ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

* On military leave.
Automobiles and Motor Vehicles — Driver's License —
— Courts — Conviction of holder of restricted (occupa-
tional) motor vehicle operator's license for violation of re-
strictions requires mandatory revocation of all licenses, li-
cense plates and registration certificates. Court or judge
has no power to permit such person to retain occupational
license under sec. 85.08 (25c), Stats.

January 5, 1945.

B. L. Marcus,
Deputy Commissioner,
Motor Vehicle Department.

As the basis for your request for an opinion on the ques-
tion of law hereinafter stated, you give the following infor-
mation:

Donald Martin, Route #3, Stoughton, Wisconsin, was
convicted of operating a motor vehicle while under the in-
fluence of intoxicating liquor in violation of sec. 85.13, Wis.
Stats., before a justice of the peace. Your department was
notified of the fact of conviction in accordance with subsec.
(24) of sec. 85.08, Wis. Stats. An order was made by the
justice of the peace for issuance of a restricted license for
occupational purposes, which order was communicated to
you at the same time. You revoked Mr. Martin's unrestrict-
ed license and issued a restricted license for occupational
driving. Shortly thereafter the same licensee was convicted
in the superior court for Dane county upon a charge of violating his restrictions and was fined $25. The clerk of the superior court made a written report to you of the fact of such conviction, with the following noted on the report form: “Court permitted defendant to retain his occupational license.”

You thereupon consulted with this office respecting your duty in the premises, and were advised by letter as follows:

“It is our opinion that you are obliged to revoke all licenses of the licensee under the terms and provisions of sec. 85.08 (25c), Stats. **

“We believe you should follow your routine procedure and write a letter to Judge Proctor, calling his attention to sec. 85.08 (24) (a) **

“Your treatment of this particular case will necessarily depend on departmental policy.”

You apparently wrote to the judge, his reply being furnished to us in connection with your present request. It reads in part:

** I am unable to find any record of a formal opinion by the Attorney General construing this particular part of Section 85.08 (25c) of the Statutes. If one has been given I would appreciate receiving a copy of the same, but if none has been rendered I would like to suggest that you request one, particularly on the issue involved in this case. Upon receipt of such opinion I wish to assure you that we will make every effort to conform thereto.”

You accordingly ask our opinion as to whether a judge or justice may, by order, continue in force an occupational or restricted motor vehicle operator’s license following a conviction of the licensee of the offense of violating his restrictions.

In the absence of the judge’s request, we would not presume to undertake to advise in a matter pending before the court; but under the present circumstances are pleased to express our views if they will be of aid in disposing of a matter which you indicate is troublesome as an administrative problem.
We are of the opinion (1) that under sec. 85.08 (25c) you are under the mandatory duty to revoke all licenses, license plates and registration certificates held by a person convicted of the offense of violating the restrictions of his occupational or restricted motor vehicle operator's license; (2) that a court, or the presiding judge thereof, has no power to permit a person so convicted to retain his occupational driver's license; and (3) that the court is under the mandatory duty as prescribed by sec. 85.08 (24) (a), Wis. Stats., to require the convicted licensee to surrender all licenses, certificates of registration and license plates.

The pertinent portion of sec. 85.08 (25c), Wis. Stats., which is involved here, reads as follows:

"* * * In the event that an occupational licensee is convicted for operating in violation of his restrictions, a serious traffic violation, or the judge or justice does not, upon the facts, see fit to permit such person to retain such occupational license, the commissioner of the motor vehicle department shall, upon receipt of notice thereof, revoke all operators' and motor vehicle licenses of such licensee. Such revocation shall be effective as of the date of such violation, conviction or withdrawal order and shall continue with the same force and effect as other revocations made by the commissioner under subsection (25). Any person convicted for violation of any restriction of an occupational license shall in addition to the immediate revocation of such licenses be punished by a fine not to exceed $100 or by imprisonment in the county or municipal jail for not more than 6 months or by both such fine and imprisonment." (Emphasis ours)

Three conditions are specified disjunctively:

1. Conviction for operating in violation of restrictions;
2. Conviction of a "serious traffic violation";
3. Conclusion of the judge that—upon the facts—he does not see fit to permit such person to retain the occupational license.

Any one of these three conditions being satisfied gives rise to the duty of mandatory revocation. The contrary view would lead to a result which we believe was not intended by the legislature in view of a reading of sec. 85.08 (25), Stats., and the last sentence of sec. 85.08 (25c),
Stats., respecting mandatory revocations. A comparison of the effect of the contrary view upon two hypothetical sets of facts will demonstrate what we mean. Under sec. 85.08 (25) five offenses are enumerated which require mandatory revocation of a convicted operator’s license. Subsec. (b) of this section, relating to driving under the influence of intoxicating liquor, constitutes the only situation where, by virtue of sec. 85.08 (25c), the court has the power to grant an occupational license. This power is further limited to a first conviction within a period of 12 consecutive calendar months. State ex rel. Martin, Attorney General v. Superior Court, Circuit Court of Dane County, 1944. Assuming, therefore, that a person who holds the unrestricted operator’s license should be convicted of manslaughter, it must be conceded that his license would have to be revoked, and, not falling within exception (b), the court would be powerless to grant a restricted or occupational license.

Assume, as the second hypothesis, the foregoing to be facts, with this difference: that the same person, convicted of manslaughter, had an occupational or restricted license at the time of his offense, instead of the unlimited license. The result would be that the court could “see fit under the facts to permit defendant to retain his occupational license.” That would follow as a matter of logic, and the third contingency of the three in sec. 85.08 (25c) would place a so-called probationary driver in a more favorable position before the court than one who had no record for driving under the influence of intoxicating liquor.

The question may be asked as to what circumstances the legislature had in mind when it conferred the power on the court “not” to see fit to permit the licensee to retain his occupational license. We shall conjecture: Firstly, the granting of an occupational license is discretionary. The presiding judge may order the issuance of an occupational license. He fixes the restrictions. The licensee may have a series of minor traffic offenses, none of which constitutes a violation of restrictions and no one of which, taken alone, measures up to the second condition, that is, a “serious traffic offense.” Yet, “upon the facts” the trial court may properly conclude in retrospect that it was inadvisable to have given the particular licensee an occupational license, because the sum to-
tal of his offenses while under restrictions evidenced careless or negligent tendencies which may result in an accident. The holder of an occupational license enjoys the privilege by the judge's sufferance. He has no absolute right to it. The judge may, then, "upon the facts" not see fit to permit that person to retain his occupational license. The following is another example: An occupational licensee may be arrested for driving under the influence, admit having imbibed, and nevertheless be acquitted by a jury of driving under the influence. In such a case the court likewise may "upon the facts" not see fit to permit the licensee to retain his occupational license, despite the acquittal.

While sec. 85.08 (25c) may not be grammatically perfect, we feel the legislative intent is sufficiently clear when read in its entirety and in connection with sec. 85.08 (25), to which it is adjunct, to arrive at the conclusions stated.

SGH

Motor Carriers — Insurance — Tender of copy of policy of liability insurance for filing with motor vehicle department bearing endorsement disclaiming copy to be a contract of insurance, and asserting it to be merely an abstract of a policy as of date when abstract was prepared, that it conferred no rights on holder and imposed no liability on company, and was subject to cancellation without notice, does not constitute compliance by motor carrier with sec. 194.41, Stats. It is proper to disapprove of the form and to refuse to accept it for filing.

January 5, 1945.

B. L. Marcus,
Deputy Commissioner,
Motor Vehicle Department.

Attention Arthur Jack, Administrative Assistant.

