

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. XXXIII

January 1, 1944, through December 31, 1944

JOHN E. MARTIN
Attorney General



MADISON, WISCONSIN
1944

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1944

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

Genevafrom Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madisonfrom Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point..from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkoshfrom Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bayfrom Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukeefrom Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, 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 Pointfrom Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend..from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK,

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

Neillsvillefrom Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madisonfrom Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT,

Richland Centerfrom Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock ..from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudsonfrom Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobelfrom Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee..from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, 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, Milwaukeefrom Jan. 2, 1939, to

ATTORNEY GENERAL'S OFFICE

JOHN E. MARTIN	Attorney General
JAMES WARD RECTOR	Deputy Attorney General
MORTIMER LEVITAN	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
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W. E. TORKELSON	Assistant Attorney General
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MYRON L. SILVER*	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
EARL SACHSE	Law Examiner

*On military leave.

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Trade Regulation — Real Estate Brokers' Board — Words and Phrases — Real Estate Broker — Persons who purchase unimproved lots and sell the same to the public after making improvements thereon come within the definition of "real estate broker" contained in sec. 136.01 (2) (b), Stats.

January 3, 1944.

WILLIAM DOLL, *Acting Secretary,*
Real Estate Brokers' Board.

You have inquired whether persons who acquire unimproved lots and who sell the same to the public after erecting residences thereon come within the purview of sec. 136.01 (2) (b), Wis. Stats., which defines a real estate broker as a person, firm or corporation

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

This definition does not exclude from its scope those who improve their own property before selling it.

As was pointed out in *State ex rel. Green v. Clark*, (1940) 235 Wis. 628, the purpose of the statute is the protection of the public, and the same reasons for protecting the public exist in the case of one who is engaged in the

business of selling his own real estate as if he were engaged only in selling the real estate of others. Likewise, the same reasons for protecting the public exist where the person engaged in the selling of his own real estate has improved the same. If anything, the opportunities for fraud on the public are even more likely to be present in the sale of improved property than they are in the case of unimproved property.

Our statutes relating to real estate brokers are very broad. *Livingston v. Linker Realty Co.*, (1930) 202 Wis. 232. And where the statute, under the facts as above stated, affords no exemption from its licensing provisions, none is to be allowed by the real estate brokers' board. See *State ex rel. Green v. Clark, supra*, at page 631.

WHR

Banks and Banking — Delinquent Banks — Segregated trusts created in connection with the stabilization and re-adjustment or reorganization of state banks are liable to the banking commission for services rendered by the commission in the supervision of the same, for expenses incidental thereto and for expenses of examination of such trusts.

January 3, 1944.

JAMES B. MULVA, *Chairman,*
Banking Department.

You request our opinion as to whether segregated trusts created in connection with the stabilization and readjustment or reorganization of state banks are liable to the banking commission for services and expenses of the banking commission in connection with the supervision of such trusts, including expenses for examinations. In your letter you quote certain provisions of one of the trust agreements in question.

Sec. 220.08 (19) provides that

"Segregated trusts heretofore or hereafter created in connection with the stabilization and readjustment or re-organization of a bank shall be administered and liquidated under the supervision of the banking commission and the circuit court of the county in which the bank is located."

Subsec. (b) of sec. 220.08 (19) provides:

"The administration and liquidation of such trust shall be subject to the supervision of the banking commission and as far as practicable shall be subject to the approval of the circuit court of the county wherein such bank is located in the same manner and to the same extent as is the administration of banks in liquidation under the provisions of this section."

Subsec. (c) of sec. 220.08 (19) provides:

"The banking commission shall make such examinations of the books, records and assets of such trust as it deems necessary and shall submit copies of such examinations to the trustees and to the circuit court. The cost of such examinations and the cost of the supervision rendered by the commission, which costs shall be determined by said commission, *shall be a charge against the trust and shall be paid as an expense of administration.*"

Par. 16 of the trust agreement in question as quoted in your letter contains the following:

"The Banking Commission throughout the administration of this trust shall have the same authority relative to the examination, control and supervision of said TRUSTEES, the trust assets, and books of account of said trust, as it would have in case said assets had been placed in the hands of a Deputy Commissioner of Banking for the purpose of liquidation pursuant to the provisions of the Wisconsin statutes."

Sec. 220.08 relates generally to the powers of the banking commission with respect to the liquidation of delinquent banks. In subsec. (7) thereof it is expressly provided that all expenses of supervision and liquidation are to be paid out of the funds of such closed banks, including the cost of

service rendered by the liquidation division of the banking department.

From the provisions of the statutes as quoted above, as well as from the express provisions of the trust agreement itself, it is clear that the banking commission can collect out of the assets of the trust its costs of supervision and expenses incidental thereto, including expenses for examinations.

We also call attention to the provisions of sec. 220.04 (5), which provide that the banking commission can audit segregated trusts and that the expenses of such audit shall be refunded to the banking commission by the trustees of such trusts out of the assets thereof and that such charges shall be a preferred claim against such assets until paid.

RHL

Appropriations and Expenditures — Highway Commission — Highways and Bridges — Highway commission is not bound to allocate aids by plat filed with it under provisions of sec. 20.49 (8), Stats.

Order creating town highway two rods wide cannot be collaterally attacked if it does not show on its face that it was not issued under sec. 80.13. No opinion expressed as to whether order may be collaterally attacked if it does.

Commission must consider highway as public for purposes of distributing aids under sec. 20.49 (8) if order establishing it is not open to collateral attack and is not set aside by direct attack.

January 3, 1944.

STATE HIGHWAY COMMISSION.

We have received the following request:

“A town, by formal action, presumed to lay a public highway, pursuant to the provisions of Chapter 80 of the Wisconsin Statutes, over what had theretofore been a private entrance leading from the public highway through abutting

property to the residence of the owner of such property. In such formal action the town specified the width of the highway laid out to be two rods, whereas Section 80.08 of the Statutes specifically requires a minimum width of three rods. (The driveway in question does not lead over another owner's property and therefore does not seem to be within the scope of Section 80.13 of the Statutes.)

"Will you please give us your opinion in answer to the following questions:

"1. Did the town in the action described lay out a legal public highway?

"2. Is the town eligible for aid under Section 20.49 (8) on the mileage of the highway presumed to have been laid out in this case?

"3. Considering the provisions of Section 84.01 (4) (formerly 82.02) and the introductory paragraph of Section 20.49, what responsibility is placed on the State Highway Commission in determining the amounts of the allotments to the towns, villages, and cities pursuant to Section 20.49 (8)?

"4. Is the State Highway Commission required to make the allotment provided by Section 20.49 (8) on every mile of road or street shown as claimed for such allotment on the plats filed by the towns, villages, and cities, even though the Commission, from information in its possession, is convinced that some of such roads claimed as eligible for mileage aid are not public highways?"

Sec. 20.49, Stats., provides for an appropriation to the state highway commission of certain revenues and for allocation to local units of government for highway purposes of a portion of the appropriation. The allocation to towns for highway improvements is covered by subsec. (8) which, so far as relevant, reads:

"Annually, on March 10, 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, * * * the following sums: Each town * * * shall receive for each mile of such road or street, the sum of \$65; * * * The board of every town and village, and the council of every city, shall file with the commission and with the county clerk, a correct plat of their respective towns, villages and cities showing the mileage of roads and streets open and used for travel. In computing the mileage, the lengths included in road and street intersections shall not be included more than once. * * *"

The question which underlies all other questions in the request is whether or not the state highway commission may look beyond the plat filed with it by a town and determine for itself the mileage of public highways which are open and used for travel. If it cannot look beyond the plat, then of course it is concluded by the mileage shown on the plat and the other questions become immaterial.

We are of the opinion that the highway commission may look beyond the plat. The statute provides that the distribution shall be made upon the basis of public highways open and used for travel. While it is contemplated that a plat showing such highways shall be filed with the commission for its assistance in determining such mileage, there is no provision that the commission shall be bound by the plat. The commission undoubtedly would be justified in accepting the plat as correct, but there is nothing in the statute which requires it to do so. The fact that there is no such requirement and the fact that the allocation is to be made upon the basis of public highways open and used for travel would indicate that the matter must rest upon a finding of fact as to those highways which come within the statutory language. The commission, being vested with the duty of making the allocation, is the body which must determine the facts with respect to the amount to be apportioned to any town.

The width of town roads is covered by secs. 80.08 and 80.13, although there may of course be town roads which become such by user, in which case the width depends upon the extent of the user. Sec. 80.13 provides for laying out public highways not less than two nor more than three rods in width in certain cases where a land owner is excluded from a public highway. Sec. 80.08 provides that in other cases highways shall be laid out at least three rods wide and that when no width is specified in the order laying them out, they shall be four rods wide.

In the case which you put it is necessarily assumed that the order laying out the highway specifies the width at two rods. If, as you state, it was not laid out under the provisions of sec. 80.13, the action of the town board was improper in that the order should have specified at least three rods instead of two. We do not have the papers before us

and we cannot speculate on just what recitation may be included within the town board's order. Unless the order shows on its face that it was not made pursuant to the provisions of sec. 80.13, the matter would be concluded by sec. 80.34 which provides that an order fair on its face is not subject to collateral attack. Highways of two rods in width may be legally laid out under the provisions of sec. 80.13 and any order laying out a highway of two rods in width would not be erroneous on its face unless it also shows that it was not laid out under the provisions of that section but instead was laid out under those sections which require that it be at least three rods in width.

If an order laying out a highway is not subject to collateral attack, then of course the commission would be bound by the order, however erroneous it might be. If the order in the case you have in mind does not affirmatively show that the highway was not laid out under the provisions of sec. 80.13, then the commission may not look beyond the order itself and must take the highway into consideration in distributing aids unless the order is directly attacked and set aside.

If the order were to show on its face that the road was not laid out in accordance with the provisions of sec. 80.13, a different question would be presented. It might be argued that the town authorities had acted contrary to statute in laying out a highway of less than the required width and that their action was ineffectual to lay out a public highway. On the other hand, there is language in *State ex rel. Thompson v. Eggen*, 206 Wis. 651, which would indicate that irrespective of statute and under general principles of administrative law such a variance in width would constitute an error which could be corrected by a direct proceeding but which would not be open to collateral attack. The question is not an easy one and we would prefer not to spend the time required to answer it correctly unless it is necessary. It would not be necessary unless an order laying out a two-rod highway showed on its face that it was not made pursuant to the provisions of sec. 80.13. We therefore suggest that if you have a question about any of these roads, you obtain copies of the orders laying them out and

determine whether any of them show on their face that action was not taken pursuant to sec. 80.13. If they do not, the question is academic.

JWR

Cities — Aldermen — Salaries and Wages — Sec. 66.526, Stats., applies to aldermen as city officials. No other statutory provision or provision of the constitution qualifies sec. 66.526 to preclude aldermen from changing their salaries according to its provisions.

January 20, 1944.

THE HONORABLE, THE ASSEMBLY

You have requested our opinion upon the following:

1. Does section 66.526, Wis. Stats., apply to the salaries of aldermen?
2. If section 66.526, Wis. Stats., does apply to the salaries of aldermen, can the aldermen validly take action to apply the provisions thereof to their own salaries during their term in office?

The section reads:

“Notwithstanding any provision of law to the contrary, the common council of any city of the first class, however incorporated, may at any meeting, regular or special, in any year introduce and pass ordinances fixing and changing the salaries and rates of pay of any city officials and employes and compensating for overtime of employes worked in excess of 40 hours per week, and may at such times in its discretion provide for a salary increment based on living costs as indicated by the findings of the United States Bureau of Labor statistics, or an equally recognized authority. This section shall be in effect only for the duration of the present war between the United States and her enemies and for 6 months after the termination thereof as proclaimed by Congress or by the President.”

By comparison, sec. 66.525, Wis. Stats., reads:

“Notwithstanding any other provision of law to the contrary, the governing body of any town, city or village at any time following June 4, 1943, may increase during his term of office the salary of any town, city or village officer, except that this section shall not be applicable to the salary of any member of the governing body of such town, city or village, including the chairman, president or mayor. This section shall be effective only for the duration of the present war between the United States and her enemies and for 6 months after the termination thereof as proclaimed by Congress or the President.”

It is noted that sec. 66.525 applies generally to any city officer, but members of the governing body of a city such as members of the common council are specifically excepted. It is obviously the view of the legislature that in the absence of such a specific exception a member of a common council would be included within the term “any city officer”. This legislative interpretation only makes clear that which would otherwise be true, namely that a member of a common council is a city officer.

Sec. 66.526 applies to “any city officials and employes”, and since there is no exception in the case of council members as there is in sec. 66.525, they must be considered as included within the provisions of the section.

We may point out incidentally that sec. 62.09 (6) (b) prohibits a change in the salaries of city officials of the second, third and fourth classes during their terms of office. The provision is not applicable to the city of Milwaukee. See sec. 62.03, Stats. It was necessary to enact sec. 66.525 permitting increases in the salaries of city officials during their terms in order to escape the prohibitions of sec. 62.09 (6) (b). But since the prohibition did not apply to the city of Milwaukee the act suspending the prohibition could have no relation to the city of Milwaukee. The only relevant provision with which we are familiar which applied to salaries in Milwaukee prior to the enactment of sec. 66.526 was sec. 22.01 Milwaukee City Charter (1934) which reads:

“The Common Council of the City of Milwaukee may at any time within four months prior to the first day of De-

ember of any year, introduce and pass ordinances fixing and changing the salaries of any city officials and employes, the ordinances to go into effect on the first day of January thereafter; provided, however, that the salaries of elective officials having a definite term of office may be changed by ordinance at any time, but not oftener than once during any term and provided, further, that the salary of no elective or appointive officer shall be reduced or diminished during the term for which he was elected or appointed.

"It shall require a two thirds vote of the aldermen-elect to pass an ordinance increasing the salaries of elective officials during their term of office."

This opinion has been hastily prepared and we have been unable to determine in the short time at our disposal as to whether the above quoted charter ordinance was amended subsequent to the time of publication of the Milwaukee city charter from which its provisions are quoted. If the provision has not been amended, the salaries of Milwaukee aldermen could be increased once during their term by a vote of two-thirds of the members elected to the common council even without the enactment of sec. 66.526.

The foregoing covers the questions submitted except for the additional statement that sec. 66.526 applies to aldermen by its terms and there is no other provision of law with which we are familiar which would so modify its provisions as to preclude aldermen from increasing their salaries during their term of office.

JWR

Public Lands — Under sec. 28.20 (2) (a), Stats., there is no duty on the part of either the state or the county to reimburse the federal government for profits made by a county on the sale of county-owned lands improved by CCC labor.

January 25, 1944.

E. J. VANDERWALL, *Conservation Director*,
Conservation Department.

You have called our attention to the fact that in 1933 when the Civilian Conservation Corps program was inaugurated by the federal government the following telegram was sent to the then governor of Wisconsin by the director of the CCC. This telegram read in part as follows:

“Before approving emergency conservation work projects on state county and municipally-owned land President desires assurance that you will urge the State legislature if now in session or if not at its next succeeding session to enact legislation providing that ‘if as a result of the work done the state derives a direct profit from the sale of the land or its products the proceeds will be divided equally between the state and the federal government until the state shall have paid for the work done at the rate of one dollar per man per day for the time spent on the projects subject to a maximum of three dollars per acre.’”

Thereafter the Wisconsin legislature enacted sec. 28.20 of the statutes which provides in part:

“(1) The governor in the name and on behalf of the state of Wisconsin is authorized to enter into such contracts or agreements with the president of the United States as the president may deem necessary or advisable in carrying out the provisions of an act of congress entitled ‘An act for the relief of unemployment through the performance of useful public work, and for other purposes,’ approved March 31, 1933, and any other act of congress amendatory thereof or supplementary thereto.

“(2) Such contracts or agreements may include the following conditions and provisions which the state of Wisconsin hereby accepts, agrees to and promises to perform:

“(a) If, as a result of any conservation work projects on state, county or municipally owned land the state derives a direct profit from the sale of any such land or the products thereof, the proceeds shall be divided equally between this state and the federal government until the federal government has been repaid the amount of its investment in such work, computed at the rate of one dollar per man per day, with a maximum limitation of three dollars per acre of land purchased.”

Forestry work by CCC camps was subsequently performed in many counties of the state. One of these counties contemplates selling at public auction some 44,000 acres of county forest lands upon which improvements were made by the CCC.

You inquire, first, whether by virtue of the above telegram and statute the county is legally bound to make any payment to the federal government for the improvements in question in the event the lands are sold, and secondly, to what measure, if any, is the state obligated to the federal government in case the county sells these lands.

It seems very clear under the wording of sec. 28.20 (2) (a), quoted above, that the provision relating to division of profits is operative only “If * * * the state derives a direct profit from the sale of any such land or the products thereof, * * *.” We do not understand that the state has or claims to have any interest in the lands in question or that it will derive any profit on the sale thereof, either directly or indirectly.

These lands are wholly owned by the county and the wording of the statute places no obligation on the county in any event.

Thus, both of your questions are answered in the negative.

We are not advised as to what agreement or contract, if any, was entered into between the federal government and the county and therefore express no opinion as to the county's liability except as indicated under the above statute.

WHR

Adoption — Consent of the state department of public welfare is a condition precedent to a valid order of adoption of an infant orphan. If the permanent care and custody of such orphan has been transferred to a licensed child welfare agency or a county home for dependent children then the county court shall obtain consent of such agency or county home before making the order of adoption.

January 25, 1944.

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

Is consent of state department of public welfare necessary in an adoption of an orphan child under sec. 322.04 of the statutes?

The request for opinion is based upon a ruling of a county court wherein a petition for adoption was pending. The court held that refusal of the state department of public welfare to give its consent did not deprive the county court of the power to hear the petition. We infer that the court was under the impression that at the conclusion of the hearing it could make a valid order of adoption without consent from any person or agency. It appears from the county court's opinion that the custody of the child was in a private child welfare agency.

Since this child is an orphan, sec. 322.04 (3), Stats., is applicable. The significant portions of that section are as follows:

“If such child has no living parent * * * adoption shall be permitted on consent of the state department of public welfare or if the permanent care, custody or guardianship of such child has been transferred by a juvenile or other court of competent jurisdiction to a licensed child welfare agency or to a county home for dependent children, then on the consent of such agency or home. * * *”

The county court's opinion seems to indicate that the “temporary custody” of the child had been awarded to the child welfare agency. In such a state of facts, consent of

the agency is ineffectual because the statutes refer to such consent only where the "permanent custody" has been transferred to such agency. Therefore, in this situation, the adoption shall be permitted on consent of the state department of public welfare.

Sec. 322.05, Stats., provides:

"If, after the hearing and the written consent of the persons whose consent to adoption is necessary, * * * and that all legal requirements relative to adoption have been complied with, then the court shall make an order that from and after the date thereof such child be deemed to all legal intents and purposes the child of the petitioners.
* * *

This section seems to clearly require consent as a condition precedent to a valid order of adoption. The county judge in his opinion indicates that consent from the state department of public welfare is being claimed by the department as a prerequisite of the court assuming jurisdiction of an adoption matter. He also refers to the court's freedom to reject the recommendations based upon the investigation. Sec. 322.01 provides that any adult inhabitant of the state may petition the court for leave to adopt a child. Sec. 322.02 provides for an investigation before the hearing. The statutes are silent as to whether the court shall follow the recommendations of the investigator. The statutes are explicit, however, that consent of the parents or of some agency standing in *loco parentis* must be obtained before the adoption is ordered (sec. 322.04). The provisions as to "investigation" and "consent" are not to be confused. The county judge need not accept the findings of the investigator. Suppose such investigation is favorable and the agency making the same recommends adoption. The court need not follow such recommendations—the judge may still feel that the adoption would be unwise. The child welfare agency obviously cannot impose its will on the court. But if the court favors a particular adoption, and the agency whose consent is necessary refuses to give such consent, the court may not go ahead and grant adoption anyway. To that extent only is the court's power limited. The purpose of requiring the consent of an agency or de-

partment is to protect the interests of the child. Hasty adoptions should be avoided. The legislature carefully considered the children's code (of which ch. 322 is a part) at the time of its adoption in 1929. The sections of ch. 322 relating to investigation and consent were radically changed, and the legislative intent is clear. The present statutes leave broad power in the courts and the final order of adoption is distinctly a prerogative of the judge, but no valid order may be made unless the necessary consent is obtained.

ES

Automobiles — Auto Registration — The Hercules Powder Company is not exempt from the duty to comply with sec. 85.01, Stats., prohibiting the operation of the motor vehicles therein enumerated unless the same are registered and the prescribed fees paid.

January 27, 1944.

B. L. MARCUS, *Acting Commissioner,*
Motor Vehicle Department.

You inquire whether the Hercules Powder Company, as lessee-operator of the Badger Ordnance Works at Baraboo under a cost-plus contract entered into with the United States government, is obliged to comply with the license or registration requirements of sec. 85.01, Wis. Stats., with respect to motor vehicle equipment operated by it on Wisconsin public highways.

Pursuant to your request we communicated directly with the representatives of the Hercules Powder Company relative to the factual basis of their claim of exemption from the terms and provisions of that statute.

The motor vehicle equipment is part of the property leased to the company by the government, and consists principally of buses used for transportation of employes

between the plant and the communities where they reside. The Hercules Powder Company is a private corporation organized for profit. It is suggested by the company that because the cost of registration fees would have to be included in a statement of its operating costs and passed on to and ultimately paid by the United States government when the company's accounts are settled under the cost-plus contract, the effect would be the taxation of government property, or the instrumentalities which it uses to discharge its constitutional functions. The company's representatives requested that if we concluded it was legally bound to pay the registration fees, such means of enforcement be used as would avoid interruption of the bus service furnished to their employes. They agreed to furnish a full description of all vehicles operated and a statement of the nature of such operations.

The statute involved, so far as applicable, provides:

"85.01 (1) No automobile, motor truck, motor delivery wagon, bus, motor cycle or other similar motor vehicle or trailer or semitrailer used in connection therewith, shall be operated upon any highway unless the same shall have been registered in the office of the motor vehicle department, and the registration fee paid. * * * The provisions of this subsection shall not apply to any motor vehicle while being operated by any dealer or distributor, in accordance with the provisions of section 85.02, nor to any motor vehicle while being operated by any private person within a period of 10 days from the date of purchase of such vehicle by such private person, provided that application for registration has been made, or to any vehicle displaying official permit issued by the motor vehicle department. * * *"

No exception or exemption appears in the text of the statute which would excuse the Hercules Powder Company from compliance under the circumstances described. Application of the maxim, "*Expressio unius est exclusio alterius*" compels the conclusion that the operator of the vehicles, i. e., the Hercules Powder Company, must comply therewith.

Any claimed exemption must therefore be based on either a federal statute or case law construing constitutional provisions which might be contended to be applicable.

The closest case in point of fact in which the principles contended for by the Hercules Powder Company were considered is *State v. Wiles*, 116 Wash. 387, 199 P. 749, 18 A.L.R. 1163. There appellant contracted to transport United States mail for certain considerations. He used trucks exclusively for the purpose of fulfilling his contract of carriage with the government. He was arrested, found guilty and fined for violating a statute similar to the Wisconsin statute in that it prohibited the *operation* of a motor vehicle on the public highways without first obtaining a license therefor. On his appeal the contentions were made that the license fee constituted a tax, the effect of which hindered the United States government in its constitutional right to carry its mails in any manner it may see fit; and that in the use of his trucks appellant was performing a governmental duty; that he was an instrumentality selected by the federal government to carry out its constitutional duty of carrying the mail. The precise argument offered by the Hercules Powder Company was advanced in that case:

“* * * Since he is doing for the government what it might do for itself, to impose a tax on him would be in fact to impose it on the government, because any private person carrying the mail must require the government to pay him an additional amount equal to any such taxation as he might be required to pay.”

The cases cited in support of appellant's contentions were rejected by the Washington supreme court and held to be inapplicable to the facts involved in the appeal. The element of ownership of the vehicle in question was not considered, since the statute was addressed to the operation of motor vehicles on the public highways of that state.

Respondent accordingly contended that a license fee is merely a tax imposed on the right to operate a motor truck on the public highways, and not a tax imposed on the right to carry the United States mail; that the state has sole control of its roads and highways; that the agents of the United States are amenable to the reasonable rules and regulations governing the use of such highways; and that the immunity of the federal government from state taxation is

not negotiable to the extent that it can transfer such immunity to every person who contracts with it to do any act for the furtherance of governmental business.

In a somewhat exhaustive analysis of the question the court said, among other things:

“A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state.”

The court quoted from the case of *Fidelity and Deposit Company v. Pennsylvania*, 240 U. S. 319, 60 L. ed. 664, 36 S. Ct. 298, to the following effect:

“* * * But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies, and confer freedom from state control * * *”

A helpful precedent is the case of *Ex parte Marshall*, 75 Fla. 97, 77 S. 869, which arose during World War I. A military encampment of United States soldiers was located near Jacksonville, Florida. The officer in charge of the camp, pursuant to proper authority, made a contract with one Marshall for the transportation by motor bus of soldiers from the camp to the city of Jacksonville upon certain terms and conditions. He was arrested for not complying with the state law imposing a license tax similar to that involved here. He defended on the ground that he was engaged in the business of the United States government. The court held that in all of the cases cited by petitioner a license tax was sought to be imposed by a state, county or municipality upon the right to do business either by a bank, railroad company or a telegraph company that had been chartered, and had been granted its franchise and right to do business by the Congress of the United States, and in all of them it was held such a license tax was invalid as an invasion of rights properly granted by the federal government. The Florida supreme court held such cases to be wholly inapplicable to the case before it. (The cases were

the same as cited in *State v. Wiles*, the Washington case, supra, which were likewise rejected by the Washington court.)

We have found no federal statute upon the subject of inquiry here.

Due consideration of all phases of the situation compels the following conclusions and recommendations as to procedure:

1. The Hercules Powder Company is not exempt from the duty to comply with sec. 85.01, Stats., prohibiting the operation of the motor vehicles therein enumerated unless the same are registered and the prescribed fees paid.

2. The further operation without registration being illegal, you should indicate to the company by letter that the customary means employed to enforce this statute is arrest for violation of the statute, and that you are duty bound to pursue such means of enforcement. The company, upon receipt of such notification, will be thereby enabled to pay the fees under duress and protest, and thus preserve the right to sue for recovery of same if it continues to disagree on the question of its legal liability.

3. This opinion involves the same consideration of authorities and discussion of principles as are involved in the question you posed as to liability of War Hemp Industries, Inc. for registration fees for motor vehicles operated by that firm. The ruling here is decisive of that question and the recommended treatment is the same.

SGH

Retirement Systems — Conservation Warden — Under sec. 23.14 (9), Stats., conservation warden's pension is fixed at a sum equal to one-half of his monthly salary at the date of retirement, and for purposes of computing such salary there should be included the monthly so-called "cost of living" bonus provided as an emergency salary raise for the duration of the war by ch. 25, Laws 1943, which created sec. 14.71 (1n) and sec. 20.07 (16), Stats.

The amount of the pension is dependent upon total salary received at date of retirement and changes in salary range of a particular classification subsequent to retirement date do not affect the amount of the pension.

January 31, 1944.

WM. A. OZBURN, *Secretary,*
Board of Trustees,
Conservation Department.

You have called our attention to sec. 23.14 providing for a conservation warden pension fund and particularly to subsec. (9) thereof which provides among other things that if any conservation warden retires after having served twenty years or more the board of trustees of the fund shall order that such member be paid a pension monthly of a sum equal to one-half of his monthly salary at the date of his retirement.

Under ch. 25, Laws 1943, which created sec. 14.71 (1n) and sec. 20.07 (16), Stats., provision is made for payment of a monthly bonus in addition to salary without restriction or limitation by reason of the maximum salary range for any particular classification. It had been found that the state was handicapped in the competitive labor market because of the comparatively low salary schedules set up for certain classifications and that to maintain proper morale and to eliminate excessive personnel turnover something in the nature of additional compensation for the emergency war period was necessary. (See title to ch. 25, Laws 1943 and sec. 14.71 (1n) (a)).

Some wardens are retiring at the present time when the above bonus system is in effect and you have inquired

whether the amount of their pensions under sec. 23.14 (9) is to be computed as one-half of the salary provided for in the classification for the position or whether it is to be computed by taking one-half of the salary plus the bonus.

As we see it, the effect of the bonus is a temporary salary increase for the emergency war period, and it is immaterial whether you call the compensation received a salary or a salary plus a bonus. The bonus must be considered as part of the salary which has been earned by an employe. If it is not compensation for services rendered, it is a gift, and if it is a gift the payment would be unconstitutional as not being for a public purpose. (For discussion of this principle see *State ex rel. Atwood v. Johnson*, 170 Wis. 218 and 251. See also *State ex rel. Wis. Dev. Authority v. Dammann*, 228 Wis. 147.)

With respect to wardens who retire while ch. 25, Laws 1943, is in effect you also inquire if any change as to pensions will be necessitated after the war when the bonus payments will automatically be discontinued in accordance with the provisions of ch. 25.

As to wardens presently retiring it is immaterial that the temporary raises now in effect will be discontinued after the war. Under sec. 23.14 (9) it is the salary at the date of retirement which governs the amount of the pension. The salary range for the position in question may thereafter be increased or decreased or may remain the same, but this cannot have any effect whatsoever as to pension rights which have become fixed under the statute at an amount equal to one-half of the monthly salary at the date of retirement.

The answers to the foregoing questions make it unnecessary to consider the third question which you have raised.

WHR

Juvenile Court — Clerk — Clerk of county court designated as juvenile court appointed under provisions of sec. 48.01 (4), Wis. Stats., may be dismissed at the pleasure of the court.

February 15, 1944.

ELMER R. HONKAMP,
District Attorney,
Appleton, Wisconsin.

This is in response to your letter of February 11.

You have raised the question as to whether the county judge is authorized to dismiss a clerk employed in his office for any cause which he considers sufficient or at his pleasure. You point out that the county board has adopted a resolution providing that all county employes may be removed for cause only and that the executive committee of the county board shall determine as to whether cause exists.

The clerk is apparently appointed according to the provisions of sec. 48.01 (4), Wis. Stats., which provides that in counties containing a city of the third class the court designated as a juvenile court may appoint a clerk where there is no clerk other than the register in probate.

The power to appoint given by the statute implies the power to remove at pleasure. *Richmond v. Lodi*, 227 Wis. 23. It is therefore our opinion that the statute granting the county court the authority to appoint a clerk implies authority to dismiss the clerk at the pleasure of the court.

JWR

Retirement Systems — Wisconsin Municipal Retirement Fund — Firemen's Pension Fund — Where a city which is a participating municipality under sec. 66.90, pays the full salary of a participating employe who works half time for the city and half time for the county, and is reimbursed by the county for one-half of said salary, the normal employe's contribution should be based upon the net salary rather than the gross salary paid by the city.*

If said employe retires as a city employe under sec. 66.90 but continues to work for the county, such employe would not be prevented from receiving his retirement annuity because of 66.90 (10) (c).

Sec. 21.70 (2) does not require participating municipality, under 66.90, to calculate and make payments upon contingent liability for municipality contributions for former employe now in armed forces, until such employe is restored to his former position or a similar one.

Where a city has two persons employed full time for fire inspections, repair work on fire equipment and answering fire calls, such city has a paid fire department, and, under 62.13 (10), must have a firemen's pension fund; said employes are not eligible for inclusion in the Wisconsin municipal retirement fund.

February 16, 1944.

FREDERICK N. MACMILLIN, *Executive Director,*
Wisconsin Municipal Retirement Fund,
Madison, 3, Wisconsin.

You request the opinion of this office upon several questions raised in connection with the administration of the Wisconsin municipal retirement fund. One of the cities, which is a participating municipality under said fund, carries on its pay roll an employe who divides his time equally between the city and the county. However, because of an arrangement between the city and the county, the city pays the employe for the time which he devotes to both the city and the county and, in turn, the city is reimbursed by the county for fifty per cent of the money so paid. You inquire

*See also opinion page 65 of this volume.

whether the normal employe's contribution should be based upon the employe's gross salary as carried on the city pay roll or upon the net amount actually paid by the city.

Sec. 66.90 (6) (a) and 66.90 (3) (i) provide:

"(6) (a) Each participating employe shall make contributions to the fund as follows:

"1. Normal contributions of 5 per cent of each payment of earnings paid to any such employe by any participating municipality. * * *"

"(3) (i) *Earnings*. An amount equal to the sum of:

"1. The total amount of money paid on a regular pay roll by a municipality to an employe for personal services rendered to such municipality * * *"

Since, under the above arrangement, only fifty per cent of the money paid to the employe by the city, is paid for "personal services rendered to such municipality," the normal employe's contribution should be based upon the net rather than gross amount of money paid to the employe by the city.

You next inquire whether sec. 66.90 (10) (c) would in any way affect this employe in the event that he retired as a city employe but continued to work for the county. Section 66.90 (10) (c) provides:

"Notwithstanding the fact that any annuity is payable for life, if any annuitant receiving a retirement annuity again becomes an employe of any municipality in the state of Wisconsin or of the state itself the annuity payable to such employe at that time shall be terminated as of the end of the month prior to the date upon which such person again becomes an employe."

Sec. 66.90 (3) (b) provides:

"*Municipality*. Any city, or village now existing or hereafter created within the state; * * *"

Since a county is not included within the definition of a "municipality" as used in sec. 66.90, the retirement of said employe by the city and the receipt of his retirement annuity would not be affected by sec. 66.90 (10) (c).

You next inquire concerning the determination and payment of contributions which a municipality may eventually have to make to cover employes now serving in the armed forces. Section 21.70 (1) provides that any person who has enlisted, or enlists, or has been, or is, inducted into active service in the land or naval forces of the United States pursuant to various acts of congress and who, in order to perform his duties, leaves a permanent position in the employ of the state of Wisconsin or any political subdivision thereof, shall be restored to such position or to a position of like seniority, pay and salary advancement as though his services toward seniority, pay or salary advancement had not been interrupted by military service, provided several specified qualifications are met. Sec. 21.70 (2) provides:

“The service of any person who is restored to a position in accordance with subsection (1) hereof shall be deemed not to be interrupted by such leave, except for the receipt of pay or other compensation for the period of such absence, and he shall be entitled to participate in insurance, pensions, or other benefits offered by the employer pursuant to established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time such person entered or was enlisted, inducted or ordered into such forces and service, * * * Each county, town, city or village shall contribute or pay from September 16, 1940 all contributions of the employer to the applicable and existent pension, annuity, or retirement system as though the service of any such employe had not been interrupted by such military service, provided that in the case of teachers such payment shall be made as provided in sections 38.24, 71.26 and chapter 42.”

The words “the service of any such employe,” as used in the last sentence of the foregoing statute, could only apply to a “person who is restored to a position” and hence there is no duty on the part of the participating municipality to make contributions at this time on behalf of former full-time employes who are still in military service. For one reason or another, many of the former employes of a municipality will not return to municipal service, and it would be difficult, if not impossible, at this time to accurately calculate and pay the municipality contributions which event-

ually may have to be paid for a former employe who does return to a position. Sec. 66.90 (8) appears to be sufficiently broad to permit a participating municipality to calculate and pay the contributions which will be required of it by Sec. 21.70 for a former employe who does return to a position with such municipality.

Lastly, you state that a certain fourth class city

“does not maintain a paid fire department but has for years had a volunteer fire department as provided in the statutes. Several years ago, however, it was thought advisable to hire two men, working on alternate shifts, to be on duty to receive calls and to drive and maintain the equipment. These men at that time were also sworn in as police officers and performed work of that nature. As time passed, they were relieved of their police officer duties, confining their work to inspections for fire hazards, repair work on the trucks and equipment and being on duty awaiting fire calls. Their work pertaining to the fire department has been under the supervision of the chief of the volunteer fire department.”

You inquire whether the provisions of Sec. 62.13 (10), paragraphs (a) and (f), prohibit these two employes from being included under the Wisconsin municipal retirement fund.

Sec. 62.13 (10) pars. (a) and (f) provide:

“(a) Each city having a paid fire department shall have a firemen’s pension fund. * * *

“(f) Each city of the fourth class shall install a pension system for full-time firemen pursuant to this subsection, unless the common council shall adopt a pension plan for such firemen in the same manner as provided for policemen by section 62.13 (9) (e).”

Sec. 66.90 (3) (e) 2, excepts from the definition of employe, as used in the Wisconsin municipal retirement fund law, persons “who are or may be included within any * * * firemen’s pension fund by virtue of * * * section 62.13 * * * (10).”

In XXV Op. Atty. Gen. 102 it was held that Sec. 62.13 (10) (a) makes it mandatory for cities which have a paid

fire department to have a firemen's pension fund. The statement of facts in that opinion was as follows:

"In a number of Wisconsin cities are fire departments, in which two, four or more members are hired and paid for full time service as firemen, while other members of the same fire departments are volunteers or call-men, rendering fire department service only at times of fires, on special call by the chief of the fire department or by regular established fire alarm system, and are paid only for such occasional fire service."

The opinion held:

" * * * Your statement of facts clearly indicates that the cities in question have paid fire departments. * * *"

See also: *Continental Hose Company No. 1 vs. City of Fargo*, 17 N. D. 5, 114 N. W. 834, and *Seavert vs. Cooper*, 187 Ia. 1109, 175 N. W. 19. The first of these two cases holds that a volunteer fireman who is paid for such services as he may render may properly be classified as a paid fireman. The second case, while apparently taking some issue with the first case, does hold: "We are of the opinion that a paid fire department is one to which the members devote their time and services and are paid a regular salary." (p. 22).

From your statement of facts it appears that at least two men are regularly paid for services as firemen. In our opinion the city in question has a paid fire department and is obliged to maintain a firemen's pension system under sec. 62.13 (10). Further, it is our opinion that in such a case it is the intention of sec. 66.90 (3) (e) 2, that the two employes in question should be excluded from the Wisconsin municipal retirement fund.

JRW

Poor Relief — Legal Settlement — Recipient of old-age assistance has not been supported as a pauper within the meaning of sec. 49.02 (4), Stats., until he has received such support.

February 16, 1944.

EARL F. KILEEN,
Acting District Attorney,
Wautoma, Wisconsin.

You recently requested an opinion regarding the legal settlement of one Mr. T. who had lived in Waupaca county but later moved to Waushara county where he made application for old-age assistance. We are advised by the state department of public welfare that the question of legal settlement is important in this case because the recipient is in need of medical attention and it is necessary to determine which of the two counties is liable for such expenditures.

According to the facts you gave us Mr. T. had a legal settlement in the town of Dayton, Waupaca county, from 1885 to April 1, 1942. He received old-age assistance from January 1, 1938 to April 1, 1940, the aid being discontinued by Waupaca county on the latter date. On July 21, 1941 the county reopened his case and granted assistance until February 1, 1942 when it was determined that he had sufficient money on hand to take care of his own needs. Mr. T. made a new application on March 14, 1942 and this was rejected because he still had sufficient funds on hand.

On April 1, 1942 Mr. T. moved to the village of Wild Rose, Waushara county and presumably has resided there ever since. On September 16, 1942 he applied for old-age assistance in the latter county. No action was taken on this request. He again applied on December 9, 1942 but was refused because he had assets which could be liquidated and applied to his living expenses. The Waushara county administrator advised Mr. T. to return in March, 1943 at which time his funds would presumably be exhausted. On March 11, 1943 Mr. T. did apply again and his application was approved and the order granting assistance was signed on March 25, 1943 to be effective from March 1, 1943. Appar-

ently the purpose of making the order retroactive was to enable him to pay a bill for room and board which had accrued during the month of March. On March 31, 1943 the check was mailed to Mr. T. and he received it on April 1st.

The question is, at what time did Mr. T. become a pauper supported within the village of Wild Rose, Waushara county, within the meaning of sec. 49.02 (4), Stats.

We believe the facts in this case are controlled by the rule laid down in *Sheboygan County v. Sheboygan Falls*, (1906) 130 Wis. 93, 95, 109 N. W. 1030. The court in discussing the status of the recipient of aid in that case said:

“* * * The conceptions involved, however, in the expression ‘supported as a pauper’ are twofold. It is not only essential that aid should have been given by the town, but that such aid should have been applied to or received by the supposed pauper. Instance a case where a town may intrust to a third person supplies intended for the supposed pauper, which, however, are diverted and were neither needed, nor in any wise received, by the latter.”

In the case of Mr. T. which you have brought to our attention, the facts show that he did not receive the check for his old-age assistance until April 1, 1943 and it could not possibly have been used by him before that date. In view of the fact that he moved to Waushara county on April 1, 1942 he had resided there one whole year without having been supported therein as a pauper. The whole year expired March 31, 1943. The pauper support received on April 1, 1943 did not fall within the year which began on April 1, 1942. For a discussion of the problem of computing time, see *Siebert v. Jacob Dudenhoefer Co.*, (1922) 178 Wis. 191, 194, 188 N. W. 610. The question in that case involved the two-year notice in personal injury cases as set forth in sec. 330.19 (5) Stats. The injury had occurred on June 6, 1916 and notice thereof was served on the defendant on June 6, 1918. The court said:

“* * * The limitation began the moment the cause of action accrued, which date was the day of the happening of the injury. The rule is well established on an issue of limitation where the time is to be computed from a certain date,

that in the computation the day of the date is to be excluded, and where the computation is from a certain event the date of that event must be included."

On the state of facts you submitted it seems clear that the time is to be computed from the happening of an event—Mr. T's. moving into Waushara county—and therefore the date on which he moved (April 1, 1942) is included. Consequently when he received his assistance check on April 1, 1943 the year necessary for him to establish legal settlement had expired.

Since Mr. T. had lived in Waushara county for one whole year without having received pauper relief, it is our conclusion that (1) Mr. T. has gained a legal settlement in Waushara county, and (2) he has lost his legal settlement in Waupaca county.

ES

Trade Regulation — Grain and Warehouse Commission
— Sec. 126.38, Wis. Stats., does not call for annual publication of standards, qualities and grades established by secretary of agriculture, but only those grades established by grain and warehouse commission. XXIII Op. Atty. Gen. 345 overruled.

February 19, 1944.

WISCONSIN GRAIN & WAREHOUSE COMMISSION,
Superior, Wisconsin.

Attention Fred R. Fisher, *Vice President*

For a number of years grades for all kinds of grain have been established by the secretary of agriculture of the United States as uniform standards for use throughout the nation. By the provisions of secs. 126.05 (2) and 126.38, Stats., they became and are the grades for this state. Accordingly you have not established any grades since that

time and all of your operations have been on the basis of the grades so established. However, each year you have been publishing said grades and deeming that you were required to do so by the provisions of sec. 126.38, Stats., as interpreted by XXIII Op. Atty. Gen. 345.

You now request that we reconsider the question of whether that section requires you to publish each year as grades of the state those established by the secretary of agriculture when no action is taken by your commission in respect thereto. Also you ask whether the situation would be changed if each year your commission passes a resolution or motion establishing as grades those established by the secretary of agriculture or adopting them, and if such action is necessary under sec. 126.38 Stats.

Sec. 126.38, Wis. Stats., which has been in its present form since 1923, provides :

"The grain and warehouse commission shall before the fifteenth day of September in each year, establish a grade for all kinds of grain bought, sold or handled, by public warehouses, which shall be known as 'Superior Grades,' and the grade so established shall be published in some daily newspaper in the city of Superior and in any other city in which a public warehouse is located; provided, however, that whenever the secretary of agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agriculture products under the United States grain standards act such grades, standards of quality and condition, weights and measures shall become the grades, standard of quality and conditions, weights and measures of this state."

The obvious purpose of this statute is to provide uniform standards for use in the buying, selling and handling of grain by public warehouses throughout this state. It accomplishes this by providing that your commission, which is the agency having to do with such matters, shall recurrently before September 15 each year set up grades which are to be used as such standards. Thus, each and every year you have the duty of taking action to specify the grades which you establish as the operative standards for that year, regardless of whether you make any changes

from or merely affirm the pre-existing grades as established by you for the prior year. In order that these annual standards fixed by you each year may be known and publicized this statute requires that upon your establishment of the grades each year they shall be published in the designated newspapers.

But, the statute then provides that if the secretary of agriculture of the United States has established grades for grains then those grades shall be the grades in this state. It seems obvious that where the secretary of agriculture has established uniform grades for use throughout the United States there is then no occasion for you to set up grades as standards for use in this state and sec. 126.38 does not intend you shall do so. You are to establish grades only in case there are none established by the secretary of agriculture that cover and are operative.

It is therefore our opinion that in years in which grades are operative in this state by virtue of their establishment as standards by the secretary of agriculture, your commission has no duty or power to establish grades because they are already established by the statutory adoption thereof as the grades for this state. Any action by your body of accepting, adopting or specifying them as the grades established for this state would be wholly superfluous as merely a recitation of what is already a fact by operation of the provision of sec. 126.38 and unauthorized as being entirely unnecessary.

As to the question of annual publication of grades by your commission under sec. 126.38, Stats., the language is plain that you shall publish annually in newspapers the grades "so established". This phrase clearly refers to the grades as annually established by your commission. It seems perfectly clear that where the grades that under this statute are operative in this state are those established by the secretary of agriculture they are not grades established by your commission. This is what is overlooked in the prior opinion in XXIII Op. Atty. Gen. 345 and for that reason such opinion is hereby overruled.

It is our opinion that under Sec. 126.38, Stats., where standards, qualities and grades for grain are established

by the secretary of agriculture of the United States, your commission has no power or duty in respect to such standards, qualities and grades, cannot establish them as they are already established, and such standards, qualities and grades are not to be annually published by your commission as grades established by you.

HHP

Appropriations and Expenditures — Municipal Budget
— A resolution adopted by a county board granting general authority to the county highway committee to transfer moneys from one appropriation for highway purposes to other appropriations for such purposes is contrary to the provisions of sec. 65.90 (5), Wis. Stats.

March 3, 1944.

K. T. SAVAGE,

District Attorney,

Kenosha, Wisconsin.

Your county board by resolution adopted a budget for 1944 providing the following appropriations:

1. \$32,500 "for the maintenance and construction of the county highway system";
2. \$55,000 "for the purchase of machinery, equipment and machinery repairs and supplies";
3. \$45,000 "for road oiling, construction, sealing and patching on the county trunk highway system";
4. \$12,000 "for gravel pit operations."

There were some additional appropriations which are not relevant to the present inquiry.

The following provision was contained in the resolution making the appropriations:

"*Section VI.* Whereas: The various highway activities, for which provision is made in this resolution are continuous from year to year, and the exact cost of any work cannot be known at the time of making the appropriation therefor, this Board does hereby direct that any balance remaining in any appropriation for a specific highway improvement after the same shall have been completed, may be used by the County Highway Committee to make up any deficit that may occur in any other improvement of the same class for which provision is herein made, and any balances remaining at the end of the year in any highway fund shall be returned to the General Fund, except in the County Trunk Allotment Fund, which balance shall remain for the same purpose in the ensuing year."

You raise the question as to whether Section VI authorizes the transfer of funds from any one of the four listed

appropriations to another and whether, if it does, it is contrary to the provisions of sec. 65.90 (5), Wis. Stats.

Sec. 65.90 (5) is a part of the municipal budget law and provides that after a budget has been adopted there may be no alterations in the various appropriations except by authorization by a vote of two-thirds of the entire membership of the governing body of the municipality.

We are very doubtful that the resolution itself would authorize such a transfer since it refers to a transfer of an appropriation "for a specific highway improvement" to an appropriation for any other improvement of the same class. None of the listed appropriations appear to be for "a specific highway improvement." All are general in nature.

However, if it be assumed that the section authorizes such a transfer, it is clearly in violation of the provisions of sec. 65.90. Those provisions are clear and explicit to the effect that moneys may not be transferred from one appropriation to another except upon the observance of certain requirements which are not contained in the resolution. The appropriations to which reference has been made are clearly separate and distinct appropriations.

JWR

Appropriations and Expenditures — University Regents — Agricultural Extension Work — The phrase “expenses incurred” in connection with the production and distribution of hybrid seed corn under the provisions of sec. 20.41 (3) (k), Wis. Stats., probably does not include the construction of a building for the purpose of drying such corn. Such a capital expenditure should be charged to the appropriation made by sec. 20.41 (11), Wis. Stats.

March 4, 1944.

A. W. PETERSON, *Comptroller,*
University of Wisconsin.

You submit the following:

“Your opinion is respectfully requested as to the legality of the use of funds available in the revolving appropriation created by Section 20.41 (3) (k) of the Statutes to construct and equip a building for drying seeds, particularly hybrid corn seeds, at the Branch Experiment Station of the University located at Spooner, Wisconsin.”

The section in question reads:

“Receipts from sales and agricultural development. All moneys received in the agricultural service by each and every person for or on account of the sale of dairy, live stock and farm products, and on account of dairy tests, rent of silo forms, deposits on account of drainage projects, certification of potato seed, and for similar lines of agricultural work, shall be paid within one week after receipt into the general fund, and are appropriated therefrom for the payment of expenses incurred in the above mentioned lines of work.”

The question resolves itself into whether a capital expenditure such as constructing a building for drying seed corn is a part of “expenses incurred” in the production and distribution of such corn.

There can be no doubt that in a sense any expenditure incurred in carrying on the business of raising seed corn is a part of the expense of carrying on the business. For in-

stance, the constitutional provision that the legislature shall anticipate the cost of the state government and provide an annual tax necessary to meet it clearly contemplates all forms of expenditure. On the other hand, the phrase "expenses incurred" may have a more restricted meaning and may refer to operating expenses as distinguished from capital expenditures. The sense in which the phrase is used must therefore depend upon a consideration of factors other than the words themselves.

We are very doubtful that "expenses incurred" as used in sec. 20.41 (3) (k) should be given a construction broad enough to permit capital expenditures, and particularly capital expenditures of the character of buildings. You will note that paragraphs (p), (r) and (s) which closely follow paragraph (k) refer to appropriations for "experimental work, necessary equipment and general expenses" in relation to the tobacco industry, protection of truck crops and the extermination of insects affecting apples. Buildings are in a sense equipment. Assuming for purposes of argument that the phrase "necessary equipment" in the succeeding paragraphs would permit a capital expenditure for a building, it is nevertheless clear that the expenditure could not be referable to the phrase "general expenses" which is found in those paragraphs. The fact that "necessary equipment" is used in addition to "general expenses" implies that the legislature did not feel that an appropriation for general expenses would cover capital expenditures such as equipment.

We also call attention to other appropriations which are relevant. Sec. 20.41 (1) (d) contains an appropriation for miscellaneous capital expenditures. Paragraph (i), which is the second paragraph following, provides that moneys collected from certain entertainments given by the school of music are appropriated as a revolving fund for payment of necessary expenses incurred in furnishing such entertainment. When considered with the provision for miscellaneous capital expenditures, it must be clear that the revolving fund provided for entertainments was not intended to be used for capital expenditures such as buildings. It was clearly intended to compensate those providing the entertainment and for incidental expenses in providing the

entertainment. The construction of a building in which to provide an entertainment would not be such an incidental expense. Moreover, sec. 20.41 (11) provides a revolving fund for capital expenditures. The regents may under the provisions of that subsection transfer moneys from sec. 20.41 (3) (k) to subsec. (11) and make capital expenditures out of the moneys when so transferred. This furnishes some indication that subsec. (11) was provided in part as a revolving fund for capital expenditures that could not otherwise be made under the various revolving funds provided for the carrying on of varying activities.

Other instances could be cited to the same effect as the foregoing, but the instances given should be sufficient to show the basis of our reasoning. We may say that we have discussed the matter with the director of the budget and he agrees with our conclusion.

JWR

Appropriations and Expenditures — Postwar Improvement and Construction Fund — Taxation — Income Tax — Division of Revenue — Transfers under sec. 20.07 (8), Stats., created by Ch. 577, Laws 1943, are not to be taken out of the total net normal income tax collections and in reduction of the amount distributable to the municipalities and counties under sec. 71.19, Stats.

