of the interest may be recovered back in an action brought by the person paying the interest. 12 USCA, sec. 86.

With respect to civil liabilities, the weight of authority is to the effect that the national banking act provides an ex-
Opinions of the Attorney General

92

elusive remedy and that civil penalties may not be assessed under state law. As to whether a national bank may be held criminally liable for violation of the usury laws of the state, there is very little authority but, in the only reported case which we have been able to find which deals directly with the subject, the conviction of a national bank for violation of a state usury law was sustained. *State v. First National Bank of Clark*, (S. D. 1892) 2 S. D. 568, 51 N. W. 587. In the absence of a decision of the supreme court of this state or of the United States, the question would be an open one here.

In conclusion, our examination of the problem with which the resolution is concerned leads us to believe that by the adoption of properly drawn and well considered legislation the state may effectively regulate the business of making loans and charging interest therefor by national banks as well as by others engaging in such business in this state.

RHL

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**Taxation — Income Taxes — Residence for voting purposes and for tax situs of income is same.**

March 31, 1943.

**EDMUND H. DRAGER,**

**District Attorney,**

Eagle River, Wisconsin.

You present the situation of a person listing his residence in his state income tax return as the designated taxable situs of his income for the purposes of sec. 71.18, Stats., and then claiming a residence in a different political subdivision of the state for voting purposes. Our opinion is asked as to the correctness of the view that, having listed his residence for taxation purposes, he must vote in the same locality.

At the outset it must be kept in mind that under some circumstances the taxable situs of income of a taxpayer may
be different from the place of his residence, and particularly his residence at the time of filing the return. In the first place there may be a change in residence during the tax year or between the end of the tax year and the time for filing income tax return. In such instances the income that is attributable to each place during residence there has a tax situs at that place. Greene v. Tax Comm., (1936) 221 Wis. 531, 266 N. W. 270; Scobie v. Tax Comm., (1937) 225 Wis. 529, 275 N. W. 531. Secondly, even though there has been no change in residence, the income may have a taxable situs of its own under sec. 71.02, subsec. (3), par. (c), Stats., that is entirely independent of the residence of the recipient thereof. By the provisions of this statute income from mercantile or manufacturing business has a tax situs at the location of such business. So also income from rentals and royalties from real estate or tangible personal property or from the operation of a farm, mine or quarry or from the sale of real property or tangible personal property has a tax situs at the location of the property from which it is derived. All other income, including royalties from patents, income from personal services, professions and vocations, income from land contracts, mortgages, stocks, bonds, securities and the sale of similar intangible personal property has its tax situs at the place of residence of the recipient.

But, aside from considerations arising out of the above, it is clear that residence is a question of fact. Bromey v. Tax Comm., (1938) 227 Wis. 267, 278 N. W. 400. A mere declaration as to residence is not, in and of itself and without supporting facts, sufficient to establish residence. If there has been no change during the period involved, then the person concerned has his residence at that place which the facts demonstrate, and it is the same whether for purposes of determining the taxable situs of his income or for purposes of voting. Obviously any declaration in an income tax return as to the place of residence cannot be taken to establish it contrary to what the facts show, and similarly a claim of voting residence cannot of itself fix legal residence where not supported by the other necessary factual bases.

However, there do arise instances in which the place of residence is controversial because of the peculiar factual
situation, and then a declaration of intention, such as the designation in a tax return or by voting, is sometimes the determinative factor. Each case of this type has to be judged upon its own facts. If, however, such a determinative and controlling declaration of intention has once been made it establishes residence at that place which continues to be the place of residence until there has been such a change in the physical facts as would constitute an abandonment thereof or the establishment of a new and different residence. *Will of Eaton*, (1925) 186 Wis. 124, 202 N. W. 309. A subsequent contrary declaration without any other change would not be sufficient to establish a new residence.

Consequently, it is our opinion that, where the facts are such that it is a close question as to which of several locations is the place of residence so a declaration of intention would be the deciding factor, a designation of one of them as the place of residence by a recitation in an income tax return, voting in one of them, or something of like moment, would establish residence at that place. But, once so established, then, in the absence of subsequent material change in the physical facts, a later declaration or designation of residence elsewhere, by recitation in a tax return, voting in another place, or something of similar effect, would not be operative to effect a change in the place of residence.

HHP
Constitutional Law — Public Printing — Printing required for state use must be let by contract to lowest bidder and cannot be done by state itself, in view of provisions of article IV, section 25, Wisconsin constitution.

April 2, 1943.

F. X. Ritger,

Director of Purchases.

You have submitted the following:

“A situation has arisen which makes it necessary to request your opinion regarding the use of a printing machine at the university extension department, university of Wisconsin, Madison.

“The machine in question is a Chandler and Price press 10” x 15” as per illustrations attached. This machine is described as a ‘rebuilt 10” x 15” C & P Kluge Automatic Duplicator.’ This is in fact a printing machine.

“In this connection I respectfully refer to section 35.34, statutes.

“Is the use of this machine for the purpose intended permitted by the above named section or any other provision of the statutes?

“Is it legal for the state of Wisconsin or any of its departments, boards, commissions, or institutions to own and operate any machinery or machines for the purpose of producing printing.”

Article IV, section 25 of the Wisconsin constitution reads:

“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.”

Your question really comes down to the one question as to whether or not the state is permitted to do its own printing. It was stated as the opinion of this office in XXIII Op. Atty. Gen. 106 that the constitutional provision in question pre-
cluded the state from doing its own printing. Even more recently it has been assumed that such a construction was required. XXXI Op. Atty. Gen. 60.

The provision itself is, in our opinion, plain and unequivocal. It has been contended that it was the intent to require the legislature to provide that any contracts let should be let to the lowest bidder, and that it was not intended to prevent the state from doing its own printing. Such a construction is contrary to the plain words of the section.

In view of the number of instances in which the question has been raised, we have felt that we should inquire into the constitutional history of art. IV, sec. 25 with the view of determining whether there is anything which would throw any doubt upon what we have stated to be a very clearly expressed intent. We find nothing in the history of the section which tends to any such conclusion. Rather, the contrary is true.

The section was introduced as an amendment upon the floor of the convention. There was some discussion of the amendment which is recorded as follows:

"Mr. Lovell suggested that if such a proposition was to be incorporated it should be so framed as to provide for every emergency which could arise. It might happen that the legislature could get no bidder. What then could they do? Must they adjourn? He appealed to the convention to decide if it was not far better to leave it to the legislature in such a case to provide a way by employing a printer and paying him for his work." Quaife, The Attainment of Statehood, p. 437.

Later on in the convention an effort was made to change the provisions of the section. Mr. Quaife records this effort as follows (The Attainment of Statehood, p. 728):

"Mr. Estabrook moved that the committee be further instructed to amend section 25 by striking out the word 'shall' and inserting the word 'may.'"

Since there are two instances in which the word "shall" is used in sec. 25, it is uncertain as to just which instance Mr. Estabrook had in mind. However, in either event, the result would be the same since the effect would be to permit
state printing to be done otherwise than by letting it to the lowest bidder. In connection with Mr. Estabrook's effort Mr. Doran moved to strike out sec. 25. Among other things, he argued that the printers "might combine together and put the state to great inconvenience". And he thought that the state printing "would be attended with very great inconvenience". Quaife, The Attainment of Statehood, p. 728.

It cannot be said, upon the basis of the constitutional convention proceedings to which we have referred, that any doubt is thrown upon the construction which we have here-tofore placed upon sec. 25. In fact, there appears to be room for the argument that the convention deliberately considered and rejected any proposal that the state do its printing.

We have been unable to find any further light upon the question in the proceedings of the Wisconsin constitutional convention, and we have found no comparable provision in another state constitution which is at all helpful.

We conclude that the state cannot do its own printing. The university, as a part of the state government, cannot employ a printing press for the purpose of satisfying its printing requirements, although it is probable that it could purchase and use a press for the purpose of instructing students. Any printing done upon such a machine could probably be utilized as an incident to instruction of students, although it could not be so great in volume as to afford a basis for saying that the instruction was an incident to the printing.

So far as sec. 35.34 of the statutes is concerned, it authorizes "multigraph, multicolor and mimeograph" operations by the director of purchases and the university of Wisconsin. If these operations constitute printing, the statute is unconstitutional in so far as they are permitted. It is a very difficult question to determine in some cases as to whether a particular operation constitutes printing. The presumption would be that none of the named operations constitute printing, since the law authorizing them is presumed valid. We are not asked to voice an opinion as to whether any of such operations are printing, and in the absence of such a request, we express none.

JWR
Constitutional Law — Public Printing — Requirement that state printing shall be done in state and by establishments maintaining wage levels and working conditions equal to those prevailing in locality in which printing is done is not in violation of Fourteenth Amendment to federal constitution, article I, section 1 of Wisconsin constitution or article IV, section 25 of Wisconsin constitution.

April 7, 1943.

THE HONORABLE THE SENATE.

You have requested our opinion with respect to the constitutionality of Bill No. 131, S. It is always a very difficult thing to anticipate the constitutional objections that may be raised against a specific piece of legislation prior to observation of the statute in practical operation. To the best of our ability, however, in the limited time that has been afforded, we have endeavored to anticipate and deal with constitutional objections that might be raised against the proposed statute.

In substance, the bill proposes the enactment of a statute under which state printing, with certain exceptions, is to be let only to those operating printing establishments in the state and employing "productive employes" under wage agreements and working conditions prevailing in the locality in which the printing is done. It is further provided that such wages and working conditions must be equal to or more favorable than those prevailing at the seat of government.

The constitutional objections that most readily occur are that such a statute would violate the due process and equal protection clauses of the Fourteenth Amendment to the federal constitution and the corresponding provision, article I, section 1, of the Wisconsin constitution, and that it would also violate article IV, section 25 of the Wisconsin constitution, which reads:

"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 Wisconsin supreme court has sustained the power of the state to limit the hours of labor upon public works for the state and its municipalities. The power is based upon the right of the state to contract for public works and specify the conditions upon which such work shall be performed. *Milwaukee v. Raulf*, 164 Wis. 172. The court has likewise sustained the power of the city of Milwaukee, which obviously has no greater power in this respect than has the state, to prescribe that laborers on city work shall be paid at the prevailing rate of labor in the city for such work. This decision was but a natural outgrowth of the decision in the *Raulf* case and is based upon the same line of reasoning. *Wagner v. Milwaukee*, 177 Wis. 410, 180 Wis. 640.

In neither case was any objection of lack of due process or equal protection considered to be valid. Moreover, the charter of the city of Milwaukee contained a provision requiring contracts to be let to the lowest bidder, and it was not considered that the legislation was contrary to the charter in that respect.

The reasoning of the court in these two cases would indicate that the proposed statute would not be in violation of either of the constitutional provisions to which we have referred, with the possible exception of the provision requiring that wages and working conditions be at least equal to those prevailing at the seat of government. As to this provision, it might conceivably be argued that it violates the spirit of article IV, section 25. It would probably be in violation of the section to impose as a condition to bidding upon a printing contract that the bidder's establishment be located in Dane county or within a particular building in the city of Madison. There could be no competitive bidding if the conditions imposed were such that there could be no competition. As to whether bidding is so conditioned in a particular case as to unduly restrict competition is a question of degree. It might be contended with some force that the provision requiring that wages and working conditions be at least equal to those prevailing in Madison unduly re-
stricted competitive bidding in that it might arbitrarily limit the competition to Madison printers. We do not say that the provision would be unconstitutional, but we feel that it would present a doubtful question.

Neither of the cases to which we have referred deals with a requirement such as the one that printing be done in the state. Such a condition would be within the reasoning of the cases, however and, in our judgment, would be a reasonable requirement. A similar requirement as to bidding has been sustained in the state of Mississippi. Dixon-Paul Printing Co. v. Board of Public Contracts, (Miss.) 77 S. 908.

There are other considerations in the statute with which we do not deal in this opinion, since it is doubtful if constitutional questions are raised. We refer to administrative provisions and to provisions such as those requiring that prevailing wages shall be determined upon the basis of the locality in which a printing establishment is situated. It might be very difficult to determine just what is meant by the term "locality" (see Perkins v. Lukens Steel Co., 310 U. S. 113), but the difficulty is probably not insoluble.

JWR.

Fish and Game — Beaver trapper licensed under sec. 29.594, subsec. (1), Wis. Stats., is also required to have general trapping license under sec. 29.13 (1), Wis. Stats.

Employee’s license issued under sec. 29.13 (1) does not authorize trapping of beaver.

April 7, 1943.

E. J. VANDERWALL, Director,
Conservation Department.

You have inquired whether a beaver trapper, holding a license to trap beaver under sec. 29.594, subsec. (1), Wis. Stats., is required also to have a general trapping license under sec. 29.13, subsec. (1), Wis. Stats.
Sec. 29.594 (1) provides for a special license for the trapping of beaver. This section was created by ch. 25, Laws 1933, although there had been special license provisions for trapping beaver even prior to this time. For example, ch. 476, Laws 1921, created sec. 29.59 (5), which provided for licenses governing the taking of beaver and otter in certain counties.

The general trapping license law, sec. 29.13 (1), was created by ch. 668, Laws 1917, and as originally enacted it provided for the issuance of trapping licenses which would authorize the trapping of fishers, martens, mink, muskrats, raccoons and skunks. In 1923, by sec. 2 of ch. 264, this enumeration of species of animals to be trapped under a general license issued pursuant to sec. 29.13 (1), was amended by substituting the present language “fur-bearing animals”.

Sec. 29.01 (3) (c) defines the term “fur bearing animals” as used in ch. 29 so as to include beaver along with otter, mink, muskrat, marten, fisher, skunk, raccoon, fox, weasel, opossum, badger, wolf, coyote, wild cat and lynx.

It is apparent that sec. 29.13 (1), as it now reads and standing alone, would authorize the trapping of beaver under a license issued pursuant to this section, since by statutory definition beaver are now included within the term “fur-bearing animals” mentioned in this statute. However, it is also clear that beaver may not be trapped without a beaver trapping license issued under sec. 29.594 (1), since this section contains the provision:

"* * * no person shall take, capture or kill, or attempt to take, capture or kill any beaver by trapping without procuring such a license."

Nevertheless, the holder of a beaver trapping license only would be unable to operate without also having a general trapping license issued under sec. 29.13 (1). This section provides, among other things, that:

"* * * Each trap used under a trapping license shall be tagged with a metal tag which shall be stamped showing the year for which the tag is issued. Such tags shall be furnished by the conservation commission or the county clerk"
upon payment of five cents for each tag required; the county clerk to be allowed ten per cent for the sale of such tags. All untagged traps shall be seized and confiscated, and the owner or person using or attending the same shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished further as provided in paragraph (d) of subsection (1) of section 29.63 and subsection (3) of section 29.63.”

Sec. 29.594 (1), relating to beaver trapping, contains no such provision for tagging traps. Hence, unless the beaver trapper also had a general license and tags issued under sec. 29.13 (1), his traps would be seized and confiscated and he would be guilty of a misdemeanor.

We understand that such is the construction which has been placed upon these sections by the conservation commission, and while such practical interpretation by the department charged with the enforcement of the game laws is not necessarily conclusive, it is, nevertheless, under the authorities, entitled to consideration in studying the problem. While no sound reason suggests itself for requiring two separate licenses to cover the same act, there is, however, no such conflict in the application of the two statutes involved here as would make it impossible to give effect to both. Thus the situation does not come within the rule of statutory construction that where there is a conflict between a general and a special statute, the special statute prevails.

You are therefore advised that a beaver trapper must have a general trapping license issued under sec. 29.13 (1) as well as a beaver trapping license issued under sec. 29.594 (1).

Secondly, you inquire whether an employee of a beaver trapper is required to secure a license under sec. 29.594 (1) to assist such licensed beaver trapper in the taking of beaver or the setting or operation of beaver traps. This employee has a license issued under sec. 29.13 (1), which, among other things, provides:

"* * * If a trapper employs any person in trapping, a license shall be required for each such person so employed. * * *

"
Sec. 29.594 (1), relating to the trapping of beaver, contains no provision such as the above with reference to employees of a beaver trapper. As previously indicated, sec. 29.594 (1) does contain a provision to the effect that “no person” shall take, capture or kill, or attempt to take, capture or kill any beaver by trapping without procuring a license under sec. 29.594 (1). The words “no person” mean just that and are all-inclusive. The trapper’s employee is just as much a “person” as is his employer. Consequently, the employee must be licensed the same as his employer unless his assistance is confined to activities which do not fall within the scope of the words “take, capture or kill, or attempt to take, capture or kill any beaver”. This, of course, is a question of fact depending upon the circumstances in each particular case.

WHR

Banks and Banking — Public Deposits — Taxation — Victory Tax — Funds withheld from employees under provisions of federal Victory tax law by state treasurer or treasurer of municipality or other governmental subdivision of state, whether such funds are carried in separate Victory tax account or as part of other public funds, are public moneys within meaning of subsec. (5), sec. 34.01, Stats., and are subject to provisions of ch. 34, Stats.

April 8, 1943.

MRS. BERNICE E. COE, Acting Executive Secretary,
Board of Deposits.

You request our opinion as to whether Victory tax funds deducted from the salaries of municipal or state officials and employees and which are on deposit by public officials in banks are within the provisions of ch. 34 of the Wisconsin statutes, relating to public deposits. You enclose with your
request an opinion of the solicitor of the Federal Deposit Insurance Corporation dealing with the subject of the effect of the laws relating to the Federal Deposit Insurance Corporation upon funds in the hands of public officials withheld for payment of Victory tax.

Your question would seem to be answered by the definition of the term "public moneys" as found in subsec. (5) of sec. 34.01 of the statutes. That subsection reads:

"'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."

We think it is clear that funds withheld from employees under the provisions of the federal Victory tax law by any of the public officials named in subsec. (5), whether such funds are carried in a separate Victory tax account or whether carried in a deposit along with other public funds, are public moneys within the meaning of subsec. (5) of sec. 34.01. Such funds are therefore subject to the provisions of ch. 34.

RHL

Bridges and Highways — Sec. 84.07, Stats., authorizes state highway commission to provide for employment of guards to prevent sabotage of state highways.

April 9, 1943.

HIGHWAY COMMISSION.

You have inquired as to whether the highway commission is authorized to expend state trunk highway maintenance funds for furnishing and maintaining special police or guards to protect highways and bridges from possible sabotage.
Sec. 84.07, Wis. Stats., relates to maintenance of state trunk highways by the state. It is there provided that maintenance "shall include such measures as shall be deemed necessary to keep the state trunk highways open for travel at all seasons, * * *." Provision is made for payment of expense of maintenance by the state. Secs. 84.10 and 20.49 (9), Wis. Stats., provide for financing such maintenance.

Obviously, if a bridge or a road were to be dynamited by a saboteur, it would become unusable and would not be open for travel until repaired. The prevention of such sabotage is a measure for keeping highways open for travel. Such precautionary measures are, therefore, included within the definition of maintenance set out in sec. 84.07.

JWR

Marriage — "Spiritual Assembly of the Bahais" may not file credentials under provisions of secs. 245.07 and 245.08, Stats., but marriage may be contracted according to its customs, rules and regulations, under provisions of sec. 245.12, Stats.

April 12, 1943.

O. L. O'Boyle,

Corporation Counsel, Milwaukee County,

Milwaukee, Wisconsin.

You present the following for our consideration:

"An interesting question concerning authority to solemnize marriage has been presented to this office, and since the same problem will, we believe, be shortly presented to county officials in other counties throughout the state, it occurred to us that it might be a matter of sufficiently statewide importance to warrant reference to your office. There is a religious sect known as the 'Spiritual Assembly of the Bahais'. It appears to be national in its scope and has its principal place of business in Wilmette, Illinois. You may
have at some time seen the very elaborate temple which has been in process of construction down there for a number of years, something in the nature of a Taj Mahal.

"This organization is incorporated in various states, the Wisconsin incorporation being called 'Spiritual Assembly of Bahais of Milwaukee'. The bylaws of this corporation provide that it 'has exclusive authority to conduct Bahai marriage ceremonies and issue Bahai marriage certificates within the area of its jurisdiction'. This bylaw provision merely restates the power that the unincorporated religious sect assumes as one of its prerogatives."

You indicate you do not believe credentials may be filed under the provisions of sec. 245.07, Wis. Stats. You also say that the society does not come under the provisions of sec. 245.06, Wis. Stats., since it has no authority to appoint a licentiate and has no bishop. You think, however, that the society may solemnize marriages under the provisions of sec. 245.12, Wis. Stats. We agree with your conclusions.

Sec. 245.05, Wis. Stats., provides, in substance, that certain designated civil officials and ordained ministers or priests in regular communion with any religious society may solemnize marriages. Sec. 245.06 provides that, in addition, licentiates of denominational bodies or appointees of bishops, while serving as the regular minister or priest of any church of a denomination to which they may belong, may solemnize marriages provided they are not restrained from doing so by the discipline of their denominations. Sec. 245.07 provides that such licentiates or bishops' appointees shall file their credentials with the clerk of the circuit court of the county in which is located the church under their ministry. Sec. 245.08 provides that ministers or priests shall file a copy of their credentials with the clerk of the circuit court of some county in the state.

There is no claim that the sect in question ordains ministers or priests nor, as you point out, does it have licentiates or bishops' appointees. Under these facts the provisions to which we have called attention are not applicable. There is no requirement for the filing of credentials and there is no authority on the part of the clerk of a circuit court to accept such credentials for filing. However, we think sec. 245.12 covers the case. The section reads as follows:
"Marriage may be validly contracted in this state only after a license has been issued therefore, in the manner following:

"(1) Before any person authorized by the laws of this state to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,"

"(2) In accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife."

This section was enacted by ch. 218, sec. 3, Laws 1917. The chapter was entitled as an act relating to the regulation of marriage and marriage licenses and to promote uniformity between the states in reference thereto. Prior to that time a provision corresponding to subsec. (1) had been in the statutes but there was apparently nothing comparable to subsec. (2) except a provision permitting marriages according to the regulations of the Quaker sect.

By reference to the uniform marriage and marriage license act which was approved by the National Conference of Commissioners on Uniform State Laws in 1911, it will be seen that sec. 1 of the uniform act is identical with sec. 245.12, Wis. Stats. That fact, together with the title of the law which created sec. 245.12, makes it clear that Wisconsin adopted sec. 1 of the uniform act. An annotation to sec. 1* of the uniform act makes it clear beyond any dispute that subsec. (2) was intended to permit marriages performed by groups such as the one here in question.

JWR

*"Clause 2 of this section is in no sense a restriction upon, but is rather an enlargement of, the provisions of clause 1 hereof. Clause 1 provides for the celebration of marriage before some legally authorized official, whether ecclesiastical or civil. But since Quakers, and many others, object to any form of ceremony other than that prescribed by the religious society to which either or both of the con-
tracting parties may belong, it was recognized by the Con-
ference that such persons should be permitted to enter into
the marriage relation in the method prescribed or autho-
rized by their respective religious rites and ceremonies. Nev-
nevertheless, while conceding the right of such parties to be
married according to the rules and regulations of any such
religious society without the sanction of a legalized 'officiat-
ing person,' by merely declaring in the presence of at least
two competent witnesses that they take each other as hus-
band and wife, it was deemed essential that at least one of
the parties should be a member of such religious society in
order to entitle such parties to the benefit of the looser form
of marriage contract authorized by said clause 2 of this sec-
tion, which, being an exception to the general rule requiring
a marriage ceremony to be performed by some officiating
person, should go no farther than warranted by the circum-
stances of the case. In other words, where a religious so-
ciety recognizes a marriage without an officiating person it
should do so only because such marriage is binding on the
conscience of at least one of the contracting parties as a
member of the society, and the peculiar rights and privi-
leges which may be granted to members of religious socie-
ties should not be extended to those who are not members
so as to allow them to take advantage of the rules of the so-
ciety to which they owe no obedience, and with which they
have no affiliation. No such society itself would celebrate a
marriage unless at least one of the parties was a member of
the society. The phrase 'any religious society, denomination
or sect,' is broad enough to include not only Quakers, but
every other denominational sect, or society, including the
Ethical Society of New York, and other states, Christian
Scientists, etc. None of these religious bodies would allow
interlopers to be married according to their rules and reg-
ulations when neither of the parties had any connection
whatever with the organization.'
Agriculture — Constitutional Law — Dairy and Food —

Imposition of excise tax upon sale of butterfat by producer to be deducted from return to producer and used for certain purposes intended to increase consumption of dairy products as proposed by Bill No. 415, A., is not unconstitutional.

April 14, 1943.

The Honorable the Assembly.

You have submitted the following questions with respect to Bill No. 415, A:

"1. Would a legislative enactment be valid requiring producers of milk to deduct and pay into the state treasury a percentage of their proceeds for butterfat produced for distribution during the month of August of each year as proposed in Bill No. 415, A., under section 94.91 (1)?

"2. Is the contemplated section of the statutes, 94.91 (2), as proposed in Bill No. 415, A., sufficiently definite and certain to legally authorize expenditure of moneys so raised (a) for any purpose indicated therein, or (b) for the execution of any other provision of section 94.91 as proposed in said bill?"

The proposed section, 94.91 (1), Stats., provides for an excise tax upon the sale of butterfat by the producer to be deducted from the return to the producer. At the 1939 session of the legislature we advised the senate that a similar provision in Bill No. 734, A., then pending before the senate was not unconstitutional by reason of the provision for deduction. XXVIII Op. Atty. Gen. 406. We remain of that opinion and respectfully refer you to the cited report for the reasoning upon which it was based.

The present request is somewhat broader in that it calls into question the validity of an excise tax upon the sale of butterfat by the producer. Comparable excises are held to be within the taxing power and we see no reason why the proposed one is not valid, particularly in view of the fact that the proceeds are to be applied in aid of the industry which is taxed. In theory there is no legal difference between the proposed tax and an oleomargarine tax such as that imposed by sec. 97.42, Wis. Stats., about which there
can be no question in view of repeated decisions by the courts.

The second question is also answered in the affirmative. The proposed section, 94.91 (2), provides that the net proceeds of the tax "shall be used to conduct dairy research, merchandising, and promotion activities" by the department of agriculture with not less than 80% to be applied in cooperation with similar funds from other states in a national dairy promotion program. The directors of the American Dairy Association of Wisconsin are to act as an advisory committee under sec. 93.02 (7).

The state obviously has power to use public moneys for the purpose of engaging in dairy research. Such research has been carried on by the university of Wisconsin for many years. Moreover, it has authority to engage in promoting the sale of dairy products. That these things are true is demonstrated in State ex rel. Wisconsin Dev. Authority v. Dammann, 228 Wis. 147. The provision relating to merchandising is not so clear. The state could probably engage in the business of merchandising dairy products, Green v. Frazier, 253 U. S. 233, although we are not clear as to whether it is proposed that the state shall do so. If it is intended that the state shall engage in merchandising activities such as actually selling and distributing dairy products owned by private individuals or firms, a different question is presented. A serious question would be raised as to whether such an activity would constitute a public purpose within the rule that public moneys can be used only for such purposes. Suring v. Suring State Bank, 189 Wis. 400.

If it is the purpose to use the appropriation for education in such merchandising methods as will tend to promote the wider use of dairy products, we suggest that the proposed statement of purposes could be improved. A somewhat similar problem arose in connection with the purposes for which the Wisconsin development authority was permitted to disburse its funds under the provisions of ch. 4, Laws Special Session 1937. A reference to the provisions of that chapter should be helpful in recasting the present bill.

The fact that the American Dairy Association of Wisconsin, a private organization, is to act as an advisory commit-
The restriction that at least 80% of the net proceeds shall be used in a national dairy promotion program in cooperation with similar funds from other states would not be unconstitutional. If the state government can legally authorize the promotion of Wisconsin dairy products, it can join with other dairy states in promoting the sale of such products generally. If, as is the case, Wisconsin furnishes a substantial portion of the dairy products of the United States, any increase in the consumption of such products reacts to the advantage of Wisconsin. Probably the benefit to Wisconsin is more direct if the sale of Wisconsin products is promoted, but the promotion of the sale of dairy products generally would benefit the people of Wisconsin to an extent sufficient to support the appropriation.

JWR
Bridges and Highways — Law of Road — Parking —
Sec. 85.19, subsec. (4), par. (f), Stats., prohibiting parking on near side of highway adjacent to schoolhouse during school hours, does not conflict with sec. 85.19 (4) (h), prohibiting parking on highways adjacent to entrances of schools and other places of public assemblage at times designated by local authorities, and effect must be given to both provisions. Extent of highway area adjacent to entrances of places of public assemblage in which parking may be prohibited at designated times by local officials under sec. 85.19 (4) (h) is discretionary and may be reasonably adjusted to meet varying conditions.

April 14, 1943.

K. T. Savage,
District Attorney,
Kenosha, Wisconsin.

You have asked whether there is any conflict between the provisions of sec. 85.19, subsec. (4), par. (f) and sec. 85.19 (4) (h), Stats., relating to prohibited parking in certain areas. These provisions read as follows:

“(4) It shall be unlawful for the operator of a vehicle to park such vehicle in any of the following places except to comply with the directions of a traffic officer or traffic control signal or sign:
"* * *"

“(f) Upon the near side of a highway adjacent to a schoolhouse during the hours of 7:30 A. M. to 4:30 P. M. during school days except that local authorities may permit parking adjacent to high schools, colleges or universities.
"* * *"

“(h) On a highway adjacent to the entrance to a school, church, theatre, hotel, hospital, or any other place of public assemblage during the hours designated by an official sign.”

You state that paragraph (f) apparently prohibits parking the whole length of a schoolhouse while paragraph (h) merely prohibits parking adjacent to the entrance of a school and that the first section if followed literally would eliminate considerable useful parking space in busy sections
of large communities where the schoolhouses occupy whole blocks, and you inquire if proper effect would be given to both sections if the local authorities placed signs adjacent to the entrances of schools during the hours of 7:30 A. M. and 4:30 P. M. and other times when the building is in use.

While the above provisions overlap somewhat there is no conflict between them, since it is perfectly possible to give full effect to both. Not infrequently it happens that the same act offends against two or more different statutory provisions, yet this does not necessarily give rise to any irreconcilable conflict.

Sec. 85.19 (4) (f) relates only to parking on the near side of a highway adjacent to a schoolhouse during school hours, whereas paragraph (h) relates to parking adjacent to the entrance of certain public buildings or places of public assemblage including schools during hours designated by an official sign.

Paragraph (f) is more extensive as to area since it prohibits parking anywhere during school hours upon the near side of a highway adjacent to a schoolhouse. This would include the highway area adjacent to the entrance, whereas paragraph (h) relates to this area only.

The purpose of each of the two paragraphs is obvious. Paragraph (f) is a safety measure designed to prevent the type of accident which so often occurs where playing children dart out from between parked cars and the vision of an approaching driver is obscured by the parked car or cars until it is too late to prevent an accident. This situation is particularly acute in a highway adjoining a schoolhouse, where numerous children are likely to be playing during recess as well as before and after school sessions.

Thus, the entire purpose of this paragraph would be defeated if enforcement of the no-parking mandate were limited to the highway adjacent to the entrance of the school pursuant to signs placed there by local authorities during school hours and at other times when the building is in use. We can discover no sound basis for disregarding the plain wording and import of the statute in which the safety of school children is made paramount to any considerations relating to the furnishing of additional parking space.
Paragraph (h) of sec. 85.19 (4), on the other hand, is designed to facilitate the unloading of passengers from and the loading of passengers on to vehicles at the entrances of public buildings or buildings used for public assemblage. Schools are included in this paragraph doubtless for the reason that meetings and entertainments are often held there outside of school hours, and thus the same reason exists for keeping clear the portion of the highway adjacent to the entrance as would be true in the case of any other public building or place of public assemblage. However, at such times there is no need of prohibiting parking along the entire near side of the highway adjacent to the school building, as school children would not then be playing there. Hence paragraph (f) does not govern this situation and at such times it would be necessary for the local authorities to place official no-parking signs adjacent to the entrance of the school building pursuant to paragraph (f).

You also inquire what is a reasonable distance to be blocked off by such signs so as to permit ingress to and egress from the building and if the distances provided for entrances to a fire station and access to fire hydrants, as set forth in sec. 85.19 (4) (c) and (d) would be reasonable.

Paragraph (c) prohibits parking within fifteen feet of the driveway entrance to a fire station or directly across the highway from such entrance. Paragraph (d) prohibits parking within ten feet of a hydrant unless a greater distance is indicated by an official sign.

We do not believe that either of these provisions has any particular relationship to the problem or that we can tell you what a reasonable distance would be under any and all circumstances. As explained above, the purpose of paragraph (h) is to facilitate the unloading of passengers from and the loading of passengers on to vehicles at the entrances of public buildings or places of public assemblage. The space to be devoted to such purpose is not defined. Presumably it is left undefined so that local officials will be free to set off whatever space may be reasonably required under varying conditions. At a relatively small public gathering it might be sufficient to leave open only space for one car to stop at a time and discharge or receive passengers, whereas under other circumstances it might be desirable in preventing
traffic congestion to have enough space for several cars to pull up to the curb simultaneously for such purpose. No hard and fast distances can be laid down and a rule of reason must govern as to such matters. It would seem that this can safely be left to the sound discretion of local officials, as they are more or less responsive to public opinion, which asserts itself quickly enough where any unreasonable curtailment of parking privileges is involved.

WHR
Civilian Defense — County and Local Councils of Defense — Under sec. 22.05, Stats. 1943, duties of county and local defense councils are determined primarily by county or municipal ordinances creating them. In absence of authority in such ordinances county or local council has no right to command local police, fire and sheriff’s departments, since state law authorizes only making of requests and directs existing officials and agencies to cooperate with and extend their services and facilities to such councils. Such cooperation must be extended by each department acting under orders from its regularly constituted head, not by individual employees acting under orders directly from defense council.

Sec. 22.07, Stats. 1943, is merely directory and does not of its own force adopt applicable federal regulations as law of this state. Sec. 2 of federal act of January 27, 1942, makes it clear that neither federal director of civilian defense nor any person acting under him or by authority of federal law or regulations may usurp any of rights or duties of existing local, municipal, county or state officials. Sec. 1903.16 (b) of Regulations No. 3 of federal office of civilian defense does not in terms vest in local council power to command regular police, fire and sheriff’s departments (unless permitted by local law), nor may it be given such effect, especially in view of federal statute above cited.

April 15, 1943.

S. Richard Heath,
District Attorney,
Fond du Lac, Wisconsin.

You have requested an opinion with reference to the powers of the county defense council organized pursuant to ch. 9, Laws 1943, which creates a new ch. 22 of the statutes. The specific question relates to whether the county defense council is empowered to command the services of local police and fire departments and the county sheriff’s office or whether these protective agencies are subject to orders only from their regular chiefs.
In discussing the applicable statutory provision we shall refer to sections of the 1943 statutes created by ch. 9, Laws 1943. Sec. 22.045 provides as follows:

"COUNTY AND LOCAL COUNCILS; HOW CREATED. The governing body of each county shall create a county council of defense. The governing body of any town, village or city may create a local council of defense. County and local councils of defense and other agencies heretofore established and carrying on functions on the effective date of this chapter in accordance with the purpose of this chapter, shall continue to exist and function under this chapter until changed by the governing body."

Secs. 22.05 and 22.06 provide as follows:

"22.05 CIVILIAN DEFENSE POWERS OF COUNTY COUNCIL. (1) Each county defense council may appoint and remove, or provide for the appointment and removal of, air raid wardens, auxiliary fire and police personnel, and such other civilian defense workers as may be found necessary for conducting the activities of any agency created pursuant to this section. Such appointments shall not be subject to the requirements of civil service and the persons appointed shall not be entitled to any pension or retirement rights or privileges.

(2) County councils of defense, if and when established, shall cooperate with and assist the state council of defense, and shall perform such services as may be requested by the council. County councils may act jointly with other such councils and shall so act when directed by the state council. Except as limited by the council, county councils shall have such powers, functions and duties as may be conferred by the governing body which established them.

"(3) In order to achieve the most effective use of the services and equipment of all political subdivisions of the state, throughout the state, each political subdivision is hereby authorized and empowered to negotiate reciprocal aid agreements with other political subdivisions of the state with respect to the furnishing of services, equipment, supplies and facilities for the purpose of rendering aid in case of disaster, including any occasioned by air raid or other form of enemy attack."

"22.06 UTILIZATION OF EXISTING SERVICES AND FACILITIES. In order to avoid duplication of services and facilities the council and the county and local councils of defense if
established or functioning under the authority of this chapter are directed to utilize the services and facilities of existing officers, offices, departments, commissions, boards, bureaus, institutions and other agencies of the state and of the political subdivisions thereof, and all such officers and agencies shall cooperate with and extend such services and facilities to the council and to the county and local councils of defense as may be requested.

Sec. 22.07 provides as follows:

"POWERS HEREIN CONFERRED TO BE EXERCISED IN CONFORMITY WITH FEDERAL ACTION. In order to attain uniformity so far as practicable throughout the nation in measures taken to aid the prosecution of the war and civilian defense, all action taken under this chapter, and all orders, rules and regulations made pursuant thereto, shall be taken or made with due consideration to the orders, rules, regulations, recommendations and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, regulations, recommendations and requests."

Ch. 9, Laws 1943, had a significant history in the legislature. It originated as Bill No. 20, S., to which three substitute amendments were introduced in the senate and one in the assembly, as to which various amendments were offered from the floor. The senate adopted Substitute Amendment No. 2, S., as amended, but the assembly adopted Substitute Amendment No. 1, A., and it was in this form that the bill was finally passed. A consideration of the original bill and the substitute amendments shows that the principal dispute in the legislature involved the question of the extent of the powers of the state, county and local councils, particularly those of the state council.

Under the original Bill No. 20, S. (sec. 22.03 (10) ), the state council would have been empowered "to require and direct the cooperation and assistance of state and local governmental agencies and officials." Substitute Amendment No. 1, S., (sec. 22.03 (11) ) and Substitute Amendment No. 3, S. (sec. 22.03 (6) ) changed this to give the state council power "to request the cooperation and assistance of state and local governmental agencies and officials, and such
agencies and officials shall cooperate with the council to the fullest possible extent." In Substitute Amendment No. 2, S., both of the above provisions were omitted, and the same was true of the final draft, Substitute Amendment No. 1, A.

Several of the drafts granted to the state, county and local boards the power to enact rules and regulations having the force of law, all of which provisions were eliminated in the final draft. See Bill No. 20, S., sec. 22.03 (11) and sec. 22.10; Substitute Amendment No. 1, S., sec. 22.03 (12); Substitute Amendment No. 3, S., sec. 22.03 (7).

The provision for utilization of existing services (22.06) appeared in substantially the same form in all drafts of the bill.

Sec. 22.05 does not specifically prescribe the duties of the county and local councils, except that it vests in the county councils power to appoint personnel and requires them to perform such services as may be requested by the state council. Aside from this the statute provides merely that "county councils shall have such powers, functions and duties as may be conferred by the governing body which established them."

Looking only at the state law, especially in the light of its legislative history, it is apparent that neither the state nor the county and local defense councils have any power to command existing officials and agencies to do anything. The latter are required to cooperate and to extend such services as may be requested. So far as the county and local councils are concerned, their powers must be found in the ordinances whereby they are created. Presumably the county or local governing body could vest in the county or local council authority to command the services of the local police and fire departments and the sheriff's office. Whether that has been done in any particular case depends upon the terms of the ordinance setting up the council. Such a provision would appear to be unwise.

It must be remembered that so far as the sheriff is concerned, he has certain statutory duties, such as being the keeper of the county jail, attendance in court, service of process and the like. Sec. 59.23, Stats. Although he is required to cooperate with the defense councils, he is also re-
quired to perform his other duties and, if he and his employees were subject to orders rather than requests from the defense councils, a situation might occur in which the defense councils would make such heavy demands upon his time and that of his subordinates that it would be impossible for them to attend to their other business. There is no ground to believe that the legislature intended to put them in any such predicament. The regular police forces would be in a similar situation.

Sec. 22.07 directs that all action taken under the statute "shall be taken or made with due consideration to the orders, rules, regulations, recommendations and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, regulations, recommendations and requests." This section is not self-executing but is merely directory and constitutes a statement of policy. It does not of its own force adopt applicable federal regulations as the law of this state. However, it may be helpful to examine the federal statute and regulations applicable to the point here under discussion.

Sec. 2 of the act of January 27, 1942 (ch. 20, 2d Sess., Pub. L. 415, 77th Cong.), relating to the director of civilian defense, contains this proviso, which qualifies the applicable regulations discussed below:

"* * * Provided, That nothing in this Act shall be construed as authorizing the Director of Civilian Defense, or any person or employee acting under him or by authority of this Act, or in pursuance of the regulations prescribed thereunder to interfere with or usurp any of the rights or duties of any local district, municipal, county, or State official."

So far as we have been able to ascertain, the only federal regulation involved here is office of civilian defense regulations No. 3 as amended, sec. 1903.16 of which provides in part as follows: (7 Fed. Reg. 6. 6900 at 6905):

"Organization and command of Local Defense Corps. (a) The Defense Corps in each community shall consist of a Staff Unit and such other units, established pursuant to sec. 1903.3 of this chapter (Office of Civilian Defense Regula-
Opinions of the Attorney General 121

sections No. 3), as shall be deemed necessary for the community in the opinion of the Commander.

(b) The Commander of each local Defense Corps shall be designated or appointed in accordance with the provisions of State and local law. He shall have complete authority during an air raid, blackout or other emergency, as well as during periods of air raid drills, practice blackouts or otherwise in connection with training, to command and direct the Defense Corps and to coordinate and direct, to the extent permitted by local law, the local Fire and Police Departments and other municipal services. He shall have responsibility and authority for the organization, training, and operation of the Defense Corps.

(c) The units of the Defense Corps may be organized into services as hereinafter specified, each of which shall be under the direction and command of a Chief of Service as indicated, to-wit:

<table>
<thead>
<tr>
<th>Service</th>
<th>Units</th>
<th>Chief</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Fire Service</td>
<td>Auxiliary Firemen...</td>
<td>Chief Emergency Fire Service (ordinarily Chief of the local Fire Department).</td>
</tr>
<tr>
<td></td>
<td>Rescue</td>
<td></td>
</tr>
<tr>
<td>(2) Police Service</td>
<td>Auxiliary Police...</td>
<td>Chief of Emergency Police Service (ordinarily Chief of local Police Department).</td>
</tr>
</tbody>
</table>

It will be noted that subsec. (b) above quoted vests in the commander of the local defense corps power to coordinate and direct the local fire and police departments and other municipal services “to the extent permitted by local law.” In the first place it will be observed that this power is not vested in the council as such but in the “commander of the local defense corps.” No such officer is provided for by the state statutes but it may be taken to refer to the head of the county or local council. Under the regulation his power to direct the regular fire and police departments (and the sheriff’s office) must depend upon the local law. He may not, by virtue of the regulation, “usurp” the rights and duties of the police and fire chiefs or the sheriff (Act of January 27, 1942, supra). In other words, in the absence of a contrary provision in the ordinance setting up the county or
local council, the latter is empowered only to request the co-operation of those officers and they in turn are required by sec. 22.06 to extend such cooperation and services. It does not follow from this that the local police, fire or sheriff’s departments are subject to orders from the county or local council.

Subsec. (c) of the federal regulation above quoted also sheds some light on this problem. It will be observed that it is not the regular fire and police departments which are to be under the command of the local commander, but only the auxiliary firemen and auxiliary police. The regulation also provides that the chief of the emergency fire service will ordinarily be the chief of the local fire department and that the chief of the emergency police service will ordinarily be the chief of the local police department. If this plan be followed—as it should be under the provisions of sec. 22.07—it seems unlikely that any cause of friction will arise. It must be obvious that the civilian commander of the county or local defense council will have to delegate authority in technical matters relating to police and fire protection to the trained officers in charge of the regular fire, police and sheriff’s departments. In all such matters it will be necessary for the personnel to work together harmoniously for the public good. Sec. 22.06 requires “cooperation” and the “extending of services” by existing agencies. There is here no suggestion that the heads of such existing agencies be in effect deposed and all details of their work be minutely supervised by untrained personnel of the county or local defense council. The “cooperation” must be by the departments, acting under orders from their regularly constituted heads, not by individual employees acting under orders from the defense council.

Accordingly, it is concluded first of all that the answer to your question must be sought in the terms of the ordinance setting up the county and local defense councils and in the second place that it is not contemplated by either the state law or the applicable federal statute and regulations that the regularly established police, fire and sheriff’s departments be subject to orders from or minute regulation by the civilian defense councils.

WAP
Social Security Act — Poor Relief — Old-age Assistance — Denial of burial expenses under sec. 49.30, Stats., is not reviewable under sec. 49.50.

April 16, 1943.

DEPARTMENT OF PUBLIC WELFARE.

You have requested our opinion as to whether the refusal of a county agency to allow for burial under sec. 49.30, Wis. Stats., is reviewable under sec. 49.50, Wis. Stats. You have called to our attention the case of State ex rel. Redgate v. Walcott, (Conn.) 3 A. (2) 852, in which it was held under a comparable statute that a refusal was appealable.

It is unnecessary for us to express an opinion as to whether the Wisconsin supreme court would agree with the cited case. The Wisconsin law differs from the law of Connecticut and we think that under the Wisconsin law the supreme court would hold that such an order is not appealable.

Sec. 49.30, Wis. Stats., reads:

"On the death of a beneficiary such reasonable funeral expenses for burial shall be paid to such persons as the county judge may direct; provided, that these expenses do not exceed one hundred dollars and provided further that the estate of the deceased is insufficient to defray these expenses."

Sec. 49.50, subsec. (4), Wis. Stats., reads:

"To enable this state to receive federal aid for old-age assistance, aid to dependent children, and blind pensions, any persons whose application for any of these forms of assistance has been denied by the county officer charged with the administration of such form of assistance may apply to the state pension department for a review of such denial. For the purposes of this subsection failure to act upon an application for assistance within ninety days after the filing of such application shall be deemed a denial thereof. Application for a review of the denial of assistance shall be made in writing, in a form to be prescribed by the state pension department, within thirty days after such denial. Such application for review shall be made in duplicate; one copy shall be sent to the state pension department and the other filed with the county officer charged with the admin-
administration of such form of assistance. Such officer within ten
days after the filing of such application for review, shall
transmit to the state pension department all records in such
case, together with any comments he may wish to make rel-
ative to such matter. Upon receipt of such application the
department shall accord the applicant a fair hearing within
thirty days, and shall cause such further investigation to be
made as he may deem necessary. Notice of such hearing
shall be given to the applicant and to the county clerk, and
the county shall be entitled to be represented at such hear-
ing. The state pension department shall render its decision
as soon as possible after the hearing and shall send a certi-
fied copy of its decision to the applicant, the county clerk
and the county officer charged with the administration of
such form of assistance. On such decision the state pension
department shall fix the amount of aid or pension to be
granted, if any, and such determination shall have the same
effect as an order of the county officer charged with the ad-
ministration of such form of assistance. Such decision shall
be final, but the proper county officer may revoke or modify
the aid or pension granted as altered circumstances may re-
quire, in the same manner as in other cases.”

It will be noted that the review provisions of sec. 49.50
(4) were enacted “to enable this state to receive federal aid
for old-age assistance, aid to dependent children, and blind
pensions.” The federal law providing aid to states for old-
age assistance requires that a state receiving aid must “pro-
vide for granting to any individual, whose claim for old-
age assistance is denied, an opportunity for a fair hearing”
before the state agency administering or supervising the
administration of assistance. 42 USCA, sec. 302 (a) (4).

The federal government does not recognize the payment
of funeral expenses as old-age assistance and it does not
furnish aid to the states upon the basis of one-half of the
state disbursement for such a purpose as it does in the case
of federally recognized grants to needy individuals for old-
age assistance under 42 USCA, sec. 303. Since the provision
for review of a denial of assistance was enacted for the pur-
pose of complying with the requirement of the federal law
with respect to receiving federal aid, and since the federal
government does not require an appeal provision with re-
spect to payment of funeral expenses, which it does not re-
gard as old-age assistance, it would seem that the appeal
provisions of the state law should not be construed to apply to the denial of burial benefits. The statute was enacted to meet the requirements of federal law, and it can hardly be assumed that it was intended to embrace matter not required by federal law. Rather, the assumption would be that the state intended to deal with the subject matter of the federal requirement.

Moreover, sec. 49.50 (4) relates to appeals by "any persons whose application for * * * assistance has been denied." Sec. 49.27 provides for filing of an application in writing by one applying for old-age assistance. Sec. 49.28 provides for investigation and allowance of the application. Sec. 49.29 provides for the issuance of a certificate entitling the applicant to old-age assistance.

The provisions of sec. 49.50 (4), relating to those whose application has been denied, if due regard be had to the statutory framework can refer only to the written application provided for by the statutes and which relates to furnishing assistance to needy living individuals.

Sec. 49.30, relating to funeral expenses, presupposes that an application has been made by and granted to a living person and that the person thereafter receiving the assistance has died. No application is provided for in connection with the granting of funeral expenses. Where no application is provided for it is difficult to see how one can be denied.

JWR
School Districts — School board may not legally provide for nurseries and preschool education for children under four years of age.

School board may provide for supervised play and recreation of school children in conformity with course in physical education prescribed by state superintendent under sec. 40.22, subsec. (3), par. (a), Stats., and subject to requirements of that section as to number of hours of instruction per week.

School board may provide for adult education under sec. 40.21 (4) and adult recreation under sec. 40.16 (9) in evening.

April 17, 1943.

JOHN CALLAHAN, State Superintend ent,
Department of Public Instruction.

You state that the war housing administration is making federal funds available for subsidization of public education areas in Wisconsin where public school enrollment has been increased due to the development of war industries and that the federal rules and regulations prevent the use of federal funds except for public education purposes which are specifically authorized under Wisconsin statutes and that the following questions have arisen:

1. Do Wisconsin school boards have the power to furnish day care including nursery and preschool education for children between the ages of 3 and 6 whose parents are engaged in war work?

While the legislature under the doctrine laid down in Manitowoc v. Manitowoc Rapids, 231 Wis. 94, would doubtless have the power to authorize school boards to furnish such nurseries and preschool education, we do not find that it has done so. Art. X, sec. 3, Wisconsin constitution, provides:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."
The only provision for younger children that the legislature has made is that relating to kindergarten instruction under sec. 40.22, subsec. (9), Stats., which reads:

"Any board which has control of primary grades may, and upon petition of the parents of twenty-five children, more than four and not more than six years of age, shall establish and maintain a kindergarten, provided such parents reside not more than one mile from the school building. Such kindergarten shall constitute a part of the public schools of the district, and shall not be discontinued unless the kindergarten enrollment for the preceding year shall have been less than fifteen."

At the other end of the school age scale the legislature has made provision for pupils over twenty years of age in sec. 40.21 (4), which provides:

"Residents above twenty years of age may be admitted to the district schools when in the judgment of the board they will not interfere with the pupils of school age."

Thus the legislature has authorized schooling for pupils from the age of four upwards without any top age limit being designated. In Manitowoc v. Manitowoc Rapids, supra, the Wisconsin supreme court held that art. X, sec. 3, Wisconsin constitution, requiring the legislature to provide free education for those between the ages of four and twenty, does not impliedly prohibit free education for those beyond the age of twenty or under the age of four, but, as indicated above, the legislature has not as yet seen fit to make provision for pupils under the age of four, although it has done so for those over the age of twenty, both in sec. 40.21 (4) and in the statutes relating to vocational education. See secs. 41.15 (1), 41.16, 41.18 and 41.19.

Officers of a school district must act within the limits of their statutory authority. State ex rel. Van Straten v. Milwuet, 180 Wis. 109. Since the statutes make no provision for children under four years of age no nurseries or free school educational facilities can be legally provided for them by the school board.
2. Do Wisconsin school boards have the power to furnish school care consisting of supervised play and recreation of the children in the absence of their parents when said parents are employed in war work?

Sec. 40.22 (3) (a) provides:

“Physical instruction and training shall be provided for all pupils in conformity with the course of instruction in physical education prescribed by the state superintendent. In one and two-room schools such instruction and training shall take the form of supervised playground work. The time devoted to such course by each pupil above the kindergarten shall aggregate at least two and one-half hours each school week, exclusive of recess periods.”

It will be seen from the wording of the statute that the terms of such supervised play and physical education are to be prescribed by the state superintendent and must include at least two and one-half hours of each week exclusive of recess periods. Subject to this the school board, under sec. 40.21 (3), is authorized to make such rules for the organization, graduation, and government of the school as may be deemed expedient. We understand that it is proposed to offer such program in part at least during evening hours or at other hours when school is not normally in session. The statutes do not prescribe the hours of the day in which such instruction is to take place, although as previously indicated, there must be at least two and one-half hours of physical education instruction per week. It might be advisable for the state superintendent, if he deems such a program to be desirable, to make suitable provision therefor in the course of instruction in physical education which he is to prepare under sec. 40.22 (3) (a).

We are not advised as to all of the details of the particular program of supervised play and recreation which gives rise to your question and, in the absence of more specific information, we conclude that the details of such a program are within the sound discretion of the school board subject only to conformity with the course of instruction in physical education prescribed by the state superintendent under sec. 40.22 (3) (a) and the minimum number of hours instruction per week specified by this section.
3. Do Wisconsin school boards have the power to provide adult education and recreation in the evening?

As previously pointed out, adults may be admitted to district schools under sec. 40.21 (4), Stats. Nothing is said in this section or elsewhere as to the hours when such instruction must be given. Also sec. 40.16 (9) states that the board may provide for the free use of the school property for civic, social and recreational activities that do not interfere with the primary use thereof. Therefore your last question is answered in the affirmative.

WHR

Public Health — Slaughterhouses — Sec. 146.11, subsec. (1), Stats., does not prohibit erection or maintenance of slaughterhouse within one-eighth mile from dwelling of owner if location otherwise conforms to law.

CARL N. NEUPERT, M. D.,

State Health Officer.

April 26, 1943.

You state that an application has been made to your department for the approval of the construction of a slaughterhouse which is to be located more than one-eighth of a mile from the nearest public highway and from the nearest dwelling except that the dwelling of the owner of the proposed slaughterhouse is within one-eighth of a mile from the proposed location. You inquire whether sec. 146.11, subsec. (1), Stats., prohibits the erection of this slaughterhouse.

Sec. 146.11 (1) provides in part as follows:

"No person shall erect or maintain any slaughterhouse unless under federal inspection, within one-eighth mile of a public highway, dwelling, or business building;"
On its face this statute contains no exceptions in favor of dwellings or business buildings owned by the owner of the slaughterhouse and would therefore seem to prohibit the erection thereof within one-eighth mile of the owner's dwelling. However, all statutes must, if possible, be construed in such a way as not to conflict with the constitution and must also be construed in the light of the legislative intent and purpose in enacting them. The application of these two principles of construction leads to the conclusion that the term "dwelling" as used in sec. 146.11 (1) does not include the dwelling of the owner of the slaughterhouse for the following reasons:

The constitutionality of laws regulating slaughterhouses has been attacked in the past on the ground that it constitutes an unreasonable interference with the right of the owner of the property to use it as he sees fit and is therefore a deprivation of property without due process of law. Both the United States supreme court and the supreme court of Wisconsin have rejected that contention on the ground that such laws are a proper exercise of the police power to promote the public comfort and convenience on the ground that the offensive and noxious character of the odors emanating from slaughterhouses as well as the offensive collection of animals for slaughtering constitutes a nuisance to the owners and occupants of neighboring property. It has never been claimed that the business of slaughtering is an unlawful business such as may be suppressed entirely, but the only justification for restricting it as to location is the protection of the neighbors and users of neighboring highways.

So in the Slaughter-House Cases, (1873) 83 U. S. (16 Wall.) 36, the court quoted as follows from 2 Kent, Comm. 340, at p. 62:

"Unwholesome trades, slaughter-houses * * *, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."
In the same case the supreme court used the following language p. 64:

"It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health and comfort of the people require they shall be located."

Sec. 146.11 (1), Stats., was attacked on constitutional grounds in Taylor v. The State, (1874) 35 Wis. 298. In that case the court held the act to be a valid exercise of the police power and related it particularly to the maxim "sic utere tuo ut alienum non laedas," which means freely translated that every person should use his own property in such a way as not to injure others. It is this maxim which justifies the abatement of nuisances.

So it is apparent that the constitutional justification for as well as the presumed legislative intent of sec. 146.11 (1) is the protection of the property rights and comfort of others. The restriction on the location of slaughterhouses is not in any way related to the protection of the public health through insuring the purity of the product. See XXX Op. Atty. Gen. 36. If the law were construed as including the dwelling of the owner, such construction would exceed the traditional constitutional justification for the law and would give it an effect not necessary to consummate the purpose of its enactment. If the owner is willing to endure the discomfort of residing near a slaughterhouse, that is his business.

WAP
Intoxicating Liquors — Proof that minors, unaccompanied by parent or guardian, enter barroom on licensed premises where they are not residents, employees, lodgers or boarders, and which premises are not hotel, restaurant, grocery store or bowling alley, and remain for period of ten minutes, without engaging in any specific acts, for purpose of killing time, probably would be sufficient for successful prosecution of tavern keeper under sec. 176.32, subsec. (1), Stats., for permitting minor to loiter.

April 26, 1943.

John M. Smith,
State Treasurer.

You have requested this office to supplement our opinion of March 23, 1943,* concerning lingering and loitering in taverns, by advising whether the following set of facts would constitute lingering and loitering under the provisions of sec. 176.32, subsec. (1):

"Two persons, 18 years of age, unaccompanied by parents or guardian enter a place licensed for the sale of intoxicating liquor and hang around for a period of ten minutes without engaging in any specific acts, apparently for the purpose of killing time."

Again it is assumed that this act was committed either in a barroom or other room in which liquor was sold and not in a hotel, restaurant, grocery store or bowling alley.

The set of facts now submitted by you indicates that the minors entered the place licensed for the sale of intoxicating liquors for the purpose of idling and that they did, as a matter of fact, do nothing of consequence while on the premises except idle. Under the aforesaid opinion, this would constitute lingering or loitering. Sec. 176.32, subsec. (1), does not prescribe any minimum period of time during which there must have been lingering or loitering before there may be a conviction, although the length of time spent in the tavern may be material in deciding whether the minor did, or did not, loiter. When it is established that a

*Page 82 of this volume.
minor spent time lingering or loitering in a tavern, the matter of the length of the time so spent is immaterial.

JRW

Banks and Banking — Trade Regulation — Money and Interest — Orders of banking commission prescribing service charges in addition to interest upon loan of money are invalid to extent that such orders permit or require banks to charge borrowers sum which, when added to interest, is in excess of ten per cent per annum.

Any bank making such service charge would violate provisions of sec. 115.05, Stats.

April 27, 1943.

Banking Commission of Wisconsin.

You have directed our attention to certain orders adopted from time to time since 1935 by the banking commission under sec. 220.04, subsec (6), par. (c) of the statutes. You direct particular attention to the provisions of these orders relating to service charges for the handling of loans.

You state you desire our opinion as to whether such orders would be valid if, by the addition to the charges therein specified to be made on loan transactions, the result would be that the borrower would pay to the bank a sum of money for interest and charges in excess of ten per cent per annum, which is the maximum permitted under sec. 115.05, Wis. Stats.

You also desire our opinion as to whether banks which make the service charge specified in such orders on the loans referred to therein and in addition thereto make a charge for interest on the money loaned with the result that that total charge paid by the borrower would be in excess of the sum permitted to be taken for the loan of money by sec. 115.05, would thereby violate the usury laws of this state.

We have examined the several orders referred to in your request. These orders provide that the banks referred to in
each shall collect certain minimum charges for banking services rendered. The charges specified to be made relate, on the one hand, to services performed by the banks in carrying checking accounts and for numerous other specified services such as returning checks marked NSF, creating overdrafts, issuing bank drafts and cashier's checks, making bond and coupon collections, certifying checks and making payments for orders, due bills or any other instruments of similar nature. In addition to the charges specified for the types of services just described, the orders contain provisions requiring charges to be made “for the handling of loans”. Under such heading the orders specify that, in addition to interest, certain specified amounts shall be charged for direct loans and discounts or renewals thereof. Generally, these provisions of the orders relate to loans up to a certain amount, such as $300.00 or $500.00, and the orders vary somewhat in the amount of charge in addition to interest which is to be made.

Each of the service charges, except those for the handling of loans, appears to relate to some service actually performed for the banks' customers, such as the maintenance of checking accounts, issuance of bank drafts and the like. Such charges would appear to be clearly within the meaning of the term “banking services rendered” as used in sec. 220.04 (6) (c). However, it would appear to be at least questionable whether a charge in addition to interest made by a bank in connection with the mere loaning of money to an individual would be a charge “for banking services rendered”. It might be argued with some force that the only “service” which a borrower gets in connection with a loan transaction is the placing of the money loaned in his hands or to his credit by the bank. The expense which the bank is necessarily put to in maintaining its records relative to loans, whatever their size, might reasonably be said to constitute an item of general overhead expense of the bank in conducting the business of loaning money on interest and not within the meaning of the term “banking services rendered” as found in sec. 220.04 (6) (c).

Assuming, however, that under sec. 220.04 (6) (c) the legislature intended that the banking commission mig
adopt orders providing for charges in addition to interest to be made upon the loan of money, the question, which is the subject of your first inquiry, arises as to the effect of such an order and compliance therewith by a bank in the light of the usury laws. There is nothing in sec. 220.04 (6) (c) which would give the slightest indication that the legislature intended to modify or repeal any of the general usury laws of the state which apply to all lenders of money, including banks.

Sec. 221.35, which is a part of the banking law, provides:

“No bank shall demand or receive for loans or discounts a rate of interest exceeding that allowed by law, excepting that it shall be lawful for any bank to receive interest in advance according to the ordinary usages of banking institutions.”

This section has been in the statutes in varying forms since 1852, and sec. 115.05 and the other provisions of ch. 115 relating to the maximum rate to be charged for the loan of money have been a part of the law of the state in one form or another since its inception. We think it is clear beyond argument that the usury laws, as applicable to banks and others, are still in full force and effect and that neither sec. 220.04 (6) (c) nor any orders adopted thereunder affect the operation of the usury laws in the slightest degree. Orders adopted under sec. 220.04 (6) (c) would be valid only to the extent that they do not conflict with sec. 115.05 and the other provisions of ch. 115 relating to usury.

With this background we turn now to your first question. Sec. 115.05, in so far as pertinent here, provides:

“No person, company or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods, or things in action, than at the rate of ten dollars upon one hundred dollars for one year; * * *”

This section and related sections have been construed in a number of cases by our court. And the construction of similar statutes of other states has furnished a wealth of au-
authority from which general principles may be deduced as applied to a particular situation. See Annotations 105 A. L. R. 795; 63 A. L. R. 823; 53 A. L. R. 743; 21 A. L. R. 797.

The language of Friedman v. Wisconsin Acceptance Corp., 192 Wis. 58, is expressive of a general rule which is material here. There it was said, p. 60:

"* * * It is true that in determining whether or not the transaction is usurious the court 'will disregard its form and look to the substance, and will condemn it if all of the requisites of usury are found to be present, despite any disguise it may wear.' * * *" (citing cases).

The attitude in which our court views the usury laws and their purpose is exemplified in State ex rel. Ornstine v. Cary, 126 Wis. 135, where it was said, p. 140:

"Contracts made in connection with the transaction of loaning money, under a scheme whereby the lender or his authorized agent receives payments of money or its equivalent in excess of the legal rate of interest, have been held to be prohibited by the law and not enforceable as valid obligations. McFarland v. Cary, 16 Wis. 259; Ottillie v. Waechter, 33 Wis. 252; Payne v. Newcomb, 100 Ill. 611; Dunham v. Gould, 16 Johns. 367; Clague v. Creditors, 2 La. 114; Miller v. Life Ins. Co., 118 N. C. 612, 24 S. E. 484. The most common devices to accomplish such purposes were by means of charges against the borrower in the form of commissions, fees for appraisals, views, examinations, and renewals in connection with the loan. The making of such contracts and insuring performances by pledge of personal property so readily and generally results in inflicting injuries on the borrower through unreasonable exactions that they are held as injurious to the community and as much against public policy as the unreasonable charges of interest. * * *"

In several early cases our court passed upon the question of whether certain charges which, when added to the interest charged on the loan of money, would exceed the sum permitted to be taken by law. It was held that where banks, in addition to the maximum interest, charged "exchange" on the loan of money, such additional charge would not be permitted unless it was contemplated that such exchange would
actually be paid by the bank. *Cornell v. Barnes*, 26 Wis. 473; *Towslee v. Durkee*, 12 Wis. 480; *Rock Co. Bank v. Wooliscroft*, 16 Wis. 22.

In general, where the lender has been put to some particular out-of-pocket expense by reason of a particular loan transaction, aside from its general cost of doing business, or renders some service to the borrower in addition to loaning the money, a charge therefor in addition to maximum interest may under particular circumstances be permitted. We have found no case, however, which would sustain the imposition of the service charge in question here. In *Dickey v. Bank of Clarksdale*, (Miss. 1938) 184 So. 314, the precise question under consideration here was answered, the court saying, p. 316:

"Eight per cent interest on a note for $25 for one month is approximately 16 cents. If the dollar service charge be counted as interest, then the interest would, as to the two first small notes, exceed 20% interest, and as to all the others would, of course, exceed 8%. Whatever may be its euphony, a service charge is something which the bank requires the borrower to pay in order to have the loan or accommodation, and, therefore, it is interest under another name; and when more than 8% per annum is thereby taken or stipulated, it is usurious.

"It is said that on small loans, banks everywhere are making these service charges,—that it has become the universal custom, justified by the fact that the expense of making these small loans cannot be covered by the legal rate of interest; and that unless these service charges are allowed, small loans cannot be made and will have to be discontinued. Whether the small borrower should be required to pay more interest than those who are able to receive larger accommodations, is a question to be addressed to the legislative department, since our province is only to declare what the law is, in which connection we must further declare that no custom or asserted business necessity can override the statutes as interpreted by the courts or in any manner displace them."

We see no reason why the rule announced in this case is not sound in Wisconsin. In interpreting our usury laws we may consider that the legislature in this state has from time to time enacted special laws relating to so-called small loans.
Under secs. 115.07, 115.09 and ch. 214, various schemes are provided for the licensing and regulation of lenders of money, which provide for certain charges to be made in addition to the ten per cent limit prescribed by sec. 115.05. It will be noted that in each of these laws rigid limits for any charges in addition to interest are fixed.

It is our opinion that the orders in question prescribing service charges in addition to interest upon the loan of money by a bank are invalid to the extent that such orders permit or require banks to charge borrowers a sum which, when added to interest, is in excess of ten per cent per annum.

It is also our opinion that any bank making such a service charge would violate the provisions of sec. 115.05 of the statutes.

RHL

Public Officers — County Clerk — Vacancies — Under sec. 17.03, subsec. (4), Stats., vacancy occurs in office of county clerk when he has moved with his family to another county, where he has accepted position under state civil service. Such employment is not regarded as temporary in character during six months' probationary period.

April 27 1943.

Clive J. Strang,
District Attorney,
Grantsburg, Wisconsin.

You state that on January 1, 1943, the county clerk of your county left to accept a position with the state as district forest ranger at Rhinelander, Wisconsin. His family remained in Burnett county until March 20, when they joined him at Rhinelander. The new position, which the county clerk has accepted, is under state civil service and becomes permanent after a six months' probationary period.
He takes the view that if he is discharged at the end of the probationary period he may continue with his duties as county clerk. On the other hand, you have advised the county board that when this man's family moved to Rhinelander a vacancy was created in the office of county clerk by virtue of sec. 17.03, subsec. (4), Stats., and you have asked for our advice in the matter.

We concur in your conclusion on the facts as stated, although we wish to make it clear that the question of whether or not the county clerk has changed his residence so as to vacate his office is one of fact, which the attorney general has no power to decide. See XXV Op. Atty. Gen. 252.

Sec. 17.03 (4) provides in substance that any county office shall become vacant when the incumbent ceases "to be an inhabitant of the * * * county for which he was elected".

As was said in XXV Op. Atty. Gen. 252-253:

"It would seem that when a person moves with his family to another county to accept employment there, he ceases to be an inhabitant of the former county. The most that can be said as to his plans for the future in such a case is that they are uncertain. This is more or less true in every case where a man accepts employment in another county or moves his family there. There is at the time of moving no definite or fixed intention to return to the former abode. It is true that a person in such circumstances doubtless feels at the time that if the new venture proves unsuccessful and no other attractive opportunity presents itself, he will return to his former home and employment if he can."

Here the officer has apparently moved with his family to another county and has accepted a position which we assume he hopes will be permanent after the probationary period has elapsed.

Sec. 6.51 contains certain rules for determining the question of residence as a qualification to vote. These may or may not be significant so far as determining whether or not there has been such a change of residence as to create a vacancy under sec. 17.03 (4), but in any event we are unable to see how such rules are helpful in sustaining the view held
by the county clerk here as it is apparently contended by some members of the county board.

Sec. 6.51 (2), (3), (4), (7), (8) and (9) read:

"(2) That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning.

"(3) A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or county, town or ward of this state for temporary purposes merely, with an intention of returning.

"(4) A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely.

"(7) The place where a married man’s family resides shall generally be considered and held to be his residence; but if it is a place of temporary establishment for his family, or for transient objects, it shall be otherwise.

"(8) If a married man has his family fixed in one place and does his business in another, the former shall be considered and held to be his residence.

"(9) The mere intention to acquire a new residence, without removal, shall avail nothing; neither shall removal without intention."

Under subsec. (8) it might be contended that there was no vacancy between January 1 and March 20 for the reason that the family continued to live in Burnett county, but after that date the residence would, under subsec. (7), be regarded as in Oneida county, the place where his family now resides. Thus there has now been removal from the county, both by the person in question and his family, and we can assume that there is no present intention of removing from Oneida county. Also we do not believe it can be said that the removal from Burnett county to Oneida county has been for a temporary purpose. One who accepts a regular appointment to a position under the state civil service is not classified as a temporary employee during his probationary period. Temporary employees are appointed only for a period not to exceed three months. See sec. 16.20 (4). The employment here considered is in substance no different in nature from ordinary private employment except that
after a six months' probationary period there is security of tenure. Hence there is nothing to distinguish it as temporary employment even during the probationary period.

WHR

Constitutional Law — Weights and Measures — Standard Bottles — Sec. 98.12, Stats., limits milk bottles to those sizes specified therein and is constitutional. Bill No. 609, A., 1943, to amend sec. 98.12 so one-gallon milk bottles could be used in Milwaukee county, is invalid as based upon improper classification.

April 28, 1943.

The Honorable the Assembly.

You have requested our opinion upon the questions which follow:

1. Is the sale of milk in one-gallon containers in violation of our present statutes?

The only statute that is applicable is sec. 98.12, Stats. 1941. It provides:

“(1) Bottles used for the sale of milk and cream shall be of the capacity of half gallon, three pints, one quart, one pint, half pint, one gill filled full to the bottom of the cap seat, stopple or other designating mark. The following variation on individual bottles or jars may be allowed, but the average contents of not less than twenty-five bottles selected at random from at least four times the number tested must not be in error by more than one-quarter of the tolerance:

* * *”

and then provides tolerances for the sizes specified; sets out that the capacity, the name, initials or trademark of the manufacturer, the designated identifying number assigned it by the department of agriculture and markets upon filing a bond for compliance with the section, and the word “sealed,” shall be blown in or permanently marked on the
bottle; in subsec. (2) provides for a penalty of $500 for any manufacturer selling bottles for use in this state that do not meet such requirements and makes the user of bottles that do not comply guilty of using false or insufficient measure; and in subsec. (3) eliminates the necessity of inspection and sealing of each of such bottles by sealers of weights and measures.

The opening language of subsec. (1) says that bottles which are used in selling milk or cream in this state shall be of the capacities there mentioned, which read and applied literally necessarily eliminates the use of bottles of capacities not included in those so specified. The second sentence says "The following variation on individual bottles or jars may be allowed" and then proceeds to provide tolerances for each of the previously mentioned sizes. This language likewise, when read in connection with the first sentence, literally precludes any other variations.

The universally recognized rule is that statutes providing penalties are to be strictly construed. It is the application of such rule that resulted in the decision in U. S. v. Resnick, (1936) 299 U. S. 207, 208, 57 S. Ct. 126, 81 L. ed. 127. The statute there involved provided

"The standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities"

and then specified nine sizes based upon a bushel of 2150.42 cubic inches. The court held that as so worded such statute did not preclude the use of a hamper of a size not therein mentioned, but merely defined what shall be the content of standard hampers.

The language of sec. 98.12, Stats., is quite different from this federal statute and goes measurably farther. Sec. 98.12 does not merely prescribe that milk bottles of the sizes therein mentioned shall each have a specified content based upon a standard therein prescribed and thereby establish such content as the standard capacity for each of said sizes, in the absence of which statute there would be no definite and single standard therefor. Rather, it accepts the measures of the sizes therein mentioned as standards, for nothing in it defines the cubic content of the various capacities
which it mentions. As it thus does not, as does the federal statute, set up standards of content, the only effect it can have is to prescribe those certain specific sizes of bottles, with established definite tolerances of departure from absolute accuracy in content, which may be used in selling milk and cream in this state. So viewed, and that is the literal meaning of its language, sec. 98.12 limits the sizes of milk and cream bottles that may be used in this state to those specified therein, which precludes the use of other sizes.

That this was the intended effect of this statute appears when its purpose is fully appreciated. It was not designed, as previously mentioned, to prescribe standards in the sense of establishing the content at a defined amount, but rather to prescribe a set of sizes that would be standard and provide an efficient and practical method for assuring the accuracy of content thereof without each bottle being itself tested, approved and sealed by the sealers of weights and measures before it could be used. At the time of the enactment of sec. 98.12 by ch. 566, Laws 1911, the use of the returnable milk bottle had assumed such proportions that there existed, or would soon exist in view of the indicated rapid increase of its use, a very serious problem of testing the accuracy of measurement of each bottle and placing a seal thereon to show its correctness. In view of the number of bottles involved and the breakage experience, it would be necessary to have a large number of inspectors just for this purpose and the cost and expense thereof would be sizable. To meet this situation and eliminate official sealing of milk bottles prior to use, the plan was designed, as set out in sec. 98.12, Stats., of limiting milk bottles to be used in this state to the sizes specified and making the manufacturer the guarantor that bottles of such sizes were accurate in measurement. It is obvious that unless this statute limits the sizes to those therein set out the very purpose in its enactment would not be effectuated.

In two prior opinions XIV Op. Atty. Gen. 206 and III Op. Atty. Gen. 904, this office concluded that sec. 98.12, Stats., clearly provides the sizes of milk and cream bottles that may be used in this state and precludes the use of other sizes. The administrative interpretation and application of
this statute consistently since its enactment in 1911 has been in accord. The current publication entitled Weights and Measures Tolerances and Specifications issued by the department of agriculture is illustrative in setting out:

"MILK BOTTLES.

"Specifications—1. Bottles used for the sale of milk or cream shall be made only in the following sizes: ½ gallon, 3 pints, 1 quart, 1 pint, ½ pint, 1 gill."

In addition, it appears that the legislature has been well apprised that such has been the applied effect thereof, for in a number of instances bills have been introduced specifically to amend this statute so as to provide for sizes other than those specified.

Upon the basis of the foregoing it is our opinion that the use of one-gallon bottles for the sale of milk in this state is prohibited by the provisions of sec. 98.12, Stats.

2. Would a legislative enactment requiring the sale of milk to be in containers of one-half gallon, 3 pints, 1 quart, 1 pint, ½ pint and 1 gill be valid?