You inquire whether the filing with your department by motor vehicle contract and common carriers of copies of insurance policies bearing the following endorsement constitutes compliance with sec. 194.41, Stats.
Opinions of the Attorney General

The endorsement reads:

"THIS IS A COPY OF THE COMBINED AUTOMOBILE POLICY NAMED BELOW ISSUED SEVERALLY BY THE WESTERN CASUALTY AND SURETY COMPANY AND THE WESTERN FIRE INSURANCE COMPANY

"This is not a contract of insurance; it is an abstract of the policy named below as said policy stood at the date this abstract was prepared, and is furnished on the condition that it is an abstract only, conferring no rights on the holder and imposing no liability upon the companies. Said policy is subject to endorsement, alteration, transfer, assignment or cancelation without notice to the holder and without the recall of this abstract."

Sec. 194.41 (1) and (3), insofar as pertinent here, reads:

"194.41 Undertaking for damage to person or property.
(1) No common carrier of property, or contract motor carrier, shall operate any motor vehicle for which a permit is required by this chapter unless it shall have on file with the motor vehicle department and in effect a good and sufficient indemnity bond, policy of insurance or other contract in writing in such form and containing such terms and conditions as may be approved by the department issued by a surety, indemnity or insurance company or exchange lawfully qualified to transact such business in this state under which such indemnitor shall assume the liability prescribed by this section with respect to such motor vehicle. *

"(3) No undertaking filed under the provisions of this section shall be limited as to the total liability of the indemnitor thereunder, for any series of accidents, and no such undertaking shall be terminated at any time prior to its expiration under the terms thereof, nor canceled for any reason whatever, unless there shall have been filed with the department by the indemnitor a notice thereof at least ten days prior to the date of such termination or cancellation."

It is our opinion that the filing of a copy of the policy bearing such endorsement does not comply with the requirements of the statute and that you may properly refuse to approve the same or to receive it for filing. The endorsement expressly negatives the statutory requirements. By the terms of the endorsement, the original policy may be
altered, transferred or cancelled without notice to the holder (your department) and without recall of the abstract. Unless the ten-day notice of cancellation provision were observed, you would have no means of knowing to a certainty that vehicles required by law to be insured were in fact insured.

SGH

Counties — Highways and Bridges — Secs. 83.07 and 83.08, Stats., do not authorize a county board or county highway committee to purchase lands for purpose of avoiding cost of providing highways and bridges to such lands.

January 10, 1945.

C. B. Carisch,
District Attorney,
Ellsworth, Wisconsin.

We are informed by your office that floods have washed out bridges and road bed of a certain county trunk highway and that the cost of repairs total some $80,000 whereas it would cost only about $47,000 to close the portions of the highway in question and purchase all of the lands immediately served by those portions of the highway which will be discontinued.

A petition has been filed with the county highway committee for the discontinuance of the damaged portions of the highway and copies of resolutions by the county board and county highway committee with respect thereto have been sent to us for our opinion as to their validity.

No copy of the petition by 10 or more freeholders of each town affected, as required by sec. 80.39 (1) (a), Stats., was included in the material sent to us and we are therefore assuming that such petition or petitions were in proper order and are not in question.
Sec. 80.39 (1) (a) sets up the county board's authority to effect such highway discontinuance and provides that all the powers therein granted may be exercised by a committee of not less than three members of the board. It appears that your highway committee has three or more members and hence qualifies to exercise the powers of the county board under the above section when properly authorized so to do. County board resolution No. 34, of which we have a copy, grants such authorization and appears to be valid as to the discontinuance of the portions of the highway therein described.

Secondly, you inquire as to the authority of the committee to purchase lands adjoining the portion of the highway proposed to be discontinued in order to avoid a possible future demand by the owners of such lands that they be provided with a public highway as a means of ingress and egress.

In XXV Op. Atty. Gen. 379 this office ruled that a county has only such powers as are given by statute and cannot purchase lands for the purpose of avoiding the cost of providing bridges, highways, etc. to such lands.

This disposes of the second question, as well as the third question, which relates to the resale of such lands by the county.

While it is true that the above opinion does not specifically discuss secs. 83.07 and 83.08, which empower the county highway committee to acquire lands deemed necessary for highway changes, it is obvious that no land is required in the situation under discussion for purposes of discontinuing a portion of the highway. The only possible purpose is to avoid the cost of providing bridges and highways for the lands purchased.

In this connection your attention is called to sec. 60.18 (14) which specifically authorizes town boards to purchase lands so as to avoid the expense of constructing and maintaining roads, bridges and other means of access thereto. Similar legislation would be required to vest a like power in the county board.

WHR
Conservation Wardens — Mileage — Witness Fees —

Conservation wardens when making arrests with warrants are entitled to the same fees for mileage as sheriffs or constables, to be paid into the conservation warden pension fund pursuant to sec. 23.14 (2), Wis. Stats., but are entitled to no fees for mileage or reimbursement of traveling expenses as costs in cases where arrests are made without warrants.

Conservation wardens are not entitled to witness fees in cases where it is their duty to prosecute and act as witnesses.

January 11, 1945.

E. J. Vanderwall,
Conservation Director,
State Conservation Department.

You state that conservation wardens at times are denied the fees provided by statute in making arrests for violations of the fish and game laws. Under sec. 23.14 (2), Wis. Stats., these fees are required to be paid into the conservation warden pension fund and for purposes of clarification you have asked for our opinion on four questions.

The first question is as follows:

1. Assuming under the law that conservation wardens are entitled to fees where acting on violations of the fish and game laws, may such wardens charge mileage fees both to and from the point of arrest to the place of arraignment where the arrest is made with or without a warrant?

In XX Op. Atty. Gen. 568 the opinion was expressed that conservation wardens are entitled to charge the same mileage as any sheriff or other ministerial officer because of sec. 271.45 which provides:

"When a fee is allowed to one officer the same fee shall be allowed to other officers for the performance of the same services, when such officers are by law authorized to perform such services."
It was pointed out that under sec. 59.28 (27) the sheriff is allowed 10 cents per mile for every mile actually traveled to serve a criminal process and that under sec. 60.55 (10) a constable is allowed 10 cents per mile for each mile actually traveled, going and returning, to serve such process. It was concluded that the same mileage is payable to conservation wardens in view of sec. 29.05 (1), which provides:

"The state conservation commission and its deputies are hereby authorized to execute and serve all warrants and processes issued by any justice of the peace or police magistrate or by any court having jurisdiction under any law relating to wild animals, in the same manner as any constable may serve and execute such process; and to arrest, with or without a warrant, any person detected in the actual violation, or whom such officer has reasonable cause to believe guilty of the violation of any of the provisions of this chapter, and to take such person before any court in the county where the offense was committed and make proper complaint."

As indicated, the foregoing opinion answers your first question except that it does not go into the problem of whether or not such fees are payable where the arrest is made without a warrant.

Attention is called to XXX Op. Atty. Gen. 488 in which it was ruled that a constable is not entitled to mileage under sec. 60.55 (10) for arresting a person without a warrant and conveying him to the county jail for safekeeping pending issuance of a warrant, but that he is entitled to mileage for a round trip subsequently made to jail to serve the warrant. Also it was pointed out that with respect to the first trip to jail without a warrant the constable would be entitled under sec. 60.55 (22) to his necessary and actual disbursements, if any, in transporting the prisoner to the county jail provided a warrant was later issued and that if he used his own automobile for such purpose he might be reimbursed for the cost of gasoline and oil allocable to such trip.