March 18, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

Sec. 20.07 (8), Stats., created by Ch. 577, Laws 1943, provides as follows:

“There is appropriated from the general fund to the post-war improvement and construction fund a sum equivalent to 10 per cent of the total net normal income tax collections during the fiscal years 1943-1944 and 1944-1945. The state department of taxation shall certify to the secretary of state

on March 1, 1944 the total net normal income tax collections from July 1, 1943 to March 1, 1944, and quarterly thereafter it shall certify the total of such collections during the preceding quarter, and thereupon the secretary of state shall transfer 10 per cent of the amount so certified from the general fund to the postwar construction and improvement fund."

You have requested our opinion as to whether the sums appropriated thereby from the general fund to the postwar improvement and construction fund are to be charged against the net normal income tax collections, thereby reducing the amount of net normal income tax collections to be apportioned to the municipalities and counties under sec. 71.19, Stats., or whether this statute merely transfers from the general fund a sum that is equivalent to 10% of the net normal income tax collection.

We find nothing in the language of sec. 20.07 (8), Stats., which in any way indicates that these transfers to the postwar improvement and construction fund are intended to reduce the amounts that would be otherwise distributed under sec. 71.19, Stats. Rather, the language of the first sentence is that the amount to be transferred from the general fund under this section is a sum *equivalent* to 10% of the total net normal income tax collections. In other words, the amount of the total net normal income tax collections is merely the measuring device or yardstick to be used in computing the amount to be transferred under this section.

Turning then to sec. 71.19, Stats., we find nothing therein to indicate that it was intended that the amounts transferred under sec. 20.07 (8), Stats., are to reduce the amounts distributable thereunder to the counties and municipalities. However, by Ch. 525, Laws 1943, specific provisions were inserted in sec. 71.19, Stats., that the high school aids appropriated by sec. 20.27, Stats., are to be taken out of the net normal income tax collections before computation of the distribution under sec. 71.19. In view of this change that does reduce the amount available for apportionment to the municipalities and counties, it must be concluded that if the legislature had intended the transfers under sec. 20.07 (8), Stats., to have like effect they would have so specifically provided in the same manner as they did in

reference to these high school aids appropriated by sec. 20.27, Stats.

It is our opinion that the sums transferred under sec. 20.07 (8), Stats., do not reduce the amount to be apportioned to the municipalities and counties under sec. 71.19, Stats., and that the mention of the total net normal income tax collections in sec. 20.07 (8), Stats., is intended merely to prescribe the basis for calculation of the amounts to be transferred thereunder.

HHP

Railroads — Public Service Commission — Assessment of Costs — Where the public service commission has conducted an investigation upon a complaint against a railroad under the provisions of sec. 195.08 (9), Wis. Stats., it must, under the provisions of sec. 196.85 (1), ascertain the cost of such investigation and assess it against the railroad.

March 25, 1944.

PUBLIC SERVICE COMMISSION.

You have submitted the following question for our opinion:

“Where a proceeding has been instituted before the Commission by or against a railroad, and notice of hearing has been issued therein; and in connection therewith the Commission deems it necessary to make an investigation of the books or records of the railroad, is the Commission required, under the provisions of section 196.85, Statutes, to assess the costs of such investigation to the railroad; or is such assessment of costs a matter within the discretion of the Commission?”

The complaint and investigation by the commission were made under the provisions of sec. 195.08 (9), Wis. Stats., which provides for the filing of the complaint and imposes

upon the commission the duty to investigate and to order a hearing.

Sec. 196.85 (1), Wis. Stats., provides in part:

“Whenever the commission in a proceeding upon its own motion, on complaint, or upon an application to it shall deem it necessary in order to carry out the duties imposed upon it by law to investigate the books, accounts, practices and activities of, or make appraisals of the property of any public utility, power district or railroad or to render any engineering or accounting services to any public utility, power district or railroad, such public utility, power district or railroad shall pay the expenses reasonably attributable to such investigation, appraisal or service. The commission shall ascertain such expenses, and shall render a bill therefor, by registered mail, to the public utility, power district or railroad, either at the conclusion of the investigation, appraisal or services, or from time to time during its progress, which bill shall constitute notice of said assessment and demand of payment thereof. * * *”

Sec. 196.01 (6), Wis. Stats., provides that for the purposes of Ch. 196: “‘Railroad’ has the meaning attributed to it by section 195.02,” which defines the word for the purposes of Ch. 195.

It seems very clear that railroads against which complaints may be filed under Ch. 195 are the railroads against which costs may be assessed under the provisions of Ch. 196, and it also clearly appears that the commission has no option or discretion as to whether costs shall be assessed in any investigation once it determines that an investigation is in order and proceeds to conduct one. The statute is clear and explicit to the effect that the commission “shall ascertain such expenses, and shall render a bill therefor, by registered mail, to the * * * railroad * * *.”

JWR

Automobiles — Motor Vehicle Operator's License — Motor vehicle operator who refuses or neglects to qualify for restricted (occupational) operator's license which has been ordered issued by the court under sec. 85.08 (25c), Stats., stands in same position at end of year following revocation as operator for whom no restricted license has been ordered, and accordingly must furnish proof of financial responsibility under sec. 85.08 (26), Stats.

March 25, 1944.

B. L. MARCUS, *Deputy Commissioner,*
Motor Vehicle Department.

You state that since the enactment of Ch. 521, Laws 1943, which became effective on July 14, 1943, recreating sec. 85.08 (25c), Stats., you have received numerous court orders for the issuance of occupational licenses to operators for vehicles other than those registered in the name of their employers. Your practice, upon receipt of such orders, is to notify the concerned operators of the statute requiring the furnishing of proof of financial responsibility as a condition precedent to the issuance of an occupational license. Some operators notify you that they do not intend to qualify for an occupational license; others do not communicate their intentions, but merely fail to furnish such proof, and accordingly do not qualify.

You ask whether, at the expiration of the year following revocation of the license of an operator who thus fails to qualify, such operator is entitled to the restoration of his operator's license in the same manner and on the same terms as an operator who did qualify and to whom an occupational license was actually issued; or whether the restoration must be conditioned upon the same terms as in the case of an operator for whom no occupational license has been ordered.

A comparative analysis of the procedure for issuance of an occupational license under subsec. (25c) before and after the 1943 amendment furnishes the solution to the problem. Subsec. (25) remains unchanged. It provides for mandatory revocation of an operator's license upon convic-

tion for any one of the five types of offenses enumerated in subparagraphs (a) through (e). Subparagraph (b) furnishes the sole exception to the mandatory revocation requirement—that being the contingency covered in subsec. (25c). The power of the court to order the commissioner of the motor vehicle department to issue an occupational license is expressly conditioned upon the furnishing of proof of financial responsibility by the operator. The commissioner is prohibited by statute from issuing an occupational or restricted operator's license unless such condition is fulfilled. It is at this stage of the procedure that the omission from the amended statute of the power of the court to "stay" a revocation of an operator's license becomes significant.

Prior to amendment, the conviction for operating a motor vehicle while under the influence of intoxicating liquor and the granting of a stay of revocation were, as a practical proposition, simultaneous. The revocation did not actually take place. Theoretically, at least, no change in the operator's licensee status took place until the restricted license was issued. That was true by virtue of the court's order *staying* the revocation. Subsec. (25c) was so interpreted in a former opinion of this department in XXXI Op. Atty. Gen. 378 at page 380, where it was said:

"Subsec. (25c) provides at the outset for a stay of revocation where the court decides to order a restricted license. The word 'stay' means the arresting of a judicial proceeding or process. * * * Hence if a stay is ordered the revocation does not become effective * * *"

Under that subsection the operator was not required to furnish proof of financial responsibility during the period of restricted operation. (See XXXI Op. Atty. Gen. 69 at page 70.)

However, a change in the operator's licensee status now takes place immediately upon notification of the commissioner of the motor vehicle department of the fact of operator's conviction of one of the five offenses referred to above. The commissioner's mandatory duty to revoke the license arises, and the operator's *broad* or unrestricted license (as distinguished from an occupational or restricted

license) must be revoked. Having thus lost his license, he no longer retains his status as a licensee. There are, then, but two methods of acquiring another license: The first method (assuming the court has ordered an occupational) is to fulfill the statutory requirements for issuance of an occupational or restricted license. The second or alternative method is to await the expiration of the one-year period of revocation, at which time the statutory requirements set forth in subsec. (26) (including the furnishing of proof of financial responsibility as required by sec. 85.09, Stats.) must be met. The operator who refuses or otherwise fails or neglects to qualify for an occupational license for which he is eligible by furnishing proof of financial responsibility, *ipso facto* remains in the second category. We conclude, therefore, that such an operator must comply with the requirements of subsec. (26) of sec. 85.08, Stats., as a condition precedent to the restoration of his unrestricted license at the end of the year following revocation.

Any variance between the conclusion arrived at here and the opinion reported in XXXI Op. Atty. Gen. 378 is consistent and reconcilable for the reason that the statute has since been amended as hereinabove indicated.

SGH

Vital Statistics — Registration of Funeral Directors —
Under sec. 69.19, Stats., funeral directors must register with register of deeds or city health officer even though licensed by state board of health under sec. 156.04, Stats.

March 28, 1944.

C. A. HARPER, M. D.,
Acting Assistant State Health Officer,
State Board of Health.

You have inquired whether it is necessary for a funeral director to register his name, address and occupation with the register of deeds of his county or the health officer of

the city pursuant to sec. 69.19, Stats., in view of the fact that all funeral directors are licensed and registered with the Wisconsin state board of health as required by sec. 156.04, Stats.

Sec. 69.19, Stats., was formerly sec. 69.17. It was renumbered and amended by Ch. 503, Laws 1943 to read:

“Each physician, midwife and undertaker *or funeral director*, shall before * * * practicing as such in any district register his or her name, address, and occupation with the * * * *register of deeds of the county or the health officer of the city* and shall thereupon be supplied by * * * *him* with a copy of this chapter, together with such rules and regulations as may be prepared by the state registrar relative to its enforcement.”

About the only difference between the former sec. 69.17 and the present sec. 69.19 is that sec. 69.17 did not include funeral directors except as this might be implied from the word “undertaker” and also under sec. 69.17 the registration was “with the local registrar of the district” where the registrant resided instead of with the register of deeds or city health officer as prescribed in sec. 69.19.

Thus if there were any doubt as to whether funeral directors were required to register locally under the old law this doubt has been completely removed by the language of Ch. 503, Laws 1943, which expressly includes the words “funeral director” in the local registration requirement.

The mere fact that a funeral director is licensed under other provisions of the statute by the state board of health is immaterial. The requirement of local registration in addition to licensing by the state is by no means uncommon. Attention is called to the fact that until amended by the last session of the legislature the optometry law, sec. 153.05 (4), 1941 Stats., required an optometrist to present his certificate to the local county clerk for recording. Also the medical practice act provides for licensing by the state board of medical examiners and in addition requires recording of the license or certificate of registration with the county clerk of the county of residence. Sec. 147.14 (1), Stats.

Presumably the purpose of such a requirement is to enable members of the public to determine locally and quickly

whether a given practitioner is licensed and also to enable local public officials to have such information available at all times without writing to some state agency at Madison, but whatever the purpose the requirement of the statute in question is clear and you are advised that funeral directors must comply with the registration requirements of sec. 69.19 regardless of the fact that they are required to be licensed by the state board of health under sec. 156.04, Stats.

WHR

Fish and Game — Fur Dealers — No license is required by sec. 29.134, Wis. Stats., for those engaged in the business of buying dressed furs for manufacture.

March 30, 1944.

CONSERVATION DEPARTMENT.

You request our opinion as to whether sec. 29.134, Wis. Stats., requires that one who is engaged in buying dressed furs and manufacturing them into wearing apparel obtain a license under the provisions of that section.

Subsec. (1) defines and distinguishes "raw fur" and "dressed fur" and provides for the issuance of licenses to three classes of "resident fur dealer", to a "fur dresser or dyer" and to an "itinerant fur buyer". "Resident fur dealer" applies to persons "having an established post or place of business in the state where they carry on the business of buying, bartering, trading and otherwise obtaining raw or dressed furs, * * *."

Subsec. (2) provides:

"No person, firm or corporation shall engage in the business of buying, bartering, bargaining, trading or otherwise obtaining raw furs until they shall have first secured a license therefor issued under the provisions of this section."

Subsec. (10) provides:

"Nothing in this section shall prohibit persons from buying raw or dressed furs for the purpose of making themselves garments or robes of any kind, but such persons shall apply to the state conservation commission or its deputies, for permits to buy such furs."

As pointed out, the definition of "resident fur dealer" refers to one obtaining "raw or dressed furs". According to the provisions of subsec. (4), licenses are in part classified upon the basis of the three classifications of "resident fur dealer". Presumably, such a license is intended to permit the licensee to carry on the business of buying "raw or dressed furs", but, strangely enough, there is no absolute prohibition against carrying on the business of obtaining dressed furs without a license. The only prohibition refers to obtaining raw furs without a license.

Subsec. (10) indicates that there is some intention to prohibit the business of obtaining dressed furs without a license since it provides that nothing in the section should be construed to prohibit individuals without a license from buying raw or dressed furs for the purpose of making garments or robes for their own use. This would certainly imply that if dressed furs were obtained for any other purpose, such as manufacturing for sale, a license would be required.

The case in our opinion comes down to the simple question as to whether a person who engages in the business of obtaining dressed furs without a license could be subjected to the penalty of fine and imprisonment provided for by subsec. (11) for those violating the provisions of the section. There certainly would be no violation of any specific provision, although it might be argued that by implication the section required that a license be obtained to engage in such a business. No court, in our opinion, would hold that such a crime could exist by implication. It is the rule that penal statutes must be construed strictly in favor of an accused, and may not be extended beyond their express terms. *Walter W. Oeflein, Inc. v. State*, 177 Wis. 394.

We are of the opinion that no license is required by sec. 29.134 to engage in the business of buying dressed furs for manufacture.

JWR

Tuberculosis Sanatoriums — Counties — Salaries and Wages — Trustees of County Institutions — There is no conflict between the provisions of secs. 46.18 (4) and 50.06 (3), Wis. Stats. Trustees of county tuberculosis sanatoriums are entitled to receive the same compensation as may be received by members of the county board under the provisions of sec. 50.06 (3) and, in addition, are entitled to be reimbursed for traveling expenses under the provisions of sec. 46.18 (4).

March 30, 1944.

K. T. SAVAGE,

District Attorney,

Kenosha, Wisconsin.

You desire to know whether in our opinion there is any conflict between secs. 46.18 (4) and 50.06 (3), Wis. Stats., and, if so, which section shall prevail. The sections read:

“46.18 Board of trustees of county institutions. * * * (4) * * * He [trustee] shall be reimbursed his traveling expenses necessarily incurred in the discharge of his functions, and shall receive such compensation as shall be fixed by the county board, unless otherwise provided by law.”

“50.06 County tuberculosis hospital. * * * (3) Compensation of trustees. The trustees of the sanatorium shall receive the same compensation as do members of the county board.”

Provision for county tuberculosis hospitals was first made by Ch. 457, Laws of 1911. A board of three trustees was created for the management of such an institution to “serve without compensation, except that they shall receive their actual expenses in the performance of their duties.” Sec. 1421-11, 1-2, Wis. Stats. 1911. This provision as to compensation of trustees was amended to conform to the present provision of sec. 50.06 by Ch. 298, sec. 2, Laws of 1917.

In 1919 there was an extensive revision of the various statutory provisions dealing with penal and charitable institutions. Bill 11,S, which was enacted as Ch. 328, Laws

of 1919, among other things, consolidated various provisions of the statutes as they then existed into a uniform provision for the management of county institutions. Sec. 25 of Ch. 328 created sec. 46.18 substantially as it now reads out of the separate provisions that then existed for the management of poor houses, asylums, tuberculosis hospitals, etc. Sec. 46.18 (4) has not been changed since that time and it was then provided, as it is now provided, that the trustees of the enumerated institutions "shall receive such compensation as shall be fixed by the county board, unless otherwise provided by law." The revisor's note to the newly created subsection read in part:

"The compensation of the trustees is left, in the revision, to be 'fixed by the county board, unless otherwise provided by law.' Owing to necessary differences in the nature of the duties imposed upon the trustees for the various institutions, and the time consumed in their performance, it is of course impracticable to prescribe uniform compensation. The present statutes provide that the trustees of the workhouse in counties containing a city of the second class shall be compensated as 'fixed by the county board, but in no case shall the aggregate compensation of any trustee exceed one hundred and twenty dollars in any one year' (697y—2 sub. 3); and that the trustees of the county asylum (604a), and of the tuberculosis sanatorium (1421—11 sub. 2), shall receive 'the same compensation for their services as is allowed members of the county board.' These provisions are retained * * *."

As appears in the revisor's note to sec. 1 of Bill 11,S, other bills were offered as companion measures. Bill 15,S, as one of those measures, was enacted as Ch. 346, Laws of 1919. Sec. 10 of that chapter created sec. 50.06 as a consolidation of certain of the provisions dealing with tuberculosis sanatoriums and included that part of sec. 1421-11, 2, to which we have referred as dealing with the compensation of trustees. As so created, sec. 50.06 provided, as it now provides, that the trustees of county tuberculosis institutions "shall receive the same compensation as is allowed to members of the county board." The revisor's note to that part of the original bill states that "The details of the establishment and administration of county tuberculosis institutions

are amply provided for in the generalized provisions revised in sections 46.17, 46.18, etc. * * *. The only features not there covered are embraced in the revision submitted here; * * *."

It is clear that the legislature in the 1919 revision did not intend the provisions of sec. 46.18 to override those of sec. 50.06. In fact, as the revisor's note points out, there is no conflict between the two sections and they were intended to be complimentary. Sec. 46.18 (4) provided that the county board should fix the compensation of trustees unless provision were otherwise made by law. As pointed out by the revisor's note, provision was otherwise made by law in the case of county tuberculosis sanatoriums at the time of the revision and that provision was continued. There has been no change in the situation since 1919 and accordingly we are of the opinion that under the provisions of sec. 50.06 (3) the trustees of tuberculosis sanatoriums must receive the same compensation as do members of the county board.

The Kenosha County board, as we understand, operates on a salary basis and the members of the board of trustees are each entitled to receive the annual salary received by a member of the county board and, in addition, are entitled to be reimbursed their traveling expenses under the provisions of sec. 46.18 (4).

JWR

Appropriations and Expenditures — Counties — County Board — County board is not authorized to appropriate public funds to private organizations for the purpose of furnishing welfare services and entertainment to members of armed forces of the United States.

April 11, 1944.

MELVIN F. BONN,

District Attorney,

Lancaster, Wisconsin.

You state that the county board at its November session appropriated \$21,000 for the National War Fund Drive. This money is to be distributed among fourteen service organizations including the USO, YMCA, YWCA and others. There are no restrictions attached to this appropriation which is to be paid out of the county general fund, and it was intended to be an outright gift for the various war activities conducted by these different service organizations.

We are asked if the county board has authority to make such an appropriation. The answer is no.

The county board has only such powers as are expressly given by statute or such as are necessarily implied therefrom. *Spaulding v. Wood Co.*, 218 Wis. 224, 228 and authorities cited. See also XXV Op. Atty. Gen. 379 and other opinions there mentioned.

We find no language in sec. 59.07, Stats. relating to the general powers of the county board, or in sec. 59.08 relating to its special powers, or in any other statute, which either specifically or impliedly authorizes the county board to give away the taxpayers' money to any service organization even though its activities in furthering the war effort may be ever so worthy and commendable.

Ch. 7, Laws 1943, did create sec. 59.08 (43), Stats., authorizing counties to appropriate money to county councils of defense during war time in a sum not to exceed one-tenth of one mill on the dollar on the assessed valuation of the property in the county. However, appropriation statutes are to be strictly construed (II Op. Atty. Gen. 10) and sec. 59.08 (43) falls far short of constituting authorization for

making a gift of public moneys to private and unofficial organizations furnishing entertainment and welfare services to members of the armed forces through the medium of funds raised by voluntary contributions.

WHR

Taxation — Motor Fuel Tax — Motor fuel imported into this state by railroad tank car to be blended is "received" and subject to the motor fuel tax when unloaded in this state under the provisions of subsec. (16), sec. 78.01, Wis. Stats., and subsec. (13) of sec. 78.01 is not applicable thereto.

April 11, 1944,

DEPARTMENT OF TAXATION.

A licensed wholesaler has a bulk plant on the Milwaukee Harbor to which motor fuel is imported from out of the state by Great Lakes tankers and also by railroad tank cars. Low pressure straight run gasoline is unloaded from Great Lakes tankers into four 500,000-gallon storage tanks through pipes from a nearby boat slip. Other motor fuel, such as high vapor pressure gasoline, benzine, etc., is brought in by railroad tank cars and unloaded through pipes from a spur track into two 100,000-gallon tanks. The only outlet from the four 500,000-gallon marine storage tanks is by a common pipe connection to two 50,000-gallon tanks. Likewise, the only outlets from the two 100,000-gallon railroad receipt storage tanks are pipe connections to these same two 50,000-gallon tanks. The contents of the two different storage facilities are drawn off into and mixed or blended together in these two 50,000-gallon tanks. The result is motor fuel that is ready for sale and loading into motor tank trucks by being pumped through loading racks. No motor fuel from any of the tanks can be dispensed or loaded, except through these loading racks.

Heretofore the railroad tank car receipts unloaded into the two 100,000-gallon storage tanks have been taxed under Ch. 78, Wis. Stats., when so delivered, but the receipts by Great Lakes tankers unloaded as above into the four 500,000-gallon marine storage tanks have not been subjected to the tax until and as drawn off into the two 50,000-gallon blending tanks. A meter has been maintained in the pipe line connection between these four 500,000-gallon marine storage tanks and the blending tanks so as to measure the withdrawals from marine storage and furnish the basis for collecting the tax thereon.

The owner now claims that the railroad tank car receipts are not subject to tax when unloaded into the storage tanks and therefore none of the motor fuel handled is taxable until it is pumped through the loading racks. The basis of this claim is that the provisions of subsec. (13) of sec. 78.01, Wis. Stats., are applicable because the railroad tank car receipts are "blended" with the marine receipts and therefore they are not "received" until they pass through the loading racks. Accordingly his position is that there should not be a meter in the connection between the four marine storage tanks and the blending tanks, but instead meters should be maintained at the loading racks and the tax payable upon the basis of the readings thereof.

Your position is that subsec. (13) is inapplicable to this situation, but that subsec. (16) is applicable and renders rail receipts subject to tax when unloaded into the storage tanks. Accordingly you maintain that a meter is necessary between the four marine storage tanks and the blending tanks in order to measure the amount drawn out of marine storage and mixed or blended with rail receipts.

We are asked which position is correct.

The fallacy in the contention of the owner is a failure to give effect to the provisions of subsec. (16) of sec. 78.01, Wis. Stats. That subsection is all inclusive in its language in that it says motor fuel brought into the state is deemed "received" in this state for purposes of the motor fuel tax at the time and place where it is unloaded, excepting in the instances specifically mentioned therein. These express exceptions are where it is brought in by boat for storage at a refinery or a marine terminal or by pipe line for storage at

a pipe line terminal or a pipe line tank farm. Thus, perforce of the provisions of subsec. (16), all motor fuel brought into the state by means or for purposes, including *inter alia* importation by boat but not for storage at a refinery or a marine terminal or by pipe line but not for storage at a pipe line terminal or pipe line tank farm, other than those coming within such recited exceptions is deemed "received" at the time and place of its unloading in the state. Accordingly it seems clear that, under the language of this subsection, motor fuel brought in by rail or motor truck even though for storage at a refinery, marine terminal, pipe line terminal or pipe line tank farm is "received" in the state when unloaded at such place, because not within the exceptions set out. *Expressio unius est exclusio alterius*.

Subsecs. (14) and (15) of sec. 78.01, Wis. Stats., cover the matter of when importations that come within the express exceptions of subsec. (16) are deemed "received" for purposes of this tax. The three subsections are fully complementary and there is no conflict between.

But, if subsec. (13) were to be given the effect for which the owner contends then as the result of such construction of subsec. (13) it would be in direct conflict with subsec. (16). It is a fundamental rule of statutory construction that if possible conflicts are to be avoided between parts and provisions of statutes and a harmonizing construction given to them. The provisions of subsec. (16) are clear and therefore this rule must be applied in determining the scope of the provisions of subsec. (13).

At the outset subsec. (13) does not say that motor fuel brought into the state for blending purposes is not "received" when unloaded here. It merely says that motor fuel "produced, refined, prepared, distilled, manufactured, blended or compounded" in the state shall not be deemed thereby to be "received" in the state and sets forth when thereafter it shall be deemed "received". Its intended application is to provide a time when motor fuel is "received" for purposes of the tax when it is produced, refined, blended, etc. in this state from crude petroleum or products, which would include any crude petroleum produced in the state or imported into the state tax free, that have not pre-

viously been "received" in the state and subjected to tax. In the absence of such a provision motor fuel of the derivation mentioned would escape the tax because never "received" in the state. Subsec. (13) thus covers and provides the time of payment of the tax on motor fuel that has not theretofore been "received" and taxed in this state and which is not covered by the provisions of subsecs. (14), (15) and (16).

As applied to the instant situation subsec. (13) so construed does not conflict with subsec. (16) and does not provide that motor fuel brought into the state for blending is not "received" and subject to tax when unloaded in the state, but that motor fuel which has not theretofore been "received" and taxed in this state shall not be deemed "received" and subject to the tax merely because and when it is blended in the state.

It is our opinion that your position in this matter is correct.

HHP

Industry Regulation — Industrial Commission — Professional Engineer — The use of the title "professional engineering employee" for the purpose of classifying employees of professional engineers for collective bargaining purposes does not tend to convey the impression that the persons so classified are professional engineers, contrary to the provisions of sec. 101.31 (1), Wis. Stats.

April 11, 1944.

REGISTRATION BOARD OF ARCHITECTS
AND PROFESSIONAL ENGINEERS.

You have called to our attention an amendment proposed by the American Society of Civil Engineers to the constitution of its local chapters. The amendment proposes to provide for committees to function in the interests of engineering employees in relation to wages, hours of employment,

etc. In order to effect the purpose employees who may participate in such collective bargaining are classified under the title of "professional engineering employee". Generally speaking, their technical qualifications include engineering training or experience, but those who are employers or who act for employers in a managerial capacity are excluded.

You desire to know whether there is any conflict with this classification in the provisions of sec. 101.31 (1), Wis. Stats. That section reads in part:

"(1) Registration, definitions. Any person practicing or offering to practice the profession of architecture or the profession of professional engineering in this state shall be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice the profession of architecture or the profession of professional engineering in this state, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is an architect or a professional engineer or to advertise to furnish architectural or professional engineering services, unless such person has been duly registered or exempted under the provisions of this section.

"* * *"

The term "professional engineer" and the scope of the practice of professional engineering are defined by paragraphs (c) and (cm) of sec. 101.31 (1), Stats.

"Professional engineering employee", as defined by the classification of the American Society of Civil Engineers, might include those registered as professional engineers under the provisions of sec. 101.31, those eligible for such registration and some who are not eligible for such registration. You seem to feel that there is some question as to whether a person not registered or not eligible to registration should be permitted to use the title "professional engineering employee" in view of the provision of sec. 101.31 (1) that he shall not use "any title or description tending to convey the impression that he is * * * a professional engineer * * *."

We see no violation of the statute in the proposed classification. The classification will be used only with respect to

collective bargaining matters and there will be no occasion for the use of any description or title as "professional engineering employee" in dealings between such employees and the public. Even if there were, the title "professional engineering employee" indicates that the person bearing the title is an employee and no member of the public would be induced to believe that a person bearing the title could negotiate with him other than as an employee. If such an employee did in fact assume to deal with the public as a professional engineer, then the remaining provisions of sec. 101.31 would effectually take care of the case.

JWR

Adoption — An adoption order entered by the court of a county other than that in which the prospective parents reside would probably be invalid and subject to attack in collateral proceedings at any time.

April 15, 1944.

DEPARTMENT OF PUBLIC WELFARE.

You state that a petition for adoption has been filed in the county court in which the rights of the natural parents of the child were terminated, and that such county is not the one in which the prospective parents reside. You ask whether it is advisable, in order to insure the validity of the adoption, to discontinue such proceedings and have a petition filed in the county in which the prospective parents reside.

The answer is yes.

As you have pointed out, sec. 322.01 (1) of the statutes reads in part:

"Any adult inhabitant of this state may petition the county court *in the county of his residence* for leave to adopt a child; * * *"

The jurisdiction conferred upon county courts by the statutory sections following the one above quoted is limited to action upon such a petition as above described.

Our supreme court said in *Adoption of Bearby*, 185 Wis. 33, 34-35, 200 N. W. 686:

“Adoption proceedings are statutory, and it is fundamental that the statutory prerequisites of jurisdiction must exist in order to authorize the court to act. The first step necessary to arouse the jurisdiction of the county court is a petition conforming to the statutory requirements. * * * While there is an increasing disposition on the part of courts to place fair and reasonable construction upon statutes and proceedings relating to the adoption of children so that mere irregularities of procedure may not defeat the beneficent purposes of the institution of adoption, plain jurisdictional requirements must be observed.”

If a court enters an order of adoption which is beyond its jurisdiction the order does not become valid by the lapse of time but may be attacked in any kind of proceeding in which it is involved. See *Will of Bresnehan*, 221 Wis. 51, 265 N. W. 93.

It is not wholly impossible that an adoption order entered in the county of the child's residence might be upheld, but we think it improbable. In one state it was held that a residence requirement similar to ours is not mandatory but directory only, so that adoption proceedings could be carried on in the county of the child's residence rather than the county of the residence of the prospective parents. *In re McQuiston's Adoption*, 86 Atl. 205, 238 Pa. 304. Most jurisdictions, however, hold that statutes are mandatory which provide that adoption petitions may be filed in the county in which a certain party resides and that a valid order of adoption cannot be entered in a different county. *Matter of Carpenter*, 74 Misc. 127, 133 N.Y.S. 735 (residence of prospective parents); *Portman v. Mobley*, 123 S. E. 695, 158 Ga. 269 (residence of child to be adopted); *Johnson v. Smith*, 180 N. E. 188, 94 Ind. App. 619 (residence of child to be adopted); *Morris v. Pendergrass' Adm'r.*, 28 S. W. 30, 159 Ark. 483 (residence of child to be adopted).

While our court has not passed upon the question specifically in connection with residence requirements it has

stated in no uncertain terms that the statutory requirements must be followed, at least in substance, in order to give the court jurisdiction. The legislature appears to have regarded the requirement with respect to the residence of the petitioners as a matter relating to the substance of the proceedings. It has provided that the order of adoption is to be issued only if the court is satisfied with the character and reputation "in the community" of the prospective parents. Sec. 322.05. Under sec. 322.02 an investigation is to be made in the community of their residence. Doubtless the legislature deemed that these matters could best be handled by the court of the county in which such persons reside.

We assume the only ground for hesitancy about transfer of the proceedings to the proper county is because of the delay. An adoption order which might be subject to attack many years hence, perhaps in proceedings involving the inheritance of the adopted child, would not justify the saving of a few months' time now. The requirement of six months' residence which is the most time-consuming of any procedural requirement has already been met.

BL

Charitable and Penal Institutions — Maintenance of Inmates — Settlement between State and Counties — Provisions of sec. 46.10 (2), Stats. 1943, as amended by ch. 499, Laws 1943, relating to payments by state to counties of state special charges for care, maintenance and treatment in county institutions construed and applied.

April 17, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

Subsec. (2) of sec. 46.10, Wis. Stats., provides for the collection by state special charges of the amounts due from the various counties for the care, maintenance and treatment of persons in state and county institutions as certified

to the secretary of state by the state department of public welfare (successor to board of control) and payment by the state to each county of the amounts due it from other counties included therein. By ch. 499, Laws 1943, this subsection was amended by adding at the end thereof:

“Whenever any county under section 74.26 (1) shall on or before March 15 of any year pay to the state but a part of the aggregate amount due from it to the state under this section, the state shall upon receipt thereof pay to each county such proportion of the aggregate due it under this section as the amount so paid to the state by all counties bears to the entire amount due from and charged to all counties under this section.”

Prior to this amendment the practice was to pay each county the full amount due it, which was charged to other counties and included in the special charges under this subsection, as soon as and when it paid to the state treasurer the full amount of the state taxes and state special charges due from such county. No partial payments were made by the state. You ask whether it is correct that such practice is no longer permissible and it is necessary to wait until March 15 before making payments to the counties of the amount due them from and included in the special charges against other counties and then pay to each county only the proportion of the amount so due to it that the total amount of such special charges actually collected by the state from all counties bears to the total of such special charges imposed against all the counties.

Until the Daus Law, ch. 426, Laws 1933, went into effect October 1, 1941, the interpretation placed upon the statutes and the practice thereunder was that the county treasurers were required to make full settlement with the state treasurer in March each year, and as soon as each county made payment of its state taxes and special charges in full then the amount due to it from the state which was included in special charges against other counties under this subsection was paid in full. The present problem did not then arise because, except in rare instances, the counties generally made full payment to the state and no serious deficiencies existed. However, this Daus Law so revamped

the statutes that the basis for requiring the county treasurers to make full settlement with the state in March of each year for all state taxes and state special charges no longer existed. As modified thereby the statutes thereafter provided that the local treasurers at the March settlement, after making full payment of certain specified obligations, should pay to the county treasurer such proportion of the state taxes and state special charges as the taxes collected by him bore to the total taxes levied, which amount the county treasurer was then required to pay over to the state treasurer. Secs. 74.03 (5) and 74.26, Stats. 1941. At the August settlement by the county treasurers for the tax collections made by them the balance of state taxes and state special charges were given priority and payments thereof were the first to be made therefrom.

The practice of paying each county the full amount due it from other counties included in the state special charges under sec. 46.10 (2), Stats., when it paid its state taxes and special charges in full was continued. This was justifiable under the circumstances as there was nothing in the statutes in respect to when payment should be made by the state to the various counties of these amounts or in any way making such payments depend upon or limited to the amount collected by the state on these special charges. The statutes did, however, place upon the state the obligation to pay the various counties, its recoupment therefor being through the means of these state special charges, and the above having been the *modus operandi* for some time, it was deemed that if the legislature in adopting the Daugs semi-annual payment tax law changing over to a sharing of tax collections between the various taxing units of the government had intended to make a change in this practice some provision would have been made in respect thereto.

At the 1943 session the legislature did exactly this by the above-mentioned amendment enacted by ch. 499, Laws 1943. Perforce of such amendment this practice can no longer be continued, and it is now necessary to wait until March 15th in each year before making any payments to the county. If by that date all the special charges against all counties that are imposed under sec. 46.10 have not been paid in full, each county may be paid only that proportion

of the amount due it from the state which was included in state special charges against other counties under said section as the total amount collected by the state from all counties on these state special charges under the section bears to the entire amount of the state special charges imposed thereunder against all counties. It is to be noted that the proportionate payment that each county shall receive in such event, which relates only to the amounts due it from other counties and included in the state special charges, is not measured by the total paid in by all counties on the inclusions in the special charges of the sums due to other counties as related to the total of such inclusions therein, but by the relationship between the total amount paid in by all counties and the aggregate of the special charges against all of them under this section, which includes not only the amounts chargeable against them for liabilities to other counties but as well the amounts which are in payment of the liabilities of the counties to the state for care, maintenance and treatment in state institutions. Such is the express language of the amendment.

The words "aggregate amount due from it to the state under this section" include the entire amount of the state special charges imposed against a county under this section. The result would be the same if, instead of the word "section", the amendment used "subsection", for certifications under subsec. (2) and the resultant special charges placed against the counties thereunder include the amounts due from the respective counties for maintenance, care and treatment in state institutions as well as in institutions of other counties. "The aggregate due it under this section" refers to and includes only the amounts which are payable to a county for maintenance, care and treatment of persons from other counties in its county institutions, for that is all which is made due by this section, as is shown later herein. The language "amount so paid to the state by all counties" refers to the language mentioned at the beginning of this paragraph and is the total of the amounts paid by all counties on the aggregate of the state special charges imposed under this section which, as previously noted, includes the total liabilities of the counties for care, maintenance and treatment in both state institutions and those of

other counties. Had the legislature intended that the amounts payable to the counties should be limited by the proportion of the amounts paid into the state by all the counties on that part of the aggregate state special charges which represents the liabilities of the counties for care, maintenance and treatment in county institutions alone, other language should and would have been used.

You then ask if you must wait to pay the balance due any county until all of the state special charges against all counties have been paid in full or should you make payment of the balance due any county as and when it pays its state taxes and special charges in full. The statute is entirely silent in respect to payments to the counties subsequent to the March settlement proration payments. However, as indicated above, the legislature by the enactment of this amendment has, in our opinion, indicated that the former practice of paying the county in full when it pays its own taxes and special charges in full is no longer applicable. As we view it the legislature has in effect adopted a proration method of payment in lieu of the former practice and the indicated method would be to make payments on a similar proration basis whenever additional payments had been made by counties on such state special charges of sufficient total to justify the time and expense attendant thereto. This would be at such times as it is reasonable, to be determined by the state treasurer and your office as a matter of administration. In other words, future payments to the counties would be in order at such times, and as frequent as consideration of the amount on hand and the work and expense involved in doing so would be rational. Whenever a sufficiently large amount is on hand to justify further payment would seem to be the proper time to do so.

You then ask whether the amounts due to the counties from the state for "state aid" and included in the certifications under subsec. (3) of sec. 46.10 are included within the limitation and scope of the prorata method of payment prescribed by the previously discussed amendment to subsec. (2) or can they be paid to each county as soon as it pays the full amount due the state for its taxes and special charges.

The situation is that either payments thereof are to be made to the counties by the state, independent of subsec. (2), which appears to us to be the case, or else such payments by the state come within the limitation of this amendment. As we view subsec. (3) it does not contain any express provision in respect to payment of these amounts by the state and only provides that the amount due shall be credited on the state tax next accruing from the county. Furthermore, although the certification under subsec. (3) to the state department of public welfare includes both the amounts due from the state to each county, commonly referred to as "state aid" (an amount fixed by other statutory provisions), for each patient in county institutions and the cost less the "state aid" of the care, maintenance and treatment in such county's institutions of patients having legal settlements in other counties which is in turn chargeable over by the state to such other counties, in the special charges under subsec. (2), the liability of the state for this "state aid" for each patient in a county institution does not arise under or become due by sec. 46.10, Stats. The liability of the state therefor is imposed by special provisions in the statutes in respect to the county institutions, wholly independent of sec. 46.10, Stats. Consequently, we interpret the words "aggregate due it under this section" as not including the direct liability of the state to the counties for such "state aid" because it is not by sec. 46.10, Stats., that the same is rendered "due" the counties. Thus the operative effect of the proration payment amendment to subsec. (2) applies only to the liabilities which are imposed by subsec. (2) and are included in the special charges against the counties thereunder. Accordingly, it is our opinion that the payments of "state aid" included in the certification under subsec. (3) are not subject to the proration method of payment prescribed by the amendment of subsec. (2) and are payable to the county, to the extent that crediting them against the next state tax due from the county does not absorb the entire amount thereof, wholly independent thereof.

You also point out that sec. 50.11, Stats., contains similar provisions for state charges against the counties in respect to county tuberculosis sanatoria and the state tuberculosis institutions. In our opinion the special charges

therefor are entirely outside of the scope of sec. 46.10, Stats., and payment to the counties for the amount chargeable over to other counties under sec. 50.11, Stats., is not subject to the proration payment provisions in subsec. (2) of sec. 46.10, Stats. Likewise, the special charges under sec. 142.08 (4), Stats., for patients in the Wisconsin General Hospital and the Wisconsin Orthopedic Hospital are not to be taken into consideration in the computations under sec. 46.10 (2).

HHP

Retirement Systems — Wisconsin Municipal Retirement Fund — Where a person is a full-time employe of a participating municipality which pays his full salary, the normal employe contribution under sec. 66.90 for such employe should be based upon the gross salary paid to such employe, even though the city is reimbursed for one-half of such salary under a contract between the city and county.

April 18, 1944.

FREDERICK N. MACMILLIN, *Executive Director*,
Wisconsin Municipal Retirement Fund,
Madison, Wisconsin.

On February 16, 1944* this office rendered an opinion in which it was held that where a city, which is a participating municipality under sec. 66.90, pays the full salary of a participating employe who works half time for the city and half time for the county and is reimbursed by the county for one-half of said salary, the employe's normal contribution should be based upon the net salary rather than the gross salary paid by the city. Upon the basis of the facts submitted it is still our opinion that the conclusion was correct.

*Page 23 of this volume.

However, the municipality involved has now submitted additional facts and you inquire whether the supplemental information would cause any change in the conclusion reached in the former opinion.

From the new statement of facts it appears that on September 10, 1937, the city accepted a bid for furnishing a police radio transmitter and tower on the condition that a signed agreement be obtained from the county, whereby the latter would guarantee payment of part of certain expenses in connection with their operation which would be for the benefit of both city and county. On September 24, 1937 the personnel board was requested by the common council to hold an examination for a second class radio operator, at a salary not to exceed \$2,200 per year, and to submit a list of qualified candidates to the police and fire commission. Mr. G. was selected as the operator and his employment began December 14, 1937.

Also on September 24, 1937 the common council instructed the city attorney to draw up a contract specifying that all operating expenses of the police radio station, exclusive of receiving sets and car transmitters, be shared equally by the city and county. Such an agreement was prepared and signed by both the city and county. The agreement, after reciting that the city had contracted to erect and install a police radio system and that the county had agreed to pay one-half of the cost, further recited:

“* * * It is further agreed that _____ county by these presents obligates itself to pay one-half of the cost of maintenance and operation thereof * * *. It is the intent of this agreement that the city of _____ and the county of _____ will share equally in the cost of operation and maintenance of the central transmitting and receiving equipment, including the salary and wages of the necessary personnel needed for the operation and maintenance of the system, but that both county and city will individually absorb such costs as are applicable or chargeable to such motor vehicles owned by the city and county respectively as are equipped with receiving or transmitting sets or both.”

The city in its yearly budget provides an appropriation to pay one-half of Mr. G's salary, as well as telephone and electric expenses, and in turn invoices the county quarterly for one-half of the moneys so expended.

From the new statement of facts it is our conclusion that Mr. G. is a full-time employe of the city rather than a half-time employe of both city and county. It does not appear that the county exercised any control in his selection or appointed him to any county position. Any work which Mr. G does is performed for the city even though such work may consist of repairing county equipment. In determining the expense which must be born by the county, the city, among other things, considers the salary of Mr. G. His salary, however, is used merely as one factor in determining the amount of the reimbursement pursuant to the terms of a contract between the city and the county to which Mr. G is not in any sense a party. The city undoubtedly would be obligated to pay Mr. G the full salary at which he was hired as long as he continued under the present employment relationship even though the county neglected or refused to pay one-half the expense in accordance with the contract. Even though Mr. G spends one-half of his time working upon county equipment, which may or may not be the fact, this would not constitute him a half-time county employe. Under the circumstances it is our opinion that the normal employe contribution for Mr. G should be based upon the gross salary paid to him by the city.

JRW

Retirement Systems — State Employes' Retirement System — Wisconsin State Guard — Commissioned Officer — Person commissioned as brigadier general to organize Wisconsin state guard pursuant to sec. 21.025, Wis. Stats., is not exempt from membership in the state employes' retirement system.

April 20, 1944.

A. A. KUECHENMEISTER,
Acting Adjutant General.

You inquire whether General C. who was "engaged by the Governor to organize and train the Wisconsin State Guard comes under the provisions of the State Retirement Act" and advise that "The State Guard is a military force organized for state protection during the absence of the National Guard in Federal service. As this force will be disbanded and mustered out of service on return of the National Guard from active duty, it is assumed that the position of General C. is for the duration only, and therefore should not have deductions made from his monthly salary for retirement purposes."

Sec. 21.025, Wisconsin statutes, gives the governor authority to organize and maintain the state guard forces which shall be composed of "officers commissioned or assigned, and such able-bodied male citizens of the state as shall volunteer for service therein."

On October 14, 1942, C. was commissioned by the former governor as a brigadier general in the Wisconsin state guard according to the record of military appointments on file in the office of the secretary of state. The oath to be taken by officers commissioned in such forces must be substantially in the form prescribed for officers of the national guard (21.025 (9)).

Sec. 42.61 (1) provides:

"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:

"(a) * * * appointed state officers who are not subject to chapter 16; * * *
* * *

“(e) * * * emergency or temporary employes as defined by the bureau of personnel pursuant to chapter 16.
* * *”

In XXXII Op. Atty. Gen. 247 this office had occasion to discuss 42.61 (1) as it applied to twelve different offices or positions in the state service. It was said:

“Ordinarily an officer as distinguished from a mere employe 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. * * * an ‘office’ is where, for the time being, a portion of the sovereignty of the state, legislative, executive, or judicial, attaches, to be exercised for the public benefit. *Martin v. Smith*, 239 Wis. 314.”

It is our opinion that the “state officers”, referred to in 42.61 (1) are civil, not military, officers, and that the commission of brigadier general in the Wisconsin state guard, does not have enough of those attributes which were associated with an office in XXXII Op. Atty. Gen. 247 to be entitled to exemption under 42.61 (1) (a).

Even if 42.61 (1) (e) had any application to the position occupied by General C., which is not in the classified civil service and the appointment to which apparently is exclusively subject to the discretion of the governor, said statute would not furnish any exemption from the state employes’ retirement system; sec. 16.20 provides that a person may not be appointed as an emergency employe for more than thirty days, nor as a temporary employe for more than ninety days. It is, therefore, our opinion that deduction should be made from the salary of General C. as provided by sec. 42.66, Wisconsin statutes.

JRW

Criminal Law — Appeal from Justice Court — Under secs. 358.01-358.04, Stats., a defendant may appeal to circuit court after he has been convicted in justice court and paid his fine and costs therein.

April 25, 1944.

EDMUND H. DRAGER,
District Attorney,
Eagle River, Wisconsin.

Sometime ago you requested an opinion on the following question:

Can a defendant appeal to circuit court after he has been convicted of a misdemeanor and paid his fine and costs in full in the justice or municipal court?

Appeals in criminal cases are governed by ch. 358, Wis. Stats. Secs. 358.01-358.04 especially apply to appeals from justice court to circuit court. According to your statement of facts the defendant files the written notice of appeal within 5 days as provided for in sec. 360.23, Stats.

There is, of course, no specific reference to taking an appeal after the fine in justice court has been paid. The statute simply provides that the appellant must be committed to abide the sentence of the justice until he shall recognize to the state in such sum as the justice shall require. In the case you put the defendant abides the sentence of the justice by actually paying the fine and costs in full. In any event, it is not mandatory that the justice require a recognizance, despite the language used in sec. 360.23, Stats. Our court considered this problem in an early case and held that the discretionary provisions in secs. 358.02 and 358.04 take precedence over sec. 360.23. See *Schieve v. State*, (1863) 17 Wis. *253 and *Sires v. State*, (1868) 73 Wis. 251, 255, 41 N. W. 81. In the latter case the court said: “* * * But the accused could appeal, and the circuit court take jurisdiction, without any bond.”

In your statement of facts you point out that these appeals are most common among game law violators and that

they take the appeal to circuit court in order to preserve their hunting privileges during the pendency of the appeal. This department for many years has adhered to the rule that sec. 29.63 (3) (a) is not applicable where an appeal is taken from justice court to circuit court. See XVII Op. Atty. Gen. 494 (1928) and XXIII Op. Atty. Gen. 512. These opinions are based upon the theory that where, on appeal, a trial *de novo* may be had, the rule is that there has in fact been no conviction until the appellant has been found guilty in circuit court. Our court has recognized the right to a trial *de novo* in criminal cases for many years. *State v. Haas*, (1881) 52 Wis. 407, 412, 9 N. W. 9; *State v. Tall*, (1883) 56 Wis. 577, 581, 14 N. W. 596; and *Steuer v. State*, (1884) 59 Wis. 472, 474, 18 N. W. 433. The doctrine as applied to civil cases was laid down in *Vroman v. Dewey*, (1867) 22 Wis. *323. There is an interesting note to this case in 8 Wis. L. Rev. 67. In *State v. Haas*, 412-413, the court said:

“* * * The cause is tried in the circuit court as though originally brought there, and that court awards sentence on conviction, without regard to the judgment rendered by the justice. In other words, the appeal in this case had the effect, as claimed by the counsel for the state, to supersede and vacate the judgment of the Justice, securing to the defendant a new trial in the circuit court upon all questions of law and fact involved in the case; and upon conviction an entirely new judgment must be rendered by that court.”

From these cases one is forced to draw the conclusion that an appeal completely nullifies the judgment and sentence of the justice.

There is still the question as to whether the defendant may be considered to have waived his right to appeal by voluntarily paying the fine and costs in circuit court. There is very little Wisconsin authority on this question and none of it appears to be directly in point. The problem of waiver of the right to appeal is covered in 18 A. L. R. 867; 74 A. L. R. 638; 17 C. J. 48, 49, esp., sec. 3327; 17 C. J. 193, n. 65 (Cr. L. sec. 3510); 24 C. J. S. 266-268 (Cr. L. sec. 1688);

24 C. J. S. 649, n. 73, sec. 1825; Ann. Cas. 1913E, 300; Ann. Cas. 1916C, 619; 2 Am. Jur. 986, sec. 229 *et seq.*, esp. secs. 231, 232.

In *Rasmussen v. State*, (1885) 63 Wis. 1, 22 N. W. 835, the defendant had appealed from justice to circuit court in a criminal action. There was later an appeal to the supreme court. The accused had apparently paid his fine into court before the appeal and the attorney general contended for the state that this should be deemed a waiver of the right to review, but the court said:

“It appears that the defendant paid into court the amount of the fine imposed, and costs. The learned assistant attorney general insists that this should be deemed a waiver of his right to a review of the case on a writ of error. But we think otherwise. We shall not discuss the question here, because we feel obliged to affirm the judgment on the merits.”
(p. 3)

It appears that this case has never been cited for the proposition of law in which we are interested. However, since the statement above is only dictum, we cannot attach too much significance to it. We have been unable to locate the original briefs in this case, so that it is impossible to determine the nature and basis of the state's argument.

In *Roby v. State*, (1897) 96 Wis. 667, 670, 71 N. W. 1046, the defendant had served out his whole prison term imposed in circuit court before the case was heard on appeal to the supreme court. The state contended that the defendant's right to appeal had been waived because reversal could do no good, since the whole sentence had been carried out and defendant could gain nothing. The court held that this fact made no difference and said in part:

“* * * A person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. The mere payment of a judgment in a civil cause does not operate to bar or waive the right to appeal therefrom (*Sloane v. Anderson*, 57 Wis. 123), and for stronger reasons the compulsory working out of a judgment in a criminal case does not debar a man from obtain-

ing a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation."

This case has never been cited in any later Wisconsin case, but has been widely cited in treatises as authority for the proposition that appeal will lie in criminal cases after the judgment is discharged, as where the accused has served out his full sentence or paid the fine and costs. See note 18 A. L. R. at 872; 17 C. J. 193, n. 65; 24 C. J. S. 649, n. 73. An inspection of the briefs in this case reveals that the state did not advance the argument referred to by the court above. It is, of course, possible that the assistant attorney general raised the question of waiver of the right to appeal in his oral argument.

The *Roby case, supra*, should be compared with *Zisch v. State*, (1943) 243 Wis. 175, 9 N. W. 2d 625, where the court held that a motion to vacate an erroneous judgment in a criminal case must be denied unless it is shown that an existing legal right of the defendant is affected by the presence of record of his conviction. Our court dismissed *Zisch's* appeal because the case was considered moot and cited in support of its conclusion *St. Pierre v. United States*, (1943) 319 U. S. 41, 63 S. Ct. 769 and 910, 87 L. ed. 718 and 922. This latter case uses language contrary to the doctrine of the *Roby case, supra*. The *Roby case* was not cited by our court in the *Zisch case*, and no reference was made to it in the briefs of counsel.