In view of our conclusion above as to the effect of sec. 98.12, Stats., we deem this as an inquiry as to whether that statute as so construed is valid and advise you that in our opinion it is. The courts generally hold that legislation adopting uniform weights and measures or requiring the sale of commodities in specified quantity, weight or sized containers, with a view to preventing fraud and deception and facilitating commercial transactions, is within the police power of a state and constitutes a valid exercise thereof. P. F. Petersen Baking Co. v. Bryan, (1934) 290 U. S. 570, 54 S. Ct. 277, 78 L. ed. 505; Pacific States Box and Basket Co. v. White, (1935) 296 U. S. 176, 56 S. Ct. 159, 80 L. ed. 138; State v. De Witt, (1937) 49 Ariz. 197, 65 P. (2d) 659; Armour & Co. v. North Dakota, (1916) 240 U. S. 510, 36 S. Ct. 440, 60 L. ed. 771. See also note in 68 L. ed. p. 814, and cases cited.

Sec. 98.12, Stats., has for its purpose the protection of the purchasing public by the elimination of deception and inaccurate measure in the sale of milk. As previously pointed
out, the restriction of milk bottles to the sizes set out in sec. 98.12 is a necessary part of that statutory scheme of providing for accuracy in content by making the manufacturer the guarantor thereof. Upon that score alone, it is our opinion that sec. 98.12 would be held a reasonable exercise of the police power of the state as being designed to facilitate the securing of accuracy in weights and measures and a proper and effective method of eliminating administrative difficulties in the prevention of deception and false measures that would otherwise exist.

3. Are the provisions of Bill No. 609, A., permitting the sale of milk in counties of 500,000 or more in containers or jars of the capacity of one gallon in addition to the containers specified in sec. 98.12 (1), legal?

Bill No. 609, A., proposes the creation of a new subsec. (1m) to sec. 98.12, Stats., which would provide that in addition to the bottle capacities of \( \frac{1}{2} \) gallon, 3 pints, 1 quart, 1 pint, \( \frac{1}{2} \) pint and 1 gill, that sec. 98.12 (1), Stats., prescribes shall be used for the sale of milk or cream in the state generally, there shall be used, in counties of 500,000 or more, bottles or jars of one-gallon capacity. The effect of such amendment would be to make sec. 98.12 preclude the use of one-gallon milk bottles everywhere in the state except in Milwaukee county, where it would allow the use thereof.

In our opinion this bill embodies an unreasonable classification and therefore if enacted would be invalid as arbitrary and discriminatory. *State ex rel. Milwaukee S. & I. Co. v. Railroad Comm.*, (1921) 174 Wis. 458, 183 N. W. 687.

The reasons why the use of one-gallon milk bottles is not allowed are the same for Milwaukee county as for the whole state and vice versa. Merely because that county has a larger population than other counties is not a sufficient basis of classification that is germane to the purpose of sec. 98.12, Stats., so that one set of sizes of milk bottles would be permitted there and another set elsewhere in the state. The purpose and objective of sec. 98.12 are the same and equally applicable to every county in the state. Actually Bill No. 609, A., would destroy the state-wide uniformity which is the basis of sec. 98.12 and upon which its validity rests. To
provide one standard in a locality and another in the remainder of the state, with no reason therefor that relates to the purpose of setting standards and providing a scheme for implementing conformity thereto, would make the statute provide for arbitrary and discriminatory standards and result in its invalidity. So far as the objectives of sec. 98.12 are concerned, namely, the prevention of deception and use of false measures through limiting milk bottles to prescribed sizes and assuring accuracy of their content by making the manufacturer the insurer thereof, we are unable to find anything germane thereto that justifies this attempted classification on a population basis. The conditions which relate to such purpose are no different in Milwaukee county than in other populous counties or areas in the state, or for that matter from elsewhere in the state.

HHP
Indigent, Insane, etc. — Mental patient cared for at public cost in section of Milwaukee county hospital is not maintained “in” or “at” Milwaukee county hospital for mental diseases so as to entitle county to state aid under sec. 51.24, Stats., where cost of operating mental disease section of county hospital is billed to mental disease hospital on per capita per diem basis and supervision of said unit is under superintendent of county hospital, who has charge of nurses, attendants, resident and interne, none of whom is under control of superintendent of mental disease hospital, notwithstanding that said section has been designated by resolution of county board of public welfare as “a unit of the hospital for mental diseases”.

Milwaukee county is not entitled to state aid under sec. 51.24, Stats., for patients removed from county mental disease hospital to county hospital, for surgery or special medical care, during time such patients are absent from mental disease hospital.

Milwaukee county is not entitled to state aid under sec. 51.08, Stats., for patients removed from county asylum to county hospital, for surgery or special medical care, during time such patients are absent from asylum.

April 29, 1943.

A. W. Bayley, Executive Secretary,
Department of Public Welfare.

You request an opinion as to the eligibility of Milwaukee county for state aid on account of certain mental disease patients under the following circumstances. The county maintains a mental disease hospital (hereinafter called the “mental hospital”) pursuant to sec. 51.24, Stats. Arrangements have also been made for the care of mental patients on a temporary basis at the Milwaukee county hospital (hereinafter called the “county hospital”), which is a general hospital owned and operated by the county. To this end the Milwaukee county board of public welfare on March 18, 1942, approved the designation of a section of the eighth floor of the county hospital as “a unit of the hospital for mental diseases” (hereinafter called the “eighth floor”).
The eighth floor receives patients sent to it by physicians or relatives, voluntarily admitted or committed by a court. The type of treatment given covers general mental observation, diagnosis and general treatment and the average stay per patient is approximately ten days. There are 14 rooms ranging from single rooms to wards. We are not informed as to whether this space is also used for other patients of the county hospital when not occupied by mental patients. The staff consists of three visiting psychiatrists, one resident, one interne and the regular staff of nurses and attendants. The director of the Milwaukee county institutions states in a letter to you dated March 18, 1943, "The entire unit is under the supervision of Dr. H. W. Sargeant, Superintendent of the Milwaukee County Hospital."

Milwaukee county does not attempt to make a separate accounting for the operation of the eighth floor, but charges the mental hospital the per capita cost for all patients. That is, if the per capita cost of maintaining all patients in the county hospital is $3.75 a day, the county hospital bills the mental hospital at that rate for all mental patients cared for on the eighth floor.

Milwaukee county has submitted a statement to your department claiming state aid for the patients maintained on the eighth floor who were committed by court orders. Although the eighth floor has been operated in the same manner for many years, this is the first time state aid has been claimed on account of such patients. You inquire whether such claims may be properly allowed.

The applicable statutes are as follows:

Sec. 51.24, subsec. (1), authorizes Milwaukee county to establish and maintain a hospital for mental diseases, to be governed pursuant to sec. 46.21. The latter section provides for a Milwaukee county board of public welfare charged with supervising the operation, maintenance and improvement of the county hospital, hospital for chronic insane, hospital for mental diseases and other charitable and curative institutions.

Sec. 51.24 (2), (3) and (4) provides as follows:

"(2) The state shall compensate every such county for all insane persons maintained at public cost at its hospital
for mental diseases, commencing July 1, 1933, at the rate of four dollars and eighty cents per week for each acute insane person and two dollars and ten cents per week for each chronic insane person. The first period of computation for such compensation shall be for the six months period ending December 31, 1923, and each succeeding period of computation for such compensation shall be each succeeding six months next after the expiration of said first six months period.

“(3) The number of weeks that each insane person has been so maintained during each period of computation, shall be ascertained; and the state board of control of Wisconsin shall determine the number of weeks that acute patients have been maintained and the number of weeks that chronic insane patients have been maintained in said institutions, and the compensation for the maintenance of such patients shall be based upon the determination made by said board.

“(4) The governing authority of each such hospital shall, as soon as practicable after the expiration of each such period of computation, prepare a statement giving the name of each insane person maintained at public cost at said hospital during the next preceding period of computation and the number of weeks he or she has been maintained during said period, also showing the aggregate of such weeks for all insane persons so maintained during said period and the amount of compensation to be made by the state to said county therefor, at the rates and upon the basis above fixed by said board, which statement shall be verified by said superintendent and approved by the board of administration in charge of said hospital as correct and true in all respects and delivered to the state board of control.”

It is well established that money may not be paid out of the state treasury except pursuant to law and that the person paying it out must be able to show clear statutory authority therefor and will be held to strict accountability. See authorities cited in XXIX Op. Atty. Gen. 470, 471.

The question is, therefore, whether patients maintained on the eighth floor under the above described arrangements can be said to be maintained “at” or “in” the hospital for mental diseases. If so, Milwaukee county is entitled to state aid for such patients. If not, aid may not be paid from the state treasury. This proposition has been recognized by your department and the board of control in a long established practice of granting state aid only for those insane cases physically present in the mental hospital.
The words "at" and "in" when used in statutes are frequently held to be synonymous and to refer to physical location within a certain designated space. See Words & Phrases (perm. ed.). No case presenting the precise question here involved has been found, but two cases involving somewhat analogous situations may be profitably considered.

In *Harris v. State ex rel. Dolan*, (1895) 72 Miss. 960, 18 So. 387, 33 L. R. A. 85, it appeared that a statute required the county board of supervisors to hold its meetings "at the courthouse." In the particular county involved there were no offices in the courthouse so the county bought a lot adjoining the courthouse lot and erected a two-story building, not connected with the courthouse, where the circuit and chancery clerks and the sheriff had offices on the first floor. Meeting in the chancery clerk's office, the county board adopted a resolution that a referendum on local option be held. The referendum was held and local option prevailed. Thereafter the relator brought a mandamus action to compel the issuance of a retail liquor license. The court held that the meeting of the county board was not held "at the courthouse," which was construed as meaning physically inside the building provided for holding courts. Therefore the meeting was illegal, the resolution and the referendum were void and a peremptory writ of mandamus must be granted. For other cases adopting the same view with reference to the place of meeting of legislative bodies see the note to the above case at 33 L. R. A. 85.

The foregoing case related to a building, whereas the present statute concerns a hospital or institution, which need not be housed in a single building but may encompass several. The case is therefore somewhat more analogous to *Spielmann v. Industrial Comm.*, (1940) 236 Wis. 240, 295 N. W. 1, in which it appeared that certain employees of the Nash-Kelvinator Corporation were laid off by reason of a labor dispute under substantially the following circumstances: The company maintained three plants, one at Milwaukee, one at Kenosha and one at Racine. All of these plants were interdependent since their schedules were synchronized with each other so that parts made at one plant would be assembled with parts simultaneously made at one
of the other plants. A labor dispute caused the shutdown of
the Kenosha plant which automatically made it necessary to
close the other two plants, where no labor dispute existed.
The plaintiffs, who were employed at the Milwaukee and
Racine plants, applied to the industrial commission for un-
employment compensation. The compensation act provided
that no employee should be eligible for benefits from his em-
ployer’s account for any week in which he was unemployed
by reason of a strike or other bona fide labor dispute “in ac-
tive progress in the establishment in which he is or was em-
ployed.” Sec. 108.04 (5) (a), Stats. The industrial commis-
sion denied compensation on the ground that although the
three plants were physically separated by distances of 40
miles between Milwaukee and Kenosha and 10 miles be-
tween Racine and Kenosha, all three constituted a single
“establishment”. The finding of the commission, which was
approved by the supreme court, was that “because of the;
functional integrality, general unity and physical proxim-
ity” of the plants they constituted a single “establishment”.

Can it be said that the same is true of the Milwaukee
county hospital for mental diseases and the eighth floor of
the Milwaukee county hospital? Can it be said that the
eighth floor is a part of the mental hospital because of
“functional integrality, general unity and physical proxim-
ity”? The care and treatment of patients on the eighth floor
is under the supervision of the superintendent of the county
hospital, not the superintendent of the mental hospital. The
costs of the eighth floor are not regarded as a part of the
cost of operating the mental hospital, but are billed to the
mental hospital on a daily per capita basis. Doubtless this
includes the cost of care by nurses, attendants, the resident
and the interne, all employees of the county hospital. We
are unable to escape the conclusion that the eighth floor of
the county hospital remains a part of that institution and
is not any part of the mental hospital, notwithstanding its
designation by the county board of public welfare as “a unit
of the hospital for mental diseases.” Merely calling it so
does not make it so. “A rose by any other name would smell
as sweet.”

The true situation appears to be that the county hospital
is acting as a subcontractor whereby it agrees to take care
of mental patients for the mental hospital at so much a head. By doing so, it does not become a part of the mental hospital any more than a trucking concern becomes a part of an industrial firm for which it makes deliveries on a contract basis. The eighth floor of the county hospital is no more a part of a mental disease hospital than the county office building was a part of the courthouse in the Harris case above discussed.

It may well be argued that there is no reason why Milwaukee county should not receive state aid for the patients temporarily cared for at the county hospital. Such argument might be persuasive if addressed to the legislature but cannot affect the construction of the plain wording of the present statutes.

You also inquire as to the allowance of claims for state aid with reference to patients temporarily removed from the mental hospital and sent to the county hospital for surgery or special medical care. These patients are not kept in the so-called mental disease unit on the eighth floor but presumably are kept in the ordinary medical and surgical units. What has been said above applies with even more force to these cases and it is quite apparent that no state aid may be granted for the time when they are not actually in the mental disease hospital.

This latter question relates also to patients removed from the Milwaukee county hospital for the chronic insane, which is governed by the general law relating to county asylums, sec. 51.26, which in turn refers to secs. 51.05, 51.08 and 51.10. Of the latter sections only 51.08 (1) need be considered. That section provides in part as follows:

“For the purpose of settlement with the county * * * the expense of the maintenance, care and treatment of each inmate and the expense of any confinement for medical observation or for public safety in any county hospital or asylum for the insane shall be computed at the rate of four dollars and fifty cents per week. For each such inmate maintained at public charge elsewhere than in the county of his legal settlement the whole rate shall be chargeable to the state and one-half thereof chargeable over by the state
against the county, if any, in which such inmate has a legal settlement. For all other such inmates maintained at public charge one-half of said rate shall be chargeable to the state and one-half to the county in which such inmate has a legal settlement. All such charges shall be adjusted as provided in section 46.10, but nothing herein shall prevent the collection of the actual per capita cost of maintenance, or a part thereof by the state board of control or by the county in counties having a population of five hundred thousand or more, pursuant to law."

In order to be eligible for state aid under this section the patient must be confined "in" the hospital or asylum, so that the rule announced above would apply.

WAP
Tuberculosis Sanatoriums — Tuberculosis patient cared for at public cost in section of Milwaukee county hospital is not maintained "in" county tuberculosis sanatorium so as to entitle county to state aid under sec. 50.07, subsec. (3), Stats., or to full payment by state under sec. 50.075, where cost of operating tuberculosis section of county hospital is billed to sanatorium on per capita per diem basis and nurses are employed and are subject to discipline or discharge by head of county hospital, notwithstanding supervision of medical and nursing care by head of county sanatorium and designation of said section as unit of sanatorium by resolution of county board of public welfare.

Milwaukee county is not entitled to state aid under sec. 50.07 (3) or to full payment by state under 50.075 for patients removed from county tuberculosis sanatorium to county hospital for special care, during time such patients are absent from sanatorium.

April 29, 1943.

CARL N. NEUPERT, M. D., State Health Officer,
Board of Health.

You state in your letter that a question has come up with reference to state aid for tuberculosis patients temporarily cared for at the Milwaukee county hospital under the following circumstances: Milwaukee county maintains a county tuberculosis sanatorium under sec. 50.06, Stats., known as Muirdale Sanatorium. Due to overcrowding at Muirdale it has happened that patients requiring sanatorium care have had to remain on the waiting list but the situation has been alleviated to some extent by the setting aside of the so-called "Muirdale unit" of the county hospital where tuberculosis patients are cared for until there is a vacancy at the sanatorium. For the fiscal year 1941 to 1942 the per capita cost at Muirdale was $21.82 a week. The per capita cost at the county hospital was $3.75 per day and this latter rate was used in determining the charge for operating the tuberculosis unit of the county hospital and was included as a cost of operation of Muirdale. A claim has now been submitted for payment by the state to Milwaukee county on account of 140 weeks and 2 days for Milwaukee
county patients and one week for a state-at-large patient so
cared for at the "Muirdale unit" of the county hospital. You
inquire whether this claim may legally be allowed.

You also state that the medical and nursing care of the
"Muirdale unit" is directed by the medical director of the
Muirdale Sanatorium. Whether this is the fact or not, our
information is that the nurses are employed and paid by the
county hospital and it seems probable that this is correct
since the daily per capita cost of $3.75 would necessarily
have to include nursing services.

A question arising out of a very similar situation relatin-
g to Milwaukee county's claim for state aid for mental pa-
tients housed in a section of the county hospital is discussed
in an opinion of even date herewith addressed to Mr. A. W.
Bayley, executive secretary of the state department of pub-
lic welfare, a copy of which is herewith enclosed.* We be-
lieve that notwithstanding some slight differences in the
facts stated the conclusions there announced apply also to
your problem.

Milwaukee county's claim is based on sec. 50.07 (3) (a)
which provides as follows:

"Each county maintaining in whole or in part such an in-
stitution shall be credited by the state, to be adjusted as pro-
vided in section 46.10, for each patient cared for therein at
public charge, as follows:
"(a) For each such patient whose support is chargeable
against said county, seven dollars per week."

Sec. 50.075 provides that indigent patients whose legal
settlement is in doubt or who have no legal settlement in
this state shall be charged against the state.

To be entitled to state aid for county patients and to full
payment for state-at-large patients, the county must main-
tain such patients in the sanatorium. Sec. 50.07. We are
satisfied that the so-called "Muirdale unit" of the county
hospital is no part of the Muirdale sanatorium for the rea-
sons stated in the opinion to Mr. Bayley.

Both the Muirdale sanatorium and the county hospital
are governed by the county board of public welfare estab-

*Page 147 of this volume.
lished pursuant to sec. 46.21. Subsec. (4) of that section provides for the appointment of department heads, and paragraph (c) of said subsection gives each department head power to appoint, discipline and remove the employees in his department. As indicated above, the nurses in the so-called "Muirdale unit" are employed by the county hospital and not by the Muirdale sanatorium. Obviously if they were regarded as employees of the Muirdale sanatorium they should be employed by the head of that institution rather than the head of the county hospital.

The only distinction between this case and that of the mental hospital is in the supervision of medical care—in this instance by the superintendent of the sanatorium; in the other by the superintendent of the county hospital. We do not think this fact alone may be regarded as conclusive.

There is nothing to prevent a sanatorium from comprising more than one building, or parts of several buildings. See XXI Op. Atty. Gen. 996. But in such cases all buildings or parts of buildings included in the sanatorium must be fully under the jurisdiction of the sanatorium authorities, all overhead costs must be paid directly or in the form of a fixed rental charge by such authorities and not on a per capita basis and certainly the nurses and other employees must be employed and subject to discipline and removal by the sanatorium head. Otherwise, as in this case, the county hospital is a subcontractor rather than being in the position of a landlord renting out part of its space to the sanatorium. The patients are maintained "in" the county hospital rather than "in" the sanatorium.

You are therefore advised that the county's claim for state aid on account of county and state-a-large tuberculosis patients maintained in the county hospital may not be allowed.

You also inquire concerning the allowance of state aid for patients temporarily removed from Muirdale sanatorium to the county hospital for special care. For the same reason, state aid may not be paid on account of such patients during the time when they are not physically present in the sanatorium.

WAP
You have requested our opinion as to the taxability for the year 1942 of property in this state owned by Defense Plant Corporation.

Pursuant to the express authority of the Reconstruction Finance Corporation act, 15 USCA, sec. 606b (3), Defense Plant Corporation was organized on August 22, 1940, by Reconstruction Finance Corporation. The charter of Defense Plant Corporation provides that its entire capital stock is owned by RFC and is not transferable, and that it is an instrumentality of the United States government. RFC is a body corporate created by act of congress and all of its stock is owned by the United States. 15 USCA, sec. 601 et seq.

Defense Plant Corporation owns a number of manufacturing plants throughout the various states. The plan generally is for it to own title thereto and rent them by written leases to concerns for use in the production of war materials either for the United States government directly or for sale to its suppliers. In some instances Defense Plant Corporation purchased the plant property while in others it acquired title to the land and then erected buildings and structures thereon which it equipped. Title to the entire plant, including the land, buildings, machinery and equipment, in each case remains in Defense Plant Corporation, but the private lessees conduct the actual manufacturing operations therein as their own private business.

The rent agreed to be paid is a percentage of the aggregate net sales by the lessee of war materials produced or furnished through the use of such leased plant, or some similar arrangement. The lessee is given an option to purchase the plant, within prescribed periods after expiration or termination of the lease, at a price to be determined in accordance with provisions therein set out. The leases contain provisions that in addition to or as part of the rental the
lessee agrees to pay "all taxes, assessments, and similar charges (but not benefit assessments) which at any time during the term of this lease or any extension thereof may be taxed, assessed or imposed upon Defense Plant Corporation with respect to or upon the site, the buildings or the machinery, or any part thereof, or upon the occupier thereof or upon the use of the site, buildings or machinery".

Under sec. 70.10, Stats. 1941 (the statutes applicable to the 1942 tax), the determinative date as to whether property is exempt from taxation is May 1. As to any plant property which Defense Plant Corporation acquired after May 1, 1942, it took title subject to the 1942 tax which had already attached thereto as a lien. United States v. Alabama, (1941) 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327; XXVIII Op. Atty. Gen. 523; XXX Op. Atty. Gen. 255. The question here then is as to whether plant properties owned by Defense Plant Corporation to which it acquired title prior to May 1, 1942, could be included in the assessment roll for 1942 and subjected to the ad valorem tax of that year falling due in 1943.

Art. II, sec. 2 of the Wisconsin constitution, so far as here material, provides:

"The propositions contained in the act of congress [enabling act of August 6, 1846 for admission of Wisconsin into the Union] are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that * * * no tax shall be imposed on land the property of the United States; * * *"

The contention is made that this provision of the Wisconsin constitution absolutely precludes the state of Wisconsin from at any time imposing any tax upon any real property owned by the United States, whether directly through title in its own name or through ownership by one of its agencies or instrumentalities, corporate or otherwise. With this we cannot agree.

Such provision is merely responsive to and as required by the enabling act of congress, August 6, 1846, pursuant to which Wisconsin became a state, and is solely for the protection of the United States. It is just documentary recog-
nition that, as recently said by the United States supreme court in *Maricopa County v. Valley Nat. Bank*, (1943) ——, U. S. ——, 63 S. Ct. 587, 87 L. ed. (adv.) 537, the authority and power of a state to tax property of the United States, does not "stem from the powers 'reserved to the States' under the Tenth Amendment." (588) The court in that case further said that such power to tax is as "conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation." (588-589) Such immunity is in essence the same as that accorded by the well recognized doctrine of intergovernmental immunity under which a state may not tax property of the United States and *vice versa*, which may be and sometimes is waived by the one in whose favor it operates.

By sec. 10 of the Reconstruction Finance Corporation Act, as amended June 10, 1941, c. 190 sec. 3, 55 Stats. 248 (15 USCA 610) it is provided that the Reconstruction Finance Corporation, its property and income

"** * * shall be exempt * * * from all taxation * * * now or hereafter imposed * * * by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

This section then goes on to provide that such exemption shall be applicable not only

"** * * to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, * * * and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, * * * Such exemptions shall also be construed to be applicable to the * * * personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), * * * of the preceding sentence, but such exemption shall not be con-
strued to be applicable in any State to any buildings which are considered by the laws of such state to be personal property for taxation purposes."

These provisions, which are by substance included in the charter of Defense Plant Corporation, constitute a consent by the United States that its real property owned through the medium of Defense Plant Corporation may be taxed by a state the same as it taxes other real property therein and in our opinion operate as a waiver of the benefits of any immunity from such taxation, including that accorded by Art. II, sec. 2 of the Wisconsin constitution. This does not impose any tax thereon, but merely removes the prohibition of such immunities and leaves the state free to tax such property if it desires to avail itself of the right and power to do so.

Sec. 70.11, Stats. 1941, specifies what property is exempt from taxation in Wisconsin, and in our opinion the effect of subsec. (1) thereof is that Wisconsin has not availed itself of the lifting of such immunities and exercised the right thereby accorded it to impose a tax on the real estate of Defense Plant Corporation owned by it as an arm of the United States government. It reads as follows:

"The property in this section described is exempt from taxation, to wit:

"(1) That owned exclusively by the United States, not including, however, any residential, rental income producing, improved real estate owned by the United States or any corporation whose capital stock is owned by the United States government or any corporate or other agency having control and jurisdiction over and administering any such real estate in this section above described, which improved real estate has heretofore or may hereafter be acquired by the United States in any such federal corporation or agency, *

The purpose and effect of this statute is to designate what property is taxed in this state and the language unequivocally excludes all property "owned exclusively by the United States" from inclusion therein, unless it is "residential, rental income producing, improved real estate". Quite obviously the manufacturing plant properties under consid-
eration are not "residential" in character, even though they are "rental income producing" and constitute "improved real estate", and so do not have one of the three prescribed qualities necessary to come within the exception of the statutory language.

Such exclusion of property of the United States from the property upon which Wisconsin statutes impose taxes is not conditioned upon any action one way or the other by congress, but is absolute. Thus, if these properties owned by Defense Plant Corporation are "owned exclusively by the United States", the state of Wisconsin has not implemented the imposition of taxes thereon and taken advantage of the waiver of immunity by congress so it could do so. The state is free, by virtue of the congressional consent, to impose taxes thereon or not according to its own desires, but, not having exercised its power in that respect, no tax is imposed thereon and the property is therefore not subject to taxation for 1942.

As previously noted, Defense Plant Corporation is a public corporation and, as such, an instrumentality of the United States government. Its stock is wholly owned by RFC and is not transferable. RFC is a corporate arm of the United States created by act of congress. The legal title in Defense Plant Corporation is held by it merely as agent for and the ownership thereof is in the United States. King County v. United States Shipping Board Emergency Fleet Corp., (1922) 282 F. 950; United States Spruce Production Corp. v. Lincoln County, (1922) 285 F. 388; Graves v. New York, ex rel. O'Keefe, (1939) 306 U. S. 466, 477, 59 S. Ct. 595, 597, 83 L. ed. 927, 931.

Thus, the only proprietary interest of any kind in the properties of Defense Plant Corporation is in the United States. In Comstock v. Boyle, (1910) 144 Wis. 180, 128 N. W. 870, our supreme court said in reference to this same statute, p. 186, that the words "owned exclusively" mean "ownership free from any kind of legal or equitable interest in any one else." By this test the properties in question are "owned exclusively by the United States."

It is therefore our opinion that the provisions of sec. 70.11 (1), Stats. 1941, stand in the way of and preclude
property owned by Defense Plant Corporation prior to May 1, 1942, from being included in the assessment roll of 1942 and subjected to ad valorem taxation of that year. We are supported in our conclusion by an opinion of the attorney general of North Carolina dated August 3, 1942, of the same import.

As to future taxation of these properties the above is not true, for ch. 59, Laws 1943, which took effect upon its publication April 17, 1943, supplied the deficiency in the 1941 statutes by adding to sec. 70.11 Stats. the following subsections:

“(1a) The exemption provided by subsection (1) shall not include real property subject to taxation under any federal statute applicable thereto, but such exemption shall extend to and include all machinery and equipment owned exclusively by the United States or any corporate agency or instrumentality thereof until such time as the congress of the United States shall expressly authorize the taxation of such machinery and equipment.”

HHP

Physicians and Surgeons — Sec. 147.20, subsecs. (3) and (4), Stats., relating to revocation of licenses to practice medicine and restoration thereof, where physician has been convicted of crime committed in course of his professional conduct, does not apply to federal courts.

May 20, 1943.

DR. C. A. DAWSON, Secretary,
Board of Medical Examiners,
River Falls, Wisconsin.

You have called our attention to the conviction in federal court of a physician charged under 18 USCA 340 with wilfully and knowingly depositing and causing to be deposited
in the United States mails a non-mailable parcel containing a quantity of poison known as morphine sulphate. This was done in the course of treating a patient and you inquire if revocation of the physician's license to practice medicine and surgery in Wisconsin is required under sec. 147.20, subsec. (3), stats., which reads:

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

This provision is followed by subsec. (4), relating to the restoration of licenses in such cases, and which reads:

"When a license or certificate is revoked no license or certificate shall be granted thereafter to such person. Any license or certificate heretofore or hereafter revoked may be restored by subsequent order of the trial court, but only after a first revocation, upon notice to the district attorney who prosecuted, or, in the event of his disability, his successor in office, upon written recommendation by the president of the state board of medical examiners, and upon findings by the court that the applicant for restoration of license or certificate is presently of good moral and professional character and that justice demands the restoration."

While it appears that this was a crime committed in the course of a physician's professional conduct within the meaning of sec. 147.20 (3), it is extremely doubtful that either this section, relating to revocation of a license, or subsec. (4), relating to its restoration upon appropriate findings by the trial court, has any application to convictions in federal courts as distinguished from state courts.

A license to practice medicine confers a very valuable privilege upon the holder thereof. A statute providing for the revocation of such a license is highly penal in character and not to be extended by implication beyond situations falling clearly within the intent and scope of the statute.
Sec. 147.20 (3) makes it the mandatory duty of the clerk of court to file with the state board of medical examiners a certified copy of the information, verdict and judgment.

The state legislature may not prescribe the duties of a clerk of a federal court any more than it can prescribe duties or jurisdiction of a federal judge in the matter of restoration of a license revoked by the state board of medical examiners.

Under art. III, sec. 2, United States constitution, the jurisdiction of federal courts is limited to

"* * * All cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grant of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

The granting, revocation and restoration of licenses to practice medicine is peculiarly an exercise of the police power of the state in the interests of public health, safety and welfare. Such matters, so far as court provisions relating thereto in the statutes are concerned, are necessarily confined to the state courts.

You are therefore advised that sec. 147.20 (3) and (4) are not applicable to convictions in federal courts and that the license in question should not be revoked upon the basis of the federal court conviction.

WHR
Indigent, Insane, etc.—Poor Relief—Old-age assistance paid to wife or widow constitutes lien on her consummate dower right even though she dies before dower is assigned.

May 24, 1943.

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

With reference to the opinion of January 22, 1943, in XXXII Op. Atty. Gen. 10, to the effect that the lien for old-age assistance attaches under sec. 49.26, Stats., to a widow's consummate dower right, you have asked whether the right to foreclose such a lien exists if the widow dies before assignment of dower, or whether both the dower right and the lien lapse upon the widow's death if it has not been previously assigned.

Many cases can be cited holding that if a widow's dower rights have not been admeasured and assigned during her life it lapses upon her death. An examination of such cases will show that most, if not all, of them were decided under the common law or under statutes whereby the widow's dower right is limited to a life estate. That was the situation in Estate of Johnson, 175 Wis. 248, 185 N. W. 180, to which you have referred. The husband whose property was involved in the above case died in 1914. At that time a widow's dower right was limited by the statute of this state to "use during her natural life." See sec. 2159, Stats. 1898. The gist of the court's ruling was that where the widow had insured the property in which she had a consummate dower right her interest in the property suffered no loss when she died at the time the damage occurred against which the property was insured. After the decision in that case the dower statute was amended by ch. 99, Laws 1921, so as to give the widow a fee simple instead of a life estate.

We do not believe it is material for the purposes of this opinion whether the consummate dower right constitutes an estate in land or a right of action. If it were regarded as an estate, sec. 233.01, as amended by ch. 99, Laws 1921, gives it the attributes of an estate of inheritance. If it be deemed a right of action, it is one which survives the death of a
widow. It was held in *Pollock v. Columbia Bank*, 193 Wis. 389, that the right is assignable, and, as stated in 1 C. J. S. 179, sec. 182,

"* * * One of the tests of whether a cause of action survives or abates is whether it is assignable or not. As a general rule, assignability and survivability of causes of action are convertible terms; * * * *"

Sec. 49.26, subsec. (4), Stats., gives a lien for old-age assistance upon "any and all real property of the beneficiary presently owned or subsequently acquired". Real property is defined in sec. 370.01 (9) to include not only lands but "all rights thereto and interests therein". In view of the evident intent of the legislature to make all of the property which should be equitably liable for the support of an old-age assistance beneficiary available to recompense the government for assistance paid out of public funds, it is our opinion that the legislature intended to use the term "real property" in a broad sense.

We are aware of the fact that on a question of statutory interpretation there may be room for doubt until the time that the statute has been construed by the courts. We believe, however, that it is the duty of administrative officers to proceed on a basis by which the statute is construed so as to protect the public funds and the public rights.

BL
Indigent, Insane, etc. — Under sec. 51.11, subsec. (1), Stats., inmate of county asylum may have re-examination of his sanity before judge of any court of record in county of his residence or where he was adjudged insane. For this purpose he does not acquire "residence" by being inmate of asylum, but term refers to place of his residence when he was adjudged insane.

May 26, 1943.

John E. Grindell,
District Attorney,
Platteville, Wisconsin.

In your letter you state that E. M. was adjudged insane by the county judge of Sawyer county in 1938 and committed to the Mendota state hospital, from which he was later transferred to the Grant county asylum by an order of the state department of public welfare. He desires a re-examination of his sanity under sec. 51.11, Stats., and you inquire whether the county judge of Grant county has jurisdiction to grant a re-examination.

Sec. 51.11, subsec. (1), Stats., vests jurisdiction of such re-examination in the judge of any court of record of the county in which such person resides or in which he was adjudged insane." You do not state where the patient's residence was at the time he was committed. It might be Sawyer county, of course, but it might also have been Grant county, since he need not have been committed from the county of residence. Sec. 51.01 vests jurisdiction to commit insane persons in the judge of the county court of the county in which such person is "found," which is not in all cases the county of residence.

If at the time he was committed the patient resided in Grant county, then the county judge of Grant county has jurisdiction to give a re-examination under sec. 51.11.

If he did not reside there at the time of commitment, the mere fact that he has been an inmate of the Grant county asylum does not confer such jurisdiction. Whether a person acquires a "residence" by being an inmate of a charitable institution is a question of legislative intent. No
case has been found holding that an inmate of an asylum acquires a residence, but there are a number of cases to the contrary, See 37 Words & Phrases (Perm. ed.) p. 252. For voting purposes, sec. 6.51 (11), Stats., expressly provides:

"No person shall be deemed to have gained a voting residence in any town, city or village in this state by remaining therein as an inmate of any county home * * * ."

Under the circumstances, it seems highly unlikely that the legislature intended the word "residence" as used in sec. 51.11 to include the asylum. Cf. XXXI Op. Atty. Gen. 78.

WAP

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Civil Service — Public Officers — Secretary of state board of health, who is also executive officer of said board and state health officer by virtue of sec. 140.02, Stats., is within classified service of state employment as defined by sec. 16.08, subsec. (3), Stats., and in order to obtain salary raise other than at beginning of fiscal year must have approval of emergency board as provided in sec. 14.71 (1m), Stats.

May 26, 1943.

CARL N. NEUPERT, M. D.,

State Health Officer.

You have inquired whether the position of state health officer and executive secretary of the state board of health is under civil service, since if the board determines to increase the salary of this position it would be necessary to bring the matter before the emergency board in the event the position is under civil service.

Sec. 140.02, relating to the organization of the state board of health, provides in part:

"* * * The board shall elect a secretary from their own number or otherwise, who shall hold his office subject
to removal at discretion by a vote of five members of the
board at a regular meeting, and while in office be a member
of the board. The secretary shall be the executive officer of
the board and the state health officer. * * *

We understand that the present incumbent of this posi-
tion was not a member of the board at the time of his ap-
pointment.

Sec. 14.71, subsec. (1), Stats., provides in part that the
various state boards, departments, etc., including the state
board of health,

"* * * are each authorized to appoint such deputies,
assistants, experts, clerks, stenographers or other employes
as shall be necessary for the execution of their functions,
and to designate the titles, prescribe the duties, and fix the
compensation of such subordinates, but these powers shall
be exercised subject to the state civil service law, unless the
position filled by any such subordinate has been expressly
exempted from the operation of chapter 16 and subject,
also, to the approval of such other officer or body as may be
prescribed by law."

Sec. 14.71 (1m) provides in part:

"Salaries of employes in the classified service, as defined
in section 16.08, except as otherwise herein provided, shall
be increased only at the beginning of a fiscal year. Heads of
departments, boards, commissions and institutions shall on
or before July fifteenth in each year file with the director
of the bureau of personnel and the director of the budget a
list of such employes showing their then existing salaries
and their proposed new salaries. Salary increases at other
periods in the fiscal year may be allowed only upon approval
of the emergency board. * * *

Sec. 16.08, relating to classification for civil service pro-
vides:

(1) CLASSES. The civil service is divided into the un-
classified service and the classified service.
(2) UNCLASSIFIED SERVICE. The unclassified service
comprises positions held by:
(a) All officers elected by the people.
(b) All officers and employes appointed by the governor whether subject to confirmation or not, unless otherwise provided.

(d) All presidents, deans, principals, professors, instructors, research assistants and other teachers in the university, state teachers colleges, Stout institute and the state school of mines.

(f) All legislative officers.

(3) **CLASSIFIED SERVICE.** The classified service comprises all positions not included in the unclassified service.”

The classified service is further subdivided into the exempt and competitive divisions by sec. 16.09, although we deem it unnecessary to go into an analysis of this section for purposes of answering the present inquiry, for the reason that both the exempt and the competitive divisions are included in the term “classified service” as used in sec. 14.71 (1m), relating to salary increases. Inasmuch as the position in question does not fall within any of the subdivisions of the unclassified service, as defined by sec. 16.08 (2) quoted above, it must perforce come within the classified service as defined in sec. 16.08 (3) quoted above, since this includes all persons in state service not included in the unclassified service.

Therefore, you are advised that sec. 14.71 (1m) applies to the matter of a salary increase for the position in question and that if such increase is made at any time other than at the beginning of a fiscal year the approval of the emergency board must be obtained as provided in said subsection.

WHR
Prisons — Prisoners — Parole — Under sec. 57.06, Stats., department of public welfare may not permit parolee from state prison or Milwaukee county house of correction to go to another state, territory or country, except, pursuant to sec. 57.13, to another state adhering to interstate compact for out-of-state parolee supervision.

May 27, 1943.

A. W. Bayley, Executive Secretary,
Department of Public Welfare.

You state that a person on parole from the state prison has been offered employment in connection with the building of the Alcan highway, which runs through Canada and Alaska, and you inquire whether the department of public welfare may permit him to accept such employment. No legal precedent for such action has been discovered so the question must turn entirely upon the construction of the parole statutes.

Sec. 57.06, Stats., authorizes the department of public welfare, with the approval of the governor, to parole felons from the state prison and the Milwaukee county house of correction. Subsec. (2) of that section provides, among other things, that the parolee must render monthly written reports to the department. Subsec. (3) provides as follows:

"Every such paroled prisoner remains in the legal custody of the state board of control [department of public welfare] and may at any time, on the order of the board [department], be reimprisoned in said prison or said house of correction; and shall be reimprisoned whenever found exhibited in any show or exhibition. A certified copy of said order shall be sufficient authority for any officer executing it to take and convey the prisoner to the institution from which he was paroled, and all officers shall execute such order in the same manner as a warrant for arrest, 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 prisoner and bring him before the board [department] for its action."

A study of subsec. (3), above quoted, leads to the inevitable conclusion that it is contemplated that the parolee re-
main within the boundaries of this state except as otherwise provided in sec. 57.13, discussed below. If allowed to go outside the state, he could not be said to be in the "legal custody" of the department of public welfare, since the department's authority perforce ends at the state line. The statute states that "a certified copy" of the department's order is sufficient authority for the taking of the parolee and conveying him to the prison, but obviously a certified copy would be of no force or effect in another state, where the board's order would have to be exemplified in the manner prescribed by the federal statutes in order to entitle it to full faith and credit, and in any event it is clear that extradition proceedings would have to be undertaken to return the parolee from another state or country. The statute further authorizes the taking of the prisoner without any warrant, and this, of course, could not be effective in another state or country. So it is apparent on the face of the statute that it does not contemplate permitting the parolee to leave the state of Wisconsin.

The only modification of the foregoing is found in sec. 57.18, Stats. (enacted subsequent to sec. 57.06), which adopts for this state an interstate compact known as the "uniform act for out-of-state parolee supervision," under which the department is permitted to send probationers or parolees to other states adhering to the compact, in case either the parolee is a resident of or has a family in the receiving state and can obtain employment there, or the receiving state consents that he be sent there. Under this compact the contracting states agree to supervise each other's probationers and parolees and to permit their return to the sending state without extradition proceedings. Except as provided in this section, there is no authority for permitting parolees to leave the state. Neither Alaska nor, of course, Canada is a party to the compact.

You are accordingly advised that the department may not permit employment of parolees on the Alcan highway project without violating its statutory duty to retain custody of the parolees.

WAP
Public Officers — Register of Deeds — Taxation — Platting Lands for Assessment — Sec. 59.57, subsec. (10), Stats., specifies fee for recording assessor's plat prepared under sec. 70.27 (1).

Assessor's plat prepared under sec. 70.27 (1) should be indexed in general index described in 59.52 and in record index described in 59.53, but no charge may be made for such indexing in addition to fee permitted by 59.57 (10).

City should pay full cost for recording of assessor's plat prepared under 70.27 (1).

May 28, 1943.

JULIUS E. GUENTHNER,
District Attorney,
Antigo, Wisconsin.

The city of Antigo has prepared an assessor's plat in compliance with the provisions of section 70.27, subsec. (1), covering a substantial acreage within the city limits and has presented this plat to the register of deeds for recording. The plat consists of eleven large plat sheets which include descriptions of three hundred seven pieces of property. Chapter 236 of the statutes relates to the platting of lands and the recording of plats, but sec. 236.02, specifically states that that chapter does not apply to assessors' plats made under the provisions of section 70.27. You inquire:

"1. What method should be used in determining the fees to be paid for the recording of the assessor's plat?

"2. Should each separate description be indexed, and if so what charge should be made?

"3. Should the city of Antigo pay the full bill for recording fees?"

Section 70.27, subsec. (1), provides in part:

"Whenever any subdivision of land situated within the limits of any city * * * is owned by two or more persons in severalty and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the common council * * * be made sufficiently certain and accurate for the purposes of assessment and taxa-
tion without noting the metes and bounds of the same, said council * * * may cause to be made a plat and an accompanying list of any lands within said city * * * which are not embraced in any of the recorded plats of land therein. The plat shall plainly define the boundary of and designate each parcel of land thereon and the accompanying list shall describe each parcel with sufficient certainty to enable a surveyor to locate the same. Both such plat and list shall be certified to by the person making the same, approved by the council * * * acknowledged by the city clerk and mayor * * * and recorded in the office of the register of deeds of the county in which said city * * * is located. * * *"

Section 59.51, subsec. (1), provides that the register of deeds shall:

"Record or cause to be recorded * * * all * * * maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose."

Section 59.57 states that, except as otherwise provided by law, every register of deeds shall receive the fees therein specified for recording the various instruments enumerated therein.

Subsec. (10) of that section reads:

"For recording plats containing from one to fifty lots, twenty-five dollars, and for each additional lot, ten cents. * * *"

The register of deeds would be entitled to a fee of $25.00 plus ten cents per lot for each lot over fifty, or a total of $50.70. See Stough v. Reeves, 42 Colo. 432, 95 P. 958.

In answer to your second question, sec. 59.52 provides that each register of deeds shall keep a general index, each page of which shall be divided into nine columns and that—

"He shall make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, * * * and he shall immediately upon the receipt of any such instrument or writing for record enter in the appropriate column, and in
the order of time in which it was received, the day, hour
and minute of reception; and the same shall be considered
as recorded at the time so noted. Wherever any register has
made in any index required by law to be kept in his office,
in the index column provided for describing the land af-
fected by the instrument indexed, the words 'see record,'
* * * such entry shall be a sufficient reference to the
record of such instrument if it be in fact recorded at large
in the place so referred to."

Section 59.53 provides:

“He shall keep an index of all records * * * kept in
his office showing the number of the instrument or writing
consecutively, the kind of instrument and where the same
is recorded * * *.”

Until an instrument has been indexed in the general in-
dex referred to in sec. 59.52 it has not been recorded.
Shoves v. Larsen, 22 Wis. 142; Lombard v. Culbertson, et
al., 59 Wis. 433, 18 N. W. 399.

It is unnecessary to index each separate description on
the plat but the column of the general index, entitled “de-
scription of land”, should read “see record” or should be
sufficiently general and comprehensive to include all of the
acreage which is subdivided into parcels and given a lot
number or other distinguishing identification. For exam-
ple: if the acreage lay in part of the northwest quarter and
in part of the northeast quarter of section 32, township 31
north, range 11 east, the column should read either “see rec-
ord” or “Parts of NW¼ and NE¼, Sec. 32, Twp. 31, N., R.
11 E.”

The record index referred to in sec. 59.53 should show the
instrument number given to the plat, that such instrument
was a plat and the volume and page where the plat was
spread upon the record.

Since the statutes do not provide any additional fee for
indexing there can be no charge for the recording and the
indexing required by section 59.52 and 59.53 in addition to
the fee provided for in sec. 59.57, subsec. (10). If a tract
index is kept pursuant to sec. 59.55 then, under sec. 59.57,
(1), par. (b), the register of deeds would be entitled to
three cents for every necessary entry in the tract index.
In answer to your third question the city of Antigo should pay the full bill for the recording of the assessor's plat. While sec. 70.27, subsec. (1), unlike sec. 70.27, subsec. (2), does not specifically provide that the municipality shall pay the fee, sec. 59.57, subsec. (10), clearly indicates that the fee must be paid to the register of deeds. Since sec. 70.27, subsec. (1), authorizes the city to prepare the assessor's plat and have the same recorded it follows, by necessary implication, that the city has authority to pay the cost of recording the plat. *State ex rel. Elliott v. Kelly*, 154 Wis. 482, 143 N. W. 153.

JRW

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*Bridges and Highways — Law of Road — Special Permits* — Neither state nor state highway commission is liable for damages to property or persons resulting from accidents on highways involving trucks or trailers operating under special permits for excessive loads issued by state highway commission pursuant to sec. 85.53, Stats., and applicants for such permits may not be required to furnish insurance to cover such nonexistent liability.

June 1, 1943.

Wm. H. Armstrong, Chairman,

*State Highway Commission.*

You have requested our opinion on the following questions:

1. Would the state or the highway commission be responsible for damage to property or injury to persons as a result of an accident on the highway in which a truck or trailer, operating under a special permit from the highway commission, issued under sec. 85.53 of the Wisconsin statutes for 1941, was involved?

2. If there is such liability on the part of the state or the highway commission, has the highway commission the power to require applicants for such special permits to provide property damage and personnel liability insurance?
Sec. 85.53, to which you refer, relates to the issuance of special permits for highway loads of excessive size and weight. This section is quite lengthy and no useful purpose would be served by attempting to set it forth in full or even by attempting to summarize all of its provisions here. Suffice it to say, that the only portion of this section which deals with the problem of damages resulting from the operation of excessive loads under such special permits is subsec. (4), which reads:

"The officer issuing a special permit may require the person, firm or corporation making application therefor to furnish a bond or certified check in a suitable sum, running to the unit of government granting the permit, and conditioned to save such unit through which such article is transported, harmless from any claim, loss or damage that may result from the granting of such permit or that may arise from or on account of any act done pursuant thereto, and further conditioned that the grantee shall restore to a condition satisfactory to the officer in charge of the maintenance of any such highway any pavement, bridge, culvert, sewer pipe or other improvement that may be injured by reason of the transportation of such heavy article, under such permit. If, after such article has been transported over the highway, no damage is found to have resulted therefrom, the certified check or bond shall be returned to the person, firm or corporation furnishing same, but in the event of any damage having resulted therefrom the officer in charge shall report the same, or if necessary, replace the damaged portion of the highway and the cost thereof shall be paid by the owner of the vehicle causing such damage and for failure to pay such cost the officer issuing the permit shall deduct the same from the proceeds of the certified check or shall enforce the bond and for that purpose may maintain an action upon such bond."

While it is provided in subsec. (1) that where the trip is wholly or partly over the state trunk system in more than one county, such permit may be given by the state highway commission, it is also true that these permits are authorized to be issued under subsec. (2) by the commissioner of public works in cities of the first class, and in other cities, towns and villages by the officer in charge of highway maintenance and by the county highway commissioner in each
county at the discretion of such officials. Public service corporations under subsec. (3) obtain annual permits from the state highway commission for the transportation of poles and similar equipment.

Doubtless the purpose of subsec. (4), requiring a bond or other indemnity to the unit of government granting the permit, is to protect such unit of government not only from the expense of repairing highways damaged by heavy loads but also to furnish protection from liability under sec. 81.15 for damages to members of the public caused by highways rendered defective by such heavy loads.

In sec. 84.07 (1) it is provided that the state trunk highway system shall be maintained by the state and all the expense of such maintenance shall be borne by the state.

To that extent the state is interested in bonds or indemnity furnished under sec. 85.53 (4) where special permits are issued by the state highway commission and damage to the highway itself results from the heavy load.

However, since the state is not mentioned in sec. 81.15, it is not liable thereunder for damages to others occasioned by defective highways maintained by the state regardless of whether or not the defect arises from the transportation of a heavy load pursuant to a special permit issued by the state highway commission under sec. 85.53 and in our opinion the same is true as to the state highway commission, which is a mere arm or agency of the state.

It is well established that neither the state nor its agencies may be sued without consent. 25 R.C.L. 412; 59 C.J. 300; Holzworth v. State, 238 Wis. 63.

Sec. 285.01, Stats., provides that a claimant may bring suit against the state "upon the refusal of the legislature to allow a claim against the state". The supreme court of Wisconsin has held that this section does not extend to cases of negligence, commonly referred to in the law as tort cases. Holzworth v. State, 238 Wis. 63, and cases cited. See also XXIII Op. Atty. Gen. 570 and XXXI Op. Atty. Gen. 312.

It seems clear under ch. 82 of the statutes that the state highway commission is an arm or agency of the state, set up to perform certain specified administrative duties.
The commission is appointed by the governor with the advice and consent of the senate, and has its principal office at the state capitol at Madison. Under sec. 82.02 it has charge of all matters pertaining to the expenditure of state and federal aid for the improvement of public highways and is directed to do all things necessary and expedient in the exercise of such supervision.

The secretary of the commission with the approval of the commission as a body is authorized to sign and execute contracts or agreements which are binding upon the state.

The commission is authorized to make regulations for the survey, plans, construction and inspection of all roads and bridges upon state highways.

It is authorized to conduct such investigations and experiments, hold such public meetings and attend or be represented at such meetings and conventions inside or outside of the state as may, in its judgment, tend to better highway construction.

It is authorized to cooperate with state and national organizations in experiments and work for the advancement of highway construction.

It is authorized to receive gifts, appropriations and bequests made to it or to the state for road purposes and also to apportion state and federal highway aid among the counties.

It is authorized to review the system of prospective state highways selected by the county boards, and to alter the same so as to connect the system of adjoining counties into continuous and direct routes, and it is authorized to acquire any lands or rights in lands that the commission may deem necessary to carry out any highway improvement made by the state, and that such lands permanently acquired shall be held in the name of the state.

The foregoing constitute a few of the many and wide powers and duties of the state highway commission under ch. 82, and particularly under sec. 82.02.

It is obvious from the foregoing that the commission is vested with many of the sovereign functions of government to be exercised by it for the benefit of the public, and that it is as much an agency of the state as the Wisconsin su-
preme court considered the board of regents of normal schools to be in the case of Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242.

In the Sullivan case the court, in speaking of an attempt to sue the board of regents of normal schools, used language at p. 245 which would be equally applicable to the state highway commission. It said:

"* * * It is an agency of the state set up to perform certain specified administrative duties. If the plaintiff should prosecute this action and recover judgment against the defendant, there would be no property out of which an execution could be satisfied. Manifestly, if the defendant has created a liability, it is a liability of the state and must be enforced as other liabilities against the state are enforced."

A little further on in its opinion the court made reference to the case of State ex rel. McDonald v. Nemacheck, 199 Wis. 13. In this case the court very clearly held the state highway commission to be an arm of the state. It said at p. 17:

"* * * If there is anything due the petitioners, it is due from the state. The commission is merely the agent of the state."

In 59 C. J. 307, it is said:

"While a suit against state officials or agencies is not necessarily a suit against the state, the general rule that a state cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of a state when the real claim is against the state itself, and it is the party vitally interested. Accordingly, it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent. * * *

* * *"
Art. VIII, sec. 2 of the Wisconsin constitution, provides, among other things, that no money shall be paid out of the treasury except in pursuance of an appropriation by law. Obviously if a negligence action were commenced against the state highway commission predicated upon some theory of liability for wrongful issuance of a special permit under sec. 85.53 and such suit were prosecuted to judgment, there would be no appropriation from which such judgment could be paid.

We believe that the foregoing discussion disposes of both of your questions relating to liability of the state or the state highway commission in connection with accidents arising on a highway involving a vehicle operating under special permit issued pursuant to sec. 85.53, Stats. Since there is no liability the state highway commission may not require applicants for special permits under this section to furnish insurance to cover such nonexistent liability.

WHR

June 1, 1943.

You have requested an opinion upon the questions hereinafter set forth:

1. Are “slot machines” as defined in substitute amendment No. 2, A. to Bill No. 325, A. lotteries within the meaning of art. IV, sec. 24 of the Wisconsin constitution?

Substitute amendment No. 2, A. to Bill No. 325, A. proposes a new statute providing for the annual licensing of
operators and possessors of "slot machines" which are therein defined as

"* * * all games and devices which are played for money, or checks or tokens redeemable in money or property and contain the element of chance."

This definition is quite broad and covers so many possible games and devices of different kinds and types that it is impracticable, if not impossible, to enumerate all of them here. However, for the purposes of this opinion it is sufficient merely to mention some of them that are somewhat commonly known and consider this proposed law as applied thereto.

Quite clearly all of the types and kinds of coin-in-the-slot machines and devices which require the insertion therein of a coin or coins in order to play or operate them and, automatically or otherwise, effect the awarding of prizes in money or redeemable checks or tokens in the event certain results are achieved by playing or operating them, in which chance is an element, come within the definition and, accordingly, the licensing provisions of this proposed statute would be applicable thereto. Among these are the "excavator" or "digger" type of machine where the endeavor is to pick-up or snare articles of merchandise; the numerous "pin-ball" devices in which one or more marbles or balls are propelled on to an inclined plane in an endeavor to have them avoid obstacles and come to rest in holes or slots of prescribed score values; the device commonly denominated slot machines by which prizes are awarded on the basis of wheels, drums or the like that are set in motion by the pulling of a lever or handle coming to rest in specified positions, and all of the many similar devices and modifications thereof. Also the games known as "bingo", "keno", "bank-night", and the like would come within the scope of this proposed statute when played for prizes in money or redeemable checks or tokens.

The pertinent provision in art. IV, sec. 24, of the Wisconsin constitution reads:
"The legislature shall never authorize any lottery, * * *"

In the recent case of State ex rel. Trampe v. Multerer, (1940) 234 Wis. 50, 289 N. W. 600, holding that "bingo" is a lottery, our supreme court referred to the above quoted provision of our constitution, noted that the provision in the constitution of Washington is identical therewith, and quoted with approval the following statement in reference thereto from Seattle v. Chin Let, (1898) 19 Wash. 38, 40, 52 Pac. 324:

"The language of the constitution is mandatory and the provision is self-executing. The question naturally suggests itself, if lotteries for charitable purposes may be lawfully conducted and permitted, why may not lotteries for any other purpose? We think that the constitutional provision admits of no exception in favor of lotteries for charitable purposes or for any other purpose."

Although the supreme court has never specifically passed upon the question of whether the coin-in-the-slot types of machines we have mentioned are lotteries, it has determined that "bingo", "bank night", and the like are lotteries and that coin operated "pin ball" machines awarding prizes are gambling devices. In State ex rel. Trampe v. Multerer, (1940) 234 Wis. 50, 289 N. W. 600, "bingo" was held a lottery. State ex rel. Cowie v. La Crosse Theaters Co., (1939) 232 Wis. 153, 286 N. W. 707, decided that "bank night" is a lottery. City of Milwaukee v. Burns, (1937), 225 Wis. 296, 274 N. W. 273, holds that "pin-ball" machines are gambling devices and this office has likewise so ruled in XXX Op. Atty. Gen. 470, XXIX Op. Atty. Gen. 206, and XXIV Op. Atty. Gen. 536. It cannot be doubted that the machines mentioned above as commonly denominated slot machines are gambling devices and we have so held in XXVI Op. Atty. Gen. 122, XXIV Op. Atty. Gen. 673 and XXI Op. Atty. Gen. 959.

While all lotteries are gambling devices it is not true that all gambling devices are necessary lotteries just per force of being gambling devices. The general rule is that a lottery involves three elements,—prize, chance, and a considera-
tion. In the cases of *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153, 286, N. W. 707 and *State ex rel. Trampe v. M utterer*, (1940) 234 Wis. 50, 289 N. W. 600, the court followed the majority rule and held that where these three elements exist the device or scheme is a lottery. In the subsequent case of *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 294 N. W. 491, holding that a “multiple dividend” scheme constituted a lottery, the following statement is made (p. 131) in reference to the *La Crosse Theaters Co.* case:

"* * * It was there held that the 'Bank night' scheme there involved constitutes a lottery; that for a scheme to constitute a lottery only three things are necessary: A prize, a chance, and a consideration; * * *.*"

Similarly, our supreme court has followed the rule of the majority of the courts for determining whether a particular game or device is a gambling device. *City of Milwaukee v. Burns*, (1937) 225 Wis. 296, 274 N. W. 273. It there used and applied the test that the character of the game or device is not whether it contains an element of chance or an element of skill, but which is the predominating element that determines the result.

The basis of the minority view appears to be extremely forced and considering that our supreme court has consistently followed the majority rule upon other related matters and questions as noted above, it is our conclusion that it would likewise follow the majority in this instance and hold that "pin ball" games, "slot machines" and other similar mechanical devices of the type here under consideration, as well as "bingo", "bank night" and other similar schemes, are lotteries when played for money or redeemable checks or tokens.

Conceivably there may be games or devices that would come within the definition of slot machines in substitute amendment No. 2, A. to Bill No. 325, A. whose use would not constitute the operation of a lottery. But, to the extent that this proposed law would apply to the various types and kinds of games, devices and machines which we have considered herein, it is our opinion that such law would authorize the conduct of lotteries and therefore would be invalid as violative of the quoted provision of art. IV, sec. 24 of the Wisconsin constitution.

2. Are "possessors" as defined in substitute amendment No. 2, A. to Bill No. 325, A., a proper class of persons to whom license for "slot machines" may be granted as proposed in said substitute amendment?

In view of our conclusion upon the preceding question, the scope of this question necessarily must be limited to such proposed statute as applicable only to devices and games, if there be such, that would come within the definition previously discussed and yet not constitute lotteries. As to whether this proposed statute would be valid when so limited and not applicable to the types and kinds mentioned in reference to the previous question is not here considered or passed upon.

As so restricted we cannot say that the classification of "possessors" is improper as not being based upon reasonable and substantial distinctions germane to the purpose of the law. Those within the class are all nonprofit organizations and there is ample precedent in the tax laws and elsewhere for according to them special privileges or treatment.
3. Are "coin machines" for which licenses are required under Bill No. 325, A. lotteries within the meaning of art. IV, sec. 24 of the Wisconsin constitution?

Bill No. 325, A. proposes a new section of the statutes to provide:

"No person shall expose to the public for play or permit the operation or use of any coin machine not used solely for vending of merchandise in which coins, or any substitute therefor exchanged for money, are inserted to effect operation, unless such machine shall have first been licensed *
*
*
"

and then prescribes how the licenses shall be obtained. This language is sufficiently broad to bring within the scope of this proposed statute all of the coin-in-the-slot games or devices mentioned herein in connection with question number 1 which are lotteries. To this extent our answer to question number 1 is equally applicable here. The definition in the statute proposed by Bill 325, A. would, however, also include coin-in-the-slot operated machines or devices used solely for amusement purposes, which, not being gambling devices, are not lotteries. Dallman v. Kluchesky, (1938) 229 Wis. 169, 282 N. W. 9; XXX Op. Atty. Gen. 300.

HHP

Courts — Suit Tax — Dollar suit tax levied by sec. 271.21, Stats., does not apply to entry of judgments on cognovit.

June 1, 1943.

MARSHALL NORSENG,
District Attorney,
Chippewa Falls, Wisconsin.

You request our opinion as to whether a clerk of the circuit court must collect and pay the suit tax provided by sec. 271.21 of the statutes in connection with judgments entered on cognovit.
Sec. 271.21, Stats., reads in part as follows:

"In each action in a court of record having civil jurisdiction there shall be levied a tax of one dollar which shall be paid to the clerk at the time of the commencement thereof, which tax on suits in the circuit court shall be paid into the state treasury and form a separate fund to be applied to the payment of the salaries of the circuit judges; * * *"

This office has previously held that the state tax provided by sec. 271.21, Stats., is collectible in actions but not in special proceedings, XXVII Op. Atty. Gen. 84, and we believe that this is a correct interpretation of the statutes.

Sec. 270.69 Stats., providing for the entry of judgments on confession, provides in part:

"A judgment upon a bond or promisory note may be rendered, without action, either for money due or to become due, * * *.*"

In the case of Guardianship of Kohl, 221 Wis. 385, 390, it was said:

"* * * The entry of a judgment for confession is not the commencement of an action. An action must be commenced by the service of a summons or the original writ. Sec. 261.01 Stats. * * *"

In accordance with the foregoing it is our opinion that a clerk of circuit court need not collect nor pay the tax provided by sec. 271.21, Stats., in connection with the entry of judgment on cognovit.

RHL
Banks and Banking — Public Deposits — Ch. 91, Laws 1943 (sec. 34.04, subsec. (4), Wis. Stats.), bank deposits and investments of board presently exceeding three million dollars, affects premium payments due from banks to board of deposits on last day of September, 1943, rather than payments due on last day of June, 1943.

June 2, 1943.

BOARD OF DEPOSITS.

You request our opinion relative to chapter 91, Laws 1943, which was published April 29, 1943, and reads as follows:

"34.04 (4) Whenever the bank deposits and investments of the board shall exceed $3,000,000 the premium rate for the ensuing quarter shall not exceed one-tenth of one per cent per annum."

You also call attention to subsec. (2) of sec. 34.08, Wis. Stats., relating to payments to be made by banks receiving public funds on deposit on the last day of March, June, September and December in each year. You state that your department presently has deposits and investments of over $3,000,000 and you ask our opinion as to when the new rate will go into effect.

As quoted above, ch. 91, Laws 1943, relates to the premium rate “for the ensuing quarter”. Subsec. (2) of sec. 34.08, Wis. Stats., relates to payments to be made quarterly on the average daily balance of deposits “for the preceding three months’ period”. It would appear from each of these provisions of the statutes that the quarterly premium payments are calculated on a status which has obtained during the preceding three months’ period,—first, under sec. 34.08 (2) as to the average daily balance, and secondly, as now provided by ch. 91, Laws 1943, on whether or not the bank deposits and investments of the board of deposits exceeds three million dollars. The use of the term “ensuing quarter” would in general parlance refer to a following or subsequent quarter. In practical operation, if the deposits and investments of the board should reach three million dollars
just before a payment date, it would seem difficult to determine the amount which should be paid, should the payment due on that date be affected. However, the payment to be made at the end of the next three months' period would be known at all times during that period.

It is our conclusion that ch. 91, Laws 1943, which became effective upon passage and publication (sec. 370.05, Wis. Stats.), will under the facts stated in your letter affect the premium payments to be made on the last day of September, 1943, rather than the payments to be made on the last day of June, 1943.

RHL

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**Taxation — Personal Property Taxes** — In event of repeal of sec. 70.13, subsec. (4), Stats. 1941, saw logs, timber, railroad ties and telegraph poles owned by nonresidents of this state that are decked, piled or otherwise temporarily stored in assessment district during April but which on May 1 no longer are located in state would not be subjected to assessment and taxation.

June 2, 1943.

**THE HONORABLE, THE SENATE.**

You have requested an opinion as to whether, in the event that Bill No. 427, A. should become law, thereby repealing sec. 70.13, subsec. (4), Stats. 1941, there will still remain in the statutes provisions for the assessment and taxation of the property described in sec. 70.13 (4), Stats.?

Recently, under date of January 29, 1943 (XXXII Op. Atty. Gen. 17), we had occasion to render an opinion to District Attorney Stellar of Sawyer county, in which we considered the applicability of this sec. 70.13 (4), Stats. We there advised that it is limited in effect to and provides only for the assessment of such saw logs, timber, railroad ties, and telegraph poles owned by nonresidents of this
state as are banked, decked, piled or otherwise temporarily stored in an assessment district during the month of April. Presumably this subsection was designed to subject to taxation saw logs, etc., cut from land in this state and then decked, piled or stored in an assessment district so that they are located therein during April but which probably will be shipped out of the state before May 1, the date for the assessment of personal property. In substance this subsection effects a special treatment of such logs, etc., by subjecting them to assessment and taxation if they are in an assessment district at any time during the month of April and regardless of whether or not they are still there on May 1. May 1 is the date prescribed for the assessment of personal property generally, but sec. 70.13 (4) makes an exception in respect to the logs, etc. which come within the special provisions thereof.

Such of said logs, etc., mentioned in sec. 70.13 (4), as on May 1 are still in such district, are located in another district in the state, or are in transit to some place in the state would be subjected to assessment and taxation by other provisions of the statutes. But such of said logs, etc., as on May 1 are not located at some place in the state or in transit to some point in the state would not, in the absence of provisions of sec. 70.13 (4), Stats. 1941, be subjected to assessment and taxation in this state.

HHP
Appropriations and Expenditures — Bridges and Highways — Street Improvement — Towns are entitled to obtain allotment under sec. 20.49, subsec (8), Stats., for improvement of town roads over lands owned by federal government in area known as Camp McCoy Military Reservation where state of Wisconsin has not ceded jurisdiction over lands in question to United States. Roads are “open and used for travel” within meaning of sec. 20.49, subsec. (8), when they are physically passable and used in fact for travel.

June 5, 1943.

WILLIAM E. O’BRIEN,
Highway Commission.

You have requested our opinion on the following question:

"Which, if any, of the town highways within the limits of the Camp McCoy Military Reservation owned and controlled by the federal government are to be considered public highways open and used for travel and eligible for allotment of state aid under section 20.49 (8) of the statutes?"

The facts giving rise to this question as stated in your letter are:

"The federal government has acquired substantial areas of land in six towns in Monroe county and the lands so acquired form a part of the Camp McCoy Military Reservation.

"On certain roads which existed in the area, the military authorities prohibit all public travel.

"On certain other roads within the area, traffic is restricted or regulated by guards, gates, or barricades, and public use thereof is subject to presentation of proper credentials approved by the military authorities.

"For certain other roads, such as those in close proximity to rifle ranges, traffic is permitted to use them only when the rifle range is not in use. Such ranges are almost in daily use and during their periods of use military police or guards prevent public use of the highways.

"Certain other roads within the area are presumably open and used by the public without special restrictions."
"The towns have taken no formal statutory action to discontinue or abandon such roads as public highways. On some of the roads open to public traffic the towns have made some expenditures such as for snow removal, and in certain instances where highways are partially restricted certain maintenance and snow removal operations have been carried on.

"Some of the towns involved have filed with the commission town plats of their respective towns showing the mileage of roads open and used for travel exclusive of all the town roads which existed within the military reservation. Another town has filed its plat showing the mileage of roads open and used for travel and includes all roads regardless of whether the use thereof is prohibited or restricted as hereinbefore described."

Sec. 20.49, subsec. (8), of the Wisconsin statutes provides that the state highway commission shall on March 10, 1942, and annually thereafter, apportion and distribute certain sums "to the towns, villages and cities of the state, for the improvement of public roads and streets within their respective limits which are open and used for travel, and which are not portions of the state or county trunk highway system, and which are not direct connections through cities between state trunk highways. * * *"

In XIV Op. Atty. Gen. 459 this office ruled that towns are not entitled to an allotment under sec. 20.49 (8), Stats., for the improvement of roads in the northern state park and in the Lac du Flambeau Indian reservation for the reason that the towns are not charged with the duty of constructing and maintaining them, stating at pp. 460-461:

"The allotments are made for the purpose of ‘improvement’ of roads. Towns, villages and cities are charged with the duty of improving only those roads which they are charged with the duty of constructing and maintaining. The answer to your question therefore depends upon whether towns, villages and cities are charged with the duty of constructing roads in the northern state park and in the Indian reservation."

The test in the instant case would therefore be whether the towns are under the duty of maintaining the roads in question.
Sec. 81.01, Stats., imposes upon towns the duty of maintaining all roads and bridges in their respective limits except as otherwise provided. The question therefore arises whether the towns in the Camp McCoy area are under a duty to maintain the roads within their limits which are now within the Camp McCoy Military Reservation. The answer to this depends upon who has the power of jurisdiction and control over these roads. *State ex rel. Neeves v. The Supervisors of Wood County*, (1876) 41 Wis. 28; II Op. Atty. Gen. 66.

The seventeenth clause of sec. 8 of art. I of the constitution of the United States grants congress the power

“To exercise exclusive legislation * * * over all of the 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; * * *.”

Sec. 1.02, Stats., grants the consent of the state legislature to the acquisition of land by the United States for the purposes enumerated in the constitutional provision referred to above, and also to a tract limited to 40,000 acres near Sparta, in Monroe county, to be used for military purposes, but in both cases the consent is subject to the conditions precedent stated in sec. 1.03, Stats., that an application must be made by an authorized officer of the United States to the governor, setting forth an exact description of the lands accompanied by a plat thereof and proof that all conveyances and records of judicial proceedings necessary to the acquisition of title have been recorded in the county in which the lands are situated. Pursuant to subsec. (2) of sec. 1.03, Stats., the ceded jurisdiction shall not vest in the United States until all the requirements of secs. 1.02 and 1.03 have been complied with.

It is without question that Camp McCoy comes within the words “forts, magazines, dock-yards, and other needful buildings” in the constitutional provision, as it has been held by the United States supreme court that Camp Pike, which was an army mobilization, training and supply sta-
tion in Arkansas, came within these words. *Surplus Trading Co. v. Cook*, (1929) 281 U. S. 647.

Where the United States acquires title to lands which are purchased by the consent of the legislature of the state within which they are situated, for any of the purposes mentioned in sec. 8, art. I, above quoted, the federal jurisdiction is exclusive of all state authority. *Fort Leavenworth R.R. Co v. Lowe*, (1885) 114 U. S. 525; *United States v. Unzeuta*, (1930) 281 U. S. 138. Where, however, the property is acquired in any other manner and the state cedes jurisdiction to the United States, the state may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. In the latter case, the terms of the cession to the extent that they may lawfully be prescribed determine the extent of the federal jurisdiction. *United States v. Unzeuta*, supra.

In *Robbins v. United States*, (1922) 284 Fed. 39, it was held that where the state through legislative agency ceded jurisdiction over roads through a national park to the United States, such action was sufficient to cede or transfer to the government such jurisdiction and control as the state possessed over the highways in the park. In Wisconsin the fee to the highways is in the abutting owners subject to a public easement. *Spence v. Frantz*, (1928) 195 Wis. 69. It would therefore seem that, where the abutting owner is the federal government and the state has ceded exclusive jurisdiction to the federal government over all land acquired by them, in the absence of any condition to the contrary, the state will have ceded or transferred such jurisdiction and control as it possessed over the roads on this land.

The conditions contained in secs. 1.02 and 1.03, Stats., under which the state legislature grants its consent to the acquisition of lands by the federal government contain no reservation of jurisdiction with respect to roads.

The jurisdiction and control of the United States over roads on lands to whose acquisition it has obtained consent of the state would necessarily be exclusive. In *State ex rel. Neeves v. The Supervisors of Wood County*, (1876) 41 Wis. 28, the court was presented with the question of whether a county purchasing a toll bridge or the towns in which such
bridge was located were under the duty of maintaining it. The court held that although the primary care of keeping highways and bridges in suitable repair devolves upon the towns and cities, the facts of the case took the bridge out of the general rule and imposed the duty on the county because the county had paid for the bridge and owned it. In its opinion the court reasoned, pp 34-35:

"* * * The fact that the bridge was purchased by the county and became the property of the county, would seem to carry with it as an incident the right to take care of, preserve and control it. And if the county has the right to control it as the property of the county, from the nature of the case this control and management must be exclusive. The cities of Grand Rapids and Centralia have no right to interfere with it, or to give directions for repairing it. It would seem to be self-evident that the power and right to control the bridge, to make repairs upon it and maintain it, cannot reside at the same time in the county and the two cities."

It is self-evident that the towns would be under no duty of maintaining roads on lands over which the United States had acquired exclusive jurisdiction and control and it would therefore appear that towns would not be entitled to receive an allotment for the improvement of roads within their limits running through that part of Camp McCoy Military Reservation to the acquisition of which the consent of the state legislature has been obtained.

However, if the conditions precedent to obtaining the consent of the state legislature have not been complied with, the reservation is a part of the territory of the state and within the operation of her laws, save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained. *Surplus Trading Co. v. Cook*, (1929) 281 U. S. 647.

Examination of the records in the office of the secretary of state discloses that applications have not been filed by the United States for the consent of the state to the acquisition of all the lands within the present limits of Camp McCoy. No applications have been filed within recent years and, since the government has greatly extended the limits of the
reservation within that time, it is probable that the highways in question are located on lands over which there has been no cession of jurisdiction. If such is the case and in the absence of a vacation of the town highways by the towns, their status would remain unchanged. The federal government would have no right to assert exclusive control over the roads. *Colorado v. Toll*, (1925) 268 U. S. 228. It is well settled law that the fee to a highway remains in the abutting owners, and that they may make such use of the highway as may be reasonable and which does not interfere with the public's right in the highway. *Hustisford v. Knuth*, (1926) 190 Wis. 495. Where the United States has not acquired the consent of the state to the acquisition of lands as required by sec. 8, art. 1 of the federal constitution, it holds merely as a proprietor, and the jurisdiction of the state is complete except that it cannot interfere with the use of such land for governmental purposes. *Williams v. Arlington Hotel Co.*, (1927) 22 F. (2d) 669. It would, therefore, follow that, where the federal government has not obtained exclusive jurisdiction, its substitution as the owner of lands abutting public highways in the place of other owners would effect no change in the character of the roads. They would remain public roads. The towns in which they are situated would be under the duty of maintaining them and entitled to receive state aid if the roads were also “open and used for travel” within the meaning of sec. 20.49 (8), Stats.

The further question to be considered is whether the disputed roads are “open and used for travel” within the meaning of sec. 20.49 (8), Stats. The meaning of these words is not defined by statute. To determine their proper construction, consideration must be given to the object and purpose of the statute and the end to be obtained. *State ex rel. Schauer v. Risjord*, (1924) 183 Wis. 553.

In construing the meaning of the words “open and used for travel” it should be borne in mind that secs. 81.01 and 81.03, Stats., impose a duty on the town authorities to keep passable at all times those highways which are required by law to be maintained by the town, and sec. 20.49 (8), Stats., was obviously passed for the purpose of providing state aid to assist municipalities in the performance of this
duty. It is apparent that the words "open and used for travel" were meant to exclude from the computation of road mileage for determination of allotments those roads which had been laid out but never opened and roads which had been altered, discontinued or vacated. The words, however, must be given their plain and ordinary meaning when applied to the particular circumstances involved here.

You state that the roads in question fall into the following classes:

1. certain roads on which all public travel is prohibited
2. certain roads on which travel is restricted to those presenting approved credentials
3. certain roads on which travel is permitted only at certain times
4. other roads presumably open and used by public.