This opinion is applicable to the extent only that it holds that no fees for mileage are payable for arresting a person
without a warrant, but that portion of the opinion relating to receipt of necessary disbursements under sec. 60.55 (22) is not applicable for the reason that sec. 271.45, which has the effect of placing a conservation warden on the same basis as a sheriff or constable so far as allowance of fees is concerned, makes no mention of disbursements. Moreover such disbursements under sec. 60.55 (22) are "to be settled by the county board," there apparently being no statutory machinery whereby such items could be included and allowed as costs in criminal trials following arrests. It might be added, however, that nothing said here is intended to alter the rights of conservation wardens to be reimbursed by the state for traveling expenses necessarily incurred in the performance of their duties the same as in the case of other state officers and employes.

Thus, by way of summary, the answer to your first question is that conservation wardens when making arrests with warrants are to be allowed exactly the same fees for mileage as sheriffs or constables, to be paid into the conservation warden pension fund as provided by sec. 23.14 (2), but that no fees or disbursements for traveling expenses of the conservation wardens are to be allowed and taxed as costs in those cases where arrests are made without warrants.

The second question reads:

2. May a conservation warden charge mileage fees when he makes an arrest in the field and orders the violator to appear in court on a later date?

The answer is no. The discussion given in answering the first question sufficiently sets forth the reasons.

The third question is as follows:

3. If a conservation warden transports the accused to the court is he entitled to transportation fees in addition to mileage fees?

The answer is no, for the reasons set forth above.

The fourth question reads:
4. Is a conservation warden entitled to witness fees where the trial of the accused is postponed and the warden is required to appear at a later date as a witness?

The answer is no. In XXX Op. Atty. Gen. 214, 215, we said:


See also XIV Op. Atty. Gen. 78.

Hence, assuming it is the official duty of the warden to prosecute and act as a witness he is entitled to witness fees neither on the original date set for trial nor on the adjourned date.

We appreciate the fact that sec. 23.14 (2) requires wardens to turn over to the conservation warden pension fund "all witness or other fees." However, we do not construe this as changing the general rule of law above set forth to the effect that an officer is not entitled to witness fees where it is his duty to prosecute and act as a witness in the performance of his official functions, although it is clear that if the warden should receive a witness fee, whether properly or improperly, in a game law violation case, he may not keep the same but must pay it into the conservation warden pension fund.

WHR
Counties — Treasurer — XXV Op. Atty. Gen. 52 is dis-approved. A county treasurer may not properly certify his conclusion based upon an examination of records in his office as to the state of tax payments on a particular parcel of land.

January 15, 1945.

M. J. McDonald,
District Attorney,
Balsam Lake, Wisconsin.

Apparently it is the practice of the Federal Land Bank of St. Paul to submit yearly to your county treasurer a document which reads in part:

"CERTIFICATE OF TAX OFFICER

"I hereby certify to The Federal Land Bank of St. Paul that there are no unpaid delinquent taxes against the land described on the reverse side of this sheet, according to the records of the office of the County Auditor, Treasurer, of County, except as indicated below."

The treasurer is requested to indicate on the document whether taxes on property referred to therein have been paid. He is then requested to certify as to the state of tax payments in accordance with the certification to which reference is made. You desire to be advised as to whether the treasurer is required to make the certification or whether, if not required, he may do so in a private capacity.

Several years ago this office expressed an opinion reported in XXV Op. Atty. Gen. 52 that a county treasurer was required to make "certified copies of unpaid taxes" upon request. Apparently it was thought that a certified copy of unpaid taxes constituted a statement in the nature of a certification as to the state of tax payments on a particular piece of property. Thus, the opinion would seem to indicate that a certificate of the character submitted to your treasurer should be executed. However, we do not agree with the opinion, and we would advise the treasurer that he should not issue such a certification.
The opinion in question was based upon the provisions of secs. 328.11 and 59.20 (9), Wis. Stats. The section first cited provides that the tax records in the office of the county treasurer shall be received as presumptive evidence of the facts stated therein. It also provides that a transcript of any record relating to "the assessment or sale for taxes of any parcel of land in any specified year or years" certified in a prescribed form shall be received in evidence with the same effect as the original document. Sec. 59.20 (9) provides that the county treasurer shall deliver to any person on demand upon payment of lawful fees a certified copy or transcript of any document or record and make any certificate which by law is declared to be evidence. Apparently the writer of the opinion felt that a certificate as to the state of tax payments was declared to be evidence by sec. 328.11 and that the treasurer was required to make it under the provisions of sec. 59.20.

Whatever the writer had in mind as to what constituted a "certified copy of unpaid taxes", we are quite sure in our own mind that sec. 328.11 does not provide for a certification by the treasurer as to the state of tax payments on any particular parcel of land. That section provides only for a certification of documents or records or books on file in the treasurer's office, which relate to the assessment of taxes or sales for taxes. It requires no testimony in the nature of a certification by the treasurer as to the state of tax payments. It merely provides for the introduction of the treasurer's records otherwise required to be kept.

We are of the view that the only duty the treasurer has in the matter of certifying with respect to taxes is to certify with respect to any records in his possession relating to taxes imposed upon any particular parcel of land. That is an entirely different matter than a certification in the nature of a conclusion as to what his records disclose.

Since the treasurer is not required to make such a certification, he is not empowered to make it in his official capacity. The statutes defining the treasurer's duties constitute the limit of his authority to act officially. No fees are provided for any such service and it is not contemplated
that it shall be furnished. He may make no such certification in an official capacity and obviously he cannot furnish such service in a private capacity and purport to act in an official capacity.

JWR

Loans — Interest — Banking Commission — 1. Holders of permits under sec. 115.07 (3a), Stats., do not have power to make loans secured by real estate mortgages and impose the charges for examinations, etc., authorized by sec. 115.07 (3) in addition to interest at legal rate. The word "property" as used in the term "chattel goods or property" as it appears in sec. 115.07 (3) means personal and not real property.

2. Permit holders under sec. 115.07 (3a) who charge interest on loans at the maximum legal rate are not required to refund any portion of the interest charge or any of the charge permitted by sec. 115.07 (3) in full for all examinations, etc., when one or more instalments on a loan are paid in advance.

3. Where a loan is made for a period of 6 months payable in six monthly instalments, the charges permitted by sec. 115.07 (3) in full for all examinations, etc., in addition to lawful interest may be made but once and no additional such charge may be made upon renewal of the loan.

4. Permit holders engaged in making loans under sec. 115.07 (3) are required to clearly express the rate of interest in writing where the interest charge exceeds $6 per $100 for 1 year and does not exceed $10 per $100 for 1 year.

5. In stating the rate of interest in writing as required by sec. 115.04 in case of loans made under sec. 115.07 (3) it is not necessary that the contract contain a break-down showing the total amount of interest and charges which a borrower is required to pay or the amount of interest or charges included in each instalment, unless it is necessary to do so to clearly express the rate.
6. If a lender licensed under secs. 115.07 (3), 115.09 and ch. 214 originally makes a loan under sec. 115.07 (3), it must be renewed under sec. 115.07 (3) and may not be renewed under either sec. 115.09 or ch. 214 if the renewal is considered a continuation of the prior obligation. If the parties agree that by the transaction the old obligation be discharged and a new one created, a lender licensed under all three may make the new loan under either secs. 115.07 (3), 115.09 or ch. 214, provided all provisions of the particular statute under which the new loan is made are complied with.

7. Where loans are made either under secs. 115.07 (3), 115.09 or ch. 214, the lender may not receive any commission on insurance which the borrower must obtain on the property which constitutes security for the loan.

8. Sec. 115.09 limits the amount which a licensee under said section may loan to one person to a sum not to exceed $1,000. It is unlawful for such a licensee to loan a sum in excess of $1,000 to one person by taking the discount authorized by sec. 115.09 (1) on the first $1,000 of the loan and charging interest at the maximum legal rate of 10 per cent per annum on the balance.