In the case you put, however, the rule of the *Zisch case* can be applied without any inconsistency because an existing legal controversy is present. If the defendant is denied the right to appeal after his fine and costs have been paid, his license would be revoked under sec. 29.63 (3) (a) and this denial of the right to retain his license would, in our opinion, give rise to a legal controversy.

There is authority in Wisconsin that the losing party may appeal after having paid the judgment in a civil action. *Sloane v. Anderson*, (1883) 57 Wis. 123, 13 N. W. 684, and *Cogswell v. Colley*, (1867) 22 Wis. * 399.

You raise a collateral question in your letter relative to the return of the money paid as a fine by the defendant in

the event that he should be found not guilty in the circuit court. However, since the case you present did not in fact involve this situation, we reserve any opinion on that question until it is presented by a specific case.

ES

Constitutional Law — Schools and School Districts — Tuition — Indigent Pupils — Sec. 40.21 (2), Stats. 1941, as enacted by ch. 123 and amended by ch. 264, Laws 1941, is constitutional. Said subsection does not authorize the state superintendent of public instruction to deduct from the amount of school aids accruing to a school district or other municipality any amounts representing interest or court costs. A certificate filed pursuant to said subsection is not rendered invalid in its entirety by reason of the fact that it includes a claim for interest or court costs, if it is in such form that the state superintendent can separate the proper from the improper items. The inclusion of improper items in the certificate can properly be considered mere surplusage and can be ignored.

April 27, 1944.

JOHN CALLAHAN,

State Superintendent of Schools.

You have submitted three questions concerning sec. 40.21 (2), Wis. Stats., as enacted by ch. 123, Laws 1941, and amended by ch. 264, Laws 1941. This section provides in substance that whenever after May 24, 1941 any school district or municipality is compensated by a county, town, city or village for the tuition of any indigent pupil as provided by sec. 40.21 (2), Stats. 1939, the amount so compensated be certified as provided in said statute to the state superintendent of schools who deducts the amount so certified from the amount of state school aid payable to such school district or municipality. It is also provided that when the county, city, village or town receives such funds it shall re-

duce the general county, city, village or town tax levy in a corresponding amount. It is also provided that the provisions of sec. 40.21 (2), Stats. 1941, do not apply to indigent tuition claims which have been reduced to judgment prior to May 24, 1941. Provision is also made to cover the situation when the amount of the school aid is less than the amount to be deducted by the state superintendent pursuant to said certification.

You ask, first: "Are the provisions of sec. 40.21 (2), Stats. 1941, constitutional?"

We are of the opinion that this subsection violates no constitutional provision. It does not involve private rights. The only rights involved are those of municipal or governmental subdivisions created by the legislature. Thus there can be no question here under the United States constitution. The United States constitution applies only to property held by municipalities in their proprietary capacity. Moneys raised by taxation even after collected do not constitute property held by a municipality in such capacity so as to afford it constitutional protection. *Town of Bell v. Bayfield County*, (1931) 206 Wis. 297. It is also well settled generally that a municipal corporation has no privileges or immunities under the United States constitution which it may invoke against state legislation affecting it. The only question here is whether there is a violation of the Wisconsin constitution, and as to that it is important to note that the authority of the state legislature over a municipal corporation is supreme, subject only to such limitations as may be prescribed by the state constitution. *State ex rel. Martin v. Juneau*, (1941) 238 Wis. 564 at 570. Attention is also called to the statement of the court in *Manitowoc v. Manitowoc Rapids*, (1939) 231 Wis. 94, where, in considering the constitutionality of certain legislation relating to schools, it said (p. 97):

"* * * At the outset, we must recur to fundamental principles and recall that when dealing with the state constitution as contrasted with the federal constitution the search is not for a grant of power to the legislature but a restriction thereon. It was pointed out in *Outagamie County v. Zuehlke*, 165 Wis. 32, 35, 161 N. W. 6, that:

“It is established by the decisions of this court that our state constitution is not so much a grant as a limitation of power, therefore the state legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution.’”

In *State ex rel. Dudgeon v. Levitan*, (1923) 181 Wis. 326, the court said (p. 339):

“* * * Bearing in mind that our constitution is not a grant of, but a limitation upon, legislative power, it is apparent that the legislature may adopt any and all measures which in its judgment will promote the efficiency of the schools and other educational institutions of the state unless prohibited by some express constitutional provision.
* * *”

We find no provision in our state constitution which prohibits or restricts the legislature from enacting the subsection of the statute here under consideration. The constitutionality of sec. 40.21 (2), Stats. 1941, was considered and sustained in an opinion appearing at XXX Op. Atty. Gen. 460. The effect of this subsection as enacted by ch. 123, Laws 1941, and amended by ch. 264, Laws 1941, is to reduce the amount of school aids receivable by a school district or municipality by the amount for which it was compensated by a county or other municipality for the tuition of any indigent pupil as provided by sec. 40.21 (2), Stats. 1939. This was done, apparently with a view to reimbursing a county or other municipality for the amount paid for tuition claims that had accrued prior to May 24, 1941 pursuant to sec. 40.21 (2), Stats. 1939, (with the exception of claims reduced to judgment prior to that date), since after that date a school district had no right to receive compensation for tuition of indigent pupils from the county or municipality where such pupils had legal settlement by reason of the fact that sec. 40.21 (2), Stats. 1939, which created the right to such claim, was repealed on May 23, 1941 by ch. 122, Laws 1941, which repeal was confirmed by ch. 264, Laws 1941.

As pointed out in our opinion in XXX Op. Atty. Gen. 460, while sec. 40.21 (2), Stats. 1941, might deprive school dis-

tricts of aids to which they might otherwise have been entitled by reason of prior enactments, these aids are gratuities given by statute which the legislature may take away or divert to other purposes as it sees fit without impairing any constitutional rights of the school district or other municipality. A governmental subdivision of the state has no vested right to a share in public funds. 16 Corpus Juris Secundum, p. 670; *Richland County v. Richland Center*, (1884) 59 Wis. 591; *Town of Bell v. Bayfield County*, 206 Wis. 297. This is but an application of the general rule that a municipal corporation obtains no vested right in an act of the legislature. Thus, in *State ex rel. Martin v. Juneau*, 238 Wis. 564, it was said (p. 571) :

“* * * Municipalities obtain no vested right under an act of the legislature, the constitution reserving to the legislature the power to repeal or alter any such act.”

Also, in *Town of Holland v. Cedar Grove*, (1939) 230 Wis. 177, in referring to the powers of the legislature over municipalities with respect to matters involving poor relief, the court said (p. 189) :

“* * * It may impose duties and liabilities upon its creatures, the various municipal corporations of the state, in accordance with its discretion provided no provision of the constitution is violated. Except with respect to their property rights municipal corporations have a limited protection against acts of the state legislature under the constitutional guaranties. In a well-considered case, the Connecticut supreme court of errors said:

“‘Municipalities, as political subdivisions of the state, created for public purposes and having their powers, rights, and duties conferred and imposed by the state through the legislature, are subject to its will and liable to have any such rights or duties modified or abolished by it, and not to be regarded as thereby being deprived of any vested rights.’ *Sanger v. Bridgeport* (1938), 124 Conn. 183, 198 Atl. 746, 116 A. L. R. 1031, 1035. See authorities cited in note beginning at page 1037.

“This is the general rule and it is the rule in this state. Municipal corporations have no private powers or rights as against the state. They may have lawfully entered into contracts with third persons which contracts will be protected

by the constitution, but beyond that they hold their powers from the state and they can be taken away by the state at pleasure. *Richland County v. Richland Center* (1884), 59 Wis. 591, 18 N. W. 497; *Frederick v. Douglas County* (1897), 96 Wis. 411, 71 N. W. 798."

The above would also be true as to school districts, which are not even accorded the status of a municipal corporation but are merely regarded as having the lesser status of a quasi-municipal corporation. In *Iverson v. Union F.H.S.D.*, (1925) 186 Wis. 342, the court said (p. 353) :

"The school district is not a municipal corporation. It is very grudgingly accorded the rank of a quasi-municipal corporation. 1 McQuillin, Mun. Corp. § 113; 24 Ruling Case Law, 564. It is but the agent of the state for the sole purpose of administering the state's system of public education and has only such powers as are conferred expressly or by necessary implication. 24 Ruling Case Law, 565.
* * *"

Art. X, sec. 3, Wisconsin constitution, is not a limitation over the power of the legislature over schools, but is designed to compel the exercise of the power granted. *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94. The legislature has full power to provide for the establishment of district schools (*State ex rel. Johnson v. Union F.H.S.D.*, (1923) 179 Wis. 631, 632) and the proceedings for their establishment are purely statutory. *State ex rel. Hermanson v. Callahan*, (1923) 179 Wis. 549, 554. For cases illustrating the very limited constitutional rights of school districts, see *School District v. Callahan*, (1941) 237 Wis. 560, and *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94.

It should also be noted that the statute here does not purport to affect contract rights between third persons and school districts or other municipal subdivisions, but involves distributions of funds by the state to school districts or municipal subdivisions entitled thereto. But, even if a school district had entered into a contract with a third person anticipating the receipt of school aids from the state, the legislature could repeal the statute carrying the appropriation for school aids and put an end to the appropriation so far as it was unexpended, at any time. *State ex rel. Board of Re-*

gents v. Donald, (1916) 163 Wis. 145. If the legislature could repeal the entire unexpended appropriation, it is obvious it could reduce or otherwise change the amount or the method by which such funds are distributed. In *Town of Bell v. Bayfield County*, 206 Wis. 297, the court said (pp. 302-303) :

“* * * The disposition of moneys raised by taxation to which one governmental unit is entitled under existing law is subject to legislative control. Rights to such moneys which the legislature has given one municipality it may take away, and such moneys in the hands of one to which the other is entitled under existing statutes may as rightly be taken from the other and given to the one as it was given to the other in the first place. ‘No principle . . . is better settled than that “whatever is given by statute may be taken away by statute,” except vested rights acquired under it, and except also that the statute must not be in the nature of a contract on the part of the legislature.’ *State ex rel. Voight v. Hoeflinger*, 31 Wis. 257, 263. Here no contract is involved and there is no vested right, were tax money a subject of such right, because the money claimed by the town had not been received by it, and no vested right of action for recovery of it existed because no demand therefor had been made prior to the commencement of the suit, which would be essential to vest such rights under the rule of *Richland County v. Richland Center*, 59 Wis. 591, 594, 18 N. W. 497. * * *”

Further, as pointed out in our opinion in XXX Op. Atty. Gen. 460, if contract rights of third persons with a school district are impaired by the enactment of this subsection, its constitutionality could be challenged only by a person whose rights have been impaired. 12 Corpus Juris 767.

In view of our conclusion that the subsection here under consideration involves the rights of school districts or municipalities which have no vested right in an act of the legislature or to receive or retain public funds, we are of the opinion that it does not violate the “due process” or “equal protection” clauses of the Wisconsin constitution. Further, it should be noted this subsection operates uniformly throughout the state and upon each school district or municipality and its residents alike. It does not treat any one or more school districts or municipalities or their residents

differently than all others are treated under like or substantially the same circumstances. Hence, there is not even present the question of whether there has been a valid classification. See *Pauly v. Keebler*, (1921) 175 Wis. 428 at 433.

There would also be no merit in any claim that this subsection would be unconstitutional because it might result in unequal distribution of aids to school districts or other municipalities. It has been long settled in this state that while inequality in the assessment or collection of a tax may invalidate it, inequality in the disbursement of its proceeds will not. *Will of Heinemann*, (1931) 201 Wis. 484.

We have also reconsidered whether the subsection here involved is repugnant to art. X. sec. 5, Wisconsin constitution and hold it is not. We reaffirm what was said in our former opinion appearing in XXX Op. Atty. Gen. 460.

Attention is also called to the provision in sec. 40.21 (2), Stats. 1941, which provides:

“* * * Any school district or municipality making claim for any state school aids except from the trust fund shall be conclusively deemed to have accepted the provisions hereof. * * *”

As previously pointed out, school districts or other municipalities have no vested right to receive funds from the state, and their acceptance of such aids may well operate to preclude a school district or municipality from attacking the constitutionality of sec. 40.21 (2), Stats. 1941. *In re Anchor State Bank*, (1940) 234 Wis. 261.

Your second question is: “Are items for interest and court costs deductible by the state superintendent under sec. 40.21 (2), Stats. 1941, when they are certified with the total amount of indigent tuition paid, by the county or other municipality under said subsection?”

We are of the opinion that the amount deducted by the state superintendent under sec. 40.21 (2), Stats. 1941, should not include any amount for interest or court costs. This subsection by its express terms contemplates that the school district or municipality be compensated for “tuition” of indigent pupils as provided by sec. 40.21 (2), Stats. 1939, and that the amount certified to the superintendent of

schools and the secretary of state be the "amount so compensated". There is no statutory provision authorizing either the certification or deduction of interest or court costs, and in its absence we are of the opinion either item cannot be certified or deducted. The only authority which the statute gives the state superintendent is to deduct the amount a school district or municipality is compensated for tuition. There is no authority to deduct items for interest or court costs.

It is well settled that the state may be subjected to the liability for payment of interest only where it is imposed by statute or by contract. There is also authority indicating that such rule is also applicable to counties and other governmental subdivisions of the state. See *Schlesinger v. State*, (1928) 195 Wis. 366; *Reichert v. Milwaukee County*, (1914) 159 Wis. 25, XX Op. Atty. Gen. 1047. The effect of sec. 40.21 (2), Stats. 1941, is to reimburse a county or other municipality for the amount it pays to a school district or other municipality after May 24, 1941, for tuition of indigent pupils pursuant to sec. 40.21 (2), Stats. 1939, from the amount of school aids which would have otherwise gone to such school district or other municipality. If it be considered that the law would not legally permit the recovery of interest against a county or other municipality, it is obvious that in enacting sec. 40.21 (2), Stats. 1941, the legislature would have intended that the amount which should be deducted by the state superintendent for the benefit of the county or other municipality under sec. 40.21 (2), Stats. 1941, should not include any amount for interest since the legislature clearly would not have intended that a county or other municipality pay interest which it was not legally obliged to pay and provide that such amount be deducted for its benefit.

On the other hand, if it be assumed that interest is recoverable against the county or other municipality after failure to pay indigent pupil tuition claims, the same result would follow. If interest is recoverable under such circumstances, it would be on the theory that the county or other municipality withheld funds which by law it was required to pay to the school district or other municipality and that the latter should be paid interest as reimbursement for the

loss sustained by reason of the withholding. See *State v. Milwaukee*, (1914) 158 Wis. 564 at 575. In other words, under this theory, the county or other municipality would be required to pay interest to a school district or other municipality for loss sustained by the latter by reason of failure to timely pay indigent pupil tuition claims as required by sec. 40.21 (2), Stats. 1939. If, after paying such interest, the county or other municipality is reimbursed by having such amount deducted by the state superintendent under sec. 40.21 (2), Stats. 1941, it follows that the county or other municipality is being reimbursed for an amount it was compelled to pay by reason of its own failure or omission. Certainly if the legislature intended such a result it would have so stated in express language and in its absence it must be considered that the legislature did not intend that a county or municipality be so reimbursed.

Your third question is: "Does the fact that the items for interest and court costs cannot be deducted by the state superintendent in determining the amount of school aids invalidate in its entirety a certificate filed pursuant to sec. 40.21 (2), Stats. 1941, which includes the total amount of compensated tuition claims paid and in addition claims for interest and court costs?"

We are of the opinion that if the certificate filed pursuant to sec. 40.21 (2), Stats. 1941, is in such form so that the amount of compensated tuition claims is stated separately from any amount claimed for interest or court costs so that there will be no chance that the improper items are included in any amount deducted by you, the fact that improper items are erroneously included will not invalidate the entire certificate. We believe that the improper items should properly be considered as surplusage, and that the formality of filing a new or amended claim which did not contain the improper items should not be required.

WET

Prisons — Probationer — Sentence — Where a probationer is received at the state prison pursuant to a sentence for a new offense and his probation is subsequently revoked, the suspended sentence for which he was on probation is deemed to have commenced running on the date he was first received at the prison pursuant to his second conviction and sentence. Sec. 57.03 (1), Stats.

April 27, 1944.

A. W. BAYLEY, *Director*,
State Department of Public Welfare.

You request an opinion as to the time of commencement of a sentence to the state prison under the following circumstances: On June 4, 1943 A was sentenced to the prison for a term of 1 to 3 years, sentence was suspended and he was placed on probation to the department of public welfare. On March 20, 1944 he was received at the prison on a subsequent sentence of 12 to 13 months for another offense. On March 27, 1944 his probation was revoked. The question is whether his discharge date on the 1 to 3 year sentence is to be computed on the basis that the sentence commenced to run on March 20th, or whether it shall be deemed to have commenced on March 27th when the order revoking probation was entered. Another similar case is also stated in your letter and it appears that such situations are frequent. Sec. 57.03 (1) provides as follows:

“Whenever it appears to the state department of public welfare that any such probationer in its charge has violated the regulations or conditions of his probation, the said department may, upon full investigation and personal hearing, order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the department shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison; but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce disci-

pline, take and detain the probationer and bring him before the board for its action."

It has been the practice of the department, where a probationer has violated his probation, to issue an order that the probationer be taken to the prison where he must await a hearing before the parole board. In such cases his sentence is deemed to have commenced running on the date when he was first received at the prison even though the final order revoking probation may not have been entered until several weeks thereafter. See XXX Op. Atty. Gen. 477. By a parity of reasoning, and giving the statute a construction in favor of liberty as is required in all penal laws, it would seem that in the case above stated the prisoner's term of 1 to 3 years should be computed as having commenced on March 20th, which is "the date of his first detention at such institution."

This construction will work substantial justice between all prisoners similarly situated, whereas the contrary construction would result in inequalities between those prisoners whose probation is promptly revoked and those who may have to wait a substantial period of time until the next meeting of the parole board.

WAP

Public Health — Health Officers — Vital Statistics — Registrar — Sec. 69.09, Wis. Stats., as amended by ch. 503, Laws 1943, does not constitute town and village clerks as health officers.

May 8, 1944.

L. J. BRUNNER,

District Attorney,

Shawano, Wisconsin.

You have requested our opinion as to whether sec. 69.09, Wis. Stats., as amended by ch. 503, Laws 1943, constitutes the clerks of towns and villages as health officers. The section reads:

“For the purposes of this chapter each county shall be a primary registration district for villages and towns and the registers of deeds’ office shall be the place for filing, except that stillbirth and death certificates shall first be filed with the local registrar of the village or town where the event occurred. The primary registration district for any city shall be the city and the office of the local health officer the place for filing. *The local registrar shall be the health officer of the board of health in cities and the clerk of each town and village.*”

Your question arises out of the italicized portion of the section.

It is very clear in our opinion that the section does not constitute town and village clerks as health officers. Neither the purpose of the section nor any language in it justifies that view. The purpose of the section, as is apparent from its provisions, is to provide for local registrars for certain vital statistics. It is not the purpose to deal with health officers. They are dealt with in another chapter of the statutes. The italicized portion specifies who the local registrar shall be in towns, cities and villages. It is the only provision in the statutes which specifies who the local registrar shall be. It states that the local registrar shall be the health officer in cities and that the local registrar shall be the village or town clerk in villages and towns. If it were to be considered as providing for the appointment of health offi-

cers, then the sentence would be meaningless as applied to cities since it would provide that the local registrar should be the health officer and there would be no provision for the appointment of a registrar. In other words, the obvious purpose of the language is to make the health officer the registrar; it is not to make the registrar the health officer. When this is cleared up, then of course the intent of the remainder of the sentence is clear.

We may say, moreover, that from a grammatical standpoint it is utterly impossible to construe the section as providing that local clerks shall be health officers. Leaving out the provisions relating to cities, the sentence would read: "The local registrar shall be the clerk of each town and village." It would have been better to say that the clerk of each town and village should be the local registrar, but the meaning is clear as it is.

JWR

State Treasurer — Escheats — Refused Legacies — Subsec. (15) of sec. 14.42, Stats., requires the state treasurer to advertise the receipt of all legacies and shares paid into the state treasury under subsec. (2) of sec. 318.03, Stats., including refused as well as unclaimed legacies or shares.

May 10, 1944.

JOHN M. SMITH,

State Treasurer.

You state that the question has arisen as to whether sec. 14.42 (15), Stats. requires the state treasurer to advertise refused legacies that have escheated to the state under sec. 318.03 (2), Stats., and request our opinion thereon.

Subsec. (15) of sec. 14.42, Stats., provides as follows:

"ADVERTISE RECEIPT OF LEGACIES AND SHARES. The state treasurer, upon the receipt of *any money which belongs to heirs or legatees*, shall forthwith advertise the fact in the

state paper by giving the name of the decedent, the time and place of his death, the amount paid into the treasury, the personal representative paying the same, the county in which the estate is probated, and that the money will be paid to the heirs or legatees without interest, on proof of ownership, if applied for within five years from the date of publication in the manner provided in section 318.03. The cost of such advertising shall be charged to the appropriation for the treasury department."

Subsec. (2) of sec. 318.03, Stats., provides as follows:

"UNCLAIMED LEGACIES AND SHARES. Except as provided in section 331.42, if any legacy or share of intestate property shall be refused or shall not be claimed by the legatee or heir within 120 days after the entry of final judgment by the county court, or within such time as shall be designated in said final judgment, the executor or administrator shall convert the same into money and pay it to the state treasurer for the state school fund, and it shall be part of said fund until and unless refunded as in this section provided."

Subsec. (3) of sec. 318.03, Stats., provides as follows:

"APPLICATION FOR REFUND. The moneys received by the state treasurer pursuant to subsection (2) shall be paid to the owner on proof of his right thereto. The claimant may, within 7 years after the date of publication by the treasurer of notice of receipt thereof as provided by section 14.42 (15), file in the county court in which the estate was settled, a petition alleging the basis of his claim to the legacy or share. The court shall order a hearing upon the petition; and 20 days' notice thereof shall be given by the claimant to the attorney-general, who shall appear for the state at the hearing. If the claim is established it shall be allowed without interest; and the court shall so certify to the secretary of state, who shall audit and the state treasurer shall pay the same."

Sec. 14.42 (15), *supra*, requires the state treasurer to advertise the receipt of *any money which belongs to heirs and legatees*. In XXVI Op. Atty. Gen. 390, we held that this requirement applies to money which is paid to the state treasurer pursuant to sec. 318.03 (2), Stats., but inasmuch as that opinion refers generally to unclaimed legacies and

shares, and does not specifically state that it applies to refused legacies as well, some amplification of our previous opinion is necessary.

Sec. 318.03 (2), Stats., states that any legacy or any share of intestate property which "shall be refused or shall not be claimed" by the legatee or heir within the time set forth by the statute shall be paid to the state treasurer for the state school fund. It thus provides for the escheat of legacies or shares in either of two events, the first being where the legacy or share is refused, and the second being where the legacy or share is unclaimed.

In either event the owner is given the right to make application for a refund by sec. 318.03 (3), which provides that moneys received by the state treasurer pursuant to subsec. (2) shall be paid to the owner on proof of his right thereto. Subsec. (2) as seen above includes both refused and unclaimed legacies and shares, and since sec. 318.03 (3) thereafter provides that the claimant may petition for a refund within seven years of the date of publication by the treasurer as required by sec. 14.42 (15), it is clearly shown that the legislature contemplated that the state treasurer should advertise the receipt of refused as well as unclaimed legacies and shares. The state treasurer is therefore required under sec. 14.42 (15), to advertise the receipt of all legacies and shares paid to him under sec. 318.03 (2), Stats., including refused as well as unclaimed legacies and shares.

As our opinion in XXVI Op. Atty. Gen. 390 correctly reasons and concludes that the provisions of sec. 14.42 (15) require the state treasurer to advertise the receipt of any money paid under sec. 318.03 (2) we reaffirm such opinion and state for the purpose of clarification that sec. 14.42 (15), Stats. applies to refused as well as unclaimed legacies or shares.

JLB

State Treasurer — Escheats — Unclaimed Legacies —

The state treasurer is not required under sec. 14.42 (15), Stats., to advertise the receipt of funds which are paid to him by local trust companies, pursuant to sec. 318.06 (6), Stats. 1925-1931.

May 10, 1944.

JOHN M. SMITH,

State Treasurer.

You ask whether the state treasurer is required under sec. 14.42 (15), Stats. to advertise the receipt of money which is paid to him as an escheat by local trust companies pursuant to sec. 318.06, Stats. 1927.

In XXVI Op. Atty. Gen. 390 we considered a question relating to the scope of sec. 14.42 (15), Stats. There we ruled that the state treasurer is required to advertise pursuant to subsec. (15) of sec. 14.42 only the receipt of money paid to the state treasurer as an unclaimed legacy or share by an executor or administrator under subsec. (2) of sec. 318.03, Stats.

Sec. 14.42 (15) provides:

“The state treasurer, upon the receipt of any money which belong to heirs or legatees, shall forthwith advertise the fact in the state paper by giving the name of the decedent, the time and place of his death, the amount paid into the treasury, the personal representative paying the same, the county in which the estate is probated, and that the money will be paid to the heirs or legatees without interest, on proof of ownership, if applied for within five years from the date of publication in the manner provided in section 318.03. The cost of such advertising shall be charged to the appropriation for the treasury department.”

The above section by its express terms requires the state treasurer to advertise only the receipt of “money which belongs to heirs or legatees” and, therefore, it should be determined whether funds paid to the state treasurer under sec. 318.06 (6), Stats. 1927, represents the payment of money belonging to such heirs or legatees.

Sec. 318.06 (6), Stats. 1927, provided that the court may authorize the personal representative to deposit unclaimed or refused legacies or shares with a local trust company and authorizes the trust company to accept such deposits and pay them over to the owners or persons interested therein within the time limitations and in the manner set forth in the statute. It thereafter provided:

“* * * If no further application by any person interested therein is made within fifteen years from the date of such deposit, then the said fund shall become the property of the state and shall be paid over to the state treasurer for the benefit of the school fund.”

As such funds at the time of payment to the state treasurer constitute funds belonging to the state, it would therefore follow that payments of deposits made to the state treasurer by local trust companies under sec. 318.06 (6), Stats. 1927, do not represent the payment of money belonging to heirs and legatees, and the state treasurer is not required to advertise their receipt.

That the state treasurer is not required to advertise receipt of such funds is further apparent from the legislative history of sec. 318.06 (6). This section was enacted by ch. 108, Laws 1925, and amended by ch. 454, Laws 1925, and continued in effect until 1933. It was complete in itself, providing for the disposition of unclaimed legacies and shares, applications for refund, and the manner and time in which such applications should be made. There were no statutory provisions requiring the state treasurer to advertise the receipt of such deposits. In 1933 the entire procedure of depositing unclaimed legacies and shares with local trust companies pending the time in which the owner had the right to make application for a refund was eliminated by ch. 190, Laws 1933, which consolidated and revised the sections of the statute relating to refused or unclaimed legacies or shares of intestate property.

Sec. 318.06 (6) was renumbered to be sec. 318.03 (2), Stats., which inaugurated a totally new procedure for the handling of unclaimed legacies or shares by requiring that the executor or administrator pay unclaimed legacies or

shares directly to the state treasurer. At the same time sec. 317.11 was revised and renumbered to be sec. 14.42 (15). It requires the state treasurer to advertise the receipt of money belonging to heirs and legatees so that notice could be given to the owner and he could make application for a refund pursuant to subsec. (3) of sec. 318.03. This subsection as amended to date provides that the moneys received by the state treasurer pursuant to subsec. (2) of sec. 318.03, shall be paid to the owner upon proof of his right thereto within 7 years from the date of publication under sec. 14.42 (15). It is therefore apparent that the requirement of advertising was merely a part of the new procedure of handling escheats under the revision of 1933, and has no application to sec. 318.06 (6) which was complete in itself.

The present question has arisen because of the fact that local trust companies have continued to hold unclaimed legacies and shares pursuant to sec. 318.06 (6), Stats. 1925-1931, for the full period of 15 years and are now paying them to the state treasurer. For the reasons stated in this opinion, it is our conclusion that the state treasurer is not required under sec. 14.42 (15), Stats., to advertise the receipt of funds which are paid to him by local trust companies, pursuant to sec. 318.06 (6), Stats. 1925-1931.

JLB

Charitable and Penal Institutions — Counties — Public Officers — Trustees of County Institutions — District Attorney — It is the duty of the district attorney to advise the trustees of county institutions appointed under the provisions of sec. 46.18, Wis. Stats., and they may not employ independent counsel for that purpose under the provisions of sec. 46.18 (6).

May 13, 1944.

ELMER R. HONKAMP,
District Attorney,
 Appleton, Wisconsin.

You have requested our opinion as to whether sec. 46.18, Wis. Stats., authorizes the board of trustees of the Outagamie County Asylum to employ counsel to advise them of their duties as trustees. The section reads in part:

“(6) * * * They [the trustees] may sue and defend, in the name of the county, any cause of action involving the interest of said institution, and may employ counsel for that purpose. * * *”

Sec. 46.18 was created by a revision and consolidation in 1919 of various provisions relating to county institutions. As stated by the revisor in his notes, the sentence was derived from sec. 604 *ha*. That section provided that the trustees of certain county institutions were empowered to bring actions for moneys due such institutions for damage to property and for the recovery of property, etc., and to retain counsel for that purpose. There is nothing in the history of the statute which would indicate that the section is to receive any broader construction than the language requires, namely, that in the case of actions counsel may be retained. This construction would of course negative the power to retain counsel for purposes of advising the board of trustees.

It is the duty of the district attorney to “give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of

such board or officers * * *." Sec. 59.47 (3), Wis. Stats. The trustees of county institutions are county officials and it is the duty of the district attorney to advise them in matters relating to the performance of their duties. It being the duty of the district attorney to give such advice, there is of course no occasion for employment of other counsel.

So far as representation in litigation is concerned, under sec. 59.47 (1) the district attorney is required to prosecute or defend all actions in the courts of his county in which the county is interested or is a party. There is some conflict between this provision and the provision which authorizes trustees of county institutions to employ other counsel. As to whether, in view of the conflict, the trustees may employ other counsel is a question which we are not required to decide, but it is certain that it is not incumbent upon the trustees to employ such counsel even in the case of litigation and that it is the duty of the district attorney to represent them when requested.

JWR

Banks and Banking — Delinquent Banks — Liquidation — Priorities — The Reconstruction Finance Corporation as holder of "A" debentures in a state bank is treated as a creditor and not as a stockholder in liquidation proceedings under sec. 220.08.

The Reconstruction Finance Corporation is entitled to be paid the principal amount of such debentures in full before the Federal Deposit Insurance Corporation (as subrogee of the depositors under sec. 220.082, Stats.) or any other creditors are entitled to receive interest from the date of closing of the bank.

June 1, 1944.

STATE BANKING DEPARTMENT.

Attention James B. Mulva, *Chairman*.

You recently requested an opinion of this department relative to certain problems arising in the liquidation of state

banks. The pertinent facts in bank liquidations like the one you referred to are as follows:

1. The bank is a state bank insured with Federal Deposit Insurance Corporation (hereinafter referred to as FDIC) under the provisions of 12 USCA sec. 264.

2. The bank has received money from the Reconstruction Finance Corporation (hereinafter referred to as RFC) and has issued an income debenture "A" payable to RFC under the provisions of 15 USCA sec. 605.

3. The bank finds itself in financial difficulties and its affairs are taken over by the state banking department which becomes the statutory liquidator under the provisions of sec. 220.08, Wis. Stats.

4. The FDIC steps in immediately and usually within 10 days pays off the depositors in full, or the principal amount of their deposits up to \$5000 each, as of the date of closing.

5. The state banking department then proceeds to liquidate the bank's assets, paying therefrom the following items: (a) Expense of liquidation; (b) excess depositors (those who had more than \$5000 on deposit and were not reimbursed by FDIC for such excess); (c) other general creditors to whom the bank may owe current bills; (d) the FDIC for all money it has paid to depositors (subrogation provided for by sec. 220.082, Wis. Stats.); (e) the RFC as subordinated creditor under the debenture agreement. (The status of the RFC as to these debentures is one of the principal issues in the case before us.)

The questions confronting the banking commission are as follows:

1. What position does the RFC take in relation to the FDIC and other creditors?

2. After all creditors (except RFC, but including FDIC) have been paid the principal amounts due them, are they in position to claim interest at the legal rate before the RFC may collect the principal of the "A" debentures?

The provisions of the debenture agreement, pars. 11 and 12, are important in determining the priorities in this case.

Par. 11, entitled "Subordination" reads in part:

"The obligations of the Bank evidenced by the Debentures shall be junior and subordinate to all obligations of the Bank to its depositors and all other creditors * * *"

Par. 12, entitled "Liquidation" reads in part:

"In case of any * * * liquidation * * * of the Bank, whether voluntary or involuntary, all depositors and other creditors of the Bank * * * shall be entitled to be *paid in full* before any payment shall be made on account of principal of or interest on the Debentures." (Emphasis supplied)

Before discussing further these provisions of the debenture, we shall consider some of the general problems involved.

At the outset it is important to know whether the RFC as holder of these debentures stands in the position of a stockholder or a creditor. It is our conclusion that this debenture creates a creditor-debtor relationship between the RFC and the bank. The agreement contains this language at the very beginning:

"[The Tenth National Bank] * * * *for value received, hereby promises to pay* to [Reconstruction Finance Corporation] or registered assigns on [July 1, 1960] at the principal office of the Bank * * * the principal amount of [\$10,000] and to pay to the registered holder thereof interest on said principal amount * * *." (Then follows a provision for a variable rate of interest.) (Emphasis in quotation supplied.)

It was held in *Federal Dep. Ins. Corp. v. Department of Financial Inst.*, (1942) 44 N. E. 2d 992 (App. Ct. of Ind., in Banc) that these provisions created a creditor-debtor relationship. The debenture is a promise to pay a definite sum at definite rates of interest, and due on a definite date. Such an instrument is not like a stock certificate and carries no voting power for the holder thereof. The case cited points out that it was not the intention of congress to make the RFC a stockholder in state banks all over the country, but rather to enable the RFC to stabilize banks by advancing money to them so that liquid assets would be available. In

Reconstruction Finance Corporation v. Gossett, (1938) 130 Tex. 535, 111 S. W. 2d 1066 it was held that the debenture "A" created a debt within the meaning of the Texas constitution and statutes. See *Commissioner of Int. Rev. v. O.P.P. Holding Corp.*, (1935) 76 Fed. 2d 11, 12 (C. C. A. 2nd) for a discussion of the difference between creditor and stockholder relationship. *In re Phoenix Hotel Co. of Lexington, Ky.*, (1936) 83 Fed. 2d 724, 726 (C. C. A. 6th) is authority for the proposition that the relationships are incompatible. We agree that the debenture "A" makes the RFC a creditor and entitled to file a claim with the state banking department in liquidation proceedings.

Par. 11 of the debenture, as quoted above, provides that the debenture "A" shall be junior and subordinate to all obligations of the bank and its depositors and all other creditors except the owners of indebtedness subordinated to the debentures.

It is clear up to this point that the FDIC and other creditors may be paid in full for the principal amounts of their claims before the RFC can receive anything. However, it is the rule in this state that the FDIC is entitled to the legal rate of interest from the date of closing to the date of payment. See the very recent case *In re Liquidation of Oconto County State Bank*, (1944) 245 Wis. 245, 14 N. W. 2d 3. That case presented a situation where the contest was between the FDIC as creditor and the stockholders of the bank. The rule in cases of that kind is well established that interest at the legal rate must be paid to all creditors out of any assets available before the stockholders can make a claim. It is interesting to note that at p. 250 the court quoted Michie on Banks and Banking, Vol. 3, p. 501, sec. 220, as follows:

"Interest at the contract rate should be credited on the accounts of creditors to the date the receiver took possession of the bank's assets, and thereafter interest is not allowable as between the creditors themselves, but is allowable against the bank, and, if the assets are sufficient for the payment of the principal indebtedness as established at the time the receiver took possession, *interest should be paid at the legal rate before distribution of the surplus to the stockholders.*"

It should be observed that Michie states that "interest is not allowable as between the creditors themselves," which is the situation in the case before us.

We have a contest between two classes of creditors, viz., the FDIC together with other creditors on the one hand, and the RFC as a subordinated or junior creditor on the other hand. In situations of that kind, the rule is well established that no interest will be paid to the senior creditors until the full principal has been paid to the junior creditors. In other words, the FDIC is not entitled to any interest until the principal amount of the "A" debentures held by the RFC has been paid in full. This precise situation was involved in the Indiana case, *supra*, 44 N. E. 2d 992. The Indiana court cited numerous authorities which sustain the proposition that where one class of creditors has not yet received its principal in full, no other class of creditors may receive interest. The Indiana court concluded that the provisions in par. 12 of the debenture agreement, quoted in part herein, limited the words "paid in full" to payment of the principal amount.

The phrase "paid in full" has been interpreted by the courts to mean payment of the principal amount where the contest is between different classes of creditors in an insolvency or liquidation proceeding. See, *Greva v. Rainey*, (1935, Cal.) 41 P. 2d 328 and *In re Prudential Trust Company*, (1923, Mass.) 139 N. E. 702, 706-707. In the latter case "paid in full" was held to mean 100% of the principal to the savings depositors, and no interest was allowed to them until the full principal had been paid on the claims of the other creditors.

It is our conclusion that in a liquidation proceeding the banking commission should (1) treat the RFC as a creditor where it is the holder of "A" debentures, and (2) the RFC is entitled to the payment of the principal of these debentures in full before the FDIC or any other creditor is entitled to interest.

ES

Elections — Nominations — Public Officers — Secretary of State — Certification of Candidates — The secretary of state is required to certify to the county clerks for placing on the ballot the names of those who have filed the requisite number of nomination papers. Secs. 5.08, 5.10, Stats. He may not refuse to certify a person who has properly qualified by filing papers upon the ground that the person should not be entitled to hold the office.

June 8, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

The Hon. Joseph McCarthy, Judge of the 10th judicial circuit, has filed with your office nomination papers for the United States senate on the Republican ticket. You have requested our advice as to whether Judge McCarthy is eligible to run for the office of senator, in view of the provisions of sec. 10, art. VII, Wis. constitution.

The only interest that you have in the matter as secretary of state is that of certifying to the county clerks the names which are to be placed on the official ballot.

It is our opinion that the statutes contemplate that you shall certify the names of those for whom the requisite number of nomination papers have been filed. Secs. 5.08, 5.10, Stats. Judge McCarthy, as we understand it, has filed the requisite number of signers and his papers are otherwise in order. You should certify his name on the official ballot, and any question with respect to his eligibility to hold the office of United States senator must await future determination.

The precise question here presented was submitted to Attorney General Morgan in 1922, when the Honorable Henry Graass, Judge of the 14th judicial circuit, filed as a Republican candidate for representative in congress from the 9th district. In an opinion reported in XI Op. Atty. Gen. 600, Mr. Morgan took the view here set out. I refer you to Mr. Morgan's opinion for case authorities on the point.

JWR

Criminal Law — Plea of Nolo Contendere — Courts — Fish and Game — Plea of nolo contendere may in court's discretion be rejected. If received, the court's docket should show the plea and the court's adjudication of guilt (as well as other proceedings) as in any other case. In a fish and game law case, conviction upon such a plea causes revocation of license under sec. 29.63 (3), Stats. Court should adjudge defendant guilty on his plea before imposing sentence.

June 20, 1944.

E. J. VANDERWALL, *Conservation Director,*
State Conservation Commission.

You have requested a reconsideration of the opinion in XVI Op. Atty. Gen. 471 in which this department informed a district attorney that a conviction of a violation of the fish and game law upon a plea of *nolo contendere* has the same effect with reference to revocation of licenses as any other conviction. You state that the opinion fails to consider the case of *Remington v. Judd*, (1925) 186 Wis. 338, 202 N. W. 679, and you ask the following questions:

"1. In an action for violation of the fish and game laws may the court refuse to receive a plea of *nolo contendere* from the defendant?

"2. If a plea of *nolo contendere* is received by the court, what should the court's docket show?

"3. Will a judgment of conviction entered by the court upon a plea of *nolo contendere*, cause the license of the defendant to be automatically cancelled?

"4. In event of the entry of a plea of *nolo contendere*, may the court assess a fine if he does not enter a judgment of conviction?"

The opinion in XVI Op. Atty. Gen. 471 was correct. The case of *Remington v. Judd*, (1925) 186 Wis. 338, 202 N. W. 679, held only that the plea of *nolo contendere* is not itself a conviction. Neither is a plea of guilty. In either case the conviction follows the plea and consists of the finding by the court that the defendant is guilty, on his plea. In two cases subsequent to the *Remington case* the supreme court used the following language:

“* * * It is a plea * * * from which a judgment of conviction follows as inevitably as such a judgment follows a plea of guilty. * * * There is no difference * * * in the nature, character, or force of the judgment following such pleas. They are both solemn adjudications of guilt. * * *” *State v. Suick*, (1928) 195 Wis. 175, 177, 217 N. W. 743.

“The plea of *nolo contendere* admitted the matters alleged in the information at the time the plea was entered. * * * Defendant ‘admits for the purposes of the case, all the facts which are well pleaded. That is to say, it is a confession of guilt, so far as this particular case is concerned, and places the defendant in the same position . . . as though he had pleaded guilty, or been found guilty by the verdict of the jury.’” *Brozosky v. State*, (1928) 197 Wis. 446, 452, 222 N. W. 311.

See also *Hudson v. United States*, (1926) 272 U. S. 451, where the nature and history of the plea are considered at length.

The answers to your questions are as follows:

1. The court may in its discretion refuse to receive a plea of *nolo contendere* in any case. *State v. Suick*, (1928) 195 Wis. 175, 177, 217 N. W. 743; *Brozosky v. State*, (1928) 197 Wis. 446, 452, 222 N. W. 311.

2. If the plea is received the court’s docket should show the same things that are required in case of a plea of guilty, except that it will show that the plea was *nolo contendere* instead of guilty. It is important that the docket show that the court adjudged the defendant guilty on his plea.

3. Any judgment of conviction, whether on a plea of guilty or *nolo contendere* or after a trial and the verdict of a jury or the finding of the court, will cause the license of the defendant to be automatically cancelled under sec. 29.63 (3), Stats.

4. The court is not authorized to assess a fine or impose any other penalty in any case merely on a plea of *nolo contendere*. After receiving the plea the court should then *adjudge the defendant guilty* before pronouncing sentence. See *State v. Suick*, (1928) 195 Wis. 175, 176-178, 217 N. W. 743; *Brozosky v. State*, (1928) 197 Wis. 446, 447, 222 N. W. 311.

WAP

Taxation — Exemption — Public Lands — Airport —
Land acquired by counties, towns, cities or villages for airport purposes is exempt from taxation under the provisions of sec. 70.11 (2). It is immaterial that such real estate may be located in another municipality or that it is not immediately used for the purpose for which it is acquired.

June 30, 1944.

M. W. TORKELOSON,
*Director of Regional Planning,
State Planning Board.*

You have requested our opinion with respect to exemption from taxation of land acquired for airport purposes in the following instances:

1. Where a city, village or town acquires real estate without its territorial limits but within the territorial limits of the county in which it is situated.
2. Where a city, village or town acquires real estate without its territorial limits and without the territorial limits of the county in which it is situated.
3. Where a county acquires real estate without its territorial limits.

All real estate so acquired is exempt. Sec. 70.11 (2) provides that lands owned by any county, city, village or town are exempt from taxation. Under the provisions of ch. 114 counties, cities, villages and towns are permitted to acquire real estate for the purpose of establishing airports, whether within or without their territorial boundaries. Real estate acquired under such authority and owned by any such town, city or county is exempt under the plain and unambiguous provisions to which reference is made.

You desire to be advised also as to whether it would make any difference if property purchased were not immediately utilized for airport purposes. You suggest that it might be desirable to purchase originally with a view to the future and that real estate not immediately needed might be leased for farming purposes until it became necessary to use it.

Assuming such a lease to be proper, land so acquired and leased is exempt from taxation. The exemption from taxation is based upon ownership and not upon the purpose to which real estate may be devoted. If it is owned by a county, town, city or village it is exempt.
JWR

Poor Relief — Old-age Assistance — Counties — County Pension Director — District Attorney — Sec. 49.26 (4) limits only the amount which may be appropriated for payment of other claims out of the proceeds of real estate subject to an old-age assistance lien.

If the estate of an old-age assistance beneficiary is no more than sufficient to pay the old-age assistance claim, neither the county pension administrator nor the district attorney may receive from the estate greater remuneration for services in its administration than provided in sec. 49.26 (7).

The old-age assistance claim provided by sec. 49.26 does not include payments by a county to doctors or hospitals for services rendered to an old-age assistance beneficiary.

July 1, 1944.

A. W. BAYLEY, *Director,*
State Department of Public Welfare.

1. You refer to the following language in sec. 49.26 (4) of the statutes:

“* * * and except that the amounts allowed by the court in the estate of any deceased beneficiary and remaining unpaid after all funds and personal property in the estate have been applied according to law, for administration and funeral expense for hospitalization, nursing and professional medical care furnished such decedent during his last sickness, not to exceed \$300 in the aggregate, shall be charged against all real property of such deceased upon which an old-age assistance lien shall have attached, and

shall in such order be paid and satisfied prior to such lien out of the proceeds derived from such real property upon liquidation of such old-age assistance lien."

and ask whether the \$300 limitation therein imposed applies to the amount that may be satisfied out of the proceeds of real estate prior to the satisfaction of the old-age assistance lien, or whether it applies to the total which may be allowed by the court for administration expenses and the like.

In construing a statute the ordinary grammatical meaning of the terms is to be followed unless the result is ambiguous or unless there is something to point to a different legislative intent. The question you have submitted involves the determination what words are modified by the phrase "not to exceed \$300 in the aggregate." That can be determined more readily by stripping out of the provision some of the descriptive verbiage so as to leave the words "the amounts allowed * * * and remaining unpaid * * * not to exceed \$300 in the aggregate * * * shall be charges, * * *." The complete subject includes "amounts allowed * * * and remaining unpaid." If the legislature had intended the \$300 limitation to apply only to amounts allowed, the limitation could have been inserted before instead of after the words "and remaining unpaid." Since the limitation falls after the compound subject it applies to the whole, that is, "amounts allowed * * * and remaining unpaid." The use of the words "in the aggregate" do not require a different construction because they may refer to the various types of expense, such as administration, hospitalization, and the like, which go to make up the amounts allowed and remaining unpaid.

In our opinion the provisions of sec. 49.26 (4) do not prevent the court from allowing more than \$300 for the various items of expense therein enumerated but prevent more than \$300 of the amount so allowed from being satisfied out of the proceeds of property on which there is an old-age assistance lien, unless such lien is first satisfied in full. Perhaps the interpretation will be made clearer by the following illustrations:

Amount allowed	Amount of personal property	Amount to be satis- fied out of property subject to lien
500	0	300
500	400	100
200	200	0

Assuming that the value of the property subject to lien for old-age assistance is sufficient to satisfy the lien in full and also to satisfy all other claims, sec. 49.26 imposes no limitation upon the amounts which may be allowed by the court and satisfied out of such property.

2. You ask whether, if the assets of the estate of an old-age assistance beneficiary are insufficient to pay the old-age assistance claim in full, a county welfare director acting as administrator of the estate, or a district attorney acting as attorney for the administrator, may collect any fee in excess of the \$50 allowed by sec. 49.26 (7).

The answer is no. The question has been answered in the negative, expressly in an unofficial opinion issued September 7, 1939, and impliedly in the official opinions of XXX Op. Atty. Gen. 275 and XXXI Op. Atty. Gen. 57. The latter two opinions are to the effect that if there is a surplus in the estate over the amount necessary to satisfy the old-age assistance claim, allowances may be made to the pension director and district attorney for services performed in connection with administration of such surplus for the benefit of the heirs. In XXX Op. Atty. Gen. 275, 276, however, it was expressly stated that:

“* * * We think it is clear that neither the district attorney nor county pension director is entitled to additional compensation out of the estate for such services as are performed on behalf of the county in obtaining payment of its claim. * * *”

The district attorney is required under sec. 49.26 (3), and the county pension director under secs. 49.20, 49.25 and 49.26 of the statutes to take whatever steps are necessary to enforce the county's claim. They are entitled to no compensation for services required by law other than that provided

by law. Where the estate is no more than sufficient to satisfy the old-age assistance claim, any services performed by the district attorney and the pension director are necessarily rendered in the performance of their statutory duties, and compensation out of the estate is limited to that provided in 49.26 (7). For a discussion of that provision, see XXXII Op. Atty. Gen. 431.

3. You ask whether payments made by the county out of a special fund for medical and hospital care of old-age assistance beneficiaries are entitled to the benefit of the provisions of secs. 49.25 and 49.26 with respect to repayment and security. We assume the payments in question are not those made under the certificates issued pursuant to sec. 49.29 but are supplementary thereto in the form of payments directly to doctors or hospitals.

In XIX Op. Atty. Gen. 548 it was ruled that old-age assistance cannot be given in the form of payments to a hospital for services. Sec. 49.31 permits medical and surgical assistance to be given in addition to old-age assistance (see also XXVI Op. Atty. Gen. 306, XXXI Op. Atty. Gen. 400) but in such cases the medical and surgical assistance is expressly distinguished from the old-age assistance and classified as other relief by the terms of the statute. The medical and funeral expense covered by secs. 49.25 and 49.26 of the statutes is expressly limited to that "paid as old-age assistance." The old-age assistance law provides for payment of funeral expense (sec. 49.30), but it does not authorize payment of medical and hospital expense, unless the same is paid for that purpose directly to the beneficiary under the certificate issued under sec. 49.29. The opinion was given in XXV Op. Atty. Gen. 287 that an old-age assistance grant might be temporarily increased to enable the recipient to take care of emergency medical expense. The need for medical care may be a consideration in fixing the amount of the grant. It may be in reference to such situations that the phrase "including medical * * * expense paid as old-age assistance" was inserted in secs. 49.25 and 49.26.

The legislature has demonstrated its intent that state funds provided for old-age assistance shall not be used for payments to doctors and hospitals in its indefinite postpone-

ment on June 18, 1943 of the proposed bill, 305 S, which would have authorized such use. Neither may funds of the United States be used for such payments, under 42 U. S. C. A, secs. 303 (a) and 306, since federal participation is thereby limited to "payments to needy aged individuals." The provision of sec. 49.25, Stats., to the effect that one-half of the net amounts recovered pursuant to sections 49.25 and 49.26 is to be paid over to the United States government and the remainder to the state and county in the proportion of their respective contributions, indicates that the legislature intended the collection procedure set up under those sections to apply only to the old-age assistance in which the federal and state governments participate.

BL

Vital Statistics — Public Health — Board of Health —
Under secs. 69.02 (3) (d) and 69.24 (3), Stats., the state bureau of vital statistics may charge a fee, to be prescribed by the state board of health by regulation published as prescribed by secs. 140.05 (3) and 227.03, for searching its records to answer an inquiry whether or not a birth certificate or other vital record is on file. No charge (other than the statutory fee for issuing copies) may be made when the search is for the purpose of making a certified copy or short form certificate, even though the record is not found so that no certified copy or short form certificate can be issued for which a fee could be charged.

July 7, 1944.

DR. CARL N. NEUPERT,
State Health Officer,
Board of Health.

You state that during the calendar year 1943 the bureau of vital statistics received and replied to 9,146 requests for information and verification of vital records. Most of these are requests for information as to whether birth certificates are on file and frequently they do not contain enough

information, so that further correspondence is necessary. The average cost of handling each inquiry is at least 50 cents. You inquire whether the state board of health may authorize the bureau to charge for this service under sec. 69.24 (3), Stats.