All of these roads are open in the physical sense that they are passable in their entire length with the possible exception of the roads upon which all public travel is prohibited by military authorities. The latter would not be "open and used for travel" in the plain and ordinary sense in which those words are used for, if the town has no authority to reopen such roads, for all practical purposes they would be as effectively closed as they would be if they had been vacated or discontinued.

The other roads which you describe in your letter are in fact used for travel although subject to various restrictions. There is no doubt of the power of the proper authorities to restrict traffic as public necessity requires and, if the roads are in fact used for travel, even though such use is restricted, they are open for travel within the meaning of sec. 20.49 (8), Stats.

It is concluded that the towns in the Camp McCoy area are entitled to receive allotments pursuant to sec. 20.49 (8), Stats., for the improvement of those roads within their respective town limits which are within their jurisdiction as it is their duty to maintain them, and the fact that the use of some of these roads is subject to certain restrictions will not preclude the towns from including them as roads which are "open and used for travel" so long as all public travel on these roads is not prohibited.

JLB
Appropriations and Expenditures — Conservation Commission — Fish and Game — Claims for deer damage under sec. 29.596, Stats., must be both verified and filed within ten days from time of damage.

Provision of said section for reference to circuit judge relates only to cases where there is dispute as to amount of damage under claim validly filed.

There is open season for deer within meaning of sec. 20.20 (19), Stats., in any year when any county in state has open season, and claims may be paid in such year in county that has closed season.

Appropriation to pay deer damage made by sec. 20.20 (19), Stats., is limited to fiscal year in which claim arises, and claims arising after appropriation for fiscal year is exhausted cannot be paid out of appropriations for subsequent years.

June 8, 1943.

E. J. Vanderwall, Director,
Conservation Department.

Due to the increase in claims for deer damage under sec. 29.596, Stats., you have asked for our opinion on the following questions arising under this section:

1. Is it necessary for the commission to make an examination to determine that the claim was made within ten days prior to the date of filing the claim?

2. What action shall be taken if the claim is filed in due time but not verified until after the ten-day period?

3. In event a claim is filed after the ten-day period is the commission required to refer the claim to the judge of the circuit court under the provisions of section 29.596 (2) (b) ?

4. May deer damage be paid on claims filed when there is not an open season (See sec. 20.20 (19) ) although there are funds available?

5. In an open season, where funds provided in sec. 20.20 (19) have been exhausted, may such claims be paid in their order of filing when further funds are available?
6. May damage be paid in the counties not having an open season when there is an open season in the counties considered as deer country?

Sec. 29.596, so far as material here, reads:

"(1) Any person claiming damage to his property caused by deer or bear shall file a verified statement of his damage with the state conservation commission within ten days from the time such damage is alleged to have been incurred. No person, however, shall be entitled to any damages under this section who shall have posted his lands against hunting.

"(2) (a) The state conservation commission shall investigate and settle all such claims.

"(b) In all cases where the commission and the claimant cannot agree upon the amount of the damage sustained, the commission shall upon not less than ten days’ notice in writing, exclusive of Sundays and holidays, to such claimant, apply to the judge of the circuit court of the county wherein the claimant resides to hear, try and determine all issues raised in said matter. * * *

"(c) * * *

"(3) The director or assistant director of the state conservation commission shall file all approved claims and a statement of witness fees with the secretary of state. Such claims and fees shall be paid out of the fund provided in subsection (19) of section 20.20."

The entire matter of compensation for damage by deer is purely statutory. No such right existed at common law. In Wisconsin the legal title to all wild animals is vested in the state. Sec. 29.02 (1). However, the mere ownership of unreclaimed wild animals creates no liability as a general rule for injuries done by them while trespassing. 3 C.J.S., Animals, sec. 183, p. 1290. This, of course, is particularly true of the state, which is immune from all liability including tort except as created by statute. Holzwirth v. State, 238 Wis. 63, and cases cited. Consequently, the claimant, in order to receive compensation for deer damage, must have a claim which comes squarely within the plain wording of the statute.

With these preliminary considerations in mind we shall next discuss each of the specific questions you have asked.
1. It is necessary that an examination be made to determine whether the claim was made within ten days from the time the damage was incurred. In XXI Op. Atty. Gen. 1070-1071 it was stated that the claim must be filed within ten days from the time within which the damages are alleged to have occurred. Any other view would result in plain disregard of the wording of the statute that the claimant "shall file a verified statement of his damage with the state conservation commission within ten days from the time such damage is alleged to have been incurred."

The obvious purpose of this requirement is to give the conservation commission a chance to examine the alleged damage while the evidence is still fresh. Thus, we believe that the word "shall" as used in the statute here should be given its ordinary preemptory meaning. The idea that any discretion is involved is particularly to be excluded where public interests or rights are concerned. People ex rel. Crowe v. Marshall, 262 Ill. App. 128, 131, 132.

2. The answer to the question as to whether or not the claim, if filed in due time, may be later verified is somewhat more difficult. The purpose of the verification is to insure against perjury. It would seem that such protection as is afforded by the verification could as well be supplied at any time before the claim is acted upon as within ten days from the time of the damage and that the important thing is that the claim itself be filed within the time required by law.

However, as previously indicated, the entire matter is purely statutory and if it is felt that the furnishing of a verification for the claim within the time set works an undue hardship the remedy lies with the legislature. It could easily provide for amendment of the claim by adding the verification later, but it has not done so. Consequently the commission has no latitude in the matter but must follow the statute strictly. Statutes providing for paying out public moneys are strictly construed. They are not to be extended by implication or construction beyond the clear import of the language used, nor will they be enlarged so as to embrace matters not specifically named or pointed out. 59 C.J. 1133. See also II Op. Atty. Gen. 10, 11 and XXIV Op. Atty. Gen. 324.
Hence the claim must not only be filed within ten days but it must also be verified within that time.

3. There would be no point in referring to the circuit judge a claim filed after the ten-day period since, as already stated, the filing within this period is a statutory condition precedent to allowance of the claim. According to sec. 29.596, subsec. (2), par. (b), application is to be made to the circuit judge only where the commission and the claimant cannot agree "upon the amount of the damage sustained." This undoubtedly refers to disputes relating solely to amount in cases where the claim has otherwise been validly filed.

Questions 4 and 6 relate to the appropriation made by sec. 20.20 (19) for deer damage and they will be considered together.

Sec. 20.20 (19), which provides the appropriation for paying claims made under sec. 29.596, reads:

"$12,000 in each year in which there is an open season for deer, for the purpose of carrying out the provisions of section 29.596 and section 29.597. Any unexpended balance at the close of any fiscal year shall revert to the conservation fund and may be used by the conservation commission for any of the purposes specified in section 20.20."

Art. VIII, sec. 2, Wisconsin constitution, provides in part:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *"

and, as indicated above, appropriation statutes are construed strictly.

Sec. 20.20 (19) was created by ch. 428, Laws 1931. At about that time it was customary in some years at least to have a general closed season which applied to all counties in the state. In more recent years there have not been any general closed seasons affecting the entire state, and the policy has been to give greater flexibility to the program by setting up closed seasons in counties where deer are consid-
ered to be scarce, while leaving the season open in other counties where the deer are more numerous. Also regulation is achieved by adjusting the length of the open season to the conditions found to exist.

As a consequence the language of sec. 20.20 (19) is somewhat obsolete in its application. Doubtless the theory back of making the appropriation available in years having open seasons was that there would be money available to the state from deer hunting licenses in those years with which to pay damages and also presumably there would be more deer in such years causing damage than there would be in the years when deer were so scarce as to call for a general closed season. But regardless of the reason back of the appropriation we must be guided by its express language. Since for a number of years now there has been an open season for deer each year in at least some counties of the state we must admit that in each such year "there is an open season for deer" within the meaning of the appropriation statute regardless of the fact that the season may be limited to certain counties, and the appropriation becomes unavailable only when there is no open season in any county of the state. Thus, it makes no difference whether the particular county where the damage occurs has an open or a closed season so long as there is an open season somewhere in the state. We believe this disposes of both questions 4 and 6.

5. Sec. 20.20 (19) provides:

"* * * Any unexpended balance at the close of any fiscal year shall revert to the conservation fund and may be used by the conservation commission for any of the purposes specified in section 20.20."

In XXII Op. Atty. Gen. 709 it was ruled that any of the appropriation which had not been expended during one fiscal year might be used in the next fiscal year, since the statute providing for the reversion of the fund specifically provides that the money may be used for any of the purposes specified in sec. 20.20 which, of course, includes subsec. (19) thereof, relating to payment for deer damage. However, it
was also indicated in the above opinion that if the fund is exhausted the conservation commission cannot authorize payment of claims out of any fund.

We take it that claims are to be paid out of the appropriation for the fiscal year in which the claims arise and that they cannot be carried forward into the next fiscal year to be paid out of a new appropriation. This department has long ruled that appropriations are available only to meet such obligations as mature within the fiscal period for which they are voted. See II Op. Atty. Gen. 8 and earlier opinions therein cited.

WHR

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Courts — Attorneys — Industry Regulation — Architects — Public Health — Doctors — Dentists — Substitute Amendment No. 1, S., to Bill 313, S., to amend statutes to prohibit any architect, doctor, dentist or lawyer practicing in this state from changing to name other than that under which originally licensed, is valid exercise of police power.

June 10, 1943.

The Honorable, the Assembly.

By resolution No. 57, A., an opinion has been requested as to the validity of Substitute Amendment No. 1, S., to Bill No. 313, S.

This substitute amendment proposes an addition to each of the statutes relating to the licensing or registering of architects, doctors, dentists, and lawyers, and to sec. 296.36, Stats., providing for the change of name by circuit court proceeding, prohibiting the practice of such a profession in this state under any other name than that under which originally licensed or registered to practice in this state or any other state. Bill No. 313, S., is not as extensive and would merely provide that no person practicing a profession in this state for which a license is required may change his name to the same or similar name of any person practising
the same profession in the county. The underlying purpose behind both the original bill and the substitute amendment is to prohibit one practising a profession in this state from changing his name so as to avoid anything that may be unfavorable in continuing to use his former name and gain the advantage of using some other name, which may be that of some other person, and thereby leading clients or prospective clients to think they are dealing with such other person. This not only might be harmful and injurious to those who should thereafter deal with him by reason thereof, but in some instance could be most unfair to such other practitioner were he of outstanding ability and reputation, and might be done for the very purpose of effecting such results.

It is suggested that although Bill 313, S., might be perfectly valid as limited in territorial scope to only the county-wide competitive area, this substitute amendment would be invalid because it does not merely preclude the taking the name of some other person who is practising the same profession in the state as the territorial competitive area but absolutely prohibits any change in the name used in practising such profession in this state regardless of whether to the name of some other person practising the same profession in the state, and in reference to whom there might be some considerations of unfair competition.

At the very outset is the question of whether a person has such a right to change his name to any one he selects that he cannot be validly precluded from doing so and carrying on a business or profession under such name. A personal name is not the subject of exclusive appropriation so that one may preclude others having the same name from using it. 63 C. J. 429. Also a person has the inherent right to use his own name and to carry on a business or profession under such name. A personal name is not the subject of exclusive appropriation so that one may preclude others having the same name from using it. 63 C. J. 429. Also a person has the inherent right to use his own name and to carry on a business or profession in his name, and it is one of the natural rights that is protected by the constitution. Hilton v. Hilton, 89 N. J. Eq. 182, 104 A. 375, LRA 1918 F 1174. But it would seem apparent that one does not have any absolute inherent or natural right to change his name and do business thereunder. It is generally stated that it is well settled that, in the absence of a statutory prohibition, a person may lawfully adopt any name he chooses. 45 C. J. 381; 19 RCL 1332. See
also Notes in 14 LRA 692, 2 LRA (N.S.) 1089, 26 LRA (N.S.) 1167, LRA 1915 D 992, 110 ALR 219. Such statement of the law clearly implies that any right which a person may have is subject to regulation by statute and we find no case which holds that a state may not regulate or prohibit changes in or use of fictitious names in the interest of preventing deception or confusion of identity. In fact there are statutes in other states regulating and prescribing exclusive procedure for changing names, and in no instance has any court held that such statutes are invalid as invading inherent personal rights. It is therefore our conclusion that the regulation of changes in name to be used in carrying on a business or profession in a state is within the police power of that state.

The next consideration is as to whether these statutory changes proposed by Substitute Amendment to No. 1, S., to Bill No. 313, S., are a reasonable exercise of such police power in view of the fact that the prohibitions against change of names are not limited to changes to names of persons in a territory sufficiently small to be geographically competitive but are against all changes. This in our opinion is reasonable as being germane to the purpose of the proposed law, which is the prevention of deception and unfair practices. The evils this bill seeks to prevent are just as much state-wide as local, for there are now, and in the future undoubtedly there well be, persons in these professions whose reputation and standing is not only state-wide, but extends beyond the borders of our state. Furthermore, this prohibition as to change in name is applied to persons who are now validly subject to license by the state as prerequisite to carrying on such profession and is pertinent to and connected up with the carrying on thereof.

HHP
Constitutional Law — Public Officers — Governor — Bill No. 642, A., providing for election of governor when permanent vacancy occurs in office of lieutenant governor during permanent vacancy in office of governor, is constitutional.

June 15, 1943.

The Honorable, the Assembly.

By resolution No. 55, A., an opinion has been requested as to whether the provisions of Bill No. 642, A., if enacted into law, would be violative of art. V or any other provision of the constitution of Wisconsin. This bill proposes a statutory provision for the filling of the vacancy in the office of governor by election when a vacancy also occurs in the office of lieutenant governor during the time that the lieutenant governor, pursuant to art. V, sec. 7 of the constitution, is filling the vacancy by acting as governor. Rather than being violative of any provision of the constitution, such proposed statutory provision in our opinion is as contemplated by and in conformity with its provisions, which so far as here material are:

Art. V, sec. 7. "In case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the governor, absent or impeached, shall have returned, or the disability shall cease. * * *"

Art. V, sec. 8. "* * * If, during a vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or from mental or physical disease become incapable of performing the duties of his office, or be absent from the state, the secretary of state shall act as governor until the vacancy shall be filled or the disability shall cease."

Art. XIII, sec. 10 "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution."
The difference in language between secs. 7 and 8 of art. V is significant. It was held in the recent case of *State ex rel. Martin v. Heil*, (1942) 242 Wis. 41, 7 N. W. (2) 375, that where the governor-elect dies before commencement of the term to which he was elected there is a vacancy in the office of governor that is permanent and the lieutenant governor-elect succeeds to and continues to possess the powers and discharge the duties of governor “until the end of the term” of the governor whose vacancy he is filling. It is obvious that where the governor dies during his term the lieutenant governor acts as governor until the end of the term. This is due to the phraseology of sec. 7, which does not contain the word “vacancy” but says that upon impeachment, removal, death, inability due to mental or physical disease, resignation, or absence from the state, of the governor the powers and duties of governor devolve upon the lieutenant governor “for the residue of the term or until the governor, absent or impeached, shall have returned, or the disability shall cease.” Quite clearly this language says that the lieutenant governor takes over the duties and powers of governor in any of these contingencies and continues to possess them until the end of the governor’s term, excepting that where the governor is impeached or absent then upon his return to office, or where he is disabled then upon the disability ceasing, the governor, so to speak, takes back to himself the duties and powers of his office and the right and duty of the lieutenant governor to discharge the functions of governor terminates.

The phraseology of sec. 8 is materially different. It says that, if “during a vacancy in the office of governor” (which is interpreted as referring to any of the contingencies set out in sec. 7 for devolvement of the duties of governor upon the lieutenant governor) any of the same events specified in sec. 7 shall occur in respect to the lieutenant governor, that is, the office of lieutenant governor shall become vacant by virtue thereof, then the secretary of state “shall act as governor until the vacancy shall be filled or the disability cease.” The court in *State ex rel. Martin v. Ekern*, (1938) 228 Wis. 645, 658-659, 280 N. W. 393, commented upon this language as follows:
"The phrase, ‘or the disability shall cease,’ may be referable either to the disability of the governor or the lieutenant governor, and the phrase, ‘until the vacancy shall be filled,’ may likewise be referable to a vacancy in the office of governor or to a vacancy in the office of lieutenant governor, which occurs ‘during a vacancy in the office of governor.’"

Then, in the more recent case of State ex rel. Martin v. Heil, (1942) 242 Wis. 41, 55, 7 N. W. (2) 375, the following reference is made thereto:

"* * * Some ambiguity is created in sec. 8 by the statement that the secretary of state shall act as governor until the vacancy shall be filled or the disability shall cease, but it is arguable that the words ‘vancancy shall be filled’ relate to the return of an absent governor in contrast with one who has been impeached but who has removed his disability."

We find no cases in other jurisdictions directly in point upon the question here under consideration.

Had the framers of the constitution intended that the secretary of state in the event of permanent vacancies in the offices of governor and lieutenant governor should perform the duties of governor until the end of the current term they would have used the same language in sec. 8 that is used in sec. 7. They did not, however, do so and instead of saying that he should act “for the residue of the term” used the words “until the vacancy shall be filled.” The question then is as to what was the intention evidenced by this divergence in language?

In sec. 7 the contingencies are in a measure divided into three groups. In the event of death, resignation or removal there would be a permanent vacancy to which the provision that the lieutenant governor should act “for the residue of the term” would apply. Absence or impeachment are treated separately as being a vacancy of a temporary nature from which there may be a return to office and sec. 7 provides that the return of the governor to office therefrom terminates the period during which the lieutenant governor shall act as governor. Similarly sec. 7 treats disability from mental or physical disease separately and as a temporary vacancy by providing that the ceasing of such disability shall
likewise terminate the time for performance of the duties of governor by the lieutenant governor. Sec. 8, however, in this regard makes only two groupings. One by the provision "until the vacancy shall be filled" and the other by the phrase "disability shall cease." Comparison of the language of these two sections leads to the conclusion that the words "vacancy shall be filled" in sec. 8, as used as the alternative for "disability shall cease", were intended to include all of the contingencies resulting in a vacancy, whether permanent or temporary, that do not come within disability by reason of mental or physical disease specifically covered by the alternative language in sec. 8 of "disability shall cease", which should be given the same inclusive effect as when used in sec. 7. In other words, the phrase "disability shall cease" refers to identically the same things in both sections, and the phrase "vacancy shall be filled" in sec. 8 encompasses all the other contingencies which are covered by the other two separated groupings in sec. 7. So construed the words "vacancy shall be filled" in sec. 8 would cover all temporary or permanent vacancies except those due to mental or physical disability. This seems to be the logical rationalization of the reason for this difference in language and in our opinion demonstrates that it was not intended that the performance of the duties of governor by the secretary of state should be of the same continuity as in the instance of succession by the lieutenant governor.

Accordingly, the provisions of sec. 8 must be interpreted as merely providing for a temporary filling of the office of governor by the secretary of state, and at the same time calling for the filling of the vacancy, both temporary and permanent, where occasioned by contingencies other than physical or mental disability. A vacancy due to impeachment or absence from the state would be temporary and a return to office of the lieutenant governor would constitute a filling of the vacancy within the words "until the vacancy shall be filled" in sec. 8. True it is, that disability by virtue of mental or physical disease would also cause a temporary vacancy which would be filled by this disability ceasing, but that is covered specifically in sec. 8. There then remains the vacancy which is permanent, including the death, resignation or removal of the lieutenant governor.
There is nothing in sec. 8, or any other provision, of the constitution of a self-executing nature which would fill the vacancy of this kind in the situation covered by sec. 8. The only method of filling such a vacancy would be the selection of a successor to the office which is vacant. The constitution is thus silent in providing therefor and is not self-executing in respect thereto, and yet, under our interpretation of sec. 8, it is contemplated that such permanent vacancy shall be filled other than by having the secretary of state act as governor. Consequently the situation would come within the provision of art. XIII, sec. 10 of the constitution, providing that where no provision is made in the constitution for filling the vacancy the legislature may declare the manner of filling the same. This is precisely the objective and scope of the statutory provision proposed by Bill 642, A.

The above interpretation of these constitutional provisions fits into the pattern of our government as set out by the constitution. As indicated in State ex rel. Martin v. Heil, (1942) 242 Wis. 41, 7 N. W. (2) 375, one of the prime purposes in providing for a lieutenant governor was to have him as an elected representative of the people available and ready to step in and fill the place of the governor in case of vacancy. Art. IV, sec. 9, expressly provides for the selection of a temporary president to discharge the duties of lieutenant governor as presiding officer of the senate when the lieutenant governor is acting as governor. But no similar provision is made for someone to carry on the duties of secretary of state when he is acting as governor, although during that time the secretary of state would also have the important and extensive duties of his own office to perform. Because the office of secretary of state would not then be vacant there would be no occasion for the appointment or election of a successor. The absence of any provision to provide someone to discharge the duties of secretary of state in this situation is another indication that the acting as governor by the secretary of state is intended to be purely temporary and to designate someone to take over the reins of the executive office until the vacancy would be filled. That the taking care of such extremely remote contingencies was the purpose of sec. 8 seems clear to us and in accord with the
following statement of the court in *State ex rel. Martin v. Heil, supra,* at page 55:

"* * * We must not fail to give effect to plain and completely unambiguous language in the constitution, but where there is a reasonable ground to differ concerning the sense in which language is used, the provision should be examined in its setting in order to find out, if possible, the real meaning and substantial purpose of those who adopted it."

It is suggested that the above interpretation is precluded by the remarks at page 59 of the decision in *State ex rel. Martin v. Heil, supra:*

"We conclude that with respect to the office of governor, the constitution takes care of every contingency involving a duly elected governor, except one in which the governor, lieutenant governor, and secretary of state are all unable to function, a contingency evidently considered so remote as not to call for specific mention. * * *"

But, we do not view this statement as directed to the question here under consideration, but merely as noting that the constitution contains provisions for someone to step in immediately and perform the functions of governor upon there being a vacancy in that office so the state will not be without a chief executive, except in the remote possibility of there being no lieutenant governor and no secretary of state, which is so highly improbable as to not justify the constitution specifically providing therefor. Certainly such statement cannot be taken as implying that the constitution covers such remote possibility, for admittedly the constitution contains no provision therefor and, that being true, it is one of the situations which the constitution contemplates may be provided for by the legislature. Art. XIII, sec. 10. Similarly it cannot have been intended to preclude the legislature in providing for filling the permanent vacancy in the situation here involved, for there likewise is nothing in the constitution providing for filling such vacancy and yet the unequivocal language of sec. 8 is that the secretary of state shall act only until such vacancy is filled, which cannot be
interpreted other than as meaning that the vacancy shall be filled.

As matters presently stand there is no provision in the constitution or the statutes for the selection of either a governor or a lieutenant governor to fill the vacancy in either of said offices where a permanent vacancy occurs in the office of lieutenant governor during a permanent vacancy in the office of governor. Consequently the secretary of state would continue to perform the duties of governor for sec. 8 says that he shall do so until the vacancy is filled.

There remains the question of whether the vacancy which is to be filled is in the office of governor or in the office of lieutenant governor. The prior quotation from the case of State ex rel. Martin v. Ekern, indicates that the language "until the vacancy shall be filled" may refer to either the vacancy in the office of governor or the vacancy in the office of lieutenant governor. If it may refer to either, then in substance it refers to both and in that event it would be within the province of the legislature to provide for the one of them it prefers. So viewed Bill 642, A., is within the legislative authority.

On the other hand the only purpose of sec. 8 is to provide someone to carry on and discharge the duties and powers of the chief executive of the state. It would seem hardly sensible to interpret this language as authorizing the legislature to provide for filling the permanent vacancy in the office of lieutenant governor so that he could then under sec. 7 succeed to the duties and powers of governor and become the acting governor, but not to provide for filling directly the vacancy in the office of governor. It would be more consistent with the purpose at hand to provide for the selection of a new governor for the remainder of the term. This view has more of an appeal to reason and it is our view that such is within the intended effect of sec. 8.

The legislature in sec. 17.03, Stats., has exercised the right given to it by art. XIII, sec. 10 of the constitution by declaring the cases in which an office shall be deemed vacant. The provisions thereof relate to permanent vacancies and would be applicable to the situation at hand. Supplemented by the statute proposed by Bill 642, A., as exercis-
ing the right given to it by art. XIII, sec. 10 of the constitution of prescribing the manner of filling a vacancy in the office when there is no provision in the constitution therefore, the legislature in our opinion would be acting as is contemplated by the language of art. V, sec. 8.

It is therefore our opinion that the statutory provision proposed by Bill 642, A., if enacted into law would be constitutional.

JEM
HHP

/Public Health — Optometry — Wisconsin Statutes —

Under rule that where statute has been repealed and then wholly or partially re-enacted, re-enacted portion of statute will be regarded as continuation of old statute, ch. 273, Laws 1943, repealing and recreating ch. 153 of statutes relating to practice of optometry, does not have effect of abolishing present board of examiners in optometry, provisions relating to board membership under sec. 153.02, subsec. (1), Stats. 1941, being identical in effect with provisions of sec. 153.03 (1), Stats. 1943.

June 15, 1943.

DR. OTTMAR T. BEECK, Vice President,
Board of Examiners in Optometry.

You direct our attention to ch. 273, Laws 1943, which repeals and recreates ch. 153 of the statutes relating to the practice of optometry, and inquire if this enactment has the effect of abolishing the existing board of examiners in optometry so as to make necessary the appointment of an entirely new board.

Under the 1941 statutes provision was made for a board of examiners in optometry by sec. 153.02 (1), which reads:

"The Wisconsin board of examiners in optometry consists of five members, appointed by the governor for terms
of five years, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter. Each shall have been a resident of this state actively engaged in the practice of optometry for at least five years immediately preceding appointment. They shall file oath of office."

Under ch. 273, Laws 1943, provision for such board is made by sec. 153.03 (1), which reads:

"The Wisconsin board of examiners in optometry shall consist of 5 members, appointed by the governor for terms of 5 years, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter. Each shall have been a resident of this state actively engaged in the practice of optometry for at least 5 years immediately preceding appointment. Each shall make and file oath of office. The board shall fix the compensation of its members at not more than $8 for each day actually spent in carrying out their official duties, and actual and necessary expenses. The secretary may receive such additional compensation as the board may direct."

It is to be noted that so far as the composition or membership of the board is concerned the provisions of the old law and the new law are identical.

The general rule in construing a statute which repeals and recreates a law is stated in 59 C. J. 927 as follows:

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed, not as an implied repeal of the original statute, but as an affirmation and continuation thereof."

This doctrine has been consistently followed by the Wisconsin supreme court. In State ex rel. Holland v. Lammers, 113 Wis. 398, the court said, at p. 409:

"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. Fullerton v. Spring, 3 Wis. 667; Laude v. C. & N. W. R. Co. 33 Wis. 640; Glentz v. State, 38 Wis. 549; Scheftels v. Tabert, 46 Wis. 439; Gilkey v. Cook, 60 Wis. 133; State ex rel. Rochester v. Board of Sup'rs. of Racine Co. 70 Wis. 543; Cox v. North Wisconsin L. Co. 82 Wis. 141. * * *"
The rule as stated above was later quoted with approval in *E. L. Hustig Co. v. Milwaukee*, 200 Wis. 434 at 437, and in *Estate of Hood*, 206 Wis. 227 at 233. See also *Amepohl v. Tax Comm.*, 225 Wis. 62 at 71; XXVI Op. Atty. Gen. 565, 566; and XXVIII Op. Atty. Gen. 702, 703.

Under the foregoing rule it seems clear that sec. 153.03 (1), as created by ch. 273, Laws 1943, and relating to the membership of the board of examiners in optometry, is to be regarded merely as a continuation of sec. 153.02 (1), 1941 statutes, and that the existing board has not been abolished by implication by the enactment of ch. 273, Laws 1943.

Attention is called in closing, however, to Bill No. 424, S., introduced on June 10, 1943, which amends sec. 153.03 (1) as created by ch. 273, Laws 1943. As amended the material portion of sec. 153.03 (1) reads:

"The Wisconsin board of examiners in optometry shall consist of 5 members, appointed by the governor for terms of 5 years, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter. One of said members shall be appointed for a term of 1 year; one for a term of 2 years; one for a term of 3 years; one for a term of 4 years; and one for a term of 5 years. Thereafter the terms of the members shall be 5 years and until their successors are appointed and qualify. * * *

Apparently this bill was introduced on the theory that ch. 273, Laws 1943, had the effect of abolishing the present board of examiners in optometry but, as above pointed out, we do not believe that such is the effect of ch. 273.

WHR
Banks and Banking — Corporations — Small Loans — Trade Regulation — Money and Interest — In view of doubt as to proper interpretation of subsecs. (3), (3a), and (4a) of sec. 115.07, Stats., question of whether state banks are entitled to permit under subsec. (3a) of sec. 115.07 is one for courts, and no opinion is expressed thereon.

Sec. 115.09 does not apply to banks and banking commission has no authority to issue license thereunder to state bank.

Ch. 214, Stats., does not apply to banks and banking commission has no authority to issue license thereunder to state bank.

June 17, 1943.

Banking Commission.

You ask our opinion as to whether the banking commission has the authority

(1) to issue a permit under sec. 115.07 (3a) to a bank chartered under the laws of this state;

(2) to issue a license under sec. 115.09 to a bank chartered under the laws of this state;

(3) to issue a license under ch. 214 to a bank chartered under the laws of this state.

You state that since August of 1938 permits have been issued under sec. 115.07 (3a) to certain banks and that there are presently thirty-four permits under this subsection outstanding to banks chartered in this state. You also state that the commission has since April of 1937 issued licenses under sec. 115.09 to certain state banks and that there are presently five such licenses outstanding to banks chartered in the state. You also state that no licenses to banks have been issued at any time under ch. 214.

You state that in connection with your request you would appreciate our giving consideration to the question, in addition to other questions which may be involved, as to whether sec. 115.07 (3a), sec. 115.09 and ch. 214, or any of them, constitute bank legislation so that a vote of two-thirds of the legislature would be required in order to make the provisions thereof applicable to banks.
With respect to your first question, we have given considerable study to the history and various interpretations of sec. 115.07, particularly subsecs. (3) and (3a) thereof. Subsec. (3) of sec. 115.07 was first enacted in a form somewhat similar to its present form by ch. 327, Laws 1895. Subsec. (3a), providing for the issuance of a permit, was enacted by ch. 450, Laws 1915.

It will be noted from examination of subsec. (3) that it is generally restrictive and penal in nature, while subsec. (3a) is permissive in nature. The effect of this apparent ambiguity as affects the question at hand has not been dealt with in any decisions which we have been able to find. We believe it may be open to question whether subsecs. (3) and (3a) of sec. 115.07 were intended to apply to banks. Banks are, by sec. 221.04, subsec. (1), par. (f), specifically empowered to make loans on real and personal security, and such transactions are, of course, carried on as a part of the usual and ordinary conduct of the business of banking. A bank would not need any permit under subsec. (3a) of sec. 115.07 in order to make loans on chattel mortgage or other security, although banks are subject to the general usury law. If subsecs. (3a) and (4a), created by ch. 450, Laws 1915, are interpreted as applying to banks, the question arises as to whether they constitute in effect a regulation of the banking business so that a vote of two-thirds of the elected members of the legislature would have been required under section 4 of article XI of the Wisconsin constitution.

In view of the fact that, as stated in your letter, a number of permits under sec. 115.07 (3a) have been issued to state banks and are now outstanding, and in view of the doubts we have expressed as to the meaning of subsecs. (3), (3a) and (4a) of sec. 115.07, we believe that your question (1) would be a question to be determined by the courts, and we express no opinion thereon. We should be glad to assist in any way possible in having this question determined.

As to sec. 115.09, the subject of your second question, we believe it is clear that this section was not intended to regulate the business of loaning money as conducted by state banks. Sec. 115.09 relates by its terms to a class of money
lenders engaging in the particular type of loan transactions and business to which the section relates. It is provided in subsec. (12) of sec. 115.09 that the section does not apply to any person, copartnership or corporation doing business under any of the laws of this state or of the United States relating to banks. Were sec. 115.09 intended to apply to the business of banking, the question might arise, as suggested in your inquiry, as to whether the section would have required a vote of two-thirds of the members of the legislature under section 4 of article XI of the constitution, as constituting a law for the regulation of the banking business. In view of our opinion that sec. 115.09 does not apply to banks, we do not deem it necessary to consider this question further.

Our answer to your question (2) is No.

With respect to ch. 214, the subject of your third question, we believe it is likewise clear that ch. 214 was not intended to apply to the business of loaning money as conducted by state banks. Sec. 214.23 provides that ch. 214 shall not apply to any person doing business under any law of this state or of the United States relating to banks. Since we believe it is clear that ch. 214 does not apply to banks, we need not consider any constitutional question which may be presented.

Our answer to your question (3) is No.

RHL
Indigent, Insane, etc. — Poor Relief — Legal Settlement — Under sec. 49.02, subsecs. (1), (5) and (7), Stats., if husband and wife have legal settlement in particular municipality and husband deserts wife, losing his legal settlement there and failing to acquire new one elsewhere, wife who continues to live in same municipality does not thereby lose her settlement so as to become county-at-large charge.

June 17, 1943.

S. Richard Heath,
District Attorney,
Fond du Lac, Wisconsin.

You have asked for our opinion on a question of legal settlement arising out of the following facts:

Mrs. X, many years prior to her marriage in 1917, resided in the city of Fond du Lac and was self-supporting. After her marriage she and her husband, both having legal settlement in the city of Fond du Lac, continued to live there until 1929, at which time the husband left his wife and did not return to the city of Fond du Lac. He lost his settlement in the city of Fond du Lac and has not acquired a new one elsewhere, as he has never been in any one place for a year.

Mrs. X received relief for three months in 1933 as a charge of the city of Fond du Lac. More than three years after this last relief was granted she again received relief and has done so ever since. The city contends that she is a county-at-large charge because her husband lost his settlement and consequently she lost hers.

It is your opinion that while the wife follows and has the legal settlement of her husband under sec. 49.02, subsec. (1), Stats., she does not follow him in his loss of legal settlement under sec. 49.02 (7) when he has been voluntarily and uninterruptedly absent from the municipality of legal settlement for a year or more.

Sec. 49.02 (1) reads:

“A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had
any settlement it shall not be lost or suspended by the marri- 
age; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall re- 
ceive it in the place where his wife shall have her settle- 
ment."

Sec. 49.02 (5) reads:

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

Sec. 49.02 (7) reads:

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

This department has ruled that a woman having a legal settlement in a municipality in this state does not lose it on marrying a man from another state. See XXII Op. Atty. Gen. 665 and 944.

It is to be noted that sec. 49.02 (1) provides that a mar- ried woman shall always follow and have the settlement of her husband "if he have any within the state". In other words, the husband must have a legal settlement in the state as a condition precedent to the creation of the derivative settlement of the wife under the above statute.

The provisions of subsec. (5) supplement the provisions of subsec. (1) by providing that a married woman whose husband has no legal settlement in this state may gain a set- tlement by residing for a year in some municipality in the state, thereby indicating that the husband's lack of legal settlement does not necessarily attach to the wife.

Moreover once a legal settlement has been acquired it can be lost only in one of the ways prescribed by subsec. (7), that is, (1) by acquiring a new one, or (2) by voluntary
and uninterrupted absence from the municipality of legal settlement for a year or more.

Here the wife has not acquired a new settlement, since her husband did not acquire a new one anywhere in the state so as to give her a derivative settlement under subsec. (1), and she has not been absent for a year or more from the city where admittedly she did have a legal settlement.

Thus under subsec. (7) the settlement which she has legally acquired in the city of Fond du Lac must be deemed to continue.

In closing it might be added that this is the administrative interpretation which is accorded these statutes by the state department of public welfare. We quote from page 19 of the Digest of Relief Settlement Laws issued by the department in January, 1942:

"Thus, a married woman whose husband has no settlement may gain one by residence. For example, if she had resided in A six months before marriage and six months after marriage, her husband not yet having gained a settlement, she would have a settlement in A by residence. Likewise, if her husband gains no settlement after marriage, she can gain or lose a settlement as would a single adult woman, be she of full age or not. If the husband has a settlement at the time of marriage, the wife would ordinarily lose her settlement when he lost his, but if the wife continued to reside in A, the town of his settlement, while the husband absented himself for the year, he would lose his settlement, but her residence for the year when he was absent would establish her independent settlement." (Italics ours.)

You are therefore advised under the facts stated that Mrs. X has not lost her legal settlement in the city of Fond du Lac so as to become a county-at-large charge merely because her husband has lost his legal settlement there and has not acquired a new one elsewhere.

WHR
Civil Service — Public Officers — State Employees — State employee compensated at monthly rate of pay is not entitled to additional pay for overtime work and has no right to hearing on any such claim before personnel board under ch. 16, Stats., civil service law.

June 18, 1943.

A. J. OPSTEDAL,
Director of Personnel.

You have inquired whether the personnel board may properly grant a hearing to a resigned state employee upon his claim for compensation for overtime, such request for hearing having been made shortly before his resignation.

The individual making the claim was employed as an investigator for the beverage tax division on August 1, 1940, and was transferred to the banking department as a bank liquidating examiner on August 20, 1941. He resigned from that employment on November 20, 1941, and was re-employed by the beverage tax division on January 5, 1942, resigning on November 19, 1942.

Request for hearing before the personnel board was made on November 7, 1942, and relates to overtime work for the banking department. The amount of the claim is $332, and on February 28, 1942, it was filed with the banking department, which has taken no action.

The only statutory right of hearing before the personnel board granted to state employees is that provided in secs. 16.05 (5), 16.13 (2), 16.24 (1) and 16.29 (4). The first of these relates to appeals from any action taken by the director in any matter arising under sec. 16.01 to sec. 16.30, upon the application of any interested party. The second relates to appeals from refusal of the director to examine or certify an eligible applicant. The third relates to cases of removal, suspension without pay, discharge or reduction in pay or position, and the fourth relates to transfer of aged or disabled employees to part-time service or pay or to retirement.

Obviously the situation under discussion comes within none of the foregoing statutory provisions granting the
right of appeal to the personnel board and public hearing thereon. Under Rule V, sec. 2 of the board rules, employees may appeal to the board from action of the director relating to allocation and re-allocation of positions in the classified service; but this again is not involved here, nor is Rule VI, sec. 10, which gives employees an opportunity to be heard on proposed changes in salary ranges.

The personnel board has broad powers with respect to holding public hearings on its own motion. See secs. 16.05 and 16.06. This, however, is quite distinct from the matter of application by individual employees as above pointed out.

Equally important for purposes of the present inquiry is the entire lack of any legal foundation whatsoever for a claim based on overtime service of a state employee employed at a monthly rate of pay. If such claims have any merit in law the legislature would need to give serious consideration to increasing the appropriations of many, if not most, state departments since overtime work is becoming more and more common, particularly now with war time labor shortages in state as well as private employment.

The only recognition that this problem has received in the legislative sense is that found in Joint Resolution No. 19, S., adopted as Joint Resolution No. 47 by the 1937 legislature, and which reads:

"Resolved by the Senate, the Assembly concurring, That it shall be the policy of the state of Wisconsin that the basis of employment in offices, departments and institutions of the state shall be a seven hour day and a five and one-half day week except where the duties are of a continuing nature and a shift arrangement on an eight hour basis is necessary and except in emergencies; that in the event of emergency overtime work, it shall be the policy of the state that employs be entitled to compensatory time off."

This, however, falls short of a statutory provision for overtime pay for three reasons: In the first place it is not a statute but merely a legislative resolution, which does not have the force of law. Secondly, it is directory rather than mandatory, since it states a policy rather than a command. Lastly, it does not provide for overtime pay but merely pro-
vides for compensatory time off. To take time off from a position after resigning from such position involves a contradiction in terms that so far as we know goes beyond the rationale of even the most liberal decisions in the field of labor law.

In this connection the personnel board has adopted Rule VI, sec. 7, which reads:

"When a monthly rate of pay has been established for a class of position, no additional compensation shall be paid for overtime, whether in the discharge of the duties of the position, or additional duties imposed, undertaken, or volunteered, or for duties in another position in the same unit; provided, however, that in accordance with the policy expressed by the legislature in joint resolution No. 19, S. (1937) compensatory time off for such overtime work may be allowed under the regulations prescribed by the appointing authority concerned. Such compensatory time off shall be reported in writing to the bureau in order that proper record may be kept thereof."

This rule correctly states the law as to additional compensation for overtime pay. In view of the foregoing you are advised that under the facts stated the claimant is not entitled to a hearing before the personnel board and that under the law the board would be powerless to grant any relief if such a hearing were held.

This discussion makes it unnecessary to go into the further questions you have raised as to whether the board has the power to order a department to comply with its findings in a case of this sort where it does hold a hearing and as to whether the claim in this instance would be barred by laches.

WHR
Automobiles — Law of Road — Corporations — Motor Transportation — Owner of trailers kept for purpose of rental to private users need not qualify such trailers under sec. 85.01, subsec. (4), par. (e), Stats.

June 22, 1943.

Hugh M. Jones, Commissioner,

Motor Vehicle Department.

Your inquiry of May 26, 1943, poses the following facts:

The owner of a number of trailers having gross weights of less than 3,000 pounds operates a business of leasing such trailers to automobile owners for their personal use. Such owners attach the trailers to their personal automobiles and transport their own property therein. The owner of the trailers has procured lessor permits under sec. 194.44, Stats., and has complied with the insurance requirements of sec. 194.41, Stats.

You request an opinion as to whether such owner must qualify each trailer under sec. 85.01, subsec. (4), par. (e), Stats., which provides:

“For the registration of each trailer or semitrailer, designed to be hauled by a motor vehicle, and having a gross weight of one and one-half tons or less, if used for hire, a fee of three dollars; for every trailer or semitrailer having a gross weight of more than one and one-half tons, a fee one-half of the fee specified in paragraph (c) of this subsection for a motor truck of the same gross weight.”

In essence, the question stated in another way is this: Are trailers used in the manner hereinbefore described “used for hire” in the sense those words are employed in the statute just quoted?

The whole phrase “used for hire” is not defined by statute. The phrase and its components must then be construed according to the general and approved usage of the language. Sec. 370.01 (1), Stats.

In the phrase “if used for hire” the words “for hire” clearly modify the word “used”. Webster’s New International Dictionary defines “use” to mean “to convert to one’s
service; to avail oneself of; to employ, as 'to use a plow' *
* * *". The vehicles here in question are "used by the lessees or bailees in accordance with the purpose for which they were constructed. The owner of the vehicle keeps and maintains them for rental purposes. But he cannot be said to be using them.

While the term "for hire" is not defined in ch. 85, Stats., it is defined in ch. 194, Stats., in the "motor vehicle transportation act" as follows, (sec. 194.01 (15)):

" 'For hire' means for compensation, and includes compensation obtained by a motor carrier indirectly, by subtraction from the purchase price or addition to the selling price of property transported, where the purchase or sale thereof is not a bona fide purchase or sale. Any person who shall pretend to purchase property to be transported by him; or who shall purchase such property immediately prior to and sell the same immediately after the transportation thereof shall be presumed to be transporting such property for hire and not a bona fide purchaser or seller thereof, which presumption may be rebutted. Nothing herein contained shall be construed to include motor vehicle operations which are conducted merely as an incident to or in furtherance of any business or industrial activity. Nothing contained in this subsection shall affect the rights of persons regulated by the provisions of chapter 129."

Since this chapter purports to define and regulate motor vehicle transportation, and since by its language the definition seeks to be all inclusive, it should suffice for the purposes of this opinion.

There appear to be but two leading cases close enough in point as to constitute persuasive authority here. In Armstrong v. Denver Saunders System Co., (Colo.) 268 P. 976, the Denver Saunders System rented automobiles to persons who themselves drove them. The office of secretary of state of Colorado sought by appropriate legal action to compel the owner of such vehicles to pay an additional license fee for registration of motor vehicles used in the transportation of passengers for hire, under a statute of that state imposing such fee. The Colorado supreme court held that such an operation did not constitute a "for hire use" of the rented automobile. The court said in part; p. 977:
"* * * the phrase 'operated for hire' could not in-
clude a * * * trailer rented to one who was to use it
in his own work. The lessor of an automobile is not operat-
ing it any more than the lessor of a farm is cultivating it,
or the lessor of a horse is driving it.” (Italics ours.)

In *State v. Hertz Driv-Ur-Self Stations, Inc.*, (Wash.) 271
P. 331, the defendant corporation kept and maintained au-
tomobiles for rental to persons driving them themselves.
Defendant was prosecuted under a criminal statute for op-
erating an automobile for hire without having a necessary
license. It was held that the rental of such cars to persons
driving them themselves was not a “for hire” operation
within the meaning of the statute.

It is our opinion that trailers so used are not “used for
hire” in the sense contemplated by the statute, and accord-
ingly the owner need not qualify them under sec. 85.01 (4)
(e), Stats.

SGH
Courts — Criminal Law — Prisons — Prisoners —

Courts of record have no power to suspend execution of sentence of imprisonment in default of payment of fine and costs imposed in criminal case without placing defendant on probation under sec. 57.04, Stats. If unlawful stay of execution is granted, period of imprisonment runs notwithstanding and defendant may not be committed or held after expiration thereof. Sec. 353.25 authorizes execution against property to collect fine.

In actions brought under ch. 288, Stats., to enforce forfeitures under county ordinances, court has no power to stay execution of imprisonment imposed for nonpayment of forfeiture and costs under sec. 288.09, and period of imprisonment will run notwithstanding such unlawful stay, so that defendant cannot be held or imprisoned after expiration thereof. Where county ordinance passed under sec. 59.07 (11) or sec. 59.08 (15) prescribes imprisonment as means of enforcing penalty for its violation, court likewise has no power to stay execution thereof, at least in absence of provision to that effect in ordinance.

Sec. 272.09, Stats., does not authorize body execution in action under ch. 288 to enforce judgment for fine or forfeiture for violation of county ordinance but execution against property may issue as provided in ch. 272, Stats.

Courts of record have no power in criminal cases to review their judgments and impose lighter sentences, either during term or afterwards, after execution of original sentence has commenced. Sheriff discharging prisoner pursuant to such void court order is guilty of negligent escape under sec. 346.36. (If sheriff discharges prisoner under court order which he knows to be void he is probably guilty of voluntary escape under sec. 346.35.) Sec. 57.04 (3) applies only to cases where defendant was originally granted probation under sec. 57.04 (1).

Courts of record have no power in municipal ordinance cases to review their judgments and impose other sentences, during term or afterwards, after execution of original sentence has commenced. Sec. 252.10 (1) is not applicable to such cases.
June 24, 1943.

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

In your letter you request an answer to eight questions, which will be taken up in order. The first two questions are as follows:

"1. May a court of record after imposing sentence on a state charge of a fine or an alternative in jail, such as $100 or sixty days in jail, for cause shown on behalf of dependents of defendant, immediately suspend such sentence for the single purpose of allowing time within which the defendant may pay the fine either on a partial payment basis or otherwise without the formality of a probation under section 57.04?

"2. If under the circumstances set forth in question #1 the fine remains unpaid at the expiration of the original sentence of sixty days, may the defendant subsequently be committed to serve such sentence?"

Both these questions must be answered in the negative. It is well established in this state that the court may not suspend sentence on a criminal charge merely to allow time to pay the fine. Any attempt to stay execution is nugatory and the time of imprisonment runs even though no actual imprisonment is suffered, so that at the expiration of sixty days after the imposition of sentence the defendant is exempt from any imprisonment for nonpayment of the fine in the hypothetical case you suggest. In re Webb, (1895) 89 Wis. 354. See State ex rel. Oshkosh Trunk Co. v. Goerlitz, (1920) 172 Wis. 581, 583; Drewniak v. State ex rel. Jacquenst, (1942) 239 Wis. 475. However, it would seem that a commitment issued at any time within said period of sixty days would authorize the imprisonment of the defendant for the balance of the period unless the fine and costs are sooner paid. See Hack v. Mineral Point, (1931) 203 Wis. 215, 223. If the court desires to give time to pay the fine, and to do so according to law, it will have to impose probation in accordance with sec. 57.04, Stats., which is the only source of authority under which execution may be stayed in such cases. See Brozosky v. State, (1928) 197 Wis. 446.
In any case, however, the court may issue an execution against the property of the defendant for the fine and costs under sec. 353.25, Stats. Since that section is silent as to the time and manner of issuing and enforcing the execution, it must be inferred that an execution under ch. 272, Stats., is meant (see VI Op. Atty. Gen. 47) and this being true, it would seem that sec. 272.04 is applicable, under which the execution may issue at any time within five years after rendition of judgment.

Your third and fourth questions are as follows:

"3. May a court of record after imposing a penalty under a municipal ordinance of a fine or in the alternative a jail sentence, such as $100 or sixty days in the county jail, for cause shown on behalf of dependents of defendant, immediately suspend such sentence for the single purpose of allowing time within which the defendant may pay the fine either on a partial payment basis or otherwise?

"4. If under the circumstances set forth in question #3 the fine remains unpaid at the expiration of sixty days from date of imposition, may a commitment then be issued to incarcerate the defendant for the original sentence or in lieu of such commitment, may a body execution for a civil debt be utilized?"

These questions cannot be categorically answered "yes" or "no" because they may depend in some cases on the terms of the ordinance. As a general rule, the court has no power to stay execution in such cases.

You as district attorney are concerned only with violations of county ordinances. Accordingly, this opinion will be devoted principally to such cases.

As a starting point, it may be said that the general or standard method of enforcing forfeitures imposed by county ordinances is by an action under ch. 288, Stats. See especially sec. 288.10. Sec. 288.09, subsec. (1), provides as follows:

"Where judgment is recovered pursuant to this chapter it shall include costs and direct that if the same be not paid the defendant (if an individual) shall be imprisoned in the county jail for a specified time, not exceeding six months, or
until otherwise discharged pursuant to law. The commitment shall issue, as in ordinary criminal actions, and such defendant shall not be entitled to the liberties of the jail.”

This section obviously intends to make it the duty of the defendant to pay the forfeitures and costs instanter or be committed forthwith, as in criminal cases under sec. 353.25. So it would seem that the rule announced in In re Webb, (1895) 89 Wis. 354, applies and the court may not stay execution of imprisonment for nonpayment, and if he does stay execution the term of imprisonment runs notwithstanding the erroneous stay. This view is supported by the case of Hack v. Mineral Point, (1931) 203 Wis. 215, 221-222, applying the rule in an action for violation of a city ordinance. See also 43 C. J. 476, sec. 695.

Moreover, sec. 288.18 shows the intention of the legislature that forfeitures should be collected promptly, since it provides:

“If any justice of the peace * * * shall give time or delay to any person against whom any such judgment is rendered by him, or take any bond or security for its future payment, he and his sureties shall also be liable for the payment of such judgment upon his bond.”

You also raise the question whether a body execution under sec. 272.09 could be issued to collect the forfeiture. Sec. 288.09, above quoted, formerly contained subsec. (3) reading as follows:

“This section shall not prevent the issue of an execution to collect any such judgment at any time within two years from its rendition.”

This was repealed by sec. 79 of ch. 483, Laws 1935 (a revisor’s bill), to which was appended a revisor’s note (found in Amendment 1, S., to Bill No. 75, S.) reading as follows:

“General provisions limiting time for issue of execution should apply.”

In view of this note, the repeal of sec. 288.09 (3) did not change the law except as to the time for issuing execution.
So it would appear that notwithstanding sec. 288.09, the provisions of ch. 272 relating to executions apply to forfeiture actions under ch. 288. Since the defendant (unless a female) is subject to arrest under sec. 264.02 (1) ("In an action for fine or penalty"), it would seem *prima facie* that under sec. 272.09 a body execution could be had, after return of an execution against property wholly or partially unsatisfied. However, it is extremely improbable that the legislature intended to provide *two* periods of imprisonment for nonpayment of the same forfeiture, and under the rule that penal statutes must be strictly construed in favor of liberty, it is considered that the execution referred to in former sec. 288.09 (3) and in the reviser's note, both quoted above, means an execution against property only. The imprisonment provided in sec. 288.09 (1) "is in the nature of an execution against the body of the offender" (See Milwaukee v. Johnson, (1927) 192 Wis. 585, 592). In criminal cases it is clear that but one term of imprisonment may be imposed for nonpayment of a fine, and that an execution under ch. 272 may issue *against property only*. Sec. 353.25, Stats. In tort actions but one body execution may issue. Sec. 272.10. A contrary result as to forfeitures would be a paradox amounting to an absurdity, which must always be avoided in construing statutes, even at the cost of doing some violence to the literal meaning of the language used. *State ex rel. Associated Indemnity Corp. v. Mortensen*, (1937) 224 Wis. 398, 400-401 (recognizing rule), and cases there cited.

So it is concluded that sec. 272.09 is inapplicable to cases covered by sec. 288.09, even if the court erroneously stays execution under the latter section.

You refer to the case of Janesville v. Tweedell, (1935) 217 Wis. 395. That case turns upon the fact that the ordinance in question was a *city* ordinance, as to which different statutes apply, but doubtless under the reasoning of that case a female could be imprisoned (under sec. 288.09) for violating a county ordinance as well.

The foregoing relates to the general method of collecting forfeitures under ch. 288. However, under two specific statutes counties apparently have power to provide other
means of enforcing penal ordinances: First, under sec. 59.07 (11), which authorizes counties to enact ordinances or by-laws regulating highway traffic on certain highways, to declare and impose forfeitures for violation thereof and "provide fully the manner in which forfeitures shall be collected * * *." Under this section it would seem that the powers of the court with reference to staying execution would depend on the terms of the ordinance or by-laws and that if it provides a period of imprisonment for nonpayment of the forfeiture without specifically authorizing a stay of execution, the court would have no power to stay execution and the rule of Hack v. Mineral Point, (1931) 203 Wis. 215, 221-222 (supra) would apply.

The second type of county ordinance which may provide the means of enforcing payment of the forfeiture is that provided by sec. 59.08 (15), which provides as follows:

"Exercise all the powers conferred by law on cities to regulate by ordinance, dance halls, roadhouses, and other places of amusement outside the limits of incorporated cities and villages. The powers hereby conferred shall be in addition to all grants, and shall be limited only by express language."

Since there is no provision of law expressly authorizing cities to regulate dance halls, etc., sec. 59.08 (15) must be considered as referring to the general powers of cities conferred by sec. 62.11 (5). Cf. Fox v. Racine, (1937) 225 Wis. 542. That section grants to cities "all the powers that the legislature could by any possibility confer on" them, limited only by express language. Hack v. Mineral Point, (1931) 203 Wis. 215, 219; see Janesville v. Heiser, (1933) 210 Wis. 526, 532. As in the case of county traffic ordinances, therefore, the power of the court to stay execution must be found in the terms of the ordinance and if the ordinance is silent the rule of Hack v. Mineral Point would prevent any stay of execution, or imprisonment after the term of the sentence has expired.

Your fifth and sixth questions are as follows:

"5. May a court of record, after sentence has been imposed of a fine or in the alternative a jail sentence under a
state charge, suspend such sentence after its execution has been commenced, or in other words, after the defendant has entered jail under sentence of $100 or sixty days, may the judge at any time short of the completion of such sentence recall the original sentence and impose such lighter sentence as to free the defendant short of the time set forth in the original sentence, less time off for good behavior?

"6. The term of the court of record in question is monthly, and may the court during the particular term modify or change the original sentences under the state charge because of extenuating circumstances such as suffering of the members of the family of the defendant?"

It is well established in this state and is the general rule elsewhere that although a court of record may, during the term at which sentence was imposed, review such sentence and impose a different one, this power ceases as soon as execution of the sentence is commenced. State ex rel. Zabel v. Municipal Court, (1923) 179 Wis. 195, 199; State ex rel. Traister v. Mahoney, (1928) 196 Wis. 113, 122; 16 C. J. 1314; 44 A. L. R. 1203; 70 A. L. R. 822. This seems to be on the ground that the prisoner is no longer in the custody of the court but has passed to a new custody, that of the keeper or warden of the prison; and it is also pointed out that at that point the term of imprisonment must become certain and beyond the power of the court to change, in order that the prisoner may cease to occupy his mind with hopes of early discharge and schemes and labors for that result. It has also been put on the ground that it would be an invasion of the executive pardoning power for the court to reduce the penalty after imprisonment has begun. (By statute the court has power to direct the kind of labor and the nature of the care and treatment of the prisoner, but not to shorten his term. Sec. 56.08 (2); XVII Op. Atty. Gen. 99.)

Any order of the court or magistrate made under such circumstances, ordering the release of the prisoner prior to completion of his original sentence—less any time off for good behavior earned under sec. 56.08 (4)—is, therefore, a complete nullity. If the sheriff, acting in ignorance of the nullity of the order, releases the prisoner pursuant thereto, he is guilty of a negligent escape for which he may be
prosecuted under sec. 346.36, Stats. Lynch v. Commonwealth, (1903) 115 Ky. 309, 73 S. W. 745, 24 Ky. L. 2180; Meehan v. State, (1884) 46 N. J. L. 355; Jiha v. Barry, Sheriff, (1901) 3 Oh. N. P. (n. s.) 65, 77 (affirmed by circuit court without opinion—see note to reported case); State v. Manley, (1809) 1 Overt. (Tenn.) 428, 430. (It should be pointed out that the negligence of the sheriff consists in his failure to know that the order of the court is void, so that if he does know that and nevertheless discharges the prisoner, he is probably guilty of a voluntary escape under sec. 346.35.)

It should be mentioned here that under sec. 57.04 (3) it is provided that the court may grant further stays of execution to a prisoner whose probation has been revoked, but on its face this clearly applies only to cases where the sentence was originally suspended and the defendant placed on probation under sec. 57.04 (1). In such cases it seems the court may pop the defendant in and out of jail indefinitely until either the entire period of imprisonment has been served or the entire period of probation has expired. But this clearly cannot be considered as authorizing a similar practice where no probation was granted in the first instance.

Your seventh and eighth questions are similar to the fifth and sixth, except that they refer to sentences imposed under municipal ordinances. It is now firmly established in this state that an action to enforce a "fine" or forfeiture under a municipal ordinance is a civil and not a criminal action. Waukesha v. Schessler, (1941) 239 Wis. 82. Most of the reasons which have impelled the courts to hold, in criminal cases, that the sentence may not be altered by the court after execution has been begun, would seem to apply with equal force to municipal cases, although no authority directly so holding has been discovered but, as pointed out above, the rule in criminal cases has been brought over into the field of municipal law to prevent the court from staying execution in municipal cases. Hack v. Mineral Point, supra.

Sec. 252.10 (1), Stats., relating to the powers of circuit courts, provides as follows:

"All judgments and court orders may be reviewed by the court at any time within sixty days from service of notice
of entry thereof, but not later than sixty days after the end of the term of entry thereof."

This statute constitutes a modification of the common-law rule that the court might review its judgment at any time during the term, and substitutes a period of sixty days after notice of entry of judgment but not more than sixty days after the end of the term. On its face this statute applies to all actions, criminal as well as civil, but so far as criminal cases are concerned, the court has, as pointed out above, retained the common-law exception against reviewing the judgment after execution has commenced. It seems probable—in view of the readiness with which the court applied criminal rules to an action under a municipal ordinance in Hack v. Mineral Point, supra,—that the court would apply the same exception to an action under a municipal ordinance.

There is a sound practical reason for this: If it be recognized that the court may review the judgment within sixty days, it may revise the sentence upward as well as downward and it could happen that a person sentenced to pay a "fine" or forfeiture of $50 or be imprisoned for thirty days might serve the full thirty days' imprisonment and be discharged and the court later, within the sixty day period, alter the sentence to provide that the term of imprisonment be ninety days or even six months, and the defendant be rearrested and committed to serve the balance of the increased sentence. No such proceeding would be tolerated in a criminal case and there is no reason to suppose that it would be tolerated in a municipal ordinance case. But if it be conceded that the court could not increase the sentence within sixty days, then it follows that sec. 252.10 (1) does not apply at all to such a case after execution of the sentence has begun.

All things considered therefore we are of the opinion that the court has no more power to order the prisoner discharged before the expiration of his full sentence in a municipal ordinance case than it would have in a criminal case. If such power exists at all, it is in the municipal authorities, not the court. See 37 Am. Jur. 841—Mun. Corp. sec. 203. WAP
Public Lands — Timber is part of land, and timber on public land constitutes interest in such lands under sec. 24.01, Stats.

Statutes relating to sale of public lands by commissioners of public lands apply also to sale of timber thereon separately.

At sale of any public lands minimum price for such lands must be announced at sale before bids are accepted.

Minimum price of land to be sold need not be inserted in notice of sale which must be published under sec. 24.09, subsec. (1).

Parcel of land, including school or university land, which has actually been offered at sale, may not be withdrawn from such sale if minimum price therefor has been bid.

No purpose is accomplished by inserting, in notice of sale of public lands, "the commission reserves the right to reject any and all bids".

Sec. 24.15 requires private sale of parcel of land, if application to purchase at minimum price is presented, only if such land has not been withdrawn from sale pursuant to sec. 24.09 (2).

July 3, 1943.

Commissioners of the Public Lands.

Attention T. H. Bakken, Chief Clerk.

You have requested our opinion in answer to the following questions concerning the sale of public lands:

1. In the sale of state lands under your jurisdiction and the sale of timber thereon separately, must the minimum price be announced at the sale before accepting bids?

2. Must the minimum price be inserted in the notice of sale which must be published?

3. If such land or the timber thereon, or both, are offered for sale and the minimum price or more is bid for any parcel of such land or the timber thereon, may such land or timber thereon, or both, be withdrawn from sale or is it mandatory that you sell?

4. What is the purpose of specifying in the notice of sale that "the commission reserves the right to reject any and all bids"?
5. Is it mandatory for you to sell at private sale under sec. 24.15, Stats., if an application to purchase at the minimum price is presented before another appraisal is made?

The following constitutional and statutory provisions are material in arriving at the answers to your questions:

Art. X, sec. 7, Wisconsin constitution:

"The secretary of state, treasurer and attorney-general, shall constitute a board of commissioners for the sale of the school and university lands * * *. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office."

Art. X, sec. 8, Wisconsin constitution:

"Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; * * * The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient * * *."

Sec. 24.01, Wis. Stats.:

"Terms used in chapters * * * 24 * * * of the statutes are defined as follows:

"(1) 'Public lands' embraces all lands and all interests in lands owned by the state either as proprietor or as trustee which constitute any part of the lands defined or specified in either of the following paragraphs of this section.

"(2) 'School lands' embraces all lands made a part of 'the school fund' by section 2 of article X of the constitution.

"(3) 'University lands' embraces all lands the proceeds of which are denominated 'the university fund' by section 6 of article X of the constitution.

"(4) 'Swamp lands' embraces all lands which have been or may be transferred to the state pursuant to an act of congress entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, or pursuant to an act of congress entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March 2, 1855.

"(5) 'Normal school lands' embraces all parcels of said 'swamp lands' which the legislature has declared or other-"
wise decided, or may hereafter declare or otherwise decide, were not or are not needed for the drainage or reclamation of the same or other lands.

“(6) ‘Agricultural college lands’ embraces all lands granted to the state by an act of congress entitled ‘An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,’ approved July 2, 1862.”

Sec. 24.08, Wis. Stats.:

“(1) Every parcel of public land, from whatever source derived, that has never been appraised, every parcel thereof forfeited to the state under section 24.28, and every parcel of land mortgaged to secure any loan of trust funds and bid in by the state at a sale thereof under the mortgage, shall be appraised pursuant to this section before it is offered or re-offered for sale at public auction or at private sale. All such lands may be reappraised whenever necessity therefor arises.

“(2) The commissioners shall from time to time and as often as they deem it necessary, make and enter in their minutes an order that any parcel or parcels of the public lands be appraised, described the lands, appointing an appraiser and stating the reasons why the appraisement is deemed necessary.

“(3) The appraisement shall be made from actual view and at cash value, the land and the timber thereon, if any, to be appraised separately. It shall be in writing and be verified by the affidavit of the appraiser who shall testify that the same is just and was made as required by law. Such appraisement shall then be filed with the chief clerk and recorded.

“(4) Such appraised value shall be the minimum price of the land until sold or reappraised. Until an appraisal under this section, the appraisal last heretofore made of any parcel of public land, if any has been made, shall fix the minimum price thereof.

Sec. 24.09, subsec. (1), Wis. Stats., (as amended by ch. 106, Laws 1943):

“All public lands that have been heretofore appraised or appraised pursuant to section 24.08, shall, from time to
time in the discretion of said commissioners, be offered for sale at public auction * * * * All sales * * * * shall be made at such times and public places as said commissioners shall designate; and they shall, previous to any such sale, cause a notice specifying such time and place and describing the lands to be sold, to be published once in each week for 3 successive weeks in one newspaper printed in the county where such lands are situated; * * * *”

Sec. 24.09, subsec. (2), Wis. Stats.:

“Said commissioners may, whenever they believe the public interest will be served thereby, withdraw and withhold from sale all or such portions of the public lands as in their opinion it may not be advantageous to sell, for so long a time as in their opinion will be most beneficial to the state; but when reoffered the lands so withdrawn shall first be offered at public sale in the manner prescribed by law.”

Sec. 24.10, Wis. Stats.:

“At the time and place specified in such notice said commissioners shall commence the sale and thereafter continue the same from day to day (Sundays excepted) between nine o’clock in the forenoon and the setting of the sun, until all lands described in said notice have been offered. The order of such sale shall be to begin at the lowest number of the sections, townships and ranges in each county and proceed regularly to the highest, until all then to be sold are offered for sale. Each lot or tract of such lands shall, except such as may be withheld as provided in section 24.09, be offered separately at the minimum price fixed by law, and shall be cried at public auction long enough to enable every one present to bid; and if the minimum price or more be bid, such lot or tract shall be struck off to the highest bidder; but if such price be not bid the tract shall be set down unsold.”

Sec. 24.15, Wis. Stats.:

“All public lands, including forfeited lands and mortgaged lands bid in by the state, which shall have once been offered or reoffered at public sale and remain unsold, shall be subject to private sale at the minimum price fixed therefor by law to the person first making application therefor; if he forthwith complies with the term of sale; but if two or
more persons shall apply at the same time to purchase any of such lands the same shall be offered to the highest bidder, and the applicant who will pay the highest price shall be the purchaser."

The trees or timber on the land are a part of the land. *Morgan v. Pott*, 124 Mo. App. 371, 101 S. W. 717; *L. N. Dantzler Lbr. Co. v. State*, 97 Miss. 355, 53 So. 1; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Walters v. Sheffield*, 75 Fla. 505, 78 So. 539; *Fox v. Pearl River Lbr. Co.*, 80 Miss. 1, 31 So. 583. Under the foregoing cases, and the definition of public lands found in sec. 24.01, Wis. Stats., the timber would constitute an interest in the land and the sale of such timber separate from the land would be subject to the same statutory provisions as the sale of the land only or the sale of the land and timber. The conclusions concerning the sale of lands which are given herein, apply with equal force to the sale of timber only.

**Answer to question 1:**

Acting pursuant to the constitutional mandate found in art. X, sec. 8 of the Wisconsin constitution as to the school and university lands, and pursuant to art. IV, sec. 1 of the Wisconsin constitution, which vests the legislative power in a senate and assembly as to the other public lands referred to above, the legislature enacted the foregoing statutes relating to the sale of the public lands. Sec. 24.10, Wis. Stats., which specifies that each lot or tract to be sold "shall * * * be offered separately at the minimum price fixed by law", which minimum price under sec. 24.08, subsec. (4), is the last price fixed by the appraisal made under that section or prior to its enactment, requires that the minimum price be announced at the sale before a bid is accepted.

**Answer to question 2:**

Sec. 24.09, which provides for the publication of the notice of sale, lists only three things which said notice must contain, to wit: a description of the lands to be sold, the time of the sale and the place of the sale. The law does not require that the minimum price be inserted in the notice of sale which is published pursuant to sec. 24.09.
Answer to question 3:
Sec. 24.10 provides in part:

"* * * If the minimum price or more be bid, such lot or tract shall be struck off to the highest bidder * * * ."

As to the public lands which are not school or university lands, this section requires that there may be no withdrawal from sale after a parcel has been offered for sale in accordance with the statute and at least the minimum price therefor has been bid. This section requires the same answer as to the school and university lands unless that part of art. X, sec. 8 which provides that the commissioners shall have power to withhold from sale any portion of the school and university lands "when they shall deem it expedient" compels a different conclusion. This provision of the constitution might appear to mean that the commissioners of the public lands may exercise their right to withdraw a parcel of school or university land from sale at any time prior to the actual consummation of the sale. It is our opinion, however, that this section, when read in connection with the previous portion of the same constitutional provision, which states that "provision shall be made by law for the sale of all school and university lands after they shall have been appraised", and sections 24.09, subsec. (2), and 24.10, enacted pursuant thereto, means that the commissioners of the public lands have the right to withhold any parcels of the public lands under their jurisdiction, including the school and university lands, from sale at any time prior to their actual offer at the sale itself, but that, when a parcel pursuant to proper notice is actually offered at the minimum price, the commissioners have lost their power to "withhold" this particular parcel "from" that sale process which has already commenced and in which that parcel is involved. After the process of selling has commenced section 24.10, enacted pursuant to authority conferred by the first part of art X, sec. 8 of the Wisconsin constitution, becomes operative, and requires the consummation of the sale of the parcel offered if the minimum price or more is bid for such parcel, even though such parcel may be a part of the school or university lands.
Answer to question 4:
No particular purpose is served by specifying in the notice of sale that "The commission reserves the right to reject any and all bids." If the sale has proceeded to the point where a particular parcel is offered for the minimum price, section 24.10 requires that the parcel be sold if such a minimum price or more be bid, and likewise requires that the parcel be set down as unsold unless such minimum price or more is bid.

Answer to question 5:
In the case of *State ex rel. Holston v. The Commissioners of the Public Lands*, 61 Wis. 274, 20 N. W. 915, the court was called upon to construe two statutes providing as follows:

Sec. 207, R.S.:
"* * * Said commissioners may, in their discretion, either before or after advertisement of sale, withhold from such sale such portions of said lands as, in their opinion, it may not be advantageous to sell, and for so long a time as in their opinion will be most beneficial to the funds to be derived from such sale."

Sec. 211, R.S.:
"All public lands which shall have once been offered at public sale and remain unsold, and all such lands that have been forfeited, if they shall have been reoffered at public sale and remain unsold, shall be subject to private sale at the minimum price fixed therefor by law, to the person first making application therefor, provided he forthwith comply with the terms of sale; * * * *"

The court held that the commissioners of the public lands might withhold lands from public sale either before or after advertisement, but that after such lands had once been offered at public sale, or after being forfeited had been reoffered at such sale and remained unsold, they were subject to private sale and could not be withdrawn therefrom.

In the case of *State ex rel. Sweet v. Cunningham*, 88 Wis. 81, 57 N. W. 1119, the court stated that in the *Holston* case, *supra*, both the court and counsel had overlooked the provi-
sions of art. X, sec. 8 of the Wisconsin constitution, which authorized the commissioners of the public lands to withhold school and university lands from sale, and that such constitutional provision would authorize the commissioners of the public lands to withhold from sale public lands which once were offered for sale but remained unsold. The decision in the Holston case, supra, was supposed to have disclosed a defect in the procedure for the sale of the public lands because, under the decision in that case, it might have been possible for the commission to hold for a long period of time lands which had once been offered but remained unsold and then, after such lands had increased in value, sell them to a private purchaser through a collusive arrangement at the last appraisal price, which would then be disproportionately low.

To remedy this defect chapter 222, Laws 1885, was enacted, providing:

"The commissioners of public lands are hereby authorized at any time, when in their judgment the public interest can be best subserved thereby, to withdraw any public lands from sale; provided, that when re-offered, the land so withdrawn shall first be offered at public sale, such public sale to be advertised and conducted in all particulars in the same manner as public land sales are now held."

This law presumably corrected the supposed defect disclosed by the decision in the Holston case as the court stated in discussing chapter 222, Laws 1885 (pp. 84-85):

"* * * The first clause of the act confers no new power upon the commissioners, so far as relates to the school lands. The commissioners had always had power to withhold the school lands from sale whenever they deemed it expedient, under the provision of the constitution above cited. [art. X, sec. 8, Wisconsin constitution.] But it did confer upon the commissioners a new power to withdraw from sale public lands other than the school lands. The last clause or proviso of the act did change the statute in a very important particular. It withdrew from private sale all public lands which had been once withdrawn from sale by the commissioners, by providing that they should not be again re-offered for sale until they have been again regularly advertised and offered at public sale. This remedy
seems to be sufficient to cure the evil. At least, it seems to give the state a chance to derive advantage from such rise in the value of the public lands as may accrue while they are withheld from market, through competition between rival bidders at a public sale. This will, no doubt, be more to the advantage of the public than a compulsory sale, at private sale, at the minimum price, to the first applicant."

The present section 24.09, subsec. (2) of the statutes contains, in substance, the above quoted portion of sec. 207 R.S. and chapter 222, Laws 1885, and the present sec. 24.15 contains the substance of the old section 211 R.S. In view of the decision in the Sweet case, supra, it must be held that sec. 24.15 requires you to sell at private sale, if an application to purchase at the minimum price is presented, only if the land applied for has not been withdrawn from sale by the commissioners of the public lands. If, after a parcel of land has been offered for sale but not sold, it increases appreciably in value but is not withdrawn from sale pursuant to sec. 24.09, subsec. (2), sec. 24.15 requires that it be sold at private sale if the minimum price, which would be the last appraised value, is offered for it. Consequently, where a parcel has been offered for sale but not sold and subsequently increases in value, it would be advisable to withdraw said parcel from sale until a new appraisal thereof is obtained.

JRW

Insurance — Public Officers — Department of Agriculture — Liability — State is not liable for damages caused by negligent construction or operation of amusement devices at State Fair Park.

O. J. THOMPSON, Secretary,
Department of Agriculture.

You have asked several questions with respect to insurance against injury to persons and property, which your
department requires to be maintained by persons and companies operating amusement equipment at the State Fair Park.

Your first question is whether it is necessary for the state of Wisconsin to be named in the policies as one of the assureds.

In an action brought for damages sustained by an individual by reason of alleged defects in the Camp Randall stadium, the supreme court of Wisconsin held that no action could be maintained against the state for the negligent acts or omissions of its officers or agents even when they occur in connection with an enterprise undertaken for profit. Holzworth v. State, 238 Wis. 63, 298 N. W. 163. Prior to that time it had been specifically ruled in Morrison v. Fisher, 152 N. W. 475, L. R. A. 1915E 469, 160 Wis. 621, that there was no liability on the part of the state or the state board of agriculture for injuries resulting from an aviation exhibition given at the state fair for the entertainment of the public.

Since the state would not be liable for damages caused by the negligent construction or operation of equipment at the State Fair Park, it need not be included as an assured in policies covering liability against injury from such causes.

You have also asked whether we consider the limits of liability adequate, and whether property damage insurance is necessary.

In so far as the protection of the fiscal interests of the state is concerned, our answer to the first question supplies the answers to the latter ones. The state, being under no liability, need not carry insurance for its own protection.

The state's immunity, however, does not extend to private individuals or companies operating under contract with the state. Apfelbacher v. State, 152 N. W. 144, 160 Wis. 565, 576. The extent of the insurance coverage to be required of such persons and companies for the protection of members of the public who resort to the State Fair Park is a matter of policy for the determination of your department rather than a legal question.
Retirement System — Ch. 176, Laws 1943, creating retirement system for state employees, construed as to meaning of "appointed state officers" in sec. 42.61, subsec. (1), par. (a), Stats., and as to other exemptions from act provided by sec. 42.61 (1) (b), (c) and (d).

A. J. Opstedal,
Director of Personnel.

You have asked our opinion as to the correct interpretation of ch. 176, Laws 1943, relating to a retirement system for state employees, as applied to some sixteen different situations which you mention.