9. A lender licensed under sec. 115.09 may at the time of extending a loan made under said section which has become delinquent, deduct the 10 per cent maximum discount if the parties agree that the old obligation be discharged and a new one created. If the parties do not so agree so that the extension of the loan is considered the carrying on of the old obligation, such licensee is limited to charging simple interest on the delinquent balances at the statutory rate of 6 per cent unless the contract provides interest may be charged at a different rate, which may not exceed the maximum legal rate fixed by sec. 115.05.

10. A licensee under sec. 115.09 may not contract for or charge a delinquent borrower any fee or charge for collection expenses, delinquency or repossession fees except such as may be allowed in event of judgment or in other cases provided for by statute, and further except interest which may be charged on the delinquent balances at the statutory rate of 6 per cent unless the contract calls for a
different rate which in any event cannot exceed the maximum legal rate of 10 per cent per annum.

11. The provisions of sec. 115.09 (8) (a) requiring that the licensee deliver to the borrower at time a loan is made a statement containing among other things a statement of the interest charged, require that it be stated in percentage so as to show the actual rate charged per annum on the amount of money actually received by the borrower and not in terms of discount.

12. Where a loan made under sec. 115.09 which is secured by a chattel mortgage is paid in full, the licensee making the loan is required to execute and deliver a release or satisfaction to the mortgagor or borrower but is not obliged to file it with the register of deeds or pay the fee for recording or filing it. The duty to file the release or satisfaction and to pay the fee is imposed by secs. 241.17 and 59.57 (12) upon the mortgagor. Same question also considered where loan is secured by real estate mortgage.

January 18, 1945.

BANKING COMMISSION.
Attention Mr. E. W. Tamm, Commissioner.

You have submitted to us for answer a number of questions which arise in cases where loans are made by lenders licensed under provisions of secs. 115.07 and 115.09, Stats.

(1) Questions under sec. 115.07.

To assist in understanding of the questions submitted under sec. 115.07 we first refer to such portions of said section as are material thereto. Subsec. (3a) of sec. 115.07 provides in effect that before any person, association, partnership or corporation shall engage in business under the pro-
visions of that section a permit must first be obtained from the banking commission which is invested with the supervision of such organizations. Subsec. (3) of sec. 115.07 limits the amount of certain charges which may be imposed by one who loans money secured by chattel mortgages and other security in addition to interest at the maximum lawful rate. This subsection provides in part:

"* * * when the payment of the money loaned shall be secured, or purport to be secured, or claimed by the payee of said loan to be secured, by chattel mortgage, bill of sale, pledge, receipt or other evidence of debt upon chattel goods or property, or by assignment of wages, or by power of attorney to execute any such instrument on behalf of the borrower, whether any such instrument or the power given to execute the same, shall be valid or not, or whether any such instrument or power shall be fully executed or executed partly in blank, any person who, as principal or as agent for another, shall ask, demand, or receive, take, accept or charge, in addition to the interest aforesaid, more than an amount equal to seven per centum per annum of the original sum actually loaned for the time of such loan, on sums of a hundred dollars or less, nor more than four per cent per annum of the original sum actually loaned for time of such loan, on sums over one hundred dollars, disregarding part payments and the dates thereof, but not to be computed for a period exceeding one year in any event, in full for all examinations, views, fees, appraisals, commissions, renewals and charges of any kind or description whatsoever in the procuring, making and transacting of the business connected with such loan, shall be guilty of a misdemeanor * * *"

We now turn to the various questions submitted by you as follows:

Question 1: Do the provisions of sec. 115.07 (3) authorize holders of permits issued under sec. 115.07 (3a) to make loans secured by real estate mortgages?

Answer: By your question we assume that you intend to ask whether holders of permits issued under sec. 115.07 (3a) have power to make loans secured by real estate mortgages and impose the charges for examinations, etc., per-
mitted by sec. 115.07 (3) in addition to interest at the maximum legal rate, since we would assume that anyone, whether the holder of a permit or not, could make loans secured by real estate and charge as interest any amount which would not exceed the maximum rate provided by sec. 115.05. The answer to your question depends upon the meaning of the words “chattel goods or property” as used in sec. 115.07 (3). Where a statute contains words relating to a particular person or specific subject followed by general words, the settled rule of statutory construction requires that such general words be restricted to persons or subjects of the same genus or family to which the particular person or specific subject belongs. Thornapple v. Callahan, (1943) 244 Wis. 266. Applying this rule here the word “property” as used in this subsection must be construed to mean personal property and not real property. Therefore, the answer to question 1 is “No.”

Question 2: Are permit holders under sec. 115.07 (3a) who charge interest on loans at the maximum legal rate as provided by sec. 115.05 required to refund any portion of the interest charge when one or more instalments on a loan which include both principal and interest are paid in advance?

Answer: As you state in your letter, the statute is silent as to whether there should be any refund. Assuming there is no provision to the contrary in the contract between the parties, we are of the opinion that no refund of interest need be made when such instalments are paid in advance. A previous opinion of this department so holds although it notes that because of express statutory provision the rule in cases of loans under sec. 115.09 would be otherwise. XXIV Op. Atty. Gen. 90 at 94. The general rule is that a debtor has no right to accelerate the time of payment of an amount to be paid under a contract without consent of a creditor. The creditor has the right to insist that the obligation be paid on the due date and cannot be compelled to accept payment prior thereto. See annotations in 17 Ann. Cas. 151; 17 A. L. R. 863. However, it is equally well settled
that a creditor may waive such right. *Pyross v. Fraser*, (1909) 82 S. C. 498, 64 S. E. 407, 17 Ann. Cas. 150, 23 L. R. A. (n. s.) 403, 129 Am. St. Rep. 901. Therefore, in event a borrower offers to pay an instalment on a loan in advance of the due date, the lender has the right, assuming there is no provision to the contrary in the contract, to either reject or accept such payment. He would also have as an incident to his absolute right to reject an offer to pay in advance, the right to impose any condition not prohibited by law under which he would accept a premature payment. Thus, a lender could inform his debtor he would accept a premature payment provided the borrower pay him the full amount of principal and interest which would be payable on the due date. In event the debtor did not wish to comply with such condition, the lender could simply insist upon payment according to the conditions of the contract. In your question you assume a case where the borrower pays an instalment on a loan in advance. Under normal circumstances the probabilities are that the borrower would tender and the lender would accept the payment without comment. Under such circumstances it is our opinion that the lender has waived his right to accept payment of the instalment on the due date but his acceptance of the full amount of the instalment would negative any intention on his part to waive the right to receive the amount of interest which would have been due had the instalment been paid on the due date. In substance, the borrower has under such circumstances offered to pay the full amount of the instalment in advance and the lender by accepting such offer agrees to accept the premature payment only on the condition offered, which is receipt of the entire amount which would be paid in event the instalment were paid on the due date.

The above conclusion finds support in the fact that where loans are made under sec. 115.09 it is specifically provided by statute that every licensee under said section must permit the borrower to make payments on the loan in whole or in part prior to maturity with interest on the payment to date thereof and also provides in event of prepayment of the loan, the lender shall refund to the borrower the unearned portion of the discount deducted at time of making
the loan in lieu of interest. Sec. 115.09 (1), (8) (c). There are no similar provisions in sec. 115.07 (3).