The duties of the division of legal records of the bureau of vital statistics are defined by sec. 69.02 (3) as follows:

“(3) The division of legal records:

“(a) Shall file and index papers required to be filed with the state registrar under this chapter and shall preserve such records after they have served their purpose as public health statistics.

“(b) Shall issue certified copies of such records upon payment of the prescribed fees.

“(c) May make transcripts of such records for the United States Census Bureau, the Social Security Board and other governmental agencies upon their request and payment of the fees mutually agreed upon. Certified copies or verifications of records may be furnished free to governmental agencies.

“(d) *May make special searches of such records and make copies, transcripts or reports pursuant thereto upon request and payment of the fees prescribed by the board.*

“(e) May operate a microfilm laboratory in connection with its duties under this chapter; the services of this laboratory may be available at cost to other governmental agencies if such use does not interfere with the bureau's duties under this chapter.”

Sec. 69.24 provides for the collection of fees by the state and local registrars. Subsec. (3) provides as follows:

“(3) The state registrar shall collect a reasonable fee not exceeding \$20 for special searches which may be requested of him to adequately meet the cost of such special search.”

It will be observed that the bureau is not required by law to make searches of its records. To be sure, searches are necessary to find original records of which certified copies or short form certificates (sec. 69.29 (2)) have been ordered. Such searches are part of the routine duties of the division of legal records and the cost thereof is intended to

be met by the fee provided for issuing the certified or short form copies.

The term "special searches" as used in sec. 69.02 (3) (d) and sec. 69.24 (3) is not defined in the statutes nor has it ever been judicially construed by any court. The word "special" means particular, uncommon or extraordinary and is the opposite of ordinary, regular or general. As used in these statutes it appears to comprehend every search not required in the routine performance of the bureau's duties. Since the bureau has no statutory duty to search its records unless a certified copy or short form certificate is ordered, all searches made for other purposes are comprehended in the term "special searches" as used in the statute. The state board of health therefore has power to prescribe reasonable fees to meet the cost of such searches under the above-quoted statutes.

But if a request for a certified copy or short form certificate of a record is received, the search for that record is a *routine* search (not a "special" search) and if it should not be found no fee may be charged. If the record is found the certified copy or short form certificate must be issued on payment of the fee prescribed by law without any additional charge for the search, and even if no fee may be charged for the copy or short form, the search must nevertheless be free of charge.

Any schedule of fees for special searches should be prescribed by the board by a regulation, published as required by sec. 140.05 (3), Stats., and filed in the office of the secretary of state pursuant to sec. 227.03.

WAP

Poor Relief — Department of Public Welfare — Counties — County Board — No rule adopted by the state department of public welfare under the provisions of sec. 49.50 (2) requires a county board to delegate its authority to fix the compensation of county pension department employees.

July 11, 1944.

J. KYLE ANDERSON,
District Attorney,
Waupaca, Wisconsin.

Sec. 49.50 (2), Wis. Stats., provides that the state department of public welfare shall adopt rules and regulations for efficient administration of old-age assistance, aid to dependent children and blind pensions. Secs. 49.51 (1) and 59.15 (1) (e) provide that the county board may fix the salary or compensation of personnel administering such public assistance subject to rules promulgated by the state department of public welfare under the provisions of sec. 49.50 (2).

Pursuant to the authority vested in it the state department of public welfare established classifications covering personnel to be employed by the counties in the administration of the aids in question. In addition salary ranges were fixed for each classification. A minimum and a maximum salary for such classification were fixed and in addition certain steps were provided as points between the minimum and maximum at which salaries could be fixed. For example, a classification might begin at \$100 and by a series of \$10 steps run to \$150. Any salary fixed between the minimum and the maximum could be fixed upon the basis of any one of the steps.

Following the establishment of these rules the county board of Waupaca county adopted a salary classification scheme identical with that adopted by the state department of public welfare and delegated to one of its committees the authority to fix salaries in accordance with the schedules of compensation so fixed. Somewhat later the state department of public welfare revised its compensation schedules, increasing the minimum and maximum figures, and in some

cases changing the steps upon which the salaries could be based between the minimum and maximum. The Waupaca county board at its May meeting considered and refused to adopt an ordinance delegating to its public assistance committee authority to fix salaries in accordance with the revised schedule. Notwithstanding the refusal of the board to adopt the ordinance, it has been suggested that the public assistance committee has authority to fix salaries in accordance with the revised schedule, and you desire our opinion as to whether it may do so.

The public assistance committee has no such authority. There is no question here of conflict between the authority of the state department of public welfare and the authority of the county board. The county board is vested with the authority to fix the compensation of county employes. So far as the personnel of pension departments is concerned the county board must exercise its authority with due regard to the rules of the state welfare department, but the state welfare department has not assumed to require a county board to delegate its authority to fix compensation. By refusing to adopt the proposed ordinance the county board of Waupaca county has in substance refused to delegate its authority to fix compensation above the maximum fixed by the original schedule adopted by the state department of public welfare.

There is no requirement that it delegate such authority. Assuming that it may delegate authority in any case, the only requirement imposed by state law is that either directly or by delegation it fix salaries within the limits prescribed in the ranges adopted by the state department. So far as we are advised no claim is made but that the salaries of Waupaca county employes are within such ranges. The revised schedule adopted by the state, as we have said, increases minimums and maximums, but at the time of its adoption the Waupaca county employes were compensated at figures far enough in excess of the minimums as they then existed as to be above the increased minimums. Above the limits of the ranges within which the county board has delegated its power to fix salaries, it may act directly or for that matter may refuse to act.

JWR

Tuberculosis Sanatoriums — Private sanatoriums are not included in the provisions of sec. 50.07 (4), Stats., notwithstanding the provisions of sec. 58.06 (2).

July 11, 1944.

DR. CARL N. NEUPERT,
State Health Officer,
Board of Health.

You state that a private tuberculosis sanatorium desires to construct a nurses' home and you inquire whether the cost of such home may be reflected in the per capita cost of county and state-at-large patients admitted to the sanatorium, under sec. 50.07 (4), Stats.

Sec. 58.06 (2), created by Laws 1929, ch. 316, sec. 2, provides as follows:

“(2) Any private, philanthropic tuberculosis sanatorium organized on a non-profit basis, if approved by the state board of health, may admit patients committed to it by any county in the manner and upon the terms provided by section 50.07.”

Sec. 50.07 (4) (then numbered 50.07 (2) (d)) was first created by Laws 1937, ch. 285, eight years after the passage of sec. 58.06 (2). The first question in construing a statute which adopts another one by reference usually is whether the legislature intended to adopt such other statute only as it existed at the time the adopting statute was passed, or whether subsequent amendments to the adopted statute may be considered to be incorporated in the new statute by reference. However, it is unnecessary here to consider whether any and all amendments of sec. 50.07 automatically become a part of sec. 58.06 (2), since it is quite apparent that sec. 50.07 (4) can apply only to county institutions and not to private sanatoriums.

Sec. 50.07 (4) provides in effect that the board of health shall, in the determination of per capita cost to be charged by a county sanatorium for state-at-large and other-county patients, include a sum to be applied on the cost of new additions. This amount is arrived at annually by dividing the

total number of patient-days into a sum representing 5% of the cost of the new addition. Thus in twenty years the cost of the new addition is completely amortized as to principal and no further charges may be made for that purpose. The legislative intent to make this applicable only to county institutions and not to private sanatoriums is evident from the language of paragraph (a) which begins as follows: "As an emergency measure to encourage the expansion and improvement of the facilities of *county* tuberculosis sanatoria, the state board of health shall" etc. Paragraph (c) provides that expenditures for the addition to any sanatorium "shall be determined on the actual expenditures *of the county* for such purpose, *less the amount, if any, of any grant of money or the value of any services, received from any source other than county funds.*"

Since the statute does not permit counties to include sums received either from private charitable gifts or bequests or from other non-county sources in determining the amount to be charged under subsec. (4), it could hardly be maintained that private sanatoriums could include such sums for the purpose of that subsection. Since no county funds can ever be available for the construction of additions to private tuberculosis sanatoriums, but the latter must be financed wholly from other sources, there is no way in which the statute can be made to apply to such institutions. This fact, together with the declared legislative purpose of encouraging the expansion of the facilities of county sanatoriums, positively excludes the private sanatoriums from the benefits of subsec. (4).

WAP

Counties — County Board — Public Officers — Service Officer — A county board has no power or authority to appoint either a committee composed entirely of members of veterans' organizations not members of the county board or a committee consisting of members of the county board and members of veterans' organizations with authority to aid and assist the county service officer. A county board has no power to delegate any authority to such committee or to appropriate any money for its expenses.

July 12, 1944.

MILTON L. MEISTER,

District Attorney,

West Bend, Wisconsin.

You have inquired (1) whether the county board has power or authority to appoint either a committee composed entirely of members of veterans' organizations not members of the county board, or a committee consisting of members of the county board and also of members of veterans' organizations with authority to aid and assist the county service officer and (2) if the authority to appoint such a committee exists, whether the county board has power to delegate any authority to it and to appropriate any money for the expenses of such committee.

The authority to create the position of county service officer is given the county board by sec. 59.08, Stats., which provides in part:

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

“* * *

“(23) SERVICE OFFICER. May create the position of service officer and elect for such office a veteran of a war, who was engaged in the service of the United States, to hold office for a term of two years, except in counties having a population of five hundred thousand or more wherein the term of such office shall be for an indefinite period pursuant to the provisions of sections 16.31 to 16.44, inclusive, of the

statutes, and to receive such compensation, as the board may fix. * * * Such service officer shall advise with all veterans of wars, residents of the county, who were engaged in the service of the United States relative to any complaint made or problem submitted by them to him and shall render them such assistance as, in his opinion, he may render. In counties having a population of five hundred thousand or more such service officer when appointed shall act as secretary of the soldiers' relief commission provided for in section 45.12. The board may provide such officer with clerical assistance and such other needs as will enable him to adequately perform his duties. The board may require such reports as it may determine."

We are of the opinion that a county board has no power to appoint a committee composed entirely of members of veterans' organizations who are not members of the board, or a committee consisting of members of the county board and members of veterans' organizations not members of the board, with authority to aid and assist the county service officer.

A county board has only such powers as are expressly conferred upon it by statute or are necessarily implied from those expressly given. *Dodge County v. Kaiser*, (1943) 243 Wis. 551; *Spaulding v. Wood County*, (1935) 218 Wis. 224; *Frederick v. Douglas County*, (1897) 96 Wis. 411; *Town of Crandon v. Forest County*, (1895) 91 Wis. 239. We find no statute which would grant the county board power to appoint such a committee.

We are unable to find any basis for holding that there is any implied power to appoint such a committee. The rule is that courts are conservative in implying powers not expressly given and if there is a fair and reasonable doubt as to the existence of an implied power, it is fatal to its being. *Dodge County v. Kaiser, supra*. In our opinion the existence of an implied power in the county board to appoint such a committee is negated by the fact that the law providing for the appointment of committees by the county board confers authority to appoint on such committees only members of such board. Sec. 59.06, Stats.; *Forest County v. Shaw* (1912) 150 Wis. 294.

It has also been held a county board has no power to either enlarge or take away or narrow the powers granted

by statute to a county officer except insofar as the legislature has authorized it to do so. *Reichert v. Milwaukee County*, (1914) 159 Wis. 25; *Town of Crandon v. Forest County*, (1895) 91 Wis. 239. Similarly a county board cannot by contract divest itself or any county officer of authority vested in them by statute. *State ex rel. Buchanan v. Cole*, (1935) 218 Wis. 187; *Beal v. Supervisors of St. Croix County*, (1861) 13 Wis. 500. If the position of county service officer is created the person who is elected to such position is given certain powers and duties by statute. Sec. 59.08 (23), Stats. Such powers as are granted the county service officer are to be exercised by him alone and the statute clearly gives him a discretion as to the manner in which he may perform his duties and exercise his powers. Hence it is clear that the county board could in no event appoint a committee consisting of non-members of such board or of members and non-members which would in any way interfere with or narrow the statutory powers and duties of such officer. Further it is the rule that a county board has no power to create a new or outside agency which would supersede the agency set up by the legislature (*State ex rel. Buchanan v. Cole, supra*), and obviously a county board would have no power to set up any committee which would either directly or indirectly have the effect of superseding in any way powers and duties of the county service officer.

This is not to say that a county board could not by proper resolution authorize its chairman to appoint a committee of its own members, some or all of which might have served in the armed forces of the United States and might be members of veterans' organizations to aid and assist the county service officer. Sec. 59.06, Stats. There would be no authority to include non-members on such a committee but if the county board attempted to create a committee consisting in part of members and part of non-members, the non-members would be considered at most as mere volunteers having no official authority. *Forest County v. Shaw, supra*. However, the powers of any committee appointed by the county board to advise with the county service officer would be subject to the restriction that such committee could not in any way invade or narrow the statutory powers of the county service officer.

It is possible that the various veterans' organizations in a county could on their own initiative create a committee to work with the county service officer. Such a committee would have no official status, but if the county service officer should see fit to consult with such committee, there would seem to be no objection to his doing so. However, this would have to be purely voluntary on the part of the county service officer who would not be required to follow the advice of such committee and would not be subject to their direction in any way whatsoever.

We conclude that a county board has no power or authority to appoint either a committee composed entirely of members of veterans' organizations not members of the county board or a committee consisting of members of the county board and members of veterans' organizations with authority to aid and assist the county service officer. In view of this it is plain that the county board has no power to delegate any authority to such committee or to appropriate any money for its expenses. Cf. *Dodge County v. Kaiser*, *supra*.

WET

Schools and School Districts — Public Officers — Superintendent of Public Instruction — An order made by the state superintendent of public instruction pursuant to the provisions of sec. 40.30 (1), Stats., dated May 5, 1944, bearing the notation "effective June 30, 1944," is a valid order.

Such order of the state superintendent, dated May 5, 1944, "effective June 30, 1944," which abolished joint school district No. 14, which had an assessed valuation of less than \$100,000 on May 5, 1944, and attached the land comprising said district to joint school district No. 1, the new district to be known as joint school district No. 1, was not rendered null and void or otherwise affected by an order of the town board made pursuant to sec. 40.30 (1) on June 20, 1944, which purported to attach certain parcels of land located in joint school district No. 1 (as it existed prior to the state superintendent's order) and another district to joint school district No. 14 so that the assessed valuation of said last-named district on June 20, 1944, if the order of the town board is given effect, exceeded \$110,000.

July 27, 1944.

L. C. YOUNGMAN,

District Attorney,

Barron, Wisconsin.

You advise us that a certain town in your county has located in it three school districts known as joint school district No. 1, joint school district No. 7 and joint school district No. 14. The first two districts have assessed valuations, according to the last assessment roll, in excess of \$200,000 each and the assessed valuation of the third is \$92,000. On May 5, 1944 the state superintendent of public instruction issued an order, pursuant to the provisions of sec. 40.30 (1), Stats., whereby joint school district No. 14 was abolished and the land comprising said district was attached to joint school district No. 1, the new district to be known as joint school district No. 1. Said order was dated May 5, 1944 and bears the notation "Effective June 30, 1944."

You further inform us that at a meeting of the town board duly called and held pursuant to the provisions of sec.

40.30 (1), Stats., on June 20, 1944, said town board by order which was to take effect on said day purported to attach certain parcels of land in joint school district No. 1 and joint school district No. 7 to joint school district No. 14, with the result that if such order is given effect, the assessed valuation of joint school district No. 14 as of said date was in excess of \$110,000. The change made by the order of the town board would not result in any increase in state aids and you state that in all likelihood they would be lessened.

You submit the following questions:

1. Is said order of the state superintendent of public instruction, dated May 5, 1944, to become effective June 30, 1944, abolishing joint school district No. 14 and attaching the land comprising said district to joint school district No. 1, a valid order?

2. Did such order become null and void or was it otherwise affected in any way by the order of the town board, effective June 20, 1944, which latter order purported to transfer certain land in joint school districts No. 1 and No. 7 to joint school district No. 14 with the result that the assessed value of all of said school districts as of said date exceeded \$100,000?

The power of the state superintendent of public instruction in the premises must be found in that portion of sec. 40.30 (1), Stats., which provides as follows:

“* * * The state superintendent is authorized, on his own motion, by order to attach districts with valuations of less than one hundred thousand dollars to contiguous districts.”

In our opinion an order of the state superintendent of public instruction, made pursuant to the above subsection such as was made here, dated May 5, 1944, effective June 30, 1944, is a valid order. It has been common practice for the state superintendent to issue an order in this form and its validity has never been questioned. In *Thornapple v. Callahan*, (1943) 244 Wis. 266, the orders there subject to at-

tack were made on April 25, 1942, effective June 30, 1942. Examination of the briefs in that case shows that the claim was made among other things that the use of such form of orders under the circumstances there present tended to show the state superintendent acted in an arbitrary manner. The supreme court held the orders valid and held the state superintendent did not act in an arbitrary manner or in an unlawful abuse of authority and hence it must be considered that the validity of such form of order has been sustained at least *sub silentio*.

An administrative body or officer has such power as is expressly granted by statute or which may be implied therefrom by necessary implication. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440; *Chicago & Northwestern R. Co. v. Railroad Comm.*, (1931) 205 Wis. 506; *Madison Rys. Co. v. Railroad Comm.*, (1924) 184 Wis. 164. We believe that the power given the state superintendent to enter an "order" is broad enough to permit him to enter an order such as is under consideration here. It has been held that where a statute authorizes an administrative body "to make and file its order" it is authorized to make whatever order may be necessary in the exercise of its jurisdiction. *Motor Transit Co. v. Railroad Comm.*, (1922) 189 Cal. 573, 209 P. 586.

There is also judicial approval for the proposition that in absence of statute, an administrative body may provide in its discretion for the time when its orders shall take effect. In *Clemmons v. Railroad Comm.*, (1916) 173 Cal. 254, 159 P. 713, the court said, page 714:

"In the absence of any provision to the contrary in the statute, we see no reason to doubt that the Commission may provide in its discretion for the time when its orders shall take effect. * * *"

As a practical matter it is difficult to see how any person against whom such an order is issued could be prejudiced thereby. Such person could not be harmed by the granting of a stay between the time when it is entered and the time when it becomes operative. Such stay is merely a matter of grace, of which the person against whom the order is en-

tered cannot complain. The practice of entering such an order is sound administrative practice since it permits any necessary adjustments to be made before it becomes operative and avoids confusion. This is especially true in cases involving orders of the state superintendent. If an order is entered, as here, "effective June 30th," it is obvious that by that time the current school year has ended and it is not necessary for the new school district to take over during the school year with its resulting complications.

We are also of the opinion that the order of the state superintendent here involved was not rendered null and void or affected in any way by the order of the town board, dated June 20, 1944, which latter order purported to attach certain land in joint school districts No. 1 and No. 7 to joint school district No. 14 with the result that the assessed valuation of each of said school districts as of said date exceeded \$100,000. When the state superintendent signed his order on May 5, 1944 the necessary jurisdictional facts existed and the administrative action was completed. No statute gives the state superintendent power to then take any further action with respect to his order. It had passed beyond his jurisdiction. See *Baken v. Vanderwall*, (1944) 245 Wis. 147; *Superior W. L. & P. Co. v. Public Service Comm.*, (1939) 232 Wis. 616; *State ex rel. Schuster Realty Co. v. Lyons*, (1924) 184 Wis. 175; *McCormick H. Machine Co. v. Aultman*, (1897) 169 U. S. 606, 42 L. ed. 875. The state superintendent assumed jurisdiction and exercised his statutory power with respect to the school districts in question on May 5, 1944, and we are of the opinion that such action precluded the town board from taking any subsequent effective action affecting the same school district or districts, such as that referred to in your inquiry.

Such conclusion is indicated by at least one decision of the supreme court. In *School District v. Callahan*, (1941) 237 Wis. 560, the court in discussing the question of a possible conflict in jurisdiction because of the dual grant of power given by sec. 40.30 (1), Stats., to the state superintendent and to town and other municipal boards, pointed out at page 575 of its opinion that at most there might arise a conflict if a board and the state superintendent should act *concur-*

rently. The clear implication from this statement is that if they did not act concurrently, which would be the case if the state superintendent acted prior to any order of the town board with respect to certain districts as he did here, the action of the state superintendent would preclude any subsequent effective action by the town board affecting the same district or districts.

Attention should be called to *Thornapple v. Callahan*, (1943) 244 Wis. 266, where the state superintendent made an order abolishing certain school districts and attaching them to another district, by order dated April 25, 1942, to become effective June 30, 1942. On May 18, 1942 the town board adopted a resolution whereby the town board in substance resolved that the boundaries of said school districts so abolished remain the same as before. It was claimed that such action of the town board rendered the order of the state superintendent void. The court said, page 270 :

“* * * Such action does not have that effect, for, (1) it is not taken pursuant to any statutory power; and (2) the board's action is subject and subordinate to the state superintendent's order. See *School Dist. v. Callahan* (1941), 237 Wis. 560, 297 N. W. 407.”

The above case is not in point here because the town board there simply attempted to act by resolution and you inform us that the action of the town board here was by order duly made pursuant to the provisions of sec. 40.30 (1). Hence it is obvious the first reason above given, which would have been sufficient to dispose of the question raised in that case, would not be applicable here. The second reason would by its language seem to be applicable here and if so would be additional support for the conclusion that the order of the state superintendent here is not rendered null or void or in any way affected by the subsequent action by the town board. However, reference to *School District v. Callahan, supra*, shows that the court there stated at page 575 of 237 Wis. that if a town board and the state superintendent act concurrently, under the statute the town board's action would be subject to and subordinate to the state superintendent's order *on an appeal from the board's order*,

and for that reason we believe that the *Thornapple* case is of doubtful value in determining the problem here presented. However, we do feel that the court in *School District v. Callahan, supra*, did indicate that if the state superintendent acted first with respect to a certain school district or districts, such action precluded any subsequent action by the town board affecting the same districts. We believe that this would be true irrespective of whether the state superintendent enters an order which recites that it is effective when entered or recites that it is effective at a later date. In either case the state superintendent has acted when the order is signed, and even in the case where it recites it is to be effective at a later date, no further action is required on his part. He has acted *in praesenti* and all that is needed to make his order operative is the lapse of time.

We therefore conclude (1) that the order of the state superintendent of public instruction here under consideration was a valid order, and (2) that such order is not rendered null and void or otherwise affected by the subsequent action of the town board. In arriving at these conclusions it must be understood that any statement herein made is made with reference to the facts which you have submitted to us as a basis for this opinion. Nothing in this opinion should be construed as holding that a town board or other municipal board referred to in sec. 40.30 (1), Stats., may not, after the state superintendent has created a *new* school district by attaching one school district to another pursuant to the power granted him by sec. 40.30 (1), Stats., initiate proceedings pursuant to sec. 40.30 (1), Stats., and enter an order altering or otherwise affecting said *new* district, subject to all requirements and provisions in said subsection. The facts submitted by you obviously do not involve such situation and we reserve any opinion on that question until it is presented by a specific case.

WET

Elections — Legal Holiday — Ch. 567, Laws 1943, changed the date of the primary election for the year 1944 from the third Tuesday in September to August 15. Sec. 256.17 providing that the day of holding the September primary election is a legal holiday must be construed with reference to the change made by ch. 567. It is the purpose of sec. 256.17 that the day of the primary election is a legal holiday irrespective of whether the election is held in August or September.

July 28, 1944.

BANKING COMMISSION OF WISCONSIN.

You refer to sec. 256.17, Wis. Stats., relating generally to legal holidays and providing in part that "the day of holding the September primary election, and the day of holding the general election in November, are legal holidays." In view of the fact that the legislature by the enactment of ch. 567, Laws 1943, has advanced the date of the primary election for the year 1944 from the third Tuesday of September to August 15, you desire to be advised as to whether the advanced date is a legal holiday.

The object of providing that the primary election date shall be a legal holiday is to facilitate voting. Such commercial pursuits as are suspended on legal holidays give way on primary election days to the end that the citizens of the state may be permitted to exercise the privilege to vote.

The intended application of sec. 256.17 is not dependent upon whether a primary is to be held in September or in August. The reference in the statute to the September primary is of course accounted for by the fact that under normal circumstances primaries are held in September. However, the primary date having been changed to August for the purposes of this year's elections, sec. 256.17 must be held applicable if the legislative purpose is to be accomplished. The word "September" in our opinion is surplusage and should be disregarded.

JWR

Banks and Banking — Delinquent Banks — Liquidation — Priorities — Holders of "B" debentures in a state bank being liquidated by the banking commission are not entitled to receive the principal amount of those debentures until the Reconstruction Finance Corporation as holder of "A" debentures is paid interest in full from the date of closing to date of payment, this matter being governed by contract between the "A" and "B" holders.

August 7, 1944.

STATE BANKING COMMISSION.

Attention James B. Mulva, *Chairman*.

You recently requested an opinion relative to certain problems arising in the liquidation of state banks. The pertinent facts are set forth in your request as follows:

1. A state bank is insured with the Federal Deposit Insurance Corporation (hereinafter referred to as FDIC).
2. The bank received money from the Reconstruction Finance Corporation and has issued income debenture "A" payable to the Reconstruction Finance Corporation (hereinafter referred to as RFC).
3. The bank has received money from various individuals and has issued income debenture "B" payable to the various lenders.
4. The bank, when its financial condition was found unsatisfactory, was taken over by the state banking department for liquidation under the provisions of section 220.08, Wisconsin Statutes.
5. The Federal Deposit Insurance Corporation steps in and immediately pays off all depositors in full up to an amount not exceeding \$5,000, as of the date of closing.
6. The state banking department then proceeds to liquidate the assets of the bank and
 - (a) To pay the expenses of liquidation.
 - (b) To pay to the Federal Deposit Insurance Corporation and creditors who had deposits in excess of \$5,000.

- (c) To pay other general creditors for claims filed against the bank.

The question confronting the banking commission is. Are the holders of class "B" non-interest bearing income debentures entitled to receive the principal amount of their debentures before interest is paid to the RFC?

On June 1, 1944* this department gave an opinion to the banking commission relative to the priorities between RFC as holder of "A" debentures and FDIC as subrogee of the depositors. The present problem carries us one step further. We are now faced with payment of the "B" debenture holders. The banking commission has already paid off the principal to FDIC and has sufficient money remaining to pay the principal of the "A" debentures, also the principal of the "B" debentures and all interest on "A" debentures which accrued between the date of closing and the date of payment. Even after all these sums are paid there would still be a surplus to apply as interest for FDIC and excess depositors to reimburse them at the legal rate of interest which accumulated between the date of closing and the date of payment. If the rule of distribution referred to in the previous opinion were applied here, "B" debentures would receive all of their principal before RFC or any other prior creditor would get any interest.

With your request for opinion you submitted copies of the "A" and "B" debenture agreements. The provisions contained in these agreements alter the application of the rule referred to in our earlier opinion.

Par. 12 of the "A" debenture agreement is entitled "Liquidation" and provides in part as follows:

"In case of any * * * liquidation * * * of the Bank * * * all depositors and other creditors of the Bank * * * shall be entitled to be paid in full before any payment shall be made on account of principal of or interest on the Debentures. After payment in full of all sums owing to such depositors and creditors, the registered holders of the Debentures * * * shall be entitled to be paid ratably * * * from all remaining assets of the

*See page 93 of this volume.

Bank * * * until payment of the principal amount of such Debentures, *plus accrued and unpaid interest thereon to the date of payment*, before any payment or other distribution * * * shall be made on account of any indebtedness subordinated as aforesaid, or on account of any capital stock of the Bank of any class." (Emphasis supplied)

The underlined clause in the above quotation expressly provides that the "A" debentures shall be paid both as to principal and interest right down to the date of payment before anything is paid to "B" debenture holders or any other subordinated creditors.

The "B" debenture agreement in par. 9 entitled "Liquidation" is expressed in similar language excepting for the clause underlined above. However, the most important provision for our purposes in the "B" debenture agreement is contained in par. 1, which reads in part:

"All of the "B" Debentures are subject and subordinate to all of the "A" Debentures, both as to principal and interest on such "A" Debentures, and all of the "A" Debentures have been * * * purchased by the Reconstruction Finance Corporation. Notwithstanding anything that may appear in the "B" Debentures, the same are subject to all of the conditions, and prior rights given to the "A" Debentures by the said "A" Debentures and by any agreement or agreements heretofore or hereafter executed in relation thereto the same as if fully incorporated herein."

It is clear that the two agreements must be considered together. The RFC as holder of the "A" debentures undoubtedly sought an advantageous position in the liquidation proceedings. However, this is not a preference taken without the knowledge of other creditors, in view of the fact that the "B" debenture holders expressly assented to this arrangement. In short, the "B" holders by their contract agreed to forego receiving any principal until the RFC had received both principal and interest on the "A" debentures. In the absence of such agreement, the rule as explained in our earlier opinion would apply. There is no doubt, however, that the "B" debenture holders have by their contract agreed to forego the advantage of this equitable rule. In other words, the two groups ("A" and "B"

holders), have established by their agreements their respective priorities. Such an agreement in a case of this kind violates neither public policy nor any rule of law.

The distribution in the case you present should be made as follows:

Out of the surplus in the hands of the commission after FDIC and RFC have been paid their principal in full, an amount sufficient to pay the principal of the "B" debentures in full should be set aside. From the surplus then remaining, the interest in full on "A" debentures should be paid. At this point the "B" debentures would be entitled to receive the sum previously set aside for them. Any surplus yet remaining can then be paid over to the FDIC and other general creditors as interest for the period between the date of closing and the date of payment.

ES

Criminal Law — Public Welfare Department — Charitable and Penal Institutions — Corporal Punishment — Rule of state board of public welfare authorizing corporal punishment of inmates of industrial school for boys does not conflict with sec. 340.58, Stats., and is authorized under sec. 46.03 (5). Excessive punishment would violate sec. 340.58 as well as constitute assault and battery giving rise to an action for damages. Rule as to permissible amount and character of punishment stated.

August 11, 1944.

A. W. BAYLEY,

State Department of Public Welfare.

You state that the board, with one dissenting vote, has approved the following rule, and you inquire whether it is contrary to sec. 340.58, Stats., or is otherwise illegal:

"Corporal punishment is not approved in principle and is forbidden in general. However, because of the lack of facilities for the punitive isolation of the inmates of the Wiscon-

sin Industrial School for Boys; because of the type and age of inmates committed to that institution; and with due regard and having recognition of the provisions of Section 340.58 of the Statutes; corporal punishment may be given but only upon authorization of the Superintendent and with the approval of the Classification Committee, where discipline, morale, or administrative necessity require it.

"No individual staff member shall impose corporal punishment, whatsoever.

"No corporal punishment shall be given, except in the presence of the institutional physician, who shall keep accurate and detailed record of the extent and means of corporal punishment used in each case."

Sec. 340.58 provides as follows:

"Any officer or other person in charge of or employed in any hospital or asylum for the insane, county home, workhouse, state prison, state reformatory, jail, police station or other place of confinement, school for the deaf and dumb or blind, the state public school, colony for the feeble-minded, house of correction, industrial school for boys or girls or orphan asylum who shall abuse, neglect or ill-treat any person confined therein or an inmate thereof, or who shall permit any other person so to do shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred dollars."

The statute forbids abuse, neglect or ill-treatment. Neglect is not involved, and lawful chastisement within the safeguards laid down in the rule would not be held to be either abuse or ill-treatment. Hence sec. 340.58 would not be violated unless it is otherwise unlawful to administer corporal punishment to inmates of the industrial school.

So far as adult penal institutions are concerned, the tendency of the law in the United States has long been away from the imposition of corporal punishment by whipping, flogging and the like. See note, 18 Ann. Cas. 295. In this state it is forbidden in the state prison, though not in other penal institutions. Sec. 53.08, Stats.

Where children are concerned, however, the ancient maxim "spare the rod and spoil the child," while not exactly erected into a rule of law, is given some recognition in the extent to which parents and those standing *in loco parentis*

are permitted to go in the physical correction of the young. The industrial school authorities, of course, stand *in loco parentis* to the inmates, all of whom are minors.

The department of public welfare is authorized under sec. 46.03 (5) (as modified by sec. 58.36) to make regulations for the management of the institutions under its jurisdiction. This power is broad enough to cover the rule here in question.

Punishment which is excessive under the circumstances constitutes an assault and battery for which the party inflicting it is liable for substantial damages and probably to prosecution under sec. 340.58. The rule is stated as follows in *Steber v. Norris*, (1925) 188 Wis. 366, 371-372, which was an action against the owner of a farm who had whipped a boy, sent there by his parents, with a twisted rubber lash having a ring at the end causing welts and abrasions on his back, hips and thighs which remained for some weeks:

"It may be said to be the general rule that one standing *in loco parentis* has the right to punish a child under his care if the punishment is moderate and reasonable and for the welfare of the child. Necessarily, the propriety of inflicting corporal punishment to a considerable extent rests in the discretion of the person holding such relation. But whether the correction is reasonable and proper or whether it is immoderate or excessive does not rest absolutely in the discretion of the teacher or other person inflicting the punishment. It is a matter for judicial investigation. It is not to be assumed that although a teacher or the defendant in this case stands in the relation of a parent he has the same right to inflict punishment as a parent.

"This parental power is little liable to abuse for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

"The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise.' *Dander v. Seaver*, 32 Vt. 114, 122.

"In determining whether the punishment has been excessive, the conduct of the child, the nature of his misconduct,

the nature of the whip or instrument used for punishment, the kind of marks or wounds left on the body, are all subjects to be considered. It is unnecessary to cite and quote from the many decisions dealing with the subject under discussion. They will be found collected in the notes now referred to. 65 L. R. A. 891; 21 L. R. A. n.s. 216; 12 Am. & Eng. Ann. Cas. 353; 1 Brit. Rul. Cas. 718."

The rule is stated as follows in 1 Am. L. Inst., *Restatement of Torts*, secs. 147, 148, 149, 150, 151 and 153 (2) :

"Sec. 147. GENERAL PRINCIPLE. One other than a parent who has been given by law or has voluntarily assumed in whole or in part the parental function of training or educating a child or one to whom the parent has delegated such training or education, is privileged to apply such reasonable force or to impose such reasonable confinement upon the child as he reasonably believes to be necessary for its proper training or education except in so far as the parent has restricted the privilege of a delegate to whom he has entrusted the child's education or training."

"Sec. 148. EXCESSIVE FORCE. One, other than a parent, who, in whole or in part, is in charge of the education or training of a child is not privileged to apply any force or impose any confinement which is unreasonable either,

"(a) as being disproportionate to the offense for which the child is being punished, or

"(b) as not being reasonably necessary and appropriate to compel obedience to a proper command."

"Sec. 149. PUNISHMENT DEGRADING IN CHARACTER OR PERMANENTLY HARMFUL. One other than a parent who has been given by law or has voluntarily assumed, in whole or in part, the parental function of training or educating a child, or one to whom the parent has delegated such training or education, is not privileged to inflict upon a child a punishment which is degrading in character or which is liable to cause serious or permanent harm."

"Sec. 150. FACTORS INVOLVED IN DETERMINING REASONABLENESS OF PUNISHMENT. In determining whether a punishment is excessive, the nature of the offense, the apparent motive of the offender, the influence of his example upon other children of the same family or group, the sex, age, and physical and mental condition of the child, are factors to be considered."

"Sec. 151. PURPOSE OF PUNISHMENT. Force applied or confinement imposed for any purpose other than

the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occasion which would be privileged had it been applied for such purpose."

"Sec. 153. POWER OF PARENT TO RESTRICT PRIVILEGE. (2) An actor who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes."

See also 4 Am. Jur. 157-159, Assault and Bat. secs. 58-60.

The rule adopted by the board is therefore well within recognized legal principles. It is suggested, however, that it might be advisable to make it more specific by prescribing the kind of instrument to be used and the portion of the anatomy to receive the punishment. The instrument should be light and the punishment moderate, to avoid any possibility of permanent harm to the child, and the use of heavy whips or cat-o-nine tails should be forbidden.

WAP

Charitable and Penal Institutions — Feeble-Minded — Insane — Insanity proceedings against person committed to state home for mentally deficient are required to be in the county of which such person was resident just prior to commitment, under sec. 52.03 (5), Stats., not in county where such home is located. Sec. 51.01 (1) does not control as to place of trial.

August 14, 1944.

A. W. BAYLEY, *Director*,
State Department of Public Welfare.

You state that on July 12, 1929, at the age of 6 years a certain girl was committed to the Southern Wisconsin Colony and Training School as a mentally deficient person, and that she is still confined there. Now she has become insane

and has to be removed therefrom because of the inadequate facilities for her care. You desire to proceed under sec. 52.03 (5), Stats., and you inquire whether proceedings should be in Racine county, where the Southern Colony is located, or in some other county.

Sec. 52.03 (5) provides as follows:

“Should an inmate of either of said institutions become insane he shall be sent to the state hospital for the insane *from the district of which he was a resident just prior to his admission to the institution*, in the manner prescribed by law.”

The words “in the manner prescribed by law” must be taken as referring to proceedings under ch. 51, Stats. Sec. 51.01 (1) provides for proceedings in a court “for the county in which such person is found.” Doubtless this patient is “found” in Racine county, where she has been for fifteen years, and if sec. 51.01 (1) determines the place of trial, Racine county is the proper place. But sec. 52.03 (5), being a specific statute applicable to this case, overcomes any inconsistent provision in the general insanity statute, ch. 51. The phrase “in the *manner* prescribed by law” does not necessarily include the *place* (otherwise) prescribed by law, and sec. 52.03 (5) specifically provides that the person “shall be sent * * * from the district of which he was a resident just prior to his admission to the institution.” Assuming that this was Milwaukee county in the case you refer to, the insanity proceedings should be commenced in the proper court of that county.

WAP

Poor Relief — Medical Treatment — Christian Science — “Temporary medical relief” as used in sec. 49.18 (1), Stats., includes only care given by a physician, surgeon or hospital, including necessary nursing care in such cases, and does not include Christian Science or chiropractic treatment or mental or spiritual healing. XXV Op. Atty. Gen. 452 disapproved.

August 16, 1944.

O. L. O'BOYLE, *Corporation Counsel*,
Milwaukee, Wisconsin.

You inquire whether sec. 49.18 (1), Stats., entitles an indigent to the services of a Christian Science practitioner, *if he so desires*.

Sec. 49.18 (1) requires the town chairman, village president, mayor or chairman of the county board, or other official designated for the purpose, to provide “temporary medical relief” for a poor person at the expense of the municipality. Subsec. (2) authorizes payment “for the hospitalization of and care *rendered by a physician and surgeon* to a person entitled to relief” without previous authorization when in the physician’s opinion immediate care and hospitalization is required, but this applies only outside Milwaukee county. Sec. 49.15 after providing that the county board may vote to go on the county system of relief, provides in the alternative that it may vote to go on the county system “as to sickness care requiring the service of a *physician and surgeon*, or hospitalization.” These statutes are *in pari materia* and should be read together.

In the first place, it has been held that the poor relief statutes do not afford to indigents a choice of physicians, from which it follows that an indication by the indigent of a preference for Christian Science treatment need not be honored, even if that form of treatment comes within the term “medical relief.” *Reissmann v. Jelinski*, (1941) 238 Wis. 462, 467-8:

“* * * Indigents may not be choosers as to who shall give them medical or surgical treatment any farther than the statutes or the practice of the responsible municipality

may provide. It is a common practice for indigents to be treated by such physician as the governing body of the municipality responsible shall select, regardless of the wishes of the indigent."

In the second place, Christian Science treatment is not "medical" treatment. The Workmen's Compensation Act, sec. 102.42 (1), speaks of "Christian Science treatment *in lieu of Medical treatment.*" Concerning this language the supreme court said: "Manifestly the statute does not consider Christian Science treatment as medical treatment although it constitutes treatment of the sick and treatment of disease. Such treatment is 'in lieu of medical treatment;' therefore it is not medical treatment." *Corsten v. Industrial Comm.*, (1932) 207 Wis. 147, 148. Likewise the statutes relating to treating the sick recognize the distinction: "nor shall any person who selects such [Christian Science or mental or spiritual] treatment for the cure of disease be compelled to submit to any form of medical treatment." Sec. 147.19 (2). Note that the statute does not say, "any other form of medical treatment."

Moreover, it appears from sec. 49.15 mentioned above, that the "medical treatment" referred to in sec. 49.18 (1) is such treatment as can be given by a physician and surgeon. If sec. 49.18 (1) were held to include every form of healing art, the result would be to authorize counties to adopt the county system of relief for sickness requiring the care of a physician and surgeon but leave with the municipalities the duty to supply Christian Science or chiropractic treatment. Such divided responsibility could hardly have been the legislative intent.

It is no doubt true that an indigent person desiring Christian Science or other mental or spiritual treatment cannot, under sec. 147.19 (2) be compelled to submit to medical treatment instead, but his remedy is to refuse the care authorized, just as the plaintiff did in *Reissmann v. Jelinski*, (1941) 238 Wis. 462, discussed above. On the other hand, if it were held that Christian Science or chiropractic treatment could be offered to the indigent and he had no right to demand the services of a physician or surgeon instead, it is apparent that the legislative intent to make the latter available to indigents would be defeated.

In XXV Op. Atty. Gen. 452 (1936) this office ruled that "medical relief" as used in sec. 49.18 (1) includes all forms of healing art, and in particular chiropractic treatment. But that opinion was rendered before the decision in *Reissmann v. Jelinski, supra*, and appears to have assumed that the indigent would request such form of treatment. The opinion also antedated the enactment by Laws 1941, ch. 204, of the alternative provision for the county system of relief as to sickness care in sec. 49.15 referred to above. For the reasons set out above that opinion is disapproved, and it is now ruled that only care rendered by a physician, surgeon or hospital is included, including necessary nursing care in such cases.

The present ruling is fortified by a brief which you have submitted with your letter, prepared by an attorney representing Christian Science interests, which arrives at the same conclusion for many of the same reasons.

WAP

Public Deposits — Pension Funds — Where the Federal Deposit Insurance Corporation has ruled that pension funds are held by banks in a separate capacity from other funds of the city and are entitled to a separate \$5,000 insurance coverage by virtue of ch. 496, Laws 1939, providing that police and firemen have vested rights in such funds, and ch. 175, Laws 1943, making similar provision for other municipal employes, such funds are to be reported separately to the board of deposits from the dates of these enactments rather than from the date of the Federal Deposit Insurance Corporation ruling based on these enactments.

August 16, 1944.

MRS. BERNICE E. COE, *Executive Secretary,*
Board of Deposits of Wisconsin.

You state that pursuant to a ruling of the Federal Deposit Insurance Corporation of March 13, 1939 the board of

deposits has required all cities and villages having police and firemen's pension funds to report the same in combination with other funds of the city or village and that they were not separately insured by the FDIC on the theory that such funds were public funds not owned by the police or firemen.

However, the 1939 legislature amended sec. 62.13 (9) (c) so as to provide that each member of such a fund shall have a vested right in and to said pension fund. The same is true under the municipal retirement system act created by ch. 175, Laws 1943. See sec. 66.90 (22) (b). Legal counsel for the FDIC has now ruled, under date of July 15, 1944, that such pension funds are held in a separate capacity and right from other funds of the city and are entitled to a separate \$5,000 insurance coverage.

In view of this recent ruling the question has arisen as to what date should be used for the change in the method of reporting police and firemen's pension funds to the board of deposits, that is, whether the adjustment should be made as of the date of the change of the law in October of 1939 or as of July 15, 1944, the date of the new ruling by legal counsel for the FDIC.

The ruling of the FDIC is based upon the provision of the Federal Deposit Insurance Law that in determining the amount due to any depositor there should be added together all deposits in the bank maintained in the same capacity. See 12 USCA 264 (c) (13). Funds on deposit however in the name of the public unit which are owned by others than the public unit are not to be added to the funds of such public unit in determining its insured deposits.

Since the ruling of the FDIC that pension funds are held in a separate capacity and right from other funds of the city and are entitled to a separate \$5,000 insurance coverage is based on the fact that such funds are in effect owned by the employes rather than the municipality by virtue of the 1939 amendment in the case of police and firemen and the 1943 act so far as general municipal employes are concerned, it is the date of the legislative enactment that governs rather than the date upon which the FDIC ruling happens to have been issued.

You are therefore advised that the separate reporting of police and firemen's pension funds to the board of deposits should date back to the effective date of ch. 496, Laws 1939, and that the separate reporting of pension funds for other municipal employes under ch. 175, Laws 1943, should date back to the effective date of that act.

WHR

Minors — Juvenile Court — Child under sixteen may not be kept in a jail under any circumstances for any period of time, under sec. 48.12 (1), Stats.

August 17, 1944.

A. W. BAYLEY, *Director,*
State Department of Public Welfare.

You state that recently there have been reported to your department some twelve cases of boys and girls under the age of sixteen being kept in jail for periods of a few hours up to almost a month. You inquire whether this is legal, in view of sec. 48.12, Stats.

Sec. 48.12 (1) provides as follows:

“No child under eighteen years of age shall be placed in or committed by the juvenile court to any prison, jail, lock-up, police station or in any other place where such child can come into communication with any adult convicted of crime or under arrest and charged with crime; provided, that a child sixteen years of age or older, whose habits or conduct are such as to constitute a menace to other children, may, by order of the juvenile court, be detained in a jail or other place of detention for adults, but in a room or ward entirely separate and apart from adults confined therein.”

Subsec. (2) provides that the county shall make provision for the temporary detention of children either (a) in a county detention home, (b) in a private home, or (c) in an incorporated institution or agency maintaining a suitable place of detention for children.

Subsec. (1), above quoted, forbids "placing" a child under 18 in a jail *by anyone*, as well as "commitment" there *by a juvenile court*, and the only exception is in the case of children 16 years of age or older. The policy of the law is to keep children under 16 out of adult places of detention altogether, and applies to sheriffs and police and probation officers as well as to the juvenile court. Therefore the detention of such children in a jail by any person, whatever the circumstances and for however short a period, is illegal.

We express no opinion whether there might be liability for false imprisonment in such case, or whether a prosecution for malfeasance would lie under sec. 348.28, Stats.

WAP

Building and Loan Associations — Stock Ownership —
Sec. 215.20 (1), Stats., relating to the amount of stock of a building and loan association which may be owned by one person, permits one person to become the owner of instalment stock in an amount not to exceed \$25,000 of par value and also the owner of paid-up stock in an amount not to exceed \$25,000 of par value, so that such person could, if he owned the maximum amount of each class of stock, become the owner of \$50,000 of par value of stock in the aggregate.

August 17, 1944.

BANKING COMMISSION OF WISCONSIN.

Attention Edward W. Tamm, *Commissioner*.

You refer to that portion of sec. 215.20 (1), Stats., relating to the ownership of building and loan association stock which provides as follows:

"(1) Any person, firm, copartnership, corporation, association, the home owners' loan corporation and other federal agencies may become a member of any such association in such manner as may be prescribed in the by-laws; but no person except the home owners' loan corporation and other

federal agencies shall in any one association, in his own name or in the name of another, become the owner of shares of instalment stock exceeding in par value the sum of \$25,000; nor of paid-up stock exceeding in par value the sum of \$25,000. * * *

You submit the following question:

"Can one person become the owner of instalment and paid-up building and loan association stock in an amount not to exceed \$25,000 of par value stock of each class of stock, so as to total in all \$50,000, or does the statute restrict the amount of stock one person can own, whether of instalment or paid-up, or both, to a total amount of \$25,000?"

We are of the opinion that the subsection above referred to permits one person to become the owner of instalment stock in an amount not to exceed \$25,000 of par value, and also the owner of paid-up stock in an amount not to exceed \$25,000 of par value, so that such person could (if he owned the maximum amount of each class of stock) become the owner of \$50,000 par value of stock in the aggregate.

In construing that portion of sec. 215.20 (1) above referred to, it must be noted that the legislature has specifically made provision for two classes of stock of a building and loan association to be known as paid-up or investment shares and instalment or savings shares. Sec. 215.08 (2) provides in part as follows:

"(2) The capital stock may be made issuable at any time as the directors may determine and shall be divided into 2 or more classes: (a) paid-up or investment shares, (b) instalment or savings shares, which savings shares may be divided into classes as prescribed by the by-laws. Shares paid for in full at the time of issue shall be designated as paid-up or investment shares and shall be issued only in amounts of \$100 or multiples thereof; and shares paid for on a partial payment plan shall be designated as instalment or savings shares. * * *

There is no statutory provision which prohibits one person from owning stock in both classes. Hence it seems clear

that when the legislature attempts to limit the amount of stock which one person may own, as it has done by sec. 215.20, and in so doing fixes a specific limit of the amount one person can own in each specific class, it must be considered that such limitation refers to the class to which it is specifically made applicable, so that if one person owns stock in each class, he is subject only to the limit in each class and may acquire stock up to the full amount permissible for each class.

This conclusion is supported by the legislative history of the above statutory provisions. Prior to August 2, 1913 the statute relating to the capital stock of a building and loan association was to the effect that the capital stock be divided into shares of not less than \$25 nor more than \$200 each, payable in periodical instalments called dues, not exceeding \$2 each per share, except that when the demand for loans exceeded the income of the association applicable for loans, the association might issue its paid-up stock to an amount sufficient to meet such demand for loans, "but no person shall become the owner of shares exceeding in par value the sum of twenty-five hundred dollars." Sec. 2012, Stats. 1911. Another section also provided in substance that any person of full age and sound mind might become a member of such association in such manner as may be prescribed by the by-laws; "but no person shall become the owner of more than one hundred shares. * * *" Sec. 2014-8, States 1911.

The chapter relating to building and loan associations was amended by ch. 732, Laws 1913, effective August 2, 1913. Sec. 2012, Stats. 1911, was amended, among other things, by *striking out* the provision referred to above that no person should become the owner of shares exceeding in par value the sum of \$2,500. Sec. 2014-8 was amended in part as follows:

"Any person of full age and sound mind may become a member of *any* such association in such manner as may be prescribed in the by-laws; but no person shall *in any one association, in his own name or in the name of another*, become the owner of * * * shares of instalment stock exceeding in par value the sum of ten thousand dollars; nor of paid-up stock exceeding in par value the sum of ten thousand dollars. * * *"

Had the legislature intended to limit the amount of stock which one person could own in any one association to an aggregate amount of \$10,000 par value of stock, whether instalment or paid-up, or both, it certainly could have used language which would have specifically so provided. This is especially true here since sec. 2012 before amendment contained language to the effect that no person shall become the owner of shares exceeding \$2,500 par value, and sec. 2014-8 was to the effect that no person shall become the owner of more than 100 shares, and either provision contained appropriate language which could have been adopted or followed by the legislature in the 1913 amendment had it intended to place a limit on the total amount of stock which one person might own, whether of paid-up or of instalment, or both. If that had been its intention, the legislature could simply have said no person shall become the owner of more than a certain number of shares or amount of stock. Instead, the legislature made a specific provision for each class of stock and set a specific limit for each class and made no mention as to the amount of stock which could be owned in the aggregate by one person, and the only reasonable construction is that it intended that a person is bound only by the restriction as to each class of stock held and may acquire the maximum amount in each class.

The same tendency to treat each class separately is shown by subsequent amendments. Ch. 382, Laws 1925, amended sec. 215.20 (which was formerly sec. 2014-8 until renumbered as sec. 215.20 by ch. 291, Laws 1923) as follows:

“* * * but no person shall in any one association, in his own name or the name of another, become the owner of shares of instalment stock exceeding in par value the sum of * * * *twenty* thousand dollars; nor of paid-up stock exceeding in par value the sum of ten thousand dollars * * *.”

It is obvious from this amendment that the legislature not only regarded each class of stock separately, but that the amount of instalment stock which one person might own has no relation to the amount of paid-up stock he could own. If this were not true there would be no point in increasing

the permissible maximum amount as to instalment stock without a like increase as to the amount of paid-up stock. Further, when the statute was in the above form, it would be difficult to interpret it in any way other than to hold that one person could own \$20,000 par value instalment stock and \$10,000 per value paid-up stock, with the result that one person could, if he owned the maximum in each class, own stock in a total amount of \$30,000 par value.