1. The first question has to do with what is meant by "appointed state officers" as that term is used in sec. 42.61, subsec. (1), par. (a), which reads:

"Membership in retirement system; exceptions. (1) Membership in the state employees' retirement system shall be compulsory for all persons in the employ of the state except the following classes of persons:

(a) Elective and appointed state officers who are not subject to chapter 16; but any such appointed officer may become a member on the same basis as an employe if he is a full-time appointed officer and if he exercises this option within 6 months after the taking effect of sections 42.60 to 42.70 or within 6 months after initially taking office."

Ordinarily an officer as distinguished from a mere employee is one who has a fixed tenure of position or who serves for a definite term and who is required to file an oath and bond. He is elected or appointed in the manner prescribed by law, as the agent of the public in the performance of duties imposed by law, although it is true that not all of the various characteristics of a public officer indicated above need be present to make such person an officer. See XIX Op. Atty. Gen. 241 and State ex rel. City of Baraboo v. Page, 201 Wis. 262. The mere fact that the legislature refers to a particular position as an "office" is not controlling. In re Nagler, 194 Wis. 437; an "office" is where, for the
time being, a portion of the sovereignty of the state, legisla-
tive, executive, or judicial, attaches, to be exercised for the
public benefit. Martin v. Smith, 239 Wis. 314.

With this general concept in mind we shall proceed to
consider each of the positions about which you have made
specific inquiry.

2. Executive secretary to the governor.
Sec. 14.09 provides:

"The governor may appoint a private secretary and an
executive clerk. He may appoint also an executive counsel
to assist him during any session of the legislature and for
thirty days after sine die adjournment thereof. He may at
pleasure remove any of said appointees."

This section was amended by ch. 132, Laws 1943, to read:

"The governor may appoint and fix the compensation of
such employes as he may deem necessary for the execution
of the functions of the executive office. He may at pleasure
remove any of said appointees."

This gives the executive secretary the status of an em-
ployee merely and hence he is not an "appointed state offi-
cer".

3. Legal counsel to the governor.
What has been said above applies equally to the gover-
nor's legal counsel.

4. Financial secretary to the governor.
This question calls for the same answer as is given in 2
and 3 above.

5. Clerk of supreme court.
Art. VII, sec. 12 of the Wisconsin constitution provides
that the supreme court shall appoint its own clerk and sec.
251.02 provides:

"The said justices shall appoint a clerk of the supreme
court who shall hold his office at their pleasure. Such clerk,
before entering upon the discharge of his duties, shall take and subscribe the constitutional oath of office, and file the same, duly certified, in the office of the secretary of state.”

Obviously the clerk of the supreme court is an appointed state officer under the tests above set forth.

6. Revisor of statutes.
Sec. 43.07 (3) provides that the revisor of statutes “shall hold office for the term of two years and until his successor shall have been appointed and qualified”. By virtue of this wording the revisor of statutes is an officer. His appointment is provided for in sec. 43.07 (1) and hence he is an “appointed state officer”.

7. Librarian of the state law library.
Sec. 43.02 provides:

“The board of trustees shall appoint a librarian, who shall serve under such conditions as shall be fixed by said board. He shall execute and file an official bond with good and sufficient surety in the sum of ten thousand dollars to be approved by the trustees. * * *”

We deem the state law librarian to be an officer under the test usually applied.

8. Assistant secretary of state.
Sec. 14.25 provides:

“The secretary of state may appoint, in writing, an assistant secretary of state who may perform and execute any of the duties of the secretary of state, except as commissioner of the public lands and as auditor. The assistant secretary shall take and subscribe the oath of office prescribed by the constitution and shall give bond to the secretary of state, in such sum and with such conditions as the said secretary prescribes, conditioned for the faithful discharge of his duties. Such oath shall be filed and preserved in the executive office”.

Thus, the assistant secretary of state is an “appointed state officer”.
Sec. 200.01 (1) provides:

"The governor, by and with the advice and consent of the senate, shall appoint a commissioner of insurance forthwith upon the taking effect of this act, and every four years thereafter. Such commissioner shall hold office for four years and until his successor is appointed and qualified."

Sec. 200.02 provides:

"The commissioner shall take and file the official oath and execute and file the official bond in the penal sum of one hundred thousand dollars, with at least six individual sureties or a surety company, which bond shall be approved by the governor. The premiums for a surety bond shall be charged to the appropriation for the commissioner, but said charge shall not exceed two hundred fifty dollars per annum. The commissioner shall have an official seal."

Thus, the insurance commissioner is an "appointed state officer".

10. Director of the department of public welfare.
Sec. 58.33 (2) provides in part:

"The board shall appoint the director of the state department of public welfare for an indefinite term and he shall not be subject to the provisions of chapter 16. * * *"

Sec. 58.34 (6) provides:

"The director shall take an oath of office and shall file a bond in such amount and with such surety as the board may direct."

We therefore consider the director of the department of public welfare to be an "appointed state officer".

11. Director of division of departmental research.
Sec. 15.16 provides that such director shall be appointed by the governor for an indeterminate term. This section also provides:
"* * * The governor shall fill any vacancy created in the office of director and may remove such director at pleasure at any time".

While the legislature has used the word "office" in referring to this position, we do not deem that to be controlling, since it is apparent from sec. 15.17 that the duties of the director of departmental research are merely investigatorial and advisory and that he does not exercise any of the sovereign powers of government. He has no tenure or term of office, takes no oath and files no bond. His powers are in all things subordinate to those of the governor, who may appoint and remove him at pleasure.

Thus he is an employee rather than an "appointed state officer".

Sec. 252.18 provides that every circuit judge may in his discretion appoint a competent phonographic reporter for the circuit or the branch of the circuit, as the case may be, for which he was elected or appointed. This section provides further:

"* * * Every person so appointed as reporter or assistant reporter is an officer of the court and shall take and file the official oath. * * *"

While not passing on the precise question of whether or not the circuit court reporter is an officer or an employee our supreme court in the case of In re Snyder, 184 Wis. 10, referred to him as an inferior judicial officer. Thus it would seem that the circuit court reporter is an officer, but reference must be had to the other sections of the statute to determine whether or not he is a state or county officer. Sec. 20.66 (2) appropriates from the state general fund to each reporter appointed pursuant to sec. 252.18 compensation at the rate of $300 per month and to one of the official reporters of the court in which the statute requires actions against state officers and state commissioners to be tried, an additional compensation at the rate of $75 per month. Such reporters can hardly be deemed to be county officers,
since in most instances they work in several different counties.

Thus it appears that the circuit court reporter is an "appointed state officer".

13. Supervisor of the state inspection bureau.

Sec. 109.02 provides that such supervisor shall be appointed by the governor for a term of four years. It also provides:

"* * * Before assuming such office, such supervisor shall take and file the official oath and execute and file an official bond in the sum of five thousand dollars, with sureties as shall be approved by the state treasurer. * * *"

Thus, a supervisor of the state inspection bureau is an "appointed state officer".

14. With respect to teachers who are covered by the teachers' state retirement system you state that the board assumes that any state employee who does not contribute to the teachers' state retirement system although he may have contributed to that system in the years past, is subject to the newly created state employees' retirement system and that by the same token a state employee who has contributed to the employees' system and then accepts a teaching position in the state service will cease to contribute to the employees' system at the time he begins to contribute to the teachers' retirement system and you inquire if this construction is correct.

It would seem that such is probably the legislative intent although the problem is complicated somewhat because of some of the language used in the act. Sec. 42.61 (1) (b) excepts from membership in the state employees' retirement system:

"Teachers who are covered by the teachers' state retirement system; except that any teacher who accepts a non-teaching position in the state service shall be permitted to transfer his deposits in the retirement deposit fund to the state employees' retirement system, and vice versa, under rules and regulations governing such transfers to be made by the annuity and investment board."
However, sec. 42.61 (3) provides in part:

"Employes who have become members of the state employees' retirement system shall not thereafter lose their status as members while they remain in the state service on any basis, including leaves of absence. * * *

Taken literally, and there is no ambiguity in the language which permits us to take it any other way, this means that once an employee becomes a member he cannot lose his status as a member while he remains in state service on any basis, which would include a teaching position in state service in which the teacher might also be required to become a member of the teachers' state retirement system. Thus, a state employee who later became a teacher in state service would have to contribute to both retirement systems if subsec. (3) means what it says.

However, subsec. (1) (b) provides that any teacher who accepts a non-teaching position in the state service shall be permitted to transfer his deposits in the retirement deposit fund to the state employees' retirement system and vice versa. This clearly gives a right to switch from one system to the other and might imply at least that subsec. (3) is not regarded as controlling in the case of a state employee who later becomes a teacher in state service. Perhaps a better reason for reaching such conclusion is the fact that sec. 42.61 (1) (b) specifically excepts from membership in the state employees' retirement system teachers who are covered by the teachers' state retirement system and this would be true whether or not such teacher had previously been a member of the state employees' retirement system. In other words, we regard sec. 42.61 (1) (b) as being controlling in such a case rather than sec. 42.61 (3).

15. You next inquire if the same construction is to be given to par. (c) of sec. 42.61 (1). This excepts from membership in the state employment system "university professors who are entitled to any benefit from the Carnegie foundation for the advancement of teaching under any plan in force prior to November 17, 1915".

The same construction would not apply here for the reason that as to university professors who are entitled to any
benefit from the Carnegie foundation the act contains no provision such as that provided for teachers in subsec. (b) which permits transfer of deposits from one system to the other. Moreover, the state has no control over the Carnegie foundation and could not provide for withdrawals from or contributions to such fund except by agreement with those who control the fund. Also it is not the function of this department to construe the rules of the Carnegie foundation which may have some bearing on the problem. There are enough difficulties in construing and applying the retirement act without conjuring up situations which may never arise in connection with the Carnegie foundation retirement plan and we deem it advisable to refrain from further discussion of this point until such time as you have a specific set of facts upon which advice is needed. Furthermore, as we understand it, the benefits of the Carnegie foundation are limited to professors employed prior to a certain date, since dwindling resources made this action on the part of the foundation necessary a considerable number of years ago, and the chances are fairly remote that you will ever have any real problem arising out of this paragraph of the act.

16. Next we are asked if the same construction applies under par. (d) of sec. 42.61 (1), which excepts from membership in the state retirement system "employes subject to the conservation warden pension fund provided for in section 23.14".

Again, the answer is no, since the act contains no provision for transferring deposits from the conservation warden fund to the state retirement fund or vice versa.

Sec. 23.14 (14) (a) provides:

"If any person, who is employed for ten years or longer as a conservation warden and who, thereafter, is transferred to any other position with and under the jurisdiction of the conservation commission, fulfills all the other requisites of this section, he is eligible to receive the benefits of this section. Such person shall continue to pay into the warden's pension fund a sum equal to three per cent of the last monthly salary earned as conservation warden at the time he was transferred. After such person completes
twenty years of combined employment service with and under the jurisdiction of the conservation commission, he is eligible to receive a pension computed on the basis of the last monthly salary he received as conservation warden at the time he was transferred."

In other words, although no longer a conservation warden a former warden continues to be “subject to the compensation warden pension fund provided for in section 23.14” as long as he is employed by the conservation commission.

However, if a conservation warden were transferred to a position in state service, not under the jurisdiction of the conservation commission, sec. 23.14 (14) (a) would not apply and no deductions from his salary would be paid into the conservation warden fund. Thus he would become subject to the state retirement act the same as any other state employee not excepted from the act.

A more difficult problem would arise were a conservation warden transferred to other state employment not under the state conservation commission jurisdiction and thereafter became a conservation warden again. He would be subject to the conservation warden fund by virtue of sec. 23.14 (2) and would still be a member of the state retirement fund by virtue of sec. 42.61 (3). This would require a salary deduction for both funds unless the conflict be resolved by ruling that he is excepted from the state retirement fund notwithstanding the positive provisions of sec. 42.61 (3) by reason of the contrary provision in sec. 42.61 (1) (d), which specifically excepts conservation wardens from membership in the state retirement fund. This would seem to be the preferable construction to adopt.

WHR
Corporations — Secretary of state has no authority to refuse charters to regularly organized private corporations formed for purpose of conducting lawful business. He has no such authority as would permit him to revoke charters of any such corporation lawfully doing business in state.

Fred R. Zimmerman,
Secretary of State.

You advise us that the common council of the city of Milwaukee has adopted a resolution requesting you not to grant charters to corporations operating private clubs in the city of Milwaukee and, if possible, to revoke the charters of all such clubs as have been granted. You desire to know whether you are authorized to comply with the request of the common council.

Your duty in the matter of issuing corporate charters is purely ministerial. Sec. 180.02, Wis. Stats. provides for the formation of corporations. Subsec. (2) provides:

"The original articles or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the secretary of state. A like verified copy and certificate of the secretary of state, showing the date when such articles were filed by the secretary of state, within thirty days of such filing, shall be recorded by the register of deeds of the county in which such corporation is located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the secretary of state a certificate stating the time when such copy was recorded, and shall be entitled to a fee of twenty-five cents therefore to be paid by the person presenting such papers for record. Upon the receipt of such certificate the secretary of state shall issue a certificate of incorporation."

A corporation comes into being when its articles are filed with the register of deeds. Sentinel Company v. A. D. Meiselbach M. W. Co., 144 Wis. 224. It is not necessary to corporate existence that the certificate of incorporation be issued to you, although, of course, it should and must be is-
sued where the statutory provisions as to organization are complied with. In that case and in the matter of filing corporate articles and certifying copies for filing with the register of deeds, you have no discretion if there has been a compliance with the statutory requirements as to organization. 14 C. J. 134, 38 C. J. sec. 212, p. 666.

It may be assumed that if the articles of organization showed an attempted incorporation for an illegal purpose you could refuse to file them, although that question is not presented.

So far as revoking licenses is concerned, it may be said that upon the assumption you could be given authority to revoke corporate charters you have, nevertheless, been given no such authority as would permit you in your discretion to revoke the charters of such private corporations as you might think it advisable to revoke. There are statutory provisions relating to institution of forfeiture proceedings by the secretary of state for failure to comply with the law in certain instances, but those provisions are not material here, and we know of none that are.

JWR

Taxation — Semiannual Payment of Taxes — Provisions of sec. 74.03, Stats., as amended by ch. 133, Laws 1943, govern settlements by county treasurer for his collection of 1942 taxes.

July 15, 1943.

JULIUS E. GUENTHER,
District Attorney,
Antigo, Wisconsin.

It is your opinion that the county treasurer, in making distributions and settlements subsequent to July 31, 1943, for 1942 taxes collected by him up to that date, should do so in accordance with the changes in subsecs. (8) and (9)
of sec. 74.03, Stats., made by ch. 133, Laws 1943, and base it upon consideration of the July 31, 1943, effective date specifically provided in said ch. 133.

The specifying of such effective date, in our opinion, is significant and shows that it was the legislative intent that the changes thus made should be controlling from that date on. That can be the only purpose thereof. Had the legislature intended that the settlements to be made after July 31, 1943, for 1942 taxes should be upon the basis set out in the provisions in sec. 74.03, Stats. 1941, and that the changes made by ch. 133 should be applicable only to settlements as to taxes for 1943 and subsequent years, it would have provided instead that the effective date should be January 1, 1944.

Ch. 133, Laws 1943, repeals the provisions in sec. 74.03, Stats. 1941, both as to settlements by local treasurers and settlements by county treasurers for taxes collected by them respectively. It then creates new provisions covering the same. Both this repeal of the old and the creation of the new provisions are specifically made operative as of July 31, 1943. From that date on the old provisions will cease to exist as defining the duties of or directing the county treasurer as to a present act to be performed subsequent to such date, and the only provisions that are effective in respect thereto after that date are those created by ch. 133. Any act he does thereafter in distributing or settling for his collections of 1942 taxes, not being in reference to any rights or liabilities that had become fixed prior to the effective date of this change in the statutes, necessarily will have to be pursuant to the new provisions because he must at that time justify his act by some statutory provision that then exists and prescribes such act.

Accordingly we agree with your conclusion.

HHP
Taxation — Exemption — Property of Federal Public Housing Authority is not subject to taxation in Wisconsin regardless of provisions of sec. 70.11, subsec. (1), Wis. Stats.

John H. Rouse,
District Attorney,
Baraboo, Wisconsin.

You state that the Federal Public Housing Authority, pursuant to powers under the defense housing act, has acquired certain lands in the town of Sumpter, Sauk county, and is now constructing thereon Badger Village, consisting in the main of some 500 housing units and various stores to serve occupants thereof, all of which will be rented with the exception of a school. It has also acquired lands in the village and town of Prairie du Sac upon which it has trailer units for rental to defense workers. All of these properties were owned by it on May 1, 1943.

Our attention is directed to the provision of sec. 70.11, subsec. (1), Wis. Stats., that all property owned exclusively by the United States shall be exempt from taxation, except “residential, rental income producing improved real estate owned by the United States or any corporation whose capital stock is owned by the United States Government or any corporate or other agency having control and jurisdiction over and administering any such real estate in this subsection above described, which improved real estate is heretofore or may hereafter be acquired by the United States or any such federal corporation or agency”, and ask whether such provisions are valid so that the real estate you mention may be included by the local assessors in the assessment rolls and subjected to real estate taxation for the year 1943.

The Federal Public Housing Authority is one of the “constituent units” in the National Housing Agency, which was created by executive order No. 9070, issued on February 24, 1942, pursuant to the authority to consolidate agencies granted the president by the first war powers act, 1941 (50 U. S. C. A. 601-622), and effected a transfer to such agency
of the powers, duties and functions of various federal housing agencies. In such transfer it expressly included the powers, duties and functions of the United States Housing Authority, a body corporate created by the United States housing act of 1937 (42 U. S. C. A. 1401-1430) and specified that they should be administered as the Federal Public Housing Authority therein prescribed as one of the constituent units of such agency. It is thus beyond question that the Federal Public Housing Agency is an instrumentality or agency of the United States government.

By par. (e) of sec. 5 of the United States housing act of 1937 (42 U. S. C. A. 1405 (e) ) it is expressly stated that all property of the United States Housing Authority shall be exempt from all taxation imposed "by the United States or by any State, county, municipality, or local taxing authority." However, par. (c) of sec. 13 of the same act (42 U. S. C. A. 1413 (c) ) provides that such Authority may enter into agreements to and pay any state or political subdivision thereof annual sums in lieu of taxes which for each year shall not exceed the taxes that would be payable thereon were the property not exempt. These provisions of the federal statutes are in direct conflict with the provisions of sec. 70.11 (1), Wis. Stats., above quoted, and the question is which prevails.

The supreme court of the United States has twice recently so spoken on the subject as, in our opinion, establishes that the above mentioned provisions of the federal statutes are conclusive in respect to the property here in question and render it presently not subject to taxation in Wisconsin regardless of the provisions in sec. 70.11 (1), Wis. Stats., or any other state statute.

In Maricopa County v. Valley Nat. Bank, (March 1, 1943) 318 U. S. 357, 63 S. Ct. 587, 87 L. ed. (adv.) 537, involving the power of a state and its political subdivisions to tax shares of stock owned by the Reconstruction Finance Corporation in a national bank, the court said, pp. 361-362:

"* * * The authority by which the taxes in question were levied did not stem from the powers 'reserved to the States' under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive au-
authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation. * * * *" 

"* * * When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will. * * * *"

In the same vein, and in some respects broader in effect is the statement by Chief Justice Stone in the decision rendered on the same date in Penn Dairies v. Milk Control Commission, (1943) 318 U. S. 261, 63 S. Ct. 617, 87 L. ed. (adv.) 549:

"We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation * * * *" (p. 269).

HHP

Taxation — Tax Sales — Upon redemption of several parcels included in one notice of application for tax deed, sec. 75.12, subsec. (2), Stats. 1941, requires payment of one dollar only for each notice that is filed and not for each parcel or certificate.

July 16, 1943.

Donald E. Schnabel,  
District Attorney,  
Merrill, Wisconsin.

Your county bid in at the tax sale several parcels of land owned by the same person but separately assessed and is the owner of separate tax sale certificates which were issued for the various parcels. In giving notice of application
for tax deed to the parcels all were included in one notice describing the parcels separately and setting forth the respective tax certificate as to each of them. Our opinion is requested as to whether, in order to redeem any parcel included in such notice, the provision in sec. 75.12, subsec. (2) Stats. 1941, for the payment of the one dollar "for each such notice and proof filed" requires the payment of one dollar for each parcel or certificate listed in the notice.

We agree with you that, even though it includes various parcels and a number of certificates separately issued, such notice in effect, is a notice as to each certificate listed therein. However, although that is its effect, there nevertheless is only one physical notice and proof of service thereof that is filed, and therefore, as the language of the statute is that "in order to redeem" there shall be paid "one dollar in addition for each such notice and proof filed", the owner in our opinion is entitled to redeem all the parcels included in the notice from all the certificates listed therein by making payment of just one dollar in addition to the total amount due on the certificates.

It is to be noted that the above applies only to sec. 75.12 (2), Stats. 1941, and that as repealed and recreated by ch. 250, Laws 1943, which took effect on its publication on June 4, 1943, sec. 75.12 (4) now provides that in addition to the redemption value of the certificates there shall be paid "the sum of $1 for each person served with such notice plus the cost of publication of the notice, if any."

HHP
Taxation — Tax Sales — County may not accept fifty per cent in full settlement and compromise of any and all delinquent tax certificates held by it.

July 17, 1943.

ALLAN M. STRANG,
District Attorney,
Crandon, Wisconsin.

The facts in reference to certain real estate to which your county owns the tax certificates for several years generally are that as to part there are such errors in the description that a valid tax deed could not be taken thereto, and in any event a large number of the owners are minors whose residences are unknown; as to the rest of it a tax deed is in order; it is all covered by one mortgage, and, considering the amount due thereon, together with the fact that it has a lumber mill on it which is of relatively little value due to the absence of any timber in the surrounding territory and because most of the machinery has been removed and the buildings are in disrepair, it would be almost certain that the amount of unpaid taxes and interest could not be realized therefrom if the county took a tax deed to all of it. You state that you have advised the county treasurer to apply for a tax deed to the part above mentioned upon which a valid deed is obtainable, and ask if the county may (1) compromise the taxes and accept in full settlement an amount less than the total due on the certificates and (2) if it may cancel the interest, penalties and fees thereon.

Also a proposed form of resolution is submitted reciting that considerable of the land in the county is tax delinquent, that much of it has been assessed above its value, that many of the owners would suffer undue hardship if such land were sold for taxes, that the county does not desire tax deeds thereon, that the delinquent taxes on much of such land exceeds its present value, that much of it has deteriorated in value, that in some instances there are errors in description which preclude a valid deed and that the county board desires to liquidate as much as possible of such delinquent taxes, and which then states that all delinquent...
taxes in the county may be compromised and settled in full by the payment of 50 per cent of the face of the delinquent taxes, provided payment is made within thirty days. It also provides that penalties, interest and cost of advertising be canceled if such taxes are so paid, and specifies that it shall apply only to tax delinquent land and not to 1942 taxes due and payable in 1943.

All of your questions, including the validity of this proposed resolution, appear to us to be answered in XXI Op. Atty. Gen. 283 and XXX Op. Atty. Gen. 261, and we do not find that any changes in secs. 74.205, 75.01(1m) and 75.015 have been made by the legislature to date.

You then ask what may be done to relieve the situation as to the particular part mentioned as to which the descriptions are in error. Of course the existence of the mortgage mentioned presents no difficulty as it would be cut off by the tax deeds if the notices are properly served and everything else is regular. It should be noted that sec. 75.12, Stats., relating to notices of and applications for tax deeds, was amended recently by ch. 250, Laws 1943, published on June 4, 1943.

We agree that at this stage of things sec. 74.135, Stats. (even as amended by ch. 253, Laws 1943, effective on its publication on June 4, 1943) has no application, as it relates only to cancellation of taxes by the governing body of the local municipality. After the taxes are returned delinquent and especially after the tax sale, the only authority of the local municipality in this regard would be under sec. 75.61(2), Stats.

However, if the county desires, under sec. 75.22, Stats., it could cancel the certificates in which the descriptions are inadequate, and proceed under sec. 75.25, Stats. (as amended by ch. 277, Laws 1943, effective on its publication, June 12, 1943), to have the tax placed against the property for the next year under its correct description. There is also a new procedure of having the description corrected under sec. 74.456, Stats., created by ch. 149, Laws 1943, effective on its publication on May 19, 1943.

The county could proceed to get valid tax deeds to the property and then under sec. 59.08(19), Stats, it may sell
Public Officers — Member of Legislature — Veterans Recognition Board — Member of legislature is not eligible for appointment to veterans recognition board created by ch. 443, Laws 1943.

July 20, 1943.

HONORABLE WALTER S. GOODLAND,
Governor.

You have requested my opinion as to whether it would be legally permissible for you to appoint a member of the present Wisconsin legislature to the veterans recognition board created by ch. 443, Laws 1943.

The board as thus created consists of five members appointed by the governor with the advice and consent of the senate, and a representative of the adjutant general's department designated by the governor without senate confirmation. The terms of original appointees to the board are staggered in order that they shall expire from time to time instead of together. Successors to initial appointees are to be appointed for terms of six years. The members of the board receive no compensation for their services but are reimbursed for their actual and necessary expenses incurred in the performance of their duties.

The functions of the board are set out in subsections (4) to (11), inclusive, of sec. 45.35, which is created by the act. It is sufficient for present purposes to say that the board has important functions in the matter of veterans' rehabilitation, that it has authority to employ a director and to formulate the policies which the director shall follow in the performance of the functions vested in the board.
Without belaboring the point at length, we may say that in our opinion it is contemplated that the members of the board are officers of the state. *Martin v. Smith*, 239 Wis. 314.

Membership upon the board constituting as it does an office, the question arises as to whether such an office may be lawfully held by a member of the legislature which created it. Art. IV, sec. 12 of the Wisconsin constitution provides:

“No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.”

The appointment of a legislator to the board, in our opinion, directly conflicts with the quoted language. As we have stated, membership upon the board is an office, and since it is not a military office it is obviously a civil office within the meaning of sec. 12. The office has been created during the term for which the legislator was elected. It may be noted, parenthetically, that while the members of the board receive no salary, the provisions of sec. 12 refer to “any civil office in the state” without regard to whether it is or is not a lucrative office.

The fact that membership on the board carries no compensation other than expenses has no bearing on the question. The matter of compensation is not important in determining whether a position is an office. *Martin v. Smith*, 239 Wis. 314. And under provisions similar to the one here involved it has been held that a civil office is nonetheless an office because no emoluments are provided therefor. *Abbott v. McNutt*, 218 Cal. 225, 22 P. (2d) 510.

In view of the foregoing, we are of the opinion that a member of the legislature cannot legally qualify for appointment to the veterans recognition board created by ch. 443, Laws 1943. We have preferred to base our conclusion upon the provisions of art. IV, sec. 12, Wisconsin constitution, although we are of the opinion that, wholly aside from the provisions of that section, it would violate the constitu-
tional doctrine of separation of power for a member of the legislature to hold the additional office of a member of the board. In our opinion there would be a constitutional incompatibility in the holding of the two offices which would result in vacating the legislative office upon accepting the administrative office. There are several cases which bear upon the point, but it would serve no useful purpose to discuss them in view of the specific application of art. IV, sec. 12 to the question involved.

JWR

_Corporations—Motor Transportation—Ton Mile Tax_—Trucks engaged in transportation of supplies to country cheese factories for use therein are exempt from assessment of taxes under secs. 194.48 and 194.49, Stats. (ton mile tax), by virtue of sec. 194.47, subsec. (5), par. (b), granting such exemption to vehicles engaged in "transportation to farms of materials, supplies or equipment for use thereon".

_HUGH M. JONES, Commissioner,_

_Motor Vehicle Department._

You request an opinion upon the question presented by the following statement of facts: A Wisconsin corporation engaged in the processing and wholesale distribution of cheese acquired certain trucks by purchase at a liquidation sale of the former owner-companies. The trucks were used by the former owners, and it is intended that they will continue to be so used by the present owner, for the purpose of hauling raw cheese from country cheese factories to the present owner's assembling plants. As an accommodation to the small cheese factories from which the cheese is purchased and transported, the corporation carries back to the factories certain supplies for use therein, such as cheese
bandages, rennet, and other materials used by the country cheese makers. The corporation makes no charge for such transportation service, and regards it purely as a courtesy.

The corporation operating the trucks claims the operations described, which constitute their exclusive operations, to be exempt from the assessment of the weight taxes on motor carriers or the mileage taxes imposed by secs. 194.48 and 194.49, Wis. Stats. The exemption is claimed under subsecs. (a) and (b) of sec. 194.47 (5), Stats., which read as follows:

"The following operations are exempt from assessment of taxes provided by sections 194.48 and 194.49, and each vehicle permitted under common carrier certificates or contract carrier licenses shall claim exemption for the number of quarters for which registration fee is paid under chapter 85.

"(1) * * *
"(2) * * *
"(3) * * *
"(4) * * *
"(5) Operations of motor vehicles which, except in respect to operations performed under special permit issued under section 194.49 and tax-exempt operations under subsection (2) of this section, are engaged exclusively in any or all of the following operations:

"(a) Transportation of fluid milk or cream, live stock or raw cheese.

"(b) Transportation of butter, dairy products or unmanufactured agricultural or forest products or manufactured or burned clay products immediately and directly from point of production, or transportation to farms of materials, supplies or equipment for use thereon, and the transportation by private motor carriers of farm machinery and parts of farm machinery."

Your department refuses to transfer licenses and certificates of title upon the vehicles in question unless the tax is paid or the claim for exemption can be properly sustained.

The question is whether the corporation claiming the exemption can bring itself within the terms of the exemption statute. Stated concretely and narrowly, the question resolves itself into this form: Is the transportation by motor vehicle to country cheese factories of materials and supplies
used by country cheese makers the "transportation to *farms* of materials [and] supplies * * * for use thereon" in the sense those words are employed in sec. 194.47 subsec. (5), par. (b), Wis. Stats?

On the basis of the facts stated, it is our opinion that the corporation is entitled to the exemption claimed upon the vehicles engaged in the operations described, under par. (b) of sec. 194.47, subsec. (5), Wis. Stats.

To reach this conclusion it is necessary to construe the phrase "transportation to *farms* of materials, supplies" etc. to mean "transportation to *country cheese factories* of materials, supplies," etc.

At first sight, in the face of the stringent rule of construction requiring a taxpayer claiming an exemption to bring himself plainly within the terms of the statute granting the favor of exemption (*Bowman Dairy Co. v. Tax Comm.*, 240 Wis. 1, 5), this might seem a formidable problem. However, a review of the legislative history and the development of the exemptions to the so-called "truck ton mile tax law" discloses a strong disposition on the part of the legislature, acquiesced in and given strength and support by judicial and administrative interpretation, to relieve the producer of farm products from the burden of the tax in question, irrespective of whether the tax would fall on him directly or indirectly.

The original "truck ton mile tax law" was enacted as ch. 454 of the laws of 1931, which became sec. 76.54 of the statutes. In an original action in the supreme court (*Wisconsin Truck Owners' Association v. Public Service Commission*, 207 Wis. 664) the constitutionality of the act was challenged upon a number of grounds, one of which was the contended unreasonableness of the exemption afforded to "motor vehicles, trailers or semi-trailers used or operated exclusively in transporting or delivering dairy or other farm products between the point of production and the primary market". In treating of the substance of the exemption, our court said, pp. 673-674:

"* * * Where the general prosperity of the state is so interwoven with and dependent upon the prosperity of the farmer, the legislature, under the broad powers which it
enjoys of selecting and classifying subjects for taxation, may very well relieve the farmer from a tax imposed upon those who make an extraordinary use of the highways. * * * This exemption rests upon a substantial basis*.

At pages 679-681 of the same case the court sets out at length the body of a public service commission pronouncement interpreting the terms “point of production,” “primary market,” and “exclusive use of vehicles transporting dairy or other farm products.” These interpretations are adopted by the supreme court at page 683, where it is stated:

“This construction of the commission meets with our entire approval and leaves nothing further to be said.”

Under the discussion of the term “point of production,” the commission said, p. 680 of the same case:

“It is the general practice in the cheese and butter industries for farm producers of milk or cream to own and operate jointly a creamery or cheese factory where they hire a cheese or butter maker and pay him a specific amount per pound for the making. Cheese and butter were originally produced on the farm, but the present general method of producing butter and cheese is but an extended farm operation, so considered by agricultural authorities. We call attention to the phraseology of the exemption, ‘dairy or other farm products.’ We construe the phrase to mean that cheese and butter produced at factories or creameries may be dairy farm products in the intent of the legislature * * *.”

(Emphasis ours.)

The court further reiterated that the “dominant rule in the construction of statutes is to discover and give effect to the legislative purpose. To discover that purpose, the object sought to be accomplished by the statute should be given great consideration” (p. 678).

Sec. 76.54 (16) of the 1933 statutes extended the exemption by providing:

“The following motor vehicles shall be exempt from the payment of the tax per mile of operation * * *

“(a) All motor vehicles owned by a producer and used by him or his employe in transporting his own dairy and
his own farm products to market, or transporting back supplies for his own use. A co-operative shall be deemed to be a producer for the purposes of this subsection. A motor vehicle permitted under a common or contract motor carrier certificate or license shall be excluded from the exemptions of this paragraph.”

Thus it appears that the exemption was extended to the individual producer in the transportation of dairy and farm products to market, and the transportation back of supplies for his own use. A cooperative was included in the definition of the term “producer”. But a contract or common motor carrier was not favored with the exemption.

In 1935 the legislature changed the exemption to read thus:

76.54 (16) “(d) Motor vehicles used exclusively in transporting (1) farm products from the point of original production to primary market and in the return of supplies to producers of such farm products;”

Here the exemption was extended to motor vehicles used exclusively in the transportation described, without conditions or limitations on ownership. Then, irrespective of whether the farm product producer or a commercial hauler of farm produce owned the vehicle, the exemption extended to the motor vehicle. The exclusion of common and contract motor carriers was repealed.

On May 26, 1936, the public service commission made another pronouncement published as MC-973, in which a discussion was had of the subject of hauling farm supplies under the terms of the then existent exemption statute, which reads in part:

“Farm Supplies. The Commission has, in recognition of the desirability of authorizing farm haulers to render to their patrons as complete a service as is consistent with the purposes of the act, been liberal in authorizing the hauling of supplies back from destinations to the farm origin territory. This policy has proven beneficial to both the farm hauler and to his patrons, and has had no unfair effect on the business of other carriers. The policy should, therefore, be given full effect in the order to be entered herein.”
In the 1937 statutes we find the exemption extended from the motor vehicles to the "operations,"—again without regard or consideration for ownership of the motor vehicle involved in the operations:

"194.47 The following operations are exempt from assessment of the taxes * * *
"*(5) Operations of motor vehicles which * * * are engaged exclusively in any or all of the following operations:
"*(a) * * *
"*(b) Transportation of butter, dairy products or unmanufactured agricultural * * * products * * * immediately and directly from point of production, or transportation immediately and directly to farms of materials, supplies and equipment for use thereon."

A further change by way of enlargement or extension of exemption is perceived in the 1939 statutes in par. (b), sub-sec. (5), sec. 194.47:

"Transportation of butter, dairy products or unmanufactured agricultural * * * products immediately and directly from point of production, or transportation to farms of materials, supplies or equipment for use thereon, and the transportation by private carriers of farm machinery and parts of farm machinery."

There appears to be no change in the form of the 1941 statutes in the language of 194.47 (5) (b) from that quoted above in the 1939 version.

While the statute has been frequently amended since the decision in Wisconsin Truck Owners' Assoc. v. Public Service Commission, supra, and since the two administrative interpretations by the public service commission, the tendency in these amendments has uniformly been to broaden the exemption and not to narrow, restrict or reverse the interpretations referred to. The amendments, as we read them, do not purport to change or modify any words or phrases heretofore interpreted. That being true, the rule of construction announced in Evans v. Michelson, 241 Wis. 423, 426, comes into play:
"* * * There is now applicable the rule that ‘when a statute has been construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally.’ [Citing, among other cases, Milwaukee County v. City of Milwaukee, 210 Wis. 336, 341.] In the latter case the court said:

"‘When a statute has once been construed by the court, it remains as construed until it is amended by the legislature or the construction given is modified or changed by the court. The statute under consideration has never been amended by the legislature since it was construed by the court, nor has the court ever in any way modified or limited the construction given . . . The legislature by not amending the statute has accepted the statute with the court’s construction incorporated therein.’"

We therefore deem the legislature has accepted the public service commission’s pronouncement that “the present general method of producing * * * cheese is but an extended farm operation, so considered by agricultural authorities,” and that such interpretation, having been adopted by the Wisconsin supreme court, accordingly becomes a part of the statute itself.

It is unnecessary to consider the claim for exemption under subdivision (a) of 194.47 (5), since the sustaining of the exemption under (b) accomplishes the desired purpose. 

SGH
Automobiles — Law of Road — Stay of revocation of operator's license under sec. 85.08, subsec. (25c), Stats., is condition precedent to issuance of restricted occupational license; court is powerless to stay revocation except in instance of first conviction for driving under influence of intoxicating liquor.

Sec. 85.08 (6) (c), Stats., effectively prohibits issuance of restricted occupational operator's license following mandatory revocation under secs. 85.08 (25) resulting from second conviction for such offense within one year.

July 26, 1943.

Hugh M. Jones, Commissioner,
Motor Vehicle Department.
Attention John W. Thompson.

You request an opinion as to the legality of your department's refusal to issue an occupational license to an individual under the following stated circumstances:

A person was convicted on June 5, 1942, of operation of a motor vehicle while under the influence of intoxicating liquor. The conviction was duly reported to your department, and an order was made by the court before whom the conviction was had staying the revocation of the operator's license and prescribing restrictions under which your department was authorized to issue a license for occupational purposes under sec. 85.08 (25c), Stats.

On May 5, 1943, the same person was convicted a second time, for the same offense, and his restricted license was surrendered to the court and turned over to your department with a report of his conviction.

Your department thereupon revoked the convicted person's operator's license for a period of one year from May 5, 1943 to May 5, 1944, in accordance with the provisions of sec. 85.08 (25), Stats.

On June 7, 1943, you received an order for the issuance of an occupational license for the convicted operator.

It is our opinion that you are prohibited by statute from issuing an occupational or restricted license under these circumstances. The answer to the question posed is to be found
clearly expressed within the several subsections of sec. 85.08, Stats., hereinafter cited. The following subsections are involved in, and applicable to, the situation described above:

Sec. 85.08 (1) defines many of the terms involved herein:

“(a) Words and phrases not specifically defined in the section shall have the meaning ascribed to them in section 85.10, except in those instances where the contents clearly indicate a different meaning.

“(e) ‘License’ is an operator’s or a chauffeur’s license except in those cases where the contents clearly indicate a different type of license.

“(f) ‘Suspension’ means that the licensee’s privileges to operate a vehicle are temporarily withdrawn.

“(g) ‘Revocation’ means that the licensee’s privilege to operate a vehicle is terminated for a definite period.

Sec. 85.08 (6) enumerates the persons not to be licensed:

“’The department shall not issue any license hereunder:

“(c) To any person whose license has been suspended, during such suspension, nor to any person whose license has been revoked, until the expiration of one year after such license was revoked’.

Sec. 85.08 (25) provides in part:

“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:

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

In the situation confronting us the revocation by the commissioner of the offender’s operator’s license is mandatory, unless the facts can be clearly brought within the terms of
the exception provided by the next following subsection, (25c), the pertinent parts of which read:

"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 proscribe, 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 persons 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). * * *

Under the status set forth as applied to the facts stated by you it clearly appears that a stay of the revocation of an operator's license is a condition precedent to the issuance of a restricted occupational license. A court is powerless to stay revocation under sec. 85.08 (25c), Stats., except in the instance of a first conviction. This being a second conviction, the plain and unambiguous language of sec. 85.08 (6) (c), Stats., prohibits the issuance of any license until the expiration of one year following mandatory revocation. "Any" license naturally includes a restricted operator's license.

SGH
Criminal Law — Inquests — Public Officers — Coroner

— Under sec. 366.14, Stats., coroner is entitled to fees and mileage and for making investigations to determine necessity for inquest. Such fees should be allowed in any case where coroner was called to view body, and in cases where he acted on his own initiative after receipt of information indicating possibility that inquest might be necessary.

Coroner should not be allowed fees for conducting inquest unless preliminary inquiry revealed ground to suppose that death was felonious or surrounded with mystery.

July 28, 1943.

HERBERT W. JOHNSON,

District Attorney,

Sturgeon Bay, Wisconsin.

You have requested an opinion as to the allowance of coroner's fees under ch. 366, Stats. Specifically, you inquire whether the coroner is entitled to fees (1) where he makes an investigation to determine the necessity for an inquest but does not hold an inquest where he had no ground for suspecting that the circumstances were such that an inquest might be necessary, and (2) where after making an investigation he holds an inquest, although he had no grounds to suspect, and no grounds existed for suspecting, that the circumstances of death were such that an inquest was necessary.

1. Under sec. 366.01, the coroner has independent authority to conduct inquests without being directed to do so by the district attorney. XIX Op. Atty. Gen. 386. Prior to the enactment of ch. 197, Laws 1935, he was not entitled to any fees for making an investigation to determine the necessity of an inquest. XVIII Op. Atty. Gen. 676. However, sec. 366.14, as amended in 1935, now provides the same per diem and mileage as is allowed for taking an inquest, for "making an investigation to determine the necessity to take inquest". It does not seem reasonable that the legislature intended to enable the coroner to earn a per diem and mileage by investigating every death occurring in his county, but, on the other hand, it would be absurd to suppose that
the coroner must have all the information necessary to justify an inquest before he may be entitled to fees for making such preliminary investigation. Apparently the legislature intended to give the coroner compensation for making preliminary investigations in those cases where no inquest is held, as well as in those cases where an inquest is found necessary.

The same problem formerly existed in Pennsylvania. The courts of that state had held that "When a coroner is called upon to view a dead body, he should make some reasonable inquiry into the circumstances of the death before proceeding to summon a jury and hold an inquest" (Pfout's Case, 7 Pa. Co. Ct. Rep. 265), but that no compensation was provided for making such inquiry. Coroner's Inquest, 20 Pa. Co. Ct. Rep. 660, 662.

It will be noticed that the duty of the coroner was said to arise when he is called upon to view a dead body. Nothing is said about the necessity that the coroner suspect that the death was felonious. Such a suspicion could hardly arise until some inquiry had been made. So, in 1897, the legislature of Pennsylvania passed an act, "That whenever the coroner shall have been called and views a dead body and decides that no inquest is necessary" he should receive the same fees and mileage as though there had been an inquest. Pa. P. L. 1897, p. 8.

So, in Pennsylvania, the statutory test was whether someone had called the coroner. Our statute is not as specific as that, but it would seem that in any case where a person having knowledge of a death has concluded that the coroner should be notified, that fact alone would justify the coroner in making a preliminary inquiry, and entitle him to fees and mileage for so doing. This is not to say that he will not be entitled to fees unless someone has called him. Clearly, if he learns of a death under circumstances which seem to him in good faith to justify an investigation on his own initiative, he should be allowed his fees for making it. But if he were to undertake the investigation of every death occurring in his county or an unduly large number of them, he should be required to make some showing in each case that the investigation was justified.
2. Answering your second question, it is well established that the coroner should not hold an inquest and should not be paid for doing so unless the preliminary inquiry shows ground to suppose that the death was felonious, or that it is surrounded in mystery. See Pennsylvania cases cited above and 13 Am. Jur.—Coroners, sec. 4. Sec. 366.01 provides that the district attorney shall order the coroner to hold an inquest if "there is good reason to believe that murder or manslaughter has been committed". Clearly, if the preliminary investigation discloses that there is good reason to believe that the death was not a homicide, an inquest would be a waste of the county's money and no fees should be allowed in such cases.

The foregoing does not, of course, affect cases coming within sec. 366.19 relating to the inquiry to be made by a coroner in cases where the body is to be cremated. Under subsec. (3) of that section, the coroner is entitled to a fee of $10.00 in each such case, irrespective of what he may have known in advance as to the circumstances surrounding the death.

WAP

Appropriations and Expenditures — Constitutional Law — Public Officers — Legislative Employees — Ch. 511, Laws 1943, is in conflict with art. IV, sec. 26, Wis. Const., so far as it provides extra compensation to legislative messengers for services performed prior to effective date of law, but is valid so far as it increases compensation of legislative employees for services performed after effective date.

July 29, 1943.

HONORABLE FRED R. ZIMMERMAN,

Secretary of State.

You have requested our opinion as to whether ch. 511, Laws 1943, is in conflict with the provisions of art. IV, sec. 26 of the Wisconsin constitution.
The law relates to the compensation of messengers in the office of the senate and assembly sergeants at arms. Prior to its enactment such messengers received a certain per diem varying with the type of work. This per diem, which may be referred to as a permanent rate of compensation, is not altered. Ch. 511 provides an increased per diem for messengers who were working as such on June 15, 1943, with the increase to be effective from the time of their first employment in the 1943 session of the legislature. As introduced in the legislature the law was clearly intended to provide the additional remuneration both for past services and for such future services as might be rendered after it became effective. An amendment was introduced limiting the payment of increased compensation to those employed on June 15 and the language of the amendment is not so clear as to whether it was intended to apply to services rendered after that time, but in our opinion the purpose of the amendment was not to restrict the increased remuneration to services performed prior to June 15 but rather was to limit the payment of compensation for past services to those who were employed at that time. There is no clearly evidenced intent to change the original idea of making the bill effective prospectively as well as retroactively. It is a fair construction of the law that it was intended to have both retroactive and prospective operation.

Article IV, sec. 26 of the Wisconsin constitution provides:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

In so far as the law applies to services which had been rendered and paid for prior to its effective date, July 11, 1943, it is in direct conflict with the provisions of article IV, sec. 26. There can be no doubt that as applied to such services the law proposes to increase the per diem compensation above that which was in effect at the time such services were performed and for which compensation had been made.
There is room, however, for at least a portion of the law to have valid operation under the provisions of article IV, sec. 26. The law contains no severability clause but, even in the absence of such a clause, any part of a statute which can be operative independently of an invalid portion should be given effect unless it can be said that it would not have been enacted independently of the invalid portion. The purpose of the legislature in increasing the per diem of these messengers is evidently to increase their compensation to meet higher living costs brought about by the war. The fact that the object could not be accomplished as to past compensation, in view of the provisions of article IV, sec. 26, would not in our opinion have resulted in the legislature refusing to increase the future compensation of its employees had it been advised of its inability to make such past compensation. Rather the legislature would probably have increased the future compensation to allow for services that had been performed in the past and which could not be compensated for at the increased per diem.

We are of the view, therefore, that to the extent services were performed after the law became effective, they may be compensated at the increased rate. As to those services rendered for which the employees had not been paid prior to the effective date of the law, we are of the opinion that payment for such services cannot now be made. Such services are in the same category as those for which compensation had been made. The constitutional prohibition runs against increasing compensation for services after they have been rendered and where the compensation involved is at a per diem it is earned from day to day and any increase for one day's work after that day has passed involves an increased compensation for services performed.

We therefore suggest that, if you are in agreement with our view, you request an additional certification by the proper officers of the senate and assembly of those employees performing services after July 10, 1943. Such certifications may be properly audited.

JWR
Minors — Child Protection — County of commitment should be held accountable under provisions of sec. 48.17, Stats., for county's share of support of neglected, delinquent or dependent child committed to state industrial school.

August 2, 1943.

DEPARTMENT OF PUBLIC WELFARE.
Attention A. W. Bayley.

You have submitted a request for an opinion reading:

"It has been the established policy of the old state board of control and the present state department of public welfare to certify the charges against the several counties for care of inmates at the industrial schools for boys and girls on the basis of the county of commitment and not of legal settlement.

"Approval of this practice apparently was given in the opinions rendered in VI Op. Atty. Gen. 210 and in XXIII Op. Atty. Gen. 105. The question we are now confronted with is whether your recent opinion in XXXI Op. Atty. Gen. 404 overrules earlier opinions and if we are now to assess such charges against the county of legal settlement."

We have given the matter a great deal of thought and in all frankness must say that we have not been, and are not now, at all clear as to the proper interpretation of the law relating to the liability of counties for the care of neglected, delinquent and dependent children. You refer to our opinion in XXXI Op. Atty. Gen. 404. We found a great deal of difficulty in arriving at a conclusion in writing that opinion and, while we are still inclined to think that it was right, we concede the force of a contrary argument. And we must also concede that certain statements made in the opinion are not entirely accurate. We refer to those statements in which we said that the support of neglected, delinquent and dependent children committed to state institutions is chargeable to the counties of their legal residence. We specifically referred to sec. 48.20, Wis. Stats., relating to the state public school, and in this we were correct, since that section so provides, but we did not have in mind institutions such as the industrial schools. Our research since that time con-
vinces us that the statutes relating to the care and support of children are such that it is inadvisable to generalize and that each problem must be considered on the basis of the particular statutory provisions dealing therewith.

There is, of course, an over-all policy in the case of these child welfare statutes that must be borne in mind in considering cases arising under them and that can be gathered only through study of the statutes as a whole, but the problem is very difficult with respect to this particular matter in view of the piecemeal growth of the statutory regulation on the subject. The statutes have been revised and additions have been made to them from time to time with no apparent recognition of broad over-all policies, at least with regard to certain problems, and the result has produced a great deal of confusion. The statutes relating to the industrial schools, for example, have been fitted into the juvenile court system, although at the time they were enacted there was no system comparable with that which exists today. During the early years of their existence these statutes clearly contemplated that, so far as the cost of those committed to the schools was chargeable to any county, it was chargeable to the county committing them. On the other hand, the statutes at that time provided for commitment solely by the county of residence. Under the juvenile court system there is no such limitation, since the county in which a child is present has jurisdiction to commit him to an institution.

In view of the intent of the original statutes relating to the chargeability of counties for those committed to the industrial schools—in view of the fact that the various revisions of the various statutes contain no clear expression of an intended change in this respect—and in view of the long continued administrative construction of your office and the prior opinions of this office, VI Op. Atty. Gen. 210 and XXIII Op. Atty. Gen. 105 (although there have been significant statutory changes since the first opinion was written)—we think you should continue to impose your charges upon the county of commitment as you have done and now do. If in any case a county from which a child is committed desires to hold the county of the child's legal residence, it can probably do so through litigation and thereby secure a court determination of the question. It is not apparent as
to why there should be a different basis of charges for the state public school and the industrial schools, nor is it clearly apparent just how the matter of concurrent jurisdiction of juvenile courts was intended to affect the question of charges. At least one difficult situation that results in this respect was discussed in XXXI Op. Atty. Gen. 404, and there are undoubtedly others that may arise. It would appear highly advisable that some effort be made in the future to clarify this matter of chargeability for support, but until it is clarified we think you should follow your usual practice. JWR
**Fish and Game — Public Nuisances** — Fishing nets which are legal for use in certain waters but are illegal for use in waters where they are found are public nuisance under sec. 29.03, subsec. (1), Stats.

If part of fishing net is composed of illegal mesh and part of legal mesh entire net is illegal.

Where fishing net of unknown owner constitutes public nuisance under sec. 29.03 (1), Stats., it may be seized and destroyed without any court proceeding.

Where known owner of illegal fishing net is not prosecuted criminally so as to result in order for confiscation of net under sec. 29.05 (7), net may be confiscated in forfeiture action commenced pursuant to ch. 288, Stats.

Acquittal on charge of fishing with illegal nets is incompatible with proof required for confiscation under sec. 29.05 (7), Stats.

Where court under sec. 29.05 (7) orders fishing nets returned to defendant on acquittal of charge of fishing with illegal nets, conservation commission should comply with such order even though nets may in fact be illegal.

August 7, 1943.

**E. J. Vanderwall, Conservation Director,**

*Conservation Department.*

You state that conservation wardens often find nets in the waters of Lake Michigan that are illegal for fishing in these waters but which are legal for use in Lake Superior and Green Bay. In many cases these nets are set in violation of law in that they are not marked with proper buoys showing location and ownership. In other cases gangs of nets are made up by fastening several nets together so as to form a continuous net and some of the portions are of legal size mesh whereas others are not. These conditions give rise to several questions upon which our advice is desired.

1. Is a net or gang of nets that is illegal for use in the waters of Lake Michigan but lawful for use in other waters a public nuisance under sec. 29.03, Stats., when used in the waters of Lake Michigan?
Sec. 29.03, subsec. (1), Stats., declares to be a public nuisance:

"Any unlicensed net of any kind, or other unlicensed device, trap, or contrivance for fishing; or any licensed net or other device, trap or contrivance for fishing set, placed, or found in any waters where the same is prohibited to be used, or in a manner prohibited by law."

The italicized wording from sec. 29.03 (1) quoted above answers this question about as clearly as words can answer it. If the net, whether licensed or unlicensed, is found in any water where the same is prohibited to be used it is a public nuisance.

2. If a part of such nets is composed of netting of illegal mesh and part of legal mesh, are these nets or gangs of nets considered illegal as a whole?

The statute above quoted does not take into account parts of a net. If any part of the net is illegal it is an illegal net. If several nets are laced or tied together so as to make one long net it is then one net for purposes of regulation.

By way of illustration reference is made to sec. 29.30 (2) (d), which provides:

"At each end of every licensed net or set line, when set in any waters, shall be placed and maintained a white flag of not less than sixteen inches square, with the upper end of the staff extending at least two feet above the water, and numbered with figures at least three inches in height corresponding with the number of the license authorizing the use of such net or set line."

As we understand it, only two white flags are required and these are at the two ends. If each part of the whole net where the parts have mesh of different sizes be regarded as a single net, then there would have to be a white flag at the end of each part.

Also, attention is called to sec. 29.336 (2) (b), relating to gill nets, which is the kind causing the most trouble in Lake Michigan. Such net is defined as follows:
“A gill net is a net designed to entangle fish and made of a single web of fine thread hung and fitted at the top and bottom with lead or maitre cord, line, or rope to which are attached at the top, floats, and at the bottom, sinkers.”

It is to be noted that a large net made up of several smaller nets would still constitute a gill net under this definition regardless of the length thereof or of the varying size of the mesh in the different parts thereof.

3. When nets or gangs of nets are seized as a public nuisance and the ownership cannot be ascertained, what action, if any, should the conservation commission take to dispose of the same?

Sec. 29.05 (7) reads in part:

“They [the state conservation commission and its deputies] shall seize and hold subject to the order of the court or judge located in the county in which the alleged offense was committed, any apparatus, appliance, or any vehicle or device, declared by any provision of this chapter to be a public nuisance, or which they shall have reason to believe is being used in violation of this chapter, and if it be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter the same shall be confiscated if the court shall so direct in its order for judgment. Any seizure of perishable property made by the conservation commission or its wardens may be sold at the highest available price, and the proceeds of such sale turned into court to await disposition of such proceeds as the court may direct. * * *”

A careful reading of the above statute indicates that it was not designed to be used in any *ex parte* proceeding in the nature of an action *in rem* against the nets of an unknown owner. The statute uses the words “in the county in which the alleged offense was committed”. This implies a criminal proceeding in which obviously the defendant must be known. The statute also provides for confiscation “if the court shall so direct in its order for *judgment*”. This again implies that there is some known party before the court who will be affected by such “judgment”.
The above section was created by ch. 668, Laws 1917, and then read:

"They [viz. the state conservation commission and its deputies] shall seize and forthwith confiscate or destroy any apparatus, appliance, or device declared by any provision of this chapter to be a public nuisance; and shall seize and hold subject to the order of the commission, any other apparatus, appliance, or any vehicle, or device, which they shall have reason to believe is being used in violation of this chapter, and if it be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter the same shall be confiscated."

In Gemert v. Pooler, 171 Wis. 271, this statute was construed and the court pointed out that the statute made no provision for notice or hearing but that under the forfeiture chapter (now ch. 288) a way was provided for legal proceedings upon due notice to the parties concerned for the determination of the questions as to whether or not the property involved had become forfeited and as to whether or not the former owner's title had been lost by reason of any such forfeiture. The court concluded that it was not the legislative intention of sec. 29.05 (7) that the property of an innocent owner unlawfully used by a trespasser or thief should be subject to forfeiture, but that he has the remedy under the forfeiture statute (now sec. 288.19) to recover the property forfeited as well as the general remedy of replevin.

Sec. 29.05 (7), as it now reads, eliminates the necessity of a civil action for forfeiture under ch. 288 in the usual case where the owner of the illegal nets is known, and this section is used ordinarily in connection with a prosecution for fishing with illegal nets, the order of confiscation being an incident of and included in the judgment of confiscation. In such a case the court has jurisdiction of the subject matter and of the parties so that no question of due process arises.

In 1923 by ch. 36 the statute was amended to read as quoted above at the beginning of the answer to this question. In 1935, by ch. 335, a further sentence was added relating to the destruction by dogs found disturbing deer or game birds, although that amendment is not material here.
In *Bittenhaus v. Johnston*, 92 Wis. 588, it was held that the provisions of a statute making it the duty of wardens

"To seize, remove and forthwith destroy any net, pound or other device found in the inland waters of this state or in the possession of any person or persons intending to use the same for fishing, or having removed or being in the act of removing the same from any of the waters where the fishing with nets or devices or the setting of the same is prohibited or illegal under this act, or any law of the state, and which are declared to be public nuisances"

were not repugnant to art. 14, sec. 1, amendments to the United States constitution (the due process clause) nor to art. I, sec. 9 of the Wisconsin constitution (declaring that every person is entitled to a certain remedy in the law for all injuries to his property). However, in that case the plaintiff had voluntarily put the nets to an unlawful use and as the court pointed out had his right of action to determine whether the nets were or were not in such unlawful use.

Similarly in *Commercial Credit Co. v. Swenson*, 235 Wis. 82, it was held that sec. 29.05 (7) was not unconstitutional as denying due process for failing to provide for a hearing on notice to the innocent holder of a conditional sales contract of an automobile confiscated from the vendee who was convicted of unlawful possession and transportation of venison. Again the court held that sec. 288.19 authorized the bringing of an action by the owner to recover property forfeited to the state. Sec. 29.06 (1) now makes provision for payment of liens against motor vehicles out of the proceeds of confiscated sales.

It is to be noted that the statute today makes no provision for seizure, confiscation or destruction forthwith of illegally used property such as was true at the time of the decisions in *Bittenhaus v. Johnston* and *Gemert v. Pooler*, *supra*. By definition the unlicensed net is a public nuisance under sec. 29.03 (1) but there is no express provision as to its disposition where the owner is unknown.

The power of any person to summarily abate a public nuisance is well recognized. 46 C. J. 756 and *Lowe v. Conroy*, 120 Wis. 151, 155-156. This power is based upon the ground
that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be obtained.

As previously indicated, sec. 29.05 (7) was not worded so as to clearly provide for a proceeding in rem against the illegal nets of an unknown owner at an ex parte hearing. Likewise it has been held that our forfeiture law, ch. 288, is not a proceeding in rem. See State v. Peterson, 201 Wis. 20, at 25.

In the absence of any clear-cut statutory procedure there appears to be no good reason why the remedy of summary abatement mentioned above should not be had under the general rule stated in Herman v. MacKenzie, 197 Wis. 281, 283:

"* * * that articles which are by law a public nuisance per se are not lawful subjects of property which the law protects and such property may be seized and destroyed without violating any constitutional provision. Frost v. People, 193 Ill. 635, 61 N. E. 1054; Mullen v. Moseley, 13 Idaho, 457, 90 Pac. 986, 12 L. R. A. n. s. 394, note and cases cited."

The above language is particularly appropriate here for the reason that it involved sec. 29.03. Subsec. (8) declares to be a public nuisance any dog found running deer at any time, or used in violation of ch. 29, and the court held that the owner of such a dog had no property right in the animal. The same reasoning should apply to an illegal fishing net declared to be a public nuisance under sec. 29.03 (1).

However, should it be that the nets are legal for use in other waters than where found and if it should develop that the real owner was innocent of any illegal use and that they had been taken from him by a trespasser or a thief, the question might be raised as to whether, on discovery of the facts, he might have a cause of action for damages if the nets were destroyed or of replevin if they were still in existence. But since this presupposes the existence of a number of hypothetical factors not specifically raised by your question we shall not attempt to make any ruling here but merely suggest the problem. See XXIV Op. Atty. Gen. 200.
4. Where illegal nets are seized in the public waters and ownership determined, may the nets be confiscated without the arrest of the owner?

Ordinarily it would seem that if illegal nets were seized and the owner known there would be no good excuse for not prosecuting. However, assuming that for some reason arrest was impossible or undesirable, a civil action of forfeiture might be instituted under ch. 288. This apparently was the procedure contemplated before sec. 29.05 (7) was so amended as to authorize confiscation in the criminal prosecution. See Gemert v. Pooler, supra, and if for any reason a criminal prosecution is not had, forfeiture would still lie under ch. 288. Such procedure would appear to be preferable to the remedy of summary abatement or confiscation discussed in answering the third question, at least in those instances where the owner is known, for the reason that the court would have jurisdiction of the subject matter and the parties so that their rights could be determined once and for all.

5. If the owner is arrested for using illegal nets, does his acquittal establish the nets as legal?

The answer is yes. As an incident of confiscation of an illegal net under sec. 29.05 (7) it must "be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter". An acquittal ordinarily would be incompatible with any such proof as is required for confiscation.

6. If the court orders the nets returned to a defendant upon being acquitted of the charge of using illegal nets, and such nets are definitely a public nuisance, may the conservation commission refuse to comply with the order and force the defendant to attempt to secure them in an action of replevin?

The answer is no. The statute specifically provides that the state conservation commission and its deputies "shall seize and hold subject to the order of the court" and if the court orders the net returned to the owner the warden should comply. Failure to do so would subject the warden to possible prosecution for malfeasance under sec. 348.28.
As indicated above the only exception would be where no criminal prosecution is commenced and no offense is alleged to have been committed. In such a case sec. 29.05 (7) does not apply, and the remedy of summary abatement or confiscation in the case of an unknown owner may be followed, or a civil action of forfeiture under ch. 288 where the owner is known; but a criminal action is not considered to be advisable.

WHR

August 10, 1943.

LYMAN K. ARNOLD,

District Attorney,

Elkhorn, Wisconsin.

This is in response to your request of August 4, in which you inquire as to whether sec. 329.09, Wis. Stats., relating to authentication of acknowledgments, created by ch. 289, Laws 1943, supersedes the provisions that have heretofore existed relating to such authentications such as sec. 235.24. I shall not here set out the provisions of the sections referred to; it is sufficient to say that in some respects sec. 235.24 contains requirements more exacting than those contained in sec. 329.09 and in some other respects the reverse is true.
Specifically, you refer to the question as to whether a certificate of magistracy is required in the case of a deed executed without the state but within another state and acknowledged before a notary public in that state. Under sec. 235.24 no certificate of magistracy was required. Under sec. 329.09 such a certificate is required.

It may be pointed out that ch. 289, Laws 1943, did not repeal the provisions of ch. 235 of the statutes which related to acknowledgments, including the authentication of acknowledgments outside the state and in foreign countries. To the contrary, sec. 329.01, as you point out in your submission of the request for this opinion, provides:

"Any instrument may be acknowledged in the manner and form now provided by the laws of the state, or as provided in this chapter."

"Manner and form" must refer to authentication of an acknowledgment as well as the form of the acknowledgment itself, since ch. 329 of the statutes, as created by ch. 289 of the laws of 1943, purports to deal with the manner and form of acknowledgments, as evidenced by the quoted language, and in doing so deals with the manner of authenticating the authority of officials taking such acknowledgments. And since such authentication is included within the words "manner and form", in so far as provision is made for manner and form by the new law, it must be assumed that in referring to the existing manner and form of acknowledgments it is also intended to include authentications.

I may say also that the uniform acknowledgments act was drawn up by the National Conference of Commissioners on Uniform State Laws, and that the note of the commissioners to the 1939 act as published in 9 Uniform Laws Annotated discloses that no intention was made to change the existing law of the state as to acknowledgments. It is stated in the note:

"* * * It should be explained to the Legislatures that there is no attempt to repeal the existing laws on the subject but the Act proposed is merely permissive in that an acknowledgment may be made either in the manner and
form now provided by the law of the state or in the manner and form fixed by this Act. * * *

"* * *

"There is not only a demand for a more modern enactment on acknowledgments in many of the States, but more uniformity on the subject in all the states. This act will provide both without disturbing the existing law for those who want to use it."

The considerations referred to and particularly the fact that no attempt has been made in enacting the new law to change the provisions of the old law, convince us that it is not necessary to authenticate an acknowledgment taken before a notary public in a sister state in the manner provided for by the new law. If the acknowledgment was valid under the old law, it is a valid acknowledgment and entitled to be recorded.

It may be argued that there is an implied repeal of the old provisions relating to authentication, although we must say that we are not impressed with any particular force in such an argument. But a purchaser of property may feel safer if any possible question is removed through compliance with the new requirements. However, so far as the duty of the register of deeds is concerned, he is justified in assuming that compliance with the old law is sufficient.

JWR
Public Officers — Annuity and Investment Board — Retirement Systems — Teachers Retirement — When net interest yield on annuity reserve fund and contingent fund of state retirement system is less than rate at which annuities have been granted and hence reserves are insufficient, annuity board may create supplemental reserve in annuity reserve fund out of sums transferred thereto from reserve for contingencies, and may also create supplemental reserve in contingent fund by requisitioning sum in addition to normal requirement under sec. 71.26, subsecs. (6) and (7), Stats., so that reserves in said funds may be built up to point where they can be valued at net interest rate which they are actually earning.

August 20, 1943.

ANNUITY AND INVESTMENT BOARD.

Attention Albert Trathen, Director of Investments.

Until January 1, 1942, annuities were granted under the teachers' retirement law from both the annuity reserve fund and the contingent fund upon the basis of a three and one-half per cent interest rate and a specially adjusted annuitants' mortality table.

For some time prior to that date the mortality experience of both of these funds was "unfavorable" in that too many of the annuitants were outliving their expectancy. For some time, also, an excess of funds in the hands of investment agencies has resulted in "cheap" money and consequently in low interest yields from the securities in which the annuity board may legally invest the various funds of the teachers' retirement system.

This combination of unfavorable mortality experience and low interest yield meant that the reserves in the annuity reserve fund and in the contingent fund of the state retirement system were actually insufficient to pay the annuities which had been granted upon the previously justified assumption that they could be invested to net the three and one-half per cent at which they had to be valued.

In order to adjust this deficiency of reserves in the annuity reserve fund, the annuity board, as of the end of the
fiscal year, has transferred thereto from the contingent fund such sum as was necessary to make up the deficiency. The deficiency of reserves in the contingent fund, as increased by this transfer, was adjusted by taking from the surtax receipts, or from the general fund through certification under sec. 71.26, subsec. (7), Stats., if the surtax was insufficient, such sum as was necessary to provide the proper reserve therein.

For some time the annuity board has felt that this practice of making relatively small adjustments each year was a makeshift arrangement, particularly because there seems to be no present likelihood of realizing sufficiently high interest returns in the near future to make the present reserves adequate, and that the exercise of sound business judgment requires the establishment of reserves in the annuity reserve fund and in the contingent fund which could be valued at the three per cent which they have been earning for some time. With this end in view the board wishes to transfer to the annuity reserve fund reserve perhaps $100,000.00 from a substantial “reserve for contingencies”, which has been built up largely from profits from securities' sales for the purpose of offsetting losses, supplementing earnings and meeting other contingencies. As a complementary action the board would requisition from the presently more than ample surtax receipts an amount which would include enough to make a comparable increase in the contingent fund reserve. This practice would be followed, probably each year, until the reserves in both funds could be valued on the more conservative three per cent basis.

You inquire whether these proposed actions are sanctioned by statute.

It is our opinion that these proposed transfers would be legal. Section 25.17 commits the entire administration of the teachers' retirement fund to the state annuity and investment board, subject to certain statutory limitations. However, the body administering such a fund necessarily must be permitted to exercise considerable discretion.

The following statutes are deemed material in arriving at the answer to your question:

Sec. 25.28:
“(1) The assets held in the contingent fund shall on June thirtieth of each year at least equal the following ratios to the present value of all future payments of benefits from the contingent fund, namely: The actual percentage of such assets to such present value on June 30, 1922, which percentage shall be increased by two and one-half per cent for each year thereafter, so that such assets shall equal such present value in not exceeding forty years from June 30, 1922.”

Sec. 42.33:

“(1) The annuity board shall at all times maintain assets:

“(a) In the ‘Annuity Reserve Fund’ at least equal to the net present value of the prospective benefit payments according to the basic assumptions for the rates on which benefits have been granted;

“(2) The annuity board shall establish and maintain such reserve or surplus funds as the interests of the members and the future solvency of the funds may require. The annuity board shall as of June thirtieth of each year make such valuations of the several funds as are necessary for the purposes of the state retirement system.

“(4) The annuity board may from time to time transfer from the contingent fund to the annuity reserve fund amounts not exceeding in the aggregate at any time five per cent of the then net present value of the prospective benefit payments then chargeable to the annuity reserve fund;”

Sec. 42.34:

“As of July 1, 1921, July 1, 1923, July 1, 1926, and triennially thereafter, the annuity board shall make such investigations of the mortality, disability, service and compensation experience of the several funds as shall be necessary. On the basis of such investigation the annuity board shall determine, adopt and certify the rates at which the annuities and other benefits shall be granted. The rates shall be adequate to provide for all benefits as near as may be at actual cost, but shall not be less than the rates based on the minimum standard prescribed by law for granting annuities in this state. No revision of rates shall affect adversely the rights of any beneficiary under an application made prior to such revision. The annuity board shall from time to time order and make such distribution of gains and savings as it may deem equitable.”
Section 71.26 imposes a surtax on incomes. Subsections (6) and (7) provide as follows:

“(6) The whole amount collected as surtax shall, through the same channel as other income taxes are paid, be paid into the state treasury, and section 71.19 shall not apply to said surtax. The amount of said surtax herein imposed is hereby levied and shall be collected as herein set forth and shall be paid into the general fund of the state treasury and set apart for the retirement deposit fund and the contingent fund as provided in this act [teachers' retirement act].

“(7) Whenever in any year the receipts from the surtax herein provided for shall not be sufficient to provide the necessary moneys to carry out the provisions of this act, the deficit shall be paid out of the general fund of the state treasurer, and if in any year such surtax provides more money than is needed, such excess shall be paid into the general fund of the state treasury.”

It was held in the case of *State ex rel. Stafford v. State Annuity and Investment Board*, 219 Wis. 31, 261 N. W. 718:

“Under ch. 459, Laws of 1921 [teachers’ retirement act], a contract relation exists between the state and the teachers in the educational system of the state. We consider this proposition definitely settled. *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 206 N. W. 213; *State ex rel. Dudgeon v. Leavittan*, 181 Wis. 326, 193 N. W. 499. * * *.” (Pp. 32-33.)

Prior to January 1, 1942, the state annuity and investment board, acting pursuant to authority granted by sec. 42.34, adopted and certified a rate of three and one-half per cent at which annuities were granted. A part of the contract which exists between the teacher and the state under the holding in the *Stafford case*, supra, is that part of section 42.34 which provides that no revision of rates shall adversely affect the rights of any beneficiary under a prior application. In other words, if an annuity is granted to a retiring teacher on the basis of three and one-half per cent interest and changing conditions make it impossible for the annuity board to invest the funds and realize three and one-half per cent on such investment, the law does not permit a reduction in the annuities previously granted to correspond
to the reduced interest yield. If it is anticipated that this condition will exist for only a short time, section 42.33, sub-
sec. (4), authorizes transfers from the contingent fund to the annuity reserve fund, which transfers would operate to make up the deficiency in reserves resulting from the decreased earnings. It is under this subsection that your board has on several occasions transferred sums from the contingent fund to the annuity reserve fund. However, section 42.33 (4) provides that the aggregate of all of these sums transferred may not exceed five per cent of the then net present value of the prospective benefit payments then chargeable to the annuity reserve fund. In other words, this section contemplates that if it appears that the interest earnings upon the annuity reserve fund reserve will consistently fall below the rate at which annuities have been granted, some other method must be found to rectify the condition. The only other method of remedying the condition is to increase the annuity reserve fund reserve until it is large enough to compensate for the decreased interest yield. Your board now proposes to do this by establishing a supplemental reserve in the annuity reserve fund by transferring an amount thereto from a reserve for contingencies. Similar transfers would be made in subsequent years.

Sec. 42.33 (1) (a) specifies only the minimum of assets to be maintained in the annuity reserve fund. Section 42.33 (2) directs the board to “establish and maintain such reserve or surplus funds as the interests of the members and the future solvency of the funds may require.” The reserve for contingencies was created under this latter subsection for the purpose, as its name implies, of meeting various contingencies, one of which is an insufficiency in the reserves in the annuity reserve fund. Sec. 42.33 (2) would also authorize the establishment of the supplemental reserve in the annuity reserve fund. When this supplemental reserve is sufficient to compensate for the decreased interest yield, the supplemental reserve can be included as a part of the regular reserve in the annuity reserve fund, and the fund as a whole may then be valued at the three per cent interest which past experience and present conditions now dictate is probably the maximum which the fund will be able to earn for some time. In this manner the annuity board will not only be pro-
viding for the future solvency of the fund but will also probably avoid the necessity for making a large increase in the reserves in any one year, which might operate as a hardship.

Annuities based upon prior service credits given by sec. 42.51 and disability annuities provided for in sec. 42.49 (4) are paid from the contingent fund. Sec. 25.28 (1) specifies only the minimum of assets to be maintained in the contingent fund. It is obvious that the amount to be added to the contingent fund each year may be a greatly varying amount, depending upon the annuities granted upon prior service credits, the amount of the disability annuities, the amounts transferred under sec. 42.33 (4), etc. Under sec. 71.26 (6) the "whole amount" of the surtax collected is set apart for the retirement deposit fund and the contingent fund of the state retirement system. The whole amount of that tax, excepting the sum paid to the city of Milwaukee, is available to pay the state deposits and to build up the contingent fund assets, if it is needed. Sec. 71.26 (7) provides that if the surtax is insufficient, the deficiency shall be made up out of the general fund. It is obvious that the annuity board, in its administration of the teachers' retirement system, bearing in mind the discretion vested in said board and its duty to provide for the solvency of the funds, must in some years requisition very substantial sums. It so happens that in the present year the surtax receipts are far in excess of the normal requirements for the retirement deposit fund and the contingent fund and that a certification for an additional sum to create a supplemental reserve in the contingent fund similar to the supplemental reserve in the annuity reserve fund will not operate as a financial hardship. Whether the additional amount under the certification comes from the surtax imposed by the legislature under section 71.26 or from the general fund, through other taxes imposed by the legislature, it would not result in the imposition of a tax by the annuity board. Sec. 71.26, subsecs. (6) and (7), operate as a legislative appropriation of a sum sufficient, the amount of such sum being left for determination by the board.

When the supplemental reserve in the contingent fund, resulting from the certification for the additional amount, is
built up to a fund which will compensate for the decreased interest yield, then the contingent fund reserve also may be valued on the three per cent basis which experience and present conditions now dictate is the maximum yield which can be expected from these reserves for some time. In this way the annuity board is providing for the solvency of the contingent fund in compliance with section 42.33 (2).

JRW

Municipal Corporations — Municipal Budget Systems — Appropriation of moneys in county contingent fund for purpose that is not within other budget items or accounts is not budgetary change so as to be subject to publication requirement of sec. 65.90, subsec. (5), Stats. 1943.

August 21, 1943.

Elmer R. Honkamp,

District Attorney,

Appleton, Wisconsin.