There remains the question of whether premature payment of an instalment on a loan made at the maximum legal rate of interest will make the contract usurious. In our opinion the answer must be in the negative provided the parties act in good faith and do not use the transaction as a cloak to evade the usury law. Randall v. Home Loan & Investment Co., (1944) 244 Wis. 623. If the premature payment results in causing the interest charge to exceed the maximum legal rate because it then becomes a charge for a longer period than that for which the principal has actually been withheld, the transaction is not usurious under the rule that an agreement to pay excessive interest upon a contingency is not usury where the contingency is under the debtor's control. 66 Corpus Juris 202; Compare Randall v. Home Loan & Investment Co., supra. A premature payment must be regarded as being under the debtor's control because it would be made only by his voluntary act, as under the law he could not be compelled to make it.

Question 3: Are permit holders under sec. 115.07 (3a) required to refund any portion of the charge permitted under sec. 115.07 (3) when one or more instalments are paid in advance?

Answer: This again is a matter about which the statute is silent. For the reasons given in our answer to the previous question it is our opinion that no refund of any charge made under sec. 115.07 (3) need be made when one or more instalments are paid in advance. Further, the charge authorized by sec. 115.07 (3) includes all expense for examinations, views, fees, appraisals, commissions, renewals and all other charges. The first five types of service enumerated are ordinarily rendered at the time the loan is made. Hence the charges for them may be considered as "earned" at that time and it would seem doubtful in principle whether a refund of a portion of such charge should be required in event one or more instalments on a loan are paid in advance.
Question 4: Where a loan is made for a period of 6 months payable in six monthly instalments, may the lender when renewing the loan for an additional 6 months again charge the fees or charges of 7 per cent on the first hundred dollars loaned and 4 per cent on sums in excess of one hundred dollars permitted by sec. 115.07 (3) in addition to lawful interest, for examinations, views, fees, appraisals, etc., on that portion of the loan that is renewed, provided the fees or charges (original plus renewal) are not computed for a period exceeding 1 year, or is the lender limited to the fees or charges on the original loan with no additional charge for the renewal?

Answer: In our opinion sec. 115.07 (3) limits the lender to the original fee or charge and there may be no additional charge for the renewal. In an opinion of this department appearing in XXIX Op. Atty. Gen. 10 it was squarely held that the charges permitted by sec. 115.07 (3) in addition to lawful interest, may be made but once and no further such charges may be made upon any renewal of the loan, to which opinion we here adhere.

Question 5: Where a loan is made and the charges permitted by sec. 115.07 (3) imposed together with interest at the rate authorized under sec. 115.05 is the contract required to clearly express such rate in writing where the interest charge exceeds $6 per $100 for 1 year?

Answer: Parties to a loan may contract for payment of interest at a rate to exceed $6 per $100 for 1 year but not to exceed $10 per $100 for 1 year, provided the rate in excess of $6 per 100 "be clearly expressed in writing." Sec. 115.04. Thus if the maximum rate of interest authorized by sec. 115.05 is charged, the rate must be clearly expressed in writing. Sec. 115.04. Therefore, where loans are made under sec. 115.07 (3) and a rate of interest in excess of $6 per $100 for 1 year is charged as provided by said section in the amount authorized by sec. 115.05, the contract must contain a clear statement of the rate of interest charged. We do not find any similar requirement in the statute respecting fees
charged under sec. 115.07 (3) and in the absence of such requirement hold that the amount of such fees need not be stated in the contract unless the lender desires to do so in order to avoid any possible difficulty under the parole evidence rule or to comply with any other provision or requirement of law requiring the contract to be in writing.

Question 6: In stating the rate of interest as required by sec. 115.04 is it necessary that the written contract contain a break-down showing (a) the amount of interest and charges which the borrower is required to pay (b) the amount of interest and charges included in each instalment to show the amount of balance due on the loan (including interest, charges and principal) and to show how much of each individual instalment is applied to each?

Answer: The only requirement contained in sec. 115.04 is that when the rate exceeds $6 on each $100 for 1 year and does not exceed $10 on each $100 for 1 year it “shall be clearly expressed in writing.” In Randall v. Home Loan & Investment Co., (1944) 244 Wis. 623, the court said the rate may be stated either in dollars or in percentage; that in whatever form stated, the rate should be separately stated and not included in the monthly instalment due on principal. In the case cited the monthly instalment which included payments on principal and interest was $22.22 but the interest rate was not separately stated and it was to this the court was referring. It is our opinion that all the written contract need contain is a clear statement of the rate of interest (where it exceeds $6 on each $100 for 1 year and does not exceed $10 on each $100 for 1 year) and that there is no requirement that the written contract contain a break-down showing either the total amount of interest and charges which a borrower is required to pay or the amount of interest or charges included in each instalment unless it is necessary to do so to clearly express the rate in writing.

Question 7: Do the provisions of sec. 115.07 (3) preclude a lender who holds separate licenses to operate under
sec. 115.07 (3), 115.09 and ch. 214, from renewing a loan originally made pursuant to sec. 115.07 (3), under either sec. 115.09 or ch. 214?

Answer: The law in Wisconsin is well settled that a renewal by giving a new note or extension of time in which to pay a pre-existing debt is not a discharge of the old and original obligation and creation of a new obligation, but a mere carrying on of a prior obligation unless and except it appears that the parties agreed it should be a destruction of the old and the creation of a new obligation. In re Beaver Drainage District, (1944) 244 Wis. 603 and cases cited. If the renewal is considered as a continuation of the prior obligation, and is originally made pursuant to sec. 115.07 (3) we are of the opinion the renewal would necessarily have to be made under that section. To hold otherwise would result in endless confusion. If, however, the parties agree that a new obligation be created, we see no reason why a lender (assuming he holds separate licenses to operate under sec. 115.09 and ch. 214 as well as 115.07 (3) ) could not make the new loan under the provisions of secs. 115.07 (3), 115.09 or ch. 214, provided that all requirements of the particular statute under which the new loan is made are complied with.

Question 8: You advise that frequently in consummating loans the lenders require that property offered as security therefor be protected by a reasonable amount of insurance. You further advise that in many cases the lender is an insurance agent and thereby receives a commission on the insurance and inquire whether in making loans and imposing charges authorized by the provisions of secs. 115.07 (3), 115.09 (1) and 214.14 (6) such subsections prohibit the lender from receiving such a commission in addition to the maximum fee or charge which may be made under such sections.

Answer: In answering this question it will be assumed that the maximum legal rate of interest is charged on the loan; that the requirement of insurance is made in good faith and the premiums charged are not in excess of what
is usually charged and that such requirement is not imposed with intent to evade the usury laws. Otherwise the entire transaction would be usurious. Friedman v. Wisconsin Acceptance Corp., (1927) 192 Wis. 58.

We will first answer the question insofar as it relates to loans under secs. 115.07 (3) and 115.09 (1). We have previously quoted from that portion of sec. 115.07 (3) which is material here and which provides in effect that the amount (which is therein specified) which may be charged in addition to interest shall be "in full for all examinations, views, fees, appraisals, commissions, renewals and charges of any kind or description whatsoever, in the procuring, making and transacting of the business connected with such loan." Sec. 115.09 (1) provides in substance that it shall be lawful to make loans to persons not to exceed $1,000 and in lieu of interest to deduct therefrom at the time of making such loan a discount not to exceed $10 upon each $100 for each year "including all fees and charges."