The last amendment was made by ch. 240, Laws 1939. Sec. 215.20 was amended so as to permit any firm, co-partnership, corporation, association, home owners' loan corporation, or other federal agencies to become members, and also to insert the word "five" after the word "twenty" and the word "twenty-five" in place of the word "ten" so as to raise the maximum limit of stock of each class which may be owned by one person to \$25,000 par value. We believe that the legislature intended thereby to simply raise the limit from twenty and ten thousand to twenty-five thousand and that there was no intent to make any other change in the meaning of this portion of the statute.

WET

Taxation — Tax Sales — Redemption — Where real estate taxes become delinquent on land mortgaged to the Farm Security Administration in 1937 and years subsequent, and said land is sold on tax sale of 1938 and years subsequent, and tax certificates are duly issued to the county, and subsequent thereto the mortgagor executes and delivers a quitclaim deed to the United States of America on July 21, 1941, the United States acquires by such quitclaim deed only such right, title and interest in the land as the mortgagor had at time of execution and delivery of said deed, and the amount which the United States must tender to the county treasurer to subsequently redeem said land from said tax sales must include interest on said tax certificates to be computed to the date of redemption and not to date of execution and delivery of said quitclaim deed to the United States. Sec. 75.01, Stats.

August 21, 1944.

ROBERT M. SPEARS,

Acting District Attorney,
Washburn, Wisconsin.

You submit to us the following facts: Certain real estate owned by an individual in Bayfield county was mortgaged to the Farm Security Administration. Real estate taxes for the year 1937 and years subsequent became delinquent and said real estate was acquired by the county by purchase at the tax sale of 1938 and years subsequent, as provided by sec. 74.44, Stats., and tax certificates were duly issued by the county treasurer to the county as provided by sec. 74.46, Stats. On July 21, 1941 the mortgagor gave a quitclaim deed naming the United States of America as the sole grantee, which deed was recorded on September 3, 1942. In April 1944 the Farm Security Administration requested the county treasurer to furnish to it a statement of the amount necessary to pay up delinquent taxes on said land. The county treasurer submitted a statement giving the amount necessary to redeem the land from said tax sales pursuant to sec. 75.01, Stats., as of April 30, 1944, the date of the statement, which included interest on the tax certificates at

the rate provided by statute computed to said date. A check from the United States, dated May 24, 1944, was sent to the county treasurer in an amount which excluded all interest on said tax certificate from and after July 21, 1941, the date when the United States received said quitclaim deed to said real estate.

You state that the Farm Security Administration takes the position that in computing the amount necessary to redeem said land from said tax sales, interest cannot be included from and after July 21, 1941, the date when the United States received the quitclaim deed, and you inquire whether the position taken by the Farm Security Administration is correct.

The answer is "no." We are of the opinion that sec. 75.01, Stats., requires that interest be computed to the date of redemption at the statutory rate in determining the amount which the United States must tender to redeem said land from said tax sales, rather than to the date of the execution and delivery of the quitclaim deed conveying said land to the United States.

There is no question but that in the absence of congressional consent, real property of the United States is exempt from taxation under authority of a state so long as title remains in the United States. *United States v. County of Allegheny*, (1944) 322 U. S. 174, 64 S. Ct. 908, 88 L. ed. (adv. op.) 845; *Penn Dairies v. Milk Control Comm.*, (1943) 318 U. S. 261, 63 S. Ct. 617, 87 L. ed. 748; *United States v. Alabama*, (1941) 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327; *Van Brocklin v. Tennessee*, (1885) 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; *United States v. City of Milwaukee*, (1944) (CCA 7) 140 F. (2d) 286. In Wisconsin it is specifically so recognized both in the constitution and by statute. Wisconsin Constitution, art. II, sec. 2; sec. 70.11 (1), Statutes. However, as pointed out by you in your letter to us, the question here involved is not one involving the *imposition* of taxes against real property of the United States, but rather involves the question of determining the proper amount necessary to redeem real property to which a tax lien had attached and which was sold on tax sale prior to the time the United States received a quitclaim deed to

such property. The specific question presented is whether in determining the amount necessary to redeem as provided by sec. 75.01, Stats., interest is to be computed to the date of execution and delivery of such deed to the United States or whether it shall be computed to the date of redemption.

A brief review of the procedure followed in Wisconsin for sale of real estate for non-payment of taxes is indicated in approaching this problem. The county treasurer on a specified date each year is required to list all land on which taxes have been returned delinquent and give notice of the sale at public auction of so much of each tract as may be necessary for payment of taxes and interest thereon. Sec. 74.33, Stats. On the day designated in the notice, the county treasurer is directed to sell so much of each parcel as shall be sufficient to pay taxes and interest thereon at the statutory rate. Sec. 74.39, Stats. Under the statutes private individuals may bid and become the purchasers of said land, or the county board may authorize and direct the county treasurer to bid in and become the purchaser of *all* lands sold for taxes for the amount of taxes, interest and charges thereon. Sec. 74.44, Stats. In the latter event the county becomes the exclusive bidder. XXVII Op. Atty. Gen. 491. The county treasurer then gives to each purchaser on payment of his bid, or if the county is the successful bidder, a tax certificate. In event the county is the exclusive bidder, provision is made for a master tax certificate. The statute prescribes a form for the tax certificate. Sec. 74.46, Stats.

At the expiration of five years from date of the tax certificate the owner of the tax certificate on compliance with statutory requirements is entitled to a tax deed unless the land is redeemed as provided by statute. Sec. 75.01, Stats., relates to redemption and provides in part as follows:

“The owner or occupant of any land sold for taxes or other person may, at any time within five years from the date of the certificate of sale, redeem the same or any part thereof or interest therein by paying to the county treasurer of the county where such land was sold, for the use of the purchaser, his heirs or assigns, the amount of the taxes for which such land was sold and all subsequent charges thereon authorized by law, or such portion thereof as the part or interest redeemed shall amount to with interest on

the amount of said taxes at eight-tenths of one per cent per month or fraction thereof from January first after the tax year, and all other taxes and charges thereon imposed subsequent to such sale and paid by such purchaser or his assigns prior to such redemption, with interest thereon at said rate, vouchers or other evidence of the payment of which shall have been deposited with the county clerk or produced to such person seeking to redeem; and in all cases any such person may, in like manner, redeem any such lands or any part thereof or interest therein at any time before the tax deed executed upon such sale is recorded, and when so redeemed, such deed shall be void; * * *

The law is clear that the owner of real estate which has been sold for taxes and is subject to outstanding tax certificates has only the right to redeem the real estate from the tax sale. This can be done only as provided by statute, and in addition to other requirements, requires the payment of interest at the statutory rate from January first after the tax year to date of redemption. The owner of the tax certificate or his assignee has a contract right to a tax deed upon compliance with the statutory requirements at any time after five years from the date of the certificate, unless redeemed according to law before a deed is recorded. One who acquires land from the owner by quitclaim deed or otherwise, after it has been sold on tax sale and is subject to outstanding tax certificates, takes only the interest of the grantor in the land, which is only the right to redeem the land from the tax sale. This rule has been held applicable in case where the state acquires the land from another as well as in cases involving private persons. In *State v. Gether Co.*, (1931) 203 Wis. 311, the state acquired title to land by escheat, which land had previously been sold on tax sale and against which a tax certificate was outstanding. In an action to quiet title, the state took the position that the escheat rendered invalid all taxes levied after the death of the owner of the land through which the state took by escheat and that title to the real estate should be declared vested in it free of the cloud raised by the tax deed and tax sales. The court said the defendant took the position that the state acquired by escheat *only the right to redeem from tax sales theretofore made*. The court held, pages 313-314:

“(1) The position of the defendant is correct. The issue of the certificate on the tax sale of 1916 for the 1915 tax gave to the purchaser at the sale and his assignee a contract right to a tax deed upon compliance with the statutory regulations at any time after three* years from the tax sale unless redemption should be made before issuance of the deed. Sec. 75.01; *Robinson v. Howe*, 13 Wis. 341. Anybody but the State taking the property, whether by descent or purchase, would take it subject to the legal title passed by the tax sale. That the State acquired an equitable title by escheat gave it no greater right than any other owner of the equity would have had. The State acquired by escheat no greater interest in the land than the owner had at his death, and the extent of his interest was the right of redemption from the tax sale as the tax sale had conveyed the title subject to this right. 3 Thompson, Real Property, § 2422; 21 Corp. Jur. p. 859; 10 Ruling Case Law, p. 616.”

The United States occupies the same position here as did the State of Wisconsin in the above case and the above principles insofar as the question of redemption is concerned are equally applicable to it. *United States v. Alabama*, *supra*. It is perfectly clear that the quitclaim deed here from the mortgagor to the United States dated July 21, 1941, at which time the real estate had been sold on tax sale and was subject to outstanding tax certificates, simply conveyed to it such right, title and interest as the mortgagor had at that time, with the result that the United States acquired only the right to redeem from the previous tax sales. Sec. 75.01, Stats. There is no exception in the redemption statute in favor of the United States and we see no escape from the conclusion that to redeem, the United States must tender to the county treasurer an amount which would include interest to date of redemption as required by sec. 75.01, Stats.

WET

*Now five years.

Municipal Court — Reporter — The provisions of ch. 23, Laws 1907, creating the municipal court for Outagamie county and acts amendatory thereto, relating to fees and compensation of the reporter of said court, considered, together with the question of whether said reporter may be entitled to the fees for making transcripts as provided by sec. 252.20, Stats.

August 30, 1944.

ELMER R. HONKAMP,
District Attorney,
Appleton, Wisconsin.

You have requested our opinion regarding the following questions:

1. Is the official phonographic reporter of the municipal court for Outagamie county entitled to receive fees to be paid by the county, for transcribing testimony taken by him in criminal actions or proceedings in said court (a) when the court in its discretion orders him to do so or (b) when there is a commitment to any state penal or reformatory institution or house of correction in counties maintaining one, and the court orders him to prepare a transcript which is filed with the clerk of said court and a certified duplicate is filed with the warden or superintendent of the institution to which the commitment is made?

2. Is such reporter entitled to receive a fee at the rate of 2½ cents per folio for transcribing testimony taken at a preliminary hearing at the request of the district attorney who deems that a transcript of such testimony is necessary?

3. In the event such reporter is entitled to receive fees for transcribing such testimony, is it material whether the work of transcribing is done during office hours or at other times?

The following sections from ch. 23, Laws 1907, which act creates the municipal court for Outagamie county, and acts amendatory thereto, are material in respect to the questions submitted here:

“Phonographic reporter. Section 15. The judge of the municipal court may appoint a phonographic reporter for said court, skilled in the art of shorthand reporting, and

may remove such reporter at pleasure and appoint another to the place. Every person so appointed shall be deemed an officer of the court and before entering upon the duties of the office shall take and subscribe the constitutional oath and file the same, duly certified, in the office of the clerk of the circuit court. He shall be furnished with all necessary stationery and shall attend when requested by said judge and report the proceedings of trials and examinations had in said court and perform such other duties as the court or judge thereof may require." (Ch. 23, Laws 1907)

"16. The salary of such reporter shall be seven hundred dollars per year, payable monthly from the county treasury on the certificate of the clerk of said court, which shall be in full compensation for such services and including the making of such transcripts from shorthand notes as may be required by said judge, and also the transcript of the testimony taken in any criminal examination or bastardy proceeding, where the defendant is bound over for trial, and in criminal actions appealed to the circuit court; *provided, however, that the county board of said county may at any session thereof, by resolution, increase such salary.*" (Ch. 54, Laws 1913)

"17. Every reporter shall, upon the request of a party to any action, transcribe in longhand the evidence or other proceedings taken by him in such action, or any part thereof as requested, and duly certify the same to be a correct transcript thereof, *and for * * * the original transcript and not to exceed two carbon copies thereof, as requested, he shall be entitled to receive and collect from the party requesting the same the sum of * * * ten cents per folio, * * * and two and one-half cents per folio for * * * each additional copy.*" (Ch. 54, Laws 1913)

* * *

"Transcripts on criminal actions. Section 19. In any trial of any criminal action on information or appeal or any bastardy case the court may, in its discretion, order a transcript of the evidence or proceedings or any part thereof to be made and certified by the reporter and filed with the clerk of the municipal court, and the cost thereof, not exceeding five cents per folio, shall be certified and paid in the same manner as the reporter's salary." (Ch. 23, Laws 1907)

* * *

"Section 68. Except as hereinbefore *and herein* provided, the fees of the municipal judges, witnesses, jurors and officers, in all actions proceeding according to justice court procedure and all examinations shall be the same as are allowed in courts of justices of the peace, and in all oth-

er actions and proceedings in said court the fees of the clerk, witnesses, jurors and officers shall be the same as in the circuit court, and except also that where the court reporter takes the testimony in justice court proceedings the fee shall be five cents per folio when simply taken and filed in stenographic note and ten cents per folio when taken in note and transcribed, * * *." (Ch. 105, Laws 1919)

It is clear from sec. 15 of the act that the person whom the judge of the municipal court for Outagamie county appoints as the phonographic reporter for such court is an officer of the court and that he is required, when requested by the judge, to attend and report "the proceedings of trials and examinations had in said court" and to "perform such other duties as the court or judge thereof may require." Hence there can be no question but that such reporter would be required to prepare a transcript of testimony and copies thereof whenever ordered to do so by the judge. His right to compensation therefor, if any, must be found in the portions of the act creating said court, and acts amendatory thereto, by virtue of which the office of reporter of said court is created and under which said reporter holds his office.

A public officer takes his office *cum onere* and is entitled to be compensated for services rendered by him in the performance of his official duties or in the performance of any duty not required by law but which may be required of him by superior authority and voluntarily performed, only such salary or fee as may be provided by law. *Dodge County v. Kaiser* (1943) 243 Wis. 551; *Henry v. Dolen* (1925) 186 Wis. 622; *Outagamie Co. v. Zuehlke* (1917) 165 Wis. 32. Statutes relating to fees and compensation of public officers are strictly construed and such officers are entitled only to what is clearly given by law. 2 Lewis' Sutherland Statutory Construction (1904) § 714.

Applying the above rules here we arrive at the following conclusions:

1. The salary fixed by sec. 16 of the act, which may be increased by resolution of the county board, must be considered as being in full compensation for any services rendered by said reporter by order or request of the judge of said

court, including "the making of such transcripts from shorthand notes as may be required by said judge, * * *." As a result said reporter is entitled to no fee or compensation in addition to his salary for preparing a transcript of testimony unless there is some additional specific provision in the act creating said municipal court for Outagamie county or acts amendatory thereto, entitling him thereto.

2. One such provision exists in cases where there has been a trial of a criminal action commenced on information, or on appeal from justice court or in any bastardy case, and the court in its discretion orders a transcript of the evidence or proceedings or any part thereof to be made and certified by the reporter and filed with the clerk, in which case under sec. 19 of the act the reporter is entitled to be compensated therefor out of the county treasury on the certificate of the clerk of the court, the measure of which compensation is the cost of the transcript not to exceed 5 cents per folio. It should also be noted that sec. 19 refers only to "a transcript," no provision being made for copies. If in addition the court orders the reporter to supply copies of the transcript, the reporter would not be entitled to additional compensation for such copies.

3. If the court orders the reporter to prepare an original and copy of a transcript of testimony taken in a criminal action or proceeding resulting in commitment to any state penal or reformatory institution, or to a house of correction in counties maintaining one, the original to be filed with the clerk and a certified duplicate copy to be filed with the warden or superintendent of the institution to which the commitment is made, the reporter would not be entitled to any fee for preparing said original and copy of said transcript except as would be permitted by sec. 19 of said act. We find no specific provision in the act creating the municipal court for Outagamie county, other than sec. 19 of the act, which would authorize payment of any compensation or fee to the reporter for preparing an original or copy of such transcript pursuant to an order of the court for such purpose. We believe that sec. 19 would, if the criminal action were on information or was on appeal from justice court, entitle

the reporter to receive the cost of preparing the original of such transcript not to exceed 5 cents per folio, but that no additional compensation should be permitted for any copy or for any original in cases not falling under sec. 19.

In arriving at this conclusion we have not overlooked sec. 252.20 which makes it mandatory for a court to order the reporter to prepare an original and copy of a transcript of proceedings in criminal cases resulting in commitment to any state penal or reformatory institution or to a house of correction in counties maintaining the same, the original being filed with the clerk of said court and a certified duplicate copy being sent to the warden or superintendent of the place of commitment, which section also provides for payment of the cost of such transcript and copy at a rate not exceeding 10 cents per folio for original and 2½ cents per folio for the duplicate, by the county treasurer upon certificate of the clerk of said court. Said section is in the chapter entitled "Circuit Courts" and there is a serious question as to whether as a general proposition it is applicable to any court other than circuit courts. However, we do not find it necessary to determine such question as sec. 24 (3) of the act creating the municipal court for Outagamie county, as amended, provides:

"3. The said municipal court *shall have and exercise* powers and jurisdiction equal and concurrent with the circuit court of Outagamie County in all cases of crimes and misdemeanors arising in said county, except the crimes of murder and manslaughter." (Ch. 195, Laws 1909; Ch. 54, Laws 1913) (Italics ours)

In our view the above portion of sec. 24 compels the judge of said municipal court to comply with the provisions of sec. 252.20 and order the reporter of said court to prepare an original and copy of a transcript in cases where it would be required had the criminal action or proceeding been had in circuit court for Outagamie county instead of the municipal court for that county. However, it does not follow that the reporter of said municipal court is entitled to the fees or compensation provided by sec. 252.20 for making an original and copy of such transcript.

Such conclusion is compelled by the language contained in sec. 16 of the act as amended which as previously stated provides in substance that the salary of the reporter shall be \$700 per year unless increased by resolution of the county board, "which shall be in full compensation for such services and including the making of such transcripts from shorthand notes as may be required by said judge, * * *." It is impossible to give full effect to the provisions of sec. 16 of the act and at the same time construe sec. 252.20 in such a manner so as to entitle the reporter of said municipal court to the fees therein provided. These sections are irreconcilable on this point and in view of the rules of law previously referred to, the only construction which can be adopted is to hold that the fees provided for in sec. 252.20 cannot be allowed such reporter for services in making such transcripts at the request of the judge, but that they must be deemed covered by his regular salary as provided for by sec. 16 of the act and such additional fee as the reporter may be entitled to receive under sec. 19.

There is also a very clear indication that when the legislature created the municipal court for Outagamie county by ch. 23, Laws 1907, it did not intend that sec. 252.20, which was then numbered sec. 2439, Stats. 1898, apply to it. This appears from the fact that in ch. 22, Laws 1907, creating the municipal court for Iron county (which was published one day earlier than ch. 23, Laws 1907) it was specifically provided in sec. 27 of said ch. 22, Laws 1907, relating to the fees of the reporter of said court that: "Section 2439 of the Statutes of 1898, shall apply to said reporter and said court." No similar provision appeared in ch. 23, Laws 1907, creating the municipal court for Outagamie county and the only inference that can be drawn is that the legislature did not intend that said section apply to the latter court and its reporter. Thereafter the legislature did nothing which would make said section applicable to said reporter or said court except that by amending sec. 24 of the act creating the municipal court for Outagamie county by ch. 195, Laws 1909, as previously referred to, the legislature required that the court from then on comply with the provisions of sec. 2439 (now sec. 252.20) but the legislature made no attempt

to make such section applicable to the reporter as well as to the court, as it did in ch. 22, Laws 1907. Further, the legislature amended secs. 16 and 17 of ch. 23, Laws 1907, relating to the fees and compensation of the reporter of said municipal court of Outagamie county by ch. 54, Laws 1913, but made no attempt to allow any compensation for transcripts made upon order or request of the judge, in addition to the allowance made by sec. 19 of the original act, although it did provide for an increase in salary of said reporter on resolution of the county board, and also increased the fees which the reporter could charge for transcripts made at the request of either party. Had the legislature intended that the reporter receive additional compensation for making transcripts in criminal cases when ordered to do so by the judge (whether acting pursuant to provisions of sec. 252.20 or otherwise) it could easily have so provided.

We are also of the opinion that sec. 68 of said act creating the municipal court for Outagamie county as amended does not authorize the reporter to receive the fees provided for by sec. 252.20. Sec. 68 provides in substance that "except as hereinbefore and herein provided" the fees of the clerk, witnesses, jurors and officers (which includes the reporter) shall be the same as in the circuit court. Thus by its very terms this section could not affect the specific provisions in said act providing for the compensation and fees of the reporter contained in secs. 16, 17 and 19 of the act, which sections must take precedence.

4. If the district attorney orders a copy of the transcript of testimony taken at a preliminary hearing, we believe that sec. 17 of the act as amended entitles the reporter to receive 2½ cents per folio therefor. We assume the original transcript would be furnished the magistrate who would order it so as to comply with the provisions of sec. 361.16, and the district attorney would receive a copy. Under such circumstances there is no reason why the district attorney should be compelled to pay 10 cents per folio for an original.

5. In cases where the reporter is entitled to an additional fee for transcribing testimony, it is immaterial whether he does the work during office hours or some other time.

WET

Poor Relief — Maternity Aid — County pension department may continue to grant aid to unwed mother under sec. 48.331 until she has recovered from the effects of childbirth even though the child has been placed in a foster home.

If the child is stillborn maternity aid under sec. 48.331 may be continued to the mother until she has recovered from the effects of such birth.

Maternity aid may not be granted to an expectant mother whose husband has deserted her for less than a year or who has been divorced for less than a year. Sec. 48.33 (5) (d).

Maternity aid may not be granted under sec. 48.331 to an expectant mother who has not lived in this state for one year next preceding application for aid.

August 30, 1944.

A. W. BAYLEY, *Director*,
State Department of Public Welfare.

You have requested an opinion relative to the interpretation of sec. 48.331, Wis. Stats. This section is entitled "Maternity Aid" and reads as follows:

"Aid shall also be granted to the mother of a child during the period extending from six months before to six months after the birth of the child, if her financial circumstances are such as to deprive either the mother or child of proper care. Such aid shall be governed in all respects by the provisions of section 48.33, except that the aid allowed under this section may be given in the form of supplies, nursing, medical or other assistance in lieu of money."

The principal problem presented by your request centers around the limitations placed upon sec. 48.331 by sec. 48.33. The latter section deals with aid to dependent children. Sec. 48.331 is by its very terms concerned with the "mother or child" whereas sec. 48.33 is concerned solely with the child. It is clear that the legislature intended the section dealing with maternity aid to be a separate program but subject to the procedure and conditions for eligibility laid down in sec. 48.33.

You raise four specific questions in your request. They will be disposed of in the order in which you have presented them.

1. May a county pension department under sec. 48.331 continue to grant aid to an unwed mother after her child has been placed in a foster home?

In our opinion it is clear that sec. 48.331 is concerned with the well-being of both the mother and the child. That statute is designed to provide aid for an expectant mother for the period immediately preceding and following the birth of her child. If the legislature had intended to deal only with support for the child, the matter could have been taken care of under sec. 48.33. The fact that the legislature created an independent section to deal with this problem indicates that it had something more in mind than aiding the child. It is well recognized that the 6 months preceding and the 6 months following the birth of a child are the most critical periods so far as the health and welfare of the mother is concerned. Sec. 48.331 provides assistance to an expectant mother during that crucial period. The welfare of a newborn infant is dependent to a very large extent upon the health of its mother and upon the maternity care she receives during pregnancy.

Since sec. 48.331 is concerned with providing assistance to a mother if her circumstances are such as to require it in order to insure proper care, we are of the opinion that such aid may be continued to her after the birth of the child for such period of time as is necessary to enable her to recover from the effects of pregnancy and delivery.

2. If a child is stillborn can maternity aid under sec. 48.331 continue to the mother, but not to exceed 6 months?

A stillbirth is a birth, and it is obvious from a medical standpoint at least, that the mother may be in need of as much and perhaps even more care than after a normal child-birth. The same arguments advanced in answering your first question are applicable here. The legislature provided for aid for both mother and child under sec. 48.331. Therefore aid could properly be continued to the mother until she has recovered from the effects of pregnancy and delivery.

3. Can maternity aid be granted to an expectant mother whose husband has deserted her for less than a year or who has been divorced for less than a year?

In order to determine the conditions under which an applicant for maternity aid is eligible to such assistance, we must refer to the provisions of sec. 48.33. The pertinent provisions of that section are as follows:

“(5) Such aid shall be granted only upon the following conditions:

“* * *

“(d) Aid shall be granted to the mother or stepmother of a dependent child who is dependent upon the public for proper support if such mother or stepmother is without a husband, or the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least one year in the opinion of a competent physician, or the wife of a husband who has been sentenced to a penal institution for a period of at least one year, *or the wife of a husband who has continuously deserted her for one or more years*, if the husband has been legally charged with abandonment for a period of one year, *or if the mother or stepmother has been divorced from her husband for a period of at least one year* and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought.”

It is our opinion that maternity aid cannot be granted to an expectant mother unless her husband has deserted her for at least a year or unless she has been divorced for at least a year. This is a specific condition of eligibility as laid down in sec. 48.33, and has been incorporated in sec. 48.331 by reference. The provisions of sec. 48.33 as amended are to be applied rather than the provisions of that section at the time sec. 48.331 was adopted. The legislature was aware and must be presumed to know that sec. 48.331 was in existence at the time the provision governing eligibility in sec. 48.33 was changed. Therefore it can be further presumed that the legislature intended the subsequent amendments of sec. 48.33 to apply in the administration of the maternity aid section. Both sections deal with the administration of public aid. This administration is frequently in the hands of ministerial officials in the local community and it is un-

reasonable to impute to the legislature an intention which would make it necessary for such local administrators to look up the provisions of the statutes of 1925 in order to determine the rules governing the granting of aids in 1944. Hence the two sections under consideration must always be read together as of the date when the application of these sections is invoked.

4. Can maternity aid under sec. 48.331 be granted to an expectant mother who has not lived in this state for a period of one year next preceding the application for such aid?

Reference to sec. 48.33 (5) (c) is necessary to an understanding of this situation. That specific provision is as follows:

“(5) Such aid shall be granted only upon the following conditions:

“* * *

“(c) In cases in which all other conditions for granting aid shall be satisfied but in which the child does not have a legal settlement in the county in which application for aid is made, such aid shall be granted, nevertheless, but only with the approval of the state department of public welfare; *provided, that the person having the care of said child has lived in this state for a period of one year next preceding the application for such aid.* * * *”

The portion italicized above clearly contemplates that the person having the care of the child must have lived in this state for the year preceding the application for aid. That portion of the subsection was added by the Laws of 1931, ch. 352, s.2. This amendment was made after sec. 48.331 was adopted, but as we have pointed out above in answering your third question, the statute as amended controls the conditions of eligibility.

Our conclusion is that the maternity aid section provides a separate and independent assistance program but that the conditions upon which it can be granted and the procedural aspects, such as the filing of application, are governed by the provisions of sec. 48.33. Wherever the provisions of sec. 48.33 are not altogether inconsistent with sec. 48.331, they must be applied.

ES

Statutes — Enactment — Counties — Traffic Patrolmen
— Sec. 83.016, Stats. 1943, which was formerly sec. 82.07 until renumbered and amended by sec. 91, ch. 334, Laws 1943, relating to appointment of county traffic patrolmen and their powers, was in all respects legally enacted and became a valid and effective law on June 20, 1943.

The subsequent enactment of ch. 491, Laws 1943, and ch. 553, Laws 1943, did not result in the repeal of said sec. 83.016, Stats. 1943, and said sec. 83.016 is now in full force and effect.

September 2, 1944.

WALTER J. PATRI,
Acting District Attorney,
Oshkosh, Wisconsin.

You have directed our attention to sec. 83.016, Stats. 1943, relating to the appointment of county traffic patrolmen and their powers and ask our opinion as to whether said section was legally enacted and whether it is in full force and effect at the present time.

Our answer is (1) that said section, which was formerly sec. 82.07, but which was renumbered as sec. 83.016 and amended by sec. 91, ch. 334, Laws 1943, was in all respects legally enacted and became a valid and effective law on June 20, 1943, and (2) that it is in full force and effect at the present time.

Bill 289,S, which became ch. 334, Laws 1943, was passed by the senate and concurred in by the assembly (Senate Journal of Proceedings, 1943 Session, p. 650; Assembly Journal of Proceedings, 1943 Session, p. 797) and was duly approved and signed by the acting governor on June 16, 1943 (Senate Journal of Proceedings, 1943 Session, p. 1275). Ch. 334, Laws 1943, was published in the official state paper on June 19, 1943, and there would seem to be no doubt but that it was in all respects legally enacted into law and became effective on June 20, 1943. Sec. 370.05, Stats. See *Integration of Bar Case*, (1943) 244 Wis. 8.

We gather from your letter that you concur in this view, but that your principal question is whether the subsequent

enactment of ch. 491, Laws 1943 (Revisor's Bill 423,S), approved July 9, 1943 and published July 10, 1943, and ch. 553, Laws 1943 (Revisor's Bill 432,S), approved July 27, 1943 and published July 30, 1943, resulted in the repeal of sec. 83.016, Stats. 1943, as renumbered and amended by sec. 91, ch. 334, Laws 1943. The portions of ch. 491, Laws 1943, material here, are as follows:

"Section 1. This act does not give effect to any mentioned bill which is never enacted. If any bill herein referred to fails, any section of this bill relating thereto is of no effect.

"* * *

"Section 10. 82.07, as repealed and recreated by chapter * * * (120-A), Laws of 1943, is renumbered 83.016 and reenacted, and section 91 of chapter 334 (289-S), laws of 1943 and the amendments thereby made to 82.07, are repealed."

The purpose of sec. 10 is evident. Sec. 91 of Bill 289,S (which became ch. 334, Laws 1943) and which, as previously stated, renumbered sec. 82.07 as sec. 83.016 and amended said section, had on April 22, 1943 been passed by the senate and concurred in by the assembly and hence was ready to go to the acting governor for approval. At that time Bill 120,A, which also purported, among other things, to repeal and recreate sec. 82.07, had passed in the assembly and was pending in the senate. On May 14, 1944, Bill 120,A was concurred in by the senate and thereafter it also awaited approval of the acting governor. The revisor, anticipating the possibility of conflict in the event the acting governor approved both bills, attempted to avoid any such conflict, as well as certain other conflicts, by causing a revisor's bill (423,S which became ch. 491, Laws 1943) to be introduced in the senate on June 9, 1943, which was before either Bill 289,S or Bill 120,A had been acted upon by the acting governor. His intent is clearly stated in a note to sec. 10 of Bill 423,S, which was enacted as sec. 10 of ch. 491, Laws 1943. The revisor stated:

"Note: Preserves the changes made in 82.07 by 120-A and renumbers the section to correspond with the revision of highway laws by 289-S."

On June 14, 1943 the acting governor returned Bill 120,A to the assembly without his approval and the assembly on June 16, 1943 refused to override the veto. On June 17, 1943 the acting governor approved Bill 289,S which, as previously stated, became ch. 334, Laws 1943. However, the revisor had anticipated such possibility and had provided for it in sec. 1, ch. 491, Laws 1943, which in substance provides that said act does not give effect to any bill mentioned therein which is never enacted and, "If any bill herein referred to fails, any section of this bill relating thereto is of no effect." It is perfectly clear that the revisor intended that if any bill referred to in any section of ch. 491, Laws 1943, did not become a law, any section contained in said ch. 491 which related to any such bill should have no effect. We are of the opinion that the language in sec. 1 of ch. 491 is sufficient to accomplish such purpose, and conclude that when Bill 120,A did not become a law, sec. 10, ch. 491, Laws 1943, was and is of no effect and hence did not repeal sec. 91, ch. 334, Laws 1943, and the amendments made thereby, with the result that it must be held that sec. 83.016, Stats. 1943, as renumbered and amended by said sec. 91, ch. 334, is in full force and effect.

There remains the question of the effect of the enactment of sec. 43, ch. 553, Laws 1943, which provides as follows:

"Section 43. Sections 5, 10 and 13 of chapter 491, laws of 1943, are repealed, and any changes in statutes proposed thereby are repealed."

The revisor's note to sec. 43 of Bill 432,S, which became ch. 553, Laws 1943, is as follows:

"Note. These sections of Ch. 491 depend on bills 374-A, which has been indefinitely postponed, 120-A, which was vetoed and the legislature refused to override the veto, and 37-A, on which third reading was refused. While Section 1 of Ch. 491 says that 'This act does not give effect to any mentioned bill which is never enacted' and 'If any bill herein referred to fails, any section of this bill relating thereto is of no effect,' it is thought that repealing these bill sections may avoid confusion."

The revisor obviously intended to make it clear by the enactment of sec. 43, ch. 553, Laws 1943, that sec. 10, ch. 491, Laws 1943, and other sections referred to, should be considered as having no effect. In our opinion the enactment of sec. 43, ch. 553, Laws 1943, accomplishes nothing insofar as sec. 10, ch. 491, Laws 1943, is concerned, because at the time it became effective Bill 120,A had been vetoed by the acting governor and by virtue of the provisions of sec. 1, ch. 491, sec. 10, ch. 491 was of no effect. Hence, the attempt to repeal sec. 10, ch. 491 by sec. 43, ch. 553 simply is an attempt to repeal a section which never went into effect.

WET

Elections — Independent Candidates — Sec. 6.23 (4) Stats., is applicable to independent candidates for whom nomination papers as party candidates have been circulated but who fail to qualify as such by reason of the provisions of sec. 5.17 (2).

September 5, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

You have requested our opinion as to whether the name of a candidate for party nomination to an office who fails to poll the required number of votes under the provisions of sec. 5.17, Wis. Stats., is to be placed upon the ballot in the independent column under the designation "Independent" or whether it may be placed in the independent column and designated as "Independent" followed by the party designation of the party for whose nomination he contended.

Briefly stated, the answer to the question involves a consideration of (1) whether the requirement of sec. 5.17 (2) that the name of such an independent candidate shall be placed on the official ballot in the column of official nominations and that "he shall be denominated in such column as

'independent' " refers to the designation of the individual or to the designation of the column, and (2) the related question whether sec. 6.23 which provides that the names of independent candidates shall be placed in the independent column followed by the party designation appearing on their nomination papers, applies only to cases where papers have been circulated for independent nominations as provided for in sec. 5.26 or whether it includes the case of an involuntary independent nominee who has circulated papers for primary nomination by a party but has failed to receive a place on the ballot as a party nominee by reason of the provisions of sec. 5.17 (2).

A disposition of the question involves a consideration of the historical development of the sections referred to, and it may be added that this historical development is replete with confusing statutory changes. In the absence of administrative construction we are frank to say we would have great difficulty in arriving at a conclusion, although we are inclined to the view that independent candidates should be identified by party designation in any case where nomination papers have been circulated for them and where in such papers they have been identified with a political party. That was the conclusion reached in XI Op. Atty. Gen. 753. Your office has followed that construction of the statute for many years. This history of administrative construction, in our opinion, is entitled to considerable weight and requires that the statute be now construed in accordance therewith.

There seems to have been some variance in the manner in which the names of independent candidates have been placed upon the ballot. Sec. 5.26 provides that papers may be circulated for independent candidates and that they may designate in such papers the party or principle they represent. Sec. 6.23 provides that the name of an independent candidate shall be followed by the party designation shown on his papers. Where the designation on the papers is Progressive, Republican, or Democrat, the statute seems to contemplate that the name of the candidate shall be followed by the word Progressive, Republican, or Democrat on the ballot, but in some cases it has been the practice to place the word Independent before the party designation. It is not a matter of great importance which of the two designations is

employed, but in any case where a particular designation is employed for those who have circulated papers with a party designation as independents, it should be employed for those who have circulated papers for a primary nomination and who have become independent nominees by reason of the failure of their party to cast the necessary number of votes under the provisions of sec. 5.17.

JWR

Counties — Salaries and Wages — County Judge — Ch. 94, Laws 1943, creating sec. 59.15 (1) (ef), Wis. Stats., is applicable to county judges and authorizes a county board to increase the salary of a county judge during his term of office for the period specified in the subsection.

September 7, 1944.

JAMES J. KERWIN,

District Attorney,

Milwaukee, Wisconsin.

You have requested our opinion as to whether ch. 94, Laws 1943, authorizes the county board of Milwaukee county to increase the salaries of the county judges of Milwaukee county during their respective terms of office.

Ch. 94 amended sec. 59.15 (1), Wis. Stats., by adding paragraph (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.”

For many years the constitution and the statutes have provided against changes in the compensation of officials during their terms of office. Art. IV, sec. 26, Wis. Const., provides against an increase or diminution in an officer's salary during his term, but the provision refers only to officers who receive a fixed salary from the state treasury. *State ex rel. Sommer v. Erickson*, 120 Wis. 435; *Sieb v. Racine*, 176 Wis. 617. The provision does not apply to county officers and would not apply to a county judge irrespective of whether he may be considered a county officer, since he is not compensated out of the state treasury. It should be pointed out in this connection that while statutes relating to the salaries of county officers may by definition include county judges as county officers, they are not, in the absence of such definition, to be regarded as county officers. *Stewart v. Kenosha County*, 226 Wis. 171; *State ex rel. Binner v. Buer*, 174 Wis. 120.

From the time certain county officials were provided with a salary shortly following the adoption of the constitution there were statutory provisions against changing such salaries during the term of the officer. These various provisions were consolidated into a general provision applicable to all county officers receiving a fixed salary by ch. 75, Laws 1867. The statute did not apply to county judges as originally enacted since they were not county officers and were not compensated on a salary basis. Ch. 121, Laws 1868, first placed county judges on a salary basis and in the revision of 1878 they were specifically included as county officers within the provisions of sec. 694, R.S. 1878, originally created by ch. 75, Laws 1867. In the revision it was provided that the salaries of county officers, *including county judges* entitled to receive a salary, should be fixed by the county board and should not be changed during their respective terms of office.

From 1878 to 1929 many changes were made in sec. 694, though none are material here except the renumbering of the statute to be sec. 59.15. In 1929 the section was amended by inserting subsec. (9) defining "county officer" for purposes of the section as any elective officer whose salary or compensation is paid in whole or in part out of the county

treasury. It may be noted that the effect of this subsection would be to include county judges within the provisions of sec. 59.15 even had they not been so included specifically since 1878. *Stewart v. Kenosha County*, 226 Wis. 171.

It is clear that prior to 1935 county judges were included within the compensation provisions of sec. 59.15 as county officers and that the provisions of that section prohibiting a change in the compensation of salaried county officers during their respective terms applied to county judges. In 1935 the legislature enacted ch. 468 amending sec. 253.15 which at that time related to fees of county judges. The amendment renumbered the two existing subsections relating to fees. It added subsec. (1) which provided that the annual salary of the county judge should be payable out of the county treasury; that it should be fixed by the county board at the annual meeting preceding the year of election; and that it should not be increased or diminished during the term of the judge. Thus, subsec. (1) specifically applied to county judges, in a section devoted exclusively to their compensation, provisions identical with those which for many years had applied to county officers generally and to county judges by reason of their statutory treatment as county officers. Ch. 468 also added subsec. (4) to sec. 253.15 providing that the county board might by resolution provide that the salary fixed for the county judge should be in lieu of all fees, per diem or other compensation out of the county treasury.

It was held in an opinion by this office in XXVIII Op. Atty. Gen. 139 that the compensation provisions of sec. 253.15 as amended by ch. 468, Laws 1935, were inconsistent with the salary provisions of sec. 59.15 (1) and constituted an implied repeal of sec. 59.15 (1) insofar as it related to the salary of county judges. In 1943 the legislature amended sec. 59.15 (1) to conform with the opinion by striking out the language "including county judge" and substituting the words "except as provided in section 253.15". Sec. 23, ch. 275, Laws 1943. It may be noted that county judges could not have been removed from the subsection simply by striking out the words "including county judge." They would still have been included by reason of the definition of county officer in sec. 59.15 (9), to which we have

referred. The purpose of the statutory change to remove county judges from the subsection is clear. The revisor's note which was printed in the bill provided (No. 40,S) :

“NOTE: Amends the statute in accordance with the attorney-general's opinion in 28 Atty. Gen. 139, holding that 59.15 (1) was repealed by the enactment of 253.15 (4) (1935 c. 468) in so far as 59.15 (1) applies to salary and compensation of county judges.”

The doctrine of implied repeal is of course based upon the view that where there are inconsistent provisions the later in point of time governs, particularly where it contains a special, as distinguished from a general, treatment of the subject matter. The doctrine is not favored and normally all statutes relating to the same subject matter are to be given effect if possible. The implied repeal of sec. 59.15 as it related to the compensation of county judges was based upon the inconsistent treatment of the same subject matter by sec. 253.15, a later statute and one dealing particularly with the compensation of county judges.

This implied repeal brought about by ch. 468, Laws 1935, cannot, however, be given the effect of an express repeal entirely removing county judges from the provisions of sec. 59.15. So far as the doctrine of implied repeal goes, there would be a repeal only to the extent of an inconsistency. The inconsistency was complete prior to the adoption of ch. 94, Laws 1943, but there could be no reason why paragraph (ef) of sec. 59.15 (1), as created by that chapter, could not be given full effect and considered with reference to the provisions of sec. 253.15. The provision of paragraph (ef) is in substance a grant of power to the county boards to increase the salaries of county officers during their terms of office notwithstanding any other law to the contrary. Even after the implied repeal of those portions of sec. 59.15 relating to the salaries of county judges, a county judge continued to be a county officer within the definition of sec. 59.15 (9) and, for that matter, was specifically included by the words “including county judge” until that language was repealed by ch. 275, Laws 1943. Consequently, if following the implied repeal any new material were to be added to sec.

59.15 which could be given effect, it would become necessary to give such language effect. The grant of power made to county boards by sec. 59.15 (1) (ef) was applicable to county judges as county officers under the provisions of sec. 59.15 and permitted a county board to increase a county judge's salary notwithstanding any other law to the contrary. This would mean any law such as sec. 253.15 (1), which prohibits such a change.

A question arises as to whether the enactment of ch. 275, Laws 1943, changes the situation from what it would have been without such an enactment. Did the revisor's change have the effect of excluding county judges entirely from the provisions of sec. 59.15, or did it exclude them only insofar as the attorney general had held the section to be inconsistent with sec. 253.15? As pointed out, the revisor struck out the words "including county judge" in sec. 59.15 (1) and added the language "except as provided in sec. 253.15." The striking out of the language "including county judge" did not remove county judges from the operation of sec. 59.15 since they were otherwise included by reason of the definition of a county officer in sec. 59.15 (9). The revisor's change recognized this situation and that is why it provided that the county board at its annual meeting should fix the salary of "each county officer, except as provided in sec. 253.15, to be elected during the ensuing year * * *." Thus, it is recognized that a county judge is a county officer within the meaning of the section, and the exception with respect to the fixing of his salary applies to the fixing of his annual salary prior to the beginning of his term. There is no exception, however, with respect to the fixing of his salary, from the provisions of sec. 59.15 (1) (ef) relating to change in salary during the term.

Consequently, we are of the opinion that the change made by the revisor, particularly in view of his statement in the note set out above, was intended only to give effect to the opinion in XXVIII Op. Atty. Gen. 139, and that it was not intended to constitute an exception of county judges from all provisions of sec. 59.15 as they then existed or as they might be thereafter amended. This construction is in accordance with the rule that changes made by the revisor are not intended to change the law.

Our conclusion is that sec. 59.15 (1) (ef) is applicable to the salaries of county judges and that by the plain terms of the subsection it permits the county board to change the salary of a county judge during his term of office. This conclusion is at variance with the views which we first entertained in the matter. Our preliminary conclusion was exactly to the contrary. It was based upon the premise that by implied repeal the legislature had entirely excluded county judges from the provisions of sec. 59.15 at the time it was amended by ch. 94, Laws 1943; that in consequence we could not attribute to the legislature an intention to apply ch. 94 to those who had been excluded from the provisions of the section prior to the amendment; that the express repeal should be given the effect attributed to the implied repeal, namely, the removal of the whole matter of county judges' compensation from the provisions of sec. 59.15. Possibly because we have entertained the view, we feel it to be a very persuasive one. However, for the reasons heretofore set out, we feel the contrary view is the more logical one and constitutes the better opinion.

JWR

Highways and Bridges — Drainage Districts — Where drainage district constructs ditch under existing highway bridge, resulting in undermining of bridge through increased water flow so as to make construction of new bridge necessary, the drainage district is obligated to pay for such cost only to the extent and in the manner provided by sec. 89.57 (1), (a) and (b).

September 7, 1944.

HERBERT T. JOHNSON,
District Attorney,
Monroe, Wisconsin.

You state that several years ago a drainage ditch was excavated in a certain town in your county. This ditch was constructed by a drainage district and was run under a

highway bridge, consent thereto having been given to the drainage district by the county and the town. The cost of maintaining this particular highway and bridge has been shared by the town and the county. The action of the drainage water gradually undermined the old bridge and widened the water course to the extent that the old bridge could no longer be used.

This year the town and the county determined to construct a new and larger bridge to replace the old one and agreed to share the expense of constructing the new bridge which is now about complete. The question has arisen as to whether all or any part of the cost of the new bridge can be recovered from the drainage district which apparently has sufficient funds to pay for the same.

The liability of a drainage district with respect to construction and reconstruction of highway bridges over drainage ditches is set forth in sec. 89.57, Stats., and particularly in subsec. (1), (a) and (b), created by ch. 550, Laws 1921.

Sec. 89.57 (1), (a) and (b) reads:

“(1) (a) Whenever the construction of a drainage ditch across a public highway shall make necessary the construction or reconstruction of any bridge, the district and the officers in charge of the maintenance of the bridge shall endeavor to come to an agreement as to the most practicable and desirable method of constructing or reconstructing the said bridge. In case they are unable to agree, the matter shall be referred to the court for determination.

“(b) If it shall be determined to reconstruct or add to the bridge existing at the time of such crossing, the district shall pay the costs incident thereto. If it shall be deemed most practicable and desirable to construct a new bridge, the district shall pay to the unit of government responsible for the maintenance of the bridge for use in constructing the new structure such sum as shall be deemed equivalent to the value of the bridge in place at the time of constructing the drainage ditch.”

We do not find that the above provisions have ever been construed by the courts or this office so far as your particular problem is concerned. The principle is well established at common law that where a land owner constructs or maintains an artificial drainage ditch for the benefit of his own

land and such ditch crosses an existing highway the land owner is liable for the construction and maintenance of a bridge over such ditch. See XXX Op. Atty. Gen. 444 and authorities cited, including *The President and Trustees of West Bend v. Mann et al.*, 59 Wis. 69.

Whether in the absence of statute there is any liability on the part of such a land owner in the case of an existing bridge which has to be enlarged or reconstructed by reason of the increased water flow resulting from the ditch construction is a question which the Wisconsin supreme court has apparently not been called upon to consider. But in any event, since the enactment of sec. 89.57 the procedure to be followed in imposing such liability is now prescribed by statute and the law having created such new remedy it would appear to be exclusive. *Clancy v. Fire & Police Commissioners*, 150 Wis. 630; *State ex rel. Waldorf v. Hill*, 217 Wis. 59.

It is obvious from reading sec. 89.57 (1) (a) that the first step in imposing liability on the drainage district for the construction or reconstruction of a bridge is an attempt to reach an agreement between the drainage commissioners and the officers in charge of the maintenance of the bridge as to the most practicable and desirable method of constructing or reconstructing the bridge and if they are unable to agree the matter is to be referred for determination to the circuit court having jurisdiction of the district. (The word "court" as used in sec. 89.57 means such circuit court. See sec. 89.02.)

The determination then having been made, either by agreement or by the circuit court as provided in subsec. (1) (a), the duty of the drainage district to pay for the bridge construction either in whole or in part, depending upon whether the existing bridge is reconstructed or an entirely new bridge is built, follows from paragraph (b) of subsec. (1), quoted above.

It might be noted that in the *Mann* case, *supra*, where no bridge existed before the laying of the ditch or raceway across the highway the court intimated that the right of the municipality to repair the bridge and recover the expense thereof from the land owner arose only upon due no-

tice to him. Presumably the theory is that the obligation upon the land owner is not an absolute one to provide such repairs or construction as might suit the fancy of the municipal authorities but that he is free to use his own judgment as to the nature and extent of the bridge facilities which he elects to provide, so long as the same meets the needs of public travel with reasonable adequacy and safety.

Since it appears from your statement of facts that no determination, as is provided for by sec. 89.57, was ever made either by agreement between the drainage district commissioners and the officers in charge of the maintenance of the bridge, or by circuit court order as a condition precedent to the duty of the district to pay, such duty does not exist under the above statute. Moreover, assuming there is a common law duty on the drainage district to pay for a new bridge under the circumstances, it would appear under the language of the *Mann* case that some sort of notice and opportunity either to be heard or to construct the bridge would have to be accorded to the drainage district before there could be any recovery of such expense from the district by the municipalities maintaining the bridge.

WHR

Civil Service — State Employee — Personnel Board — Reinstatement Order — Where state board of personnel reinstates employe its determination cannot be collaterally attacked through failure to honor pay roll certified in accordance with order of reinstatement if procedural requirements as to filing of appeal and holding of hearing provided for by statute governing reinstatement are complied with.

September 12, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

You have transmitted to us a pay roll for Mrs. Clara J. Reick as an employe of the veterans recognition board for the months of June and July. It appears that Mrs. Reick

was discharged as an employe of the veterans recognition board by the director, Col. Levenick, that she thereafter appealed to the board of personnel for reinstatement under the provisions of sec. 16.24, Stats., and that a hearing on such appeal was held. At the hearing a stipulation was presented to the board, executed by Mrs. Reick and by Col. Levenick, reciting that the charges were withdrawn, that Mrs. Reick was to withdraw her appeal, and that the board should thereupon order her reinstatement to August 1, 1944 and grant her a leave for one year from that time. The board thereupon reinstated Mrs. Reick and granted her a leave of absence.

You desire to be advised whether the board could properly reinstate Mrs. Reick in the face of the stipulation that her appeal was to be withdrawn.

Our view of the matter is this. If this stipulation was valid, if Col. Levenick could withdraw the discharge, it would require no further action to entitle Mrs. Reick to reinstatement, since she would thereby automatically be reinstated and would be entitled to receive her salary. If, on the other hand, Col. Levenick could not withdraw the discharge after Mrs. Reick had appealed, then it is evident that Mrs. Reick's stipulation to withdraw her appeal, being a part of the whole stipulation, would fall with the remainder and the stipulation would be of no effect. In that event it would not have authorized the board to reinstate Mrs. Reick.

However, wholly aside from the stipulation, there is no question but that the board had jurisdiction to reinstate Mrs. Reick. There had been a discharge followed by an appeal. It was the clear intent of the parties involved, notwithstanding the informality of the proceedings, that their differences should be adjusted and that the board should reinstate Mrs. Reick with pay to August 1. The board could undoubtedly have insisted upon taking testimony in order to determine whether the discharge was unlawful, but it was not required to do so. If the employing department was no longer interested in supporting the discharge, the board of personnel was justified in ordering the reinstatement.

The board of personnel having acted, its action cannot be subjected to collateral attack. Assuming that it erred in ordering Mrs. Reick reinstated, its error could not be cor-

rected except by a direct appeal in accordance with those provisions of law which permit an appeal to the circuit court. An administrative determination may not be subjected to collateral attack where the law under which the determination is made is constitutional, where the order is directed to the subject matter covered by the law, and where there has been compliance with jurisdictional procedural requirements. 42 Am. Jur. 515; *State ex rel. Martin v. City of Juneau*, 238 Wis. 564.