You state that your county has established a contingent fund and it was included in the budget as an account to take care of emergency matters, as well as other expenditures that were not contemplated. An opinion is requested as to whether the appropriation of moneys in the contingent fund by the adoption of a resolution at an adjourned meeting of the county board approving the expenditure of a certain amount for a purpose not within any of the other items or accounts and the use of the contingent fund to pay for the same constitutes a budget change within the provisions of sec. 65.90 (5), Stats. 1943, and subject to the requirements thereof, particularly as to publication.

It seems obvious that the purpose in having a contingent fund is to include in the total budget a provision for moneys on hand to be available for expenditure for emergency and other unforeseen matters not contemplated and otherwise provided for in the budget. Accordingly, the expenditure of
the funds in the contingent account for a purpose which is not one that is within any of the other budget accounts would not constitute any change in the budget but be in furtherance of the very purpose for which the amount included in the contingent fund was provided. However, the expenditure of the moneys in the contingent fund for any of the purposes included in any of the other budget accounts or the use thereof to supplement expenditures from other budget accounts for the purposes covered by such other budget accounts, or the transfer of all or any portion of the moneys in the contingent fund to any other budget account to augment the amount in the other budget account, would constitute a budget change and all of the requirements of sec. 65.90 (5), Stats. 1943, would have to be complied with. XXX Op. Atty. Gen. 304, 309.

Sec. 59.84 (5), Stats. 1943 (as amended by ch. 103, Laws 1943), requires a two-thirds vote of the members elect of the county board to appropriate money from the contingent fund of a county. This is the same vote requirement that sec. 65.90 (5), Stats. 1943, requires for a budgetary change, so that the resolution which you mention would have to be passed by a two-thirds vote of all the members of the county board, but, if so passed and appropriating moneys in the contingent fund for a purpose that is not within any of the other budget items or accounts, it would not constitute a budget change and the publication requirements of sec. 65.90 (5), Stats., would not have to be complied with.

HHP
Public Health — Dentistry — Scheme pursuant to which licensed dentist is paid one dollar for signing authorization whereby mail order dental plate company may make and ship through mail or in interstate commerce denture for customer of such company without any professional services being rendered by dentist and for sole purpose of enabling dental plate company to evade purpose of 18 USCA, sec. 420f, and sec. 152.02, subsec. (1), Wis. Stats., constitutes immoral and unprofessional conduct on part of dentist within meaning of sec. 152.06 (5), Stats., and justifies suspension or revocation of his license.

August 25, 1943.

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

You have called our attention to a scheme now in use by an out of state mail order dental plate company whereby the new federal law relating to mail order dentures is being circumvented through a working arrangement with a local dentist licensed in Wisconsin.

The federal statute, 18 USCA, sec. 420f, reads:

"Unlawful transportation of dentures made in derogation of State or Territorial laws regulating the practices of dentistry.

"It shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—

"(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

"(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

"(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry, any denture constructed from any cast or impression made
by any person other than, or without the authorization or
prescription of, a person licensed under the laws of the
State or Territory into which such denture is sent or
brought to practice dentistry.” (Dec. 24, 1942, ch. 823, sec.
1, 56 Stats. 1087)

This statute is applicable in Wisconsin, since sec. 152.02,
subsec. (1), Wis. Stats., defining the practice of dentistry
provides in part:

"* * * Any person shall be said to be practicing den-
tistry within the meaning of this chapter who * * * except on written prescription of a licensed dentist, and by
use of impressions taken by a duly licensed and practicing
dentist, shall directly or indirectly by mail, carrier, person
or any other method furnish, supply, construct, reproduce
or repair prosthetic dentures, bridges, appliances or other
structures to be used or worn as substitutes for natural hu-
man teeth; * * *.

In order to continue in the business of selling dentures by
mail pursuant to a plan whereby the customer takes his own
impressions on wax furnished by the dental plate company,
such company enters into an arrangement with a local den-
tist, willing to become a party to the scheme, in which such
dentist receives the sum of one dollar for signing an author-
ization blank requesting and authorizing the company to
make a denture for a customer of the company in the state
where such dentist is practicing. The customer has pre-
viously been attracted by mail order advertising and has sent
in his wax impression, presumably accompanied by the pur-
chase price of the teeth.

The customer then receives a letter from the company
worded as follows:

"Dear Customer:

"Your impressions are good and your case is in the labo-
ratory for completion.

"Enclosed you will find a stamped envelope addressed to a
dentist in your state, and in this envelope there are two au-
thorization blanks, $1.00 in cash and a pink envelope ad-
dressed to us.

"Sign the letter enclosed with this letter, addressed
'Dear Dentist'—put it in the stamped envelope and mail
to the dentist at once. You can go to your own dentist if you care to.

"This is the new law governing the making of dental plates by mail.

"Please do this NOW so we can make your plates at once.
Yours very truly,
'X' DENTAL PLATE CO."

The letter which the customer is requested to send to the dentist reads:

"Dear Dentist:

"I the undersigned hereby request you to authorize the X Dental Laboratory to make plates for me and I am enclosing herewith fee in payment. Please forward enclosed authorization to them at once.

__________________________"

The authorization blank, a copy of which is kept by the dentist, and a copy of which he sends to the dental plate company reads:

"To the X Dental Plate Co.

"Gentlemen:

"At the request of —— residing at ———— I the undersigned Dentist duly licensed to practice dentistry under the laws of the State of ———— do hereby request and authorize you to construct the following plate for — upper — lower set of teeth.

Dated this ————.

__________________________

Dentist

__________________________

Address"

It is to be noted that the customer probably never sees the dentist and that the dentist knows nothing about the dental work he has authorized or prescribed. The authorization or prescription is hence not a bona fide one, and the whole program is designed to evade the purpose of both the state and federal laws, which together have the effect of prohibiting the making, interstate transportation and mailing of dentures except on prescription or proper authorization of a licensed dentist.
Under the circumstances you inquire if a Wisconsin dentist who participates in such a scheme is guilty of violating the Wisconsin dental law, ch. 152.

Among the causes for suspension or revocation of a dentist's license, under sec. 152.06, is immoral or unprofessional conduct, which is defined in subsec. (5) to include among other things:

"* * * Employing what is known as 'cappers' or 'streeters' to obtain business; or resorting to unprofessional advertising, as defined in subsection (6); obtaining fee by fraud or deceit;"

Sec. 152.06 (6) (e) defines "unprofessional advertising" to include "Employing or making use of advertising solicitors or free publicity press agents".

We shall discuss the scheme in question in the light of the foregoing statutory provisions.

It would seem that the dentist in availing himself of the services of the dental plate company to earn the one dollar fee is in effect employing what is known as a "capper". The legislature has not defined the word "capper". In People v. Dubin, 367 Ill. 229, 10 N. E. (2) 809, 811, it was held that the legislature was not bound to define such term as used in a dental practice statute, the intent being to forbid the obtaining of patronage by the use of solicitors. The sole interest of the dentist here is to secure the dollar fee for his authorization or prescription. Obviously no such business would reach him except by the solicitation of customers through the medium of the mail order company's advertising. Consequently it can be said that he has employed or engaged the services of that company to solicit such business. By the same token the transaction constitutes the employing or making use of an advertising solicitor within the meaning of sec. 152.06 (6) (e).

This leaves then the question of whether or not the dentist under such an arrangement is guilty of obtaining a fee by fraud or deceit.

It seems perfectly clear that any dentist who lends his license to the perpetration of a scheme such as this must know that he is rendering no real dental or professional service either to the customer or to the dental plate com-
pany. He makes no examination, takes no impressions and gives no professional advice. All he does is to sign a slip which requests and authorizes a mail order dental plate company to make a plate for John Doe, and without which slip the making and mailing of such plate would be illegal.

We must presume that when congress used the words "authorization or prescription" of a licensed person it meant a bona fide authorization or prescription made in good faith in the ordinary course of professional practice on personal examination and after the taking of an impression by a licensed person. Presumably the statutes in question, state and federal, were enacted in the interests of the public health and welfare upon the assumption that people needing dentures should have the protection afforded by the professional assistance of licensed dentists.

Certainly no one would contend that the purpose of the law was to enable a dentist to farm out his license to an unlicensed person or company even at the modest rate of one dollar for each use of his signature.

The customer is not advised of the true nature of the transaction. He is told by the dentist's confederate, the plate company, after the impression has been sent and the money received, that it is necessary to send one dollar to the dentist for his authorization to make the plates and that "this is the new law governing the making of dental plates by mail." This is not the law but rather the most grotesque perversion of the law designed to defeat its wholesome purpose, and the words of the dental plate company in telling the customer that this is the new law may be in the voice of Jacob but the hands are the hands of Esau.

When the customer sends the dollar to the dentist with the request for certain services involving the use of the dentist's license to practice dentistry, the customer is entitled to assume that the professional relationship of dentist and patient exists and that some sort of professional service as a dentist is being rendered to the patient, when, as a matter of fact, no professional service whatsoever is performed by the dentist and the patient becomes the innocent victim of a breach of trust and confidence by which dental laws designed for his protection are attempted to be evaded.

In State ex rel. Williams v. Purl, 228 Mo. 1, 128 S. W. 196, the court held that the word "deceit" as used in a stat-
ute making it grounds for revocation of a dental license meant any trick or contrivance used to defraud another to his injury and that the word "fraud" meant an intentional perversion of the truth to induce another in reliance on it to part with some valuable thing belonging to him or to surrender a legal right.

By joining forces with the mail order plate company in a scheme whereby the customer is in effect induced to surrender the protection of public health legislation designed for his benefit, the dentist is in our opinion guilty of obtaining a fee by fraud and deceit so as to justify suspension or revocation of his license under sec. 152.06 (5).

You have asked further if the dental plate company may be prosecuted in Wisconsin courts.

Since the dental plate company is an out of state concern it is not subject to the criminal jurisdiction of our courts or to the jurisdiction of the Wisconsin state board of dental examiners. Whether or not a prosecution could be successfully instituted in federal court for violating the federal statute is a question upon which we pass no opinion, as it is not within our province to construe the federal criminal statutes in cases of this sort. That is a problem which must be taken up with federal authorities.

WHR
Automobiles — Law or Road — Discharge in bankruptcy does not relieve judgment debtor from fulfilling requirements of sec. 85.135, Stats., as conditions precedent to restoration of driving privileges. Sec. 85.135, subsec. (2), is not in derogation of bankruptcy act nor is it obnoxious to due process clause of 14th Amendment.

August 25, 1943.

HUGH M. JONES, Commissioner,
Motor Vehicle Department.

You inquire whether "liquidation of a judgment" through bankruptcy proceedings permanently prevents reinstatement of a judgment debtor's driving privileges under sec. 85.135, subsec. (2), Wis. Stats., where such judgment is based upon a finding of negligent operation of a motor vehicle.

It appears that you suspended an operator's license upon receipt by your department of a certified copy of a transcript of judgment for damages based on the operator's negligence in the operation of a motor vehicle. The operator was subsequently discharged from the payment of such judgment, along with his other dischargeable debts, in a bankruptcy proceeding.

You now say that "some course of action should be available to such a person in order to gain reinstatement of his driving privileges."

The only course of action is payment of the judgment and fulfillment of such other conditions as are prescribed in sec. 85.135, Stats., as conditions precedent to the restoration of such an operator's privileges.

Sec. 85.135 (2), Stats., provides as follows:

"A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this section."

This statute means precisely what it says. The validity of a similar statute (New York) was sustained in the case of Reitz v. Mealey, 314 U. S. 33, 86 L. ed. 21, 62 S. Ct. 24. In that case the New York statute provided that one against
whom a judgment is rendered for injury resulting from the operation of a motor car and who fails to pay it within a time designated shall have his license and registration suspended for three years, unless in the meantime the judgment is satisfied or discharged, except by a discharge in bankruptcy. (Section 94-b, vehicle and traffic law of New York)

Speaking through Mr. Justice Roberts, the United States supreme court said (pp. 26-27):

"The purpose of the statute is clear. * * *

"The statute, * * * is not obnoxious to the due process clause of the 14th Amendment. The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process. * * * As the court below has held, the effect of the statute * * * was to make the license privilege a form of protection against damage to the public inflicted through the licensee's carelessness.

"* * *

"* * * we are clear that it [the statute] would constitute a valid exercise of the state's police power not inconsistent with sec. 17 of the bankruptcy act. The penalty which sec. 94-b imposes for injury due to careless driving is not for the protection of the creditor merely but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety."

In our opinion the basis on which the cited case is reasoned would apply with equal force and effect to the Wisconsin statute, notwithstanding the Wisconsin statute is without a time limitation, whereas the New York statute is
limited to three years. This case is adequate authority for sustaining the validity of the Wisconsin statute. There is no alternative but for a person whose license to operate a motor vehicle has been suspended by reason of an unpaid damage judgment based on the negligent operation of a motor vehicle to strictly comply with the requirements of sec. 85.135, if he is ever to have his driving privileges restored under the existing statute.

SGH

_Education — Vocational and Adult Education_ — Where local board of vocational and adult education has received amount which it requested from city under sec. 41.16, Stats., city and not local board of vocational education has authority to make short term loan from bank to pay current expenses of such board.

August 26, 1943.

**George P. Hambrecht, Director,**

_Board of Vocational and Adult Education._

Occasionally a local board of vocational and adult education finds itself financially embarrassed due to the fact that it has advanced considerable sums of money for materials, supplies and other immediate expenses in connection with a defense activity. Before its revenues from taxation and federal aids come in there is frequently a need for short term borrowing from a bank. You inquire whether the local board of vocational and adult education has authority to negotiate a short term loan from a bank or whether such a loan should be made by the city.

You are advised that such a loan must be negotiated by the city. With a few exceptions, which are here immaterial, chapter 67 of the statutes governs municipal borrowing. Sections 67.12 and 67.125 authorize temporary borrowing by certain municipalities. However, those sections do not authorize temporary borrowing by a local board of voca-
tional and adult education. Those sections permit temporary borrowing by a city for current and ordinary expense. If the local board of vocational and adult education finds itself in need of money to pay its current expenses it cannot negotiate a short term loan from a bank, but may request that such a loan be made by the city which has authority to do so.

In XVI Op. Atty. Gen. 394 it was held that in a case where the city council had reduced the amount requested by the local board of vocational and adult education under sec. 41.16 of the statutes such local board had authority to borrow money to carry on the school. It is unnecessary in this opinion to affirm or overrule the holding of that opinion for the reason that in the present instance it does not appear but what the local board of vocational and adult education received all of the money which it requested from the council under sec. 41.16. In our opinion, however, the local board of vocational and adult education, in so far as authority for temporary borrowing is concerned, is in the same position as the board of education in a city operating under the city school plan. In State ex rel. Board of Education v. Racine, 205 Wis. 389, 236 N. W. 553, it was held that the board of education in a city operating under the city school plan is merely an arm of the city government and, in XX Op. Atty. Gen. 985, it was held that such board of education was not authorized to borrow temporarily but that such temporary borrowing must be done through the city council.

JRW
Indigent, Insane, etc. — Poor Relief — Old-age Assistance — County judge, or director of county pension department, acts as agent for county in administration of old-age assistance under secs. 49.20 to 49.51, Stats.

Where property is recovered by such county judge, or pension director, under sec. 49.25 or 49.26, Stats., appropriate percentages must be paid by county to state and federal governments even though property is appropriated by said county judge, or pension director.

County judge, or pension director, is authorized under sec. 49.26 to receive money from beneficiaries of old-age assistance and under sec. 49.25 to receive payment of claims filed against their estates.

Transfer of property may be required under sec. 49.26 without formal written finding as to necessity therefor.

August 26, 1943.

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

You have recently audited the books of a county pension department and discovered a substantial shortage in the accounts of the director. The shortage involves primarily money and property collected from beneficiaries of old-age assistance which the director failed to turn in to the county treasurer. You desire to know whether the state department of public welfare may make audit adjustments in the form of disallowances of state aid on the grounds that a certain percentage of these funds collected by the director should be paid to the state and federal governments under the provisions of sec. 49.25, Stats. You have asked a number of general questions to which the district attorney has added several others, and have also asked our opinion with respect to each specific case reported. We will first discuss the general principles involved, and then attempt to apply the principles specifically to each of the cases you have reported.

I

You ask first: In each case was the director acting as an individual or as a public agent?
The duties of the director of public welfare are governed by statute. In relation to administration of old-age assistance, he has only such authority as is expressly or impliedly conferred by statute or as may be imposed upon him by the county board consistently with the provision of the statutes. He may not undertake any agency for private individuals which is incompatible with his duties under the law. In performing functions in connection with the administration of old-age assistance which the statutes authorize him to perform, he must be presumed to be acting as a public agent under his statutory authority rather than as an agent of private parties, performing functions inconsistent with his statutory duties. It is fundamental that all reasonable presumptions are to be made in favor of the regularity and validity of the acts of a public officer or employee. Tainter v. Lucas, 29 Wis. 375; State ex rel. Willis v. Prince, 45 Wis. 610.

II

If acting as an agent, was the county director of public welfare an agent of the county, state, the federal government, or all such governmental units?

The handling of property by the county director of public welfare in connection with the administration of old-age assistance given may be deemed to have some analogy to the collection of state taxes by county officials, with respect to which it is said in 5 McQuillin 976:

"* * * if state taxes are collected by municipalities, the municipal officer whose duty it is to receive and pay over the taxes is not the agent of the state in respect to that duty but is the agent of the municipality, so that if the money is lost through the embezzlement or fault of such officer, the loss falls upon the municipality."

The above excerpt, however, cannot be considered as governing all cases in which a county official or employee is charged with the duty of collecting funds to be paid over to the state. The question of agency depends upon the statute involved in each case, since the law may either charge the local official directly with duties to be performed on behalf of the state without regard to his relation to the county as a
unit, or it may charge the county as a unit with the duty and specify the county officer who is required to carry out the necessary functions. Cases can be cited in which county treasurers have been held to be acting directly for the state in the collection of state taxes so that they, rather than the county, are chargeable with shortages. The case of State v. Milwaukee, 145 Wis. 131, 129 N. W. 1101, Ann. Cas. 1912A p. 1212 is similar to these. There it was held that the state could not recover against a county and a city for the failure of the county treasurer to pay over to the state treasury proceeds of fines collected, unless it could be shown that the county and city actually received the funds and used them for municipal purposes. That case, however, is not necessarily applicable to the present situation, since it was decided under a totally different statute. It is essential to refer to the provisions of the law relating to administration of old-age assistance in order to determine the legislative intent.

It may be a helpful approach to the question to note that the state has plenary power over counties and could, if it chose, impose upon them the sole liability to give assistance to needy persons without reimbursement in any form. Holland v. Cedar Grove, 230 Wis. 177. On the other hand, the state could, if it chose, undertake the administration of old-age assistance directly and appoint its own agents for that purpose in each county. An examination of the statutes, however, makes it clear that the legislature did not intend to leave counties as governmental units out of the picture. It intended for counties to assume the primary responsibility for local administration of old-age assistance with only such supervision by the state as is necessary to enable them to take advantage of state and federal aid. That purpose appears in sec. 49.50, subsec. (3), where the legislature has said:

"To the end that this state and its counties may be enabled to receive federal aid for old-age assistance * * * all county officers and employees performing any duties in connection with the administration of these forms of public assistance shall observe all rules and regulations made and promulgated by the state pension department * * *"
The legislature has in the first instance named the county judge as the local officer charged with the administration of old-age assistance in counties, but has authorized counties to transfer the duties to officers and employees to be selected by the county governing bodies subject to civil service requirements. Such a transfer was effected in the county involved in your audit, where a county welfare department was created under the provisions of sec. 49.51. While it may not have any bearing on the legal issues involved, it is interesting to note that the pension director whose accounts were in default had been chosen by the county as its welfare director prior to the adoption of the statute imposing civil service requirements and was retained in office by the county board after qualifying under civil service regulations.

Intent of the legislature that the county as a unit shall be responsible for the administration of old-age assistance rather than that the county director of public welfare shall administer the laws as a state agent, can be gleaned from various provisions of ch. 49, Stats. Particularly, with respect to fiscal adjustments the statutes show that the legislature intended the state to deal with the county as a unit rather than with the individual pension directors of public welfare. Sec. 49.20 provides that the cost of old-age assistance shall in the first instance be borne by the county, but the county shall be entitled to state and federal aid. Sec. 49.38 provides that the claim of the county for state and federal reimbursement of aid paid shall be certified to the state welfare department. The state welfare department is then to certify to the secretary of state the proper percentage of the amount paid by each county. The secretary of state is then to draw his warrant for reimbursement to the separate counties. Thus it seems clear that the legislature intended the state to deal with the county as a unit in so far as financial matters are involved rather than with the administrative officer directly. Under such circumstances, the local administrative officer is an agent of the county rather than of the state.

The situation is very different from that involved in the case of State v. Milwaukee, supra. In that case the county had no interest in the funds collected by the treasurer. They were state funds for which the county treasurer, not the
county, was made the collecting agency. The county board had no authority nor status whatever with respect to collection of the funds.

It is true that the legislature has defined the duties of the county official or employee who supervises the administration of old-age assistance and has authorized the state welfare department to amplify the statutory provisions by administrative regulations. It is equally true that the legislature has defined the authority and duties of many county officers whose status as county agents cannot be doubted. For example, see the provisions of sec. 59.17, specifying the duties of the county clerk, and sec. 59.21, describing those of the sheriff, undersheriff and deputies.

The purpose of the legislature in providing for state supervision of county administration was not to relieve counties of the primary responsibility but to insure the use of state funds in accordance with legislative policies and to make possible the receipt of federal aid.

III

Can the state recover from the county (through the reimbursement procedure under sec. 49.38 or otherwise) 80 percent of the full amount of the shortages, the amount recouped by the county from the bonding company, or any other amount?

The only amounts to which the state and federal governments are entitled are the proper proportions “of the net amount recovered pursuant to the provisions” of sections 49.25 and 49.26 of the statutes. See section 49.25. The amount recouped by the county from the bonding company is not necessarily the true measure of what constitutes the net amount recovered under those sections. The state is entitled to recover from the county the net amounts which may be said to have come into the possession of the county by reason of the provisions of secs. 49.25 and 49.26. If the pension director collected certain sums pursuant to his statutory duties under the above mentioned sections, those funds came into the possession of the county by virtue of his agency, and the county thereupon became obligated to pay over to the state and federal governments the proper share. Subsequent defalcations of one of its agents does not relieve the county of this liability.
Whether the collections made by the director were made pursuant to sec. 49.25 or 49.26 is to be determined upon the specific facts of each case, which are covered by the latter part of this opinion.

IV

Would the old-age assistance recipients or their estates have a claim against the county or Mr. Gordon in any of these situations?

This question can be answered only with relation to the facts in individual cases and is also covered in the latter part of the opinion.

V

Does sec. 49.26 authorize the director of the pension department to receive money on behalf of the county or is the county treasurer the only officer authorized by statute to receive county moneys?

Sec. 59.20 reads:

"The county treasurer shall:

"(1) Receive all moneys from all sources belonging to the county, and all other moneys which by statute or county ordinance are directed to be paid to him, * * * *.*"

Sec. 59.20 is primarily a statute to confer authority and impose duties upon the county treasurer rather than a statute of inhibition directed against other persons. That sec. 59.20 was not intended to exclude other county officials from collecting county moneys in the first instance, if so required by their statutory duties, is made clear by sec. 59.73, which reads:

"Every county officer and employe and every board, commission or other body that collects or receives moneys for or in behalf of the county, shall:

"(1) Give such receipts therefor and file such duplicates thereof with the county clerk and county treasurer as the county board directs.

"(2) Keep books of account and enter therein accurately from day to day with ample description, the items of his official service, and the fees therefor.

"(3) Pay all such moneys into the county treasury at such time as is prescribed by law, or if not so prescribed daily or at such intervals as are prescribed by the county board."
“(4) Perform all other duties in connection therewith that are prescribed by or pursuant to law.”

The question of whether the county pension director is authorized to receive any county moneys must be determined by the provisions defining his duty and authority. Sec. 49.25 provides that it shall be the duty of the county judge (which under sec. 49.51 (5) means the county pension department if that has been designated by the county board to administer old-age assistance) to file the claim for recovery of old-age assistance against the estate of a deceased beneficiary. The county treasurer is given no express duty or authority to collect these claims. It is certain that the legislature intended that some official or employee should have the necessary power to take whatever steps are necessary to effect collection. If such authority and duty are given to no other officer the legislature must have intended the officer who is empowered to file the claim to follow through for the protection of the governmental interests. As stated in Kasik v. Janssen, 158 Wis. 606, 609-610, 149 N. W. 398:

“In addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers. * * *

Sec. 49.26 (1) provides that if the county judge (or county pension department) deems it necessary, he may require as a condition to the granting of a certificate that all or any part of the property, with certain exceptions, of an applicant for old-age assistance be transferred to the county court (or county pension department). Such county officer or department is given power to sell, lease or transfer the property. When old-age assistance is discontinued only such portion of the property transferred as exceeded the assistance paid is returned to the beneficiary or his estate. The balance is to be retained to compensate the public for assistance given. Obviously if the director of the pension department has power to sell or lease such property, he must have power to receive money therefor.
Some question has been raised with respect to his right to receive money, as distinct from other types of property, from the beneficiary in the original instance. The term property includes money unless there is some clear manifestation of a legislative intent that it shall not do so. See the many cases in 34 Words & Phrases 480 et seq.

It might be argued that if an applicant has cash or liquid assets which could be applied to his needs no aid should be granted him. The determination of that question is apparently to a large extent left to the discretion of the administrator. It may have been intended by the legislature that such discretion should extend to the point of permitting the administrator to grant assistance to one having some cash, but at the same time to require the transfer of such cash so as to prevent its dissipation. To deny assistance until the applicant is wholly without liquid assets might tend to encourage the rapid dissipation of funds so as to advance the date of eligibility, and thus result ultimately in a greater cost to the public for assistance. In any event, the county here involved did not question until now the proper exercise of discretion of the director in making the grants. Throughout the period in question it permitted county funds to be paid and claimed reimbursement from the state and federal governments, thus tacitly admitting a proper determination of eligibility in each individual case. Assuming that the question of eligibility was properly determined and the grants properly made, the administrative officer had the right to require under the statute that all or any property of the beneficiary should be transferred to the pension department. The county can not now consistently claim that the property of the recipient was improperly transferred on the grounds that the beneficiary was ineligible to receive assistance, unless it is willing to refund the amounts which were claimed from the state and federal governments for payment of the assistance.

VI

Does sec. 49.26 require a written finding as to necessity of the transfer of property of an applicant for old-age assistance and a written condition requiring the transfer, (a) where the property is transferred before the grant is made, and (b) where it is transferred after the grant is made?
The terminology of the statute is:

“If the county judge deems it necessary, he may require as a condition to the grant of a certificate that all or any part of the property, * * * of an applicant for old-age assistance be transferred to the county court, * * *.”

The statute does not specify that either the finding of necessity or the condition shall be written. It is said in 43 Am. Jur. 71, sec. 253:

“Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary.”

As stated in XXV Op. Atty. Gen. 205, the discretion of the county administrative official with respect to whether a transfer of property shall be made by an applicant for old-age assistance is limited to a determination whether the transfer is necessary to secure the public. The mere taking of the assignment shows that the discretion as to determining such necessity has been exercised.

The statute also provides that the transfer may be required “as a condition to the grant of a certificate”. The supreme court of this state, said in Estate of Oeflein, 209 Wis. 386, 393-394, 245 N. W. 109:

“* * * it is not necessary to constitute a condition that it be expressed as such. * * * The doing of a thing ‘may operate as a condition because the parties intended that it should, such intention being reasonably inferable from conduct other than words. * * *’”

When a transfer is made at the time that a grant is made, it is fairly inferable from the acts of the parties that the transfer was made as a condition to the grant because the county administrative officer deemed it necessary.

It has been suggested that the situation might be different where the transfer is not made until some time after aid has been granted. The phraseology in sec. 49.26 above quoted appears ample to enable the county administrative officer to impose either a written or an oral condition at the time of
making the grant that the applicant shall transfer property which is scheduled to come into his possession in the future. Further, sec. 49.29 (2) authorizes the county administrative officer, on the basis of reports which he may require the applicant to file, to modify any certificate issued if it appears at any time that the applicant's circumstances have changed. The power to modify the certificate we believe would be sufficient to enable the administrator to attach a condition for transfer of property coming into the applicant's possession after the original grant.

The alternative to presuming that the transfer of property to the welfare department was required in the course of administration of statutory authority is to presume that the transfer constituted a gratuitous arrangement between the applicant and the director on the basis of some private understanding separate and distinct from the performance of official duties. Even in negotiations between private parties the same person cannot act as agents for both parties without their consent. *State v. Rogers*, 226 Wis. 39; *Shirland v. The Monitor Iron Works Co.*, 41 Wis. 162. Certainly it would have been incompatible with the duties of the administrator of old-age assistance to grant such assistance and at the same time to accept property from the beneficiary in his personal capacity.

In the light of the principles above enunciated, we advise you as follows with respect to the specific cases reported:

1.

An applicant for old-age assistance transferred to the director $300 in cash of which $270 was returned to the applicant from time to time, $30 being retained in the director's hands. After the death of the beneficiary, the director sold a trailer which had belonged to the former for $80 and appropriated the proceeds.

Since we have expressed the opinion that the director had the right to require the transfer of money under sec. 49.26, the $30 which was not returned to the beneficiary must be considered an amount recovered pursuant to the provisions of sec. 49.26 of which the appropriate share should be paid to the state and federal governments.

You do not state whether the trailer which the director sold was transferred to him by the beneficiary. If that is the
case, the director was empowered by sec. 49.26 to sell the same and the proceeds should be considered an amount recovered pursuant to sec. 49.26 of which the appropriate percentage should be paid to the state and federal governments.

2.

The beneficiary of old-age assistance had real estate subject to a lien under sec. 49.26 (4). The director of the county pension department received $45 from an heir or representative of the beneficiary, which was a partial payment of the amount needed to secure a release of the lien. This money he failed to turn over to the county treasurer.

Sec. 49.26 (4) reads in part:

"* * * The beneficiary, his heirs, personal representatives, or assigns may discharge such lien at any time by paying the amount thereof to the treasurer of the proper county who, with the approval of the county judge, shall execute a proper satisfaction which shall be duly filed with the register of deeds. * * *"

The foregoing provision specifies that money paid for the purpose of securing the release of a lien must be paid to the county treasurer. The lien is not satisfied in any part until money is so paid.

Persons dealing with a public officer are deemed to have notice of the limitations on the authority of such officer. State v. Hastings, 10 Wis. 518. The director being unauthorized to receive the payment on behalf of the county, the payor made it as his own risk and must bear the loss. The county’s lien still exists in full and no money can be said to have been recovered by the county under the provisions of sec. 49.26.

3.

A relative of a beneficiary of old-age assistance desired to reimburse the government for assistance paid to such beneficiary and for such purpose gave the sum of $124.50 to the director of the pension department, which the director failed to deposit with the county treasurer.
This reimbursement does not appear to have been made through administration proceedings in payment of a claim against the beneficiary's estate nor as the result of any property transfer by the beneficiary to the pension department. While it is no doubt true that the government may receive voluntary reimbursement from a third party for assistance given in the form of relief, we find no statutory authority for the director of the pension department to receive such payments. In such cases we believe the payment should be made directly to the county treasurer under sec. 59.20, Stats., and that the funds may not be said to have come into the possession of the county until so paid. We are of the opinion that this payment can not be considered as one made pursuant to secs. 49.25 and 49.26 of the statutes.

Under such circumstances the county's claim against the estate of the beneficiary would remain wholly unpaid. It should be borne in mind that this opinion is not binding upon any court. If in future proceedings it should be determined by a court of law that the county's claim has been discharged to the extent of moneys paid to the director of the pension department, it might be possible for the state and federal governments' share of the assistance to be recovered from the county.

4.

The real estate of a beneficiary of old-age assistance was leased after the death of such beneficiary, and the director of the pension department collected the rentals in the net amount of $123.85 but failed to turn such sum over to the county treasurer. Proceedings to administer the estate of the beneficiary have since been commenced in county court.

Under such circumstances the county's claim will undoubtedly be adjudicated in the administration proceedings. If the rentals collected by the director of the pension department are determined by the court not to have constituted a payment to the county, then the county's claim may be enforced in full through its lien against the real estate. Such lien is prior to all other claims except tax liens. We advise that your department await the decision of the court in which the estate is being administered. The state and federal governments will at that time be entitled to the
proper percentage of all the amounts collected in such proceedings or determined by the court to have been previously paid to the county.

5.

The beneficiary of old-age assistance transferred a bond to the county pension department. The director sold the bond and received the proceeds in the amount of $91.00 of which he himself retained $90.00.

As before indicated, the pension department, through its director, is authorized to receive the transfer of such property from one who applies for and receives old-age assistance, and is authorized to sell property so transferred. The proceeds of the sale constitute an amount recovered pursuant to sec. 49.26 of which the state and federal governments are entitled to receive the appropriate proportions.

6.

The director of the pension department collected rentals in the amount of $14.00 upon real estate of a deceased beneficiary of old-age assistance. We assume the county had a lien on such real estate under the provisions of sec. 49.26 (4). The situation is similar to the one described in case 4, excepting that you have not indicated whether any legal proceedings have been commenced in which the county’s claim may be adjudicated.

We do not find any statutory authority for the director of the pension department to receive rentals from the real estate of the beneficiary of old-age assistance unless he has been appointed as an administrator, or as a receiver in connection with foreclosure proceedings. The situation is the same as that described in case 4, however, to the extent that if the rental collected by the director is not deemed to have been paid to the county then the county’s claim and lien still exists in full and may be enforced against the real estate. We would suggest that this adjustment be held in abeyance until the final collection is made.

7.

The director of the pension department sold certain real estate of a beneficiary of old-age assistance for $150.00. It
appears that while the county had a lien on such property for the amount of assistance paid to the beneficiary, which was $391.50, the lien had not been foreclosed nor title to the property obtained through other proceedings. It was, therefore, impossible for the director to give title to a purchaser. We find no statutory authority for the director of the pension department to sell real estate situated in Wisconsin either before or after the county has obtained title. If the director acted in excess of his statutory authority, the purchaser dealt with the director at his own risk, since one is presumed to know the limitations on the authority of a public officer or employee. The claim of the county may still be collected in full through foreclosure of its lien. Nothing can yet be said to have been recovered pursuant to secs. 49.25 and 49.26.

If any court of competent jurisdiction should, in future collection proceedings, determine that the county did receive payment in the amount of the sum which the director received, we believe that the state and federal governments would then be entitled to their proportionate shares.

8. The next case, in which the beneficiary of old-age assistance turned over to the director of the pension department the proceeds of an insurance policy on the life of her husband, is governed by the answer to case 1.

9. The next case, in which you report that a certain individual had reimbursed the county welfare department for old-age assistance paid to the owner of certain real estate in order to secure a release of the lien on such property, is governed by the answer in connection with case 2.

10. A beneficiary of old-age assistance died and administration of his estate was commenced, a secretary of the county pension department being appointed as administratrix. The administratrix collected rentals and placed the sum of $63.55 in the pension department office, from which it disappeared. Your statement does not show whether the money
was placed in the pension department office by the administratrix in partial payment of the county’s claim. The administrator’s account would show whether or not the sum was paid to the county for that purpose. If the county’s claim is debited for that amount it is a sum collected pursuant to sec. 49.25 out of which the state and federal government are entitled to proportionate shares; otherwise they are not so entitled. We would suggest that you hold your adjustments in abeyance until after the county court approves the final account of the administrator, at which time you may ascertain the total amount recovered on the county’s claim.

11.

A beneficiary of old-age assistance totaling $1,418.50 transferred to the director of the pension department certain property which was partially liquidated by the director for the net amount of $202.55. In addition, the director later collected $1,075.27 from the estate of the beneficiary through administration proceedings. From these collections there was a net balance of $1,275.72 which the director failed to turn over to the county treasurer. These sums were amounts recovered pursuant to the provisions of secs. 49.25 and 49.26, out of which the state and federal governments are entitled to their respective shares.

12.

A beneficiary of old-age assistance transferred to the director of the pension department $150.00 to be held in trust for burial or needed expenses of the former. This money was appropriated by the director.

The administrator of old-age assistance had the right under sec. 49.26 to require the transfer of this sum to the pension department. If he did so the transfer was subject to the provisions of said sec. 49.26 and such provisions could not be superseded by private agreement. For the director to attempt to hold the property on any other basis would be incompatible with his duties under the statute.

The amount must be regarded as one recovered pursuant to sec. 49.26 out of which the shares of the state and federal governments must be paid.
13.
The next case, in which you report that property was transferred to the pension department by a beneficiary of old-age assistance and partially liquidated by the director, is governed by the answer to case 5.

14.
Your next case, in which a beneficiary of old-age assistance transferred property to the pension department, is the same as case 5, and is governed by the answer thereto, except for the fact that the director collected $9.00 in interest on the property in addition to receiving certain sums for its liquidation.

Sec. 49.26 (1) provides that the net income from property transferred shall be paid to the “person or persons entitled thereto”. If income from the property were paid to the beneficiary, that would have to be considered in connection with the amount of his grant under sec. 49.21, which limits the total of income and assistance to $40.00 per month, and under sec. 49.29, which authorizes the administrator to modify the certificate if the applicant’s circumstances change. If, however, the administrator made no such modification by reason of income received by the applicant but paid the grant in full, and the county claimed federal and state aid for payment of such grant, what might have been paid to the beneficiary as income no longer retains its character as such. It has then become for all practical purposes property which the administrator required the beneficiary to transfer as a condition of receiving his grant. Under such circumstances it is an amount recovered pursuant to sec. 49.26 upon which the state and federal governments are entitled to reimbursement of their respective shares.

15.
The situation in this case is almost identical with that described in case 14 and is governed by the answer thereto.

16.
This case, in which a third party voluntarily undertook to reimburse the county for old-age assistance granted to a beneficiary, is governed by answer to case 3.
17. The shortage of $50.00 in this case, arising from liquidation by the director of property transferred by a beneficiary of old-age assistance, is governed by the answer to case 5.

18. This case, in which an old-age assistance grant was discontinued and the beneficiary thereafter undertook to reimburse the county partially for assistance formerly paid to her, is governed by the answer to case 3.

19. A beneficiary of old-age assistance transferred to the pension department two $1,000.00 bonds which were called on July 1, 1941 at $1,025 per bond. The bonds were, however, sold by the director prior to the call date and he retained the proceeds. As previously pointed out, the administrator has the right to require the transfer of the beneficiary's personal property and to manage and sell the same. If, through error in judgment, he sold the property for less than he could have obtained by holding it longer the county cannot be charged for the difference. The county is chargeable only with the amount actually received for the sale of the bonds or, if that cannot be ascertained, for the fair market value at the time of the sale.

The amount obtained for the bonds apparently exceeded the amount of assistance given. The difference is either to be returned to the beneficiary if his assistance is discontinued or to be held under the provisions of sec. 49.26 if he continues receiving aid. The portion of the amount received for the sale of the bonds which equals the assistance given is an amount recovered pursuant to sec. 49.26, and the state and federal governments are entitled to their proportionate shares.

20. The next case, in which a beneficiary of old-age assistance transferred to the county pension department the sum of $175.00 to be held in trust for her needs as directed, of which the director retained $150.00, is governed by the answer to case 12.
21. The next case, in which the proceeds of the sale of real estate belonging to a beneficiary of old-age assistance were transferred to the pension department, is governed by the answer to case 1.

22. The next shortage reported is one resulting from the sale of a typewriter belonging to the county pension department from which the director received and appropriated the proceeds. The money paid for the typewriter cannot, we believe, be considered as an amount recovered pursuant to sec. 49.25 or sec. 49.26 and neither the state nor the federal government has a claim thereon.

BL
Statistics — Vital Statistics — Birth Records — Sec. 69.24, subsec. (1), Stats., authorizes state registrar or registrar of deeds or city health officer to collect one fifty cent fee from person who requests him to make correction in birth record pursuant to sec. 69.835, except in cases involving correction on record filed before one year of date of birth, in which case he may not collect any fee.

Official collecting such fee and making such correction must certify such correction to other officials named in sec. 69.25 (2), who apparently must make corresponding correction on their records.

Other officials to whom certification is made under sec. 69.25 (2) are not entitled to any part of such fifty cent fee, nor may official who makes correction and certification collect additional fee for them.

Sec. 69.21 requires register of deeds to make all corrections certified to him by state registrar without charge.

Sec. 69.24 (1) does not authorize any of officials therein mentioned to collect fee for correcting record of stillbirth, death, marriage or divorce.

August 27, 1943.

CARL N. NEUPERT, M. D., Health Officer,

Board of Health.

Chapter 503, Laws 1943, effected numerous changes in chapter 69 of the statutes relating to the registration of marriages, births and deaths. That act repealed section 69.24 of the statutes of 1941 and created a new section 69.24, reading in part as follows:

“(1) The state registrar, register of deeds, city health officer and village clerk, who are authorized to issue certified copies, as stated in this chapter, shall collect the following fees for the search, filing and issuing of certified copies of birth, stillbirth, death, marriage and divorce records and for making authorized corrections, alterations or additions:

“*(a) A fee of 50 cents for making authorized corrections, alterations and additions.

“(c) No fee shall be collected for making such corrections, alterations and additions on records filed before one year of the date on which the event recorded has occurred.”
The question arises: "whether the 50¢ filing fee which goes to the official making the corrections on the records in his files at the request of the applicant also covers corrections of the original or copies of this same record in corresponding files".

The following statutes are deemed to be material to a determination of the answer:

Sec. 69.21:

"Every register of deeds shall make, file and index copies of all certificates of births, stillbirths, deaths, or marriages, received by him and properly bind the copies in book form. He shall also make all corrections or additions certified to him by the state registrar."

Sec. 69.25:

"* * *

"(2) The city health officer, register of deeds and state registrar shall certify to each other all corrections and additional information received by them to complete any original certificate received."

Sec. 69.335:

"A person born in this state may request the state registrar or the register of deeds of the county of his birth or in cities the health officer of a city of his birth, to correct his birth record. Minor corrections in the record of his given name, or the spelling of his surname may be made upon filing a supplementary report signed by him or his parent, guardian, sister or brother. Major corrections of the record as to his surname, sex, date and place of birth may be made by the state registrar, the register of deeds or city health officer only upon filing his affidavit setting forth the corrections to be made and the reasons therefor. * * * The state registrar, city health officer or the register of deeds to whom such requests are made shall promptly notify each other of the corrections which have been made; and the other shall make and sign the same corrections and notation in red ink on his records. * * *"

Sec. 69.50:
"The circuit court of any county in which any marriage is legally recorded shall make an order correcting such record on proof being made to the satisfaction of the court that the record is incorrect in any particular. The officer in charge of such records shall record the order or a copy certified by the clerk under the seal of the court, and such record shall have the same effect as the record of marriage duly returned by the proper person."

Although sec. 69.24, subsec. (1), par. (b), seemingly provides for the collection of a fifty cent fee by various officials for making corrections, alterations and additions, in cases not covered by 69.24 (1) (c), there is no specific provision made in chapter 69 for the payment of this fee even to the first official who is requested to make the change in the record.

Sec. 69.21 requires the register of deeds to make all corrections or additions certified to him by the state registrar, and sec. 69.25 (2) requires the city health officer, register of deeds and state registrar to certify to each other all corrections and additional information received by them. Presumably these officials must make the proper changes on their records which these certifications indicate should be made in order to have the record correspond to the fact.

Sec. 69.50 provides the method for correcting a marriage record but does not provide for the payment of a fee for the court order correcting the record, although the register of deeds, under 59.57, is entitled to the fee therein authorized for recording such order.

There is no specific statutory provision for correcting a stillbirth or a death certificate.

Neither the register of deeds, city health officer nor local registrar keeps the records of divorces and hence those officers would have no occasion to correct such records.

Sec. 69.335 provides a method by which an individual may request the state registrar or the register of deeds or the health officer of a city to correct his birth record. Although this section does not specifically provide for the payment of a fee, since 69.24 (1) states that these officials "shall collect * * * (b) a fee of 50 cents for making authorized corrections, alterations and additions", it must be presumed that it was the intention of the act to compel the person who
requested the correction of the birth record to pay fifty cents to the official to whom such request was directed. That official, however, is not authorized to collect any more than fifty cents for himself or to collect for any other official, and is not directed to divide such fifty cent fee with any other official who, under the foregoing statutes, apparently is to make a similar correction on his own record. It is not contemplated that the person requesting the correction of the birth record will contact any official about the correction other than the one to whom the request is first directed.

JRW

Appropriations and Expenditures — State Aid to High Schools — Appropriation made by sec. 20.27, Stats., as amended by ch. 525, Laws 1943, is set aside and allocated out of income tax collections in same manner and by same method as is prescribed by sec. 71.19, subsec. (1), Stats., for setting aside of appropriation made by sec. 20.09 (4), Stats.

August 31, 1943.

DEPARTMENT OF TAXATION.

Ch. 525, Laws 1943, effective on its publication, July 16, 1943, increased the annual appropriation of sec. 20.27, Stats., for high school aids and did so by amending that section to appropriate “annually, beginning July 1, 1943, $3,500,000 to be paid out of the normal income tax as provided in section 71.19”. It then also amended sec. 71.19 (1) Stats., by inserting “after setting aside that portion of the appropriation made by section 20.27 which is chargeable to the normal income tax,” in the fourth sentence thereof so that it provides for a division between the state, counties and municipalities upon a percentage basis of the amount of income tax collections remaining after setting aside therefrom not only the annual appropriation by sec. 20.09 (4) Stats., for administration of the income tax law, which was
the only one previously provided by sec. 71.19 (1), but also after “setting aside” this new $3,500,000 high school aid appropriation. You request our opinion as to whether this appropriation by sec. 20.27 is to be taken out and allocated by the same method prescribed in sec. 71.19 (1) for the setting aside and allocation of the appropriation for administration of the income tax law made by sec. 20.09 (4), that is, using the income tax collections of the prior fiscal year as the basis for the allocations.

It is perfectly clear that both this $3,500,000 appropriation for high school aids and the appropriation by sec. 20.09 (4) for expenses of administration of the income tax law are to be taken out of the income tax collections before the distribution to the state, counties and municipalities. But, although sec. 71.19 (1) specifically prescribes the basis for allocation of the appropriation by sec. 20.09 (4), neither sec. 20.27 nor sec. 71.19 (1) contains language explicitly stating the basis upon which this high school aid appropriation is to be taken out, and therefore consideration must be given to the phraseology of these statutes to ascertain what was intended.

Sec. 20.27 says the appropriation is to be “paid out” of the normal income tax but “as provided in section 71.19”, and the word “paid” is used in sec. 71.19 (1) in connection with the percentage distribution of the remainder of the tax collections to the state, counties and municipalities. If this were all that might bear on the question, it could be taken as indicative that the allocation should be upon the basis of current collections which is used in making the distributions. But the language relating to this high school aid appropriation that was inserted in sec. 71.19 (1) contains the words “setting aside”, which is the same language used in connection with the appropriation for administration of the income tax law. The use of this same phrase in respect to both appropriations and especially in the same subsection, is significant and to us is indicative that in setting up this new appropriation the legislature had in mind the provisions respecting the allocation of the appropriation made by sec. 20.09 (4) and intended it should be handled in the same manner.
Furthermore, both appropriations being taken out of the income tax collections prior to a distribution of the remainder to the state, counties and municipalities and of the same nature so far as deduction therefrom is concerned, the practicalities of computation are identical. Unless there were some good reason for computing the allocations differently it would be normal and customary to follow the same method for both. Certainly if there existed some consideration sufficiently compelling to allocate this high school aid appropriation on a different basis, then the legislature would have expressly prescribed in reference thereto.

It is therefore our conclusion that the appropriation made by sec. 20.27 Stats. is set aside and allocated out of income tax collections in the same manner and by the same method as sec. 71.19 (1), Stats., prescribes for the appropriation made by sec. 20.09 (4), Stats.

HHP

Indigent, Insane, etc. — Poor Relief — Old-age Assistance — Taxation — Tax Collection — Preferences under sec. 74.03, subsec. (9), par. (e) and sec. 74.031 (11) (e) include charges and taxes under sec. 49.37 (2) and (4), Stats.

Sept. 15, 1943.

DEPARTMENT OF TAXATION.

Secs. 74.03, subsec. (9), and 74.031 (11), Stats., created by ch. 133, Laws 1943, provide for monthly distributions by the county treasurer of real estate taxes collected by him subsequent to July 31 and the order of preferences in said distributions. Each of these subsections, after specifying that the collections shall be applied first to unpaid balances of state trust fund loans, high school tuition levies, state taxes, state special charges and county school taxes, in the order named, contains the following identical paragraph:
“(e) He shall next retain for the county the balance due on county taxes levied for social security pursuant to sections 47.08, 48.33 and 49.37.”

Sec. 49.37 relates to old-age pensions and provides two methods for financing the county’s burden thereof. Subsec. (1) calls for an annual appropriation by the county for this purpose, which would be included in the county general tax and thus have the preference accorded by subsec. (e) of secs. 74.03 (9) and 74.031 (11), Stats.

Subsecs. (2) and (4) of sec. 49.37 provide that the county may cause each city, town and village to reimburse the county for old-age pensions to persons having a legal settlement therein and effect such reimbursement by making a charge to each of said municipalities, which shall, in turn, annually levy a tax sufficient to meet the charge against it by the county.

You ask whether the preferences conferred by secs. 74.03 (9) (e) and 74.031 (11) (e) include the amount of the charges made under sec. 49.37 (2) and (4) as well as that portion of the general county tax levied pursuant to sec. 49.37 (1).

Actually the amount charged to the municipality is a county charge rather than a county tax, and the only tax levy called for is by the local municipality. Apparently this was recognized by the legislature for sec. 49.37 (4) specifically states:

"* * * Such tax shall be deemed a county special tax for tax settlement purposes * * *

By this language the legislature has said that nevertheless for tax settlement purposes it shall be treated and have the same standing as if it were in fact a county special tax. In our opinion the words “such tax” refer to the tax levied by the local municipality pursuant to that subsection. But it would make no difference if they were taken as referring to the county charge, for the result is the same in either instance.

The above is consistent with the indicated legislative intent that the collections on these special tax levies shall have
a preference in distributions in order to assure adequate funds for carrying on the old-age pension system irrespective of other fiscal considerations. Such legislative intent appears from the provision in sec. 49.37 (4) that upon the March distribution by the local treasurer of his tax collections there shall be paid to the county the percentage of such special tax levied by the municipality as the actual taxes collected bear to the total taxes on the roll.

It is our opinion that the preferences in secs. 74.03 (9) (e) and 74.031 (11) (e) include the charges and taxes under sec. 49.37 (2) and (4).

HHP

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Municipal Corporations — Beer Licenses — Sale of fermented malt beverage to person under eighteen years of age not accompanied by parent or guardian is misdemeanor under sec. 66.05, subsec. (10), par. (d) 1, par. (h) 2 and par. (m) 1, Stats.

Sept. 15, 1943.

S. Richard Heath,
District Attorney,
Fond du Lac, Wisconsin.

You inquire whether sale of fermented malt beverages to anyone under the age of 18 years unless accompanied by parent or guardian is a misdemeanor punishable by fine or imprisonment.

Subsec. (10) of sec. 66.05 is the statute regulating manufacture and sale of fermented malt beverages. Par. (d), subdiv. 1, provides in part as follows:

"No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal or traffic in fermented malt beverages, unless licensed as provided in this subsection by the governing board of the city, village or town in which the place of business is located, * * *."
Par. (h) provides in part as follows:

"Conditions of licenses. Wholesalers' and retailers' licenses shall be issued subject to the following restrictions:

"2. No fermented malt beverages shall be sold to any person under the age of eighteen years unless accompanied by permit or guardian."

Par. (m) provides in part as follows:

"1. Any person who shall violate any of the provisions of this subsection, or of any municipal ordinance adopted pursuant thereto shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for a term of not more than ninety days, or by both such fine and imprisonment, and his license shall be subject to revocation by a court of record in its discretion. Every town, village or city shall have the right to revoke any license by it issued to any person who shall violate any of the provisions of this subsection or any municipal ordinance adopted pursuant thereto. No license shall thereafter be granted to such person for a period of one year from the date of such forfeiture."

You pose the question whether the sale of beer to a person under the age of 18 years is a misdemeanor or merely constitutes grounds for revoking the seller's license. The question arises out of the fact that the provision forbidding such sale is referred to in the statute as a condition or restriction on the license.

In the view which we take of the matter it becomes unnecessary to determine whether or not par. (h), subdiv. 2, should be treated as a prohibition, the violation of which is a misdemeanor, or merely as a condition or restriction upon the license. We are of the opinion, however, that it is a prohibition because if it were not it would be meaningless. The statute does not provide for revocation of licenses for violation of restrictions or conditions contained therein. The language of par. (m), subdiv. 1, above quoted is to the effect that the town, village or city may revoke any license issued by it to any person "who shall violate any of the provisions of this subsection". If sale to a person under 18
years of age is not a “violation of this subsection” so as to constitute a misdemeanor, neither is it grounds for revocation of the license. To say that the legislature created conditions of the license which are unenforceable would be to convict the legislature of an absurdity.

But in any event a breach of the condition of the license by making a prohibited sale is a misdemeanor on another theory. Par. (d), subdiv. 1, prohibits the sale of fermented malt beverages by any person “unless licensed as provided in this subsection.” The license provided does not authorize sales to persons under the age of 18 unless accompanied by their parents. Hence such a sale is ipso facto made without a license, which is clearly in violation of the statute and constitutes a misdemeanor under par. (m).

WAP

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Public Health — Basic Science Law — Applicant for limited basic science certificate under sec. 147.07, Stats., who requests examination on spinal column only is entitled to such limited examination if he has qualifications prescribed by sec. 147.05, and particular method of treating sick which he proposes to follow is immaterial.

September 20, 1943.

M. F. Guyer, President,
Basic Science Board.

You have asked for an interpretation of the last sentence of sec. 147.07, Stats., relating to the examination in the basic sciences and which provides:

'* * * If the applicant states that his practice is to be confined to one organ or set of organs, his examination and certificate shall be limited accordingly.'

This request is occasioned by the fact that an applicant, who is a graduate chiropractor, has asked for an examina-
tion on the "spinal column". It is the feeling of the basic science board that the language of the statute quoted above was intended by those who framed the law to apply to such specialists as occulists who treat maladies or injuries of the eye only; aurists, who treat diseases of the ear only; surgeons and other similar experts who have not only had a regular four-year medical course but several years of additional training. It is also the understanding of the board that the so-called spinal adjustments practised by chiropractors and others who treat human ills by manipulation of the spine are not primarily concerned with treatment of maladies of the spine itself but with the treating of many and divers other ills through physical handling of the spinal column.

The basic science law, of which sec. 147.07 is a part, was created by ch. 284, Laws 1925. In examining the legislative history of this enactment we have been unable to find anything throwing light on the language in question.

The basic science board is not concerned with the method of treatment which an applicant professes to follow or the type of professional school he has attended. In fact these considerations are, so far as possible, excluded from the operation of the basic science law. For example, sec. 147.03 provides that the basic science board shall consist of three lay educators, none of whom shall be on the faculty of any department teaching methods of treating the sick. Sec. 147.05, relating to qualifications for taking the basic science examination, merely provides for satisfactory evidence of good moral character and preliminary education equivalent to graduation from an accredited high school. No professional training of any kind is prescribed. Moreover, sec. 147.06 provides that no applicant shall be required to disclose the professional school he may have attended nor what system of treating the sick he intends to pursue.

Hence "if the applicant specifies that his practice is to be confined to one organ or set of organs" the board must take him at his word, and "his examination and certificate shall be limited accordingly". If it develops later that in his practice he has violated the limitations under which his certificate is granted we take it that appropriate action could be taken to force the discontinuance of such practice, but the
board is not to assume in advance that he will violate the law.

Nor are we impressed with the suggestion that the language of sec. 147.07, relating to limited practice, was designed specifically for oculists, aurists, surgeons or other specialists who have completed regular medical educational requirements plus additional specialized training in certain fields. In order to so practice it would be necessary to have a license to practice medicine and surgery which would involve the passing of a comprehensive examination before the state board of medical examiners in all of the subjects covered in the examination by the basic science board in addition to other subjects. This examination by the board of medical examiners is not limited to any one organ or set of organs. Moreover, most specialists in the fields above mentioned have had some general practice before specializing and to be qualified for such general practice they would have to have the regular basic science certificate rather than one limiting practice to a certain organ or set of organs. Hence there would be no point in applying for a limited certificate where the applicant is already qualified for and probably has the unlimited certificate in the basic sciences.

It would seem rather that the purpose of the limited certificate under sec. 147.07 is to meet the needs of practitioners such as chiropodists, whose practice is limited to certain portions of the body and whose training does not include the broad general background such as is true in the case of specialists of the type mentioned above. By way of illustration it might be said that there is no particular need so far as a chiropodist is concerned in being able to diagnose diseases of the eye, ear, etc.

It is suggested in the request for this opinion that whatever the method of treatment employed all practitioners should have a thorough knowledge of the functions and maladies of the entire human body to make it safe for them to treat that body. If this is true it is in conflict with what we have said above concerning chiropodists and we are unable to read into either the basic science law or ch. 154, the chiropody law, the requirement that these practitioners must have a thorough knowledge of the structure, functions and
maladies of the entire body to make it safe for them to practice on the feet. Under secs. 154.02 and 154.03 they are required merely to be trained and examined in anatomy and physiology of the feet, diagnosis of foot ailments and deformities, 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. The provision in sec. 147.07 about which you have inquired supplements the foregoing provisions by making it possible for the chiropodist to be given a limited examination which will not require him to be familiar with the entire field of anatomy, physiology, pathology and diagnosis which he would otherwise be required to cover in the basic science examination.

There remains one contention that gives us some difficulty. It is urged that the spine is not an “organ” within the meaning of the limited practice provision of sec. 147.07. Gould’s Medical Dictionary defines the term “organ” to mean any part of the body having a definite function to perform. In this sense it seems to be used more commonly in referring to parts of the body as the heart, which performs a definite function for the circulatory system, or the lungs, which perform a definite function for the respiratory system, rather than to the bony structure of the body whose purpose is to furnish a framework for the body. In its broader sense the furnishing of such a framework is a definite function, and it cannot be properly said that such an important part of the body as the spinal column has no definite function.

Moreover, if we use the term “organ” here in its most restricted sense, it would probably not include the feet and what we have previously said respecting a limited examination in basic science for chiropodists would have to be ruled out, with the result that a chiropodist would be compelled to take unlimited examination in the basic science subjects covering all parts of the body. For the reasons above indicated we conclude that the term “organ” as used in the latter part of sec. 147.07 must be regarded as sufficiently comprehensive to include parts of the body such as the spine or the feet.
In passing we call attention to the fact that a basic science certificate, whether limited or unlimited, does not authorize anyone to treat or attempt to treat the sick or any part of the human body, either medically, surgically or by chiropractic, chiropody or any other system or method of treating the sick. Whether an applicant desires to practice medicine, surgery, osteopathy, chiropractic, chiropody or the like he must be licensed by the examining board in that field of practice, and it is the responsibility of such board to protect the public by seeing that no one is licensed unless he is competent in the branch of healing which he proposes to practice. The only purpose of the basic science law is to insure that the registrant shall be familiar with the basic sciences of anatomy, physiology, pathology and diagnosis and the provision for a limited examination and certificate under sec. 147.07 is designed to take care of those whose activities will be limited to working on some particular part of the body only, whether it be the spine or the feet or something else and irrespective of the fact that treatment of such organ or part of the body may incidentally affect other parts of the body or the general health of the patient.

You are therefore advised that an applicant for basic science registration presenting the credentials prescribed by sec. 147.05 and asking to be examined under sec. 147.07 as to the spinal column only should be so examined and the certificate should be limited accordingly regardless of the branch of the healing art in which he has received his professional training and proposes to practice.

WHR
Bonds — Bridges and Highways — Funds allotted by state highway commission to cities for connecting streets under sec. 84.10, subsec. (2), Stats. 1943, and to counties for county trunk highways under sec. 83.10 (1), Stats. 1943, may be used to retire bonds where cost of construction for which bonds were issued might properly have been paid from such funds in first instance.

September 28, 1943

WILLIAM H. ARMSTRONG, Chairman,
Highway Commission.

In view of the changes made by chs. 81, 334 and 531, Laws 1943, you have inquired whether the funds allotted to a city for connecting streets pursuant to sec. 84.10, subsec. (2), Stats., as revised by ch. 334, Laws 1943, may be used for retiring city highway bonds, the proceeds of which were expended on such connecting streets.

Sec. 84.10 (2) was not affected by ch. 81, nor ch. 531, Laws 1943, but it was revised by ch. 334, Laws 1943, to read:

"The commission shall allot to each city and village a sum computed at $500 per mile of connecting streets within its limits. The allotments may be used for maintenance, repair, construction, snow and ice removal and control and traffic regulation on such connecting streets, and may be cumulated for such purposes. The funds shall be held to the credit of such cities and villages, and paid to the treasurers thereof upon presentation to and approval by the commission of certified statements, itemized as required by the commission, setting forth the amounts expended on connecting streets; provided the maintenance thereof is satisfactory to the commission."

There was a further amendment by ch. 491, Laws 1943, but such amendment is not material here.

In XXV Op. Atty. Gen. 658, in construing somewhat similar language in sec. 84.10 (2) (b), it was concluded that the allotment of funds there made to cities and villages for construction of connecting streets and other purposes might be used to retire bonds issued for construction of such
streets, the theory being that if the cost of construction in the first instance could be paid out of such fund there was no good reason why indebtedness incurred in such construction might not be similarly paid out of the fund, citing Bridges v. State, 208 Ind. 684, 190 N. E. 758.

We find nothing in sec. 84.10 (2) as revised by ch. 334, Laws 1943, which compels us to reach a contrary conclusion.

You have also inquired whether funds allotted and paid to a county for county trunk highways pursuant to sec. 83.10, ch. 334, Laws 1943, may be used by the county for retiring county highway bonds, the proceeds of which were used in the improvement of county trunk highways.

By ch. 334, Laws 1943, sec. 84.03 (2) and (6) was renumbered sec. 83.10. We shall not take the space here to quote all of sec. 83.10, which is quite lengthy. Suffice it to say that the material part of sec. 83.10 contains language similar in effect to that of sec. 84.10 (2), sec. 83.10 (1) reading in part:

"* * * Such allotments shall be used for constructing, repairing and maintaining the county trunk highway system, and the bridges thereon, including snow and ice removal and control, under the direction of the county highway committees. * * * All or part of such allotment not allocated to match or supplement federal aid as herein provided shall be expended in accordance with the applicable provisions of this chapter."

In view of the reasoning in XXV Op. Atty. Gen. 658 and the answer here given to the use of funds allotted under sec. 84.10 (2), we conclude likewise that funds allotted and paid to a county under sec. 83.10 may be used in retiring county highway bonds when the cost of construction of such highways might properly have been paid from such funds in the first instance.

WHR
Counties — Except as otherwise provided by law it is contemplated by sec. 59.07, subsec. (3), sec. 59.17 (3) and sec. 59.20 (2), Stats., that all claims against county are to be audited by county board before payment. Situations falling under rule as well as others coming within exceptions thereto, discussed.

September 28, 1943.

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

You have inquired as to what claims may be paid by the county treasurer upon audit by a standing or special committee of the county board or a public officer of the county without audit by the entire county board where the board has not delegated to any standing, finance, or audit or executive committee power to audit accounts not in excess of $500 under sec. 59.08, subsec. (38), Stats.

Since a question of such generality would be extremely difficult to subdivide into all hypothetical situations that might be imagined you have limited it to a number of specific situations and we shall confine our discussion to these situations. However, before doing so we first call attention to secs. 59.07 (3), 59.17 (3) and 59.20 (2), Stats., which read:

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

"* * *"

"(3) Examine and settle all accounts of the receipts and expenses of the county, examine, settle and allow all accounts, demands or causes of action against such county, and when so settled to issue county orders therefor as provided by law."

59.17 "The county clerk shall:

"* * *"

"(3) Sign all orders for the payment of money directed by the board to be issued, and keep in a book therefor a true and correct account thereof, and of the name of the person to whom each order is issued, but he shall in no case sign or issue any county order except upon a recorded vote or reso-
olution of the board authorizing the same; nor shall he sign or issue any such order for the payment of the services of any justice of the peace, magistrate, clerk of court, district attorney or sheriff until the person claiming such order files an affidavit stating that he has paid into the county treasury all moneys due the county and collected or received by him in his official capacity.”

59.20 “The county treasurer shall:

“(2) Pay out all moneys belonging to the county only on order of the county board, signed by the county clerk and countersigned by the chairman, except when special provision for the payment thereof is otherwise made by law; and, except in counties having a population of one hundred and fifty thousand or more, pay out all moneys belonging to the county road and bridge fund on the written order of the county commissioner of highways, signed by the county clerk and countersigned by the chairman of the county board.”

Attention is also called to XX Op. Atty. Gen. 416, enumerating instances in which the county clerk is authorized to issue orders without resolution of the county board.

No comment is made here as to sec. 59.07 (7), relating to the powers of a county purchasing agent for the reason that your county apparently does not have such a purchasing agent.

See also sec. 59.81 (2), which provides:

“In all counties having a population of less than three hundred thousand, all disbursements from the county treasury shall be made by the county treasurer upon the written order of the county clerk after proper vouchers have been filed in the office of the county clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the county clerk, it shall hereafter be the duty of the county clerk to draw and deliver to the treasurer an order therefor before or at the time when such payment is required to be made by the treasurer. The provisions of this subsection shall apply to all special and general provisions of the statutes relative to the disbursement of money from the county treasury.”

Having the foregoing in mind, we shall take up the various problems you have raised. They are as follows:
First May the clerk draw a county order and the treasurer pay the claim for all types of indebtedness incurred through the county highway committee for state and county highway and bridge construction and maintenance?

Sec. 82.05 (1), renumbered 83.015 (1) by ch. 334, Laws 1943, provides that the county highway committee shall be the only committee representing the county in the expenditure of county funds in constructing or aiding in constructing or maintaining any roads or bridges within the county. The powers and duties of the committee are further defined in sec. 82.06, which by ch. 334, Laws of 1943, was renumbered sec. 83.015 (2) and revised to read:

“The county highway committee shall purchase and sell county road machinery as authorized by the county board, determine whether each piece of county aid construction shall be let by contract or shall be done by day labor, enter into contracts in the name of the county, and make necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board, enter private lands with their employes to remove weeds and brush and erect or remove fences that are necessary to keep highways open for travel during the winter, direct the expenditure of highway maintenance funds received from the state or provided by county tax, meet from time to time at the county seat to audit all pay rolls and material claims and vouchers resulting from the construction of highways and perform other duties imposed by law or by the county board.”

In commenting on the auditing provision of what is now sec. 83.015 (2) the court in Rinder v. Madison, 163 Wis. 525, 533, said that the duty of the county highway commission to audit

"* * * is not to be interpreted as abrogating the duties imposed by law on county clerks, nor is it to be considered that such 'audit' implies that the committee is given power to finally pass on the allowance or disallowance of claims against the county. It is evident that their duties under this part of the act are to examine claims to ascertain whether or not they pertain to and properly itemize the charges for material furnished and work done, and to check the items as to their correctness in these respects to assist the county clerk and the county board to determine whether they are just and legal claims. * * *"
However, in *Joyce v. Sauk County*, 206 Wis. 202, the court said at page 206:

"It is clear that the county board has the power under sec. 82.06 to determine what highway projects shall be undertaken by the county. It is equally clear that such determination having been made, the county highway committee is expressly vested with power to make contracts binding upon the county for the prosecution of this work. The statute has vested in the county highway committee the power not only to make contracts but to audit payrolls, material claims, ad vouchers, and to order the expenditure of money from the road and bridge fund, and its acts in pursuance of this authority are binding upon the county. When it has acted within its authority, rights are created in the person contracting with the county through this committee, which exist independently of any action by the county board. Such causes of action as may arise because of the exercise of its authority by the county highway committee are not created by statute. The statute has created an agency which is empowered to bind the county by contract, and when the contract has been executed such rights and liabilities as may thereafter arise have their origin in the contract by virtue of the rules of the common law. * * *"

It would appear from the *Joyce* case that the act of the highway committee in the making of contracts and in auditing would be final and binding on the county irrespective of the language used in the earlier case of *Rinder v. Madison*.

In XXII Op. Atty. Gen. 393 disapproval was expressed of the practice of a county highway committee in purchasing trucks, tractors and other needed road machinery and equipment without authorization or approval for the same by the county board as provided under what was formerly sec. 82.06 (1), Stats.

You mention the situation where the county board makes an appropriation of say $50,000 annually for replacement of highway machinery including purchase of new machinery. Under such circumstances it would seem to be unnecessary to submit each individual purchase to the county board for audit. This situation differs materially from that discussed in XXII Op. Atty. Gen. 393, where the machinery was purchased entirely out of the earnings of the county.
highway department without either previous authorization or appropriation by the county board.

It is clear, however, that the county highway committee may incur no county liability for maintenance of highways in excess of funds made available by law or by the county board. VII Op. Atty. Gen. 392.

Hence, as to your first question, it would seem that as to items properly within their authority the audit of the county highway committee would be sufficient and that no county board audit would be required before payment. Attention, however, is called to the fact that under sec. 59.20 (2) the county treasurer of a county under 150,000 is authorized to pay out moneys belonging to the county road and bridge fund only on the written order of the county commissioner of highways signed by the county clerk and countersigned by the chairman of the county board.

Secondly you inquire as to the auditing of indebtedness incurred by the county nurse for medical supplies, vaccines, dental supplies, dental bills, tonsillectomies, etc. It has been the practice of the health committee of the county board to audit such bills and they have thereupon been paid with the approval of the county board.

Sec. 141.06 (1) makes provision for employment of one or more county nurses by the county health committee when so authorized by the county board, and enumerates the duties of the county nurse. No mention is made of the purchase of supplies of any kind, but after listing the various duties this subsection concludes with the words "and to perform such other duties as may be assigned." Whether such assignment of additional duties, including the possible purchase of medical supplies, is to be made by the county board itself or the county health committee is not entirely clear. Subsec. (2) provides that the work of the county nurse shall be directed by the county health committee. Subsec. (3) provides that the county board shall fix the salary of the county nurse and make necessary appropriations to carry out the provisions of subsec. (1).

Reading the three subsections together, it would seem that the legislature intended that the county health committee should appoint the county nurse and prescribe her du-
ties other than those specified by statute in addition to directing her work. But whether the duty of purchasing the medical supplies and services mentioned are assigned by the county health committee or the county board itself, sec. 59.20 (2) would appear to govern the payment of such bills, that is, such payment would have to be on order of the county board signed by the county clerk and countersigned by the chairman.

See XX Op. Atty. Gen. 664, holding that expense accounts for travel of county nurses must be presented to the county board before the clerk issues an order upon the county treasurer in payment. The same would seem to be true in so far as purchase of medical supplies and services by her are concerned.

Third, you state that with regard to current bills for the upkeep of the courthouse such as for coal, painting, repairs, cleaning, janitor supplies, etc., it has been the custom for the public buildings committee of the county board to audit the bills, after which they are paid without specific approval of the county board.

We can find no special statutory authority which would properly authorize the payment of these items without audit by the county board. It can readily be seen that disbursements falling within this third group, as well as some of those discussed under other classifications in this opinion, are going to be held up for long periods of time where the county board meets but once or twice a year. However, this difficulty could be avoided to a great extent if the county board would only delegate the auditing power to the standing finance or audit or executive committee for those items not in excess of $500 pursuant to sec. 59.08 (38). If the county board does not want to delegate such authority then it must do the auditing itself. See XXVIII Op. Atty. Gen. 641, holding that the county board may delegate the function of examining, settling and allowing current accounts only to the committees above named and subject to the limitations prescribed. See also Op. Atty. Gen. for 1904, 98.

Fourth, you state with respect to insurance on county property that the county board has passed a resolution pro-
viding that on renewals of existing policies the premiums shall be paid after they have received the approval of the county treasurer. With regard to new insurance the county treasurer is allowed by said resolution to secure needed new insurance and pay for the premium thereon subject, however, to subsequent confirmation by the county board at its next meeting. With respect to such premiums, vouchers are submitted by the insurance companies, audited by the treasurer and paid by himself.

The county board by its resolution has in effect placed a standing order calling for renewal of all existing policies as they expire. Where no change in rate or coverage is involved in the renewal thereof there has been in a sense a pre-audit of all of such items by the county board. A further audit can serve no useful purpose and the authority delegated here to the county treasurer appears to be purely ministerial. It does not, therefore, fall within the rule that powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated. 15 C. J. 465.

Sec. 59.20 (6) provides that the county treasurer shall

"Cause to be insured, when directed by the county board, at the expense of the county, the county buildings or any of them in the name of the county; and, in case of loss, demand and receive the money due on account of such insurance for the use of the county; and all such money shall be applied to rebuilding or repairing such county buildings."

It would seem that the resolution in question is in conformity with the above statute.

We are not entirely clear as to what would happen in the case of loss prior to county board confirmation of new insurance purchased by the county treasurer but we assume that it is the intent of the resolution that the county treasurer shall have authority to bind the county on the purchase of new insurance up to the time that it takes action thereon, either by way of confirmation or disaffirmance, and that in case of disaffirmance the county would be obligated to pay the premium earned under the insurance policy up to the date of disaffirmance, in which case the county would be
protected against loss during the period for which the premium was earned and paid.

**Fifth** The county owns an airport and the county board's aviation committee has an annual appropriation at times exceeding $50,000 to be used by the committee for the purpose of developing the airport. A special resolution confers full power upon the committee to enter into the necessary contracts and incur the necessary indebtedness within the limits of its appropriation for rental of grading machinery, hiring of labor, acquisition of materials, including asphalt for pavement, tile for drainage, etc. In practice the committee negotiates such contracts as are necessary and vouchers are submitted for labor, materials, machinery rentals, etc., which are approved by the aviation committee and paid by the treasurer without audit by the county board.

What has been said in discussing most of the preceding problems applies equally here. None of the statutes applicable to county-owned airports contain any special provisions as to auditing these items. They, therefore, require audit by the county board in accordance with the statutory provisions and principles hereinbefore discussed.

**Sixth** The county superintendent of schools purchases all supplies for her own office, including books, stationery, etc. In addition thereto she pays for her own travel expenses and then submits her own voucher which is paid by the treasurer without audit by the county board.

Sec. 39.01 (3), as amended by ch. 392, Laws 1943, reads in part:

"* * *

The county superintendent shall be allowed and shall receive (in addition to his salary) his reasonable, actual and necessary expenses for travel, including travel outside the county when necessary to the performance of his duties, meals and room rent while on travel duty, stationery, mimeographing, postage and printing incurred in or necessary for the proper discharge of the duties of the office. The county board may authorize the county superintendent to travel outside of the state at county expense. The county superintendent shall present itemized monthly stat-
ments of that officer's expense to the county clerk. The county board shall make provision for the monthly payment of the county superintendent's salary and expenses."

Another type of travel by the county superintendent of schools is also specifically covered by statute. Sec. 39.04 provides:

"The county superintendent shall annually attend at least one convention called by the state superintendent for the purpose of consultation, advice and instruction pertaining to the public schools. His necessary and actual expenses for such attendance at the most accessible convention shall be paid by the county upon allowance by the county board of proper bills for such expense with the certificate of the state superintendent attached, showing that the claimant attended such convention for the number of days specified in the bill."

We can see no reason why the above statutes should not be followed and the practice of the county treasurer in paying for such items on the voucher of the county superintendent without previous provision therefor by the county board is improper.