In our opinion the answer to this question must be in the affirmative with respect to loans made under the provisions of secs. 115.07 (3) and 115.09 (1). In an opinion of this department appearing in XXIX Op. Atty. Gen. 10, it was held on authority of the case of Friedman v. Wisconsin Acceptance Corp., (1927) 192 Wis. 58 that in cases of loans made under sec. 115.07 (3) a loan made at the maximum legal rate was not rendered usurious because the lender required the borrower to furnish a reasonable amount of insurance on the property pledged as security for the loan. Referring to that case it was stated in this opinion (pp. 12-13):

"* * * The court stated that by the weight of authority where the insurance contract was entered into in good faith and where the evidence does not disclose the exaction of a higher premium than what is usual or customary, the charge is considered a proper one and not in violation of the usury law. An examination of the cases indicates that in the event that the insurance requirements in a particular case are unreasonable or unusual, or where the lender directly or indirectly receives a profit out of the insurance transaction, such requirements will not be permitted. * * *"

"* * *"
The above statement was made with reference to loans made under sec. 115.07 (3), but the same rule would also be applicable with respect to loans made under sec. 115.09 (1). It is apparent from the facts contained in question 8 that the lender would receive a direct commission out of the insurance transaction and hence we hold in conformity with our former opinion that secs. 115.07 (3) and 115.09 (1) prohibit a lender from receiving a commission on insurance written to insure the property pledged to secure a loan made under either section.

A similar conclusion must also be reached regarding loans made under the provisions of ch. 214. XXV Op. Atty. Gen. 1. This is plain from the provisions of sec. 214.14 (6) Stats., which provides in part as follows:

"No licensee shall, in addition to the interest or charge herein provided, directly or indirectly charge, contract for or receive any other charge or amount whatsoever for any examination, service, brokerage, commission, expense, fee, bonus or other things or otherwise. * * *

(2) Questions under sec. 115.09.

Question 1: May one licensed under sec. 115.09 make a loan of $1,500 to be repaid in 12 equal monthly installments and charge the borrower the discount rate provided under sec. 115.09 (1) on $1,000 of the loan and interest at the maximum lawful contract rate of 10 per cent per annum on the remainder or is the amount that such licensee may loan to one individual limited to $1,000?

Answer: In our opinion the amount which one licensee can loan to one individual must be limited to $1,000. Sec. 115.09 (1), Stats., provides in part:

"It shall be lawful to loan money directly to any person, persons, copartnership, or corporation in sums not to exceed one thousand dollars, repayable in equal weekly, semi-monthly or monthly installments and in lieu of interest, to deduct therefrom at the time of making such loan a sum not to exceed ten dollars upon each one hundred dollars for
each year including all fees and charges, or a discount in the same proportion on fractional parts or multiples thereof;

We find nothing in sec. 115.09 which would justify the type of loan or procedure suggested in your question. Obviously such a loan must be considered a single loan and it cannot be split up in parts. The plan suggested seems clearly to be one to avoid the limitations imposed by sec. 115.09 (1). This cannot be done. If one desires to exercise the privileges of a license under sec. 115.09 one must also accept the limitations imposed by that section, one of which is that a loan to any one individual must not exceed $1,000. Such a limit must be observed by licensees under sec. 115.09 and they cannot avoid it by splitting up a loan in a manner suggested by your question even though two or more notes are executed, since the entire transaction is a single transaction and must be viewed in its entirety. We regard a loan made as outlined in your question, not only as an attempt to evade the requirements of sec. 115.09 but also one which may well be usurious and in violation of sec. 115.09 (9), which provides in part as follows:

"No person, copartnership or corporation, except as authorized by this section and chapter 214 of the statutes, shall directly or indirectly charge, contract for or receive any interest or consideration greater than ten per centum per annum upon the loan, use or forbearance of money, goods or things in action, or upon the loan, use or sale of credit. The foregoing prohibition shall apply to any person * * * who by any device or pretense of charging for his services or otherwise seeks to obtain a greater compensation than is authorized by this section. No loan for which a greater rate of interest or charge than is allowed by this section has been contracted for or received, wherever made, shall be enforced in this state, and every person in anywise participating therein in this state shall be subject to the provisions of this section."

Where a borrower desires a loan which will net him cash in hand in amount of $1,500 for one year to be repaid in 12 monthly instalments and $100 is deducted on $1,000 of the loan and the maximum legal rate is charged in advance on
the remaining $600, the borrower would pay a charge of $132.50 on the loan and hence would, in substance, be paying interest at the rate of 18.09 per cent per annum for the $1,500 actually received, and under such circumstances it would seem there would be probable ground for not only claiming that the transaction is in violation of the usury statute (secs. 115.05, 115.07) but also in violation of sec. 115.09. See XXII Op. Atty. Gen. 836.

Question 2: May the lender, at the time a delinquent loan made under sec. 115.09 is extended, again deduct the 10 per cent maximum discount, or is such licensee limited to charging interest on the balance at the maximum legal rate of 10 per cent per annum?

Answer: The answer to this question would seem to depend largely upon the agreement of the parties at the time the loan is renewed. As previously stated, the law in Wisconsin regards the giving of a new note or an extension of time to pay a pre-existing debt as a carrying on of the old obligation unless the parties agree that it should be a discharge of the old and the creation of a new obligation. In re Beaver Drainage District, (1944) 244 Wis. 603. Therefore, if a loan is extended or renewed without any agreement that the existing obligation be discharged and a new one created, we are of the opinion the lender can thereafter charge on each delinquent instalment or instalments simple interest at the statutory rate of 6 per cent unless the contract between the parties provides that interest be charged at a higher rate, not to exceed the maximum legal rate fixed by sec. 115.05. XXII Op. Atty. Gen. 836. If the parties agree that there be a discharge of the old and a creation of the new obligation, we are of the opinion that the discount provided by sec. 115.09 (1) may be taken as in case of an original loan.

Question 3: You ask us whether you are correct in interpreting an opinion of this department appearing in XXII Op. Atty. Gen. 836 as holding that a licensee under sec. 115.09 may not contract for or charge a delinquent
borrower any fee or charge of any kind or nature whatsoever, excluding any costs or fees which may be recovered in the event of judgment or in other cases provided for by statute, for collection expenses, delinquency or repossession fees except that interest may be charged on delinquent balances at a rate not to exceed 10 per cent per annum.

Answer: You are correct in your interpretation of the opinion appearing in XXII Op. Atty. Gen. 836. We also call your attention to the opinion of this department appearing in XXIX Op. Atty. Gen. 10 at 15. It should be noted, however, that where interest is charged on delinquent balances it should be at the statutory rate of 6 per cent per annum unless the contract calls for a different rate which in any event cannot exceed the maximum legal rate of 10 per cent per annum.

Question 4: You refer us to the provisions of sec. 115.09 (8) (a) and ask whether the rate of interest should be stated in terms of discount or simple interest.

Answer: Sec. 115.09 (8) (a) provides that every licensee shall:

"Deliver to the borrower at the time a loan is made, a statement in the English language showing in clear and distinct terms the amount and date of the loan and of its maturity, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee, and the rate of interest charged."

The reference to "rate of interest" in the above subsection is confusing since technically the discount authorized by sec. 115.09 (1) is stated to be in "lieu of interest" but is in full for all "fees and charges." However, it is clear from the entire context of sec. 115.09 that the term "rate of interest" as it appears in sec. 115.09 (8) (a) refers to the discount authorized by sec. 115.09 (1). We have previously referred to the case of Randall v. Home Loan & Investment Co., (1944) 244 Wis. 623. In that case the court, referring to the requirement of sec. 115.04 that where interest is
charged in excess of $6 per $100 per year and not to exceed $10 per $100 per year the rate shall be stated in writing, held that the rate of interest may be stated either in dollars or by percentage. The conclusion that the rate could be stated in dollars unquestionably was reached because sec. 115.04 states the rate in dollars and in case of simple interest the rate whether stated in dollars or in percentage would be an accurate statement of the true rate. This would not be true in cases of loans made under sec. 115.09. As you point out in your letter to us a discount of $10 made in advance on a $100 loan for 12 months produces an interest yield of 19.92 per cent. It would be misleading in such case to attempt to state the interest rate in dollars by way of discount unless all the facts were given. Even in such case the average person would no doubt find it difficult to compute the actual rate. Unquestionably in requiring the borrower to state the interest rate the legislature intended that it be stated in such a manner as to accurately inform the public of the actual rate charged without the necessity of a difficult computation. In case of a loan made under sec. 115.09 where a discount can be taken in advance, the only way the rate of interest could be stated in such a manner would be by stating it in percentage. We therefore are of the opinion that sec. 115.09 (8) (a) requires the interest rate be stated in percentage so as to show the actual rate charged per annum on the amount of money actually received by the borrower, and not in terms of discount.