We are of the opinion that you should pay Mrs. Reick upon the basis of the pay roll certification made to you.
JWR

Fish and Game — Hunting Licenses — A county clerk is required to issue resident hunting licenses to any natural person who duly applies therefor and presents definite proof of his identity and that he has been a legal resident of this state for at least one year next preceding his application, and who is otherwise qualified to receive such license, and may not restrict the issuance of licenses to residents of his county only.

In the event an applicant for a resident hunting license has lived in several counties in the state in the year next preceding the date of application, he may apply for such license in any county of the state.

September 12, 1944.

CONSERVATION DEPARTMENT.

Attention Mr. E. J. Vanderwall, *Director*.

In your letter of August 30, 1944 you refer us to sec. 29.10, Stats., relating to resident hunting licenses and also to that portion of sec. 29.09 relating to the same subject and state that at different times the conservation department has been called upon to advise whether or not a county clerk may issue resident hunting licenses to any resident of the

state (as contrasted to a resident of his county) who duly applies for one and is in all respects otherwise qualified to receive one, and that you have answered in the affirmative. You also call our attention to an opinion of this department dated November 21, 1928 appearing in XVII Op. Atty. Gen. 579 to the effect that the county clerk should issue resident hunting licenses only to residents of his county, and request (1) a clarification of this opinion, and (2) our answer to the questions (a) whether the county clerk's authority is limited to issuing resident hunting licenses to residents of his county or whether he may issue them to any resident of the state, assuming that in each case application for such license is duly made and the applicant is in all other respects qualified to receive one and (b) in event the applicant has resided in several counties in the year next prior to application for such license, which county would be the proper county in which to make his application.

The issuance of resident hunting licenses is governed by sec. 29.10, Stats, 1943, which provides in part:

“Resident hunting licenses and deer tags shall be issued subject to the provisions of section 29.09, by the county clerks of the several counties upon blanks supplied to them by the state conservation commission, to residents of each county duly applying therefor who have resided in this state for at least one year next preceding the application.
* * *”

The portion of sec. 29.09, Stats. 1943, which is material to the questions under consideration here appears in subsec. (1) and provides:

“* * * Such licenses shall be issued to *and obtained by only* natural persons, and *in case of resident hunting, trapping or fishing licenses, shall be issued only to persons who shall present to the county clerk or issuing agent definite proof of his identity, and that he is a legal resident of this state.* * * *”

The portion of sec. 29.09, Stats. 1943, which appears above in italics was inserted by ch. 182, Laws 1939, which, in addition to amending other subsections of sec. 29.09, also

amended secs. 29.10 and 29.14 (2), Stats. In view of this amendment we may now assume that the interpretation placed on sec. 29.10, Stats. 1927, by the writer of the opinion in XVII Op. Atty. Gen. 579 was correct, although, as was there recognized, the question was not free from doubt. It is our opinion that the amendment of that portion of sec. 29.09 above referred to by ch. 182, Laws 1939, changed the previous law, since such amendment makes it plain that a county clerk or other issuing agent is authorized to issue a resident hunting license to any natural person who shall present definite proof of his identity and "that he is a legal resident of this state." There is no requirement that such person present proof that he is a resident of any particular county and the only conclusion which can be arrived at is that the authority of a county clerk or other issuing agent to issue a resident hunting license is not limited to those who are residents of his county. In fact, there would seem to be no doubt but that a county clerk is required to issue a resident hunting license to any natural person who presents definite proof of his identity and that he is a legal resident of this state, assuming of course that such person has been a resident of this state for at least one year next preceding the date of application, as required by sec. 29.10, Stats., and is otherwise qualified to receive such license and makes due application therefor. If a county clerk attempted to restrict the issuance of such license to residents of his county only, such county clerk would be imposing a condition beyond that provided for by sec. 29.09, Stats., which of course cannot be done.

In view of this it follows that in the event an applicant has lived in several counties of the state during the year next preceding his application for a resident hunting license, he may apply for such license in any county of the state.

WET

Minors — Illegitimate Children — Adoption — Termination of parental rights with respect to illegitimate child born to married woman discussed.

September 22, 1944.

MRS. ROSAMOND DORAN,

Child Welfare Department.

You have asked whether it is possible to terminate the parental rights, so as to clear the way for adoption, with respect to an illegitimate child of a married woman whose husband is in the military service and has been overseas during the entire period when conception could have taken place, without giving notice to the husband. I do believe it possible to terminate parental rights in such a case without notice to the husband but since the proof of illegitimacy as to a child born in wedlock is extremely difficult, I believe that such a proceeding should be avoided except in cases in which it is necessary for the welfare of the child.

The procedure which I recommend, if it is by any means possible, is to obtain the signatures of both the mother and her husband upon the application for termination of parental rights under sec. 48.07 (7) (c). The entire proceeding can then be handled as in the case of legitimate children and can be so conducted that the adoption will not be subject to challenge.

You state, however, that there are sometimes cases in which the mother is so opposed to having her husband informed of the birth that refusal to proceed without notifying him might result in the abandonment of the child and might jeopardize its future. In such a case the husband in the eyes of the law is the father of the child, even though he knows nothing of its birth, and becomes at least technically subject to penalty for its abandonment or non-support. Even if he should later be divorced from the wife he would still be legally liable for the support of the child so long as its illegitimacy has not been established nor the parental rights terminated. Where the alternative to obtaining the husband's signature to an application for termination of parental rights appears likely to involve a sac-

rifice of the child's future welfare and in the husband's becoming legally chargeable without his knowledge with the support of a child which is not his, there might be a strong argument in favor of resorting to procedure to open the way for adoption of the child into a good home even though the legality of the procedure has not been fully tested. Perhaps the reason why we do not have a direct precedent for the procedure is that in practice the validity of adoptions is challenged in a very small percentage of cases.

I believe that in cases where the husband has been out of this country on military service during the entire period when conception could have taken place, it is possible to transfer the permanent care and custody of the child according to law without notice to the husband. Sec. 48.07 (7) (c) provides that upon the application of the mother of an illegitimate child the court may order transfer of its permanent care, control and custody. In the case of an illegitimate child no person other than the mother has any right in the child which entitles him to notice of proceedings for the termination of parental rights. It is true, of course, that every child born to a married woman is presumed to be legitimate, and that such presumption is so strong as to be extremely difficult to overcome. It may, however, be overcome by proof that the husband was entirely absent during the period when the child could have been conceived so that there was no possibility of intercourse. *Estate of Lewis*, 207 Wis. 155, 158-159; *Riley v. State*, 187 Wis. 156, 158-159; *Shuman v. Shuman*, 83 Wis. 250; *Watts v. Owen*, 62 Wis. 512; *Mink v. State*, 60 Wis. 583.

The War Department will, upon receipt of a court order requesting it, supply a certified statement of the date of the departure from and return to this country of any man in foreign service. Such a certificate we believe would be competent evidence under sec. 327.18 of the Wisconsin Statutes and would be admissible for the purpose of establishing illegitimacy. The mother's testimony is not admissible for that purpose, but I believe a certificate from the War Department, possibly supplemented by testimony of third persons who know of the husband's absence during the period in question, would be sufficient to establish the illegitimacy

of the child so that parental rights could be terminated upon the application of the mother alone.

BL

Embalmers and Funeral Directors — Person holding embalmer's license granted in Iowa is not eligible for reciprocal licenses as embalmer and funeral director in Wisconsin until he has practiced for 5 years after granting of Iowa license, under sec. 156.08, Stats. Period of "studentship" in Iowa is equivalent to "apprenticeship" in Wisconsin and cannot be counted in the 5 years of practice required for reciprocity.

Person who has practiced for 5 years as "embalmer" under Iowa license is eligible for reciprocal licenses as "embalmer" and "funeral director" under sec. 156.08, Stats., both professions being included in the single Iowa license.

September 29, 1944.

DR. CARL N. NEUPERT,
State Board of Health.

You have requested an opinion with reference to the following situation: An embalmer licensed in Iowa on August 18, 1941 has applied for reciprocal licenses in funeral directing and embalming in this state. It appears that he was issued an embalmer's studentship certificate on July 20, 1938 and a Class "A" studentship certificate on August 16, 1940 and again on January 31, 1941. From October 2, 1939 to June 8, 1940 he attended a school of embalming approved by the Iowa board of registration. He was born on July 8, 1919.

Sec. 156.08 provides that the board of health may on recommendation of the committee of examiners in funeral directing and embalming issue an embalmer's or funeral director's license (or both in a proper case) to any person of good moral character who holds an unexpired license as an

embalmer or funeral director issued by the proper authorities of another state whose requirements for a license are substantially equivalent to those of this state, providing that the applicant for the Wisconsin license has been employed as a licensed embalmer or funeral director for a period of not less than 5 years in the state in which such license was issued and shall submit to and pass a written examination of the committee of examiners of this state.

It is obvious that the Iowa applicant above referred to has not been employed as a licensed embalmer or funeral director for 5 years. He was not licensed until August 18, 1941 and the earliest possible date on which he could become eligible for a reciprocal license is August 18, 1946. The time spent by him as a student in Iowa is equivalent to the period of apprenticeship required in this state and cannot possibly be construed as employment as a "licensed embalmer" or as a "licensed funeral director" within the meaning of sec. 156.08, Stats.

Sec. 2585.03 of the Iowa Statutes provides that "No applicant shall be issued a license to practice embalming unless and until he shall:" (1) File proof that he has completed an accredited high school course or its equivalent with evidence of one year's studentship under a regularly licensed embalmer in Iowa prior to entering an accredited school of embalming. (2) Successfully complete a course of training in an accredited school of embalming. (3) Pass the next examination held by the board after his graduation, then receive a "Class 'A' Certificate of Studentship" and complete one additional year of continuous studentship during which he must embalm not less than 25 bodies "under the direct supervision of a licensed embalmer in good standing in the state." (4) Have passed another examination in certain prescribed subjects. (5) Have demonstrated his proficiency by embalming a body as directed by the board of examiners. This last applies also to applicants by reciprocity.

Sec. 2585.04 of the Iowa Statutes provides that the board shall by rule provide for studentships and "regulate the registration and training thereof; and no applicant shall be eligible to take the embalmers' examination who has not first been legally registered as a student."

Sec. 2439 of the Iowa Statutes provides: "No person shall engage in the practice of * * * embalming * * *, unless he shall have obtained from the state department of health a license for that purpose." Sec. 2440 provides that no person shall be licensed until he has attained the age of 21 years.

The reciprocity requirements in Iowa are similar to those prescribed in this state. By rule no. 34 of the Iowa board of examiners, 5 years' practice is required for a reciprocal license, and by sec. 2585.03 of the statutes the applicant is required to demonstrate his proficiency by embalming a body. Iowa will not grant a reciprocal license unless the 5 years' practice was in the state where the original license was issued *by examination*, but this has no bearing on the present problem.

From the foregoing, it will be seen that the applicant was not *licensed to practice* in Iowa during the period of his studentship. What he held at that time was a *certificate* of studentship, not a license of any kind. He could not be licensed until he attained the age of 21, but he could be, and was, granted a certificate of studentship at the age of 19. All of his experience during the period of studentship was required to be under the supervision of a licensed embalmer and he could on no account enter into the practice of the profession independently by virtue of his registration as a student.

It is absolutely clear, therefore, that the applicant is at present ineligible for a reciprocal license in this state. Moreover, if the period of studentship was deemed to constitute practice as a licensed embalmer, then the Iowa law would not contain requirements "substantially equivalent to those of this state," (sec. 156.08, Stats.) since the studentship certificate can be issued to a person who has merely graduated from high school or its equivalent, while in Wisconsin a license to practice either funeral directing or embalming requires a prior period of apprenticeship. However, this question does not arise since it is obvious that the studentship in Iowa is of no higher dignity than an apprenticeship in this state.

You also inquire whether it is legal to issue separate funeral directors' and embalmers' licenses by reciprocity to

Iowa licensees who are licensed only to practice embalming. Iowa does not have separate embalmers' and funeral directors' licenses, as is required by the constitution of this state, (*State ex rel. Kempinger v. Whyte*, (1922) 177 Wis. 541) but the definition of an "embalmer" in sec. 2585.01 of the Iowa Statutes clearly indicates that it includes both embalming and funeral directing as known in the law of Wisconsin.

It follows that a person who holds an embalmer's license in Iowa is both a "licensed embalmer" and "a licensed funeral director" as those terms are used in our statute and accordingly both licenses may be issued by reciprocity.

WAP

Counties — Cooperative Associations — A county has no authority either express or implied to furnish space in a county building rent free to a cooperative association formed to improve dairy herds in said county, for the purpose of establishing a laboratory to test milk of members of said association.

The county agricultural representative commonly known as the "county agent" may not on county time train or supervise the work of persons employed by said cooperative association to make such laboratory tests.

October 7, 1944.

NORRIS E. MALONEY,

District Attorney,

Madison 3, Wisconsin

You advise us that there is located in your county a cooperative association organized under the provisions of ch. 185, Wis. Stats. known as the Dane County Cooperative D. H. I. A., the purposes of which are stated as follows:

"To improve the dairy herds in Dane County, Wisconsin (or in the vicinity of Dane County, Wisconsin), by testing the milk of dairy cows of association members and giving them information as to which of their cows are most productive; by holding meetings and otherwise to disseminate knowledge beneficial to its members in the improvement of their dairy herds; to employ such help and purchase and distribute such material as may be needed and to do all things necessary or incidental to the said business and purpose."

The articles further provide, in substance, that the owner of dairy cattle or manager of a dairy herd may become a member of the association upon payment of an initial fee of \$3.00 and by acceptance of his application for membership by a majority vote of the members or board of directors.

You further state that due to shortage of manpower caused by the present national emergency "dairy herd associations in this county" which previously employed field men (formerly called "cow testers") are now unable to continue

with their work because of inability to hire field men. By this we assume you must refer to some other association than the Dane County Cooperative D. H. I. A., since the latter did not file its articles of incorporation until May 31, 1944 and could not therefore have previously employed a field man.

In any event, you also state that a large portion of the work of a field man consists in making laboratory tests. Formerly field men had no central laboratory, but carried supplies with them to make the tests. It is now felt that one field man could do the work of several if a central laboratory were established to be staffed by women who would devote their entire time to making tests on milk collected by the field man. You advise this would be feasible only if such women were given constant supervision and training by someone experienced in the field.

It is contemplated that the Dane County Cooperative D. H. I. A. would assume the full expense of paying the field man and the women employed in the laboratory as well as the cost of laboratory material which we assume includes both equipment and supplies. It is proposed that the training and supervision of the laboratory employes would be done by the county agricultural representative commonly known as the "county agent", and that the central laboratory be located in the Dane County Court House Annex which is the building in which the county agent has his office. Such laboratory space is to be given rent free.

You request our answer to the following questions:

1. May the county provide such a laboratory for use by the Dane County Cooperative D. H. I. A. within a county building rent free?
2. May the county agent train and supervise the work of the persons employed by the Dane County Cooperative D. H. I. A. to make such laboratory tests?

The answer to both questions is "no".

A county has only such power as is expressly conferred upon it by statute or which may necessarily be implied therefrom. Courts are conservative in implying powers not expressly given and if there is a fair and reasonable doubt as to the existence of an implied power, it is fatal to its be-

ing. *Dodge County v. Kaiser*, (1943) 243 Wis. 551; *Spaulding v. Wood County*, (1935) 218 Wis. 224.

We find no express statutory provision which would authorize the county to provide such a laboratory within a county building for use by such an association rent free, or which would authorize the county agent, by reason of a resolution of the county board or otherwise, to train and supervise persons employed by such association to make laboratory tests under the circumstances stated.

Any implied power must be found in subsecs. (1), (2) and (3) of sec. 59.87, Stats., which authorizes a county through the county board to establish and maintain an agricultural representative and which prescribes his duties. In our view the case of *Spaulding v. Wood County*, (1935) 218 Wis. 224, is direct authority which negatives any claim that these subsections give such implied power. In that case the court held that a county did not have either express or implied power by reason of subsecs. (1), (2) and (3) of sec. 59.87, Stats., to employ a cow tester at county expense. There has been no change in sec. 59.87 in so far as the particular questions here are involved since the decision in *Spaulding v. Wood County*, *supra*, and we see no escape from the conclusion that this case requires that both of your questions be answered in the negative.

We cannot see how in principle it is any different for a county to employ a cow tester at county expense than it would be for the county to furnish the Dane County Cooperative D. H. I. A. with laboratory space in a county building rent free for the purpose of testing milk of its members. Furnishing laboratory space in a county building rent free is certainly furnishing it at county expense. There could be no question under the *Spaulding* case but that a county would have no authority to appropriate money to pay the rent for laboratory space used by the Dane County Cooperative D. H. I. A. for testing milk of its members. It would seem equally true that the county could not accomplish the same thing by simply giving space, rent free, in a county building.

Likewise, we cannot see how in principle it is any different for a county to employ a cow tester at county expense

than it would be to permit the county agent to train and supervise the work of persons employed by the Dane County Cooperative D. H. I. A., which is of course a private corporation. The salary of the county agent is paid by the county and it would be very clear that he could not devote all of his time to training and supervising the laboratory employes of such association at county expense. We see no difference if he devotes part instead of full time to such work. Irrespective of how much of the county's time the county agent would spend in such activity we do not see how in principle it would differ in any way from the case where the county directly attempts to employ a cow tester at county expense.

You refer us to the Smith-Lever Act (7 U.S.C.A. §§ 341-348) and also to Project No. 17 entitled "Dairy Cattle Management and Improvement" which is a project undertaken pursuant to the Smith-Lever Act following approval of the secretary of agriculture by the department of dairy husbandry of the university of Wisconsin. The object of said project is: "to improve Wisconsin dairy cattle by the use of records of production as a basis for selection and improvement of breeding stock, improving feeding practices and the culling of unfit animals from the herd." You further state that as part of the procedure under Project No. 17:

"The Department of Dairy Husbandry will promote the organization of Dairy Herd Improvement Associations through extension specialists and through county agents and interested farmers. It will supervise the work of Association fieldmen (formerly called 'cow testers'). It will help select and train fieldmen by personal visits, conferences, and schools. It will encourage the keeping of complete farm accounts by each member of an association."

We do not see how this changes the situation here. The authority of the county or of the county agricultural representative or "county agent" to engage in projects approved under the Smith-Lever Act must be found in subsec. (3) of sec. 59.87, which provides in part:

"For the partial maintenance of agricultural development of such county under the supervision of such agricultural

representative, and for such other extension work as is provided for * * * [in the Smith-Lever Act], authority is hereby given the county board to raise, by tax levy or otherwise, for periods of not less than two years each, such moneys as may be deemed sufficient to cover the share of the county in such work. * * *”

However, in *Spaulding v. Wood County, supra*, the court referring to subsec. (3) of sec. 59.87 said at page 229:

“* * * That subsection authorizes the raising of money for the purpose of fostering the work of the county representative and other authorized extension work. That subsection does not in our opinion impliedly authorize a county to hire a cow tester at the expense of the county.
* * *”

This being true, we cannot see how the Smith-Lever Act or any project adopted thereunder can authorize the proposed arrangement here.

Further, it would seem that there would be considerable doubt whether the furnishing of free laboratory space in a county building to the Dane County Cooperative D. H. I. A. and the training and supervising of laboratory workers of this association by the county agent at county expense is the type of cooperative agricultural extension work contemplated by the Smith-Lever Act. Section 1 of that Act (7 U.S.C.A. § 341) provides in part:

“In order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same, there may be inaugurated in connection with the college or colleges in each State receiving the benefits of the foregoing provisions of this chapter, agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture * * *.”

Section 2 (7 U.S.C.A. § 342) provides:

“Cooperative agricultural extension work shall consist of the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or

resident in said colleges in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise; and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State agricultural college or colleges receiving the benefits of sections 341 to 348, inclusive, of this chapter."

We question whether the above provisions contemplate any activity whereby members of a particular cooperative association or any other group receive direct aid of the kind proposed here. Rather, it would seem that the work contemplated would be more in the direction of activity which would impart information on subjects relating to agriculture and home economics to the general public as contrasted to those in a private group.

WET

Elections — Independent Candidate — Although a person's name appears as a candidate in the Independent column he may be voted for by having his name written in as a party candidate for the same office for which he is an Independent candidate. All such votes received as a party candidate of any party should be added to any votes the candidate receives as an Independent in order to determine his total number of votes.

October 10, 1944.

FRED R. ZIMMERMAN,
Secretary of State.

You refer to a situation where a person's name appears on the ballot in the Independent column and desire to be advised as to whether, if his name is written in a party column for the same office on the same ballot, the vote should be counted, and if all votes received by the candidate both as an Independent and as a write-in party candidate should

be added together in determining his total vote. In our opinion the question should be answered in the affirmative.

It is provided by sec. 6.75, Wis. Stats. that "the person appearing satisfactorily to have received the highest number of legal votes for any office shall be deemed to have been duly elected to that office * * *." Therefore, unless there is some illegality connected with voting for a man in the party column, where his name appears on the same ballot as an Independent, a vote for such a candidate as a party candidate should be added to any votes which he may receive as an Independent in order to determine whether he has obtained a plurality. We know of no provision of law to the effect that such voting is illegal.

Sec. 6.22 (1) (b) providing for instructions to voters states that

"* * * If the voter does not wish to vote for all the candidates nominated by one party, he shall mark his ballot by making a cross or mark in the square at the right of the name of the candidate for whom he intends to vote, or by inserting or writing in the name of the candidate."

This instruction, while ambiguous, on the basis of one interpretation would give a voter the option of going outside a party column and marking the names of candidates or writing in such names in the party column in which he prefers to vote.

The same is true of the provisions of sec. 6.23 (7) providing for instructions to voters on the official ballot. There again the language is ambiguous. It reads:

"* * * 'If you desire to vote for particular persons without regard to party, mark in the square at the right of the name of the candidate for whom you desire to vote, if it be there, or write any name that you wish to vote for, in the proper place.' * * *"

Sec. 5.01 (6) provides:

"This title shall be construed so as to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions."

The title referred to is Title II of the statutes which includes ch. 6 relating to elections. It is provided in sec. 6.42 that:

“All ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intent can be ascertained therefrom. * * *”

It clearly appears that statutes are to be given a liberal construction for the purpose of determining the true intent of the voter and giving such intent effect, if possible. Under the circumstances, we think every question should be resolved in favor of the legality of a vote cast in the manner referred to, and that the vote should be counted in determining the total vote of any candidate.

JWR

Public Printing—After a successful bidder for state printing has entered into a printing contract and furnished a bond as provided by sec. 35.49, Stats., the state treasurer has no authority to return to said bidder the \$1,000 in cash or United States bonds which were deposited with him pursuant to sec. 35.46, Stats., prior to the time said contract has been fully performed. Such deposit may be returned only on full performance of such contract.

October 10, 1944.

BUREAU OF PURCHASES.

Attention Mr. F. X. Ritger, *Director of Purchases*.

You request our answer to the following question:

After a successful bidder for state printing has entered into a printing contract and furnished a bond as provided by sec. 35.49, Stats., may the state treasurer return to said bidder the \$1,000 in cash or United States bonds which were deposited with the state treasurer pursuant to the provisions

of sec. 35.46, Stats., prior to the time said contract is fully performed?

The answer is "no". The necessary requisites of a bid for state printing are stated in sec. 35.46, Stats. Said section also provides that every such bid:

"* * * shall be accompanied by a certificate of the state treasurer showing that the bidder has deposited with such treasurer one thousand dollars in money or United States bonds, subject to the provisions of this chapter; shall be accompanied by a provisional agreement under seal, executed by the bidder to the effect that if such bid be accepted, and if he shall fail to enter into a printing contract and execute a bond within the time and conditioned as required by law, and to the effect that if, after executing such printing contract and bond, he shall fail to comply therewith, then and in either such case, the said one thousand dollars shall become absolutely the property of the state, and shall not constitute an offset or counterclaim against the penalty or damages which may be recovered by the state upon said contract and bond; and shall be further accompanied by a bond, executed by a surety company duly authorized to do business in this state, in the sum of five thousand dollars, to the effect that it guarantees the bidder will, if his bid be accepted, execute the contract and bond required by law within such time as may be prescribed by said director of purchases."

Sec. 35.48 provides:

"No bid shall be considered that does not fully comply with the requirements of section 35.46; and if a bid be rejected for any reason the certificate of the state treasurer, the bidder's provisional agreement and desposited money shall be returned to him. With every accepted bid the accompanying provisional agreement, certificate and money or bonds shall be retained until the bidder has entered into the printing contract, and furnished the bond required of him by section 35.49 and has fully performed all the terms and conditions thereof. Upon such full performance they shall be returned to him."

Sec. 35.49 provides:

"Within ten days after the acceptance of any bid, or such further time as the director of purchases may allow there-

for, said director of purchases shall cause a contract to be prepared and entered into by said director of purchases on the part of the state and said bidder, setting forth fully the terms and conditions under which the work specified is to be performed. Such bidder shall at the same time furnish a bond to the state, such bond to be executed by a surety company duly authorized to do business in this state, and to be conditioned for the faithful performance of all duties required of him by law and by the terms and conditions of his contract. The amount or penalty of such bond shall be fifteen thousand dollars for each class of public printing or subdivision thereof; excepting that the penalty of such bond shall be five thousand dollars for the following printing:
 * * * Said bond shall be approved by said director of purchases, and, together with the contract and all other papers relating thereto, be deposited in the office of the secretary of state."

Sec. 35.50 provides :

"If a successful bidder fails to enter into a printing contract and execute a bond as required by this chapter the one thousand dollars deposited by him with the treasurer shall at once become the absolute property of the state; and there shall be forfeited to the state the amount of the penalty named in the guaranty accompanying his provisional agreement. If such bidder or contractor shall enter upon the performance of his printing contract, and shall thereafter at any time during the term thereof refuse or neglect to comply with its terms and conditions or with the law relating to public printing, he shall be liable to the state in damages to the amount of the difference between the cost of public printing under his printing contract and the cost thereof under any subsequent contract or contracts made by the director of purchases, pursuant to law for the supplying of such public printing as he ought to have supplied under the terms of his printing contract. * * *"

These sections are in *pari materia* and must be construed together. It is very clear from sec. 35.46, Stats., that a bid for state printing must be accompanied by a provisional agreement executed by the bidder under seal to the effect that if the bid be accepted and the bidder fails to enter into a printing contract and execute a bond within the time and conditioned as required by law or if after executing such printing contract and bond, the bidder fails to "comply

therewith," the \$1,000 deposit of cash or United States bonds becomes absolutely the property of the state "and shall not constitute an offset or counterclaim against the penalty or damages which may be recovered by the state upon said contract and bond." The words "comply therewith" obviously must refer to the executed printing contract as well as the bond, so that in the event a successful bidder executes a printing contract and bond as required by law and then fails to comply with his contract, the \$1,000 deposit becomes absolutely the property of the state. In such event all the state treasurer need do is to take the deposit and apply it to the account of the state. No legal action is necessary on his part as he already has possession of the deposit.

A breach of the printing contract might occur at any time prior to the time performance is completed and it is obvious that as a practical matter the \$1,000 deposit should be retained by the state treasurer until there is no chance that this deposit might become the property of the state. If he prematurely released the deposit and a breach of contract occurred the only way such deposit could then be recovered would be by legal action. Hence it is important that he retain possession until the bidder has fully performed his contract. This is what is contemplated by that portion of sec. 35.48, Stats., which provides that with every accepted bid "the accompanying provisional agreement, certificate and money or bonds shall be retained" until the bidder has entered into the printing contract and furnished the bond required by sec. 35.49, Stats., "and has fully performed all the terms and conditions thereof. Upon such full performance they shall be returned to him." The context makes it clear that the words "fully performed all the terms and conditions thereof" must refer to the printing contract as well as the bond. This section must be read in conjunction with sec. 35.46 and to construe it otherwise would make it impossible to carry out the scheme provided for by sec. 35.46. Hence we hold sec. 35.48 authorizes return of the \$1,000 deposit by the state treasurer only after the successful bidder has fully performed all the terms and conditions of his printing contract.

It should also be noted that sec. 35.50, Stats., among other things, provides in substance that in event a successful bid-

der enters upon performance of his printing contract and subsequently during the term thereof, refuses or neglects to comply with its terms or conditions or with the law relating to public printing, he shall be liable to the state in damages in an amount equal to the difference between the cost of public printing under his printing contract and the cost under a contract or contracts made by the director of purchases to furnish the public printing which should have been supplied pursuant to the first contract. This portion of sec. 35.50 creates a cause of action for damages against a successful bidder who fails to perform as required by his printing contract or who fails to comply with the law relating to public printing, and prescribes the measure of damages. It in no way prevents the \$1,000 deposit made by said bidder from becoming the property of the state, pursuant to the provisions of sec. 35.46. This is evident from the provisions of sec. 35.46 since it is there provided, among other things, that if the successful bidder executes a printing contract and bond and thereafter fails to comply therewith the \$1,000 deposit becomes the absolute property of the state "and shall not constitute an offset or counterclaim against the penalty or damages which may be recovered by the state upon said contract and bond; * * *"

WET

Criminal Law — Negligent Discharge of Firearms — No crime is involved in the negligent discharge of firearms not resulting in the death of a person struck by the bullet.

October 10, 1944.

JOHN A. MELSKI,
District Attorney,
Stevens Point, Wisconsin.

You state that a driver of a truck discharged a revolver in the nighttime. The revolver was pointed out the window of the truck and discharged with no intention of shooting

any person or object. Several boys were walking in the darkness along the highway and one of them was struck by a bullet and injured. The question arises as to whether any crime was committed.

It is, as you know, contrary to law to discharge a firearm in proximity to a state park or a public park, and it is also contrary to law to carry a firearm in an automobile unless the same is unloaded and knocked down. However, we know of no law which makes the negligent discharge of firearms a crime unless death results. If death were to result, then a charge of manslaughter might lie. However, where injury not resulting in death occurs, the situation does not appear to be any different from any other negligence resulting in injury. A civil action for damages would appear to be the only liability in such a case.

We express no opinion as to whether under the circumstances discharge of the firearm was negligent. We are assuming for present purposes that it was, only because it is upon such a basis that we must determine whether there could possibly be a prosecution.

JWR

Investments — Building and Loan Associations — Sec. 219.05 (1), Stats., relating to investments by insurance companies, fiduciaries and others in shares of local building and loan associations or in shares of federal savings and loan associations or other institutions within the state, does not restrict investment in shares of local building and loan associations organized under ch. 215, Wis. Stats., to those which are insured by the Federal Savings and Loan Insurance Corporation.

October 11, 1944.

BANKING COMMISSION OF WISCONSIN.

Attention Mr. E. W. Tamm, *Secretary*.

In your letter of September 23, 1944 you request our answer to the following question:

“Does sec. 219.05 (1), Stats., in so far as it permits investments in shares of local building and loan associations which are organized under ch. 215, Wis. Stats., restrict such investment to shares of local building and loan associations which are insured by the Federal Savings and Loan Insurance Corporation pursuant to Act of Congress or may such investments be made in shares of local building and loan associations which are not so insured?”

The subsection referred to provides that the investment by certain types of insurance companies, credit unions, building and loan associations, federal savings and loan associations, certain fiduciaries, administrative bodies or officers and governmental units and also the state insurance fund and other “funds”:

“* * * in shares of any local building and loan association in an amount not exceeding five thousand dollars; or in shares of any federal savings and loan association or other institution within the state, to the extent to which the withdrawal or repurchasable value of *such shares* now are, or may hereafter be, insured by the federal savings and loan insurance corporation, under acts of congress of the United States now in effect or which may hereafter be enacted, shall be lawful.” (Italics ours)

It is our opinion that sec. 219.05 (1), Stats., does not restrict investment in shares of local building and loan associations to shares of such associations as are insured by the Federal Savings and Loan Insurance Corporation. It will be noted that this subsection refers to shares of “local” building and loan associations, which by statute mean building and loan associations organized under the laws of Wisconsin. Sec. 215.01, Stats.

The determination of the problem here obviously depends upon the construction of the meaning of the words “such shares” which appear in italics in that portion of sec. 219.05 (1), Stats., set out in this opinion. It is clear that they refer to the words “shares of any federal savings and loan association or other institution within the state.” The difficult question is whether they also relate back so as to apply to the words “shares of any local building and loan association.” We think that application of settled rules of statutory

construction as well as a consideration of the legislative history of sec. 219.05 (1), Stats., necessitates the conclusion that the words "such shares" do not refer back so as to apply to shares of local building and loan associations.

The word "such" is a descriptive and relative word, and refers to the last antecedent unless the meaning of the sentence would thereby be impaired. *Strawberry Hill Land Corp. v. Starbuck*, (1918) 124 Va. 71, 97 S. E. 362; *Summerman v. Knowles*, (1868) 33 N. J. Law 202. It has also been stated that the word "such" when used in a contract or statute must in order to be intelligible refer to some antecedent, and will generally be construed to refer to the last antecedent in the context, unless some compelling reason appears why it should not be so construed. *American Smelting & Refining Co. v. Stettenheim*, (1917) 177 App. Div. 392, 164 N. Y. S. 253. The case here is one where this general rule is applicable. It is obvious that the meaning of the sentence would not be impaired by its application and there is no compelling reason for not applying such rule here. Further, the application of such rule is indicated by the fact that the phrase "in shares of any local building and loan association in an amount not exceeding five thousand dollars" is separated by a semicolon from the clause "or in shares of any federal savings and loan association or other institution within the state, to the extent to which the withdrawal or repurchasable value of such shares now are, or may hereafter be, insured by the federal savings and loan insurance corporation, under acts of congress of the United States now in effect or which may hereafter be enacted, shall be lawful."

Punctuation by a semicolon is ordinarily indicative of a complete thought in one clause separate from the other clauses of a statute. *United States ex rel. Palermo v. Smith*, (CCA 2, 1927) 17 F. (2d) 534. Hence, the use of the semicolon to separate the two phrases here must be taken as some indication that each phrase contains a separate thought or refers to a separate subject. The words "such shares" are contained in the phrase following the semicolon and there is every reason to conclude that they refer to the antecedent contained in such phrase which is also the last antecedent.

Another very strong reason for reaching such result grows out of the fact that the subsection here limits the amount which can be invested in shares of any one local building and loan association to \$5,000. In case of shares of any federal savings and loan association the investment is limited only to the amount the withdrawal or repurchasable value of its shares are insured by the Federal Savings and Loan Insurance Corporation under acts of congress "now in effect or which may hereafter be enacted." The limitation in investment in shares of local building and loan associations is in respect to amount, while the limitation in investment in shares of federal savings and loan associations is with respect to insurability. There is no relation between them. At the present time we understand the limit of such insurance is \$5,000 for shares held by any one person, but in the event the limit is raised in the future by act of congress, it is obvious that the amount which could be invested in such shares would be raised, while the \$5,000 limitation upon investments in shares of local building and loan associations would remain the same. Under such circumstances it would seem illogical to apply the limitation of insurability to shares of local building and loan associations. We therefore conclude that the words "such shares" do not refer to shares of any local building and loan association.

This conclusion is also supported by the legislative history of sec. 219.05. This section was created by ch. 383, Laws 1939, which before enactment was Bill No. 917,A. The bill as originally introduced on June 27, 1939 was entitled as a bill: "To create section 219.05 of the statutes, relating to investments in shares insured by federal savings and loan insurance corporation." The original bill provided in substance, among other things, that the investment by named insurance companies and others:

"* * * in shares of any federal savings and loan association or other institution within the state, to the extent to which the withdrawal or repurchasable value of such shares now are, or may hereafter be, insured by the federal savings and loan insurance corporation, under acts of congress of the United States now in effect or which may hereafter be enacted, shall be lawful."

There could be no question as to the meaning of this portion of the original bill. It clearly applied to shares of any federal savings and loan association or other institution within the state, which would include local building and loan associations, to the extent that the withdrawal or repurchasable value of such shares was or might thereafter be insured by the Federal Savings and Loan Insurance Corporation under existing or subsequent acts of congress. The words "such shares" obviously referred to the antecedent phrase "shares of any federal savings and loan association or other institution within the state." However, on August 2, 1939 the legislature adopted amendment No. 1,A to Bill No. 917,A and the bill as amended was subsequently enacted into law as ch. 383, Laws 1939. The amendment, among other things, amended the title to the bill by inserting after the word "shares" the words "of local building and loan associations, and in shares," and also amended the bill so as to insert ahead of the words "in shares" above quoted the words "in shares of any local building and loan association in an amount not exceeding five thousand dollars; or." There were also certain other amendments not here material. The result was that ch. 383, Laws 1939, reads in part as follows:

"AN ACT to create section 219.05 of the statutes, relating to investments in shares of local building and loan associations, and in shares insured by federal savings and loan insurance corporation.

"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"Section 1. A new section is added to the statutes to read: 219.05 Investment in shares insured by the federal savings and loan insurance corporation. (1) The investment * * * *in shares of any local building and loan association in an amount not exceeding five thousand dollars; or in shares of any federal savings and loan association or other institution within the state, to the extent to which the withdrawal or repurchasable value of such shares now are, or may hereafter be, insured by the federal savings and loan insurance corporation, under acts of congress of the United States now in effect or which may hereafter be enacted, shall be lawful.*" (Italics ours)

The amendments above referred to which were made by Amendment No. 1,A to Bill No. 917,A appear in italics

above. It would seem clear that by adopting such amendments the legislature indicated its intention to place shares of local building and loan associations in a different class and to distinguish between them and shares of any federal savings and loan association or other institution within the state. This is plain not only from the fact the body of the bill was amended as above indicated, but also from the fact the title to the bill was also amended to the same effect. The amendment to the title makes a plain distinction between investments in shares of local building and loan associations and investments in shares insured by Federal Savings and Loan Insurance Corporation. This would clearly seem to indicate that the requirement of insurability does not apply to shares of local building and loan associations. In construing this section the title to the act creating it may be resorted to in case of doubt as some indication of the legislative intent. *Federal Rubber Co. v. Ind. Comm.*, (1924) 185 Wis. 299, 201 N. W. 261.

In view of the foregoing we conclude that the words "such shares" relate only to shares of any federal savings and loan association or other institution within the state and do not relate back or apply to shares of any local building and loan association, with the result that sec. 219.05 (1), Stats., does not restrict investments in shares of local building and loan associations to shares of such associations which are insured by the Federal Savings and Loan Insurance Corporation under present or subsequent acts of congress.

WET

Criminal Law — Abandonment — Public Welfare Department — Probation — Department of public welfare has no authority to grant a discharge to person on probation under sec. 57.04, either during the term of probation or at its expiration. Discharge at end of term is automatic and certificate from clerk of court is sufficient evidence thereof, if any be needed. Power to discharge probationer before end of term is vested exclusively in court by sec. 57.04 (3).

Person placed on probation for abandonment under sec. 351.30 (4) but without having been convicted, may not be placed in custody of department of public welfare. Sec. 57.04 does not apply to such cases, but applies only if there has been a conviction. No supervision of such probationer is contemplated by sec. 351.30 and revocation may only be had for violation of the court's order to pay support money, under sec. 351.30 (5).

October 16, 1944.

A. W. BAYLEY, *Director,*

State Department of Public Welfare.

You state that V. W., an adult, was convicted of nonsupport under sec. 351.30 and placed on probation for a period not to exceed two years. At the expiration of the two-year period the state department of public welfare issued a discharge from probation. The court in which the conviction was had now disputes the right of the department to grant a discharge, expressing the belief that in those cases placed on probation under sec. 57.04, Stats., the court has exclusive jurisdiction to grant the discharge. You have raised the following questions suggested by this situation:

“(a) Does the state department of public welfare have the authority to grant a discharge in cases placed on probation under the provisions of section 57.04 of the statutes upon the expiration of sentence;

“(b) Under the same section of the statutes, does the state department of public welfare have the authority to grant a discharge prior to expiration of the sentence if the probationer's conduct is meritorious and worthy of such consideration?”

Sec. 57.04, Stats., authorizes probation of adults *convicted* of any misdemeanor or of abandonment under sec. 351.30. The abandonment statute itself contains certain provisions relative to probation which must be read in connection with sec. 57.04. Thus sec. 351.30 (4) provides in substance that the court may *either before the trial* (with the consent of the defendant) *or on entry of a plea of guilty or after conviction*, make an order directing the defendant to pay a certain sum weekly as support money for a period not exceeding two years and release him from custody "on probation" for the period so fixed, upon his entering into a recognizance conditioned to appear in court whenever so ordered and to comply with the order for support and any modifications thereof. Subsec. (5) of sec. 351.30 provides in part as follows:

"If the court be satisfied by information and due proof under oath, that at any time during said period of two years the defendant has violated the term of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence, as the case may be. * * *"

Sec. 57.04 applies only *after conviction* and subsec. (1) authorizes the court "by order [to] suspend the judgment or stay the execution thereof and place the defendant on probation for such period of time, not exceeding the maximum penalty prescribed, and upon such terms and conditions * * * as it shall determine * * *." If a fine is imposed, probation automatically ceases upon payment thereof.

Sec. 57.04 (2) provides:

"In such case the court shall by said order place the probationer in charge of the state department of public welfare or designate some suitable person to act as probation officer who 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, and, for causes hereinafter named, may, without warrant or other process, or upon the order of the court, at any time until the final disposition of the case, take the probationer and bring him before the court; and thereupon, if the court shall have reason to be-

lieve from the report of the probation officer, or otherwise, that the probationer has violated or is violating the conditions of his probation, or is engaging in criminal practices, or has formed improper associates, or is leading a vicious life, it may revoke such probation and pronounce sentence on the former conviction, or if sentence has been pronounced, issue commitment on the sentence or judgment without deduction of the period of probation."

Sec. 57.04 (3) provides:

"The court may at any time after such revocation of probation again stay further execution on any terms and conditions which it could have imposed originally; *and may, whenever the ends of justice shall be subserved thereby, and the good conduct and reform of the probationer shall warrant it, terminate the period of probation and discharge him from custody; but in all cases, if the court has not revoked the probation, or discharged the probationer, he shall at the end of the term of probation be discharged from custody, and said judgment or sentence be deemed fully satisfied.*"

Sec. 57.04 (5) provides in part as follows:

"Whenever any person is placed on probation under this section, the clerk of the court shall immediately mail to the state department of public welfare certified copies of the information or indictment, the plea, the sentence or judgment, the order for probation, and, from time to time thereafter, each report of the probation officer; * * *."

From a consideration of the foregoing statutes it would appear to be the legislative scheme to keep the convicted probationer under the control of the court throughout the period of probation, whether placed in charge of the department of public welfare or not. It would appear that sec. 57.03, under which the department takes charge of adult probationers convicted of felonies and acts independently of the court in the matter of revoking probation and granting discharges, does not apply to persons on probation under sec. 57.04. This conclusion is based on the decision of the supreme court holding that the department's powers under sec. 57.03 do not apply to minors placed on probation under sec. 57.05. *State ex rel. Currie v. McCready*, (1941) 238 Wis.

142, 297 N. W. 771. The reasons set out in that case seem equally applicable in the case of adult probationers under sec. 57.04 who have been convicted of misdemeanors or abandonment.

Therefore in cases under sec. 57.04 the department is without authority to grant a discharge either at the end of the period of probation or before the expiration thereof.

Under sec. 57.04 (3) it would appear that the discharge of the probationer *at the expiration of the period of probation* is automatic and requires no written discharge from either the department of public welfare or the court. See *Ex parte Slattery*, (1912) 163 Cal. 176, 124 Pac. 856. But in view of the fact that control of the probationer is primarily in the court, it would seem that if a document evidencing the discharge were to be furnished at all it should come from the court rather than the department of public welfare. It would seem that a certificate signed by the clerk of the court to the effect that the period of probation has expired would be sufficient.

With reference to your second question, it would appear that under sec. 57.04 (3) the power to terminate the period of probation and discharge the probationer *before the end of the period of probation* is vested in the court exclusively. This is discretionary and requires a court order.

In summary, the answer to both questions above set out is "no."

You raise a further question with reference to a person placed on probation in an abandonment case under sec. 351.30 without having been convicted. As noted above, the court has power to do this under sec. 351.30 (4) but sec. 57.04 does not apply, since the latter section requires that the defendant have been convicted. It is not within the statutory authority of the department of public welfare to take charge of such cases. It would seem that the legislature's view was that the defendant does not stand in the same position as a convicted offender and therefore should not be subjected to the same supervision over his conduct as is exercised in the case of convicted probationers. The defendant is in a situation very similar to an accused who is released on bail, with the added condition that he must pay the sup-

port money ordered by the court. So long as he pays the support money and appears in court at any time when he is ordered to do so he fulfills the condition of his probation. The statutes do not provide for custody or control by either the department of public welfare or any other probation officer and in my opinion the court has no authority or jurisdiction to subject him to such supervision. Neither may his probation be revoked for the causes set forth in sec. 57.04 (2), but revocation must be based upon violation of the order for support money as prescribed in sec. 351.30 (5).
WAP

Agriculture — Potatoes — Potatoes are a perishable agricultural commodity within the provisions of sec. 100.01 (1) (b), Stats.

October 16, 1944.

RONALD F. NORTH,

District Attorney,

Chippewa Falls, Wisconsin.

You desire to be advised as to whether potatoes constitute a perishable agricultural commodity under the provisions of sec. 100.01, Wis. Stats., requiring a dealer's license to engage in the business of dealing in such commodities. In our opinion potatoes do constitute such a commodity.

Sec. 100.01 (1) (b), Stats. provides:

“The term ‘perishable agricultural commodities’ means fresh fruits and fresh vegetables of every kind and character.”

Potatoes are vegetables. The only possible question that might be raised is whether they are fresh vegetables. We think that the term “fresh vegetables” as used in the section refers to vegetables in their natural state as distinguished

from processed vegetables such as dried, canned, frozen or preserved vegetables. Unless such a construction is to be given, the section becomes unenforceable.

Lettuce upon being cut is obviously a fresh vegetable. It is likewise highly perishable. The question as to how long it may remain crisp depends upon the manner in which it is kept. If it is properly kept, it is as edible after several days as it is the day it is cut. The same is true of carrots. It is a matter of common knowledge that if kept under proper conditions, carrots may be retained in their original state of edibility for a considerable period of time. One could hardly say that a carrot having been taken from the ground and kept under refrigeration is any less fresh two or three weeks from the time it was taken than it was the day it was taken. But for that matter, the statute cannot refer to the condition in which vegetables may be found. It certainly is not implied that a dealer is required to have a license to deal in crisp lettuce but not to deal in wilted or spoiled lettuce. Neither can it be said that if carrots are soft and no longer fresh within one sense of the word, a dealer is not required to have a license to wholesale them, whereas he would be required to obtain a license to deal in those more fit for consumption. Again, as pointed out, within certain limits time has nothing to do with the question as to whether a vegetable is or is not in a desirable condition to eat. The condition in which a vegetable is kept has considerable to do with the question. Consequently, neither the passage of time nor the desirability of a vegetable for purposes of consumption has anything to do with the question of whether it is a fresh vegetable within the meaning of the statutes.

Fresh fruits are likewise included and the same observations made with regard to vegetables apply to fruit. An apple is a fresh fruit so long as it remains in its unprocessed state. The same is true of oranges, peaches or other such fruits. When they spoil they are spoiled fresh fruits. They are nonetheless fresh fruits because they may be spoiled by improper care or by the passage of time.

While we think enough has been said to clearly show the intention of the statute, it might be pointed out that under the provisions of sec. 97.02 (14) where definitions and stan-

dards for vegetables are set out, a distinction is drawn between vegetables and dried, sun-dried, evaporated and canned vegetables. We gather the legislative intent is to treat vegetables in their natural state as fresh vegetables as distinguished from processed vegetables. This is in accord, in our opinion, with the intention of sec. 100.01 (1) (b), Stats.

JWR

Trade Regulation — Real Estate Brokers' Board — Under sec. 136.12, Wis. Stats., a nonresident may not obtain a Wisconsin real estate broker's license unless he is licensed in his home state.

October 18, 1944.

WISCONSIN REAL ESTATE BROKERS' BOARD,

Milwaukee 3, Wisconsin.

Attention William Doll, *Acting Secretary*.

Your board has requested an opinion regarding the interpretation of sec. 136.12 (1), Wisconsin Statutes. Sec. 136.12 (1) reads as follows:

“(1) A nonresident of this state may become a real estate broker or a real estate salesman by conforming to all of the provisions of this chapter, *except that such nonresident broker shall maintain an active place of business in the state in which he holds a license.*”

In your request you state that the board has received an application for a broker's license from a resident of Illinois who is not licensed as a real estate broker in that state or elsewhere. The question confronting your board is whether such nonresident can obtain a license in Wisconsin.

The difficulty in the interpretation of this section arises from the presence of the portion underlined above. It appears to be clear that the legislature provided that a nonresident broker must maintain an active place of business in

his home state. Such active business must be presumed to mean "real estate business." When the legislature added the last phrase of the section, "in which he holds a license," it must have intended to require that an applicant have a license in the state where he has conducted his regular business before he could be eligible for a nonresident license in Wisconsin. If the legislature had intended to provide only that the applicant maintain an active business in his home state, there would have been no need whatever to include any mention of such person holding a license in that state.

We believe this view is strengthened by a reference to subsec. (2) of sec. 136.12, Stats., which reads as follows:

"(2) The board may recognize in lieu of the affidavit required to accompany an application for license, *the license issued to a nonresident broker or salesman in such other state*, upon payment of a license fee and the filing by the applicant with the board of a certified copy of the applicant's license issued by such other state."

It is apparent that the legislature had in mind the license which the nonresident applicant held in his own state, since it was provided that the board could recognize such a license in lieu of the affidavit required by sec. 136.06, Stats., for residents of this state. It may be assumed that the board could rely upon the applicant's license as being proof of his trustworthiness and competence. However, it does not follow that a nonresident applicant is assured of a license in Wisconsin simply because he holds a license in another state. The requirements for a license in Wisconsin may be more rigid than those prevailing elsewhere. Whenever a real estate broker operates in a state requiring a license he must, of course, have such license if he is to operate lawfully. If he does not have such a license, Wisconsin certainly would not grant him a nonresident license, since it would be apparent on the face of his application that he was not complying with the law of his own state.

It is our conclusion, therefore, that a nonresident applicant may not become a real estate broker in this state unless he maintains an active place of business in his home state and has a license in that state.

ES

Prisons and Prisoners — Counties — Secretary of State
— Sec. 14.30 (16), Stats., does not permit reimbursement to a county for expenses incurred in the return of escaped convicts where such escape was from an institutional activity located within the county where the institution itself is located.

October 18, 1944.

STATE DEPARTMENT OF PUBLIC WELFARE.

Attention H. B. Evans, *Chief Accountant*.

Your department has requested an opinion regarding an interpretation of sec. 14.30 (16), Wis. Stats. That section involves the duties of the secretary of state as auditor and provides that it shall be the duty of that officer to

“Receive, examine, determine and audit claims, duly certified and approved by the state department of public welfare, from the county clerk of any county in behalf of such county, which are presented for payment to reimburse such county for certain expenses incurred or paid by it on and after July 1, 1937, in reference to all matters growing out of the return of escaped convicts, from the state prison, prison for women, state reformatory, industrial home for women, *provided the escape was from some prison camp or institutional activity not located in the same county as the institution proper.* * * *”

In your request you state that Dodge county has presented to your department claims incurred under this section and included therein were bills covering inmates who escaped from the prison itself and farms Nos. 1 and 2, all of which are located in Dodge county. On the basis of the underlined portion of the section above quoted, we conclude that such claims may not be approved by your department. The legislature apparently intended to exclude those expenses growing out of the return of escaped convicts where the escape took place in the county where the institution itself was located.