Formerly sec. 39.01 (3) provided for quarterly payment of the expenses of the county superintendent. Under the 1943 amendment such expenses will now be paid monthly. This should eliminate much of the difficulty and prolonged waiting for reimbursement involved in following the former statute.

Seventh The county agent and home demonstration agents make out county vouchers for their travel, meals, office supplies, etc., and these are paid by the treasurer on approval of the chairman of the county board without audit by the board.

By "county agent" or "home demonstration agent" we assume you mean the county agricultural representatives provided for by sec. 59.87. It is to be observed that moneys for their work are derived from two different sources. Sec. 59.87 (3) provides for the expenditure of funds raised by the county for this purpose and "Such moneys shall be disbursed by the county treasurer only upon orders of the
county clerk which shall have been approved by the special committee on agriculture.” The membership of this committee is provided for in sec. 59.87 (9).

Since expenditures of moneys raised under sec. 59.87 (3) require the approval of the special committee on agriculture we do not believe that prior audit by the county board is also required under any general statute, as the statutory expression of this special method of approval impliedly excludes any other general procedure which might otherwise apply.

However, as to state aids for this work the situation is somewhat different. Sec. 59.87 (4) provides:

“To supplement the funds provided by the county for the agricultural development, state aid, in the sum of seven hundred dollars annually, shall be given to each county in which the county board has made the required appropriation, and in which a county agricultural representative has been established. Such state aid shall be expended under the direction of the board of regents of the University of Wisconsin.”

Consequently reference must be had to such directions as may have been made by the regents of the university of Wisconsin in this respect in order to determine the correct procedure as to the expenditure of such funds.

Eighth You state:

“With regard to the probation officer of Winnebago county, and bills for foster home care, the municipal judge enters the order placing a child or children in a foster home, at a cost of not to exceed a certain maximum. The foster mother presents a voucher for the foster home care, and delivers the same to the probation officer; the probation officer then approves the bill, and it is sent to the county treasurer, who pays the same. The probation officer also okeys vouchers of merchants for clothing supplied to children receiving foster home care, and these are paid by the treasurer, upon the probation officer's approval, without audit by the county board. Bills for medical, hospital, and dental care for children in foster homes are referred to the social security committee of the Winnebago county board, and after approval by that committee, are paid by the treasurer, without audit by the county board.”
As to the expenses of the probation officer, sec. 57.04 (2) provides that he “shall be entitled to necessary expenses in the performance of his duties, to be paid out of the county treasury the same as other court expenses.”

However, we are unable to find any statutory authority whereby the approval of vouchers for foster home care and for clothing of children in foster homes may be properly delegated to the probation officer, nor do we find authority whereby medical, hospital or dental bills for children in foster homes may be approved by the social security committee of the county board and be paid by the treasurer without audit by the county board.

These matters we deem to be covered by sec. 48.07 (6) (a) and (b), which reads in part:

“(a) 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. In counties in which such a home is being maintained, the county board may authorize the payment for care of children in private homes or private institutions and fix the maximum rate to be paid thereof. * * *

“(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.”

In those cases falling under paragraph (a), except where the county board itself has authorized payment, the only audit necessary would be the approval of the compensation by order of the court. It then becomes “a charge upon the
county”. However, charges arising under paragraph (b) are “payable as are other claims against the county”. Such charges would require audit either by the county board or by a committee to whom such duty has been delegated by the county board pursuant to sec. 59.08 (38). We consider both paragraph (a) and paragraph (b) to be broad enough to encompass medical, hospital and dental bills, and consequently what has already been said with respect to audit under paragraphs (a) and (b) likewise applies to such bills. Paragraph (a) was amended by ch. 444, Laws 1943, but the amendment is not material here.

Lastly you state that the county board has indicated a desire to have sec. 59.08 (38) amended so as to permit any committee to allow accounts for indebtedness, the incurring of which is more or less its responsibility, or where the indebtedness is something that the committee has made a particular study of, and you have therefore suggested the following amendment of sec. 59.08 (38) authorizing delegation of county board auditing power and request our comment on the same.

“ALLOWANCE OF CURRENT ACCOUNTS. Delegate to the any standing finance or audit or executive or special committee of the county board its power to examine, settle and allow all current accounts against the county not in excess of five hundred dollars on any one such account and when so settled and allowed to authorize the issuance of county orders therefore.”

We believe that what has already been said here illustrates the confusing status of the law respecting the payment of claims of various sorts against the county. With the increase in county business and the expansion of its activities into fields undreamed of when the statutes relating to audit of accounts by the county board were originally enacted, it has become obvious that audit of all claims by the county board before payment is entirely too cumbersome if not impossible. This doubtless accounts for the many exceptions which have come into the statutes from time to time and that are involved in some of the situations which you have presented here.
Accordingly there is merit in the suggestion that the exception contained in sec. 59.08 (38) as now worded, should be further broadened along the lines you have indicated. Perhaps, in order to prevent further conflict and confusion with special statutes providing for audit by other committees or officers, it would be advisable to preface the language of the proposed amendment with the words "Except as otherwise provided by law" or words having a similar import. It might be well, however, for your county to consider taking advantage of sec. 59.08 (38) as it is now worded, by delegating auditing power to the standing finance or audit or executive committees before going into the matter of delegating such power to additional committees.

In closing we wish to say that it is difficult to encompass within an official opinion of customary length anything like an adequate or comprehensive treatise on the subject of allowance of claims by the county so as to cover all situations which might possibly be conjectured and that we ordinarily prefer to treat each individual situation as it arises with full knowledge of all of the material facts.

WHR

Uniform Administrative Procedure — Requirements of sec. 227.03, Stats. 1943, interpreted and applied.

September 28, 1943.

PUBLIC SERVICE COMMISSION.

As one of the departments expressly subject to the uniform administrative procedure act (secs. 227.01 to 227.21 Stats.), enacted by ch. 375 Laws 1943, you are concerned as to which of your pronouncements constitute rules within the requirements of sec. 227.03 and request an opinion as to what you must file with the secretary of state in order to comply therewith.

It appears that you have in force certain so-called general orders that have been issued from time to time and either
promulgate or amend pre-existing rules in respect to the practice and procedure to be followed in the institution and conduct of proceedings before you. Quite clearly these all come within the definition of a "rule" as set out in sec. 227.01 (2), Stats., and therefore copies thereof must be filed as prescribed by sec. 227.03, Stats. In this class would be included any and all unrevoked promulgations which prescribe or specify in reference to methods, practices or procedures in the enforcement or administration of any law which has been committed to you, irrespective of whether your consideration thereof is ex parte or otherwise, but not including such as concern or relate only to the internal management of your department.

In another and second class are the general orders that you have issued from time to time which are regulatory in nature and effect in that they govern and are determinative of matters that are subject to your control or supervision. As they set up standards, prescribe specifications, define rights, or the like, and are applicable to all coming within their scope, such orders are of general application. Examples of this type are those issued pursuant to the express authority in sec. 196.49, Stats., and orders fixing minimum rates to be charged by common motor carriers for the transportation of various and specified commodities. Their purpose is to implement, interpret and apply the statutes and to further your enforcement or administration thereof. All your orders in this class have the force of law and in our opinion clearly are "rules" which sec. 227.03, Stats., requires shall be filed.

There is still a third class made up of the innumerable orders which you have issued over the years as decisions in the many cases that have come before you for determination in your various functions. They either contain or effectuate written opinions or decisions rendered by you in the particular matter and to that extent involve statements of policy and do "implement, interpret or make specific" the laws which it is your duty to enforce or administer. However, they are controlling and binding only as to the parties involved and their sole function and purpose is to decide and determine the particular question or controversy. While they are precedents which may be relied upon and followed
by you in subsequent similar situations, they are not a "rule, regulation, standard or statement of policy of general application". Any reliance or controlling effect accorded to them in future cases would arise out of their appeal to reason and if it were shown that they were not a sound and correct application of the statutes they would be disregarded upon such analysis and there would be no occasion for formally revoking the same as would be the case if they constituted a rule within the meaning of sec. 227.03. It is, therefore, our opinion that these decisions or orders are not rules within the provisions of sec. 227.01 et seq. and therefore are not required to be filed with the secretary of state as provided in sec. 227.03.

It may be that in some instances there are orders issued by you very similar in character to those of the class just mentioned, yet which are not decisions or determinations of a particular case. Upon your own initiative or the complaint or petition of some person, you might hold a hearing, the scope of which would not be limited to matters affecting or relating to one individual or group of individuals, but rather encompass a whole group or class of parties or the practices, etc., of a large field of operations, and as a result thereof issue an order covering and prescribing as to a whole class some of which were not parties to the proceeding, or setting forth standards, regulations, rules, etc., for a whole field of activity. In such an instance it is our opinion that the order thus entered would not be of the same character and status as those in the third and last above-mentioned class but would be of the same nature as those in the second group above. Accordingly, any such orders would be subject to the same requirements as those in group two above, for they would be of general application and have the force and effect of law.

HHP
Retirement Systems — State Employees’ Retirement System — Under ch. 176, Laws 1943, which created state employees’ retirement system:

First date upon which voluntary or involuntary retirement of member may be effective is February 1, 1944.

In computing “years of service” for purpose of determining eligibility for retirement, member is entitled to credit for those years of service prior to effective date of act which were spent in service of state in any capacity.

Basically, year of service is total of three hundred sixty-five days of service.

Year of service may be composed of number of periods of service which are “tacked together” without regard to length of such periods.

In computing years of service those members who are employed full time and those who are employed part time on monthly basis and who work for month are entitled to credit for total number of days in such month even though because of Sundays or holidays they did not actually work every day of that month.

Members employed on part-time basis by day are entitled to credit for only those days on which they actually work and for which they are paid, except that part of day shall be counted as full day.

Members employed on seasonal basis, whether by month or by day, are entitled to credit for only those days or parts of days on which they actually work and for which they are paid.

Member may designate two or more beneficiaries to whom his death benefit shall be paid and may change beneficiary and also name alternate beneficiary or beneficiaries.

Last five years of full-time employment used as one factor in determining amount of retirement annuity is composed of those last periods during which member was employed full time and which, when added, total five years.

September 28, 1943.

Albert Trathen, Director of Investments,
Annuity and Investment Board.

You have requested an answer to a number of questions concerning chapter 176, Laws 1943, relating to the state
employees' retirement system. These questions will be discussed and answered in order:

Question 1: "What is the first date upon which the voluntary or involuntary retirement of a member may be effective?"

Sec. 42.62, subsec. (1), Stats., provides:

"The ages of retirement shall be distinguished. Voluntary retirement shall be permitted at age 65 after January 1, 1944, after 30 years of service, upon application to the annuity and investment board. The compulsory retirement age shall be 70 years after January 1, 1944, for both men and women except as provided in subsections (2) and (4). Retirement shall be effective on the first day of the month next succeeding the month in which the employee reaches the age of retirement."

Sec. 42.69 (1) provides in part:

"* * * No annuity shall be paid until January 1, 1944. * * *"

Although the foregoing part of sec. 42.69 (1) might imply that an annuity could be paid January 1, 1944, sec. 42.62 (1) clearly permits voluntary retirement only after January 1, 1944 and makes compulsory retirement effective only after January 1, 1944. In other words the first date upon which a member could retire would be January 2, 1944 (or perhaps January 3, 1944 in as much as January 2 falls on Sunday). Since both voluntary and compulsory retirement become effective on the first day of the month next succeeding the month in which the employee reaches the age of retirement, February 1, 1944, will be the first date upon which either voluntary or involuntary retirement can become effective. Thus, the first pension checks which can be issued will be for the month of February, 1944.

Question 2: "In computing the number of years of service for the purpose of determining eligibility for retirement, is a member entitled to credit for those years of service prior to the effective date of the act which were spent in the
service of the state in any capacity—for example, as an elected officer, or a senior teacher contributing to the teachers’ retirement system—or is credit to be given only for those years of service during which the individual would have been eligible to membership had the present law been in effect?"

Sec. 42.61 (1) provides:

"Membership in the state employees' retirement system shall be compulsory for all persons in the employ of the state except the following classes of persons:

(a) Elective and appointed state officers who are not subject to chapter 16; but any such appointed officer may become a member on the same basis as an employe if he is a full-time appointed officer and if he exercises this option within 6 months after the taking effect of sections 42.60 to 42.70 or within 6 months after initially taking office.

(b) Teachers who are covered by the teachers' state retirement system; except that any teacher who accepts a non-teaching position in the state service shall be permitted to transfer his deposits in the retirement deposit fund to the state employees' retirement system, and vice versa, under rules and regulations governing such transfers to be made by the annuity and investment board.

(c) University professors who are entitled to any benefit from the Carnegie foundation for the advancement of teaching under any plan in force prior to November 17, 1915.

(d) Employees subject to the conservation warden pension fund provided for in section 23.14.

(e) Provisional, emergency, or temporary employes as defined by the bureau of personnel pursuant to chapter 16.

(f) Part-time employes, except part-time employes who because of age or otherwise have become partially incapacitated and have been placed on a part-time service basis at a part-time rate of pay under rules and regulations of the bureau of personnel."

Chapter 176, Laws 1943, does not expressly make any distinction in the nature of the services to the state for which credit may be given and it is our opinion that no such distinction can be inferred. The act gives credit for "years of service" and does not specify anything as to the nature of the service. Although the act specifically excludes from membership certain classes of persons who now are serving
the state, that exclusion is based primarily not upon the nature of their services but upon the fact that some other provision is made for assuring them retirement benefits. Whether certain persons in the service of the state are included as members of the state employees' retirement system and hence entitled to credit, or excluded from membership depends upon their present status and not upon their status at any time prior to the effective date of the act. It is recognized that this interpretation will mean that, whereas a person presently serving the state in the capacity of an elected officer is excluded from membership and the incidental credit, any person now a mere employee of the state but who was formerly an elected officer thereof may be entitled to receive credit for his prior years of service as such elected officer.

This interpretation will also mean that a person who is presently a member of the state employees' retirement system, but who was formerly a senior teacher contributing under the teachers' state retirement system, will in a measure receive double credit because she may now receive credit for the years of service during which she contributed to the teachers' state retirement system and she previously received some credit for those years because the deposit made by the state, under sec. 42.45 of the latter system, depends to some extent upon years of teaching experience.

Similarly, a member of the state employees' retirement system who was formerly subject to the conservation warden pension fund will be entitled to credit for those years of service which he spent as a warden subject to the provisions of sec. 23.14.

Questions 3 and 4:

"In computing years of service are calendar years only to be used (January 1 to December 31, both inclusive) or may the periods of service be ‘tacked together’ without regard to the length of such periods or their relationship to the calendar year? "In computing years of service how is part time service to be counted, if at all?"

Sec. 42.63 (4) provides:
"In the case of persons employed on a seasonal basis as defined by the bureau of personnel, only time actually worked for which a salary or compensation was paid shall be credited in computing years of service under this section."

The act contains no definition of a "year of service". Section 370.01 (10) provides:

"In the construction of the statutes of this state the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

"*(10) The word 'month' shall be construed to mean a calendar month unless otherwise expressed; and the word 'year' a calendar year unless otherwise expressed; *

This definition of a "year" is merely a legislative restatement of the common law. Fretwell v. McLemore, 52 Ala. 124.

A "calendar year" is ordinarily and in common acceptance considered to be three hundred and sixty-five days. Geneva Cooperage Co. v. Brown, 124 Ky. 16, 98 S. W. 279; Shaffner v. Lipinsky, 194 N. C. 1, 138 S. E. 418. See also Erwin v. Benton (Ky.) 87 S. W. 291. The calendar year is composed of twelve months varying in length according to the common or Gregorian calendar. Parker's Estate, 14 Wkly. Notes Cas. 566; Shaffner v. Lipinsky, supra; Muse v. London Assur. Corp., 108 N. C. 240, 13 S. E. 94. The term "year" does not necessarily mean the period commencing with the first day of January and ending with the 31st day of the succeeding December. Knodle v. Baldridge, 73 Ind. 54 (citing Thornton v. Boyd, 25 Miss. 598; Inhabitants of Paris v. Inhabitants of Hiram, 12 Mass. 262).

The case of State ex rel. Hyde v. Dowe, 129 Conn. 266, 28 A. 2d 12, involved the interpretation of the state employees' retirement act of Connecticut. In that case the court stated, pp. 271-272:

"The basis upon which the amount of a retirement salary is determined * * * is not, however, simply 'service of
the state' but 'years of service.' To say that one who gives only a small fraction of his time at irregular intervals to the service of the state and devotes all the rest of his time to his own purposes has spent a year in the service of the state offends against common sense. This is not to say that one must have given all of his time to that service, for the nature of his work may have been such that the duties imposed upon him did not require this, but unless in any year he has been regularly engaged in some state service which required that he devote at least a substantial part of his time to that service he cannot properly claim to have given a 'year of service' to the state. It is inconceivable to us that by the words 'years of service' the legislature meant to include in the basis for granting a retirement salary to any person a year when, at irregular intervals, he served the state only on a few scattered days, payment for which was made solely upon a per diem basis; nor can we conceive that the legislature meant to include service where no compensation was received or where compensation was paid by others than the state."

Although the foregoing quotation relates to years of service as applied to a determination of the amount of a retirement salary, as stated elsewhere in that case (p. 271):

"* * * It is a familiar principle of statutory construction that where the same words are used in a statute two or more times, they will ordinarily be given the same meaning in each instance. Beacon Falls v. Seymour, 44 Conn. 210, 217 * * *"

From the foregoing it is our opinion that under the state employees' retirement act a "year of service", basically, is three hundred and sixty-five days. The act does not provide that the service must be continuous, so short periods of service may be "tacked together" in order to make a year of service. A full-time employee who works a full month is entitled to credit for the number of days in that month although, because of Sundays and holidays, he may not have worked every day of that month. Those part-time employees who, under sec. 42.61 (1) (f), are members of the system and are employed on a monthly basis and who "devote at least a substantial part" of their time to the state service may likewise be given credit for the number of days in any
month during which they worked a full month even though they did not work every day of that month. It is to be noted that a very large percentage of the part-time employees who are members of the system actually are serving the state almost full time but are receiving less than the minimum full-time pay because of the fact that their efficiency has been impaired because of age or other partial incapacity.

Under sec. 42.63 (4) seasonal employees who are members of the system are entitled to credit only for the days or part days which they actually worked and for which compensation was paid, whether they are employed on a daily or monthly basis. A half day of work for them is counted for a half day, as the legislature in computing their services apparently intended to abrogate the common law rule which disregarded a part of a day. See Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581.

From the provisions of sec. 42.63 (4), it would appear to be the legislative intent, at least so far as seasonal employees are concerned, that an employee who may work but a few days in one month should not be entitled to receive the same amount of credit as the employee who works the full month. Obviously, it would be inequitable to permit an employee to receive the same credit for thirteen days of actual work in a month as the employee who actually worked twenty-six days in the same month. (Note also that only those appointed state officers who are full-time officers may become members). Although sec. 42.63 (4) refers only to seasonal employees, the apparent reason for that provision would apply with equal force to those part-time employees who are members of the system and who are employed on a daily basis and may or may not work every working day. Consequently it is our opinion that these latter employees, like the seasonal employees, are entitled to credit only for those days or part days which they actually work and for which compensation is paid except that as to them the common law rule was not abrogated and hence a part of a day must be counted as a full day.

Question 5: “May more than one beneficiary be designated except in the alternative?”
Sec. 42.65 (1) provides in part:

"* * * In case of the death of a member while in the state service or after leaving the state service otherwise than by retirement under sections 42.60 to 42.70, his estate or named beneficiary shall receive the deceased member’s deposits with interest as earned."

Sec. 370.01 provides:

"In the construction of the statutes of this state the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

* * *

(2) Every word importing the singular number only may extend and be applied to several persons * * * as well as to one person * * * ."

The act apparently intends that the payment of a death benefit should be made in a single sum. We cannot see that any complication need arise if more than one beneficiary were designated and we cannot say that a construction permitting the designation of more than one beneficiary would be inconsistent with the manifest intent of the legislature. In accepting designations of beneficiaries, however, care should be taken to see that the member provides for the disposition of the death benefit in the event that one or more of the designated beneficiaries predecease the member so that your board will not be compelled at its peril to make payment of the death benefit in accordance with your interpretation of ambiguous designations. The right to designate a beneficiary includes the right to change the beneficiary and would permit the designation of an alternate beneficiary or beneficiaries, which is no more than a conditional change of designation.

Question 6: "Are 'the last 5 years of full time employment' to be calendar years (January 1 to December 31, both inclusive) or the last periods totalling five years during which periods the member was employed full time?"

Sec. 42.63 (1) provides:
"The annual retirement allowance payable monthly shall be the straight life annuity or its actuarial equivalent as provided in section 42.64 which the accumulations of the member's deposits will buy at the time of retirement in accordance with rates specified by the annuity and investment board plus a state pension or its actuarial equivalent to those who have been in the service 20 years or more computed as follows: 1/140 of the average full-time salary earned during the last 5 years of full-time employment multiplied by the number of years or major fraction thereof of service as a member of the state employees' retirement system plus 1/70 of the average full-time salary earned during the last 5 years of full-time employment multiplied by the number of years or major fraction thereof of service prior to the effective date of sections 42.60 to 42.70."

It is our opinion that years of employment under sec. 42.63 (1) are to be computed in the same manner as "years of service" under sec. 42.62 (1), except that the periods of employment which may be "tacked together" to aggregate the five years must be the last periods during which the member was employed full time.

JRW

Fish and Game—Exclusive authority to regulate hunting and fishing and to establish open or close season for entire state or for any county or part of county is vested in state conservation commission by sec. 29.174, subsecs. (1) and (2), Stats., but villages, cities and Milwaukee county, in furthering interests of public peace and safety, may adopt ordinances relating to use of firearms which have incidental effect of restricting hunting privileges within their boundaries despite open season therein established by conservation commission order.

September 28, 1943.

E. J. VANDERWALL, Director,
Conservation Department.

You state that for a number of years the conservation commission has opened Milwaukee county to hunting but
that a Milwaukee county ordinance relating to the improper use of firearms appears to conflict with the conservation commission order and we are asked which is controlling.

The Milwaukee county ordinance referred to, sec. 63.02, reads as follows:

"Improper use of firearms. It shall be unlawful for any person to unnecessarily or willfully discharge any firearm or explosive, or in any other manner create any noise or disturbance, or to flourish or use any weapons, or make threats, or resort to violence in a manner tending to disturb the peace or frighten any of the inhabitants of the county."

In XXVII Op. Atty. Gen. 705 it was ruled that a town board had no power to prohibit or regulate hunting, this power being vested in the conservation commission under sec. 29.174, Stats.

It should be noted, however, that the powers of Milwaukee county are much broader than those of a town by virtue of sec. 59.083, subsec. (1), Stats., a home rule statute relating to Milwaukee county. This section reads in part:

"Except as elsewhere specifically provided in these statutes, the county board of any county with a population of two hundred fifty thousand or more, is hereby vested with all powers of a local, legislative and administrative character, * * *"

The general hunting regulations of the conservation commission contain the following provision (Order No. G-602):

"(6) (a) There shall be no open season for the taking, catching, or killing of any game animal with the use of firearms in any incorporated city or village in the state of Wisconsin wherever such incorporated city or village has in effect an ordinance prohibiting the discharging of firearms within the legal boundaries.

"(b) There shall be no open season for the taking, catching, or killing of any game animal with the use of firearms in any of the county parks or parkways in Milwaukee county."

This has the effect of prohibiting hunting by firearms in all incorporated cities or villages in Milwaukee county.
which have ordinances prohibiting the discharge of firearms and also prohibits hunting with firearms in county parks or parkways in Milwaukee county.

However, as to those areas in Milwaukee county not covered by the provisions of Order No. G-602, set forth above, hunting with firearms is legal so far as the state conservation commission is concerned. But this does not mean that a hunter who is in all respects complying with state conservation commission orders relating to hunting in Milwaukee county is thereby immune from arrest where his activities are in violation of ordinance 63.02 of Milwaukee county, although the enforcement of that ordinance is the province of the county and not the conservation commission.

It happens not infrequently that an act may be perfectly legal under state law and at the same time be definitely illegal under the restrictions of some local ordinance.

While in view of the authorities hereinafter discussed, it may be doubted that Milwaukee county under its home rule powers could legislate in a matter of state-wide concern, such as regulation of hunting where the legislature has delegated this matter to the conservation commission, it should be noted that the Milwaukee county ordinance is not directed against hunting as such, even though it may have the incidental effect of prohibiting all hunting in the county by use of firearms.

Thus the question is not to be solved by saying either that the conservation commission order prohibiting hunting in parts of Milwaukee county supersedes the Milwaukee county ordinance, or that the ordinance supersedes the commission order. Each pronouncement is controlling on the subject which it purports to cover. The conservation commission undoubtedly has the authority to regulate hunting in Milwaukee county and on the other hand it would seem that Milwaukee county has the authority to make reasonable regulations relating to the use of firearms in view of its special powers under sec. 59.083 (1), and the fact that it is made up largely of a densely populated metropolitan area making the promiscuous use of firearms, either for hunting or otherwise, highly dangerous to public peace and safety.

You state that the conservation department is interested in having public hunting in the outlying areas of Milwaukee
county so as to reduce the farm crop damage which in recent years has become quite serious because of over-population of game, such as pheasants and rabbits. If such is the case we would assume that the Milwaukee county board would doubtless be willing to cooperate in protecting such farm crops and victory gardens by so amending sec. 63.02 as to permit hunting with firearms in the areas needing such relief. This could still be done with a proper regard for public safety by restricting the type of permissible firearms, to small-bore shot guns using fine shot.

Otherwise we are afraid that hunters relying on the open season arrangements and provisions of conservation commission order No. G-602 may find themselves in danger of prosecution under Milwaukee county ordinance 63.02, assuming that we have correctly interpreted its provisions.

Secondly, you call attention to the fact that it is the understanding of the commission that an order opening the season on game in a county ordinance excepts cities, villages and towns and that some question has been raised as to why conservation commission orders take precedence over town and possibly county ordinances but not over municipal ordinances.

Sec. 29.174 (1) and (2), Stats. provides:

"(1) There shall be established and maintained, as here- in provided, such open and close seasons for the several species of fish and game, and such bag limits, size limits, rest days and conditions governing the taking of fish and game as will conserve the fish and game supply and trapping.

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

We take it that if a conservation commission order provided for an open season on game in a particular county without excepting any part thereof no one could properly be prosecuted for violating the order even though he were
to shoot game on the busiest street in the largest city of that county. This does not mean, however, that he would be immune from prosecution under a city ordinance prohibiting the use of firearms within the city.

What we have already said respecting the Milwaukee county ordinance is for the most part applicable here. Cities and villages have wide powers of local government under the home rule amendment to the Wisconsin constitution, art. XI, sec. 3, as well as by statute. However, our supreme court held in *Monka v. State Conservation Commission*, 202 Wis. 39, that the state, as trustee, has an interest in its wild animal and fish, the conservation of which is a matter of general state-wide interest to all of its people as distinguished from merely local concern. Matters that are of state-wide concern, as evidenced by legislative enactments such as sec. 29.174, *supra*, do not come within the proper scope of the home rule powers of cities and villages under art. XI, sec. 3, Wisconsin constitutions. See *Van Gilder v. Madison*, 222 Wis. 58.

Thus, neither a city nor a village could control hunting as such, and towns have no such power, as we pointed out in XXVII Op. Atty. Gen. 705. The same is true of counties since there are no statutes, so far as we are able to find, which confer on counties the power to regulate hunting, and it has been held that counties have only such powers as are expressly granted or necessarily implied from the statute. *Spaulding v. Wood County*, 218 Wis. 224.

By way of recapitulation we conclude that the authority to regulate hunting is vested in the state conservation commission by statute and to the complete exclusion of the exercise of such power by towns, villages, cities or counties, but that in their conduct of local affairs it may well be that villages, cities and Milwaukee county may properly prevent the use of firearms and the like in such a way that hunters may be able to make but little or no use of the open season for hunting in the area affected by such ordinances, and assuming, of course, that such ordinances do not purport to regulate hunting as such but have been adopted in good faith for the purpose of protecting the public peace and safety. That there is also some limited power in town boards
with respect to controlling the use of firearms in connection with fire prevention under sec. 60.29 (18) is indicated in XXVII Op. Atty. Gen. 705.

WHR
Public Health — Wisconsin General Hospital — Per diem charge for hospitalization of war veterans at Wisconsin general hospital for period from April 1 to July 11, 1943, may not exceed $4.90 per day.

H. M. Coon, M. D., Superintendent,
Wisconsin General Hospital.

You state that since April 1, 1943, you have been rendering charges of $5.90 per day for hospitalization of war veterans, and ask whether that practice is permissible in view of ch. 508, Laws 1943. You state that the emergency board increased the per diem rate for state and county patients to $5.90, effective April 1.

During the period from April 1, 1943 to July 11, 1943, sec. 142.10 of the statutes specifically limited the charge for hospitalization of war veterans at the Wisconsin general hospital to a maximum of $4.90 per day. Ch. 508, Laws 1943, which raised the maximum to $5.90 per day, did not become effective until July 11, 1943, the day after its publication. (See sec. 370.05, Stats., which provides that every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication.) There is nothing in ch. 508, Laws 1943, to indicate that it was intended to apply retroactively. It is a well established principle that a statute is intended to have only a prospective effect unless a contrary intent is clearly shown. The following are only a few of the cases in which this principle has been applied: State ex rel. Schmidt v. District No. 2, Town of Red Springs, 237 Wis. 186, 295 N. W. 36; Lanz-Owen Co. v. Garage Equipment Mfg. Co., 151 Wis. 555, 139 N. W. 393; Smith v. Chicago & N. W. Ry. Co., 49 Wis. 443, 5 N. W. 240.

The authority of the emergency board under sec. 142.07 to increase the maximum rate specified in that section appears to apply only to patients admitted under the preceding sections of ch. 142, Stats., and not to war veterans, for whom specific provision has been made in sections 45.275, 45.277 and 142.10.

Sec. 45.277 provides that the per diem charge for hospitalization of war veterans shall not exceed that for similar
care rendered public patients under sec. 142.07, but does not prohibit a lesser rate. Since the legislature has specifically fixed the maximum rate for services rendered war veterans, and has not authorized any administrative agency to modify such statutory rate, the maximum specified in sec. 142.10, Stats. 1941, must be applicable until July 11, 1943, when the legislative amendment became effective.

BL

Public Officers — Department of public welfare possesses no authority to collect and disseminate information to induction centers for purpose of assisting in examination of selectees under selective service act.

October 4, 1943.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley.

This is in response to your request for my view as to whether the state department of public welfare may properly engage in collecting and forwarding information to induction centers for selectees under the selective service law to be used in the examination of selectees. The information relates particularly to the family background, including mental and physical health of the selectees.

I am of the view that the department possesses no such authority under the law of this state. It is a creation of statute and as such has only such powers as are expressly granted or necessarily implied from those expressly granted. There can be no claim that the department possesses such an express grant or that such authority is necessary in order to permit it to carry into effect any power which it is expressly granted.

The question becomes important in the financing of the venture. An unauthorized exercise of authority by a state department to the extent that it requires the use of public moneys means that there has been an illegal and improper
use of public moneys. I am of the opinion that any such ac-
tivity on the part of the department would result in an im-
proper expenditure of state funds.

JWR

Constitutional Law — Legislature — Article IV, section 12, Wisconsin constitution, does not apply to prevent mem-
ber of legislature which enacted statute increasing salary of
governor from being candidate for office of governor.

October 5, 1943.

WILLIAM A. FREEHOFF,
State Senator.

You have raised a question as to whether a member of
the present legislature is eligible to be a candidate for the
office of governor at the next election in view of the passage
by the present legislature of a law increasing the salary of
the governor. Your question arises by reason of article IV,
sec. 12, Wisconsin constitution, which provides:

“No member of the legislature shall, during the term for
which he was elected, be appointed or elected to any civil
office in the state, which shall have been created, or the
emoluments of which shall have been increased, during the
term for which he was elected.”

The Wisconsin supreme court, which is the final authority
in the interpretation of the Wisconsin constitution, has not
passed upon the question. It has passed upon a related
question, however, and it is my view upon the basis of its
action in doing so that it would hold members of the present
legislature to be qualified to be candidates for the office of
governor at the next election.

In the case of State ex rel. Zimmerman v. Dammann, 201
Wis. 84 (1930), the court was asked to pass upon the ques-
tion as to whether members of the legislature could increase their salaries during the term of office for which they were elected. The question arose out of the amendment of the constitution in 1929 repealing article IV, sec. 21, which had fixed the compensation of members of the legislature. The effect of repealing the section was to vest the legislature with the power to fix legislative salaries. The 1929 legislature fixed the salaries of legislators at a figure considerably above that at which they had been fixed under the repealed constitutional provision.

The question arose as to whether the legislature could legally increase the salaries of its members during the term for which they were elected under article IV, sec. 26, which is not here material.

During the course of its decision it became material for the court to consider the question as to whether the provisions of article IV, sec. 12, were applicable. If they were, the result would be that no member of the 1929 legislature could be a candidate to succeed himself. Thus, the court was called upon to determine whether, in view of the legislative action increasing the salaries of legislators, the members of the legislature could stand for reelection. On the face of article IV, sec. 12, they would appear to have been precluded, since the section as above set out specifically provides that no member of the legislature shall be elected to any office which has been created or the emoluments of which have been increased during the term for which he was elected.

The court pointed out that at the time the constitution was adopted the office of legislator was created by the constitution and the compensation of legislators was fixed by the constitution. It held that article IV, sec. 12, was intended to apply to offices created by the legislature and to an increase in emoluments made by the legislature. Consequently, the conclusion was reached that at the time of the adoption of the constitution, article IV, sec. 12, was not intended to prevent legislators from standing for election to that office in either of the contingencies mentioned, since neither of them could possibly occur.

The court was of the opinion that in view of its prior decisions on the point, article IV, sec. 12, since it constituted a restriction on eligibility for public office, should receive a
strict construction and that the application of such a construction required the holding that the section remain inapplicable in the case of an increase of legislative salaries notwithstanding that the constitution had been changed since its adoption to permit legislative fixing of salaries.

The office of governor was created by the constitution at the time of its adoption and its compensation was fixed by the constitution. Clearly, it could not have been intended to prohibit legislators from running for the office in either of the contingencies mentioned in article IV, sec. 12, since the office of governor existed without legislation and its compensation could not be fixed by legislative action. It is true, as in the case of the legislators’ salaries, the constitution has subsequently been changed to permit the legislature to fix such salary, but the strict interpretation applied in the Zimmerman case would require the result there reached, that eligibility should be based upon the intention as evidenced at the time the constitution was adopted.

It is possible that some distinction could be drawn between the Zimmerman case and the question submitted, but the reasoning of the court in the Zimmerman case in my opinion is controlling of the question here.

JWR

Municipal Corporations — Town Storm and Sanitary Sewers — Only town boards in Milwaukee county and town boards which have been granted powers of village boards pursuant to sec. 60.18, subsec. (12), Stats., may provide for installation of storm and sanitary sewers in areas which are located neither within town sanitary district nor within unincorporated village.

October 9, 1943.

CARL N. NEUPERT, M. D., State Health Officer,

Board of Health.

Sec. 60.64 of the statutes outlines a method whereby the construction of storm and sanitary sewers may be financed with certificates issued against the parcels of real estate
benefited by such construction, or with special improvement bonds. Since this section is found in chapter 60, relating to "towns", it would seem to imply that a town board may install such sewers. However, in order to clear this matter up, you request our opinion as to the legality of sewer installations in towns where the area to be served is located neither within a town sanitary district nor an unincorporated village.

It is assumed that your question relates to the powers of town boards outside of the county of Milwaukee as sec. 60.29, subsecs. (19) and (28) grants special powers to the town boards of that county for laying sewers and assessing the cost to property owners.

Sec. 60.64 provides:

"(1) When any contract is let for street improvements, for the construction of any sanitary sewer or sewage works or surface or storm water sewers, or the laying of any water or heat main or lateral, or the laying or repair of any sidewalk, and such work or a portion thereof is chargeable to the real estate to be benefited thereby, it may provide that the amount so chargeable may be paid with certificates against the parcels of real estate so benefited, or special improvement bonds or the proceeds of the sale of such bonds, or that payment may be in part made in certificates or in part in special improvement bonds or the proceeds of the certificates or special improvement bonds.

"(2) All the provisions of section 62.20 and section 62.21 of the statutes, relative to payment for public work and special improvement bonds issued therefor in cities shall apply to towns, so far as applicable thereto, and the town board shall have all powers therein conferred, and to perform all duties assigned to boards of public work in cities, and the town clerk and town treasurer shall perform all duties therein assigned to the city clerk and city treasurer respectively."

Neither of the subsections in the foregoing statute grants the town board power to lay sewers. Such power, if any exists, must be found in other sections of the statutes. Sec. 60.29 (26) grants to the town board of any town authority to cause any highway, street or alley to be graded, paved, or otherwise improved, including the construction of curbs and gutters under certain circumstances, but there is noth-
ing in this subsection to indicate that the improvement therein contemplated includes sewers. In fact, the specific mention of the construction of curbs and gutters would indicate that sewers were not intended to be included.

Sec. 66.06 (22) authorizes a town to

"* * * construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the treatment and disposal of sewage, including the intercepting sewers necessary in connection therewith * * *"

This section would not authorize a town to construct or extend storm sewers. It would authorize a town to construct sanitary sewers only as a part of, and in connection with, the construction of a sewage disposal plant, or to extend sanitary sewers in connection with a disposal plant already in existence.

Sec. 60.18 (12) provides that the town meeting may authorize the town board, in towns having a population of not less than five hundred and having therein one or more unincorporated villages, to exercise all powers relating to villages and conferred upon village boards by ch. 61 of the statutes, except such powers as would conflict with other statutes. Sec. 60.29 (13) authorizes the town board to exercise the powers granted to it under 60.18 (12). Secs. 61.45 and 61.455 authorize villages to lay sewers and drains. These sections provide procedure whereby a town board could be given authority to lay sewers and drains but apply only to cases where the town contains an unincorporated village or is contiguous to the limits of any city. Your question implies that the towns about which you are inquiring do not expect to lay sewers or drains in unincorporated villages, but you do not indicate whether there are any such villages in the town or whether the town is contiguous to the limits of any city, so we cannot tell whether these sections are material.

The present sec. 60.64 was created by ch. 242, Laws 1925, as sec. 60.306. A section 60.305, relating to the construction of a waterworks system in a town, was created at the same time. At the time of the passage of ch. 242, Laws 1925,
there was in existence a section 60.30, which read as follows:

“The town board, may, whenever they may deem it necessary for the public health, cause a sewer or sewers to be constructed and maintained in any part of the town where an outlet can be obtained into any sewerage system and alter or repair any sewer so constructed within the town, and in so doing such work the town board shall proceed in accordance with subsection (12) of section 62.15 and sections 62.18, 62.20 and 62.21, inclusive, so far as the same may be applicable, except that any town may levy a special tax of not more than three mills on the dollar of the assessed value of the taxable property in any sewer district for the extension or improvement of the sewer system of such district, and for the purpose of this section the town board shall have and may exercise all the powers conferred by said sections upon the common council and board of public works of cities and may issue bonds against said sewer district in the same manner as provided for the issue of general city bonds for construction of sewers in chapter 67 of the statutes.

* * *

The legislature undoubtedly intended that sec. 60.306, relating to charging sewer construction work and water mains to benefited property, should be read in connection with the then sec. 60.30, which granted the town board the power to lay sewers and drains and with the said sec. 60.305. However, the legislature of 1925, by ch. 19 of the laws of that year, had already created secs. 60.305 to 60.3059, relating to sanitary districts in towns. Consequently, the revisor of statutes, pursuant to sec. 43.08 (2), which gives him authority to renumber any section of the statutes, renumbered sections 60.305 and 60.306, created by ch. 242, Laws 1925, to be 60.63 and 60.64 respectively. Thus, 60.64 was placed in the statutes away from the section 60.30, with which it was intended to be read.

By ch. 12, Laws 1935, the legislature repealed 60.30 to 60.309, inclusive, relating to town sanitary districts and the laying of sewers in towns. This chapter 12, Laws 1935, re-created the town sanitary district law but failed to re-enact any provision similar to the 60.30, Stats. 1925, which gave the town board the authority to lay sewers and drains. Sec. 60.64, which was to be read in connection with said section
60.30 was not repealed, probably because it had been moved to the latter part of the chapter when it was renumbered by the revisor and hence was missed by the legislature when it revised the town sewer and sanitary district laws by ch. 12, Laws 1935.

Sec. 60.309 (2) provides:

"The powers conferred upon town sanitary district commissions by sections 60.30 to 60.309, inclusive, shall be supplementary to any other powers conferred by law upon towns in which sanitary districts exist, or upon the town boards of such towns."

In XXVII Op. Atty. Gen. 314, 315, it was stated:

"We therefore conclude that the matter of waterworks and sewerage systems is a town sanitary district affair rather than a town affair and that the town board is hence without authority to provide for engineering surveys in connection with proposed sewerage systems intended to serve only a portion of the town."

In view of sec. 60.309 (2) and the conclusions reached herein, this opinion must be construed as modifying the statement made in the foregoing quotation from XXVII Op. Atty. Gen. 314.

JRW.
Public Health — Rendering Plants — Sec. 146.12, Stats., relating to rendering plants, as amended by ch. 400, Laws 1943, exempts from its regulation by virtue of sec. 146.12, subsec. (1), par. (b), Stats., operator of fur farm who collects carcasses only for food for his fur-bearing animals, but such exemption does not permit him to collect carcasses to feed to hogs nor for purpose of engaging in rendering business.

Sec. 146.12 (12), Stats., prohibits operation of hog farm in connection with rendering plant.

Sec. 146.124, Stats., prohibits collection or receipt of dead animals for hog feed unless such material is first thoroughly rendered, as provided under sec. 146.12 (8) and rules of state board of health.

October 9, 1943.

CARL N. NEUPERT, M. D., Health Officer, Board of Health.

You state that an individual has been collecting both dead and live animals for feeding to his mink, foxes and hogs and that the meat from these animals is cooked in steam pressure cookers before feeding. Not all of the material is used for feed. The hides from the dead animals and the grease extracted by rendering are resold on the market.

We are asked whether these operations are such as to require a renderer’s license under sec. 146.12, Stats. as amended by ch. 400, Laws 1943.

Sec. 146.12, subsec. (1), par. (a), Stats. 1943, exempts from licensing requirements of the rendering law the “operator of a fur farm who collects carcasses only for food for his fur-bearing animals”. This exemption, however, does not permit the collection of carcasses for hog food or for the purpose of rendering fats to sell. It is limited strictly to food for fur-bearing animals. This section provides also with respect to such dead animals:

“* * * No such animals nor any part thereof so collected shall be resold except to a licensed renderer.”

The obvious purpose of this limitation is to prevent the operation of an unlicensed rendering plant under the guise of
a fur farm and at the same time to provide the legitimate fur farmer with a sales outlet for material from or parts of dead animals that cannot be used as feed for his fur-bearing animals.

Sec. 146.12 (12) provides that no hog or pig farm shall be permitted to be operated in connection with a rendering plant. Thus a licensed renderer would not be allowed to operate a hog farm in connection with his rendering plant.

Sec. 146.124, Stats. 1943, provides that no person shall collect or receive from anyone dead or diseased animals or the parts thereof for feeding to animals used for human consumption, unless first thoroughly rendered as provided in sec. 146.12.

Sec. 146.12 (8), with reference to the manner of rendering, provides in substance that all cooking shall be done in closed steel vessels by the dry-rendering process in accordance with state board of health rules regulating the equipment and operation of the plant and for the disposal of vapors, odors, gases, sewerage and waste matters so as to prevent the creation of a nuisance.

We understand that ordinary pressure cookers, such as are used by the individual in question, do not comply with the foregoing statute or the rules of the board. Even if the equipment and manner of rendering fully complied with sec. 146.12 (8) and the rules of the board, there would still be a noncompliance with sec. 146.124, since such rendering must be done prior to collection or receipt of the dead animals by the hog farmer. In other words a hog farmer may not collect or receive dead animals or parts thereof to feed to his hogs unless such material has first been thoroughly rendered.

The result is that the individual in question may collect carcasses only for food for his fur-bearing animals. If he wants to continue operating a hog farm in addition to a fur farm and to use dead animals for hog feed such material must be rendered before he collects or receives it. If he proposes to operate a licensed rendering plant on his farm it will be necessary for him to discontinue the hog raising business on his own premises.

WHR
Education — School Administration — Public Officers — County Superintendent of Schools — Ch. 392, Laws 1943, does not effect immediate increase in salaries of county superintendents of schools to $2,000. Salary of any present incumbent that is below $2,000 will continue at that figure unless and until county board raises it.

October 9, 1943.

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

The county board of your county at the November, 1940, session fixed the salary of the county superintendent of schools at $1,800 per year, and the present incumbent was then elected at the spring election in 1941 for a 4-year term commencing the first Monday of June, 1941. At that time sec. 39.01, subsec. (3), Stats., provided, so far as here material:

"The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his annual salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. The following shall be the minimum annual salaries of county superintendents: If there shall be under his supervision fewer than one hundred teachers, one thousand two hundred dollars; if more than ninety-nine and less than one hundred and fifty teachers, one thousand four hundred dollars; if one hundred and fifty teachers or more, one thousand six hundred dollars. * * *"

Ch. 392 Laws 1943, amended sec. 39.01 (3) by deleting the words italicized above and inserting in their place the following:

"The salary of county superintendents as fixed by the county boards shall not be less than $2,000 a year."

You ask these questions:

1. Does ch. 392, Laws 1943, immediately increase the salary of a county superintendent of schools to $2,000 a year upon its publication, July 2, 1943; or
2. Will it require some action of the county board to change this salary; or

3. Will the salary of the present county superintendent of schools remain for the expiration of his term, in other words, until July, 1945, as previously fixed, unless presently changed by action of the county board?

The provision in art. IV, sec. 26 of the Wisconsin constitution against changes in salaries of public officers during their terms of office is applicable only to public officers whose salaries are paid out of the state treasury. XXXII Op. Atty. Gen. 51. Although sec. 59.15 (1), Stats., prohibits changes in salaries of elected county officers during their terms of office, the creation of par. (ef) thereof by ch. 94 Laws 1943, suspends its operative effect up to January 1, 1945. Thus, as there is no constitutional or statutory bar to a present increase in the salary of an incumbent county superintendent, the problem narrows itself to a determination of the legislative intent in the enactment of ch. 392.

The fundamental difference between the language of sec. 39.01 (3) before and after this amendment is indicative of the legislative intent. Formerly, after providing that the county board shall fix the salary, it provided that specific salaries of from $1,200 to $1,600, graduated for different ranges in the number of teachers under supervision, "shall be the minimum annual salaries of county superintendents." The language did not expressly limit the power of the county board in fixing salaries, but merely set up minimum salaries. Although this necessarily operated to effect a limitation upon that power, such result was not effected by express language to that end but as an incident of the establishment of minimum salaries. The language of the amendment is quite different in structure in that it does not say that $2,000 is the minimum salary, but that the salary "as fixed by the county board shall not be less than $2,000 a year." The only mention of a minimum is in connection with the fixing of the salary by the county board.

This contrast in phraseology indicates to us that in enacting this amendment the legislative intent was not to fix $2,000 as the minimum salary that should be paid to a county superintendent after its effective date, but to raise
the lower limit of the county board's power in the fixing of salaries. Had it been the intention of the legislature to prescribe $2,000 as the minimum salary payable, as was the form of the provision prior to amendment, that could have been effected by a much simpler change. Striking out all the language of the second sentence following the colon and inserting "$2,000" in lieu thereof is all that would have been necessary.

But the contention might be argued that as there was no change in the opening sentence of the subsection which provides that the salary as fixed by the county board "shall continue to be the salary of said officer until changed by the board or by operation of law", the change made by ch. 392 comes within the phrase "by operation of law", and therefore an increase to $2,000 is immediately made of all salaries below that amount. However, consideration of the intended scope of the phrase "by operation of law" shows that legislative enactments were not the changes this phrase was inserted to cover.

Under the language prior to this amendment, whenever the number of teachers supervised fell within any of the specified ranges the statutory minimum salary for that range automatically became applicable. Consequently, if the number of teachers supervised increased during the term of a county superintendent so as to come within a higher range and his salary as fixed by the board was less than the minimum salary set by the statute for that range, automatically his salary payable thereafter was increased "by operation of law" to such prescribed minimum. Also, if the county board failed to fix the salary for a new term at or above the applicable statutory figure or fixed it at a lower amount, either the statute was self-executing and made the applicable minimum the salary payable or furnished the basis for compelling the board through mandamus to fix the salary at not less than such minimum, which change to the proper minimum in either instance would be "by operation of law". In our opinion the covering of the above, or other similar situations if any there were, was the intended scope of the words "by operation of law". No such language would be necessary in order to make effective any changes by subsequent legislation, for by the very inherent character of legislative enact-
ments they become operative at their effective date, inde-
pendent of and without any such language in the statutes
they amend.

Accordingly, even though under the amendment there no
longer exist the automatic increases during the term be-
cause of the number of teachers supervised, the phrase as
retained is applicable to the other situations mentioned, and
the retention of the phrase cannot be made the basis of an
argument that it must be given some effect and therefore it
applies to the instant case for otherwise there would not be
anything to which it does apply.

The history of ch. 392 bears out our conclusion. As finally
approved and published it is in the form of Bill 254, A., as
introduced. Amendment 1, A., created a new subsec. (7)
providing that notwithstanding any provision of law to the
contrary the county board might increase the salary of
county superintendent during his term of office and spe-
cifically said it was to be effective only for the duration and
six months thereafter. Amendment 2, A., inserted in the
body of subsec. (3) substantially the same provision but
without any time limitation on its operative effect. These
amendments were in recognition of the necessity of obviat-
ing the effect of the prohibition in sec. 59.15 (1), Stats.,
again increasing the salary of a county officer during his
term of office. Both these amendments were adopted and as
so amended the bill went to the governor for approval. But,
by joint resolution, it was thereafter recalled, the amend-
ments were stricken out, the bill was passed in its original
form, and upon the governor's approval and publication it
became law and took effect immediately.

The reasons for this recall of the bill and the subsequent
elimination of the amendment are obvious. In the first place
the amendments were inconsistent, as one had an expiration
limitation and the other had none. Secondly, the substance
of the amendments was no longer necessary because by that
time ch. 94, Laws 1943, had already become law and ade-
quately dealt with the matter, and in addition the amend-
ments each conflicted with ch. 94 in that its expiration date
is January 1, 1945.

While these amendments would apply to increases during
the term of salaries already above the $2,000 minimum as
well as those below that amount, they show very positively that the legislature had in mind that county board action would be necessary for present increases in at least some instances. Under the circumstances it seems clear that had it been the legislative intent at the time the amendments were stricken that the changes made in the statute by ch. 392 were to operate as a legislative increase to $2,000 of all salaries then below that figure and without any action by the county boards the bill would have been changed so as to state it in clear and unequivocal language.

Although the legislature indicated as its view that a county superintendent should receive not less than $2,000 a year, it left with the county board the matter of making increases to bring present salaries up to that figure. It is therefore our opinion that the answer to your question No. 1 is No, the answer to question No. 2 is Yes and the answer to question No. 3 is Yes.

HHP

Elections — Sec. 6.44, subsec. (2), Stats., relating to non-registered voters, as amended by ch. 469, Laws 1943, is not in conflict with and does not supersede sec. 6.18 (1) (a), Stats., requiring cancellation of registry of voters failing to vote for two years.

October 9, 1943.

FRED R. ZIMMERMAN,
Secretary of State.

You state that sec. 6.18 (1) (a), Stats., requires city clerks in municipalities where registration of voters is applicable to cancel the registration of all voters who have not voted within a period of two years and that this appears to conflict with sec. 6.44 (2) as amended by ch. 469, Laws 1943, and which provides that no absent qualified elector serving in time of war with any of the armed forces need furnish the affidavit required of non-registered voters under sec. 6.44 (2).
We are asked whether this amendment is to be regarded as excusing city clerks from obeying the mandate of sec. 6.18 (1) (a) so far as persons in military service are concerned.

A careful reading of ch. 469, Laws 1943, indicates that there is no conflict between it and sec. 6.18 (1) (a). Effect may be given to both, and we do not believe that any hardships need result to those in the armed services whose registrations as electors are canceled under sec. 6.18 (1) (a) for failure to vote for two years.

The amendment to sec. 6.44 (2) made by ch. 469, Laws 1943, reads:

"* * * No such absent qualified elector serving in time of war with any of the armed forces of the United States or any of the women's auxiliary military services established by act of congress, shall be required to furnish such an affidavit. Such person's name shall be listed upon the registry list specified in subsection (1) (b) under a heading to be entitled 'non registered members of the armed forces.'"

It is to be noted that while registration of such persons may be canceled under sec. 6.18 (1) (a), they will to all intents and purposes have a special registration of their own under sec. 6.44 (1) (b), which reads:

"The inspectors shall keep a list of the names and residences of the electors voting whose names are not on said completed registry attach such list to the registry, and return it, together with all such certificates, to the proper town, city or village clerk, or the election commission in cities of the first class."

Their names are to be listed under the heading "Non registered members of the armed forces" on the above list, and they are exempt from the requirement of furnishing affidavits which is required of other non-registered voters. The result is that their voting privileges are in effect as full and complete as though their names had not been stricken under sec. 6.18 (1) (a) for failing to vote for two years.

Thus there is no good reason why city clerks should refuse to obey the mandate of sec. 6.18 (1) (a), irrespective
You have asked whether a Wisconsin court would have jurisdiction to grant a petition for adoption under the following circumstances:

A woman, resident of Wisconsin, has married a man who is a resident of another state, but who has been stationed in this state for more than a year as a member of the military forces of the United States. The wife is the natural parent of a child born prior to the marriage. The husband desires to adopt the child. He expects to be transferred overseas very soon and will not have sufficient time prior to the transfer to complete adoption proceedings in the state of his residence.

The right to adopt is strictly statutory, and unless the statutory provisions are followed implicitly, no court has the right to decree an adoption on the ground that it would be desirable or equitable. Will of Bresnehan, 221 Wis. 51, 265 N. W. 93; Will of Mathews, 198 Wis. 128, 233 N. W. 434; St. Vincent's Infant Asylum v. Central Wis. T. Co., 189 Wis. 483, 206 N. W. 921; Adoption of Bearby, 185 Wis. 33, 200 N. W. 686.

The Wisconsin statutes, sec. 322.01, subsec. (1), provides:

"Any adult inhabitant of this state may petition the county court in the county of his residence for leave to adopt a child; but no such petition by a married person shall be granted unless the husband or wife shall join therein ex-
cepting that when such petitioner shall be married to the
natural father or mother of such child then such joinder
by such father or mother shall be deemed unnecessary.”

In sec. 370.01 (6), Stats., it is provided that the word “in-
habitant” shall be construed to mean “resident.”

A member of the military forces of the United States
does not gain residence in a state merely by being sta-
tioned therein in the course of his military service. The hus-
band in this case is not an inhabitant of Wisconsin and could
not file a petition for adoption individually. The wife is an
inhabitant of Wisconsin, however, and would have a right
under the above quoted section to file a petition for adop-
tion. The statute provides that where a petitioner is mar-
rried the husband or wife shall join in the petition, but does
not expressly require that such husband or wife shall also
be an inhabitant. The mother in this case, being the natural
parent of the child, would not need to petition for adoption
or join in her husband’s petition in order to constitute the
child her heir. The purpose and effect of adoption of a child
by a married couple under the Wisconsin statutes, however,
is to make the child the heir of both the father and mother.
If the statutes would permit the adoption of a stranger by
this couple upon petition of the wife in which the husband
joined, we do not believe that the legislature intended to pre-
clude an adoption under the same circumstances merely be-
cause the wife is the natural parent of the child. Normally,
it would be simpler for the husband alone to petition for the
adoption where the wife is the natural parent. The circum-
stances which render that procedure impossible in the in-
stant case are unusual. It is probably for that reason that
we have been unable to find any reported case in which a
court has passed upon the validity of such as is here pro-
posed. We are, however, of the opinion that a valid order of
adoption could be entered in this case upon the petition of
the wife, who is an inhabitant of this state, if her husband
joins therein.

Since the question has not been submitted, so far as we
know, to a Wisconsin court, we cannot state with absolute
finality that such an adoption would be immune from attack.
The parties might desire, if an opportunity presents itself
in the future, to set at rest any doubt in their own minds, by the father's carrying out adoption proceedings in the state of his own residence.

This suggestion is not to be taken as an indication that we doubt the validity of an order of adoption entered under the circumstances described.

BL

Public Health — Maternal and Child Health — In providing plan for use of federal aid funds for maternal and infant care for wives and infants of servicemen, state board of health has power and duty to establish, by regulations, standards of quality of such care relating to protection of life and furtherance of maternal health, under sec. 140.05, subsecs. (1) and (3), and sec. 146.18, Stats. Such regulations are prima facie valid until set aside by court action or altered or revoked by board. Limiting participation to persons licensed to practice medicine is proper, since neither midwives nor osteopaths are authorized by law to render complete obstetrical services such as are contemplated by plan.

October 20, 1943.

DR. CARL N. NEUPERT,
State Health Officer.

You state that federal aid funds have become available to the state board of health for emergency maternal and infant care of wives and infants of men in the armed forces (hereinafter called the EMIC program). The program is designed to provide complete obstetrical services including prenatal and post partum care of both mother and child. Under sec. 146.18, Stats., the board of health "shall prepare and submit to the proper federal authorities a state plan for maternal and child health services" which "shall conform with all requirements governing federal aid for this purpose and shall be designed to secure for this state the maximum
amount of federal aid * * *" You state further that the board conceives that it has the power to establish regulations and standards relating to the quality of the care available under these plans, so long as such regulations bear a direct relation to the protection of life and the furtherance of maternal health. You inquire whether the board has such power. You have informed us that your plan provides that only persons licensed to practice medicine may participate in the EMIC program.

Sec. 140.05, subsecs. (1) and (3), provides in part as follows:

"(1) The state board of health shall have general supervision throughout the state of the health and life of citizens, and shall study especially the vital statistics of the state and endeavor to put the same to profitable use. * * * The board may establish bureaus and shall possess all powers necessary to fulfill the duties prescribed in the statutes * * *"

"(3) The board shall have power to make and enforce such rules, regulations and orders governing the duties of all health officers and health boards, and as to any subject matter under its supervision, as shall be necessary to efficient administration and to protect health, and violation shall be punished by fine of not less than ten nor more than one hundred dollars for each offense, unless penalty be specially provided. The rules and regulations shall bear the seal of the board, be attested by the state health officer, and be published in the official state paper and distributed in pamphlet or leaf form to all health officers and any citizen asking for the same. They shall not be effective until thirty days after publication. All rules and regulations so adopted and published and all orders issued by the board in conformity with law shall be valid and in force, and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose or until altered or revoked by the board."

It is clear from a reading of the above quoted statutes that the board has not only the power but the duty to provide adequate standards of care in connection with the EMIC program and that any orders made by it in this connection are prima facie reasonable and lawful until found to be otherwise in a court action or until altered or revoked by
the board. Certainly in view of the last sentence of sec. 140.05 (3), this office cannot say that the plan adopted and approved by the board is unlawful.

The feature of the plan which restricts participation to persons licensed to practice medicine is not objectionable. This office has ruled that the practice of obstetrics is a branch of the practice of medicine not open to osteopaths. V Op. Atty. Gen. 470. Under ch. 150, Stats., provision is made for registration of midwives but their powers are limited to assisting at the delivery of the baby and they are not authorized to use instruments, assist delivery by artificial, forcible or mechanical means, perform versions, remove adherent placentas, administer or prescribe drugs, herbs or medicines other than disinfectants and ergot (sec. 150.04 (3), Stats.) or to give prenatal care. XXVI Op. Atty. Gen. 236. Osteopaths are expressly exempted from the requirement of a midwife's certificate under sec. 150.01 (2), but this merely permits osteopaths to practice midwifery (i.e., assist at the birth) without a midwife's certificate and does not authorize them to render any services in connection with prenatal care or birth which require the use of drugs and medicines. Cf. Sachs v. Board of Registration in Medicine, (1938) 300 Mass. 426, 15 N. E. 2d 473, 475.

In view of the very limited nature of the services which midwives and osteopaths are authorized by law to perform in connection with childbirth, as outlined above, it is our opinion that the board's ruling limiting participation in the EMIC program to persons licensed to practice medicine is proper.

WAP
Constitutional Law — Elections — Chapter 173, Laws 1943, extending term of incumbent local officials from one to two years by abolishing provision for 1944 elections is probably in violation of art. XIII, sec. 9, Wisconsin constitution.

October 21, 1943.

DONALD W. GLEASON,
District Attorney,
Green Bay, Wisconsin.

Chapter 173, laws 1943, made important changes in the statutes relating to the terms of certain town and village officials. The changes do not affect village officials in Milwaukee county. So far as they affect other portions of the state, they may be summarized as follows:

Elective town officials other than justices of the peace
Sec. 60.19, Wis. Stats., formerly provided for election at the annual town meeting of three supervisors, a town clerk, a treasurer, an assessor and constables. This statute has now been amended to provide that such officials shall be elected in the odd numbered years. Secs. 5.27, 10.52 and 60.22 have been correspondingly changed to lengthen the terms of such officials from one to two years and to provide for the holding of the town election at such times as one may be required by sec. 60.19 as amended.

Elective village officers other than trustees
Sec. 61.19, which formerly provided for an annual election of a president, clerk, treasurer, assessor, supervisor, constable and justice of the peace, has been amended to provide for the election of such officials in the odd numbered years only. Secs. 5.27 and 61.23 have been changed to provide for two-year terms of such officers and for an election in accordance with the amendment of sec. 61.19.

It may be noted that village justices of the peace are in a somewhat different category from the other village officers referred to in sec. 61.19 since, while they have heretofore been elected annually along with other village officers under the provisions of that section, their terms, unlike the other
officers enumerated, have run for two years instead of one. This, of course, has always necessitated the election of more than one justice of the peace.

Chapter 173 became effective May 22, 1943. The 1943 village and town elections had been held at that time and officials affected by the law had been duly elected. With the exception of justices of the peace all such officials had been elected for one-year terms. The statutes as now amended provide for the election of village and town officials in the odd numbered years only. There can be no election for town and village officers affected by chapter 173 until the spring of 1945. You have raised the question, therefore, as to whether officials elected for one-year terms at the spring election of 1943 are to continue to serve until 1945.

We think such officers must necessarily serve until 1945 if chapter 173 is valid. In each case they were elected for one year and until their successors were elected and qualified. Secs. 60.22, 61.23, Wis. Stats. There will be no provision in the statutes for holding an election to fill such offices in the spring of 1944, and in the absence of some such provision those elected at the 1943 election must necessarily continue to hold.

However, we are by no means sure that chapter 173 is constitutional. Article XIII, sec. 9 of the Wisconsin constitution has been construed by the supreme court to prohibit the legislature from itself appointing officials to local offices which existed at the time the constitution was adopted. The court has also held that the extension of the term of an incumbent local official is equivalent to a legislative appointment and is accordingly in violation of article XIII, sec. 9. O'Connor v. City of Fond du Lac, 109 Wis. 253.

As to whether the extension of terms which will necessarily result from the abolition of the 1944 election would constitute an unlawful extension may be a debatable question. There are cases holding both ways. See note: 97 A.L.R. 1448. Some authorities hold that where the extension is indirect and where it is incidental to another general purpose it is not unlawful, while other cases take a contrary view. In O'Connor v. City of Fond du Lac, supra, our court said, in holding the act there involved, invalid (p. 269):
"It follows that it is the duty of the court to declare the act in question, so far as the effect thereof would otherwise be to extend the term of office of any officer mentioned in it, either expressly or by taking from cities the power to elect and install his successor, an excess of legislative authority and void."

We are inclined to think, in view of the quoted language, that the court would hold chapter 173 invalid. Putting the matter most favorably for the constitutionality of the law it should be said that it is in grave doubt.

It should be pointed out here that we have not made an extensive investigation to determine whether all the offices in question existed at the time the constitution was adopted. Enough of them existed to invalidate the entire law in the event the court were to hold that the legislature could not extend the terms of incumbents of those offices.

It is our suggestion in view of the doubtful validity of chapter 173 that the matter be called to the attention of the legislature when it convenes in January. The constitutional difficulty could be easily removed without in any way interfering with the object of the statute, by amending it to provide that it become effective on January 1, 1945. Such an amendment would permit an election to be held during the spring of 1944 and officials elected at that time would serve until 1945. Any question as to lengthening of terms of incumbents could thus be avoided.

You have pointed out in your request that the election of village trustees does not appear to be affected by chapter 173. We agree with your conclusion. It will continue to be necessary to elect such trustees annually. Sec. 61.20, Wis. Stats.

We might also point out that some attention might be given to the situation with respect to village justices of the peace. As the law has heretofore existed there have been two justices of the peace in each village. Each has been elected annually to serve for a period of two years. Secs. 61.19, 61.30, Wis. Stats. As amended by chapter 173, sec. 61.19 now provides for the election of justices of the peace in odd numbered years. The effect of chapter 173 will be to reduce the number of justices in villages, since there will be no further provision for election in even numbered years.
The legislature has constitutional authority to so reduce the number of justices. *State ex rel. McLogan v. Burke*, 161 Wis. 429. However, there might be some argument as to whether the legislature ought not to make some provision for the termination of the terms of justices elected in 1942 for two-year terms. The terms of such justices will expire in 1944. There will be no provision for reelection, but under the constitution and the statutes such justices hold until their successors are elected and qualified. It would appear to be desirable, in order to avoid any question as to termination of the offices of such justices, to expressly provide that the offices of the justices elected in even numbered years are to be abolished upon the expiration of existing terms.

JWR

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*Public Officers — Board of Supervisors — Sec. 59.15, subsec. (1), par. (ef), Wis. Stats., created by ch. 94, Laws 1943, is inapplicable to county boards of supervisors.*

November 2, 1943.

J. LESTER JOHNSON,

*District Attorney,*

Racine, Wisconsin.

The members of the Racine county board of supervisors are at the present time compensated at the rate of $5.00 per day, the rate having been set in accordance with sec. 59.03, subsec. (2), par. (f), Wis. Stats. On August 4 the board adopted a resolution by a vote in excess of two-thirds of the members elected changing the compensation of each member to $500.00 per year with the chairman to receive an additional $200.00 per year. It was provided that the increase should become effective January 1, 1944. You inquire as to whether the board has acted within its authority.

County boards of supervisors are provided for by sec. 59.03, Wis. Stats. The provision is a complete one extending from the make-up of the boards to their compensation.
In substance it is there provided as to compensation that members shall receive a per diem of $4.00 which may be increased to $5.00 at an annual meeting, with the increase to be limited to members of the board elected at the next ensuing election. It is also provided that as an alternative method of compensation a county board in counties having a population in excess of 25,000 may at its annual meeting by a two-thirds vote of members elected “fix the compensation of the members of such board to be elected at the next ensuing election at an annual salary not to exceed five hundred dollars”. At one time the section provided only for a per diem, but the alternative method of compensation by salary was inserted by ch. 407, Laws 1935.

If the provisions of sec. 59.03 are exclusively applicable, then the county board has exceeded its authority in that it has made the salary effective as to present members of the board rather than limiting the effect to those elected at the next ensuing election. The basis for the board’s action appears to be ch. 94, Laws 1943, which creates sec. 59.15 (1) (ef) which reads:

“Notwithstanding any other provision of the law to the contrary, the county board may increase the salary of any elective county officer for or during his term of office. Any action taken by a county board since November 1, 1942, increasing the salary of any elective county officer, and all appropriations therefor shall be ratified and validated, as if such action and appropriation had been authorized by law. This paragraph is emergency legislation and shall expire January 1, 1945.”

It is apparently the thought that supervisors are elective county officers within the meaning of the quoted language and that their salaries may accordingly be increased during their terms of office.

It is our view that the members of the county board of supervisors of your county are not county officers, and we have so advised the district attorney of Kenosha county in an opinion which we have rendered to him on this date. We are enclosing a copy of the opinion. We call particular attention to an opinion in Op. Atty Gen. for 1912, 781, which so holds. However, there is an additional reason why sec. 59.15 (1) (ef) is inapplicable.
The subsection in question is a part of sec. 59.15, Wis. Stats. Sec. 59.15 has for some years applied to county officials elected by the voters of the several counties and to officers and employees elected or appointed by the county board or by proper county authorities. So far as it applies to elective county officials, it provides:

"(1) The county board at its annual meeting shall fix the annual salary for each county officer, except as provided in section 253.15, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:"

It may be noted that this provision is inconsistent with the provision of sec. 59.03, relating to the per diem compensation of supervisors. Even the salary provisions in sec. 59.03 are inconsistent with sec. 59.15 in that a specific vote is required to place supervisors on a salary basis, and the amount of the salary that may be paid is fixed. There is no restriction as to amount contained in sec. 59.15 and no suggestion of any required vote in excess of a majority vote to fix a salary.

It seems very clear to us that prior to amendment of sec. 59.15 by ch. 94, Laws 1943, the compensation of county boards of supervisors was not included in sec. 59.15. The two sections were mutually exclusive. The amendment made by ch. 94 did not broaden the scope of sec. 59.15. It simply provided that the compensation of officers included within that section could be changed during their terms of office notwithstanding other provisions of the section which prohibit such increased compensation.

Aside from the other considerations to which we have referred, it is also clear that sec. 59.15 (1) (ef) is inapplicable by reason of the fact that a change from a per diem to a salary as proposed by the board is not an increase in salary. The subsection refers only to increases in salary. The action of the board substitutes a salary for a per diem and the only authority to do so is contained in sec. 59.03, Stats. JWR
Military Service — Public Officers — Board of Supervisors — Vacancies — Member of board of supervisors in counties other than Milwaukee county, elected from city, is city officer within meaning of sec. 17.035, Wis. Stats.

Vacancy created by entry of such supervisor into armed forces is to be filled as vacancy in elective city office under provisions of chapter 17, Stats.

Supervisor upon his return is entitled to reinstatement for unexpired portion of his term under provisions of sec. 21.70, Stats., although he has not applied for leave of absence. Sec. 17.035 (2).

November 2, 1943.

K. T. SAVAGE,

District Attorney,

Kenosha, Wisconsin.

Ch. 242, Laws 1943, creates sec. 17.035 of the statutes, which reads in part:

“(1) If an elected or appointed official or employe of any city or village or school district however organized shall enter the armed forces of the United States and shall remove himself temporarily from the municipality or district for which he is an officer or employe such temporary removal shall constitute a temporary vacancy in such office or position.”

Other changes are made in the statutes, but for the purpose of this opinion it will not be necessary to go into them in detail.

You have inquired whether a member of the Kenosha county board of supervisors elected from the city of Kenosha is a city officer within the meaning of the section above set out, and if he is, what his status is under the law following his entry into the armed forces.

It is our opinion that a supervisor from the city of Kenosha is an officer of the city of Kenosha within the meaning of the section in question. As you point out, such supervisors are denominated as city officers by the provisions of sec. 62.09. While, as you suggest, sec. 17.21, relating to
county officers, refers to filling vacancies in the office of supervisor in counties over 250,000 population, that section does not apply except in the case of Milwaukee county, where the supervisors are elected by assembly districts. See sec. 59.08 (1), Stats. In the case of all other counties in the state supervisors consist of the chairmen of the town boards and supervisors elected from cities and villages. The provisions of chapter 17 relating to removals and the filling of vacancies in city offices apply to supervisors elected from cities. There is no special provision; the provisions relating to county officers do not in terms apply; and since by reason of sec. 62.09 the city supervisor is an elective city official, the provisions of ch. 17 relating to elective city officials necessarily apply.

The view here expressed is one that has been held in this office for many years. Op. Atty. Gen. for 1912, 781.

The supervisor concerning whom you have inquired did not obtain a leave of absence under the provisions of sec. 66.52 as amended by ch. 242, Laws 1943. He could have applied for such a leave under the provisions of sec. 17.035 (2), Stats. It is provided, however, by the last named subsection that "Whether he applies for a leave of absence or not he shall be entitled to all the benefits of section 21.70." Sec. 21.70 as applied to the facts requires that if the supervisor returns prior to the termination of his term of office, he is entitled to reinstatement upon compliance with the provisions of that section. During his absence the temporary vacancy provided for by sec. 17.035 (1) is by the provisions of sec. 17.035 (3) to be filled in the same way as are other vacancies in the office of supervisor. As we have pointed out, the provisions of ch. 17 relating to filling of vacancies in elective city offices apply to the filling of such a vacancy.

JWR
Public Officers — District Attorney — Under sec. 59.15, subsec. (1), par. (c), Stats., district attorney may be reimbursed for travel in performance of his official duties but this does not include travel from his home or private office in one city to county seat located in different city, where county board contributes to payment of rent on office for district attorney.

Melvin F. Bonn,  
District Attorney,  
Lancaster, Wisconsin.

You state that the district attorney of Grant county is employed on a part-time basis. The county seat is at Lancaster but as district attorney you have been maintaining an office at Bloomington, which is sixteen miles from the county seat, and also an office at the county seat, principally for the work of district attorney, and that the rent of the office at the county seat is paid in part by the county and in part by yourself. Definite office hours are kept on four days a week at Lancaster and on other days at Bloomington. Additional trips are made to the county seat from time to time as duties of the office require.

In view of the foregoing you have asked whether a district attorney whose home and office are in a city or village other than the county seat may charge mileage to and from the county seat.

Sec. 59.14, subsec. (1), Stats., relating to the location of county offices, provides:

"Every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices provided by the county or by special provision of law; or if there be none such, then at such place as the county board directs. The county board may also require any elective or appointive county official to keep his office at the county seat in an office to be provided by the county. * * *"

It is to be noted that the above statute makes no specific provision as to the location of the district attorney's office,
and we are not advised whether your county board has taken any action requiring the office of the district attorney to be kept at the county seat. The fact that it has appropriated money to pay part of the rent for the district attorney’s office at the county seat indicates that so far as the county board is concerned, the official office of the district attorney is at the county seat.

Sec. 59.15 (1) (c) makes provision for reimbursement to the district attorney of the amount of his expenses “actually and necessarily incurred * * * in traveling within and without his county in the performance of his official duties”.


However, the same principle is involved in a number of opinions relating to state officers and employees who are allowed expenses necessarily incurred in the performance of duties required by the public service under sec. 14.32. It has been ruled that state officers may not charge to the state street car fare in going from their homes to their office. 1908 Op. Atty. Gen. 82, 84. In I Op. Atty. Gen. 440 it was stated at page 441:

"* * * The statutes which provide for the payment of actual and necessary expenses while absent from the office in the transaction of the business of the State apply only to those officers who are on duty away from their home office. * * *"

In I Op. Atty. Gen. 508 it was ruled that expenditure for car fare and meals of a public officer not made because of traveling on official business, but necessary only because of the distance between the officer’s home and office, could not be allowed as traveling expenses. See also VII Op. Atty. Gen. 666, VIII Op. Atty. Gen. 302, 304, 423, 466 and XVII Op. Atty. Gen. 381, all to the effect that traveling expenses are not allowable to state officers and employees for travel between home and office regardless of duties and regardless of whether or not the home and office are in the same city or in different cities.
One who accepts a public office does so *cum onere* and is considered as accepting its burdens and obligations with its benefits. 43 Am. Jur., sec. 264. One of the burdens of the officer is that of presenting himself at such office. This may involve much or little travel, depending upon the location of his residence or other place of business in the case of a part-time official, but we are unable to find that such travel has ever been considered as constituting any part of “the performance of official duties” so as to come within mileage allowance provisions of sec. 59.15 (1) (c) or similar statutes.