Question 5: When a loan made under sec. 115.09 is paid in full is the licensee making the loan obliged to file a release or satisfaction of a mortgage securing it with the register of deeds and pay the fee for recording or filing it?

Answer: Fees for filing or recording releases of chattel mortgages and releases and satisfactions of real estate mortgages must be paid in advance by the party procuring such service. Sec. 59.57 (12). Ordinarily this would be by the party whose interests are protected by recording. 53 C. J. 617. Therefore unless the licensee making the loan is obliged to file or record a release or satisfaction either by
reason of some provision in the contract between the parties or because of statute, such licensee would not be required to pay the fee for filing or recording such documents.

The obligation of a licensee to release any mortgage that may be security for a loan made under sec. 115.09 is clear under subsec. (8) (d) thereof, which provides that every licensee shall:

"Upon repayment of the loan in full mark indelibly every paper signed by the borrower with the word 'Paid' or 'Canceled' and release any mortgage, restore any pledge, cancel and return any note, and cancel and return any assignment given by the borrower as security."

The duty to execute a release would not include the duty to cause it to be filed or recorded. This is apparent by a comparison with the provisions of sec. 241.17, which makes a distinction between the execution and delivery of a release of a chattel mortgage and filing it with the register of deeds. Said section provides in substance that whenever any chattel mortgage is paid and all other conditions are fully performed the mortgagee "shall execute and deliver a release thereof," and further provides:

"* * * The mortgagor shall within ten days after receiving such release or partial release, cause the same to be filed in the office of the register of deeds, where the mortgage to which the same applies is filed."

The duty to record a release of a chattel mortgage being imposed on the mortgagor (who would be the borrower) it would seem clear that (in the absence of a provision in the contract to the contrary) he should pay therefor. Sec. 59.57 (12); XXIV Op. Atty. Gen. 90 at 97.

We arrive at the same conclusion in case the security is a real estate mortgage. We are unable to find any statute which would require a real estate mortgagee to record a release or satisfaction of a mortgage and hence, such recording being for the benefit of the mortgagor, he should pay therefor. 58 C. J. 617. XXIV Op. Atty. Gen. 90 at 97. A penalty is provided in certain circumstances where after compliance with certain statutory conditions including
"tender of legal charges" a mortgagee refuses to discharge a real estate mortgage or *execute and acknowledge* a certificate of discharge or resale or to *record* all assignments of the mortgage. Sec. 235.64. If it is assumed this requires a mortgagee to either discharge the mortgage by entry on the margin of the book where the mortgage is recorded or by filing a proper certificate as provided by sec. 235.55 and the term "legal charges" refers to the fees therefor, it is obvious that while the mortgagee would thus be required to pay the fees to the register of deeds, they would have previously been tendered to him by the mortgagor, and hence the mortgagee would not be forced to pay them.

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*Poor Relief — Legal Settlement* — A person settled in a Wisconsin municipality, who enlists in the army and thereafter deserts and remains without the state voluntarily for a period of over 1 year, loses his settlement in the Wisconsin municipality.

February 1, 1945.

**JOHN C. DANIELSON,**  
*District Attorney,*  
Manitowoc, Wisconsin.

You have inquired as to whether a certain individual loses his legal settlement in a municipality under the following circumstances. The individual enlisted in the army and following such enlistment, deserted. During the period of his desertion he resided in Minnesota for some time and at intervals resided in the town of Two Rivers and the city of Two Rivers. He then returned to Minnesota and resided there from February, 1943 to May, 1944 without, as we understand, returning to either the city or town. The man was originally settled in the city of Two Rivers.

It is unnecessary to determine whether during the period of his desertion the man acquired a settlement in the town
of Two Rivers. Whether settled in the town or the city, he lost his settlement by reason of continuous and voluntary absence for a period in excess of 1 year. Sec. 49.02 (7), Stats.
JWR

Counties — Civil Service — Deputy Sheriffs — Sec. 59.21 (8), Stats., provides for the removal of deputy sheriffs appointed under a county civil service ordinance enacted pursuant to the provisions of that section. The provision is exclusive. Sec. 16.38 is not applicable to such removals.

February 5, 1945.

Leon L. Brenner,
District Attorney,
Waukesha, Wisconsin.

You present the question whether an ordinance dealing with the appointment of deputy sheriffs under the provisions of sec. 59.21 (8), Stats., can provide for the removal of such deputies under the provisions of sec. 16.38, Stats. Sec. 59.21 (8) may be roughly denominated a provision for the enactment of a civil service ordinance applicable to deputy sheriffs. It authorizes the enactment of an ordinance providing for selection of deputies upon the basis of competitive examinations and provides that deputies so appointed shall not be removed except upon affirmative vote of three-fourths of the members elect of the county board upon charges of malfeasance or neglect of duty after notice and hearing. The section provides that competitive examinations may be given by a county civil service commission or by the state bureau of personnel, as the county board may provide. In the event a civil service commission is decided upon to give examinations, the provisions of secs. 16.31 to 16.44 are to be applicable so far as consistent, with the exception of secs. 16.33, 16.34 and 16.43.
You indicate that sec. 16.38 relating to county civil service systems provides for the removal of employees by the county civil service commission following a hearing upon charges preferred by the employing officer. You question whether this provision is not incorporated in sec. 59.21 (8) in the general provision incorporating secs. 16.31 to 16.44 so far as applicable, and whether it is not in conflict with the provision of sec. 59.21 (8) that deputies may be removed only by the county board.

We do not believe there is any conflict in the two provisions. The language incorporating the provisions of secs. 16.31 to 16.44 specifies that those sections are incorporated only insofar as they are consistent with the provisions of sec. 59.21 (8). The provision for removal by a county civil service commission is inconsistent with the provisions of that section and is therefore not applicable. There could be a conflict only in case both sections were by their terms applicable to removal of deputy sheriffs. It may be pointed out that the provisions of sec. 59.21 (8) relating to the function of county civil service commissions apply only to the selection of deputy sheriffs. They do not purport to deal with the matter of discharge. It is our opinion that a county board may not by ordinance provide for any different method of removal than that specifically authorized by sec. 59.21 (8). The provision is specific and exclusive.

JWR
Highways and Bridges — Towns — A town highway may be created by grant from the owner and acceptance by the town board or town meeting through resolution adopted and filed with the town clerk under the provisions of sec. 80.01 (2), Stats. Such a resolution need not be drawn with legal nicety, but it should fairly indicate an intention to accept the particular grant.

February 5, 1945.

HIGHWAY COMMISSION.

You have requested our opinion as to whether certain roads shown on a plat filed with you under the provisions of sec. 20.49 (8), Stats., by a town board constitute public roads. You state that you have caused an examination to be made of the circumstances under which these roads were laid out and that the procedure for laying out town highways contemplated by sec. 80.02 and subsequent sections has not been followed. Neither, so far as appears, have formal orders been entered pursuant to such procedure. You have enclosed copies of the records dealing with the establishment of at least one such road. It appears that the roads are in fact driveways leading from farms to established town roads. They were attempted to be incorporated as town roads pursuant to a resolution passed at an annual town meeting on April 6, 1943 providing that “the town board take over some of the long driveways and make town roads out of them, the farmers to give the land and pay for the grading, and town is to gravel them and keep them in repair.” At a town meeting on April 4, 1944 a resolution was passed appropriating $1,000 “to continue the work authorized at the 1943 town meeting and build long driveways.”