Sec. 14.30 (16) was created by ch. 119, Laws 1937. That same chapter amended sec. 53.01 (2) by adding the proviso

underlined following so that the amended section read as follows:

“(2) For the purpose of all judicial proceedings the prison and precincts thereof shall be deemed to be within and a part of the county of Dodge, and the courts of said county shall have jurisdiction of all crimes and offenses committed within the same, *provided that any farming, forestry, quarrying, or other activity conducted under the jurisdiction of and by said prison, no matter where located, shall be deemed and is hereby made a precinct of said prison.*”

This amendment made all outlying activities of the prison a precinct of that institution. It is a well known fact that it has been the practice of the state department of public welfare to take care of some of the inmates of the prison by placing them in camps, on farms, and at other extramural activities in various parts of the state. In the absence of the statute quoted immediately above, the proper place of trial for an offense committed at one of these outlying camps would be the county in which the camp is located. This, no doubt, would result in considerable inconvenience to the authorities in prosecuting inmates who violated the law in attempting to escape since it would necessitate trials in distant counties. This probably was the reason for fixing the place of trial in the county where the institution itself was located.

It is apparent that such prosecutions would place a heavy burden on Dodge county where the prison is located because that county would be liable for all expenses incurred in prosecuting escapes even though they occurred in counties far distant from the institution. Accordingly the legislature provided by sec. 14.30 (16) a method for reimbursement. However, the legislature expressly excluded escapes which take place within the county where the institution is located. The reason for this is probably that the legislature concluded that the county should be liable for the costs of prosecution for any crime which was committed within its own borders. Escape from the state prison is a felony. Sec. 346.44, Stats.; XXVI Op. Atty. Gen. 259. The offense of escape from the prison is no different from any other felony.

If an inmate working outside the walls committed larceny or robbery within Dodge county, he would certainly be prosecuted by that county for the offense.

Although it may be a disadvantage to Dodge county to be burdened with the cost of prosecuting prisoners who escape within that county, the legislature made no provision for relieving it from that burden. The statutes provide for reimbursement only in cases where the escape took place from a prison activity located outside the county. It is therefore our conclusion that Dodge county is not entitled to submit claims for expenses incurred by it in reference to the return of escaped convicts from the state prison, where such escape was from an institutional activity located in that county.

ES

Counties — Taxation — Waiver of Interest and Penalties
— Sec. 75.015, Stats. 1943, precludes waiver of penalties and interest which accrue during the first two years a tax is delinquent.

October 19, 1944.

HOWARD ESLIEN,

District Attorney,

Oconto Falls, Wisconsin.

You inquire as to our interpretation of sec. 75.015, Stats. 1943, stating that you construe it as precluding waiver of interest and penalties on the first two years of delinquency so that if A were delinquent in his taxes for the years 1939, 1940, 1941 and 1942 he would have to pay the interest and penalties accrued on the 1939 and 1940 taxes, but the county could waive the 1941 and 1942 interest and penalties. On the other hand your county treasurer presents a construction that interest and penalties on the two most recent years of delinquency must be paid so that in your example the interest and penalties for the years of 1941 and 1942 must be paid but the interest and penalties for 1939 and 1940 could be waived.

In our opinion neither of the constructions stated by you correctly interprets this statute, which provides as follows:

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

Although there has been no official opinion respecting this statute other than XXVIII Op. Atty. Gen. 113, which concerned only 1937 taxes, we have consistently advised and it is our opinion now that this statute operates upon and treats each year's taxes separately so as to preclude the waiver of interest and penalties which accrue during the first two years of delinquency of each separate delinquent tax, but permit the waiver of the interest and penalties which accrue thereon during the third and any subsequent year. In your example, the county could not waive the penalties and interest that accrued during the years 1940 and 1941 on A's delinquent 1939 tax, but could waive those that accrued thereon in 1942 and subsequently. Similarly it could not waive the penalties and interest that accrued during the years 1941 and 1942 on A's delinquent 1940 tax but could waive those that accrued thereon in 1943 and 1944.

HHP

Counties — County Board — Taxation — Tax Deed Lands — Sec. 59.08 (42), Stats., empowers the county board to give the county clerk authority to enter into land contracts for the sale of county tax deed lands generally, and does not require specific action in respect to each parcel or tract of land.

October 30, 1944.

S. RICHARD HEATH,

District Attorney,

Fond du Lac, Wisconsin.

You ask whether under sec. 59.08 (42), Stats., which provides as follows:

“The county board of each county is empowered at any legal meeting to authorize the county clerk to enter into a land contract, upon such terms and at such price as he may deem advisable, to convey by deed to cities, towns, villages or individuals, any land which the county has acquired by tax deed. The title to such land shall remain in the county until fully paid for and the purchaser shall pay for such lands within 5 years or less. The land contract shall contain the usual standard provisions and in event of default the county may foreclose the same with costs and reasonable attorney fees. When such contract runs to a person or private corporation such land shall be placed on the tax roll and be subject to taxation the same as though absolute title thereto was vested in the purchaser under such land contract and such purchaser shall be liable to pay all taxes assessed against such land. If such purchaser shall fail to pay such taxes the county may pay the same and add the sum so paid to the amount due on the land contract.”

the county board must take specific action in respect to each parcel or tract of land acquired by tax deed, particularizing the same, or may it give the county clerk blanket authority to enter into land contracts for the sale of county tax deed lands generally?

As you state, the provisions of sec. 370.01 (2), Stats., are applicable in interpreting the statute, so that the use of the singular imports the plural as well. In view of this rule of interpretation it is deemed that had the legislature intended

to restrict the county board and require it to take specific action in respect to each individual parcel of land it should and would have used language that was thus restrictive.

Consideration of the background and purpose of this statute leads to the same conclusion as to the legislative intent. Investigation discloses that, although in XXIII Op. Atty. Gen. 650 it had been concluded that the county board might authorize the sale of county owned lands by land contract, there was some doubt entertained because of the language therein and in XXII Op. Atty. Gen. 484, XXIII Op. Atty. Gen. 20 and XXIII Op. Atty. Gen. 238 as to whether this conclusion extended to county owned tax deed lands. It being deemed that such method of sale would promote and facilitate the getting of such lands back on the tax roll, but only if all doubt was dispelled in respect to the legality thereof, this statute was enacted so as to clearly authorize the same. In view thereof, and of the fact that this statute contemplates delegation to the county clerk of the determination of the price and terms of such sales, subject of course to the limitations expressed in the statute itself, there does not appear to be any reason for interpreting this statute as requiring specific action by the county board for each particular parcel. Of course, if the county board desires it may, by so specifying in its resolution, restrict the parcels as to which the county clerk may make land contract sales. In this connection it may be noted that a number of counties have considered this statute, which was enacted by ch. 225, Laws 1941, as granting power to authorize the county clerk to enter into land contracts for county tax deed lands generally and have acted accordingly.

HHP

Taxation — Tax Deeds — Notice of application for tax deed under sec. 75.12, Stats. 1943, should not be given until after the expiration of the 5-year redemption period provided by sec. 75.01 (1), Stats. 1943.

October 30, 1944.

DONALD C. O'MELIA,

District Attorney,

Rhineland, Wisconsin.

You have asked our opinion as to whether notice of application for tax deed under sec. 75.12, Stats. 1943, may be served prior to the expiration of 5 years from the date of the tax sale certificate or must the 5-year redemption period have expired before the notice may be served?

Prior to the enactment of ch. 250, Laws 1943, which made a number of changes in sec. 75.12, Stats., it seems to have been pretty well understood that a notice of application for tax deed might be given before the end of the redemption period but not more than 1 month prior to the expiration thereof. See XIII Op. Atty. Gen. 121. The latter limitation is by virtue of the provisions of sec. 75.12 (2), Stats., that the notice shall provide that "after the expiration of 3 months from the date of service of such notice a tax deed will be applied for" and of sec. 75.01 (1), Stats., presently providing a redemption period of five years so that an application for the issuance of a tax deed could not be made before the 5-year redemption period has expired.

In the amendment effected by said ch. 250, Laws 1943, there was added the last sentence of subsec. (2) of sec. 75.12, Stats. 1943, which had not previously been in the statutes, as follows:

"The owner and holder of such tax sale certificate may include in said notice all the certificates he holds upon the same tract of land as to which certificates more than 5 years from the date of each has elapsed."

Perforce of this provision (which by virtue of the 6-year limitation in sec. 75.20, Stats., is applicable in the main to instances where the certificates are held by the county or a

municipal corporation as the owner and the one to whom the certificates were issued so the 15-year limitation is applicable as pointed out in *Agnew v. Milwaukee Co.*, (1944) 245 Wis. 385, 14 N. W. (2) 144, 907) if more than one certificate is included in the notice then all of the certificates so included therein would have to be over 5 years old. As respects the newest certificate this would then preclude the giving of the notice for a tax deed thereon until after the 5-year redemption period had expired as to that certificate.

This appears to be the only provision in the statutes, other than the one previously mentioned specifying that the notice shall state that application for tax deed will be made at the expiration of 3 months from the date of service thereof, which expressly states anything as to the time when the notice may be served. Strictly speaking, this provision in sec. 75.12 (2), Stats. 1943, is applicable only where more than one certificate is included in a single notice. However, as you state, it is the policy of the courts to construe statutes respecting tax deeds liberally in favor of the owner of the property. *King v. Soldner*, (1938) 228 Wis. 348, 280 N. W. 350; *Clause v. Ruplinger*, (1940) 233 Wis. 626, 290 N. W. 133. In view thereof the fact that it is the only expression of the legislative intent as to when a notice may be served might be taken and considered, along with the provisions of sec. 75.01, Stats., for a 5-year period of redemption and also the right to redeem at any time before the tax deed is recorded, as constituting a legislative expression of an intent that notices of application for tax deed shall not be given until after the 5-year period of redemption has expired. Because of the foregoing, and upon a realization that in taking tax deeds title is being made so that everything should be done which will eliminate any doubts as to the validity of the tax deed proceeding, it is our opinion that notices of application for tax deed under sec. 75.12, Wis. Stats. 1943, should not be given until after the 5-year period of redemption has expired. In this connection it should be noted that although ch. 250, Laws 1943, put into sec. 75.12 a new subsection (6) providing that no tax deed should be taken upon any notice after 6 months from the last date of service thereof, by subsequent enactment ch. 574, Laws 1943, said

subsec. (6) was amended so as to change such limitation from 6 months to 1 year.

HHP

Appropriations and Expenditures — Commissioners of Public Lands — Constitutional Law — Trust Funds — School Fund — Under article X, section 2, Wisconsin Constitution, proceeds from the sale of timber from state school lands may not be utilized for payment of expenses necessarily incurred in appraising such timber, conducting public sales thereof or in supervising timber cutting. These expenses must be paid out of the appropriations made under sec. 20.19, Wis. Stats.

October 31, 1944.

T. H. BAKKEN, *Chief Clerk,*

Commissioners of the Public Lands.

You inquire whether under article X, section 2, Wisconsin Constitution, the expenses necessarily incurred by the state in appraising, conducting public sales and supervising of timber cutting operations on school lands may be paid from the proceeds of timber sales or whether these expenses must be met out of the appropriation from the general fund to the commissioners of public lands provided by sec. 20.19.

Article X, section 2, Wisconsin Constitution, so far as material here, provides :

“The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes * * * shall be set apart as a separate fund to be called ‘the school fund,’ the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:

“1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.

“2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor.”

Sec. 20.19 provides in part:

"Commissioners of public lands. There is appropriated from the general fund to the commissioners of public lands:

"(1) General administration. Annually, beginning July 1, 1941, \$7,500 for the execution of their functions.

"(2) Survey and inventory of lands. Annually, beginning July 1, 1943, \$7,000 for an inventory and survey of all lands under their jurisdiction.

"(3) Appraisal of lands. On May 1, 1943, \$17,000 for the appraisal of all lands under their jurisdiction.
* * *"

The principles determining the answer to this question are set forth in XXVI Op. Atty. Gen. 202, based on the supreme court decision in *State ex rel. Owen v. Donald*, 162 Wis. 609, 645, where it is pointed out that expenses of administering the common school funds are not chargeable to such funds. As was said in XXVI Op. Atty. Gen. 202, referred to above, at page 203:

"Furthermore, sec. 20.19 of the statutes makes an appropriation from the general fund to the commissioners of public lands for the execution of their functions. This appropriation must be considered as exclusive and may not be enlarged by intentment so as to permit the use of trust funds for the purposes covered by such appropriation. Appropriation statutes are strictly construed, and implied appropriations are not favored. II Op. Atty. Gen. 10, 12.

"Sec. 2 of art. VIII of the Wisconsin constitution provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. Since there is no statute appropriating any of the trust funds to your department for administrative purposes it would be impossible to pay any money out of the trust fund account for such purposes, and even if there were such an appropriation it would be unconstitutional under the *Owen* case above discussed."

In addition to survey, inventory and appraisal of lands which are specifically covered in sec. 20.19, there is also an appropriation therein for general administration to cover other expenditures and under the foregoing discussion these appropriations must be deemed to be exclusive.

It is to be noted that so far as lands are concerned the common school fund under article X, section 2, Wisconsin

Constitution, is made up of "the proceeds of all lands" et cetera. This language is used in contradistinction to the wording employed later on in the same sentence in the case of forfeitures or escheats and fines. In these instances the framers of the constitution were careful to specify the wording "clear proceeds." It has been held that the word "clear" as so used implies that something is to be or may be deducted so that the balance is "clear" from all charges or demands and hence that it is therefore competent to provide that a part of a fine should be paid to the informer for the purpose of securing a better enforcement of the law, although should the legislature grant so large a percentage to the informer that the sum left for the school fund becomes merely nominal the court would feel obliged to correct the evil, for in such a case it would be apparent that the constitution was evaded. *State v. De Lano*, 80 Wis. 259.

The absence of the word "clear" in referring to the proceeds of lands, on the other hand, would imply that nothing is to be deducted, which construction has received legislative sanction in that appropriations from the general fund are made to the commissioners of public lands under sec. 20.19 to cover administrative expenses and appraisals as pointed out above.

Moreover, so far as present purposes are concerned we draw no distinction between the proceeds of the sale of lands and the proceeds of the sale of timber from lands. Both are the proceeds of lands and even if money from the sale of timber were to be regarded as income rather than principal arising out of the sale of the land itself, the money would be equally a part of the trust fund beyond the power of the legislature to divert to any use other than the support of the schools of the state. In other words so far as the constitutional problem here is concerned principal and income stand on exactly the same footing and neither may be diverted from the support of the schools. X Op. Atty. Gen. 511, 519.
WHR

Insurance — Mutual Insurance Company — Policyholders of a mutual insurance company organized pursuant to the provisions of sec. 201.02, Wis. Stats. 1933, may not legally adopt a resolution at an annual meeting of policyholders providing for a refund or repayment to directors of the company of the amounts contributed by them to its surplus, there being no attempt by said directors to lend said amounts to the company and to take notes of the company payable out of surplus or notes which were general obligations of the company not payable out of surplus, as provided by sec. 201.17, Stats.

Subsecs. 201.03 (1) and (2), Stats. 1937, are not applicable to mutual insurance companies organized before effective date of ch. 203, Laws 1937, which created sec. 201.03, Stats. 1937.

November 9, 1944.

MORVIN DUEL,

Commissioner of Insurance.

You have submitted to us the following facts: The H. Mutual Casualty Company was duly incorporated on April 4, 1935 as a domestic mutual insurance corporation pursuant to the provisions of sec. 201.02, Wis. Stats. 1933. A certificate of authority was issued by the commissioner of insurance and this company commenced business on May 29, 1935. At that time it had issued in excess of two hundred policies on which the premiums had been paid in cash as provided by sec. 201.14, Wis. Stats. 1933.

In addition, directors of the company made contributions to surplus as follows:

Date	Amount	Date	Amount
May 27, 1935	\$5,500.00	Aug. 3, 1936	\$ 75.00
July 3, 1935	500.00	Oct. 5, 1936	44.45
Dec. 18, 1935	1,000.00	Dec. 31, 1936	4,069.91
May 23, 1936	750.00	Dec. 31, 1937	3,600.00
June 29, 1936	75.00	Dec. 31, 1941	6,000.00
July 6, 1936	55.55		

You advise us that when an examination of the company was made on May 28, 1935, at which time \$5,500 had actu-

ally been paid in as a contribution to surplus, an examiner from your department was assured by officers of the company that this was an outright contribution to surplus. In the latter part of 1935 the directors, who had then contributed \$7,000 to surplus, unanimously adopted a resolution which provided as follows:

“Resolved by the Directors that the original contributions of the directors be placed in the surplus funds of the company. The following named persons have each individually expressed themselves in favor of turning over to the surplus the respective sums of money set opposite their names: * * *.”

You further state that in sworn annual statements filed by the company with the insurance department as required by law the amounts above referred to are designated as “Directors’ Contribution to Surplus” or as “Directors’ Contributed Surplus.”

No surplus notes or any other notes were issued by the company as provided for in sec. 201.17 to any of the directors who made such contributions.

You further state that at an annual meeting of policyholders of the company held on March 24, 1943 a resolution was adopted by a rising vote of policyholders present to the effect that the sum of \$6,000 be paid out of a \$20,000 contingent reserve fund to “reimburse those of the Directors who contributed in excess of One Thousand (\$1,000.00) Dollars to the Contributed Surplus of the Company; the Board of Directors to designate the directors to be reimbursed out of said Six Thousand (\$6,000.00) Dollars,” and ask the following question:

“Have the policyholders of a mutual insurance company power to adopt a resolution at an annual meeting providing for a refund or repayment to directors who made contributions to surplus of the company of such portions of the money so contributed by them?”

It is our opinion that the answer is “no”. The contributions made by the directors, who are of course members of the company, must under the facts you have given us be con-

sidered as absolute and irrevocable contributions to surplus of the company, and upon receipt of the amounts so contributed the company became the absolute owner of the amounts contributed, and they became a part of its assets. The legal title to assets of a mutual insurance company is in the company, but the beneficial or equitable title is in the members, the right of each member being equal to that of any other member similarly situated. *Huber v. Martin*, (1906) 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (n.s.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; *Mutual Fire Ins. Co. v. United States*, (CCA 3, 1944) 142 F. (2d) 344. There is also authority to the effect that policyholders of a mutual life insurance company have a property interest in its surplus. *Clifford v. Metropolitan Life Ins. Co.*, (1942) 264 App. Div. 168, 34 N. Y. S. (2d) 693. It has also been held that assets of a mutual insurance company are trust funds. *Clark v. Lincoln Liberty Life Ins. Co.*, (1941) 139 Neb. 65, 296 N. W. 449.

Such common equitable ownership of assets is an essential characteristic of a mutual insurance company. *Mutual Fire Ins. Co. v. United States*, *supra*. The authorities also sustain the proposition that any impairment of the rights of members of a mutual insurance company with respect to their proportionate share of the assets may be successfully resisted by appropriate legal proceedings. *Huber v. Martin*, *supra*; *Clifford v. Metropolitan Life Ins. Co.*, *supra*; *Clark v. Lincoln Liberty Life Ins. Co.*, *supra*. It has also been held that a mutual insurance company cannot discriminate among its policyholders and any agreement which would result in the payment of larger proportionate dividends to one of its policyholders than to others in the same class is illegal and void. *Grange v. Penn Mut. Life Ins. Co.*, (1912) 235 Pa. 320, 84 A. 392; *Herman v. Mutual Life Ins. Co. of New York*, (CCA 3, 1939) 108 F. (2d) 678. We therefore hold that policyholders of a mutual insurance company have no right to adopt a resolution providing for a refund or repayment to directors of the amount of contributions made by them to surplus of the company. It is obvious that if such distribution were made it would not be a distribution to all members in proportion to their interests therein. Such a distribution would be in violation of the rights of mem-

bers who would not participate on a proportionate basis, and it must be held that the resolution adopted at the annual meeting of policyholders providing for reimbursement of those directors who contributed in excess of \$1,000 to surplus of the company is illegal. Possibly those policyholders who voted for it could not attack it, but it is clear that the rights of policyholders who did not vote for it or who did not assent to the resolution could not be impaired by its adoption. As a practical matter it should be noted the resolution here was adopted by a rising vote, which would make it difficult, if not impossible, to determine even those policyholders who voted for the resolution.

It might be claimed that such directors should be entitled to a greater share in the assets of the company than other members by reason of their contribution to surplus. This is not correct. The only rights of the directors are as members of the company and their rights are the same as those of any other member. Their contribution to surplus must be regarded as a voluntary contribution or donation to the company. Such donations did not change the quantum of the rights of such directors as members. They must be regarded as having the same proportionate interest in the assets of the company as any other member similarly situated who did not make any such contribution. To hold otherwise would in effect change their contribution from an outright contribution to surplus to a contribution with a condition for repayment in whole or in part, which would not constitute a contribution at all but which would in substance be a loan. Had the directors intended to make a loan to the company they could have done so, assuming such loan was for purposes of its business or to enable it to comply with any requirement imposed upon it by law, by taking notes of the company payable out of surplus or notes which are general obligations of the company not payable out of surplus. Sec. 201.17, Stats. The facts you submit to us indicate there was no attempt to make a loan to the company. Had this been done and surplus notes given in return, an entirely different question would have been presented.

Reference should also be made to sec. 201.03, Stats., as created by ch. 203, Laws 1937, effective June 4, 1937. Subsection (1) of sec. 201.03, Stats. 1937, stated the procedure

to be followed in filing articles of incorporation of a mutual insurance company and also stated that after the commissioner of insurance issues his certificate of incorporation the company may open its books to receive applications for insurance. Said subsec. (1) then provides:

“* * * No such company hereafter organized shall issue any policies of insurance unless and until:

“(a) It shall have not less than four hundred bona fide applications for insurance on property or risks located in this state from not less than four hundred persons and upon not less than four hundred separate risks in this state on which the cash premiums plus cash contributions shall amount to at least twenty thousand dollars, which shall have been actually paid in, in cash, by the applicants.

“(b) It shall be examined by the commissioner and he shall certify that the company has complied with all requirements of law and that it has on hand in cash or invested as permitted by law, the premiums amounting to twenty thousand dollars.”

Subsection (2) provides:

“(2) Contributions to the fund of twenty thousand dollars by some or all of the first applicants in excess of the actual premium on the first policy to any applicant shall be returnable five years from date of organization or at any time thereafter when the earned surplus of the company is equal to or in excess of twenty thousand dollars. Such refund can be made only with the approval of the commissioner and must be returned to every applicant or his legal representative entitled thereto.”

In *Cheesemaker's Mutual Cas. Co. v. Duel*, (1943) 243 Wis. 406, 10 N. W. (2d) 125, it was stated that some portions of sec. 201.03 as created in 1937 applied to companies already organized and some to those to be organized. It is clear from the context that subsecs. (1) and (2) apply to mutual insurance companies “hereafter organized,” which would include companies organized after June 4, 1937. The H. Mutual Casualty Company was incorporated on April 4, 1935 and a certificate of authority was issued by the commissioner of insurance on May 28, 1935. Hence, subsecs. (1) and (2) of sec. 201.03 were and are not applicable to

said company. Sec. 201.03 was amended by ch. 127, Laws 1941, effective May 24, 1941. It is unnecessary in view of the facts here to express any opinion as to whether the statute as amended is applicable to companies to be formed thereafter or whether it is applicable to existing companies.
WET

Appropriations and Expenditures — Counties — Memorials — A county may not appropriate county funds for the erection of a building as a memorial to those residents of the county serving in the present war. No provision of the statutes authorizes such a memorial and the county board has no such power in the absence of statute.

November 10, 1944.

ELMER R. HONKAMP,
District Attorney,
Appleton, Wisconsin.

You have stated that local patriotic organizations are interested in the construction of a building in the city of Appleton as a memorial to those residents of the county who have served in the wars in which this nation has engaged. The building would be used as a meeting hall for Spanish American War Veterans, the American Legion, the Veterans of Foreign Wars, Disabled American Veterans, other veterans' organizations and by the general public. It would in addition be used for offices of the various veterans' organizations to which reference is made. Sporting events and other public functions also could be held in the building. The city of Appleton has set aside the sum of \$25,000 for the purpose of erecting the building and intends to set aside more. Those interested have requested that the county board appropriate the sum of \$50,000 toward the construction of the building.

You also state that a plaque listing the names of over seven thousand service men and women would be housed within the building.

The building may be operated by the city of Appleton and Outagamie county jointly or it may be operated by a non-profit organization incorporated for that specific purpose under the direction of the city of Appleton, or it may be operated under the supervision of one of the municipal agencies of the city of Appleton.

The matter of veterans' memorials is covered by ch. 45 of the statutes. Sec. 45.055 provides for the erection and establishment of memorials to soldiers, sailors and marines who served during the Spanish American War and the first World War. Sec. 45.05 (3) provides for the erection by counties of memorials to commemorate the deeds of soldiers and sailors who served during the Civil War. There is also a provision that monuments may be erected in memory of distinguished citizens of the county. However, the use of the word "monument" in this connection should be considered together with the use of the phrase "monument or building" which is used in reference to memorials for Civil War veterans, and it implies that memorials to distinguished citizens are limited to monuments other than buildings. We do not think it is permissible to erect a building in memory of those who are serving during the present war under sec. 45.05 (3).

Since there is no provision in the statutes for a memorial to veterans of the present war, no appropriation can be made for that purpose. The county board has no power to make such an appropriation. Its powers are purely statutory in this respect and it can exercise no power not granted by statute.

JWR

Coroner — Cities — Police — The offices of coroner in counties having population of less than 500,000 and city police officer are incompatible.

November 10, 1944.

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

In your letter of October 24, 1944 you request our opinion as to whether the office of county coroner is incompatible with that of a member of the police force of the city of Antigo. It is our opinion that they are incompatible.

Incompatibility of office exists when the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. It is not essential that the conflict of duty exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties might conflict to the public detriment with the exercise of other important duties in the subordinate office, the offices are incompatible. *State v. Jones*, (1907) 130 Wis. 572, 110 N. W. 431, 8 L. R. A. (n.s.) 1107, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696.

The duties of coroner are enumerated in sec. 59.34, Stats. One of his duties, except in counties having a population of 500,000 or more, is to take inquests of the dead when required by law. Sec. 59.34 (1), Stats. The procedure to be followed appears in ch. 366 of the statutes. It is there provided among other things that:

“Whenever any coroner, deputy coroner or justice of the peace shall hold an inquest, he shall issue a precept to the sheriff or any constable forthwith to summon a jury of six good and lawful men of the county to appear before him at the time and place specified in the precept, * * *.”
Sec. 366.02, Stats.

“Every officer to whom such precept shall be directed and delivered shall forthwith execute the same and make return

of the precept, with his proceedings thereon, to the justice who issued the same." Sec. 366.03, Stats.

"If any officer shall refuse or neglect to execute such precept or to return the same as aforesaid he shall forfeit and pay the sum of five dollars, * * *." Sec. 366.04, Stats.

There can be no question but that a city police officer is required to perform the duties which secs. 366.02, 366.03 and 366.04 impose upon constables.

Sec. 62.09 (13), Stats., provides in part:

"(13) * * * The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables; * * *."

It is apparent that the duties of the office of coroner might conflict with those of a city police officer in the event the coroner should issue a precept for execution as provided by sec. 366.02, Stats. The coroner might attempt to execute the precept in his capacity as police officer and collect the fees therefor. We think this would be undesirable from a standpoint of public policy. Further, in the event he failed to execute the precept as police officer, he might by reason of self-interest refrain from acting in his capacity as coroner for the purpose of setting in motion the processes for collecting the forfeiture imposed by sec. 366.04, Stats. We must therefore conclude that the offices of coroner and city police officer are incompatible. *State v. Jones, supra.*

WET

Counties — County Board — Sec. 59.03 (2) (f), Stats., does not authorize payment of mileage to county board members in counties having a population of less than 250,000, for travel for each day while attending an annual or special meeting of the board. Members are entitled to mileage for one round trip to and from the place of meeting.

Sec. 14.71 (6) (f) does not authorize payment of traveling expenses to county board members in attending county board meetings insofar as that term includes cost of meals, lodging and other incidentals incurred in traveling.

County board members are entitled to an allowance for mileage under sec. 59.03 (2) (f) in attending county board meetings irrespective of the form of conveyance used, which includes an allowance for use of their personal automobiles in attending such meetings.

Sec. 14.71 (6) (f) by reference to other provisions of sec. 14.71 (6) fixes the rate at which mileage under sec. 59.03 (2) (f) must be computed.

Allowance to county board members for mileage for use of their personal automobiles in attending board meetings must, as in case of all allowances for mileage under sec. 59.03 (2) (f), be limited to one round trip to and from the place of meeting and not for each day the board is in session.

November 13, 1944.

JULIUS E. GUENTHNER,

District Attorney,

Antigo, Wisconsin.

You request our answer to the following questions:

1. Does sec. 59.03 (2) (f), Stats., authorize payment to county board members, in counties having a population of less than 250,000, of mileage for travel for each day while the board is in session?
2. Does sec. 14.71 (6) (f), Stats., authorize payment of traveling expense to county board members in counties having a population of less than 250,000 for attending meetings of the board?

The answer to the first question is "no". Sec. 59.03 (2) (f), Stats., provides in part:

"In each county containing less than two hundred fifty thousand population:

"* * *

"(f) *Compensation.* Each member of the county board, of each county to which this subsection is applicable, subject to the limitations herein provided, shall be allowed and paid by the county a compensation for his services and expenses in attending the meetings of the board at the rate of four dollars per day for the time he actually attends, excepting Sundays, and mileage for each mile traveled in going to and returning from the place of meeting by the most usual traveled route at the rate prescribed in paragraph (f) of subsection (6) of section 14.71; * * *."

Previous opinions of this department have held that the above subsection does not authorize payment of mileage to county board members for travel for each day while attending either an annual or special meeting of the board. They are entitled to mileage for one round trip to and from the place of meeting. XXIV Op. Atty. Gen. 805; XXV Op. Atty. Gen. 86; XVII Op. Atty. Gen. 158. Since these opinions there have been no changes in that portion of sec. 59.03 (2) (f), Stats., which is applicable here and we therefore adhere to them.

In answer to your second question reference should first be made to sec. 14.71 (6), Stats., which provides in part as follows:

"(6) ALLOWANCE FOR USE OF AUTOMOBILES. (a) Whenever any department, board, or commission determines that the duties of any employe require the use of an automobile, it may authorize such employe to use his personal automobile in his work for the state, and reimburse him for such use on either of the bases outlined in paragraphs (b) and (c), and subject to all of the conditions set forth in this subsection.

"(b) If the officer or employe travels less than six hundred miles in any month he may receive an allowance of not to exceed seven cents for each mile traveled.

"(c) If the officer or employe travels six hundred miles or more in any month, he may receive an allowance of not to exceed thirty dollars plus his actual and necessary dis-

bursements for gasoline and lubricating oil.

“* * *

“(f) The provisions of this section relating to the allowance for the use of a personal automobile shall apply also to members of county boards and to county employes, any part of whose salary or expenses are paid, directly or indirectly, by the state.

“(ff) For travel between points convenient to be reached by railroad or bus without unreasonable loss of time the allowance for the use of a personal automobile shall not exceed the railroad or bus fare between such points.”

The question submitted by you asks whether county board members are entitled under this subsection, to receive “traveling expenses” in attending meetings of the board. If you intend to use the term “traveling expenses” in the sense that it includes not only cost of transportation, but also cost of meals, lodging and incidentals incurred while traveling, the answer to your question must be “no”. It is clear from its context that sec. 14.71 (6) (f) could in no way be construed as authorizing payment of cost of meals, lodging or incidentals incurred by county board members in attending county board meetings. Allowance for such type of expense must be considered as being included in the per diem allowed by sec. 59.03 (2) (f), Stats., which specifically provides that county board members shall be allowed a certain sum per day for services and *expenses* in attending meetings of the board plus mileage traveled to and from the place of meeting unless the alternative method of compensation provided for in said subsection is adopted. A county board member is entitled to only such travel expense as is allowed by statute. Any such expense incurred in addition thereto must be defrayed by him personally. *State v. Cleveland*, (1915) 161 Wis. 457, 152 N. W. 819, 154 N. W. 980; XXX Op. Atty. Gen. 88.

However, if in your question you intended to ask whether a county board member was entitled to an allowance for use of his personal automobile in going to and from board meetings, the answer would be “yes.” In the event a county board member uses his personal automobile in attending board meetings, he would be entitled to mileage as provided by sec. 59.03 (2) (f), Stats. This subsection and not sec.

14.71 (6) (f) authorizes the allowance of mileage to a county board member for attending board meetings, which mileage is allowed irrespective of the type of conveyance used. Sec. 14.71 (6) (f) is applicable only insofar as it fixes the rate upon which mileage is computed. There is nothing in the latter subsection which *grants* or *authorizes* the allowance of mileage to county board members for use of their personal automobiles or as reimbursement for expense incurred in using any other form of conveyance. This subsection can only be construed as a limitation upon the amount which can be allowed as mileage under sec. 59.03 (2) (f). Thus, sec. 59.03 (2) (f) specifically provides the mileage allowed to county board members for traveling to and returning from the place of meeting shall be "at the rate prescribed in paragraph (f) of subsection (6) of section 14.71; * * *."

The reference to sec. 14.71 (6) (f) in sec. 59.03 (2) (f) as fixing the rate at which mileage is to be computed is confusing since there is no mention of any rate in paragraph (f) of sec. 14.71 (6). The rates are prescribed in paragraphs (b) and (c) and are subject to a limitation contained in paragraph (ff) of sec. 14.71 (6). However, said paragraph (f) of said subsection provides that: "The provisions of this section relating to the allowance for the use of a personal automobile [meaning sec. 14.71 (6) which includes paragraphs (b), (c) and (ff)] shall apply also to members of county boards * * *." Therefore, it may be concluded that the rates prescribed in paragraphs (b) and (c) of sec. 14.71 (6) and the limitation prescribed in paragraph (ff) of said subsection are applicable in determining the rate at which the mileage for use of personal automobile by a member of a county board in attending board meetings shall be computed. It follows that where a county board member uses his personal automobile in going to and from board meetings, and the miles traveled do not exceed 600 in a month, he would be entitled to be compensated therefor at a rate not to exceed 7 cents per mile. He would not in such case be entitled to be reimbursed for gasoline and oil in addition thereto. In the event the miles so traveled exceed 600 in a month he would be entitled to receive *only* a sum not to exceed \$30 plus actual and necessary dis-

bursements for gasoline and oil. In addition it is important to note that all allowances for use of personal automobile between points which can be conveniently reached by bus or rail without unreasonable loss of time must, by reason of sec. 14.71 (6) (ff), be limited to an amount not to exceed rail or bus fare between such points.

The allowance for mileage to county board members for use of personal automobile in attending meetings of the board must, of course, as in case of all allowances for mileage under sec. 59.03 (2) (f), be limited to one round trip to and from the place of meeting and not for each day the board is in session.

WET

Criminal Law — Cemeteries — Act of city in laying out and constructing street over portion of cemetery owned by it in which graves are located which are not marked by any tombstones, headstones or other distinguishing marks, so that such graves will be covered by an earth fill and hard-surfaced street, does not, under facts submitted, show any violation of secs. 343.455, 351.42 or 351.43, Stats., or any other criminal statutes.

November 15, 1944.

FREDRIC W. CROSBY,
District Attorney,
La Crosse, Wisconsin.

In your letter of October 24, 1944 you give us the following facts:

Prior to 1930 a cemetery was located in the town of Campbell, La Crosse county, and known as the Campbell Cemetery. In that year the city of La Crosse extended its city limits to take in and include the area upon which the cemetery was located, and the cemetery was acquired pursuant to sec. 157.04 (3), Wis. Stats. Since that time the city has managed the cemetery.

In the spring of 1944 the city determined to build a new street adjacent to and over a part of the cemetery. In so doing it is apparent that the street is going to cross an area of the cemetery where many years ago some bodies were buried. These graves were not marked by any tombstones or headstones or any other distinguishing marks, but it is quite certain that graves do exist where the road is to run. As a result of the road building operations these graves will be covered with a four or five foot fill, then a hard-surfaced highway.

You inquire as to whether such facts disclose the violation of secs. 343.455, 351.42 and 351.43, Stats., or any other criminal statute of this state.

The facts you submit do not disclose any violation of sec. 343.455, Stats. This section provides in part:

“Any person who shall wilfully or wantonly destroy, mutilate, injure or remove any tomb, monument, gravestone, building or other structure, fence, wall, railing, tree, shrub, plant or flower within the limits of any burying ground or cemetery or other thing intended for the ornament or protection thereof shall be punished * * *.”

We arrive at this conclusion because, in the first place, an essential element of a violation of this section is that the act be done “wilfully or wantonly” and the facts you submit to us do not show that the act of locating and building the road in question was done with such intent. The mere doing of an act is not sufficient to show it was wilfully or wantonly done. There must be other facts which would establish beyond a reasonable doubt that the act was done with a wilful or wanton intent. *Thomas v. State*, (1883) 14 Tex. App. 200. The term “wilfully” has been defined in *Brown v. State*, (1909) 137 Wis. 543 at 549, as follows:

“* * * The word ‘wilfully’ has acquired a pretty well defined meaning in criminal statutes. While its lexiconic significance may in some association be no more than intentionally or even knowingly, yet, when used to describe acts which shall be punished criminally, it includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, according to the great weight of authority. * * * This meaning for the word

has been declared for Wisconsin statutes in the words of Dixon, C. J., in *State v. Preston*, 34 Wis. 675, as satisfied only by 'evil intent without justifiable excuse.' It is used 'to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty;' and that case has been considered authoritative. * * *

The term "wantonly" is defined in *Palmer v. Smith*, (1911) 147 Wis. 70 at 75, as:

"* * * 'Wantonly' means without reasonable excuse, and implies turpitude. An act to be done wantonly must be done intentionally with design and without excuse and under circumstances evincing a lawless, destructive spirit. * * * 'Wantonly' is also defined as a reckless disregard of the lawful rights of others. *Werner v. State*, 93 Wis. 266, 67 N. W. 417. Such a degree of rashness as evinces a total want of care, . . . or willingness to destroy, although destruction itself may have been unintentional. * * *"

In the second place, the facts submitted by you fail to show the destruction, mutilation, injury or removal of any "tomb, monument, gravestone, building or other structure, fence, wall, railing, tree, shrub, plant or flower" within the cemetery limits "or other thing intended for the ornament or protection thereof."

Likewise, the facts you submit obviously do not show any violation of sec. 351.42, Stats., which provides in part:

"Any person, not lawfully authorized, who shall dig up, disinter, remove or convey away any human body or the remains thereof, or shall knowingly aid in such disinterment, removal or conveying away, or any accessory thereto, either before or after the fact, shall be punished * * *."

The remaining section referred to by you is sec. 351.43, Stats., which provides in part:

"Any person who shall open or make any highway, town way or private way or shall construct any railroad, turnpike or canal or anything in the nature of a public easement over, through, in or upon such part of any inclosure, being the property of any town, city, village or religious society

or of private proprietors, as may be used for the burial of the dead, unless an authority for that purpose shall be specially granted by law or unless the consent of such town, city, village, religious society or private proprietors, respectively, shall be first obtained, shall be punished * * *."

The facts you submit do not show any violation of this section since it is clear there is no violation where the highway is constructed with the consent of the owner of the cemetery. Here the city is engaged in laying the street in question over a cemetery owned by it, and under the circumstances it must be considered that it is with the consent of the city. A city has power to cause streets to be opened, improved, swept, sprinkled and cleaned. Sec. 62.16, Stats.

We have made a careful search to determine if there are any other provisions of the statutes which might be considered as being violated by the facts you have given us, and find none.

WET.

Cities — Police Court — Territorial jurisdiction of police court under sec. 62.24, Stats., is limited to city.

Proceeding may not be removed from justice of peace to police justice upon affidavit of prejudice.

Warrant issued by police justice under sec. 62.24 may be served anywhere in the state.

November 16, 1944.

MILTON L. MEISTER,

District Attorney,

West Bend, Wisconsin.

You have made certain inquiries with respect to the conduct of the police court of the city of West Bend organized under sec. 62.24, Wis. Stats. Your questions and our answers follow:

1. Does the territorial jurisdiction of the police court extend throughout the county or is it limited to the boundaries of West Bend?

In our opinion the territorial jurisdiction of the court is limited to the city.

Sec. 62.24 (2) (a) provides:

“The police justice shall have the jurisdiction of a justice of the peace and exclusive jurisdiction of offenses against ordinances of the city.”

A justice of the peace has territorial jurisdiction throughout the county, which has been vested in him by legislative action pursuant to constitutional provision that his jurisdiction may be such as the legislature may provide. However, a police justice court is a municipal or inferior court within the meaning of art. VII, sec. 2, Wis. Const., and it is provided that the judges of such courts must be elected by the qualified electors of their respective jurisdictions. The justice of a police court must be elected by the electors in the territory in which the court has jurisdiction. Otherwise the court is unconstitutionally created. *State ex rel. Reynolds v. Sande*, 205 Wis. 495. The police justice is elected by the voters of the city. If the court has territorial jurisdiction throughout the county, those voters outside the city and within the jurisdiction of the court are deprived of the right to vote for the justice and the court is unconstitutionally created.

It is the rule that where a statute is subject to two constructions it should be given the one which would sustain its constitutionality. Therefore, the provision that the police justice shall have the jurisdiction of the justice of the peace should be interpreted to mean jurisdiction over subject matter and should not be construed to include territorial jurisdiction. This is in accord with the history of the statute. As originally created it provided that the police justice should have the jurisdiction of the justice of the peace within the city. This would indicate that the word “jurisdiction” did not refer to territorial jurisdiction. By ch. 188, Laws 1927, the words “within the city” were stricken and the words “within the county” were inserted.

Such an amendment, in our opinion, would be unconstitutional but it is indicative here of the fact that the legislature was still dealing with the word "jurisdiction" as jurisdiction over subject matter. By ch. 271, Laws 1933, the words "within the county" were stricken. We must assume that some change was intended, and the only change that could have been intended was to limit the jurisdiction to the city as originally provided. Certainly that is the construction which should be given under the rule of construction which is applicable.

Sec. 62.26 (6) (a), referring to cities located in more than one county, provides that

"Justices of the peace and police justices shall qualify and have jurisdiction in each county the same as though the city lay wholly therein, and may hold court in one county while exercising jurisdiction in the other. * * *"

The provision does not necessarily mean that a police justice has countywide jurisdiction. It may be construed to mean that he may exercise his jurisdiction throughout a city even though the city may lie in two counties. It must be so construed in view of the constitutional question to which we have referred.

2. We shall not state the second question since it seems to be academic in view of our answer to the first.

3. Can a proceeding be removed from a justice of the peace to the police justice upon an affidavit of prejudice?

This question is answered in the negative. Proceedings for removal upon an affidavit of prejudice are statutory and there is no statute which applies to such a removal. Sec. 62.24 (2) (c) provides for removal of civil actions, except actions under city ordinances, from a police justice to a justice of the peace, and sec. 62.24 (2) (d) provides for the trial of a criminal case where an affidavit of prejudice is filed against a police justice. There is no provision, however, for removal of an action from a justice of the peace to a police justice.

4. If territorial jurisdiction of a police court is limited to the city of West Bend, can a warrant out of said court be served anywhere in the county? In the state?

Such warrants may be served throughout the county and throughout the state. Sec. 62.24 (2) provides that a police justice shall have the jurisdiction of a justice of the peace. We have construed this jurisdiction to mean jurisdiction over subject matter. Sec. 360.01 defines the criminal jurisdiction of a justice of the peace. Sec. 360.02 provides for the issuance of a warrant by a justice of the peace. Sec. 361.01 relates to the issue of process for the apprehension of persons charged with crime and provides for such issuance by a justice of the peace. Sec. 361.02 provides for the issuance of warrants for such apprehension. A warrant issued under sec. 361.02 and one issued under sec. 360.02 may, in cases where witnesses are not mentioned, be identical. Sec. 361.03 provides that the warrant may be served by the officer to whom it is directed in any county in the state. It might be argued that there are essential differences between the two kinds of warrants and that the provision of sec. 361.03 relating to service throughout the state is applicable only to warrants issued for the arrest and examination of offenders as distinguished from arrests for trial in justice court. However, it is stated in Bryant's Wisconsin Justice that the provision is applicable to both warrants. Bryant's Wisconsin Justice, (6th ed.) secs. 1282, 1305. The work is regarded as so authoritative in the field of justice court jurisdiction that its statement of the law may be safely regarded as an accurate one.

The justice's jurisdiction as referred to in sec. 360.01 seems to overlap with the grant of jurisdiction made to justices in sec. 361.01, and the warrant referred to in sec. 360.02, referring as it does to offenses over which justices are given jurisdiction under sec. 360.01, seems to overlap with the warrant provided for in sec. 361.02. This is undoubtedly one of the circumstances which influenced Mr. Bryant's statement of the law.

JWR

Soldiers, Sailors and Marines — Reemployment — A state employe inducted into the army and thereafter discharged under the provisions of Army Regulation 615-360, Sec. X, 1942 and Sec. II, War Department Circular No. 397, 1942, for Convenience of Government, is not entitled to reemployment where in accordance with the conditions of his discharge he entered an essential war industry and did not apply for reemployment within 40 days after his discharge under the provisions of sec. 21.70, Wis. Stats.

November 20, 1944.

E. J. VANDERWALL,
Conservation Director,
Conservation Department.

You refer to a case in which an employe of your department was inducted into the armed forces of the United States on December 2, 1942. He was discharged from the military service of the United States on January 29, 1943. The discharge cites that it was issued by reason of C of G, Sec. X, AR 615-360, 1942 and Sec. II, W. D. Circular 397, 1942.

Sec. X, Army Regulations, 615-360, 1942 provides for certain discharges for the convenience of the government which are not here material. So far as material, the section provides that enlisted men will be discharged for the convenience of the government by authority of the secretary of war only and that such authority may be given either in each individual case or by an order applicable to all cases of a class specified. War Department Regulation Circular No. 397 issued by order of the secretary of war purports to deal with discharges for convenience of the government. It provides that enlisted men who by reason of advanced age, 38 years of age and over, are unable satisfactorily to perform military service but who are qualified to assist in the national war effort if discharged from the army, may be discharged if they voluntarily request discharge in writing and if they present satisfactory evidence that they will be employed in an essential war industry, including agriculture, if they are discharged. The employe in question was

discharged under the provisions referred to.

The employe made no request for reemployment with the state until May 24, 1943. The statute (sec. 21.70, Wis. Stats.) relating to the rights of such employes to reemployment, so far as applicable, reads:

“(1) Any person who has * * * been * * * inducted * * * into active service * * * and any person whose services are requested by the federal government for national defense work as a civilian during a period officially proclaimed to be a national emergency * * * who, in order to perform such training or service, has left or leaves a position * * * in the employ of the state of Wisconsin * * * shall be restored to such position or to a position of like seniority, status, pay and salary advancement as though such service toward seniority, pay or salary advancement had not been interrupted by such military service; provided that * * * (c) he makes application for reemployment within 40 days after he is relieved from such training or services * * *.”

The employe did not make application for reemployment within 40 days from the time of his discharge. The record shows that he made no demand until May 24, 1943. He claims, however, that upon his discharge from the military service he was directed by his local draft board to secure employment in an essential industry and that he did secure employment in such an industry and that application was made for reemployment with the state within 40 days after completion of service in such essential industry. Thus, the employe takes the position that his employment in the essential industry fell within that provision of the section which grants a leave to an employe whose services are requested by the federal government for national defense work as a civilian. He claims that since he applied for reemployment within 40 days subsequent to the termination of such service, he is entitled to reemployment.

The employe's services were never requested by the federal government for national defense work as a civilian within the meaning of sec. 21.70. The employe points out that upon arrival home from the army he reported to his draft board and was advised to seek employment in an essential industry or agriculture. This advice was of course

given in view of the employe's commitment which was made as a condition to his discharge that he would seek such employment. He had agreed to seek such employment as a condition of his discharge and such agreement was upon his own initiative under the army regulation to which reference has been made. The advice of his local draft board naturally was that he should act in accordance with his commitment. If he were not to do so, he would be subject to again being drafted.

There are several other factors which we need not discuss in view of the conclusion at which we have arrived. However, it might be pointed out that where a person is claiming a leave by reason of civilian service in national defense work at the request of the federal government under the provisions of sec. 21.70, he should be able to point to some request by an agency of the United States government authorized to request his services for such work. The context of the section would seem to indicate that it was intended to cover cases in which employes might leave the state of Wisconsin to go into the service of the federal government in either a military or a civilian capacity. Thus, a person might leave the employ of the state and join one of the various federal war agencies as a civilian upon the request of an official authorized to employ personnel for such an agency. This construction of the section would clearly preclude the employe in question from reemployment since he has at no time been employed in a civilian capacity by the United States government in national defense work at the request of an authorized official of the United States government. If the reference to civilian employment in national defense work covers work for a private employer, the employe is in no better position, since there is no showing that a local draft board has authority to solicit employes for such organizations.

JWR

Banks and Banking — Banking Commission — Under sec. 221.046, Wis. Stats., the banking commission must give its approval to a modification of the form and content of debentures previously issued by a state bank.

The board of directors of a state bank may not authorize the payment of interest on non-interest-bearing debentures previously issued by a state bank, unless such action of the directors is unanimously approved by the stockholders of the bank.

November 28, 1944.

BANKING COMMISSION OF WISCONSIN.

Attention James B. Mulva, *Chairman*.

You have requested an opinion concerning Class B non-interest-bearing income debentures issued by one of the state banks under the jurisdiction of your department. The questions you present are as follows:

1. Does the board of directors of such bank have the authority to pay interest at the rate of 3 per cent to the holders of these outstanding B debentures?

2. May such payment of interest be made, if the stockholders unanimously consent?

In the case before us, the bank has retired all A debentures, but now finds itself in a good financial condition and the directors are willing to pay interest on the B debentures provided such action is permissible.

Sec. 221.046, Wis. Stats., provides for approval by the banking commission of the issuance and sale of debentures by any state bank. The amount, form and content of the debentures are subject to such approval. It seems to be clearly implied that any alteration or modification of such debentures must also be approved by the banking commission since the form and content thereof are affected by a modification. If the board of directors of a state bank wishes to pay interest on non-interest-bearing income debentures, such modification of the original contract would necessarily require the approval of the banking commission. This raises the question as to whether the banking commission could approve an agreement to pay interest on debentures

which were originally issued without any provision for interest.

A careful examination of the Class B non-interest-bearing debenture, a copy of which you enclosed with your request for opinion, clearly shows that the bank is under no contract obligation to pay interest thereon. The debenture is entitled as follows: "Class 'B' Non-interest Bearing Income Debenture Registered."

There is no provision anywhere in the body of the agreement for paying interest. If the bank was under no legal obligation to pay interest on these debentures when they were issued, would an agreement to do so at this time be an enforceable legal obligation?

The rule in Wisconsin is that a contract wholly executed by one party may not be modified without new consideration. *Murray v. Hamilton Beach Mfg. Co.*, (1922) 178 Wis. 624, 190 N. W. 460. At p. 628, the court said:

"* * * If, however, the contract is complete or executed by one party, any modification thereof must be supported by a new consideration."

The contract we are here considering is wholly executed by one party, viz., the B debenture holders. They have done everything under the terms of that agreement that they are called upon to do. The present proposal of the board of directors to pay interest to these creditors is not supported by any new consideration. It is clear that the creditor will suffer no legal detriment nor will the other party, the bank, gain any legal advantage. The bank already has the funds represented by these debentures and is under no obligation to pay interest thereon. These creditors still have an enforceable claim against the bank for the principal amount of the debentures.

It is our conclusion, therefore, that any agreement by the directors of the bank to pay interest on the non-interest-bearing B debentures would be without consideration and an unenforceable promise. It would be in legal effect a voluntary donation or gratuity. The authorities are unanimous that directors of a bank may not give away the assets of the bank no matter how laudable the purpose.

In *Park Falls State Bank v. Fordyce*, (1932) 206 Wis. 628, 638, 238 N. W. 516, 79 A. L. R. 1139, the court said:

“* * * A natural person, not standing in the relation of a trustee, may make a gift if he wants to. But a trustee may not make a gift of trust property *nor may the officers of a bank make a gift of its funds*, and if either be done, no reason is perceived why action will not lie for rescission and recovery.” (Italics ours.)