It is of no proper concern to the public treasury that one officer resides at a greater distance from his office than does some other officer. Presumably if the burden is too great he can either refuse to accept the office or take up a residence nearer to it.

We also call attention to ch. 342, Laws 1943, creating sec. 59.15 (1) (g) of the statutes relating to reimbursement to county officers and employees for traveling expenses. This section provides for

“Reimbursement to county officers and employees for traveling expenses including food and lodging disbursed in the course of discharging the duties and functions of the particular position or office; and the county board may at the annual meeting establish a standard allowance for such traveling expenses and the general purposes for which such reimbursement may be allowed.”

It may be doubted, however, that this provision would authorize the county board to provide for reimbursement for expenses in traveling not connected with the performance of official duties. Its purpose rather is to enable the establishment of uniform standards of allowance and to permit the county board to make provisions relating to details or items which under the general statute may be uncertain or debatable. This, however, falls far short of either an express or implied withdrawal of the requirement in sec. 59.15 (1) (c) that the expense to be reimbursed must have been for travel in the performance of official duties.

You are therefore advised that a district attorney whose home and private office are located in a city other than the
county seat is not entitled to be reimbursed for travel expense to and from the county seat.

WHR

Statistics — Vital Statistics — Birth Certificates — Provisions of sec. 69.22, Stats., as to minimum proof required for filing of delayed birth certificates are mandatory and registers of deeds may not file or issue such certificates unless such proof is supplied. Violation of law may subject register of deeds to penalties prescribed by sec. 69.55 and to removal from office under sec. 17.09 (5).

Where delayed birth certificate received from register of deeds shows on its face that less than statutory minimum proof was submitted, statutes contemplate that state registrar file it for what it is worth and require register of deeds to obtain further proof and send abstract of same to state registrar. Secs. 69.06 (2), 69.25 and 69.27, Stats.

November 4, 1943.

CARL N. NEUPERT, M. D.,

Board of Health.

You have requested an opinion with reference to the delayed birth certificate law as amended by ch. 503, Laws 1943.

Under sec. 69.03 the state board of health has power to make rules and regulations necessary to carry out the provisions of ch. 69, relating to vital statistics. Sec. 69.05 requires the state registrar to prepare forms of birth certificates and other necessary forms.

Sec. 69.06, subsecs. (1) and (2), provide as follows:

“(1) The state registrar shall prepare and issue detailed instructions required to secure the uniform observance and the maintenance of a perfect system of registration, and no blanks shall be used other than those supplied by him.
“(2) He shall carefully examine the certificates received from the local registrars and registers of deeds and if any such are incomplete or unsatisfactory he shall require such further information as may be necessary to make the record complete.”

Sec. 69.02 (2) (b) requires the division of public health statistics of the state board of health to “instruct registers of deeds and local registrars in their duties under this chapter [vital statistics law] and supervise them in their work.”

Sec. 69.22 provides for delayed registration of births and issuance of delayed birth certificates by either the state registrar or the register of deeds of any county. That section provides in part as follows:

“(1) Such proof [on which delayed birth certificates may be issued] shall consist of the following:
“(a) Hospital or doctor’s record of such birth accompanied by the affidavit of such doctor or custodian of doctor’s or hospital records, stating that the facts as set forth in such certificate are true; or
“(b) The affidavit of parent or parents accompanied by at least one document made within 5 years of the date of birth of the applicant or 2 documents made more than 5 years prior to the date of application, each of which documents shall contain the birthdate, birthplace, and one of such proofs showing parentage of such applicant, or
“(c) Three pieces of documentary evidence made more than 5 years prior to the date of application, each setting forth the birthdate and birthplace, and one of such proofs showing parentage of such applicant. An affidavit shall be accepted only as one of the above required proofs.
“(2) The register of deeds, upon completion of such delayed registration of birth, shall after making a copy thereof transmit the original registration to the state registrar.”

Based on the foregoing statutes, you ask the following questions:

“1. Is the register of deeds authorized under 69.22 to file and issue delayed birth records which do not fully meet the requirements as far as required documentary proof is concerned?
“2. After the register of deeds has filed and issued such a record in his office, is the state registrar authorized to accept such a record for filing?”
1. The requirements of sec. 69.22, above quoted, as to the minimum proofs required for the issuance of a delayed birth certificate are mandatory. Therefore, the answer to question No. 1 must be "No" because the powers of the registers of deeds are limited by the statute. In the absence of sec. 69.22 they would have no authority to file and issue delayed birth certificates and it is clear that under the statute they cannot file and issue them unless the proofs submitted meet the statutory requirements.

A birth certificate is a matter of great importance not only to the individual whose birth it records but also to other persons whose legal rights may depend on it and to the public at large. It is presumptive evidence of the birth so recorded. Sec. 328.09 (1), Stats. Hence it is not to be lightly issued without sufficient proof as required by law.

Moreover, a register of deeds who issues a certificate contrary to law may be subject to the criminal penalties provided by sec. 69.55 and, if he persists in so doing, may be removed from office by the governor under sec. 17.09 (5).

2. Under sec. 69.05 mentioned above, the state registrar has prescribed a form for delayed birth registrations containing space for abstracting the proof on which it is based, so that the certificate may show on its face whether or not such proof complies with the law. This is necessary (1) because employers and federal governmental agencies making use of such certificates are unwilling to accept them unless shown to be founded upon adequate proof and (2) for the further reason that the state registrar, who is responsible for the integrity of the vital statistics system of this state, would be unable to judge whether the delayed certificate complied with the law unless it contained an abstract of the proof on which it was based.

Under sec. 69.06 (2), above quoted, the state registrar is required to examine certificates received from local registrars and require further information, in case any of them are incomplete or unsatisfactory. This section does not state that the certificate shall not be filed for what it is worth, even if incomplete or unsatisfactory, and secs. 69.25 and 69.27 seem to imply that the certificate shall be filed notwithstanding the fact that it is defective, subject to later correction or completion. However, the state registrar has
a duty to attempt to obtain further information and for that purpose may require the register of deeds to obtain further proof and send an abstract of the same.

WAP


November 9, 1943.

A. W. BAYLEY,

Acting Director,

Department of Public Welfare.

You request an opinion with reference to two cases at the state prison, both convictions under sec. 343.18, Stats., which prohibits the operation of an automobile without the owner's consent and provides the following punishment:

"* * * imprisonment in the state prison not more than five years, or by imprisonment in the county jail or workhouse not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in the discretion of the court."

It will be noted that the foregoing statute fixes no minimum sentence. In the two cases to which you have reference, the court imposed sentences of not less than two nor more than three years and not less than five nor more than five years imprisonment, respectively. Your inquiry relates to parole eligibility under sec. 57.06, Stats., as amended by ch. 313, Laws 1943.

Under that statute if the minimum term fixed by the court is considered binding, the prisoner sentenced to 2 to 3 years
must serve one-half the maximum, or one and one-half years, before being eligible for parole while the prisoner sentenced to not less than five nor more than five years must serve two years before he may be paroled. On the other hand, if the minimum sentence fixed by the court is erroneous, a different parole eligibility date will result.

Sec. 359.05 provides that in cases coming within the indeterminate sentence law 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. If, through mistake or otherwise, any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section."

Sec. 359.07 provides in part as follows:

"* * * In all other cases [i.e., in cases coming within the indeterminate sentence law] the sentence shall be for a term not less than one year and shall be for a general or indeterminate term of not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. In imposing the maximum term, the court may fix a term less than the maximum prescribed by law for the offense. * * *

The offense of operating an automobile without the owner's consent is one of a number of crimes for which the statutes prescribe no minimum term. Such cases have caused difficulties in the past in attempting to apply to them the law relating to indeterminate sentences.

The trial courts at one time had authority to fix a minimum term in excess of that established by statute for the
offense (ch. 527, Laws 1927; Voss v. State, (1931) 204 Wis. 432), but since the enactment of ch. 181, Laws 1931, they must impose the minimum provided by law. This office has given inconsistent rulings in the past with reference to the application of this law to cases where the statute defining the offense prescribes no minimum. In XXI Op. Atty. Gen. 322 (1932) it was stated that in such cases the court might fix the minimum and that a minimum of five years fixed by the court was proper. On the other hand in XXV Op. Atty. Gen. 717 this office ruled that in such a case where the court fixed no minimum, the minimum prescribed by law must be taken to mean a minimum of one year as fixed by sec. 359.07, above quoted. These two opinions are directly in conflict—both cannot be right. It seems that the second opinion is correct for the following reasons:

(1) Under the law as it now stands the court has no authority in any case to fix any other minimum than that prescribed by law. Under sec. 343.18 the minimum imprisonment is nothing so that looking only to sec. 359.05 it would appear that the court would have to impose a sentence of not less than nothing and not more than five years or some other maximum fixed by the court. But this would be an absurdity, since the prisoner would be eligible for parole before reaching the prison, contrary to the parole law, sec. 57.06 (1) (a).

(2) Sec. 359.07 provides that indeterminate sentences to the state prison shall be for a term not less than one year. This provision was first inserted in the statute by ch. 359, Laws 1925, which created the indeterminate sentence law. The apparent reason for this language is to supply the lack of a statutory minimum term in certain sections of our criminal law, including sec. 343.18.

(3) To say that the court may fix a minimum sentence where none is provided by the particular section under which the prosecution has been had, as was said in XXI Op. Atty. Gen. 322, is to overlook the plain language of sec. 359.05 to the effect that the minimum term shall be that fixed by law—not that fixed by the court.

(4) Criminal statutes must be construed strictly in favor of the prisoner, in case of ambiguity.
Accordingly you are advised that the minimum term in each of the two cases submitted by you must be deemed to be the period of one year, notwithstanding the erroneous attempt by the court to fix a higher minimum. In all such cases the prisoner will be eligible for parole after serving either one year or one-half the maximum sentence imposed by the court, whichever is the lowest, under sec. 57.06 (1) (a).

WAP

Statistics — Vital Statistics — Birth Certificates — Trade Regulation — Notaries — Provisions of subsecs. (4) and (5) of sec. 137.01, Stats., are not applicable to form prepared and furnished under sec. 69.06 (1) by state registrar of vital statistics for delayed registration of births under sec. 69.22. Such form does not require that date of expiration of notary’s commission be included in jurat.

November 9, 1943.

Board of Health,
Bureau of Vital Statistics.

Form 120 as prepared and furnished by you pursuant to sec. 69.05 Stats. (as renumbered and amended by ch. 503, sec. 8, Laws 1943) for delayed registrations of births under sec. 69.22 Stats. (created by ch. 503, sec. 26, Laws 1943) in the upper portion, after providing designated blank spaces for the insertion of requisite birth data, concludes with a place for the signature of the applicant immediately followed by:

“Subscribed and sworn to before me on 19. by the above signed, who personally appeared before and satisfactorily identified himself to me .

Title

Notary Public, Justice of the Peace, etc.”
Because in the past federal authorities and employers in war industries have returned some delayed birth certificates to you because they lacked the expiration date of the notary’s commission, you have returned to the register of deeds, as defective, the original certificates which do not have the date of expiration of the notary’s commission. Our attention is directed to the provisions of subsecs. (4) and (5) of sec. 137.01 Wis. Stats., and an opinion is requested as to whether the absence in the certificate of the date of expiration of the notary’s commission will result in such delayed birth certificates not being presumptive evidence of the facts therein stated.

Sec. 137.01, Stats., so far as here material, provides:

“(1) * * *
“(2) * * *
“(3) * * *
“(4) All certificates of acknowledgments of deeds and other conveyances, or any written instrument required or authorized by law to be acknowledged before any notary public, within the state of Wisconsin, shall be attested by a clear impression of the official seal of said officer, and in addition thereto shall be written or stamped the day, month, and year, when the commission of said notary public will expire.
“(5) The official certificate of any notary public, when attested and completed in the manner provided by subsection (4) of this section, shall be presumptive evidence in all cases, and in all courts of the state of Wisconsin, of the facts therein stated, in cases where by law a notary public is authorized to certify such facts.
“(6) * * *
“(7) * * *
“(8) * * *
“(9) * * *”

It is very clear that said statutory provisions are applicable only to an acknowledgment which is a certificate by a notary, or other properly authorized officer, at the end of an instrument stating that the person who signed the instrument appeared before such notary or other proper officer and acknowledged to such notary or officer that he signed said instrument. Sec. 235.22 sets forth the form thereof. No oath is involved in an acknowledgment, as it is merely a
certification by the notary that the facts recited therein are true. The language of your form 120 as quoted above is not an acknowledgment and therefore the provisions of sec. 137.01 above quoted are not applicable thereto.

The quoted language of this form is, however, a jurat, which is that part of an affidavit wherein the notary, or other properly authorized officer, certifies that the same was sworn to before him. In contrast to an acknowledgment an oath is involved. A jurat is a certificate that the person signing the document did so in the presence of a notary, or other officer, as the case may be, and that he did so under oath administered by the notary, or other officer, that the recitals therein are the truth.

The only statutes that we find applicable to a jurat are secs. 235.46, specifying that affidavits attested by two witnesses, stating facts as to certain matters may be recorded in the office of the register of deeds, which, however, does not specify that the date of the expiration of the notary's commission be included in the jurat to such affidavit, and 326.01, covering the execution of oaths and affidavits both within and without the state, which likewise contains no provision requiring the inclusion in a jurat of the date of expiration of the commission.

It is therefore our opinion that the jurat in the upper portion of your form 120 does not require the inclusion of the expiration date of a notary's commission in order to be valid. However, sec. 69.05, Stats., gives you the authority and makes it your duty to prepare and furnish printed forms for delayed registration of births. If you so desire the form could include a space for the insertion of the date of expiration of the notary's commission and you could then require that the same be filled out as a prerequisite to acceptance of the same for filing. Whether or not you do include such a provision in the form is purely an administrative matter for you to determine.

HHP
Indigent, Insane, etc. — Military Service — Sec. 45.20, Stats., does not apply to wives or minor children of persons now serving in United States armed forces nor to widows or minor children of servicemen who die in service.

November 9, 1943.

Elmer R. Honkamp,
District Attorney,
Appleton, Wisconsin.

You have requested an opinion with reference to the construction of sec. 45.20, Stats., which provides as follows:

"Temporary aid shall be given, granted, furnished and provided, according to the provisions of chapter 49, to and for any honorably discharged indigent soldier, sailor, or marine of any war of the United States and the indigent wife, widow or minor child of any such, without requiring the removal of any such person to any county home, but such temporary aid shall not continue longer than three months at any one time or in any one year unless the authorities charged with the relief of the poor shall determine otherwise."

Your question is whether this section applies to indigent wives, widows and minor children of soldiers, sailors and marines still in the service or whether it is limited to wives, widows and children of honorably discharged indigent or deceased soldiers, sailors and marines.

The answer to your question depends on the interpretation of the word "such" as used in the statute. A study of the legislative history of the statute shows that it was first enacted by ch. 518, Laws 1887 as a proviso to sec. 1524, R. S. 1878, in the following language:

"Provided, that temporary aid and assistance shall be given, granted, furnished and provided to and for all honorably discharged, indigent union soldiers, sailors and marines, and the indigent wives, widows and minor children of indigent or deceased honorably discharged union soldiers, sailors or marines, without requiring the removal of any such indigent person or persons to any poor or almshouse," etc.
This statute remained in substantially the same language until ch. 42, Laws 1919, which was entitled "An Act to amend section 1524 of the statutes, relating to temporary aid for honorably discharged indigent soldiers, sailors and marines." The principal purpose of that act was to bring within the terms of the law the honorably discharged soldiers, sailors and marines of the Spanish and World Wars, and their dependents. The present language was first incorporated in Amendment 1,S to that bill, introduced by the finance committee, apparently with the intention of shortening the somewhat verbose and awkward phraseology employed in the original bill, No. 22,S. (1919). Hence, it amounts to a revision bill so far as the language here in question is concerned.

It is apparent from the legislative history as above outlined that the word "such" as used in the present statute means and refers to "any honorably discharged indigent (or deceased) soldier, sailor or marine of any war of the United States." It is therefore clear that it does not apply to the dependents of men now serving in those forces.

WAP
Bridges and Highways — Flood Control — Constitutional Law — State may properly provide for emergency relief to inhabitants of village of Spring Valley as it has done under provisions of sec. 79.20, subsec. (2), Stats. 1943.

State may not, under provisions of art. VIII, sec. 10, Wis. Const., build levees, dredge channels or otherwise engage in flood control activities or restore residential properties, business establishments or public utility facilities damaged or destroyed by flood. Neither may state as incident to flood control remove buildings to new sites.

Construction of streets and roads is excepted from provisions of art. VIII, sec. 10, Wis. Const.

Member of flood disaster committee created by sec. 79.20, Stats., is not liable for expenditures made by committee in good faith although such expenditures may be unauthorized.

November 17, 1943.

SPRING VALLEY FLOOD DISASTER COMMITTEE.
Attention Adolph Kanneberg, Secretary.

The Wisconsin legislature at the present session enacted ch. 467, Laws 1943, creating secs. 20.507 and 79.20 of the statutes. Sec. 79.20 consists of four subsections. Subsec. (1) creates a flood disaster committee consisting of the governor and certain members to be designated by him. Subsec. (2) provides that the committee shall make a survey of conditions resulting from a flood in the village of Spring Valley in September, 1942, and shall “provide such emergency relief for the inhabitants affected by such flood as the committee may deem necessary in the interest of the public health and welfare, * * *.” Subsec. (3) reads:

“In addition to such emergency relief, the committee may make such expenditures from said appropriation as it may deem necessary in the interest of the public health and welfare for the restoration, reconstruction, and repair of residential properties, business establishments, streets, roads, and public utility facilities damaged or destroyed by such flood. In cooperation with the public service commission and state planning board it shall provide adequate flood control including the removal of buildings to new sites if in the judgment of the committee such action is necessary.”
Sec. 20.507 provides an appropriation of $50,000 to finance the execution of the provisions of sec. 79.20.

You desire to be advised with respect to certain possible constitutional objections to the validity of the foregoing statutes.

The provision that the committee may provide emergency relief for the inhabitants of Spring Valley is in our opinion constitutional. The appropriation is for a public purpose and for a state purpose. *Appeal of Van Dyke*, 217 Wis. 528; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563. The statute does not define the term "emergency relief", but we assume that it includes such forms of assistance as have come to be commonly known as emergency relief and which are necessitated by the flood. As to whether such relief may be found to be necessary now, over a year from the time the flood occurred, is a matter which the committee must itself determine in the light of the existing facts. The legislature must have felt that some emergency relief was required as late as July, 1943, since it enacted the legislation at that time notwithstanding that the flood had occurred in September, 1942.

We are of the opinion that subsec. (3) is in large part unconstitutional. The state cannot provide flood control through the building of levees or other such works, nor may it engage in the removal of buildings as an incident to such work. Such activities constitute works of internal improvement in which the state cannot engage. Art. VIII, sec. 10, Wisconsin constitution; *State ex rel. Jones v. Froehlich*, 115 Wis. 32. For the same reason the state could not restore, reconstruct or repair residential properties, business establishments, public utility facilities, etc. And since the state may not engage in the erection of dikes, dams, the cleaning and enlarging of channels, etc., the committee may make no expenditures related to such work or to the other works mentioned.

So far as the reconstruction and repair of streets and roads is concerned, the state could finance such activities since they are excepted from the restrictions against the state's engaging in works of internal improvement. A question may arise, in view of the fact that subsec. (3) is for the most part unconstitutional, as to whether the provision
for repairing streets and roads is severable. We are inclined to think that the provision is severable since it has no such relation to the other matters as would prevent its being given full effect. However, the matter is not free from all doubt. So far as construction of streets at a new site is concerned, however, we are of the view that the committee ought not to engage in such activity. Assuming that such construction were permissible as an incident to removing buildings to another site, the project of removal is invalid and the invalidity carries with it all such incidental activities as might be necessary to effectuate the purpose.

You have inquired as to whether members of the committee would be personally liable for expenditures made beyond the scope of the committee's authority. We have failed to find any instance in this state of liability of such an officer where he has acted in good faith. Where there is bad faith liability may exist. *Webster v. Douglas Co.*, 102 Wis. 181; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85. The members of the committee in performing their functions will not act as disbursing officials. All vouchers must be cleared through the secretary of state and the state treasurer and accounts must be audited and paid by those officials. It is probable that the state treasurer would be liable for any improper payments irrespective of good faith, but his liability is that of a disbursing officer who is required to account for all moneys in his possession not disbursed according to law. The liability of the members of the committee is quite different and we know of no rule imposing any such burden upon them.

JWR
Civil Service — Counties — County Agricultural Representatives — Provisions of sec. 59.87, subsec. (9), Stats., for appointment of agricultural representative for Milwaukee county are not applicable since county has discontinued its county school of agriculture. Any further appointments of agricultural representative should be made by board of regents of university of Wisconsin.

November 18, 1943.

O. L. O’Boyle, Corporation Counsel,
Milwaukee County,
Milwaukee 3, Wisconsin.

Sec. 59.87, Wis. Stats., provides for establishment of county agricultural representatives. It is provided in general that such representatives shall be appointed by the board of regents of the university of Wisconsin. Subsec. (9) reads:

“From and after the annual meeting of the county boards in November, 1919, the special committee on agriculture shall consist of the chairman of the county board of supervisors, the county superintendent or superintendents of schools, and three practical farmers representing the agricultural interests of the county, appointed by the county board of supervisors, one of whom shall be a member of the county board of supervisors. In those counties that have county agricultural schools, the two boards shall work in conjunction as one board, provided that in counties having a population of two hundred and fifty thousand or more, the county agricultural representatives shall be appointed pursuant to section 46.21, and the power and duties of his office shall be exercised in connection with and as a department of the county school of agriculture. * * *”

It thus appears that in Milwaukee county the representative is to be appointed pursuant to sec. 46.21 in the contingency set out.

You have inquired as to whether such a representative is to be considered as in the classified civil service of Milwaukee county.

In our view the question is academic since we do not think that Milwaukee county is entitled to appoint the representative at the present time.
The italicized portion of subsec. (9) quoted above is admittedly the language upon which reliance must be had if the appointment of the Milwaukee county representative is to be excepted from the general provisions of sec. 59.87 and which provide for appointment by the board of regents the university. Sec. 59.87 (6), Stats. Such portion was added by ch. 359, Laws 1923, as a proviso to a sentence dealing with counties having county agricultural schools. It was provided that in such of those counties which might have a population of 250,000 or more the county agricultural representative should be appointed under the provisions of sec. 46.21. It was also provided that the duties of the representative's office should be exercised in connection with the county school of agriculture. It is quite clear that the proviso is restricted to counties having a school of agriculture.

At the time ch. 359, Laws 1923, was enacted Milwaukee county had an agricultural school. The school has since been abandoned. In our opinion, when it was abandoned there was no further right in Milwaukee county to appoint representatives under the provisions of sec. 59.87 (9), Stats.

JWR
Indigent, Insane, etc. — Poor Relief — Sec. 49.505 and sec. 20.18, subsec. (9), Stats., were designated to aid counties which are financially unable to perform duties required of them by secs. 47.08, 48.33 and 49.37. Sec. 49.505 does not contemplate aid to counties which have refused or neglected to provide adequate funds for public assistance where such counties have sufficient resources within limits allowed by statutes. Sec. 65.90 does not in any way alter mandatory duty of county board to provide sufficient sums to pay for public assistance having due regard for state and federal aid.

November 19, 1943.

Department of Public Welfare.

Sec. 20.18 (9), Stats., was created by ch. 132, Laws 1943, sec. 22. It provides a fund of $150,000 (annually beginning July 1, 1943) "for allotment to counties upon certification of the state department of public welfare as provided in section 49.505 * * * They [the funds] shall be made available by the emergency board at such times and in such amounts as the board may determine to be necessary to adequately provide for the purposes for which they are appropriated, with due regard for the whole amount available for such purposes * * *"

Sec. 49.505, Stats., was created by ch. 132, Laws 1943, sec. 61. It provides:

"Any county which is financially unable to fully perform its duties under sections 47.08, 48.33, 48.331 and 49.20 to 49.38 may make application to the state department of public welfare for financial assistance to enable it to perform such duties. Before making a determination upon the application, the department shall hold hearings, investigate and obtain or receive proof as to total indebtedness, debt and tax levy limitations, cash on hand * * * borrowing ability under chapter 67 * * * and such other factors not enumerated which are probative of the applicant's financial condition. If the department is satisfied that the applicant's financial condition is such that it cannot provide money for such forms of public assistance, the department shall certify to the secretary of state for payment to the applicant out of the appropriation provided by section 20.18
(9) [supra] an amount which will, together with money that the applicant can provide, be sufficient to enable the applicant to properly perform its duties. * * *

The question involved is: Can a county by reason of failure or refusal to make an adequate appropriation for public assistance make itself eligible for and require the state department of public welfare to recommend a grant of state aid under sec. 49.505? (Sec. 61, ch. 132, Laws 1943.)

Sec. 47.08 (10) requires the county board of every county to levy a tax sufficient to pay the blind pensions provided for in that section, "taking into account the state and federal aid available for this purpose."

Sec. 48.33 (9) makes similar provision as to aid to dependent children. However, reference to the state and federal aids appears in a subsequent subsection.

Sec. 49.37 (1) places a similar duty upon the county board to provide sufficient funds to give relief to the poor, taking into account state and federal aid (as provided in sec. 47.08 (10), supra).

All three sections are clearly mandatory and place upon each county board a definite duty to provide sufficient funds to pay the grantees of public assistance. This office has consistently held that this duty is a serious one and must be performed in good faith. XXII Op. Atty. Gen. 269, XXIV Op. Atty. Gen. 280, XXIV Op. Atty. Gen. 453, XXV Op. Atty. Gen. 386.

It seems clear that the state aid to counties contemplated in sec. 49.505 is for the benefit only of a county which is financially unable to fully perform its duties under secs. 47.08, 48.33, 49.37. A county does not fall into this classification simply because it fails or refuses to make adequate provision for the public assistance requirements as demanded by the statutes. The duty imposed by these sections is general. Sec. 49.505 was intended to apply only in cases where a county had exhausted its resources. It follows that if a county has not levied a tax to the limit allowed in sec. 70.62 (2) nor, if it is able to borrow, has not borrowed money to the limit allowed in sec. 67.03 (1), it has not done all within its statutory power to meet the demands made in secs. 47.08, 48.33 and 49.37. Consequently,
it cannot claim under sec. 49.505 that it is financially unable to fully perform its duties under the public assistance sections. Throughout sec. 49.505 it is clear that the legislature intended that the whole financial standing of an applying county be investigated. Only if the state department of public welfare is satisfied "that the applicant's financial condition is such that it cannot provide money for such forms of public assistance" shall it certify to the secretary of state for payment out of the appropriation.

In your request you inquire as to the effect of sec. 65.90 (5). This section does not in any way affect the operation of sec. 49.505 nor the mandatory duty placed upon county boards under secs. 47.08 (10), 48.33 (9) and 49.37 (1). Sec. 65.90 (5) merely provides for a two-thirds vote of the governing body to alter the budget once it is approved. It does not say that a budget cannot be changed, but merely provides the method by which it can be changed.

The request for opinion contains references to borrowing money and sec. 67.12 (temporary borrowing) is cited. We note that in Rule 14, p. 1 of the state department of public welfare's bulletin which accompanied the request for opinion there appears sec. 5 which is entitled Loan or Grant. It reads:

"Financial aid * * * may be in the form either of a loan or outright grant as conditions may warrant * * *"

We can find no authority in the statutes for this treatment of the fund. Sec. 20.18 (9) speaks of "allotments" to counties in need. Sec. 49.505 speaks of "financial assistance" to the needy counties, and of "payment to the applicant out of the appropriation * * * an amount which will * * * be sufficient." We can find no language indicating that the legislature intended this fund to be used otherwise than for allotment or outright grant. Therefore we do not feel that we are called upon to decide whether sec. 67.12 (temporary borrowing) applies to the aids paid under chapters 47 and 48 as well as chapter 49 which is specifically mentioned.

EGS
JWR
Statistics — Vital Statistics — Birth Certificates — Public Officers — Register of Deeds — Under sec. 69.22, Stats. 1943, delayed birth record may be filed by register of deeds of any county, whether birth occurred there or not. Register of deeds must make and file copy and send original to state registrar for filing, who shall make and send copy thereof to register of deeds of county in which birth occurred, if not originally filed there.

Under sec. 69.24, subsec. (2), register of deeds originally filing delayed birth record is entitled to fee of $1 plus additional fee of 50 cents if he issues certified copy thereof.

Under sec. 59.57 (11b) he is entitled to filing fee of 25 cents to be paid by county, as is register of deeds of county where birth occurred upon filing copy of delayed birth certificate transmitted by state registrar.

November 19, 1943.

CARL N. NEUPERT, M. D., Health Officer,
Board of Health.

You have requested an opinion with reference to the construction of sec. 69.22, Stats. 1943, which provides in part as follows:

"(1) When no registration of any birth has been made within one year after the occurrence thereof, the state registrar or the register of deeds of any county may accept proof thereof for the purpose of filing a birth certificate, and issue certificates of births based on such proofs.

"(2) The register of deeds, upon completion of such delayed registration of birth, shall after making a copy thereof transmit the original registration to the state registrar.

"(3) The state registrar shall forward a copy of any delayed record filed with him to the register of deeds of the county in which the event occurred."

Your question is whether a delayed birth record may be filed in accordance with the foregoing section in a county other than the one in which the birth occurred. Subsec. (1) states quite plainly that the register of deeds "of any county" may accept the proof, file the birth certificate and issue what apparently means a certified copy thereof. Subsec. (2) requires him to make a copy thereof, which he is
Opinions of the Attorney General

apparently to file, and send the original to the state registrar. Subsec. (3) then requires the state registrar to forward a copy thereof to the register of deeds of the county in which the event occurred, which he presumably would not do in those cases where the event occurred in the same county in which the delayed certificate was originally filed. From the foregoing, it seems quite apparent that a person desiring to file a delayed record is not required to go to the register of deeds of the county in which he was born, but may file it in any county in the state. (Of course, this applies only to persons born in the state and would not authorize a person born in some other state or country to file a delayed registration of his birth in Wisconsin.)

A study of the origin of this law confirms the above conclusion. Reference to the files of the state legislative reference library shows that in the first draft of bill No. 505, A, 1943, the provision for delayed registrations provided in part as follows:

"69.22 Delayed registration. When no registration of any birth, stillbirth, death or marriage has been made for one year or more after the occurrence thereof, the register of deeds of the county where the event occurred, may accept for filing proof thereof, if the proof meets with the requirements of the rules and regulations made by the state registrar, and issue his certificate based thereon. * * *"

This first draft was apparently submitted to the secretary of the Wisconsin Recorders Association, who suggested certain changes therein, which were incorporated in the second draft which eventually became bill No. 505, A.

This second draft (Bill No. 505, A., sec. 26) provided in part as follows:

"69.22 Delayed Registration. (1) When no registration of any birth has been made within one year after the occurrence thereof, the register of deeds of any county may accept proof thereof for the purpose of filing a birth certificate, and issue certificates of births based on such proofs. * * *"

"(2) The register of deeds, upon completion of such delayed registration of birth, shall transmit a copy of such registration to the state registrar."
It will be noted that whereas the first draft had provided that the delayed certificate should be originally filed with the register of deeds of the county where the event occurred, the second draft changed this to read "the register of deeds of any county." This was apparently done with the express purpose of enabling a citizen who no longer resided in the county in which he was born to go to the nearest register of deeds instead of having to travel to his birth place. It will also be noted that subsec. (3) of the statute was not contained in the original bill No. 505, A., but was inserted in substitute amendment No. 1, A., which also amended subsec. (1) by including the state registrar.

So it is clear that registers of deeds are authorized to file delayed certificates for persons not born in their county. This raises another question which you have requested us to answer with reference to the fees to be charged in such cases. Sec. 69.24 (2), Stats., 1943, provides as follows:

"The state registrar or the register of deeds, as the case may be, shall collect a fee of $1 for the examination of documentary proof and the filing of a delayed record, and in addition thereto a fee of 50 cents for the issuance of a certified copy of a delayed record."

Under the above statute the register of deeds is entitled to the full fee of $1.50 if he examines the proof, files the delayed certificate and issues a certified copy, whether the birth so recorded occurred in his county or not.

Sec. 59.57 provides in part as follows:

"Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

*(1b) For registering any marriage, birth, stillbirth or death certificate, when recorded into regular bound volumes, or filed in special filing cases, securely locked, 25 cents to be paid by the county."

Since a copy of the delayed certificate is to be filed in the office of the register of deeds where it is originally issued and also in the office of the register of deeds of the county where the birth occurred, it seems clear that both registers of deeds are entitled to fees of 25 cents to be paid by their respective counties.

WAP
Indigent, Insane, etc. — Poor Relief — Old-age Assistance — Sec. 49.26, subsec. (7), Stats., contemplates payment of fee to district attorney to be deducted from county’s claim and to be paid over by district attorney to county treasury.

Provisions for necessary and essential repairs and for purchase of tax certificates are intended as protection for county’s lien. Such expenditures made by county are not reimbursable by state under provisions of sec. 49.38. Expenditure for repairs cannot be recovered by county in any event, but purchase of tax certificate is recoverable in sense that certificate constitutes prior lien and county is entitled to subrogation in amount of prior lien. It may deduct amount in distribution to state and federal governments upon liquidation of old-age assistance lien.

County pension department under sec. 49.26 (7) may make expenditures for repairs and may purchase outstanding tax certificates without obtaining authorization of any other county authority. Question as to what repairs are necessary or essential is one which must be determined by pension department in exercise of sound discretion.

December 1, 1943.

DEPARTMENT OF PUBLIC WELFARE.

You have raised certain questions with respect to the interpretation of ch. 374, Laws 1943, creating sec. 49.26 (7), Stats. The section reads:

“The county court in which the estate is probated may authorize the payment of an attorney’s fee of 10 per cent but not in excess of $50 for the collection of an old-age pension lien or other payment, or legal work in connection with the administration of any estate for the recovery of an old-age assistance lien. The court in which such an old-age assistance lien is foreclosed as provided in subsection (4) may authorize likewise the payment of such an attorney’s fee but not in excess of $50. The county pension department shall be authorized to make and pay for necessary and essential repairs or purchase outstanding tax certificates on such property as the county may have on old-age assistance lien.”
The following inquiry is submitted with respect to the provisions dealing with attorneys' fees:

“If the old-age assistance claim under sec. 49.25 or the lien under sec. 49.26 (4), Stats., exceeds the value of the estate assets, may the attorney's fee exceed $50 in any one case? Does the statute indicate the possibility of two attorneys' fees, one for the collection and one for the administrator’s attorney, thus making the maximum $100 per case? If the court allows a fee not exceeding the limitations, does the state or county pension administration have any interest in whether the fee goes to a private attorney, a full-time district attorney, or a part-time district attorney as discussed in XXX Op. Atty. Gen. 275 and XXXI Op. Atty. Gen. 57?”

The attorney's fee for which provision is made is for the collection or recovery of amounts payable to the county by virtue of the claim which it asserts on behalf of itself and the state and federal governments. The fee has no relation to the fee that may otherwise be allowed to the administrator’s or executor’s attorney in the probate of an estate. It is to be deducted from the county's claim. The statute does not expressly provide that the deduction is to be made, but it could not have been intended that the fee is to be an administration expense. The estate is not benefited by the collection of the claim against it and there is no indication that the allowance of a fee for collection is to be charged against the estate.

We are unable to determine just what is meant by that part of your inquiry relating to two attorneys' fees, “one for the collection and one for the administrator’s attorney, thus making the maximum $100 per case”. Clearly the county's recovery can be diminished by the allowance made to the district attorney for collection of its claim. Assuming that some creditor other than the county filed a petition for administration and assuming that the district attorney filed the county's claim and was allowed $50.00, we can see nothing in the statute which in any way relates to an allowance for the administrator’s attorney. An allowance could be made to the administrator’s attorney for his work in connection with the probate in accordance with the usual rules.
It is the function of the district attorney to represent the county and state in the courts of his county and his statutory function in that respect cannot be delegated by the county pension department or by any other county authority. With the district attorney's consent a private attorney may appear for the county in litigation, but he cannot appear at public expense. *The State ex rel. Durner v. Huegin*, 110 Wis. 189. Where, as in the matter under consideration, the county's claim is to be diminished by the amount of the attorney's fee allowed, it cannot be represented otherwise than by the district attorney or an assistant. In case of such representation the fee allowed is to be paid into the county treasury. XXX Op. Atty. Gen. 275. It may be argued that this view results in a meaningless statute, but such is not the case. The county will benefit by the amount of the fee allowed and it will serve to compensate the county for the burden carried by it in asserting a claim which upon recovery is to be divided with the state and federal governments.

The state pension department is not concerned with the question as to whether the fee is paid to the district attorney or to a private attorney so long as the allowance does not exceed the amount provided for in the statute. The county pension department is in a little different situation, however, in that normally it might have something to do with the employment of a private attorney in the event that the district attorney's services were not to be used. It should enter into no such agreement with a private attorney, just as it should enter into no other unauthorized agreement.

You have requested our view as to whether the provision for necessary and essential repairs and for the purchase of tax certificates relates to protection of the lien or whether it is intended as assistance to the owner of the property. In our view the provision was intended as a protection for the lien. The repairs and the purchase of certificates are limited to properties upon which there is a lien. If assistance to the owners were intended, there would be no purpose in any such limitation. People who have not received assistance and who do not, as a result, have property subject to a lien, may be in need of assistance, their property may be in need
of repair and there may be outstanding tax certificates against such property. Yet there is no provision for making repairs or purchasing a certificate in such a case. The provision applies only where the lien has already attached, thereby indicating that the purpose is to protect the lien.

Without the provisions under consideration the old-age assistance law would permit allowances as old-age assistance covering repairs and taxes. In framing a budget for a person in need of assistance provision would customarily be made for such items. However, in any such allowance provision would be made for payment of the taxes in the first instance and would not be limited to payment upon tax certificates outstanding. The fact that under the provisions in question the benefits to the old-age assistance beneficiary are indirect and are not derived in accordance with the usual method of allowance and the fact that the tax benefit is limited to purchase of outstanding certificates which presumably are to be held in the name of the county as purchaser, would indicate that protection of the county’s lien rather than extension of assistance was the legislative object.

We cannot advise you as to what repairs may be necessary and essential. The statute provides no rule other than that they shall be necessary and essential, and in determining whether any particular repairs fall within that classification the pension authorities must exercise sound discretion.

You inquire as to whether the provision for purchase of outstanding tax certificates includes the authority to pay taxes in the first instance and to redeem outstanding certificates. We think not. The statute does not so provide and any payment or redemption can be made only by way of allowances to a beneficiary for such purposes. Such allowances are permissible, as we understand the law, without any regard to the provisions of this section. In response to your question as to whether there are any other statutory provisions permitting a county to pay such taxes directly or to redeem outstanding certificates, we must say that we are aware of no such provisions.

You inquire as to whether the words “shall be authorized” imply the need for authorization by some authority other
than the statute itself. It is our view that no such authoriza-
tion is necessary. The words "shall be authorized" were, we think, intended to be used in the same sense as though the legislature had said "shall have authority". There is no provision as to who is to make the authorization. It would hardly seem sensible for the legislature to require some one to authorize the pension authorities to act without specifying as to who should give such authorization.

You inquire as to whether a separate county appropriation is necessary to finance the repairs and purchases contemplated or whether they can be financed from the normal old-age assistance appropriation. We are not advised as to just how these county appropriations are usually denomi-
nated. Sec. 49.37, Stats., provides:

"The county board of each county shall annually appro-
riate a sum of money sufficient to carry out the provisions of sections 49.20 to 49.40, taking into account the money expected to be received during the ensuing year as state and federal aid."

This provision certainly contemplates the appropriation of money by counties for old-age assistance. Any such appropriation would not in our judgment be sufficient to au-
thorize disbursements for repairs and purchases of tax cer-
tificates, since such disbursements do not constitute old-age assistance. However, it is clear that the county may appro-
priate money for such purposes. As to whether any particu-
lar appropriation is in terms broad enough to permit of such expenditures is dependent upon the language of the appropriation.

Payments made for purchase of tax certificates and for repairs are not in our opinion reimbursable by the state un-
der the provisions of sec. 49.38, Stats. That section refers to claim for reimbursement of "aid paid under sections 49.20 to 49.38." Disbursements for repairs and for pur-
chase of tax certificates do not constitute aid paid under the provisions of those sections for the reason, as we have al-
ready pointed out, that such payments are made for the purpose of protecting the county's lien and it was not in-
tended that they should constitute old-age assistance. The
situation differs from reimbursement for burial expenses as discussed in XXV Op. Atty. Gen. 270. Burial expenses under our statutes are treated as old-age assistance. See secs. 49.25, 49.26, Stats.

Finally, you inquire as to whether a county which expends money for repairs or which purchases a tax certificate to protect its lien may reimburse itself out of moneys recovered from the estate of a deceased pensioner or upon foreclosure of the lien. The statute relating to division of amounts recovered in such cases is sec. 49.25. It is there provided that of the net amount recovered one-half shall be paid to the United States government and the remainder to the state and to the county in proportion to their contributions. This statutory provision is exclusive and we know of no other provision for distribution of recovered payments. It would not permit the county to reimburse itself for repairs prior to dividing the money recovered with the state and federal governments. The situation differs somewhat in the case of tax certificates. Certificates are prior liens. See sec. 49.26. If the county were to acquire such prior lien through purchase of an outstanding tax certificate in order to protect itself and the state and federal governments, it should be entitled to deduct the amount secured by the prior lien before making distribution to the state and federal governments of any recovery. We have pointed out that the statutes do not contemplate the county shall be reimbursed for the purchase of tax certificates and it must have been understood that the county would reimburse itself when authorization to purchase was given. Otherwise there would be no object in making such a provision, since the counties would not avail themselves of it. The net amount to be divided under sec. 49.25 clearly excludes amounts paid to persons other than the county to discharge tax liens and the county is entitled to subrogation to the extent that any purchase made by it of a tax certificate has the effect of discharging such a third party claim. See XXVII Op. Atty. Gen. 751, 758.

JWR
Charitable and Penal Institutions — Education of Blind — State department of public welfare under secs. 47.05 and 47.06, Stats., is authorized to provide vocational rehabilitation for adult blind.

December 3, 1943.

DEPARTMENT OF PUBLIC WELFARE.

You inquire whether the statutes of this state authorize the state department of public welfare to provide vocational rehabilitation for the blind as defined in secs. (3) and (10) (a) of the federal vocational rehabilitation act (Public law 113 - 78th congress).

Secs. 47.05 and 47.06, Wis. Stats., make provision for a field agency and workshop for the blind. This agency, originally established under the state board of control, was by sec. 58.37, Stats., transferred to the state department of public welfare, where it remains at the present time.

The duties of the agency as authorized by statute include keeping records of all the blind in the state and their capacity for educational and industrial training. Sec. 47.05, subsec. (2), par. (b). Also included is the duty to establish an employment agency so that the blind may be employed in industries for which they are fitted. See sec. 47.05 (3) (a). The agency is further authorized to establish schools for industrial training and workshops for the employment of suitable blind persons and to equip and maintain the same. See sec. 47.05 (3) (b). These sections clearly give authority to the state department of public welfare to provide vocational training and education to adult blind persons. The state department of public welfare apparently comes within the definition of a "State blind commission, or other agency which provides assistance or services to the adult blind * * * authorized to provide them vocational rehabilitation,” as provided in sec. 2 (a) (1) of the act of congress referred to above. Sec. 3 of the act of congress, referred to in your letter, does not contain any definitions of a state blind agency but deals exclusively with payments to states under the plan contemplated by the act. However, sec. 10 (a) of the federal act defines the term "vocational rehabili-
It seems that under Wisconsin statutes the state department of public welfare is authorized to provide for the adult blind the kind of services contemplated in the definition of the federal act.

We wish to make it clear that this opinion is strictly limited to the question propounded in your letter of November 3, and in no way constitutes approval by this office of participation in such a plan as is set forth in the act of congress referred to above.

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Intoxicating Liquors — Words and Phrases — Terms “grain”, “vegetable” and “fruit” as used in sec. 176.60, Stats., include sugar cane.

December 6, 1948.

John M. Smith,

State Treasurer.

Due to the shortage of intoxicating liquor and particularly of grain neutral spirits or alcohol as a result of the distilleries producing alcohol for war purposes, alcohol produced in Cuba and Puerto Rico from sugar cane and known as cane neutral spirits or alcohol is being used for blending purposes. You ask whether whiskey blended with and containing cane neutral spirits or alcohol can be labeled “whiskey” in view of the provisions of sec. 176.60 Wis. Stats., which so far as here material, provide:

“(1) * * * No alcoholic liquor shall be labeled whiskey, brandy, cognac, gin, rum, kümmel or by the-name of any other definitely known distillate unless the entire alcoholic content thereof is a distillate of fermented mash of grain or mixture of grains or of fruit, or vegetables or to which during the process of distillation herbs have been added for the purpose of extracting the flavor, quality, or
medicinal properties of the herbs. No spirits shall contain any substance, compound, or ingredient which is injurious to health or deleterious for human consumption. * * *"

The question narrows itself down to whether sugar cane, from which such cane neutral spirits or ethyl alcohol is derived, is within any of the terms "grain", "vegetable" and "fruit" as used in sec. 176.60. Investigation as to both the technical and commonplace definitions of such terms discloses that they are extremely flexible and overlapping, and not sufficiently definite to positively exclude sugar cane from coming within some one of these terms.

It is apparent that the purpose of this statute is to preclude adulteration and prevent the inclusion of unwholesome and deleterious ingredients, and it should be construed accordingly. Our information is that neutral spirits or ethyl alcohol derived from sugar cane is identical in chemical substance with and indistinguishable from neutral spirits or ethyl alcohol derived from grain. This being true, the substitution of cane neutral spirits in the blending of whiskey for grain neutral spirits, heretofore used in such blending but which is no longer available because of the above mentioned war requirements, produces blended whiskey (other things being the same) that is no different than had grain neutral spirits been used. Consequently there can be no assertion of adulteration or that there is an inclusion of any unwholesome or deleterious content, and the purpose of the statute is as fully accomplished in one case as in the other.

As bearing upon the question under consideration, it is of extreme significance that practically all, if not all, of the rum which was available for sale at the time of the enactment of this statute in 1934 and of that which has been sold in this state for now nearly 10 years, was and has been a sugar cane derivative. This must have been known to the legislature at the time of its enactment and certainly has been well known during the subsequent years. To conclude that sugar cane is not included within the words "grain", "vegetable" and "fruit" as used in this section would mean that all of the rum sold in this state for the last 10 years was in violation of sec. 176.60 and that the rum now being
offered for sale cannot be sold under that name. So far as we are able to ascertain no one, including the state agencies which have had charge of administering this section, has ever raised any question, or even suggested, that rum made from sugar cane could not be sold under that name in this state because it did not comply with the requirements of sec. 176.60. Such administrative construction of the statute is persuasive evidence that the words "grain", "vegetable", or "fruit" as used in sec. 176.60 were intended to and have meanings sufficiently broad to include sugar cane.

In view of the foregoing it is our opinion that sugar cane comes within the meaning of some one of the words "grain", "fruit", or "vegetable" as used in sec. 176.60, it not being necessary to decide which, as it is sufficient that it comes within some one of them, and that therefore the use of cane neutral spirits in the blending of whiskey in lieu of grain neutral spirits, as previously used over the years in such blending, does not preclude the blended product from being sold in this state under the name of and labeled whiskey.

HHP
Retirement Systems — State Employees’ Retirement System — State employees who were on duly granted and recorded leave of absence when ch. 176, Laws 1943, became effective, and have been on such leave ever since, did not become members of state employees’ retirement system unless such leave was military leave.

In computing prior service record of members of state employees’ retirement system for purpose of determining amount of state pension under sec. 42.63, subsec. (1), Stats., no credit may be given for time during which employee was on duly granted and recorded leave of absence.

State employees who were rendering nonteaching service to state when ch. 176, Laws 1943, became effective are not excluded from membership in state employees’ retirement system because of fact that both before and since passage of act they received annuity benefits under teachers retirement act.

In determining average annual salary earned during last five years of full-time employment for purpose of computing state pension under 42.63 (1), amount of salary which said employee voluntarily waived should be included.

December 10, 1943.

A. J. Opstedal,
Director of Personnel.

Prior to May 23, 1943, when chapter 176, Laws 1943, creating a state employees’ retirement system, became effective, the bureau of personnel had officially granted and duly recorded leaves of absence for a number of state employees. Some of these leaves of absence extended for a year, so that since May 23, 1943, the persons who were granted such leaves have not performed any work for the state. You inquire:

“Is the bureau correct in holding that a leave of absence granted an eligible employee does not terminate his employment status or contractual relationship that formerly existed, and that even though he did not perform his usual
tasks or receive his usual compensation from the state, he is to be regarded as 'in the employ of the state' and therefore a member of the retirement system?'

Many of said persons who were granted leaves of absence have served the state of Wisconsin for many years, and if they are members of the state employees' retirement system would be eligible to retire with a state pension effective February 1, 1944.

Section 42.61, subsec. (1), of the Wisconsin statutes, provides in part:

"Membership in the state employes' retirement system shall be compulsory for all persons in the employ of the state except the following classes of persons:

* * *

"(f) Part-time employes, except part-time employes who because of age or otherwise have become partially incapacitated and have been placed on a part-time service basis at a part-time rate of pay under rules and regulations of the bureau of personnel."

The case of State ex rel, Mellen v. Public School Teachers' Annuity and Retirement Fund Trustees, et al., 185 Wis. 653, 201 N. W. 383, involved an interpretation of what became section 42.55 of the Wisconsin statutes relating to the teachers' retirement system for the city of Milwaukee. In that case a teacher had been granted a leave of absence during which she did no teaching whatsoever. During the leave of absence the retirement act was amended to extend certain benefits to teachers who were "in the service" at the time of making an application for a benefit. The court specifically held that the leave of absence which was granted to the teacher did not affect her status as such within the meaning of Sec. 42.55, and that she must be considered as being "in the service" within the meaning of that statute as amended, during her leave of absence. This case was approvingly cited in Fritzke v. Public School Teachers' Annuity and Retirement Fund Trustees, 201 Wis. 179, 229 N. W. 543. The words "in the service", as used in the statute involved in the Mellen case, supra, would have substantially the same meaning as the words "in the employ", as used in sec. 42.61, sub-
Opinions of the Attorney General

sec. (1). Buffalo Steel Company v. Aetna Life Insurance Co., 136 N. Y. S. 977, 982; White v. Lumiere North American Company, 79 Vt. 206, 64 A. 1121; Mousseau v. City of Sioux City, 113 Ia. 246, 84 N. W. 1027. Consequently, the Mellen case, supra, would require an affirmative answer to your question were it not for the inference to be drawn from sec. 42.61, (1) (f), and (3), which provides as follows:

"Employes who have become members of the state employees' retirement system shall not thereafter lose their status as members while they remain in the state service on any basis, including leaves of absence. Employes who are absent from the state service on military leave under section 16.275 (3), or section 21.70 shall be deemed to be members of the state employees' retirement system the same as other state employes who qualify for membership therein under this section."

Under the first part of section 42.61 (3) a state employee who has become a member of the state employees' retirement system will not "thereafter" lose his status as such member if he is granted a leave of absence. This provision, however, can refer only to leaves of absence granted after the act took effect because until the act took effect there were no members of the state employees' retirement system who could be granted a leave of absence.

The second part of section 42.61 (3) specifically extends membership to employees who are absent from the state on military leave. If the legislature intended that sec. 42.61 (1) should grant membership to all employees who were on a leave of absence at the time that the act took effect, there was no necessity for declaring, as it did in sec. 42.61 (3), that employees on military leave of absence were deemed to be members.

Sec. 42.61 (1) (f) prevents an employee who was on part-time service on May 23, 1943, for reasons other than partial incapacitation, from gaining membership until he becomes a full-time employee, regardless of the length or percentage of his part-time service. To hold that an employee who was on a leave of absence other than military leave, on May 23, 1943, gained membership, would be equivalent to holding
that the aforesaid part-time employee could have taken a leave of absence prior to May 23, 1943, and gained membership, whereas he could not have gained membership if he had continued to work as usual.

It is our opinion, therefore, that your question must be answered in the negative.

You also inquire as to how officially granted and recorded leaves of absence are to be treated in computing the prior service record of persons who are now members of the state employees' retirement system.

In the case of State ex rel. Hyde v. Dowe, 129 Conn. 266, 28 A. 2d 12, which involved the construction of the state employees' retirement act of the state of Connecticut, the supreme court of that state said, pp. 271-272:

"The basis upon which the amount of a retirement salary is determined is not, however, simply 'service to the state' but 'years of service.' To say that one who gives only a small fraction of his time at irregular intervals to the service of the state and devotes all the rest of his time to his own purposes has spent a year in the service of the state offends against common sense. This is not to say that one must have given all of his time to that service, for the nature of his work may have been such that the duties imposed upon him did not require this, but unless in any year he has been regularly engaged in some state service which required that he devote at least a substantial part of his time to that service he cannot properly claim to have given a 'year of service' to the state. It is inconceivable to us that by the words 'years of service' the legislature meant to include in the basis for granting a retirement salary to any person a year when, at irregular intervals, he served the state only on a few scattered days, payment for which was made solely upon a per diem basis; nor can we conceive that the legislature meant to include service where no compensation was received or where compensation was paid by others than the state."

Upon the basis of the reasoning in the foregoing case it is our opinion that no credit may be given in computing prior service for time during which the state employee was on a duly granted and recorded leave of absence and during which he did not perform any work for the state.
You have also inquired whether those state employees who were engaged in nonteaching work when chapter 176, Laws 1943, became effective, but who were formerly teachers and who have been receiving annuity benefits under the teachers' retirement act before and at all times since the state employees' retirement system was created, are members of said system.

Sec. 42.61, subsec. (1), par. (b) of the statutes excepts from membership in the state employees' retirement system:

"Teachers who are covered by the teachers' state retirement system; except that any teacher who accepts a nonteaching position in the state service shall be permitted to transfer his deposits in the retirement deposit fund to the state employees' retirement system, and vice versa, under rules and regulations governing such transfers to be made by the annuity and investment board."

It is to be noted that the foregoing exception does not exclude "state employes" or "persons" who are covered by the teachers' state retirement system, but only "teachers". Since these employees were not engaged in teaching work, and may not properly be classified as teachers under the state employees' retirement law, it is our opinion that they were not excluded from membership simply because of the fact that they were receiving annuity benefits under the teachers' retirement law.

Lastly, you refer to sec. 42.63, subsec. (1), which provides:

"The annual retirement allowance payable monthly shall be the straight life annuity or its actuarial equivalent as provided in section 42.64 which the accumulations of the member's deposits will buy at the time of retirement in accordance with rates specified by the annuity and investment board plus a state pension or its actuarial equivalent to those who have been in the service 20 years or more computed as follows: 1/140 of the average full-time salary earned during the last 5 years of full-time employment multiplied by the number of years or major fraction thereof of service as a member of the state employes' retirement sys-
tem plus $1/70$ of the average full-time salary earned during the last 5 years of full-time employment multiplied by the number of years or major fraction thereof of service prior to the effective date of sections 42.60 to 42.70.

In arriving at the basic salary to be used in making the computation under the foregoing statute for those members who have been on part time for several years, it will be necessary to go back to the period during which those employees took salary waivers. You inquire whether the amount of the salary waived should be included or disregarded in determining the "full-time salary earned during the last 5 years of full-time employment". If the amount of the salary which was waived is included, it will increase the salary which is used in making the computations.

In XXVI Op. Atty. Gen. 500 this office upheld the validity of section 10a of ch. 6, Laws 1937, which appropriated money from the general fund to the board of regents of the university to restore certain salary waivers taken by some of the university employees for the years 1935 to 1937. The question raised was whether the act violated art. IV, section 26 of the Wisconsin constitution, which prohibited the legislature from granting any extra compensation to any public officer, agent, servant or contractor after the services had been rendered. It was stated in the opinion:

"* * * by referring to the records it appears that each month the departmental pay roll was made up and submitted to the director of personnel for certification, and that in each such pay roll so submitted and certified during the time covered by sec. 10a (as to each employee) the base minimum salary of seventy-five dollars was set out in one column, in the next column was set out the amount of waiver consented to and in the last column the net amount payable after deduction of the amount of the waiver. This showed that the employee was entitled to a compensation of seventy-five dollars per month and that was the rate of pay.

The deduction made therefrom by voluntary waiver in effect was that the employee received the full compensation but returned to the state by voluntarily refraining from taking the amount of the waiver deduction and took from the state only the remaining amount of his earned compensation. By the voluntary waiver arrangement the employee, acting upon a realization of the existing economic situation,
made a donation or gift to the state of the amount of the waiver deduction, so as to co-operate in a time of financial distress and to bring the state expenditures within the limits of the moneys available for appropriation, thereby eliminating the necessity of discharging some of the employees.

"* * * Viewed thus, sec. 10a does not pay to an employee extra or additional compensation for service performed, but gives back to the employee by way of reimbursement or repayment the amount which the employee had foregone and let the state have in its time of need due to adverse financial conditions."

Both from a practical and from a legal point of view it is immaterial whether the employee received the full amount of his basic salary and then turned a portion of it back, or whether the portion which he intended to turn back was deducted from his salary check with his consent so that he never actually had the amount of the salary waiver in his own hands.

As stated in the case of Schuh v. Waukesha, 220 Wis. 600, 605, 265 N. W. 699:—"* * * the case should not be made to turn upon the mere mechanics of the operation * * *." Where the employee acquiesced in the deductions it is considered that he made voluntary donations to his employer. See Eck v. Kenosha, 226 Wis. 647, 276 N. W. 309, and Maxwell v. Madison, 235 Wis. 114, 292 N. W. 301.

It is our opinion that in computing the average annual salary earned for the last five years of full-time employment that part of his salary which was waived by the employee must be deemed to have been "earned" by him and should be included.

JRW
Municipal Corporations — Municipal Law — Retirement Systems — Municipal Retirement Fund — Policeman in city of fourth class which becomes participating municipality under Wisconsin municipal retirement fund, who otherwise qualifies as employee under sec. 66.90, subsec. (3), par. (d), Stats., is not excluded from said fund by 66.90 (3) (e) 2 unless such policeman is then included in policemen's pension fund created by ordinance passed pursuant to sec. 62.13 (9) (e).

December 18, 1943.

FREDERICK N. MACMILLIN, Executive Director,
Wisconsin Municipal Retirement Fund,
Madison, 3, Wisconsin.

You inquire whether policemen in fourth class cities are included as employees under the Wisconsin municipal retirement fund established by chapter 175, Laws 1943. That act created section 66.90 of the statutes, which reads in part:

"(3) The following words and phrases as used herein, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

"* * *

"(d) Employee. Any person who:

"1. Receives earnings out of the general funds of any municipality or out of any special fund or funds controlled by any municipality as payment for personal services.

"2. Whose name appears on a regular pay roll of such municipality.

"3. Is employed in a position normally requiring actual performance of duty during not less than 600 hours a year in such municipality, and

"4. Has completed at least 6 months continuous service or 12 months total service for the municipality by which such person is employed when such person otherwise first becomes eligible for participation in the fund;

"(e) Exceptions. The definition of employee shall not include persons:

"* * *

"2. Who are or may be included within any policemen's pension fund by virtue of section * * *

62.13 (9) * * *"
Sec. 62.13, subsec. (9), makes it mandatory for a city of the second or third class to have a police pension fund. *State ex rel. McCarty v. Gantter, 240, Wis. 548, 4 N. W. (2nd) 153.*

Par. (e) of said subsection, as amended by chapter 165, Laws 1943, provides:

“In cities of the fourth class the council may annually and from time to time provide by ordinance for the pensioning, out of the general fund or otherwise, of members of the police department who have served for a term of 20 years or more, and shall have reached the age of 55 years, or who shall be disabled or superannuated, and for the widows and orphans of deceased members. Such pension shall not exceed one-half the salary of such officer at the time of his pensioning or death.”

This paragraph makes it optional with cities of the fourth class to provide for the pensioning of the police officers therein described. *State ex rel. McCarty v. Gantter, supra.*

Sec. 62.13 (12) provides:

“The provisions of section 62.13 * * * shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of police * * * departments.”

The regulation of police is a matter of state-wide concern. *Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25.* A city may not, by a charter ordinance deal with, or avoid the operation of a legislative enactment of state-wide concern. *Van Gilder v. Madison, supra.*

However, the fact that the legislature may have required that those cities of the fourth class which elected to pension their policemen should do so in accordance with 62.13 (9) (e) does not mean that the legislature had exhausted its power to legislate with respect to the pensioning of policemen in fourth class cities.

There is nothing in section 66.90 inherently inapplicable to policemen in cities of the fourth class. If it be construed to exclude all such policemen, then if a fourth class city
which became a participating municipality under 66.90 took no action under 62.13 (9) (e), the policemen in such city might well be practically the only regular employees thereof who were not covered by any pension system. It is our opinion that 62.13 (9) (e) was not intended as an exclusive method for the pensioning of policemen in cities of the fourth class, but that policemen in such cities could be included under 66.90 as employees. The words "may be included" in 66.90 (3) (e) 2 refer not to all of those policemen who could be included in a police pension fund under 62.13 (9) but to those who, at a later date, actually are so included. The rule appears to be settled that the term "may be" as used in statutes is to be construed as meaning in the future, unless the contrary appears from the context. Shoemaker v. Smith, 37 Ind. 122, 128; Bohart v. Anderson, 24 Okl. 82, 103 P. 742.

However, if at the time that a fourth class city becomes a participating municipality under 66.90 its policemen are then subject to a pension ordinance enacted pursuant to 62.13 (9) (e), such policemen will be excluded from the provisions of 66.90 by subsection (3) par. (e) 2 thereof. JRW
Public Officers — Board of Supervisors — Provisions of sec. 59.15, subsec. (1), par. (ef), Stats., enacted by ch. 94, Laws 1943, do not extend to salaries of county officers other than those whose salaries are fixed pursuant to provisions of sec. 59.15. Remuneration of county board supervisors is not included within provisions of sec. 59.15 but is covered by provisions of sec. 59.03. Action of Dane county board of supervisors increasing per diem of its members during their term of office is not governed by provisions of ch. 94, Laws 1943, and is invalid.

December 20, 1943.

Norris E. Maloney,
District Attorney,
Madison, Wisconsin.

The Dane county board on August 16, 1943, voted to increase the per diem of its members as of that date from $4.00 to $5.00. An opinion by this office to the district attorney of Racine county on a related matter has raised doubts as to the validity of the board’s action. You have requested that the opinion be reconsidered and have furnished an extensive memorandum in support of your view that it is erroneous. Since the Racine county matter is only incidentally involved the views here expressed will deal directly with the Dane county situation.

The statutory provision for the establishment of county boards is found in sec. 59.03, Wis. Stats. The section is extensive in character and covers the composition of the boards and the election, terms and compensation of their membership. Two general classes of county boards are provided: Those in special counties containing a population of at least 250,000, and those in other counties. Milwaukee county is the only county in the state qualifying as a special county. We shall not consider the special county provisions, since they are not involved in this question.

Sec. 59.03, subsec. (2), par. (f), dealing with compensation of supervisors in counties other than Milwaukee county provides that supervisors shall be paid at the rate of
$4.00 per day for services and expenses in attending meetings plus an allowance for mileage. However, a county board may at its annual meeting fix the compensation of the members “to be elected at the next ensuing election” at a sum not exceeding $5.00 per day and such additional compensation for the chairman as the board may determine by a two-thirds vote. “As an alternative method of compensation” a county board of a county containing a population in excess of 25,000 may at its annual meeting by a two-thirds vote of the members elected fix the compensation of the members to be elected at the next ensuing election at an annual salary not to exceed $500.00.

It is very clear that so far as the provisions of sec. 59.03 (2) (f) are concerned the county board of Dane county has no authority to increase the per diem compensation of its members from $4.00 to $5.00 otherwise than by adoption of a resolution fixing the compensation at the higher figure for such members only as are to be elected at the next ensuing election. Nor do we understand that you differ with this conclusion. However, you contend that ch. 94, Laws 1943, creating sec. 59.15 (1) (ef) authorizes the board’s action, notwithstanding the provisions of sec. 59.03.

In order to determine the applicability of sec. 59.15 (1) (ef) it is necessary to consider its relation to the other parts of sec. 59.15 and to consider the relation of that section and its component parts to sec. 59.03. The relevant portions of sec. 59.15, as amended by ch. 94, read:

“(1) The county board at its annual meeting shall fix the annual salary for each county officer, except as provided in section 253.15,* to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer’s term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

“(a) Compensation to the sheriff for keeping and maintaining prisoners in the county jail;

“(b) Reimbursement to the sheriff in counties containing three hundred thousand or more population, according to

*The exception relates to the salary of county judge.
the last preceding state or United States census, for expenses actually and necessarily incurred in the performance of his official duties;

“(c) Reimbursement to the district attorney of the amount of his expenses actually and necessarily incurred in briefing and arguing criminal cases before the supreme court, as required by subsection (7) of section 59.47, and in traveling within and without his county in the performance of his official duties;

“(d) Compensation received by the clerk of the circuit court for work done for the United States government or for congress.

"* * *

“(ef) Notwithstanding any other provision of the law to the contrary, the county board may increase the salary of any elective county officer for or during his term of office. Any action taken by a county board since November 1, 1942, increasing the salary of any elective county officer, and all appropriations therefor shall be ratified and validated, as if such action and appropriation had been authorized by law. This paragraph is emergency legislation and shall expire January 1, 1945.

"* * *

“(5) The county board may at any time change the compensation of any county officer from fees collected and retained by him to a salary, and may fix the annual salary of such officer. However, if such change is made after election or appointment of the officer, the board and such officer shall stipulate in writing the amount of compensation which shall be received and accepted annually by such officer for the remainder of his term as equivalent to the fees or fees and salary to which he was theretofore entitled. The county board of any county wherein such change has been made may at any time change the compensation of any such officer from a salary to fees collected or to part salary and part fees collected; but no change of compensation shall be made during the term for which any such officer was elected or appointed except as provided in this subsection.

"* * *

“(9) In this section the term ‘county officer’ means any elective officer whose salary or compensation is paid in whole or in part out of the county treasury, including salaries or compensation so paid for which compensation is made by the state.”

If sec. 59.15 (1) (ef) is applicable, and if the provision therein that “the county board may increase the salary of
any elective county officer" during his term of office refers to increasing the per diem of county board members, then the Dane county board has acted within its authority. Otherwise, it has not.

Prior to amendment by ch. 94 the only provisions of sec. 59.15 which related to fixing the salary of elective county officers were those parts of subsecs. (1) and (5) above set out permitting the county board to fix an *annual salary* and providing that when so fixed such salary shall not be increased or diminished during the term of the officer receiving it. The word "salary" is sometimes used in a broad sense to cover all remuneration of a public officer and when so used would include fees, per diem and possibly reimbursement for expenditures. It has a more limited meaning, however, and is generally used in the sense of a fixed annual or periodical payment for services without regard to the amount of services rendered. *Gobrecht v. City of Cincinnati*, 51 Ohio St. 68, 36 N. E. 782; 46 Corpus Juris 1017; 38 Words and Phrases, permanent edition, 37. The authority given by sec. 59.15 to fix an *annual salary* necessarily refers to salary in the more limited sense and can have no reference to the fixing of a per diem. The fixing of an *annual salary* can refer only to the fixing of a stated amount as an annual compensation.

In *Board of Supervisors v. Hackett*, 21 Wis. 613, the court held that the word "compensation" in art. IV, sec. 26 of the Wisconsin constitution, prohibiting the change of compensation of a public officer during his term of office, means a fixed salary payable out of the state treasury and does not include the remuneration received by way of fixed fees paid for specific services. If the word "compensation", which is a more comprehensive and much broader term than and includes salary, is there to be limited to what is the restricted or narrow meaning of the word "salary", then where, as here, the word "salary" is used in the same field it certainly cannot be given any other meaning than its restricted meaning.

In amending sec. 59.15 by providing for an increase in the salary of any elective county officer during his term of office for the emergency period of the war the legislature clearly
intended to temporarily supersede the provisions of sec. 59.15 prohibiting an increase or decrease in the annual salaries of elective county officers during their terms of office. The amendment could have no reference to any per diem to be fixed within the provisions of sec. 59.15 because there was and is no provision in that section for fixing a per diem for elective county officers.

Your argument that the provisions of sec. 59.15 which relate to fixing the salary of elective county officers refer to the fixing of a per diem for supervisors is premised principally upon the contention that the legislative policy to prevent an increase or diminution in the salary of elective officials is a salutary one and that supervisors should be regarded as included in sec. 59.15 in order that they might be subject to such provisions. It might be pointed out that this argument is made in support of permitting supervisors to receive an increase during their term contrary to this salutary policy. You recognize that in order to make the amendment removing the restriction applicable it is first necessary to establish the restriction. It is a sufficient answer to the contention that if the plain provisions of sec. 59.15 do not refer to the per diem compensation of supervisors, any suggestion that they should be included within what are deemed to be its salutary provisions is beside the point.

But a better answer lies in the fact that sec. 59.03 (2) (f), which is specifically and in our opinion exclusively applicable to fixing the per diem of county board supervisors, in different language contains the same provisions against increasing or diminishing the per diem as the provisions of sec. 59.15 contain with respect to increasing or diminishing annual salaries. Sec. 59.03 (2) (f) provides a statutory per diem of $4.00 which shall be paid in the absence of any affirmative action on the part of the county board changing the figure. The county board is permitted to fix such per diem at any increased amount not in excess of $5.00 as compensation for those supervisors to be elected at the next ensuing election. After a supervisor has been elected there is no authority vested in the county board to fix his per diem in any amount, and as a consequence the amount which is fixed prior to his election must be the amount which he will receive during his term of office. The fact that you find it
necessary to rely upon the amendment made by ch. 94 in order to justify an increase in the per diem of county board supervisors during their term establishes the fact that it would otherwise be impossible under the provisions of sec. 59.03 (2) (f) to so increase the per diem.

The only basis upon which it may be contended that sec. 59.15 (1) (ef) is applicable to the per diem compensation of county board supervisors is to assume that the provisions of that amendatory paragraph were intended to apply generally to elective county officers including those whose compensation is provided for in sections other than sec. 59.15; that a county board supervisor is an elective county officer without regard to the provisions of sec. 59.15; and that the increase in salary permitted embraces an increase in the per diem provided for by sec. 59.03 (2) (f). There are several reasons why the amendment cannot be given such an application:

(1) It is a general rule that an implied repeal or an implied amendment is not favored and that any repeal or amendment will not be extended beyond its express terms. Not only would the extension of the amendatory provisions to sec. 59.03 result in the amendment of a section which is not specifically amended; it would also result in destruction of the legislative scheme to treat the compensation of county board supervisors and “elective county officers” separately. That the specific provisions of sec. 59.03 are inconsistent with the general provisions of sec. 59.15 is of course clear. Sec. 59.03, so far as it provides a per diem, is inconsistent with the provisions of sec. 59.15 which provides for an annual salary. In so far as under the provisions of sec. 59.03 supervisors are permitted to substitute an annual salary for a per diem “as an alternative method of compensation”, it is required that the action be by a two-thirds vote and that the amount fixed shall not be in excess of $500.00. Under the provisions of sec. 59.15 there is no requirement of a vote in excess of a majority vote to fix a salary nor is there a salary limit. The fact that the two sections were inconsistent and mutually exclusive prior to the amendment by ch. 94 would repel any suggestion that the amendment of the one should be implied from the amendment of the other. See Milwaukee County v. Halsey, 149 Wis. 82.
(2) Since the effect of extending the amendatory provisions beyond sec. 59.15 to include sec. 59.03 would be to permit an increase in the salary of a public official where otherwise there could be no increase, such a construction is not permissible where two constructions are open. 46 Corpus Juris 1019.

(3) The fact that the legislature in sec. 59.03 has provided a flat annual salary for Milwaukee county supervisors and a per diem for supervisors in all other counties but with an alternative provision that an annual salary may be substituted in a certain class of those counties, clearly indicates a legislative distinction between a per diem and a salary as a method of compensating supervisors. To hold that the amendatory provisions of sec. 59.15 (1) (ef) which permit an increase in the salary of elective county officers apply to the per diem of supervisors is to take considerable liberty with the word "salary". We do not intimate, however, that even as to those supervisors for whom a salary has been fixed under the provisions of sec. 59.03 the amendatory paragraph is applicable. The other considerations which we have pointed out as relating to the matter clearly indicate to the contrary, and the fact that the amendatory provisions cannot be applied to those supervisors receiving a per diem would indicate that they should not be applied to those receiving a salary unless such a construction were a necessary one, which it obviously is not. We should not attribute to the legislature an intention to make a distinction in the two cases.

(4) In any event, we are of the opinion that supervisors are not elective county officers in any general sense. They may be defined as such for the purpose of a particular section or it may be necessarily implied in a particular section that they should be considered as such. However, they are so far treated as town, village and city officers for the purpose of particular sections that one cannot say they are county officers for general purposes. We touched upon this view in an opinion to the district attorney of Kenosha county on November 2, 1943,* to which we call attention, and shall not elaborate upon it here.

*Page 404 of this volume.
The foregoing results in the following conclusions: that the provisions of sec. 59.15 (1) (ef) permitting an increase in the salaries of elective county officers during their terms of office do not extend to the salaries of county officers other than those whose salaries are fixed pursuant to the provisions of sec. 59.15; that the per diem compensation of county board supervisors is not included within the provisions of sec. 59.15; and, while the matter is not directly involved, that the annual salary provided for supervisors is not covered by the provisions of sec. 59.15; but even if the amendatory provisions were to be construed to extend beyond the matter covered by sec. 59.15, it could not refer to the compensation of county board supervisors which is covered by sec. 59.08.

In a general way this covers all the matters dealt with in your memorandum except your suggestion that a certain notation in the legislative reference library indicates that it was the intention of the legislature in enacting sec. 59.15 (9) by ch. 362, Laws 1929, to include county board supervisors within the provisions of that section. The notation consists of a written statement for the convenience of the reference library, made after the close of the session, as to the authorship and the purpose of the bill which was enacted as ch. 362. It appears to be the practice to keep such notations in the case of all laws which are enacted. The notation reads:

“One of a series of bills introduced by Assemblyman Cords or at his instance in connection with the increase in salary of supervisors of Milwaukee county put through the 1927 legislature. Purpose of bill to make it impossible for any county officer to have his salary increased during his term of office.”

There are several answers which could be made to this argument. In the first place, the notation is not a written record required by law to be kept. A written statement by the author of a bill as to his object in introducing it would not be admissible as evidence to prove the legislative intent in enacting it. If such a written statement by the author of a bill is not admissible, it is difficult to see how a statement
of his intent by a third party would be admissible. It would be hearsay of a most unreliable nature. If the matter of expressed intent is to be considered, we could produce evidence that the author of ch. 94, Laws 1943, did not regard it as applicable to county board supervisors. We could also show that many of those interested in the enactment of the bill did not so regard it. However, we think none of these statements can be considered in determining a question of statutory construction.

But, assuming that the statement were admissible, there are two other answers. One is that while a supervisor is elected and is paid out of the county treasury and would consequently be a county officer within the provisions of sec. 59.15 (9), as added by ch. 362, he would be such by virtue of that definition only for the purposes of sec. 59.15. We have shown that sec. 59.15 could not be applied to supervisors, and certainly not, beyond question, as to those compensated on a per diem basis since its substantive provisions related only to the fixing of an annual salary. You suggest that the effect of the 1929 amendment is such as to bring supervisors within the scope of sec. 59.15 and thereafter an annual salary for supervisors could be fixed under the provisions of sec. 59.15. But, ch. 407, Laws 1935, specifically amending sec. 59.03 (2) (f) to provide for fixing the annual salaries of supervisors, would constitute a legislative recognition that sec. 59.15 then was not deemed to cover supervisors or that if it was, they took them out by that amendment. This would then remove the matter from the operation of sec. 59.15, if it ever was there, and restore the provisions of sec. 59.03 as exclusively operative.

Finally, it may be said that the reference library notation to which you refer is an equivocal statement and proves nothing. Prior to the 1927 session Milwaukee county supervisors received a fixed annual compensation of $1500 by virtue of the provisions of sec. 59.03 (1) (c). Ch. 181, Laws 1927, amended the section in question increasing the compensation of such supervisors to $2400 per annum. During the 1929 session Assemblyman Cords proposed the repeal of the 1927 act but was unsuccessful in doing so. He was also responsible for the introduction of ch. 362, which could not
apply to Milwaukee county supervisors since their salaries were and are fixed by legislative act and could not be affected by an amendment to sec. 59.15 dealing with salaries to be fixed by county boards. The only relevant statement in the notation is that the "Purpose of bill [is] to make it impossible for any county officer to have his salary increased during his term of office." Obviously, this statement is of no value since even prior to the introduction of ch. 362 all county officers within the meaning of sec. 59.15 were precluded from having their salaries increased during their terms of office. The only change made by ch. 362 was to extend the application of the section to county officers other than those to which it had theretofore applied. That he succeeded in doing so cannot be questioned. Stewart v. Kenosha County, 226 Wis. 171. It begs the whole question, however, to assume that Mr. Cords thought he was including county board supervisors. So far as supervisors are concerned it is a fair inference that Mr. Cords was primarily concerned with the supervisors of Milwaukee county since he represented that county, but he was unsuccessful in doing anything about their salaries. And as we have shown, ch. 362 could not possibly apply to such supervisors.

It necessarily follows from what we have said that in our opinion the action of the Dane county board of supervisors of August 16, 1943, is unauthorized and ineffective for any purpose.

JWR
Intoxicating Liquors — Municipal Corporations — Beer Licenses — Where patrons of “Class B” retail liquor and beer licensee are permitted to remain on premises and are served with liquor after closing time, place is “open” in violation of secs. 66.05, subsec. (10), subd. (hm), and 176.06, Stats., even though door is locked and additional customers are not admitted.

December 27, 1943.

John A. Meleski,
District Attorney,
Stevens Point, Wisconsin.

In your letter you state that a certain “Class B” liquor licensee closed his place of business at 1 o’clock A. M. but permitted patrons to remain therein and served them with liquor until about 2 A. M. You inquire whether the licensee is subject to prosecution for violation of the closing hour law.

Sec. 176.06, Stats., provides in part as follows:

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

* * *

“(3) If a retail ‘Class B’ license, in any county of a population of less than 500,000, between 1 a. m. and 8 a. m.”

It was formerly the rule under the above statute that it was not necessary for the licensee to close his doors at 1 o’clock, but that the place would be held not to be open for the sale of liquor if no liquor was sold or offered for sale after that time. See XXIII Op. Atty. Gen. 191, 199-200. However, the place could remain open for the transaction of other business, notably for the sale of beer where there was no municipal ordinance prohibiting it.

However by ch. 473, Laws 1943, the fermented malt beverage law was amended by adding paragraph (hm) to sec. 66.05 (10) reading in part as follows:
"1. In any county having a population of less than 500,000 no premises for which a retail Class ‘B’ license has been issued shall be permitted to remain open between 1 a. m. and 8 a. m. or on any election day until after the polls of such election are closed."

Accordingly under the present law all liquor taverns are required to be completely closed up between 1 a. m. and 8 a. m. since they also have fermented malt beverage licenses.

The question is then whether the tavern in question is "open" in the meaning of sec. 66.05 (10) (hm) 1 and also whether it is "open for the sale of liquor" within the meaning of sec. 176.06.

Under the American authorities a liquor tavern or saloon is generally regarded as being "open" if customers are permitted to remain there, even though the doors may be locked and no new customers admitted after the closing hour, although the opposite has been held in England. Although many cases do not go so far, it has even been held in Iowa to be a violation of law for the owner of the tavern and his bartender to remain after closing hours for the purpose of counting the cash, the court saying:

"* * * If the proprietor or employes remain, even though the door be fastened, how shall it be known that others are not also there? If they may open the saloon to leave, they may do so to enter. If they can leave or enter together, they may do so separately, and at all hours of the night, and, save for the sale of intoxicating liquors, the place be kept open as effectually as though being ‘open’ were not prohibited." Lingelbach v. Hobson, (1906) 130 Ia. 488, 107 N. W. 168, 169.

In another case where it appeared that a saloon was securely locked but there were evidently people inside and there was a light on between 1 and 2 A. M., the court held that the place was "open" contrary to law. McKinney v. Mayor of Nashville, (1896) 96 Tenn. 79, 33 S. W. 724.

In an early case in Michigan the supreme court said that the statute there involved "very clearly intends to close up the places named against liquor selling, on Sundays, or after eleven at night. It is not important on this record to ex-
amine critically into the meaning of the term ‘closed,’ as applicable to houses, rooms, or parts of rooms. It is clearly meant that the sales at least shall be entirely stopped, and the traffic shut off effectually, so that drinking, and conveniences for drinking, shall be no longer accessible, and those who frequent them for that purpose shall be dispersed. Common sense will dispose of such cases readily enough. Everybody knows practically what closing a saloon or drinking place means, and there is no occasion for seeking or solving imaginary difficulties”. (Italics supplied.) Kutrz v. People, (1876) 33 Mich. 279, 282, quoted in Whitcomb v. State, (1891) 30 Tex. App. 269, 272, 17 S. W. 258, 260.

It was subsequently held in Michigan that where a man entered a saloon before the legal opening time to fix a clogged waste pipe under the icebox and remained thereafter visiting with the bartender, his presence after his business was finished rendered the saloon “open” illegally. People v. Lundell, (1904) 136 Mich. 303, 99 N. W. 12.

In another Michigan case the supreme court said:

“If the saloon had been securely locked and fastened, and yet after the hour of ten o’clock in the evening the defendant and his bartender were inside furnishing drinks to others, also inside, he would be amenable to the statute, because either the persons inside must have got in after ten, or have been left inside when the doors were closed and locked. In either case the law would be violated. When the statute requires the doors to be closed, it means that no one shall be inside, or get inside thereafter, before lawful hours, at least with the consent of the defendant or his authorized agents.” People v. Cummerford, (1885) 58 Mich. 328, 331, 25 N. W. 203, 204-205.

The only authority we have been able to discover to the contrary consists of two English cases wherein it appeared that customers were permitted to remain on the licensed premises and were served with liquor after closing hours, the doors having been securely closed and locked. It was held that the licensed premises were not illegally open under those circumstances, but the court in each case pointed out that the sale of liquor after closing hours was a separate offense under the statutes and that in order to keep the two
offenses distinct it would not be held that the sale after hours constituted a violation also of the closing law, so long as the place was physically closed so that the public had no access to it from the outside. *Jeffrey v. Weaver*, Law Journal [1899], 2 Q. B. 817; *Commissioner of Police v. Roberts*, Law Journal [1904], 1 K. B. 231.

You are therefore advised that permitting patrons to remain in a tavern after closing hours constitutes a violation of sec. 176.06 and sec. 66.05 (10) (hm), Stats., even though the door be locked and additional members of the public excluded.

WAP
## INDEX

**Acknowledgments.** See Mortgages, Deeds, etc.  
**Adoption.** See Courts.  
**Agricultural representative, county.** See Counties.

### AGRICULTURE

- Imposition of excise tax upon sale of butterfat by producer to be deducted from return to producer as proposed by Bill No. 415, A., is not unconstitutional 109

### APPROPRIATIONS AND EXPENDITURES

- Street improvement—town is entitled to allotment under 20.49 (8) for improvement of town road over lands owned by federal government where state has not ceded jurisdiction over lands to United States 191
- Street improvement—road is open and used for travel within meaning of 20.49 (8) when physically passable and used in fact for travel 191
- Conservation commission—there is open season for deer within meaning of 20.20 (19) in any year when any county has open season; claims may be paid in such year in county that has closed season 198
- Conservation commission—appropriation to pay deer damage under 20.20 (19) is limited to fiscal year in which claim arises; claims arising after appropriation for year is exhausted cannot be paid out of appropriation for subsequent years 198
- Ch. 511, L. 1943, is in conflict with art. IV, sec. 26, Wis. Const., so far as it provides extra compensation to legislative messengers for services performed prior to effective date of law; is valid so far as it increases that compensation for services performed after effective date 279
- State aid to high schools—appropriation made by 20.27 is set aside and allocated from income collections in same manner and by same method as is prescribed by 71.19 (1) for setting aside appropriation made by 20.09 (4) 334

### AUTOMOBILES

- Law of road—suspension of operator's license under 85.08 (27) (a) is mandatory only where offense for which conviction is had is direct contributing cause of accident resulting in serious property damage; right to hearing before motor vehicle department may be denied; what constitutes such damage is question of fact. 2
- Law of road—certified copy of notice of appeal and of undertaking to stay execution must be filed with motor vehicle department in order to stay suspension of driving privilege of person against whom judgment is had in civil court for Milwaukee county for damages arising
AUTOMOBILES—(Continued) Page

- out of negligent operation of vehicle pending appeal to circuit court from such judgment .......................... 31

Law of road—owner of trailers kept for purpose of rental to private users need not qualify such trailers under 85.01 (4) (e), Stats. ........................................ 225

Law of road—stay of revocation of operator's license under 85.08 (25c) is condition precedent to issuance of restricted occupational license; court may not stay revocation except in instance of first conviction for driving under influence of intoxicating liquor .............................. 274

Law of road—85.08 (6) (c) effectively prohibits issuance of restricted occupational operator's license following mandatory revocation under 85.08 (25) resulting from second conviction for offense within one year .............................. 274

Law of road—discharge in bankruptcy does not relieve judgment debtor from fulfilling requirements of 85.135 as conditions precedent to restoration of driving privileges; 85.135 (2) is not derogation of bankruptcy act nor is it obnoxious to due process clause of Amendment XIV ........................................ 309

Banking commission. See Public Officers.

BANKS AND BANKING

National bank may be subjected to state regulatory laws unless such exercise of police power conflicts with federal statutes ........................................ 90

National bank—by weight of authority may not be subjected to civil penalties for violation of state usury law ............................... 90

National bank—conviction for violation of state usury law has been sustained; no decision has been made by supreme court of U. S. or Wis. ........................................ 90

Deposits, public—funds withheld from employees under provisions of Victory tax law by state treasurer or treasurer of governmental subdivision of state are subject to provisions of ch. 34, Stats. ........................................ 103

Orders of banking commission prescribing service charges in addition to interest upon loan of money are invalid if such sum added to interest exceeds 10 per cent per annum; any bank making such charge violates provisions of 115.05 ........................................ 133

Deposits, public—ch. 91, L. 1943 (sec. 34.04 (4), Stats.), affects premium payments due from banks to board of deposits on last day of Sept., 1943 ........................................ 188

Question of whether state banks are entitled to permit under 115.07 (3a) is one for courts; no opinion is expressed ............................... 216

Sec. 115.09 does not apply to banks; banking commission has no authority to issue license thereunder to state bank ............................... 216

Ch. 214, Stats., does not apply to banks; banking commission has no authority to issue license thereunder to state bank ............................... 216

Basic science law. See Public Health.
Beaver. See Fish and Game.
Beer licenses. See Municipal Corporations.
Beverage tax. See Trade Regulation.
Index

Birth records. See Statistics, vital statistics. Page
Board of supervisors. See Public Officers.

Bonds

Funds allotted by state highway commission to cities for connecting streets under 84.10 (2) and to counties for county trunk highways under 83.10 (1) may be used to retire bonds where cost of construction for which bonds were issued might properly have been paid from such funds in first instance ........................................... 345

Bridges and Highways

Sec. 84.07 authorizes state commission to provide for employment of guards to prevent sabotage of state highways ................................................................. 104

Law of road—85.19 (4) (f), prohibiting parking on near side of highway adjacent to schoolhouse during school hours, does not conflict with 85.19 (4) (h), prohibiting parking on highways adjacent to entrances of schools at designated times .................................................. 112

Law of road—extent of highway area adjacent to entrance of place of assemblage in which parking may be prohibited at designated times by local officials is discretionary and may be adjusted to meet conditions ...... 112

Law of road—neither state nor highway commission is liable for damages resulting from accidents on highways involving trucks or trailers operating under special permits issued pursuant to 85.53; applicants for permits may not be required to furnish insurance to cover liability ............................................................. 176

Street improvement—town is entitled to allotment under 20.49 (8) for improvement of town road over lands owned by federal government where state has not ceded jurisdiction over lands to United States .................. 191

Street improvement—road is open and used for travel within meaning of 20.49 (8) when physically passable and used in fact for travel .......................................................... 191

Funds allotted by state highway commission to cities for connecting streets under 84.10 (2) and to counties for county trunk highways under 83.10 (1) may be used to retire bonds where cost of construction for which bonds were issued might properly have been paid from such funds in first instance ........................................... 345

Flood control—state may provide for emergency relief to inhabitants of village of Spring Valley as done under provisions of 79.20 (2) ......................................................... 420

Flood control—state may not under art. VIII, sec. 10, Wis. Const., build levees, dredge channels or otherwise engage in flood control activities, restore properties or facilities damaged by flood nor may state as incident to flood control remove buildings to new sites ............. 420

Flood control—construction of streets and roads is excepted from provisions of art. VIII, sec. 10, Wis. Const. ..... 420

Flood control—member of committee created by 79.20 is not liable for expenditures made by committee in good faith although such expenditures may be unauthorized ...... 420
CHARITABLE AND PENAL INSTITUTIONS

Blind, education—department of public welfare is authorized to provide vocational rehabilitation for adult blind ........................................ 437

Child protection. See Minors.

CIVIL SERVICE

Secretary of state board of health, who is also executive officer of board and state health officer, is within classified service; must have approval of emergency board in order to obtain salary raise other than at beginning of fiscal year .................................................. 168

State employee compensated at monthly rate is not entitled to additional pay for overtime; has no right to hearing on such claim before personnel board .................. 222

County agricultural representative—provisions of sec. 59.87 (9) for appointment for Milwaukee county are not applicable since county has discontinued its county school of agriculture; any further appointment should be made by board of regents of university .................. 423

CIVILIAN DEFENSE

Council of defense, county and local—duties are determined, under 22.05, primarily by county or municipal ordinances creating them; state law authorizes only making of requests and directs existing officials and agencies to cooperate with such councils under orders from regularly constituted heads .................................. 116

Claims for deer damage. See Fish and Game.
Conservation commission. See Appropriations and Expenditures.

CONSTITUTIONAL LAW

Legislature may authorize county boards to increase salaries of elective county officials during terms of office for which elected; art. IV, sec. 26, Wis. Const., is not applicable to county officials ........................................ 51

Legislation proposed by Bill 137, S., would be unconstitutional as violation of art. I, sec. 1, Wis. Const. and amendment XIV, U. S. Const.; state cannot refuse to recognize gains and losses for income tax purposes resulting from condemnation of lands by federal government .................................................. 79

Printing required for state use must be let by contract to lowest bidder; cannot be done by state itself .......... 95

Requirement that state printing be done in state and by establishments maintaining wage levels and working conditions equal to those prevailing in locality in which printing is done is not in violation of Amendment XIV, U. S. Const., art. I, sec. 1 or art. IV, sec. 25, Wis. Const. 98

Imposition of excise tax upon sale of butterfat by producer to be deducted from return to producer as proposed by Bill No. 415, A., is not unconstitutional .................. 109

Bill No. 609, A., to amend 98.12 so one-gallon milk bottles can be used in Milwaukee county is invalid; 98.12, limiting milk bottles to sizes specified therein, is constitutional .......................... 141
CONSTITUTIONAL LAW—(Continued) Page

Coin-in-the-slot gambling games and devices of pin-ball, slot machine or similar design type, bingo, bank night, etc., are lotteries prohibited by art. IV, sec. 24, Wis. Const. 181

Bill No. 642, A., providing for election of governor when permanent vacancy occurs in office of lieutenant governor during permanent vacancy in office of governor, is constitutional 206

Ch. 511, L. 1943, is in conflict with art. IV, sec. 26, Wis. Const., so far as it provides extra compensation to legislative messengers for services performed prior to effective date of law; is valid so far as it increases compensation of legislative employees for services performed after effective date 279

Art. IV, sec. 12, Wis. Const., does not apply to prevent member of legislature which enacted statute increasing salary of governor from being candidate for office of governor 378

Ch. 173, L. 1943, extending term of incumbent local officials from one to two years by abolishing 1944 elections is probably in violation of art. XIII, sec. 9, Wis. Const. 398

Flood control—state may not under art. VIII, sec. 10, build levees, dredge channels or otherwise engage in flood control activities, restore properties or facilities damaged by flood nor may it as incident to flood control remove buildings to new sites 420

Flood control—construction of streets and roads is excepted from provisions of art. VIII, sec. 10 420

Flood control—member of committee created by 79.20 is not liable for expenditures made by committee in good faith although such expenditures may be unauthorized 420

Coroner. See Public Officers.

CORPORATIONS

Finance company—person, firm or corporation previously licensed under 218.01, having no other activity than liquidation of contracts previously acquired and acquiring no new contracts, is not required to be licensed 1

Small loans—lenders operating under 115.07 (3a), 115.09 or ch. 214 may, upon taking or sale of property securing loans, recover necessary costs of taking and keeping such property in event of redemption by mortgagor before sale or in event of foreclosure and sale 50

Small loans—ch. 214, Stats., does not apply to banks; banking commission has no authority to issue license thereunder to state bank 216

Motor transportation—owner of trailers kept for purpose of rental to private users need not qualify such trailers under 85.01 (4) (e), Stats. 225

Secretary of state has no authority to refuse charters to regularly organized private corporations formed for purpose of conducting lawful business; may not revoke charters of such corporations lawfully doing business in state 256

Motor transportation—trucks engaged in transportation of supplies to country cheese factories for use therein are exempt from assessment of taxes under 194.48 and 194.49 by virtue of 194.47 (5) (b) 267
COUNTRIES

Liability—county may be held liable for injury caused by failure to conform to requirements of safe-place statutes. 35

See XXXI 176

Liability—in case where county has title to 20 acres of county fairgrounds and fair association to 6 acres county is not liable for injuries to frequenters of fairgrounds caused by defects of repair or maintenance of fair buildings; nor for injuries caused by defective original construction of fair association buildings on 6 acres or 20 acres; may be liable as to buildings owned by county and on its 20 acres for injuries caused by defects of original construction. 35

County officers—legislature may authorize county boards to increase salaries of elective officials during terms for which elected; art. IV, sec. 26, Wis. Const., is not applicable to county officials. 51

Except as otherwise provided by law it is contemplated by 59.07 (3), 59.17 (3) and 59.20 (2) that all claims against county are to be audited by county board before payment; situations falling under rule as well as others coming within exceptions discussed. 347

Agricultural representative—provisions of 59.87 (9) for appointment for Milwaukee county are not applicable since county has discontinued its county school of agriculture; any further appointment should be made by board of regents of university. 423

COUNTIES

COURTS

Garnishment—deductions required to be made by state from employees’ wages or salaries for Victory tax operate to reduce amount judgment creditors will receive; will not reduce amount to which employee is entitled under 272.18 (15). 23

Suit tax—dollar tax levied by 271.21 does not apply to entry of judgments on cognovit. 186

Attorney—Substitute Amendment No. 1, S., to Bill 313, S., to amend statutes to prohibit any lawyer from changing to name other than that under which originally licensed, is valid exercise of police power. 203

Right of court of record to suspend execution of sentence in default of payment of fine and costs imposed in criminal case without placing defendant on probation, and effect on defendant’s period of imprisonment discussed; execution against property to collect fine is authorized by sec. 353.25. 228

Power of court to stay execution of sentence of imprisonment imposed for nonpayment of forfeiture and costs under county ordinance and effect upon period of imprisonment discussed; body execution to enforce such judgment and execution against property discussed... 228
INDEX

COURTS—(Continued)

Power of court of record in criminal case to review its judgment and impose lighter sentence either during term or afterwards after execution of original sentence has been commenced and probable offense of sheriff who discharges prisoner under void court order discussed. 228

Court of record has no power in municipal ordinance case to review its judgment and impose another sentence during term or afterwards after original sentence has commenced; sec. 252.10 (1) does not apply to such case 228

Adoption—valid order might be entered upon petition of wife who is inhabitant of this state and natural parent of child to be adopted, where husband joins in such petition, although he is inhabitant of another state 393

CRIMINAL LAW

Gambling—coin-in-the-slot gambling games and devices of pin-ball, slot machine or similar design type, bingo, bank night, etc., are lotteries prohibited by art. IV, see. 24, Wis. Const. 181

Right of court of record to suspend execution of sentence in default of payment of fine and costs imposed in criminal case without placing defendant on probation and effect on defendant's period of imprisonment discussed; execution against property to collect fine is authorized by sec. 353.25 228

Power of court to stay execution of sentence of imprisonment imposed for nonpayment of forfeiture and costs under county ordinance and effect upon period of imprisonment discussed; body execution to enforce such judgment and execution against property discussed 228

Power of court of record in criminal case to review its judgment and impose lighter sentence either during term or afterwards after execution of original sentence has been commenced and probable offense of sheriff who discharges prisoner under void court order discussed 228

Court of record has no power in municipal ordinance case to review its judgment and impose another sentence during term or afterwards after original sentence has commenced; sec. 252.10 (1) does not apply to such case 228

Inquest—coroner is entitled under 366.14 to fees and mileage for making investigation to determine necessity for inquest; such fees should be allowed in any case where coroner was called to view body and in case where he acted on his own initiative after receipt of information indicating possibility that inquest might be necessary; he should not be allowed fees unless preliminary inquiry revealed ground to suppose death was felonious or surrounded with mystery 277

Judgments—indeterminate sentence to state prison under 343.18 or any other statute fixing no minimum term of imprisonment must be for minimum of one year; attempt of court to fix higher minimum sentence is ineffective. 412

See XXV 717

Contra XXI 322

DAIRY AND FOOD

Imposition of excise tax upon sale of butterfat by producer to be deducted from return to producer as proposed by Bill No. 415, A., is not unconstitutional 105
Deeds. See Mortgages, Deeds, etc.
Dentistry. See Public Health.
Dentists. See Public Health.
Department of agriculture. See Public Officers.
Department of public welfare. See Public Officers.
Deposits, public. See Banks and Banking.
Director of bank. See Public Officers, banking commission.
Director of building and loan associations. See Public Officers, banking commission.
District attorney. See Public Officers.
Doctors. See Public Health.
Dogs. See Police Regulations.
Domestic animals. See Words and Phrases.

EDUCATION
Vocational education—alien is not denied benefits of 41.71 if otherwise eligible ........... 47
Vocational and adult education—where local board has received amount requested from city under 41.16 city and not local board has authority to make short term loan from bank to pay current expenses of such board ..... 311
School administration—ch. 392, L. 1943, does not effect immediate increase in salaries of county superintendents of schools; salary of any present incumbent below $2,000 will continue at that figure unless and until county board raises it .................. 387

ELECTIONS
Sec. 6.44 (2), relating to non-registered voters, as amended by ch. 469, L. 1943, is not in conflict with and does not supersede 6.18 (1) (a), requiring cancellation of registry of voters failing to vote for two years .......... 391
Ch. 173, L. 1943, extending term of incumbent local officials from one to two years by abolishing provision for 1944 elections is probably in violation of art. XIII, sec. 9, Wis. Const. ........................................ 398

Exemption. See Taxation.
Exemption from taxes. See Taxation.

Finance companies. See Corporations.

FISH AND GAME
Beaver trapper licensed under 29.594 (1) is also required to have general trapping license under 29.13 (1) ..... 100
Beaver trapper's employee's license under 29.13 (1) does not authorize trapping of beaver .................. 100
Claim for deer damage—must be verified and filed within ten days from time of damage; provision for reference to circuit judge in 29.596 relates only to case where there is dispute as to amount of damage under claim validly filed ........................................ 198
Claim for deer damage—there is open season for deer within meaning of 20.20 (19) in any year when any county in state has open season; claims may be paid in such year in county that has closed season .......... 198
Claim for deer damage—appropriation to pay, made by 20.20 (19) is limited to fiscal year in which claim arises; claim arising after appropriation for year is exhausted cannot be paid out of fund for subsequent years ..... 198
### FISH AND GAME—(Continued)

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public nuisance—fishing nets which are legal for use in certain waters but are illegal for use in waters where they are found are public nuisance under 29.05 (1)</td>
<td>285</td>
</tr>
<tr>
<td>Public nuisance—if part of fishing net is composed of illegal mesh and part of legal mesh entire net is illegal</td>
<td>285</td>
</tr>
<tr>
<td>Public nuisance—where fishing net of unknown owner constitutes public nuisance under 29.03 (1) it may be seized and destroyed without court proceeding</td>
<td>285</td>
</tr>
<tr>
<td>Public nuisance—where known owner of illegal fishing net is not prosecuted criminally so as to result in order for confiscation of net under 29.05 (7) net may be confiscated in forfeiture action commenced pursuant to ch. 288, Stats.</td>
<td>285</td>
</tr>
<tr>
<td>Public nuisance—acquittal on charge of fishing with illegal net is incompatible with proof required for confiscation under 29.05 (7)</td>
<td>285</td>
</tr>
<tr>
<td>Public nuisance—where court under 29.05 (7) orders fishing nets returned to defendant on acquittal of charge of fishing with illegal net, conservation commission should comply with such order even though net may in fact be illegal</td>
<td>285</td>
</tr>
<tr>
<td>Exclusive authority to regulate hunting and fishing and to establish open and close season for entire state or for any county or part of county is vested in conservation commission; but villages, cities and Milwaukee county may adopt ordinances relating to use of firearms which have effect of restricting hunting privileges within their boundaries</td>
<td>370</td>
</tr>
</tbody>
</table>

Flood control. See Bridges and Highways.

Gambling. See Criminal Law.

Garnishment. See Courts.

Governor. See Public Officers.

Grain. See Words and Phrases.

Income taxes. See Taxation.

### INDIGENT, INSANE, ETC.

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor relief—property acquired by wife upon death of husband through assignment of her dower and homestead rights is subject upon her death to claim for old-age assistance given her, except for homestead rights when limited to life estate</td>
<td>10</td>
</tr>
<tr>
<td>Poor relief—lien given for old-age assistance under 49.26 (4) attaches to consummate dower right of widow but not to inchoate dower right of wife during husband's life; such lien is not enforceable against husband's curtesy right in realty unless he attempts to transfer such right during his lifetime</td>
<td>10</td>
</tr>
<tr>
<td>Poor relief—district must, under 40.47 (5), Stats. 1939, file its claim for tuition of nonresident indigent pupils admitted to high school, with clerk of municipality from which such pupils were admitted regardless of fact that their legal settlement is elsewhere; statutes make no provision for reimbursement to municipality of residence</td>
<td>43</td>
</tr>
<tr>
<td>Poor relief—sec. 40.21 (2), Stats. 1939, is limited to instances where pupils reside in district making claim for recovery of tuition of indigent pupils</td>
<td>43</td>
</tr>
</tbody>
</table>
Milwaukee county is not entitled to state aid under 51.24 under circumstances set forth notwithstanding section of Milwaukee county hospital has been designated by resolution of county board of public welfare as unit of hospital for mental diseases

Milwaukee county is not entitled to state aid under 51.24 for patients removed from county mental disease hospital to county hospital for surgery and special care during time such patients are absent from mental disease hospital

Milwaukee county is not entitled to state aid under 51.08 for patients removed from county asylum to county hospital for surgery or special care during time such patients are absent from asylum

Poor relief—old-age assistance paid to wife or widow constitutes lien on her consummate dower right even though she dies before dower is assigned

Inmate of county asylum may have re-examination of sanity before judge of any court of record in county of his residence or where he was adjudged insane

Poor relief—if husband and wife have legal settlement in particular municipality and husband deserts wife, losing his legal settlement there and failing to acquire one elsewhere, wife who continues to live in same municipality does not, under 49.02 (1) (5) and (7), thereby lose her settlement so as to become county-at-large charge

Poor relief—county judge or director of county pension department acts as agent for county in administration of old-age assistance under 49.20 to 49.51

Poor relief—where property is recovered by county judge or pension director under 49.25 or 49.26 appropriate percentages must be paid by county to state and federal governments even though property is appropriated by said county judge or pension director

Poor relief—county judge or pension director is authorized under 49.26 to receive money from beneficiaries of old-age assistance and under 49.25 to receive payment of claims filed against their estates

Poor relief—transfer of property may be required under 49.26 without formal written finding as to necessity therefor

Poor relief—preferences under 74.03 (9) (e) and 74.031 (11) (e) include charges and taxes under 49.37 (2) and (4)

Sec. 45.20 does not apply to wives or minor children of persons now serving in U. S. armed forces nor to widows or minor children of servicemen who die in service

Poor relief—secs. 49.505 and 20.18 (9) were designated to aid counties financially unable to perform duties required by 47.08, 48.33 and 49.37; 49.505 does not contemplate aid to counties which have refused or neglected to provide adequate funds for public assistance where sufficient resources are had within statutory limits; 65.90 does not alter mandatory duty of county board to provide for public assistance

Poor relief—in case of old-age pension lien fee is paid to district attorney, is deducted from county's claim and is paid over by district attorney to county treasurer.
INDIGENT, INSANE, ETC.—(Continued)

Poor relief—repairs by county in case of old-age assistance lien are not reimbursable by state ........................................ 431
Poor relief—purchase of tax certificates in case of old-age pension lien is recoverable by county and county is entitled to subrogation in amount of prior lien; it may deduct that amount in distribution to state and federal governments upon liquidation of old-age assistance lien 431
Poor relief—expenditures for repairs and for purchase of tax certificates may be made by county pension department without obtaining authorization of any other county authority .......................................................... 431

INDUSTRY REGULATION

Safe-place statutes—term "owner" is defined by 101.01 (13); mere legal title is not sufficient to fix liability for injuries caused by failure to comply with requirements of statute .......................... 35
Safe-place statutes—test as to liability for injuries caused by defects of maintenance or repair in case of public building in control of person other than holder of fee title is whether fee owner has right to control necessary to enter premises to perform duties fixed by statute; as to injuries caused by unsafe original construction liability may rest upon party erecting building or his successors in interest ......................................................... 35
Safe-place statutes—as applicable to case where county has title to 20 acres of fairgrounds and fair association has title to another 6 acres with custody and control of entire fairgrounds discussed ................................................. 35
Architect—Substitute Amendment No. 1, S., to Bill 313, S., to amend statutes to prohibit any architect practicing in state from changing to name other than that under which originally licensed, is valid exercise of police power .......................................................... 203

Inquests. See Criminal Law.

INSURANCE

State insurance—that in force on property of absorbed district remains in force until expiration in case absorbing district is not insured in state fund ........................................... 69
State insurance—liability of fund under policies in force at time of consolidation remains in effect until expiration according to their terms ................................................................. 69
State is not liable for damages caused by negligent construction or operation of amusement devices at State Fair Park ................................................................. 245

INTOXICATING LIQUORS

Winery license—license held under 176.05 (1f) authorizes holder to rectify wine without having also rectifier's permit under 176.05 (1a) ................................................................. 28
Fermented malt beverage containing 7½% of alcohol by volume or 6.01% by weight is not taxable as intoxicating liquor under ch. 139; sale of such beverage is subject to provisions of ch. 176 ................................................. 48
Proof that minors, unaccompanied by parent or guardian, enter barroom on licensed premises where they are not
residents, lodgers or boarders, which premises are not hotel, restaurant, grocery store or bowling alley and remain for short period, during which they dance, purchase and consume soft drinks or purchase and consume beer or play pool, probably would not be sufficient for prosecution of tavern keeper under 176.32 (1) for permitting minor to loiter

Sec. 176.32 (1) provides penalty for minor convicted of loitering thereunder; 176.32 (2) provides penalty for one who enters place where liquor is sold after sale to him has been forbidden as specified in 176.26

Proof that minors, unaccompanied by parent or guardian, enter barroom on licensed premises where they are not residents, employees, lodgers or boarders, and which premises are not hotel, restaurant, grocery store or bowling alley, and remain for period of ten minutes, without engaging in any specific acts, for purpose of killing time, probably would be sufficient for prosecution of tavern keeper under 176.32 (1), for permitting minor to loiter

Words "grain", "vegetable" and "fruit" as used in sec. 176.60 include sugar cane

Where patrons of "Class B" retail liquor licensee are permitted to remain on premises and are served with liquor after closing time, place is "open" in violation of 176.06, even though door is locked and additional customers are not admitted

Judgments. See Criminal Law.

Law of road. See Automobiles.

Law of road. See Bridges and Highways.

Legal settlement. See Indigent, Insane, etc.—poor relief.

Legislative employees. See Public Officers.

LEGISLATURE

Art. IV, sec. 12, Wis. Const., does not apply to prevent member of legislature which enacted statute increasing salary of governor from being candidate for office of governor

Legislature, member. See Public Officers.

Liability. See Counties.

Liability. See Public Officers, department of agriculture.

Lieutenant governor. See Public Officers.

MARRIAGE

"Spiritual Assembly of the Bahais" may not file credentials under 245.07 and 245.08, but marriage may be contracted according to its customs, rules and regulations under 245.12

Maternal and child health. See Public Health.

Member of legislature. See Public Officers—legislature, member.

MILITARY SERVICE

Vacancy created by entry of member of board of supervisors in county other than Milwaukee county, elected
INDEX

MILITARY SERVICE—(Continued) ........................................... 404

from city, into armed forces is to be filled as vacancy in
elective city office under ch. 17, Stats............................... 404
Supervisor elected from city upon his return from service
is entitled to reinstatement for unexpired portion of
his term under 21.70 although he has not applied for
leave of absence ......................................................... 404
Sec. 45.20 does not apply to wives or minor children of per-
sons now serving in U. S. armed forces nor to widows
or minor children of servicemen who die in service ....... 418

MINORS

Child protection—county of commitment should be held ac-
countable under provisions of 48.17 for county's share
of support of neglected, delinquent or dependent child
committed to state industrial school .............................. 282
Money and interest. See Trade Regulation.

MORTGAGES, DEEDS, ETC.

Register of deeds should accept for recording deed acknowl-
edged in another state and authenticated as provided
by 253.24, notwithstanding enactment of ch. 329, Stats. 292
Motor transportation. See Corporations.
Municipal budget systems. See Municipal Corporations.

MUNICIPAL CORPORATIONS

Municipal budget system—appropriation of moneys in
county contingent fund for purpose not within other
budget items or accounts is not budgetary change so as
to be subject to publication requirement of 65.90 (5) .... 301
Beer license—sale of fermented malt beverage to person un-
der 18 years not accompanied by parent or guardian is
misdemeanor under 66.05 (10) (d) 1, (h) 2 and (m) 1 338
Sewers, town storm and sanitary—only town boards in Mil-
waukee county and town boards which have been
granted powers of village boards may provide for in-
stallation in areas which are located neither within
town sanitary district nor within unincorporated village
See .................................................. XXVII 314
Municipal law—policeman in city of fourth class which is
participating municipality under state municipal re-
tirement fund, who otherwise qualifies as employee un-
der 66.90 (3) (d) is not excluded from fund by 66.90
(3) (e) 2 unless he is then included in policemen's
pension fund created by ordinance passed pursuant
to 62.13 (9) (e) ............................................ 448
Beer licenses—where patrons of beer licensee are permitted
to remain on premises and are served with liquor after
closing time, place is “open” in violation of 66.05 (10)
(hm) even though door is locked and additional cus-
tomers are not admitted ............................................. 461

Municipal law. See Municipal Corporations.
Municipal retirement fund. See Retirement Systems.

NATIONAL GUARD

Sec. 21.69 (free instruction in military science) applies
only to educational institutions incorporated under ch.
180 or ch. 187, Stats., not to public high schools ...... 72
PHYSICIANS AND SURGEONS

Sec. 147.20 (3) and (4), relating to revocation of license to practice medicine and restoration thereof where physician has been convicted of crime committed in course of his professional conduct, does not apply to federal court

Platting lands for assessment. See Taxation.

POLICE REGULATIONS

Dogs—sec. 174.11 does not impose absolute liability upon owner of dog injuring domestic animal; makes provision for payment of claim by county for injury to animal in case where owner of dog causing such injury is otherwise liable therefor

Policeman. See Retirement Systems, municipal retirement fund.

Poor relief. See Indigent, Insane, etc.

PRISONS

Prisoner—under 57.06 department of public welfare may not permit parolee from state prison or Milwaukee county house of correction to go to another state, territory or country, except, pursuant to 57.13, to another state adhering to interstate compact for out-of-state parolee supervision

Right of court of record to suspend execution of sentence in default of payment of fine and costs imposed in criminal case without placing defendant on probation, and effect on defendant’s period of imprisonment discussed; execution against property to collect fine is authorized by sec. 353.25

Power of court to stay execution of sentence of imprisonment imposed for nonpayment of forfeiture and costs under county ordinance and effect upon period of imprisonment discussed; body execution to enforce such judgment and execution against property discussed.

Power of court of record in criminal case to review its judgment and impose lighter sentence either during term or afterwards after execution of original sentence has been commenced and probable offense of sheriff who discharges prisoner under void court order discussed.

Court of record has no power in municipal ordinance case to review its judgment and impose another sentence.
PRISONS—(Continued)

during term or afterwards after original sentence has commenced; sec. 252.10 (1) does not apply to such case 228

Public deposits. See Banks and Banking—deposits, public.

PUBLIC HEALTH

Wisconsin general hospital—neither expenses incurred by physician under 142.03, expenses of conveyance to or from hospital under 142.05 and 142.06 nor expenses to county judge as fees under 253.15 can be recovered by county under 142.08; there is no other statutory section granting recovery for said expenses 57

Slaughterhouse—sec. 146.11, relating to location and operation, does not apply to slaughterhouse erected by county at county home and asylum for sole use of that institution; it may not be so operated as to result in nuisance 73

Slaughterhouse—146.11 (1) does not prohibit erection or maintenance within one-eighth mile from dwelling of owner if location otherwise conforms to law 129

Doctor or dentist—Substitute Amendment No. 1, S., to Bill 313, S., to amend statutes to prohibit any doctor or dentist practicing in this state from changing to name other than that under which originally licensed, is valid exercise of police power 203

Optometry—ch. 273, L. 1943, does not abolish present board of examiners 218

Dentistry—scheme pursuant to which licensed dentist is paid one dollar for signing authorization whereby mail order dental plate company may make and ship through mail or in interstate commerce denture for customer of such company without any professional services being rendered by dentist and for sole purpose of enabling dental plate company to evade purpose of 18 USCA 420f and 152.02 (1), Wis. Stats., constitutes immoral and unprofessional conduct on part of dentist within meaning of 152.06 (5) and justifies suspension or revocation of his license 303

Basic science law—applicant for limited certificate under 147.07 who requests examination on spinal column only is entitled to such examination if he has qualifications prescribed by 147.05; particular method of treating sick which he proposes to follow is immaterial 340

Wisconsin general hospital—per diem charge for hospitalization of war veterans for period from Apr. 1 to July 11, 1943, may not exceed $4.90 per day 376

Rendering plants—sec. 146.12 as amended by ch. 400, L. 1943, exempts from its regulation by virtue of 146.12 (1) (b) operator of fur farm who collects carcasses only for food for his fur-bearing animals, but such exemption does not permit him to collect carcasses to feed to hogs nor for purpose of engaging in rendering business 385

Rendering plants—146.12 (12) prohibits operation of hog farm in connection with rendering plant 385

Sec. 146.124 prohibits collection or receipt of dead animals for hog feed unless such material is first thoroughly rendered as provided under 146.12 (8) and rules of board of health 385
Maternal and child health—in providing plan for use of federal aid funds for wives and infants of servicemen, state board of health has power and duty to establish, by regulations, standards of quality of such care under 140.05 (1) and (3) and 146.18; such regulations are prima facie valid until set aside by court action or altered or revoked by board; limiting participation to persons licensed to practice medicine is proper ....... 395

PUBLIC LANDS
Timber on public lands constitutes interest in such lands under 24.01 ........................................... 237
Statutes relating to sale of public lands by commissioners apply also to sale of timber thereon separately ........ 237
At sale of any public lands minimum price must be announced at sale before bids are accepted .......... 237
Minimum price of land to be sold need not be inserted in notice of sale which must be published under 24.09 (1) 237
Parcel of land, including school or university land, which has been offered at sale, may not be withdrawn from such sale if minimum price therefor has been bid ....... 237
No purpose is accomplished by inserting in notice of sale that commission reserves right to reject any and all bids ......................................................... 237
Private sale of parcel of land is required by 24.15 if application to purchase at minimum price is presented only if such land has not been withdrawn from sale pursuant to 24.09 (2) ............................................. 237

Public nuisances. See Fish and Game.

PUBLIC OFFICERS
Annuity and investment board—may create supplemental reserve in annuity reserve fund out of sums transferred thereto from reserve for contingencies and may create supplemental reserve in contingent fund by requisitioning sum in addition to normal requirement under 71.26 (6) and (7), when net interest yield on annuity reserve fund and contingent fund of state retirement system is less than rate at which annuities have been granted.. 295
Banking commission—member may be officer or director of bank or building and loan association or other corporation subject to supervision of banking commission; may be officer or director in corporation not subject to commission's supervision; or may hold other position of trust and have other interests provided he is not thereby prevented from devoting his full time to duties of his office ......................................................... 65
Board of supervisors—59.15 (1) (ef) is inapplicable to county boards ................................. 4............. 401
Board of supervisors—member in counties other than Milwaukee county, elected from city, is city officer within meaning of 17.035 .............................................. 404
Board of supervisors—member in counties other than Milwaukee county, elected from city, upon his return from service with armed forces is entitled to reinstatement for unexpired term under 21.70, although he has not applied for leave of absence ................................. 404
PUBLIC OFFICERS—(Continued)

Board of supervisors—provisions of 59.15 (1) (ef) (enacted by ch. 94, L. 1943) do not extend to salaries of county officers other than those whose salaries are fixed pursuant to 59.15; remuneration of supervisors is covered by provisions of 59.03; action of Dane county board of supervisors increasing per diem of members during their term is not governed by ch. 94, L. 1943, and is invalid ................................................................. 451

Coroner—is entitled to fees and mileage for making investigations to determine necessity for inquest; such fees should be allowed in any case where he was called to view body and in cases where he acted on his own initiative after receipt of information indicating possibility that inquest might be necessary ....................... 277

Coroner—should not be allowed fees for conducting inquest unless preliminary inquiry revealed ground to suppose death was felonious or surrounded with mystery ......... 277

County clerk—under 17.03 (4) vacancy occurs in office when clerk has moved with his family to another county, where he has accepted position under civil service; such employment is not regarded as temporary during six months' probationary period ................................. 138

Department of agriculture—state is not liable for damages caused by negligent construction or operation of amusement devices at State Fair Park ....................................... 245

Department of public welfare—possesses no authority to collect and disseminate information to induction centers for purpose of assisting in examination of selectees under selective service act ........................................ 377

District attorney—may, under 59.15 (1) (c), be reimbursed for travel in performance of his official duties; this does not include travel from his home or private office in one city to county seat located in another city where county board contributes to payment of rent on office for him. . 406

Governor—Bill No. 642, A., providing for election, when permanent vacancy occurs in office of lieutenant governor during permanent vacancy in office of governor, is constitutional ................................. 206

Legislative employees—ch. 511, L. 1943, is in conflict with art. IV, sec. 26, Wis. Const., so far as it provides extra compensation for services performed prior to effective date of law; is valid so far as it increases compensation for services performed after that date .................................. 279

Legislature, member—is not eligible for appointment to veterans recognition board created by ch. 443, L. 1943 ... 265

Lieutenant governor—is entitled to receive compensation of office of governor when he succeeds to powers and duties of that office by reason of death of governor ...... 7

Register of deeds—59.57 (10) specifies fee for recording assessor's plat prepared under 70.27 (1) ............... 173

Register of deeds—assessor's plat prepared under 70.27 (1) should be indexed in general index described in 59.52 and in record index described in 59.53; no charge may be made in addition to fee permitted by 59.57 (10) ... 173

Register of deeds—should accept for recording deed acknowledged in another state and authenticated as provided by 235.24 notwithstanding enactment of ch. 329, Stats., by ch. 289, L. 1943 ............................. 292
PUBLIC OFFICERS—(Continued)

Register of deeds—under 69.22 delayed birth record may be filed by register of deeds of any county, whether birth occurred there or not; he must make and file copy and send original to state registrar for filing .......... 428

Register of deeds—under 69.24 (2) register of deeds originally filing delayed birth record is entitled to fee of $1 plus 50¢ if he issues certified copy thereof .......... 428

Register of deeds—under 59.57 (11b) register of deeds is entitled to fee of 25¢ to be paid by county, as is register of deeds of county where birth occurred upon filing copy of delayed birth certificate transmitted by state registrar ............................................. 428

Secretary of state board of health, who is also executive officer of board and state health officer, is within classified service; must have approval of emergency board in order to obtain salary raise other than at beginning of fiscal year ........................................ 168

State employee—deductions required to be made by state from wages or salaries for Victory tax operate to reduce amount judgment creditor filing judgment under 304.21 will receive; will not reduce amount of wages or salary to which employee is entitled under 272.18 (15) 23

State employee—compensated at monthly rate is not entitled to additional pay for overtime; has no right to hearing on such claim before personnel board .... 222

Superintendent of schools, county—ch. 392, L. 1943, does not effect immediate increase in salary; salary of any present incumbent below $2,000 will continue at that figure unless and until county board raises it ............................ 387

Vacancy—under 17.03 (4) vacancy occurs in office of county clerk when he has moved with his family to another county, where he has accepted position under civil service; such employment is not regarded as temporary during six months' probationary period .................. 138

Vacancy—created by entry into armed forces of supervisor in county other than Milwaukee county, elected from city, is to be filled as vacancy in elective city office under provisions of ch. 17, Stats. ..................... 404

Veterans recognition board—member of legislature is not eligible for appointment to board created by ch. 443, L. 1943 ........................................ 265

PUBLIC PRINTING

Bookmaking for state historical society is public printing within meaning of 35.01; must be done through state printer even though paid for from income of funds donated or bequeathed to society .................... 86

Printing required for state use must be let by contract to lowest bidder; cannot be done by state itself in view of provisions of art. IV, sec. 25, Wis. Const. .......... 95

Requirement that state printing be done in state and by establishments maintaining wage levels and working conditions equal to those prevailing in locality in which printing is done is not in violation of Amendment XIV, U. S. Const., art I, sec. 1 or art. IV, sec. 25, Wis. Const. 98

Rabbits. See Words and Phrases, domestic animals.
Register of deeds. See Public Officers.
Rendering plants. See Public Health.
<table>
<thead>
<tr>
<th>RETIREMENT SYSTEMS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>State employees' retirement system—ch. 176, L. 1943, constucted as to meaning of “appointed state officers” in sec. 42.61 (1) (a) and as to other exemptions provided by sec. 42.61 (1) (b), (c) and (d)</td>
<td>247</td>
</tr>
<tr>
<td>Teachers retirement—when net interest yield on annuity reserve fund and contingent fund is less than rate at which annuities have been granted, annuity board may create supplemental reserve in annuity reserve fund out of sums transferred from reserve for contingencies and may create supplemental reserve in contingent fund by requisitioning sum in addition to normal requirement under 71.26 (6) and (7)</td>
<td>295</td>
</tr>
<tr>
<td>State employees' system—first date upon which voluntary or involuntary retirement may be effective is Feb. 1, 1944</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—in computing “years or service” for purpose of determining eligibility member is entitled to credit for years of service prior to effective date of ch. 176, L. 1943, spent in service of state in any capacity</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—basically, year of service is 365 days of service</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—year of service may be composed of number of periods of service tacked together without regard to length of periods</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—members employed full time and those employed part time on monthly basis who work for month are entitled to credit for total number of days in such month even though because of Sundays and holidays they did not actually work every day of that month</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—members employed on part-time basis by day are entitled to credit for only those days on which they actually work and for which they are paid, except that part of day counts as day</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—members employed on seasonal basis, whether by month or day are entitled to credit for only those days or parts of days on which they actually work and for which they are paid</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—member may designate two or more beneficiaries to whom his death benefit shall be paid and may change beneficiary and also name alternate beneficiary or beneficiaries</td>
<td>362</td>
</tr>
<tr>
<td>State employees' system—last five years of full time employment used as one factor in determining amount of retirement annuity is composed of those last periods during which member was employed full time and which total five years</td>
<td>362</td>
</tr>
<tr>
<td>State employees' retirement system—employees who were on duly granted and recorded leave of absence when ch. 176, L. 1943, became effective and have been on such leave ever since did not become members of system unless such leave was military leave</td>
<td>441</td>
</tr>
<tr>
<td>State employees' retirement system—in computing prior service record of members for purpose of determining amount of pension under 42.63 (1) no credit may be given for time when employee was on leave</td>
<td>441</td>
</tr>
</tbody>
</table>
| State employees' retirement system—employees who were rendering nonteaching service to state when ch. 176,
RETIREMENT SYSTEMS—(Continued)

L. 1943, became effective are not excluded from membership because of fact that they both before and since passage of act received benefits under teachers' retirement act ........................................ 441

State employees' retirement system—in determining average annual salary earned during last five years of full-time employment amount of salary which employee voluntarily waived should be included ..................... 441

Municipal retirement fund—policeman in fourth-class city participating under state municipal retirement fund who otherwise qualifies as employee under 66.90 (3) (d) is not excluded from fund by 66.90 (3) (e) 2 unless he is then included in fund created by ordinance passed pursuant to 62.13 (9) (e) .................. 448

Safe-place statutes. See Industry Regulation.
School administration. See Education.

SCHOOL DISTRICTS

Tuition—sec. 40.21 (2), Stats. 1939, is limited to instances where indigent pupils reside in district making claim for recovery of tuition .......................... 43

Tuition—district must file its claim, in case nonresident pupil is admitted to high school, under 40.47 (5), Stats. 1939, with clerk of municipality from which such pupil was admitted regardless of fact that his legal settlement is elsewhere; statutes make no provision for reimbursement to municipality of residence ........... 43

State insurance in force on property of absorbed district remains in force until expiration in case absorbing district is not insured in state fund ........... 69

Liability of state insurance fund under policies in force at time of consolidation of districts remains in effect until expiration according to their terms .......... 69

School board may not provide for nurseries and preschool education for children under four years .......... 126

School board may provide for supervised play and recreation of school children in conformity with course in physical education prescribed under 40.22 (3) (a) .... 126

School board may provide for adult education under 40.21 (4) and adult recreation under 40.16 (9) in evening.... 126

Secretary of state board of health. See Civil Service.
Secretary of state board of health. See Public Officers.
Semiannual payment of taxes. See Taxation.
Sewers, town storm and sanitary. See Municipal Corporations.
Slaughterhouses. See Public Health.
Small loans. See Corporations.

SOCIAL SECURITY ACT

Poor relief—combined property of husband and wife must be considered in determining eligibility for relief under 49.23 even though they may be living separately ...... 25

Poor relief—department of public welfare may adopt rule under 49.50 (2) as to what may be regarded as prima facie showing of need for old-age assistance provided rule does not preclude exercise of discretion in individual cases .................. 53
### SOCIAL SECURITY ACT—(Continued)

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor relief—liens to secure repayment of old-age assistance grants provided by amendments to 49.26 by ch. 7, Laws special session 1937, are not applicable to state real estate of beneficiaries for aid theretofore granted in case there had been no transfer of such real estate, prior to amendments, to secure repayment of such assistance</td>
<td>76</td>
</tr>
<tr>
<td>Poor relief—denial of burial expenses under sec. 49.30 is not reviewable under 49.50</td>
<td>123</td>
</tr>
</tbody>
</table>

**Special permits.** See Bridges and Highways, law of road.

**Standard bottles.** See Weights and Measures.

**State aid to high schools.** See Appropriations and Expenditures.

**State employees.** See Public Officers.

**State employees’ retirement system.** See Retirement Systems.

**State insurance.** See Insurance.

### STATISTICS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vital statistics—state registrar or register of deeds or city health officer is authorized by 69.24 (1) to collect one 50-cent fee from person who requests him to make correction in birth record</td>
<td>331</td>
</tr>
<tr>
<td>Vital statistics—official collecting such fee and making such correction must certify such correction to other officials named in 69.25 (2), who apparently must make corresponding correction on their records</td>
<td>331</td>
</tr>
<tr>
<td>Vital statistics—other officials to whom certification is made under 69.25 (2) are not entitled to any fee</td>
<td>331</td>
</tr>
<tr>
<td>Vital statistics—69.21 requires register of deeds to make all corrections certified to him by state registrar without charge</td>
<td>331</td>
</tr>
<tr>
<td>Vital statistics—69.24 (1) does not authorize any of officers therein mentioned to collect fee for correcting record of stillbirth, death, marriage or divorce</td>
<td>331</td>
</tr>
<tr>
<td>Vital statistics—provisions of 69.22 as to minimum proof required for filing delayed birth certificates are mandatory; registers of deeds may not file or issue such certificates unless such proof is supplied; violation of law may subject register of deeds to penalties prescribed by 69.55 and to removal from office under 17.09 (5)</td>
<td>409</td>
</tr>
<tr>
<td>Vital statistics—where delayed birth certificate received from register of deeds shows on its face that less than statutory minimum proof was submitted, state registrar shall file it for what it is worth and require register of deeds to obtain further proof</td>
<td>409</td>
</tr>
<tr>
<td>Vital statistics—provisions of 137.01 (4) and (5) are not applicable to form prepared and furnished under 69.06 (1) by state registrar for delayed registration of births under 69.22; such form does not require that date of expiration of notary’s commission be included in jurat</td>
<td>415</td>
</tr>
<tr>
<td>Vital statistics—under 69.22 delayed birth record may be filed by register of deeds of any county, whether birth occurred there or not; register of deeds must make and file copy and send original to state registrar for filing; state registrar shall make and send copy to register of deeds of county in which birth occurred if not originally filed there</td>
<td>428</td>
</tr>
</tbody>
</table>
STATISTICS—(Continued)

Vital statistics—under 69.24 (2) register of deeds originally filing delayed birth record is entitled to fee of $1 plus additional fee of 50c if he issues certified copy . . . 428

Vital statistics—under 59.57 (11b) register of deeds is entitled to filing fee of 25c to be paid by county, as is register of deeds of county where birth occurred upon filing copy of delayed birth certificate transmitted by state registrar ................................. 428
## STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS AND RESOLUTIONS, ETC. REFERRED TO AND CONSTRUED

<table>
<thead>
<tr>
<th>U. S. Const.</th>
<th>Page</th>
<th>Wis. Const.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. Sec.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I 8</td>
<td>193-196</td>
<td>XI 3</td>
<td>374</td>
</tr>
<tr>
<td>III 2</td>
<td>164</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amendment XIV</td>
<td>79</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>98</td>
<td>XIII 9</td>
<td>398, 399</td>
</tr>
<tr>
<td></td>
<td>289</td>
<td></td>
<td>10. . 206-213</td>
</tr>
<tr>
<td>U. S. Stats.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 Stats. at L.</td>
<td>56</td>
<td>Ch. 258</td>
<td>. . . 21</td>
</tr>
<tr>
<td>47 5</td>
<td>157</td>
<td>Ch. 222</td>
<td>244, 245</td>
</tr>
<tr>
<td>48 1083</td>
<td>162</td>
<td>Ch. 518</td>
<td>418</td>
</tr>
<tr>
<td>49 711</td>
<td>91</td>
<td>Ch. 179</td>
<td>21</td>
</tr>
<tr>
<td>50 888</td>
<td>260</td>
<td>Ch. 221</td>
<td>289</td>
</tr>
<tr>
<td></td>
<td>890</td>
<td>Ch. 566</td>
<td>143</td>
</tr>
<tr>
<td></td>
<td>895</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53 1380</td>
<td>124</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1381</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55 248</td>
<td>159</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>841</td>
<td></td>
<td></td>
</tr>
<tr>
<td>56 19</td>
<td>116-121</td>
<td>Ch. 42</td>
<td>419</td>
</tr>
<tr>
<td></td>
<td>355</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>884</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1087</td>
<td></td>
<td></td>
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<tr>
<td>57 139</td>
<td>23</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>374</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>437</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sec. 5198, R.S.</td>
<td>91</td>
<td>Ch. 497</td>
<td>. . . 21</td>
</tr>
<tr>
<td>Wis. Const.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art. Sec.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I 1</td>
<td>79</td>
<td>Ch. 450</td>
<td>217</td>
</tr>
<tr>
<td></td>
<td>98</td>
<td>Ch. 218</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>289</td>
<td>Ch. 668</td>
<td>101</td>
</tr>
<tr>
<td>II 2</td>
<td>158, 160</td>
<td>No. 22, S.</td>
<td>419</td>
</tr>
<tr>
<td>IV 1</td>
<td>241</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>91</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>210</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>266,267</td>
<td>Ch. 42</td>
<td>419</td>
</tr>
<tr>
<td></td>
<td>378-380</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>21</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>379</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>181-186</td>
<td>Bills 1919</td>
<td></td>
</tr>
<tr>
<td></td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>95-97</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>98-99</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>51</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>279-281</td>
<td>Ch. 99</td>
<td>165</td>
</tr>
<tr>
<td></td>
<td>379</td>
<td>Ch. 476</td>
<td>101</td>
</tr>
<tr>
<td></td>
<td>388</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>446</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>454</td>
<td></td>
<td></td>
</tr>
<tr>
<td>V 7</td>
<td>206-212</td>
<td>Ch. 36</td>
<td>288</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>206-213</td>
<td>Ch. 264</td>
<td>101</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>248</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VIII 2</td>
<td>181</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>201</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>Ch. 19</td>
<td>383</td>
</tr>
<tr>
<td>X 3</td>
<td>126, 127</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>242</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>382, 383</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Laws 1925  Page
284 ........................................... 341
359 ........................................... 414

Laws 1927
Ch. 181 ........................................... 459
527 ........................................... 414

Laws 1929
Ch. 362 ........................................... 458-460

Laws 1931
Ch. 181 ........................................... 414
428 ........................................... 201
454 ........................................... 269

Laws 1933
Ch. 25 ........................................... 101
374 ........................................... 67

Laws 1935
Ch. 12 ........................................... 388-384
197 ........................................... 277
217 ........................................... 29,30
335 ........................................... 288
407 ........................................... 402
483 ........................................... 459
503 ........................................... 30

Bills 1935
No. 75, S ........................................... 231

Laws 1937
Ch. 6 ........................................... 446
281 ........................................... 87

Resol. 1937
Jt. No. 47 ........................................... 223

Laws 1937 (Special Session)
Ch. 4 ........................................... 110
7 ........................................... 76-78

Laws 1939
Ch. 79 ........................................... 63
228 ........................................... 70

Bills 1939
No. 734, A ........................................... 109

Laws 1941
Ch. 5 ........................................... 16
225 ........................................... 15

Laws 1943
Ch. 9 ........................................... 116-118
59 ........................................... 162
81 ........................................... 345
91 ........................................... 188, 189
94 ........................................... 388, 390

Laws 1943  Page
103 ........................................... 401-403
106 ........................................... 451-459
132 ........................................... 302
133 ........................................... 239-240
139 ........................................... 248
149 ........................................... 425
165 ........................................... 336
173 ........................................... 264
175 ........................................... 449
176 ........................................... 400
362, 364 ........................................... 448
441, 445 ........................................... 247

Bills 1943
No. 254, A ........................................... 390
325, A ........................................... 181-186
415, A ........................................... 109
427, A ........................................... 189
505, A ........................................... 429, 430
609, A ........................................... 141, 145
642, A ........................................... 206-213
20, S ........................................... 118, 119
52, S ........................................... 51, 52
131, S ........................................... 98
137, S ........................................... 79
313, S ........................................... 203-205
424, S ........................................... 215
<table>
<thead>
<tr>
<th>R. S. 1878</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sec. 207</td>
<td>243, 245</td>
</tr>
<tr>
<td>211</td>
<td>243</td>
</tr>
<tr>
<td>1040</td>
<td>21</td>
</tr>
<tr>
<td>1524</td>
<td>418, 419</td>
</tr>
<tr>
<td>2034</td>
<td>11</td>
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<td>39</td>
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<td>Stats. 1898</td>
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<td>Sec. 2159</td>
<td>165</td>
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<td>Stats. 1917</td>
<td></td>
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<tr>
<td>Sec. 29.05 (7)</td>
<td>288, 289</td>
</tr>
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<td>29.15 (1)</td>
<td>101</td>
</tr>
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<td>Stats. 1919</td>
<td></td>
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<td>Sec. 1629</td>
<td>63</td>
</tr>
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<td>Stats. 1921</td>
<td></td>
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<tr>
<td>Sec. 29.59 (5)</td>
<td>101</td>
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<td>288</td>
</tr>
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<td>383</td>
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<td></td>
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<tr>
<td>Sec. 60.30</td>
<td>383</td>
</tr>
<tr>
<td>60.306</td>
<td>382, 383</td>
</tr>
<tr>
<td>60.63</td>
<td>383</td>
</tr>
<tr>
<td>60.64</td>
<td>383</td>
</tr>
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<td>Sec. 76.54</td>
<td>269</td>
</tr>
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<tr>
<td>Sec. 76.54 (16)</td>
<td>270–271</td>
</tr>
<tr>
<td>288.09 (3)</td>
<td>231, 232</td>
</tr>
<tr>
<td>Stats. 1935</td>
<td></td>
</tr>
<tr>
<td>Sec. 49.26 (4)</td>
<td>12</td>
</tr>
<tr>
<td>59.07 (2)</td>
<td>15, 16</td>
</tr>
<tr>
<td>59.67 (2)</td>
<td>15, 16</td>
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<td>383</td>
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<td>75.35</td>
<td>15, 16</td>
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<td>176.05 (1f)</td>
<td>29, 30</td>
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<td>Sec. 49.26 (1)</td>
<td>76–77</td>
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<td>77</td>
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<td>194.47 (5)</td>
<td>272</td>
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<td>43–45</td>
</tr>
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<td>45</td>
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<th>Page</th>
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<td>31</td>
</tr>
<tr>
<td>174.11 (4)</td>
<td>63</td>
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<td>194.47 (5)</td>
<td>272</td>
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<tr>
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<tbody>
<tr>
<td>Sec. 1.02</td>
<td>193–196</td>
</tr>
<tr>
<td>1.03</td>
<td>193, 194</td>
</tr>
<tr>
<td>(2)</td>
<td>193</td>
</tr>
<tr>
<td>6.51 (2)</td>
<td>140</td>
</tr>
<tr>
<td>(3)</td>
<td>140</td>
</tr>
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<td>(4)</td>
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</tr>
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<td>168</td>
</tr>
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<td>248</td>
</tr>
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<td>249</td>
</tr>
<tr>
<td>14.71 (1)</td>
<td>169</td>
</tr>
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</tr>
<tr>
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</tr>
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<td>223</td>
</tr>
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<td>223</td>
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<td>169</td>
</tr>
<tr>
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<td>169–170</td>
</tr>
<tr>
<td>(3)</td>
<td>168, 170</td>
</tr>
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<td>170</td>
</tr>
<tr>
<td>16.13 (2)</td>
<td>222</td>
</tr>
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<td>16.20 (4)</td>
<td>140</td>
</tr>
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</tr>
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<td>222</td>
</tr>
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<td>17.03</td>
<td>212</td>
</tr>
<tr>
<td>(4)</td>
<td>138–139</td>
</tr>
<tr>
<td>20.16</td>
<td>88, 89</td>
</tr>
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<td>20.20 (19)</td>
<td>198–202</td>
</tr>
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<tr>
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<td>105</td>
</tr>
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</tr>
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<td>20.78</td>
<td>88–89</td>
</tr>
<tr>
<td>20.785</td>
<td>89</td>
</tr>
<tr>
<td>20.80</td>
<td>89</td>
</tr>
<tr>
<td>21.69 (1)</td>
<td>72, 73</td>
</tr>
<tr>
<td>23.14 (2)</td>
<td>255</td>
</tr>
<tr>
<td>(14)</td>
<td>254–255</td>
</tr>
<tr>
<td>24.01 (1)</td>
<td>238, 241</td>
</tr>
<tr>
<td>(2)</td>
<td>238</td>
</tr>
<tr>
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<td>238</td>
</tr>
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<td>239</td>
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<td>239</td>
</tr>
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<td>239</td>
</tr>
<tr>
<td>(2)</td>
<td>239</td>
</tr>
<tr>
<td>(3)</td>
<td>239, 241</td>
</tr>
<tr>
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<td>239</td>
</tr>
<tr>
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<td>240–245</td>
</tr>
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<td>24.10</td>
<td>240–243</td>
</tr>
<tr>
<td>Stats. 1941</td>
<td>Page</td>
</tr>
<tr>
<td>-----------</td>
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<td>296</td>
</tr>
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<td>101</td>
</tr>
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<td>199</td>
</tr>
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<td>290</td>
</tr>
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<td>29.05 (7)</td>
<td>285-292</td>
</tr>
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<td>289</td>
</tr>
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</tr>
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<td>29.30 (2)</td>
<td>286</td>
</tr>
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<td>29.336 (2)</td>
<td>286-287</td>
</tr>
<tr>
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<td>100-103</td>
</tr>
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<td>198,201</td>
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<td>199</td>
</tr>
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<td>34.01 (5)</td>
<td>103,104</td>
</tr>
<tr>
<td>34.08 (2)</td>
<td>188</td>
</tr>
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<td>35.01</td>
<td>86-89</td>
</tr>
<tr>
<td>35.02 (2)</td>
<td>87</td>
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<td>87</td>
</tr>
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<td>97</td>
</tr>
<tr>
<td>35.42</td>
<td>87</td>
</tr>
<tr>
<td>35.44 (8)</td>
<td>89-90</td>
</tr>
<tr>
<td>35.45</td>
<td>88</td>
</tr>
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<td>35.555</td>
<td>87</td>
</tr>
<tr>
<td>39.01 (3)</td>
<td>387</td>
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<td>40.01 et seq.</td>
<td>70</td>
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<td>129</td>
</tr>
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<td>128</td>
</tr>
<tr>
<td>(4)</td>
<td>126-129</td>
</tr>
<tr>
<td>40.22 (3)</td>
<td>126,128</td>
</tr>
<tr>
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</tr>
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<td>70</td>
</tr>
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<td>127</td>
</tr>
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<td>127</td>
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<td>41.18</td>
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<td>127</td>
</tr>
<tr>
<td>41.71</td>
<td>47,48</td>
</tr>
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<td>(5)</td>
<td>47</td>
</tr>
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<td>42.33 (1)</td>
<td>297,299</td>
</tr>
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<td>(2)</td>
<td>299,301</td>
</tr>
<tr>
<td>(4)</td>
<td>299,300</td>
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<td>42.34</td>
<td>297,298</td>
</tr>
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<td>42.49 (4)</td>
<td>300</td>
</tr>
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<td>300</td>
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<td>249</td>
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<td>249</td>
</tr>
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<td>249</td>
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<td>44.01</td>
<td>88,89</td>
</tr>
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</tr>
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<td>148</td>
</tr>
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<td>(4)</td>
<td>155-156</td>
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<td>47.08 (1)</td>
<td>56</td>
</tr>
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<td>48.17</td>
<td>282</td>
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<td>48.20</td>
<td>282</td>
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</tr>
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<td>219,220</td>
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<td>54,55</td>
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<td>54,55</td>
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<td>10,11</td>
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<td>49.26</td>
<td>76,78</td>
</tr>
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<td>10-13</td>
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<td>77,78</td>
</tr>
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<td>125</td>
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<td>125</td>
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<td>123,125</td>
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<td>50.07 (3)</td>
<td>154,155</td>
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<td>50.075</td>
<td>154,155</td>
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<td>167</td>
</tr>
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<td>147</td>
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<tr>
<td>(1)</td>
<td>152-153</td>
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<td>51.11 (1)</td>
<td>167,168</td>
</tr>
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<td>147</td>
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<tr>
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<td>148-149</td>
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<td>234</td>
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<td>228,229</td>
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<td>171,172</td>
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<td>171,172</td>
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<td>228,233</td>
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<td>174</td>
</tr>
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<td>173-175</td>
</tr>
<tr>
<td>59.53</td>
<td>173,175</td>
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<td>175</td>
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<td>175</td>
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<tr>
<td>Stats. 1941</td>
<td>Page</td>
</tr>
<tr>
<td>------------</td>
<td>------</td>
</tr>
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<td>173-176</td>
</tr>
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<td>15</td>
</tr>
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<td>59.69 (2)</td>
<td>35-42</td>
</tr>
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<td>398</td>
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<td>17.20</td>
</tr>
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<td>70.11 (1)</td>
<td>160,161</td>
</tr>
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<td>17-20</td>
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<td>18.20</td>
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<td>18</td>
</tr>
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<td>17-21</td>
</tr>
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<td>258</td>
</tr>
<tr>
<td>74.205</td>
<td>264</td>
</tr>
<tr>
<td>75.01 (1m)</td>
<td>264</td>
</tr>
<tr>
<td>75.015</td>
<td>264</td>
</tr>
<tr>
<td>75.12 (2)</td>
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Street improvement. See Appropriations and Expenditures.
Street improvement. See Bridges and Highways.
Suit tax. See Courts.
Superintendent of schools, county. See Public Officers.
Suspended licenses. See Automobiles, law of road.

Tax collection. Set Taxation.
Tax sales. See Taxation.

**TAXATION**

**Tax sale**—no provision is made by statute for county to charge back to village tax certificate held by county and canceled by it because land was not subject to taxation 14

**Personal property tax**—corporation organized under laws of Delaware but having its principal office and place of business in this state is treated, under 70.14, for purposes of taxation of personal property tax as resident of this state 17

**Income tax**—legislation proposed by Bill 137, S., would be unconstitutional as denying equal protection of law in
TAXATION—(Continued)

violation of art. I, sec. 1, Wis. Const. and Amendment XIV, U. S. Const.; state cannot refuse to recognize gains and losses for income tax purposes resulting from condemnation of lands by federal government .......... 79

Income tax—residence for voting purposes and for tax situs of income is same ......................................................... 92

Victory Tax—funds withheld from employees under provisions of federal law by state treasurer or treasurer of governmental subdivision of state are public money within meaning of 34.01 (5) and are subject to provisions of ch. 34 ......................................................... 103

Exemption—property owned by Defense Plant Corporation is not subject to 1942 ad valorem tax ............................ 157

Platting lands for assessment—59.57 (10) specifies fee for recording assessor’s plat prepared under 70.27 (1) ......................................................... 173

Platting lands for assessment—assessor’s plat prepared under 70.27 (1) should be indexed in general index under 59.52 and in record index under 59.53; no charge may be made in addition to fee permitted by 59.57 (10) ... 173

Platting lands for assessment—city should pay full cost for recording of assessor’s plat prepared under 70.27 (1) .... 173

Personal property tax—in event of repeal of 70.13 (4), Stats. 1941, saw logs, timber, railroad ties and telegraph poles owned by nonresidents that are decked, piled or otherwise stored in assessment district during April but which on May 1 no longer are located in state would not be subject to assessment and taxation .... 189

Semiannual payment of taxes—provisions of 74.03 as amended by ch. 133, L. 1943, govern settlements by county treasurer for his collection of 1942 taxes .......... 257

Exemption—property of Federal Public Housing Authority is not subject to taxation in Wisconsin, regardless of provisions of 70.11 (1) ......................................................... 259

Tax sales—upon redemption of several parcels included in one notice of application for tax deed, 75.12 (2), Stats. 1941, requires payment of one dollar only for each notice filed and not for each parcel or certificate .... 261

Tax sales—county may not accept fifty per cent in full settlement and compromise of any and all delinquent tax certificates held by it ......................................................... 263

Tax collection—preferences under 74.03 (9) (e) and 74.031 (11) (e) include charges and taxes under 49.37 (2) and (4) ......................................................... 336

Teachers retirement. See Retirement Systems.

Ton mile tax. See Corporations, motor transportation.

Town storm and sanitary sewers. See Municipal Corporations.

TRADE REGULATION

Fermented malt beverage containing 7½% of alcohol by volume or 6.01% by weight is not taxable as intoxicating liquor under ch. 139; sale is subject to provisions of ch. 176 .......... 48

Money and interest—lenders operating under 115.07 (3a), 115.09 or ch. 214 may, upon taking or sale of property securing loans, recover necessary costs of taking and keeping such property in event of redemption by mortgagor before sale or in event of foreclosure and sale... 50
TRADE REGULATION—(Continued)

Money and interest—orders of banking commission prescribing service charges in addition to interest upon loan of money are invalid if such sum added to interest exceeds 10 per cent per annum; any bank making such charges violates provisions of 115.05 ........................................ 133

Money and interest—question of whether state banks are entitled to permit under 115.07 (3a) is one for courts; no opinion is expressed ......................... 216

Sec. 115.09 does not apply to banks; banking commission has no authority to issue license thereunder to state bank ........................................ 216

Notary—provisions of 137.01 (4) and (5) are not applicable to form prepared and furnished under 69.06 (1) by state registrar of vital statistics for delayed registration of births under 69.22; such form does not require that date of expiration of notary’s commission be included in jurat .................. 415

TUBERCULOSIS SANATORIUMS

Milwaukee county is not entitled to state aid under 50.07 (3) or to full payment by state under 50.075 under circumstances set forth notwithstanding supervision of medical and nursing care by head of county sanatorium and designation of section of county hospital as unit of county sanatorium by resolution of county board of public welfare ........................................ 154

Milwaukee county is not entitled to state aid under 50.07 (3) or to full payment by state under 50.075 for patients removed from county tuberculosis sanatorium to county hospital for special care during time such patients are absent from sanatorium .......... 154

Tuition. See School Districts.

UNIFORM ADMINISTRATION PROCEDURE

Requirements of 227.03 interpreted and applied ................. 359

Vacancies. See Public Officers.
Veterans recognition board. See Public Officers.
Victory tax. See Taxation.
Vocational education. See Education.
Vocational and adult education. See Education.

WEIGHTS AND MEASURES

Standard bottles—98.12 limits milk bottles to those sizes specified therein and is constitutional ............ 141

Standard bottles—Bill No. 609, A., to amend 98.12 so one-gallon milk bottles can be used in Milwaukee county is invalid .................................................. 141

Winery licenses. See Intoxicating Liquors.
Wisconsin general hospital. See Public Health.

WISCONSIN STATUTES

Ch. 273, L. 1943, repealing and recreating ch. 153, optometry statutes, does not abolish present board of examiners ........................................ 213
Nonresident—in 70.13 means nonresident of state ............ 17
Terms "own" and "owner" when used in statutes have no technical meaning; may be satisfied by less than absolute and entire ownership; must be construed with reference to object sought to be reached by statute ....... 35
Term "owner" as used in safe-place statutes is defined by 101.01 (13) as including person having ownership, custody and control, but mere legal title to public building is not sufficient to fix liability for personal injuries caused by failure to conform to requirements of statute 35
Domestic animals—rabbit of variety not found in wild state, developed and used by man for purposes of food is domestic animal within meaning of 174.11 ............... 61
Words "grain", "vegetable" and "fruit" as used in 176.60 include sugar cane .......................... 438