In *Schwenker v. Parry*, (1931) 204 Wis. 590, 595, 236 N. W. 652, the court laid down this rule:

“One dealing with a bank must be presumed to know that a cashier thereof has no authority, express or implied, to give away any of the assets of the bank.” (Citing cases)

Numerous other authorities sustain the proposition that a bank has no implied power to make a donation of its funds. See 7 Am. Jur. 121, sec. 157; 13 Am Jur. 921, sec. 962 (as to corporations in general); 4 Michie, Banks and Banking, (Perm. ed.) 111, sec. 14; 1 Morse, Banks and Banking, (6th ed.) sec. 127; 1 Zollmann, Banks and Banking, 189, sec. 227; 13 Fletcher, Cyc. Corps., (Perm. ed.) 103, sec. 5789 (as to corporations in general).

The second question in your request concerns the possibility of paying interest on these B debentures if the stockholders of the bank unanimously consent.

In view of the fact that the bank could properly provide for paying interest on money borrowed by it, it is our opinion that if the stockholders unanimously consent, payment of interest may be made, even though the original contract did not provide for it. Zollmann, Banks and Banking, Vol. 1, p. 189, sec. 227, states: “* * * Only the unanimous vote of the stockholders could authorize such a gift.” See, also, 2 Fletcher, Cyc. Corps., (Perm. ed.) 408, sec. 520.

In *Parrott v. Noel*, (1925) 8 F. (2d) 368, 371, Judge Groner said:

“* * * it is undoubtedly true that the stockholders of a private corporation may, by unanimous agreement, where the rights of creditors are not involved, and where the pro-

posed act will not impair their obligations to the state of their creation, dispose of the corporate assets without restriction, and an appropriation by them, with or without consideration, would neither be outside the powers of the corporation itself nor forbidden by positive law or public policy."

In *Hamilton v. Menominee Falls Quarry Co.*, (1900) 106 Wis. 352, 360, 81 N. W. 876, the court said:

"* * * It is also true that stockholders of a corporation may, by action, prevent the directors from wasting or squandering the capital or assets of the corporation, and may compel restitution of squandered property to the corporation, because the corporate property is the property of the stockholders (subject to the payment of debts), and the directors are their trustees in the management thereof, and have no right to squander or give it away when a stockholder objects. No such question arises here, however, because the transfer here attacked was made with the consent and approval of every stockholder, and they could not be heard to complain thereof, and in fact are not complaining.
* * *"

See, also, *Chounis v. Laing*, (1942) 23 S. E. 2d 628, 637 (W. Va.).

Nor are the creditors of the bank in any position to complain if the directors with the unanimous consent of the stockholders make an agreement to voluntarily pay interest on these B debentures. Under the law of this state, the directors of a corporation are not trustees for the corporate creditors. In the *Hamilton case*, *supra*, the court said at p. 360:

"* * * It is now settled in this state, * * * that the directors of a going corporation are in no sense trustees for the corporate creditors in the management of the corporate business,* * * and, further, that when the corporation is solvent, and there is no actual intent to defraud creditors, it may dispose of property for an inadequate consideration or by voluntary conveyance as an individual may do, and subsequent creditors cannot question the transaction
* * *"

In the same case the court held that the same rule applies to existing creditors. (See pp. 360-361)

It is our conclusion that (1) under sec. 221.046, Wis. Stats., the banking commission must give its approval to the modification of the form and content of the debentures as well as to the original issue thereof; (2) the board of directors of a state bank may not authorize the payment of interest on non-interest-bearing debentures previously issued by the bank, unless (3) the stockholders of the bank unanimously consent.

ES

Automobiles and Motor Vehicles — Reciprocity — Taxation — Motor Fuel Tax — Under sec. 85.05 (2) (d), Stats., the commissioner of the motor vehicle department may not validly enter into agreement with other states to exempt nonresident operators from payment of motor fuel tax in Wisconsin.

November 28, 1944.

B. L. MARCUS,
Deputy Commissioner,
Motor Vehicle Department.

You request our opinion for your guidance in replying to the superintendent of motor vehicle registration for the state of Iowa respecting an interpretation of the agreement made June 29, 1943 between the responsible officials acting for the states of Wisconsin and Iowa, approved by acting governor Walter S. Goodland, concerning reciprocal motor vehicle fee and tax exemptions in favor of operators of vehicles engaged in interstate commerce.

It is urged by the Iowa official on behalf of the truck operators domiciled in that state that such operators engaged in the operation of trucks in interstate commerce in Wisconsin are exempt from the payment of the motor vehicle fuel tax imposed by ch. 78, Wisconsin Statutes. It is contended that the agreement, by interpretation, exempts such

operators from compliance with sec. 78.08, Wis. Stats., which regulates the importation of motor fuel purchased outside the state of Wisconsin in excess of certain quantity limits.

The letter of the Iowa official states that he is sure that at the time of the signing of the June 29, 1943 agreement the Wisconsin authorities intended such exemption. His conclusion is based upon the fact that the agreement does not specifically except the tax in question from the general statement of the taxes from which the operators were granted exemption by the contract.

A consideration of the statutory basis for the agreement discloses the answer to your problem. Sec. 85.05 (2) (d), Stats., constitutes the sole authority of the officials who participated in the negotiations to enter into the agreement now in force. It reads as follows:

“For the duration of the present war and until its termination as proclaimed by the President or the Congress, the commissioner of the motor vehicle department, with the approval of the governor, shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees, mileage and flat taxes under which motor vehicles, trailers or semitrailers properly licensed or registered in other states may be operated in interstate commerce in this state without a Wisconsin registration or the payment of permit fees or mileage or flat taxes, provided like privileges are accorded to vehicles owned by Wisconsin citizens when operated in such other states.”

The statute is clear that the only fees or taxes which may constitute the subject of reciprocal exemption agreements are “registration fees,” “permit fees” and “mileage or flat taxes.” Each of these classifications of fees and taxes is defined in its proper place within our statutes. We deem it unnecessary to go into a detailed description of the same for the purposes of answering your question. The motor vehicle fuel tax is not embraced in any of these definitions, but is provided for elsewhere (ch. 78). Our legislature presumably had in mind the several types of fees and taxes which our own statutes exact or impose when it empowered the

commissioner of the motor vehicle department to enter into reciprocal agreements. It could refer only to our own fees and taxes as they are defined in our statutes. It left the reconciliation of the varying terms and definitions of different kinds of taxes to the responsible officials of the contracting states in order that effect might be given to that portion of the reciprocity statute which states: "provided *like privileges* are accorded to vehicles owned by Wisconsin citizens, etc." In view of the language of our statute, that is the extent to which the commissioner may "negotiate."

The so-called "reciprocity agreements" are, in substance, merely memoranda which are designed and intended to set up for reference by those affected the fees and taxes of the contracting states from which their respective citizens, upon the conditions recited, are exempted. The volume of tax laws of the forty-seven states and the District of Columbia with which we may enter such agreements, coupled with the variances in tax and fee terminology, make it impracticable to be completely conversant with the same, nor do we deem it necessary, in view of the plain language of the statute, to specifically enumerate all types or classes of taxes which are excluded by implication. Experience in applying these agreements to practical situations which have arisen in the past twenty months between our state and other contracting states has disclosed the necessity of administrative interpretation from time to time in the light of the limitation on the commissioner's power as contained in the statute.

Suffice it to say that our statute does not permit the commissioner of the motor vehicle department to enter into reciprocal exemption agreements respecting motor fuel taxes. He could not validly enter into such a contract if he wanted to. His power is defined and limited by the statute quoted. Any agreement in excess of the statutory authority so conferred would be wholly void and of no force or effect whatsoever, to that extent.

SGH

Minors — Courts — Justice Court — Juvenile Court —
Sec. 57.05, Wis. Stats., relating to the probation of minors
applies to justice courts.

Children 16 years of age and less than 18 years of age are subject to the jurisdiction of both juvenile and criminal courts. Juvenile courts may not confine them in prisons or jails by reason of the provisions of sec. 48.12, but there is no such restriction placed upon criminal courts.

November 28, 1944.

GEO. F. FRANTZ,

District Attorney,

Lancaster, Wisconsin.

This is in response to your inquiry of November 16. You inquire, first, as to whether under sec. 57.05, Wis. Stats., a justice of the peace may suspend sentence and place a minor under probation in cases falling within the jurisdiction of the justice. The statute provides generally that courts may suspend sentence and place minors on probation, with certain exceptions. It is to be distinguished from other provisions such as sec. 57.01 and sec. 57.04 which relate to courts of record. We inferred in XXIX Op. Atty. Gen. 371 that we thought the section applied to justices of the peace, and we remain of that opinion for the reason that they are literally within its terms and there is nothing to indicate that they were not intended to be included.

You also inquire as to whether a minor of the age of 17 years or under may be committed to jail. Sec. 48.11 provides that children under 16 shall not be convicted of crime but shall be brought before juvenile courts to be dealt with as neglected, dependent or delinquent under the provisions of sec. 48.06. The opinion has been expressed, however, that children 16 or over may be treated as criminals in courts other than juvenile courts and may be penalized as are criminals generally for infractions of the criminal law. XX Op. Atty. Gen. 978. However, under the provisions of sec. 48.12 no juvenile court may confine a child within its jurisdiction in prison, even though he be over 16. In cases where children are under 16 the juvenile courts have exclusive juris-

diction. Where such children are 16 and not yet 18, juvenile courts and other courts have concurrent jurisdiction. Juvenile courts may not confine such children in jail, but other courts may.

We pointed out in an opinion rendered to the director of the state department of public welfare on August 17, 1944* that sec. 48.12 forbids the detention of any child under 18 in a prison or jail as well as it forbids his commitment to prison by a juvenile court. We had in mind the action of law enforcement authorities in detaining children while they were waiting action by a court. However, we do not think the section should be construed as forbidding courts other than juvenile courts from committing children over 16 to prisons or jails. The section does not purport to deal with commitments by any court other than a juvenile court and should not be interpreted to restrict the power which such other court would otherwise have to deal with offenders within its jurisdiction.

JWR

Counties — Taxation — Tax Sales — Delinquent real estate taxes returned to the county and bid in by it at tax sale, but not collected because of bankruptcy of owner thereafter, cannot be charged back by the county to the town. A county may not charge back taxes except in the instances specifically authorized by statute and there is no statute providing therefor in such a case.

November 29, 1944.

FRANCIS J. GOLDEN,

District Attorney.

Merrill, Wisconsin.

The taxes on certain land in the town of Bradley were returned delinquent to the county for the years 1933, 1934, 1935 and 1936. The owner subsequently went into bank-

*Page 137 of this volume.

ruptcy and pursuant to an order of the bankruptcy court the land was sold free and clear of all taxes and other liens, which were transferred to the sale proceeds. The county held the tax sale certificates but because the fund was insufficient or for some other reason it never realized anything thereon. You ask whether there is any statute of limitations preventing the county from now charging these uncollected tax items back to the town and refer to XXII Op. Atty. Gen. 16 as indicating there may be some time restriction thereon.

Before reaching this question there is a more fundamental one. It is whether the county has any right to make a charge back under the above circumstances. We do not find any statutory authority for it to do so.

The statement in XXII Op. Atty. Gen. 16 that when the county board orders a refund on account of the invalidity of a tax certificate or tax deed it is not mandatory under sec. 75.25, Stats., that it reassess the tax against the property so that if it is not satisfied it should be so reassessed it may merely charge the amount of the tax back to the town, city or village without reassessment, is wholly unjustified and unsupported by anything in sec. 75.25, Stats., which is the same now as it was then except for changes that have been made in respect to the interest rate. In a later opinion XXVII Op. Atty. Gen. 724 the question was directly considered and it was there stated definitely that a county has no power or authority to charge taxes back except in the instances specifically authorized by statute.

The situation at hand is not one in which there is any illegality in the tax or any error or irregularity in the taxing processes that would come within sec. 70.74, Stats., which if it did only provides for reassessing the tax against the property and in no way authorizes a charge back to the local taxing unit except for reassessment against the property. Nor is it a case of withholding from sale under sec. 74.39, Stats., which would likewise come within sec. 70.74, Stats. It is not a refund by the county of a tax improperly assessed or paid by mistake that is covered by sec. 74.64, Stats. There has been no recovery of an unlawful tax paid to the local treasurer that would come under sec. 74.73 Stats. Clearly it does not come within sec. 75.61 (2), Stats.,

which now, by an amendment made subsequent to the opinion in XXVII Op. Atty. Gen. 724, provides for a charge back to the local unit where action is taken thereunder.

We thus find no statutory authority for any charge back by the county under the facts submitted. The situation is similar to where a county after bidding in the property at the tax sale does not take a tax deed within the 15-year life of a certificate provided by sec. 75.20, Stats. There is nothing in the statutes authorizing the county to charge back the uncollected taxes in such a case. Likewise, if a county should sell its tax certificates for less than face value or after taking a tax deed should sell the land for less than the unpaid taxes on it, it could not charge back the unrealized amount of the taxes because there is no statutory authority therefor.

The burden of the loss resulting from non-collection, would not fall on the county, as noted at the end of the opinion in XXVII Op. Atty. Gen. 724, in any of the years involved where there was excess roll, excepting only if the ultimate total collections should not be sufficient to pay in full the unpaid county taxes in such roll. It would only be in the cases of a non-excess roll that the burden of this loss would fall on the county. In this connection the provisions of sec. 74.66, Stats., might be applicable. That section does not of itself create any right of charge back, but if the failure of collection could be attributed to default of county officers it would appear to preclude any charge back otherwise existing from being operative.

It is our opinion that the county has no power or authority to charge back the taxes in question to the town.

HHP

Taxation — Exemption — Child welfare agency, licensed under sec. 48.37, Stats., and charitable in character, in which the children maintained are predominantly not orphans, is not entitled to tax exemption as an "orphan asylum or home" under sec. 70.11 (15), Stats. As it is owned by a religious corporation and operated as a benevolent institution it is entitled to exemption under sec. 70.11 (4), Stats.

December 4, 1944.

WISCONSIN DEPARTMENT OF TAXATION.

The United Norwegian Lutheran Church owns and operates the Homme Children's Home on real estate which it owns and has owned for 30 years in the town of Wittenberg, Shawano county. Prior to 1937 about 390 acres were used for the Home. Another 70-acre parcel, about a mile and a half distant therefrom, was operated by the Bethany Indian Mission, but since its abandonment in 1937 these 70 acres also have been used by the Home. There are a large house and set of buildings on the 390-acre tract and also a playground. It is stated that the balance of the lands are used for farm purposes for the support of the Home.

In prior opinions, XX Op. Atty. Gen. 685 and XXVIII Op. Atty. Gen. 154, it was concluded that this same property was exempt as an orphan home under sec. 70.11 (15), Stats. No consideration, however, was there given to the following details of its operation. The institution is licensed by the state department of public welfare as a "child welfare agency" under secs. 48.35 to 48.42, Stats., to provide "dependent and neglected children" (which terms are defined in sec. 48.01, Stats.) with care and maintenance but limiting the number to not in excess of 65 at any one time. While it has in the past at times cared for as many as 90, the facilities are deemed suitable for only about 40. The number and classification of the children in the Home in 1940, which has been substantially the same since, is as follows: 1 child with both parents dead; 14 children with 1 parent alive; 13 with parents separated; 5 with parents divorced; and 6 with parents living together. These proportions are typical and have

been fairly constant. The children receive food, clothing, shelter and religious guidance. Education was provided until 1940 but since then the children have attended the public schools and no school facilities are maintained at the Home. More than 65 per cent of the total cost of maintaining all the children is paid for out of money contributed by the church and by individual benefactors, and the balance is paid out of aid by counties from which the children are committed or from payments made by parents. In no instance does the amount paid by the parents of a child exceed 50 per cent of the cost of the maintenance of the child.

Since 1938 the town authorities have assessed this real estate for taxation and our opinion is requested as to whether the Home qualifies as an orphan asylum or home under sec. 70.11 (15), Stats., or whether it is a religious or charitable institution within the meaning of sec. 70.11 (4), Stats.

The statutory provisions involved are:

“70.11 Property exempt from taxation. The property in this section described is exempt from taxation, to wit:

“* * *

“(4) Personal property owned by any educational institution having a regular curriculum and offering courses for at least six months in the year, or by any religious, scientific, literary, or benevolent association, women’s clubs or incorporated historical societies, or by fraternal societies, orders or associations operating under the lodge system, except university, college and high school fraternities and sororities, which is used exclusively for the purposes of such association, and the real property necessary for the location and convenience of the buildings of such institution or association and embracing the same, not exceeding ten acres; provided, such real or personal property is not leased or otherwise used for pecuniary profit; * * *

“* * *

“(15) All the real and personal property of any orphan asylum or orphan home in this state, and the real estate of the Home of the Friendless in the city of Milwaukee, not exceeding one lot, while the same are actually used for such homes. For the purposes of this subsection the term ‘orphan home’ shall include the Wisconsin Home and Farm School, at Dousman.”

It is obvious that the exemption in sec. 70.11 (15), Stats., is available only to an institution that qualifies as an "orphan asylum" or an "orphan home." Although our supreme court has not had occasion to lay down the requisites necessary to come within those terms and there is very little authority upon the subject, it appears that the terms "orphan asylum," "orphan home" and "orphange" are synonymous and used interchangeably as designating an institution whose activity is the furnishing of a home to orphans. *Baker v. State*, (1903) 120 Wis. 135, 97 N. W. 566; *In re Pearson's Estate*, (1896) 113 Cal. 577, 45 P. 849; *McKinnon v. Second Judicial Dist. Court*, (1913) 35 Nev. 494, 130 P. 465. Century Dictionary: "Orphanage. An institution or home for orphans." "Orphan Asylum. An asylum or home for destitute orphan children." New Standard Dictionary: "Orphanage. An institution for the care of destitute orphans; orphan asylum." Webster's New Int. Dictionary, Second Ed.: "Orphanage. An institution or asylum for the care of orphans." As stated in *Baker v. State*, *supra*, there is no unanimity on the subject but there is a leaning toward and probably there should exist also the element of destitution so that it is a charitable institution. See also: *Kemmerer v. Kemmerer*, (1908) 233 Ill. 327, 84 N. E. 456.

As to the meaning of the word "orphan" there is some divergence. It has been held that an "orphan" is a child both of whose parents are dead. *Chicago Guaranty Fund Life Soc. v. Wheeler*, (1898) 79 Ill. App. 241. In other cases an orphan is said to be a child that is fatherless. *Soohan v. Philadelphia*, (1859) 33 Pa. 9; *Stewart v. Morrison's Executor*, (1860) 38 Miss. 417; *Poston v. Young*, (1832) 30 Ky. 501. Still others take the view that an orphan is one who has lost one or both parents. *Heiss v. Murphy*, (1876) 40 Wis. 276, *Beardsley v. Selectmen of Bridgeport*, (1886) 53 Conn. 489, 3 A. 557. Century Dictionary: "Orphan. A child bereaved of one parent or of both parents, generally the latter." New Standard Dictionary: "Orphan. A child deprived of its parents by death; sometimes applied to a minor child who has lost either one of its parents." Webster's New Int. Dict., Sec. Ed.: "Orphan. A child bereaved by death of both father and mother, less commonly, of either parent."

The character of an institution is judged upon the basis of its actual operation and its predominant activity is controlling as determinative thereof. *St. Joseph's Hospital Ass'n. v. Ashland County*, (1897) 96 Wis. 636, 72 N. W. 43; *Rogers Memorial Sanitarium v. Summit*, (1938) 228 Wis. 507, 279 N. W. 623; *Order of the Sisters of St. Joseph v. Plover*, (1941) 239 Wis. 278, 1 N. W. (2) 173; *Prairie du Chien Sanitarium Co. v. Prairie du Chien*, (1943) 242 Wis. 262, 7 N. W. (2) 832.

A viewing of the facts as above set forth in accordance with these principles results in the conclusion that this institution is a home for children generally. While some of the children cared for are orphans they do not predominate. Actually the orphans are in the minority and the predominance is of children who are not orphans. This is true even though, in recognition of the rule of liberal construction so as to favor charities, the word "orphan" is given its broadest possible meaning as including a child who has lost only one parent as well as a child without any parents. In such case only about 38 per cent of the children in the institution are orphans. On the other hand if, under the usual rule of strict construction of tax exemption statutes, the word "orphan" is given its ordinarily accepted meaning of including only a child without parents, the predominance of furnishing a home to children generally is more apparent. Thus, laudible as is the conducting of a home for needy children, that does not constitute the institution in question an "orphan asylum" or "orphan home." While under a different set of facts an opposite conclusion might be reached, upon the basis of the facts above as typical of the operation of the Homme Children's Home, it is our opinion that it does not meet the qualifications necessary for it to be accorded the exemption under sec. 70.11 (15), Stats.

On the other hand the home is owned and operated by the United Norwegian Lutheran Church, a religious corporation organized under the laws of Minnesota. As such it is a religious "association" under sec. 70.11 (4), Stats. *St. John's Military Academy v. Edwards*, (1910) 143 Wis. 551, 128 N. W. 113. Under the tests applied in the cases previously cited the Homme Children's Home is an institutional operation that is benevolent in character. While in some instances

parents of the children make payment to the institution, in no case does the amount paid by the parents of a child defray more than half of the cost of maintenance of the child. As stated in *Order of the Sisters of St. Joseph v. Plover*, *supra*, at page 282, the fact that the home receives payments from counties from which children come does not avoid the result that the maintenance furnished such children is charity. Furthermore, no profit is made by anyone through the conduct of this home and 65 per cent of the cost of operating it is paid from funds donated by the members of the church or other private benefactors. In *State ex rel. State Assoc. of Y. M. C. A. v. Richardson*, (1928) 197 Wis. 390, 222 N. W. 222, it was held that sec. 70.11 (4) Stats. does not grant a single exemption but one for each taxing district. In our opinion the personal property and the 10 acres of land upon which the Homme Children's Home buildings are located are exempted from taxation under sec. 70.11 (4), Stats., as the property of a religious or benevolent association.

HHP

Highways and Bridges — Appropriations and Expenditures — Highway Commission — State highway commission is the proper agency to administer the provisions of sec. 84.20.

No specific appropriation has been made to meet the provisions of sec. 84.20 and none may be implied.

State's liability under sec. 84.20 for repair of town and county roads or city and village streets damaged in the course of repair or construction of state trunk or federal highways is not affected by secs. 85.54 (2), 86.02 or 343.483.

December 6, 1944.

STATE HIGHWAY COMMISSION.

You have requested our opinion on a number of questions which have arisen under sec. 84.20, Stats., created by ch. 543, Laws 1943. This section provides:

“State repair of town and county roads and city and village streets. When any town or county road or city or village street is used as a detour or for hauling material for repair or construction because of the use thereof incident to the repair or construction of any state trunk or federal highway or street carrying such highway, the damages to such road or street caused by such use shall be repaired by and at the expense of the state.”

Several towns have filed claims with the state highway commission requesting the state to repair or reimburse them for repairs made by them for damage, deterioration and wear to town roads allegedly caused by contractors hauling materials over such town roads in connection with the repair or construction of state trunk highways under contracts with the state made by the state highway commission.

The first question is as follows:

“1. Is the commission required or empowered to repair the damage resulting to a town road caused by the use thereof incident to the repair or construction of a state trunk highway?”

This question calls for an affirmative answer subject, however, to the limitations discussed in the answer to the second question.

The statute says, “* * * the damages to such road or street caused by such use shall be repaired by and at the expense of the state.”

Obviously the state in complying with this statute must act through some agency, and the state highway commission is the agency set up by ch. 84 for discharging the functions assumed by the state under that chapter. For instance, sec. 84.01 (4) provides that the commission shall have charge of all matters pertaining to the expenditure of state and federal aid for the improvement of highways, and shall do all things necessary and expedient in the exercise of such supervision. Sec. 84.07 (1) provides that the state trunk highway system shall be maintained by the state at state expense, and the state highway commission, as you have indicated, is the agency which made the contracts for repair or construction of state trunk highways in the execution of which the damage to these town roads arose.

Hence, by clearest implication if not by the direct wording of sec. 84.01 (4), it must be assumed that the commission is empowered and required to act for the state in discharging the state's liabilities for damages to town roads under sec. 84.20.

The second question reads.

"2. If so empowered, from what appropriation to the commission shall the cost of such repairs be paid? That is, may funds appropriated for the maintenance or improvement of state trunk highways be used for the repair of such town roads?"

Art. VIII, Sec. 2, Wis. Const., provides that no money shall be paid out of the state treasury except in pursuance of an appropriation by law. We find no specific appropriation for payment of claims arising out of sec. 84.20. While the argument might be made that the legislature by passing sec. 84.20 had in effect enlarged the scope of the statutes making appropriations for the maintenance of state trunk highways so as to include moneys expended in paying damages or making repairs under sec. 84.20, it is to be remembered that appropriations by implication are not favored. The late Justice Owen, when he was attorney general, said in II Op. Atty. Gen. 10, 13:

"Nowhere do I find any authority under which it may be held that an appropriation may be implied in the absence of a declaration by the legislature in some express terms to the effect that money is appropriated or shall be paid to or received by some designated person or for some designated purpose. Even were such authority available, under the settled rule of this department, I should be constrained to rule against any appropriations from the state treasury unless the authority for the appropriations is or may be made clear and express."

The appropriations made to the state highway commission for construction and maintenance of state trunk highways are declared to be for the purpose of meeting the provisions of particular sections of the statutes, but nowhere is reference made to sec. 84.20 in these appropriations and in

the absence of a clear and express reference to sec. 84.20 we are impelled to follow the rule of strict construction as applied to appropriation statutes and conclude that no appropriation to meet the provisions of sec. 84.20 may be implied.

The answer to this question makes it unnecessary at this time to consider the problems raised in your third and fourth questions, both of which are predicated upon the assumption that funds are available for meeting the provisions of sec. 84.20.

The fifth question is as follows:

"5. May the status of a claim for such damage be affected in any way by the provisions of sections 85.54 (2), 86.02 or 343.483?"

Sec. 85.54 (2) reads:

"General restrictions. If at any time any person is operating upon any highway any vehicle which is causing or is likely to cause injury to such highway or is visibly injuring the permanance thereof or the public investment therein, the officer in charge of the maintenance of highways maintained by a town, city or village and the county highway commissioner or county highway committee or any member of such committee in the case of highways maintained by the county, and any traffic officer may summarily suspend the operation of such vehicle on such highway, and the owner or operator thereof shall forthwith comply with such suspension."

Sec. 86.02 reads:

"Injury to highway. Any person who shall injure any highway by obstructing or diverting any creek or watercourse or sluiceway, or by dragging logs or timber thereon, or by any other act, shall be liable in treble damages, to be recovered by the political division chargeable with the maintenance of highway injured, and the amount recovered shall be credited to the highway maintenance fund."

Sec. 343.483 provides:

"Highways, cultivation of; injury by farm machinery.
(1) No person shall, within the limits of any public high-

way, plough, cultivate or otherwise work any lands in such manner as to interfere with or obstruct the drainage in any public highway ditch, nor shall any person operate any farm or other machinery on, over, along or across any public highway in such manner as to materially damage the said highway.

“(2) Any person who shall violate the provisions of this section shall be 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 not less than ten days nor more than thirty days, and shall in addition pay the whole cost of restoring the ditch or highway, or both, to their former condition.”

Your question presupposes the existence of a valid claim for damages under sec. 84.20 and since this statute is specific in its application to the state and is later in point of time than any of the three sections above quoted, we cannot see how its application can in any way be affected by these prior general statutory provisions. Hence the fifth question is answered in the negative.

WHR

Prisons and Prisoners — Parole — Parole eligibility date of person serving life term in state prison is computed, according to sec. 57.06 (1) (a), Stats., by deducting from a term of 20 years, an amount equal to good time which the prisoner would have earned under both sec. 53.11 (1) and sec. 53.12 (1) had he been serving a term of 20 years. Loss of good time due to misconduct operates to postpone parole eligibility of life termers.

December 7, 1944.

A. W. BAYLEY, *Director,*
State Department of Public Welfare.

You inquire whether extra good time earned under sec. 53.12, Stats., by an inmate of the state prison serving a life sentence is to be considered in determining his parole eligibility date under sec. 57.06.

Sec. 57.06 (1) (a) provides that the department of public welfare with the approval of the governor may parole a prisoner "who, if sentenced for life, shall have served 20 years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for 20 years."

Good time can be earned at the state prison under only two sections of the statutes, secs. 53.11 and 53.12. Under sec. 53.11 an inmate serving a sentence of 20 years would earn 8 years and 9 months good time and be eligible for discharge at the end of 11 years and 3 months. Under subsec. (2) of that section good time previously earned may be forfeited for misconduct. Sec. 53.12 (1) provides as follows:

"Every convict employed on construction or other work outside of the prison walls on the honor system, who shall conduct himself in a peaceful and obedient manner, and shall faithfully perform all the duties required of him, shall be entitled to a diminution of time on the ratio of five days for each month of thirty days or fraction thereof, while he is so employed, in addition to the credit for good conduct prescribed by section 53.11."

The diminution of sentence earned under sec. 53.11 is for good conduct and so is that which may be earned under sec. 53.12. Under sec. 53.12 the convict must "conduct himself in a peaceful and obedient manner, and * * * faithfully perform all the duties required of him" in order to earn the extra good time. Clearly, therefore, the diminution of sentence earned under sec. 53.12 is a "diminution which would have been allowed for good conduct, pursuant to law," within the meaning of sec. 57.06 providing for parole eligibility.

You are therefore advised that whenever a life term is given work outside the walls under circumstances which would have entitled him to extra good time if he was serving a 20-year sentence, this must be counted in the computation of his parole eligibility date. Conversely, loss of good time due to misconduct will operate to postpone the parole eligibility date.

WAP

Banks and Banking — Finance Companies — Automobiles and Motor Vehicles — The provisions of sec. 218.01, Stats., prohibiting sales finance companies from engaging in the business of acquiring retail instalment contracts on motor vehicles by purchase or discount unless they have obtained a license as provided in said section are not applicable to national banks engaged in such business in the state of Wisconsin, but are applicable to state banks engaged in such business in this state.

December 12, 1944.

BANKING COMMISSION.

Attention Mr. James B. Mulva, *Chairman*.

You ask our opinion as to whether state and national banks which purchase or discount retail instalment contracts on motor vehicles are required to be licensed as sales finance companies as provided by subsec. (2) (a) of sec. 218.01, Stats., which reads in part as follows:

“No motor vehicle dealer, motor vehicle salesman or sales finance company shall engage in business as such in this state without a license therefor as provided in this section.
* * *”

An application for a license is required to be in such form and contain such information as the banking commission shall require. It may require in the application or otherwise, information relating to applicant's solvency, financial standing or other pertinent information concerning applicant which would be material in safeguarding the public interest in the locality where applicant proposes to engage in business. All such facts may be considered by the banking commission in determining the fitness of applicant to engage in business. Sec. 218.01 (2) (b), Stats.

The license fee for sales finance companies is based on gross volume of purchases of retail sales contracts of motor vehicles sold in the state for the twelve months next preceding October 31 of the year the application for license is made. The fee ranges on a graduated scale from \$25 on a gross volume of \$25,000 or less to \$185 on a gross volume of

\$1,000,000, with an additional \$5 for each \$100,000 purchased over \$1,000,000. Gross volume is based on the unpaid balance of said contracts. Sec. 218.01 (2) (d) 7, Stats. We regard such fee as a regulatory or enforcement fee imposed by the state in the exercise of its police power to cover the cost and expense of supervision or regulation, and not as a tax. *State ex rel, Attorney General v. Wisconsin Constructors*, (1936) 222 Wis. 279.

Any person, firm or corporation who violates any of the provisions of sec. 218.01, Stats., is deemed guilty of a misdemeanor and upon conviction thereof may be punished by fine or imprisonment. Sec. 218.01 (8), Stats. In the event any person, firm or corporation purchases a retail instalment contract without being licensed as a "sales finance company" the buyer of the motor vehicle, if a Wisconsin resident at the time of purchase of the vehicle, is given a defense to any action for recovery upon the contract. Sec. 218.01 (6) (g).

The term "sales finance company" as used in sec. 218.01 is defined in subsec. (1) (d) of said section as follows:

"(d) '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 sells any motor vehicle on an instalment contract or acquires any retail instalment contracts in his retail sales of motor vehicles."

The terms "retail instalment contract" and "retail seller" are also defined in subsecs. (1) (e) and (f) of sec. 218.01 as follows:

"(e) 'Retail instalment contract' or 'instalment contract' means and includes every contract to sell one or more motor vehicles at retail, in which the price thereof is payable in one or more instalments over a period of time and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under a form of contract designated either as a conditional sale, chattel mortgage or otherwise.

"(f) 'Retail seller' means a person, firm or corporation selling or agreeing to sell one or more motor vehicles under

a retail instalment contract to a buyer for the latter's personal use or consumption thereof."

In answering your question we will assume from the material you have supplied us that there are two methods by which banks in this state, both national and state, acquire retail instalment contracts on motor vehicles as follows: Method (1): A dealer sells a car for \$1,000 on a conditional sales contract payable in instalments over an 18-month period. The dealer then gives his note for \$1,000 to the bank and assigns the conditional sales contract to the bank as collateral and receives \$910 in return. If the purchaser of the car defaults in making payments on the conditional sales contract the bank may have recourse against the car or maker of the note. If the conditional sales contract is paid in full the note is marked paid in full. Method (2) A dealer sells the car on a conditional sales contract for \$1,000. The contract is then assigned by the dealer to a bank for \$910, without recourse. No note is given to or acquired by the bank and in the event the purchaser of the car defaults in making payments on the contract, the bank's only recourse is to sell the car or to take steps against the purchaser.

- (1) Applicability of the licensing provisions of sec. 218.01 Stats., to national banks.

National banks are instrumentalities of the federal government and are subject to the paramount authority of the United States. They are subject to nondiscriminatory laws of a state in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States. *First National Bank v. Missouri*, (1923) 263 U. S. 640, 68 L. ed. 486; *Lewis v. Fidelity & Deposit Co.*, (1934) 292 U. S. 559, 78 L. ed. 1425; *Anderson National Bank v. Luekett*, (1944) 321 U. S. 233, 88 L. ed. (Adv. Op). 499.

We have here a case where the state seeks to determine whether national banks which are engaged in acquiring retail instalment contracts on motor vehicles by purchase or discount are subject to the state law requiring sales finance

companies to be licensed before engaging in such business. The statutory definition of a "sales finance company" is broad enough to cover national banks engaged in such business and the only question is whether the state law is free to act under the circumstances or whether its operation is precluded by some provision of the National Bank Act or other federal law of paramount authority. *Jennings v. United States F. & G. Co.*, (1935) 294 U. S. 216, 79 L. ed. 869. The latter question must be answered here by an inquiry into whether in engaging in such business a national bank would be acting within the powers given to it by the National Bank Act. *First National Bank v. Missouri*, *supra*.

The extent of powers of national banks must be measured by the National Bank Act and they can rightfully exercise only such powers as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. Powers not conferred by congress are denied. *First National Bank v. Missouri*, *supra*; *City of Yonkers v. Downey*, (1940) 309 U. S. 590, 84 L. ed. 964.

The portion of the National Bank Act which is material here is sec. 5136, U. S. Rev. Stats., as amended (12 U.S.C.A., sec. 24) which, among other things, provides that a national banking association shall have power :

"Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *"

There would seem to be no doubt but that sec. 5136, U. S. Rev. Stats., gives a national bank power to acquire retail instalment contracts in the manner stated in method (1). If this method is followed the bank would in substance be making a loan to the dealer secured by the retail instalment contract which would clearly be within the power of a national bank. *Corn Exchange Nat. Bank v. Kaiser*, (1915) 160 Wis.

199; *Knowlton v. Fourth-Atlantic Nat. Bank.* (1928) 264 Mass. 81, 162 N. E. 356; *First Nat. Bank v. Harris*, (CCA 8, 1928) 27 F. (2) 117; *Lucas v. Federal Reserve Bank*, (CCA 4, 1932) 59 F. (2) 617.

We are also of the opinion that a national bank would have power to acquire retail instalment contracts in the manner outlined in method (2). The transaction contemplated by method (2) in substance amounts to a purchase of a retail instalment contract by the bank at less than the face amount of the contract. The weight of authority sustains the view that the power given national banks to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt by sec. 5136, U. S. Rev. Stats., includes the power to purchase commercial paper at less than its face value. See 9 C. J. S. p. 1259. 7 C. J. 818-19, and cases cited in Note 29; cases cited in Annotation in 24 U.S.C.A. p. 47. In *Steward v. Atlantic Nat. Bank*, (CCA 9, 1928) 27 F. (2) 224, promissory notes secured by bales of cotton owned by one bank were sold to the Atlantic National Bank. In an action by the latter bank against the maker of the notes it was claimed that the bank was not the owner and holder of the notes sued on since it purchased them from another bank; that a national bank may not purchase commercial paper or bring suit upon commercial paper purchased by it. The court said, page 228:

“* * * Such restriction would interfere with the purposes of their creation. It is much too narrow. Not only may such banks make loans or advances thereon, but it is held they may buy commercial paper at less than its face value. Rev. St. § 5136 (12 USCA §24); (citing cases)
* * *”

For other cases to the effect that the term “discount” or “discounting” includes a purchase as well as a loan, see: *Danforth v. National State Bank*, (1891) 1 CCA 629, 48 Fed 271; *Morris v. First Nat. Bank*, (1905) 73 CCA 211, 142 Fed. 25. In *Smith v. Exchange Bank of Pittsburgh*, (1875) 26 Oh. St. 141, the court said page 151:

“* * * In the business of banking, the purchasing and discounting of paper is only ‘a mode of loaning money.’

Niagara County Bank v. Baker et al., 15 Ohio St. 69; *Fleckner v. The Bank of the United States.*, 8 Wheat. 333."

In view of the above authorities we conclude that a national bank has power to acquire what is ordinarily considered commercial paper by purchase at less than its face value. The question still remains as to whether "retail instalment contracts" as defined in sec. 218.01 can be included among the various types of commercial paper which a national bank may purchase. We have not been furnished with copies of forms of chattel mortgages or conditional sales contracts actually used. However, if the transactions are carried out in the usual manner and the usual forms are used we are of the opinion a national bank may purchase retail instalment contracts. A retail instalment contract is defined so as to include both a chattel mortgage and conditional sales contract taken by a seller of a motor vehicle to secure the payment of the price which is to be paid in instalments over a period of time. If a chattel mortgage is given to the seller, the usual practice is for the buyer of the motor vehicle to execute a note payable in instalments or a series of notes secured by the chattel mortgage. In such event there could be no doubt as to the power of a national bank to acquire the note or notes and chattel mortgage by purchase at less than its face value. That would be an ordinary banking transaction. Further it should be noted that the usual form of chattel mortgage not only contains a recital by the mortgagor that he is indebted to the mortgagee in a certain amount but also contains a covenant to pay such sum. See Winslow's Forms of Pleading & Practice, (3rd Ed) §8302. Hence, even if there were an omission to execute a promissory note, the chattel mortgage might itself be considered as evidence of the debt. *Lierman v. O'Hara*, (1913) 153 Wis. 140.

If the seller takes a conditional sales contract from the buyer of the car the latter would by virtue of the provisions of the Uniform Conditional Sales Act which has been adopted in Wisconsin be liable to the seller, which includes an assignee of the contract, for the purchase price or instalments when they became due. Sec. 122.03, Stats. In the event of default by the buyer and if there is a deficiency upon a

resale of the goods, sec. 122.22, Stats., is applicable. It provides in substance that the seller may recover a deficiency against the buyer or anyone who has succeeded to the obligations of the buyer, in the event the proceeds of the resale are insufficient to cover the balance due upon the purchase price, together with expenses of the sale and other expenses. Therefore it would seem proper to conclude that the conditional sales contract would, of itself, be an evidence of debt.

Authority supporting the view that a chattel mortgage or conditional sales contract are "other evidences of debt" within the meaning of sec. 5136 U. S. Rev. Stats., even though in case of default, recourse could be had only against the chattel covered by the instrument, and not against the maker personally, is *National Bank of Commerce v. Francis*, (1922) 296 Mo. 169, 246 S. W. 326, certiorari denied, 261 U. S. 618. In that case a national bank purchased "notes" of the Allegheny Improvement Company secured by certain collateral. It was claimed that said "notes" contained no absolute promise by the maker to repay the money obtained therefrom and hence were not "promissory notes" or "evidences of debt" and that in purchasing them the bank engaged in an "illegal and *ultra vires* speculation." The court said, page 334:

"* * * We do not agree to this contention. We hold, it is true, that there was no absolute promise in said notes to repay the money, by the Allegheny Improvement Company, and the only recourse plaintiff had for such repayment, was upon the stocks and bonds of the railroad companies and other funds pledged to secure them. While said notes may not have been, strictly speaking, in every sense ordinary promissory notes, they were 'evidences of debt,' which the bank was allowed to discount. They were absolute promises to pay the money called for by them with interest out of the securities pledged to secure them and their purchase or discount by plaintiff was not a mere speculative adventure such as a direct purchase or subscription for stock in another corporation. * * *"

For the foregoing reasons we conclude that a national bank has charter power under sec. 5136 of the National Bank Act to acquire retail instalment contracts on motor

vehicles at less than their face value. Obviously imposition of the requirements of sec. 218.01, Stats., upon national banks would result in a direct interference with such charter power. That section, if applicable, would not only impose the requirement of a license (which may or may not be granted by the banking commission) as a condition to engaging in the business of discounting or purchasing retail instalment contracts, but in addition would make it a misdemeanor to engage in such business without a license and also would give the buyer of any motor vehicle a defense to any action on a retail instalment contract. There is ample authority to the effect that a state has no power to impose such restrictions which would result in such an interference with the charter powers of a national bank. *First National Bank v. Missouri, supra.*

It therefore follows that the provisions of sec. 218.01, Stats., prohibiting sales finance companies from engaging in such business in the state of Wisconsin without having obtained a license as therein provided are not applicable to national banks engaged in such business in the state of Wisconsin. *First National Bank v. Missouri, supra; Rushton v. Michigan National Bank, (1941) 298 Mich. 417, 299 N. W. 129.*

(2) Applicability of licensing provisions of sec. 218.01, Stats., to state banks.

The definition of "sales finance company" contained in sec. 218.01 (1) (d) is broad enough to include state banks engaged in acquiring "retail instalment contracts" on motor vehicles by purchase or discount, and we hold that state banks are prohibited from engaging in such business unless they have obtained a license as provided in sec. 218.01, Stats. The reasons why this section is not applicable to national banks engaged in such business are, of course, not applicable in case of state banks.

WET

Administrative Procedure — Motor Vehicle Department — Expenses of Hearings — There being no statute authorizing same, motor vehicle department may not charge expense incurred for court reporter's services in connection with license suspension or revocation hearing to party who does not prevail.

December 19, 1944.

B. L. MARCUS,

Acting Commissioner,

Motor Vehicle Department.

Your department has conducted several hearings under the rules of practice and procedure adopted pursuant to authority of ch. 227, Stats. These hearings were initiated by the filing of written verified complaints against persons licensed to do business in Wisconsin as motor vehicle dealers or motor vehicle manufacturers under sec. 218.01, Stats. The purpose of the hearings was to determine whether the licenses of such dealers or manufacturers should be suspended or revoked for cause in accordance with sec. 218.01 (3), Stats. Sec. 227.11, Stats., provides as follows:

“Each agency shall keep an official record of all proceedings in contested cases. Exhibits and testimony shall be part of the official record.”

Your department has incurred expenses in three such hearings for court reporter's services in reporting testimony taken, aggregating the sum of \$600.00.

You ask our opinion as to whether such expenses can be recovered from the parties who do not prevail in such proceedings.

Any such right of recovery must necessarily be founded upon statute. The right of hearing and duty to keep an official record are respectively created and imposed by statute. We find no statutory provision expressly covering the situation. There is a subdivision of ch. 218, Stats., which authorizes the department to recover certain expenses in connection with an *examination* or *audit* of a licensee's “perti-

ment books, records, letters and contracts . . . relating to any written complaint made to it against such licensee." Sec. 218.01 (3) (d), Stats. The phraseology of this section, however, appears rather clearly to relate to services in the nature of an auditor's or accountant's examination of books and records. And in such instances as it does apply, liability may be imposed upon only the licensee when he is found guilty of violating the statute or other lawful order of the licensor. In no event, even under this section, would a complainant, failing in his proof, be obliged to pay the cost of such examination.

We hold sec. 218.01 (3) (d) does not cover nor contemplate a court reporter's fee for services rendered during a formal hearing on suspension or revocation of any license your department is empowered to issue under ch. 218, Stats. Nor is there any other statute authorizing your department to collect such expenses from the party who does not prevail upon such hearing.

It would otherwise be a rather risky and unprofitable venture for a complainant to make a complaint were he obliged to stand the cost of a reporter's fee on failure to sustain the allegations of his complaint. The deterrent effect of such potential liability would, in our opinion, defeat the public interest sought to be protected by the encouragement the licensing law gives to those who would make complaint in writing and under oath. It would be comparable to imposing upon litigants in our courts of law the court reporter's fees, juror's fees, and other costs which are now spread over the entire body of taxpayers as a proper cost of government. Under such conditions the cost of justice would become prohibitive.

SGH

Automobiles and Motor Vehicles — Auto Registration —
Motor vehicles owned by the United States government and operated by auxiliary military police under command and authority of the commanding officer of Badger Ordnance Works, United States army, need not be registered under sec. 85.01, Stats.

December 19, 1944.

B. L. MARCUS,

Deputy Commissioner,

Motor Vehicle Department.

You request our advice as to the present necessity of compliance with a former opinion* of this office concerning the liability of the Hercules Powder Company for motor vehicle registration fees upon buses used to transport employes to and from the Badger Ordnance Works.

Following rendition of that opinion, and at the request of the ordnance department of the United States army, a meeting was held at this office attended by army officers and representatives of your office and of this office. Certain facts furnished us and relied on in our former opinion appear to be at variance with the facts established at the meeting. An official copy of the contract under which the Hercules Powder Company undertook to construct and operate the powder plant was furnished, and it was determined that the same was a "cost plus a fixed fee" arrangement, which had been concluded prior to the time when Hercules Powder Company assumed the duty of operation of the bus lines in question. Accordingly, it was satisfactorily demonstrated that the operation of the bus line was without profit to the powder company. The contract was in no manner altered when this added responsibility was assumed. The powder company acted merely as the government's disbursing agent in paying the salaries of the driver-employes out of a special trust fund.

The office of chief of ordnance, United States army, brought about the designation of the bus drivers as aux-

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iliary military police. We are informed they were sworn in as such and placed in uniform so identifying them. The vehicles are clearly marked as property of the United States government. The drivers were further placed under the command and authority of the commanding officer at the Badger Ordnance Works, who in turn appointed a member of the army of the United States as a so-called plant guard officer in direct charge of the operation of the buses.

Our considered opinion, based upon an examination of the contract which was not available to us when we first considered the question, and upon the change in status of the bus drivers, placing them under jurisdiction of the army, leads to the conclusion that the buses in question and referred to in our opinion of January 27, 1944 need not now be registered under sec. 85.01, Wis. Stats., for the reason that in our opinion they are operated by the United States government. The principles stated as controlling in our former opinion would not be applicable to the changed facts.

SGH

Minors — Probationer — Juvenile Court — Public Welfare Department — Sec. 57.05 (1), Stats., does not apply to children adjudged delinquent by the juvenile courts, nor is there any other statute authorizing the court to vest custody of such child in the department of public welfare while on probation under sec. 48.07 (1) (a). But by virtue of sec. 46.03 (11), the department's probation officers may accept custody of such juvenile probationers, in their individual capacity; however, this does not give the department any control of the probationers.

Sole power to discharge juvenile probationers from further supervision is in the juvenile court by virtue of sec. 48.01 (5) (b).

July 13, 1943.

A. W. BAYLEY,

Executive Secretary,

Department of Public Welfare.

You have submitted certain correspondence relating to a juvenile probationer with a request for an opinion thereon. It appears that the juvenile, aged 16, was found delinquent by the juvenile court of Bayfield county, that the court placed him on probation for the period of 2½ years and, according to a letter from the judge, probation was "with the state department of public welfare." However, the exact terms of the order of probation do not appear anywhere in the papers submitted. The probation officer now feels that the probationer is eligible for discharge from further supervision but the judge takes the position that he has no authority to discharge him, and that such authority is vested in the department of public welfare. You inquire as to where the power to discharge this probationer is vested, if it exists at all.

In the first place, there is no statute directly providing that the department of public welfare (or the former board of control) shall have any jurisdiction over juvenile court probationers. Sec. 57.05 (1) relating to probation of minors convicted of misdemeanors or felonies does not apply, first, because under sec. 48.07 (3) a child found to be delinquent

by the juvenile court is not considered a criminal nor is he deemed to be convicted of a crime, and second, because sec. 57.05 (1) expressly excludes from its provisions "a delinquent child as defined in section 48.01."

The only provision which authorizes the department to undertake any duties whatsoever in connection with juvenile court probationers is sec. 46.03 (11) which provides as follows:

"The board shall promote the enforcement of all laws for the protection of mentally defective, illegitimate, dependent, neglected and delinquent children, except laws whose administration is expressly vested in some other state department. To this end it shall co-operate with juvenile courts and all licensed child welfare agencies and institutions of a public or private character, and shall take the initiative in all matters involving the interests of such children where adequate provision therefor has not already been made or is not likely to be made."

The above-quoted statute has been considered sufficient to authorize probation officers employed by the department to supervise juvenile delinquents by way of "cooperating" with juvenile courts, but it certainly does not authorize the department to receive the custody of such probationers as it does under ch. 57, Stats., in cases of persons convicted of crime. Plainly the department has no such custody and has no jurisdiction to discharge the probationer as it might do in the case of an adult under sec. 57.03 (2). Sec. 46.04 (4), relating to the "Juvenile Department," does not vest any powers in the board of control (department of public welfare) but merely provides the means by which the board (department) may exercise powers and functions elsewhere by law delegated to it.

Sec. 48.07 (1) (a) provides as follows:

"(1) If the court shall find that the child is delinquent, neglected or dependent, it may:

"(a) Place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine;

* * *

The statute just quoted permits the court to place the child on probation upon such terms as the court shall determine and seems to infer that supervision of the probationer shall be vested in a "person." Whether that word as used in this statute might properly be construed as referring to anyone other than a natural person, it is clear that it does not include the department of public welfare, which is not a "person" in any sense of the word. The custody of the probationer must therefore be vested in the probation officer rather than in the department of public welfare, if the court desires to make use of the facilities of the department rather than place the child in the custody of some private person. However, the probation officer acting as custodian for the juvenile court has no more power to discharge the probationer than would any private person acting in a similar capacity.

Sec. 48.01 (5) (b) provides as follows:

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

This section is subject to some limitations, notably cases where the delinquent child has been committed to a state industrial school (see *In re Willard*, (1937) 225 Wis. 553) but nothing in the statutes contains any reason for holding that probationers may not be subject to the further order of the court and the section just quoted indicates that they may be discharged before reaching the age of 21. Since the power to discharge the delinquent is nowhere in the statutes vested in any one *but* the court—except in those cases of commitments to the industrial school, as to which the court held in the *Willard case* that the sole power to discharge the inmate prior to the age of 21 is in the department, not in the court—it must necessarily follow that only the court can discharge the probationer. That the court has power to *revoke* the probation and commit the child to the industrial school, see XXIV Op. Atty. Gen. 103.

It is therefore concluded that the department of public welfare has no authority to discharge juvenile court probationers and that such power is vested in the juvenile court by sec. 48.01 (5) (b).

WAP

NOTE: This opinion was omitted from the volume for 1943.

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