The records with respect to the particular road show that at a meeting of the town board on May 1, 1944 the following action was taken:

“Motion made by Raymond E. Lange supervisor seconded by Edward Rasmussen supervisor to lay out Walter Dahlke driveway in Section 13. Motion carried.”
Thereafter the owners and mortgagees conveyed the right of way to the town for highway purposes.

It may be said generally that a town highway can be created otherwise than by the statutory procedure of petitioning for such establishment under the provisions of sec. 80.02 and subsequent sections. Sec. 80.01 (2) provides that unrecorded highways which have been worked as public highways for a period of 10 years are legal highways. It has been held that roads may also become public highways by public use for a period of 20 years without reference to improvement or maintenance as public highways and without reference to any original establishment as public highways. Neither of these methods of establishing highways is relevant here except for your general information. However, a public highway may also be established by a grant of public highway rights by the owner and acceptance of such rights by the proper public authorities. Sec. 80.01 (2) provides, however, that no grant of lands for highway purposes subsequent to July 1, 1913 shall become effective "unless the grant is accepted by the town board or by the town meeting of the town wherein the lands and proposed highway are situated, and until a resolution of such acceptance is recorded in the office of the town clerk."

The question to be decided in this case is whether there has been a resolution accepting the road as a public highway. Allowance must be made for the fact that town boards and other such local governmental bodies do not ordinarily function by observing all the niceties in procedure that are observed by the state legislature. Any recorded action which would fairly indicate an intention to accept a grant of a public highway should be held sufficient to accomplish that purpose. However, we do not believe that the action recorded in the present case is sufficient. The only recorded action which relates to the acceptance of the particular highway is the motion adopted some time prior to the grant and which specifies that a highway shall be laid out on the grantor's farm in section 13. This falls considerably short of being acceptance of the grant in question.

We suggest that you examine the records showing the action of the town board with reference to the acceptance of
the other roads involved for the purpose of determining whether there has been a resolution accepting such roads as public highways. We have indicated generally the test that should be applied in any such examination. If specific questions arise concerning which you are in doubt, we will be pleased to advise you further.

JWR

Constitutional Law — Public Lands — Public Land Commissioners — Indians — Appraisal provision of art. X, sec. 8, Wisconsin constitution, relating to sale of school and university lands, does not apply to swamp lands.

Under sec. 24.09 (1), as amended by ch. 106, Laws 1943, the commissioners of public lands may sell state-owned lands lying within Indian reservations, to the United States, for the benefit and use of the Indians without regard to other or inconsistent statutory provisions applicable generally to the sale of public lands.

February 7, 1945.

COMMISSIONERS OF PUBLIC LANDS.

In connection with the proposed sale of state-owned swamp lands in the Menominee Indian Reservation to the United States in trust for the use of the Menominee Tribe of Indians, certain questions have arisen as to the extent of the authority of the commissioners of public lands in making the sale, the procedure, if any, required to be followed in the matter of appraisal, and whether such sale must be made subject to the limitations contained in sec. 24.11, Stats., as to terms, reservation of mineral rights and of rights of access to waters, etc.

At the outset some statement of the history of the matter is in order, as the present transaction is merely the last step in a controversy that had its origin nearly a century ago.
By the treaty of October 18, 1848 (9 Stat. 952) the Menominee Tribe of Indians ceded to the United States all of their lands in the state of Wisconsin in exchange for certain lands lying west of the Mississippi, among other things. However, it was discovered that the lands ceded to the Menominees were unsuited to their circumstances and in 1850 they petitioned the president for leave to stay longer in Wisconsin. By successive orders of the president the time for the Menominees to remove from Wisconsin was extended to October 1, 1852. In view of the great reluctance shown by the Menominees to leave Wisconsin a further treaty was made on May 12, 1854 (10 Stat. 1064) whereby the Menominees ceded to the United States the lands west of the Mississippi, acquired by them under the treaty of 1848, in return for twelve townships of land situated in Shawano and Oconto counties, Wisconsin, two of which townships were later ceded by the Indians to the United States.

However, in the meantime congress had passed what is known as the “Swamp Land Act,” approved September 28, 1850 (9 Stat. 519) by which the various states were granted the swamp and overflowed lands situated within their respective borders. But in the treaty of 1854 with the Menominees the United States made no reservation of these swamp lands included in the twelve townships. 15,276.14 acres of swamp lands lying within the reservation were patented by the federal government to the state of Wisconsin in 1865 and from time to time since then the state has asserted claims to several thousand acres of additional swamp lands located within the reservation. A federal-state commission was appointed in 1881 to settle the controversy, but it failed in that endeavor as did a commission appointed by the state of Wisconsin in 1898. The total acreage which was finally agreed to by the state, the federal government and the Indians was 33,870.23 acres, although previously the state had not asserted claim to more than 26,270.83 acres.

These circumstances gave rise to a dispute as to whether the state’s title to the swamp lands under the 1850 act was superior to that of the Indians under the treaty of 1854, and
in 1923 the United States, on behalf of the Menominees, filed suit against the state of Wisconsin to cancel the patent relating to the swamp lands within the reservation. In the same year a similar suit was brought against the state of Minnesota. The United States supreme court held that the state of Minnesota had taken title to the swamp lands by the act of 1850, which effected a gift *in praesenti* and that the inclusion of such lands within the boundaries of the tract described in a subsequent treaty of cession did not operate to convey legal title to the Indians. *United States v. Minnesota*, (1926) 270 U. S. 181. After this decision the United States dismissed its suit against the state of Wisconsin. Then congress, by 49 Stat. 1085, approved September 3, 1935, amended by 52 Stat. 208, approved April 8, 1938, conferred jurisdiction on the United States court of claims to adjudicate claims of the Menominees against the United States.

"* * * including, but without limiting the generality of the foregoing, (1) a claim for damages for swamp lands which the United States allegedly purported to convey to the Menominee Tribe of Indians by a treaty ratified May 12, 1854 (10 Stat. L. 1064), but which the United States allegedly did not convey because of already having conveyed the same to the State of Wisconsin (9 Stat. L. 519); * * *"

"Sec. 6. (a) If it shall be determined by the court that the United States in violation of the terms and provisions of the treaty ratified May 12, 1854 (10 Stat. L. 1064), unlawfully failed to convey certain swamp lands to the Menominee Tribe of Indians the court shall render judgment in favor of the Menominee Tribe of Indians for a sum equal to (1) the value of the timber removed therefrom since May 12, 1854, with interest at 4 per centum per annum from the time of such removal and (2) the present acquisition costs of such lands to the Menominee Tribe of Indians, which shall be determined by the court, with a proviso that the United States may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians."

Pursuant to this provision the Menominees filed their petition with the court of claims on December 1, 1938, *Menominee Tribe of Indians v. United States*, No. 44294. This
case was decided in favor of the Indians on December 1, 1941 and the government elected to exercise the alternative proviso of the enabling act, which authorized the lawsuit and wherein it was provided that the United States might "in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians."

Thereupon negotiations were commenced with the commissioners of public lands of Wisconsin for the purpose of determining the swamp land acreage, the value of the land, the volume, species and value of the timber thereon and the value of the timber illegally cut from time to time on these lands, so that some fair figure might be reached as compensation to the state of Wisconsin for a conveyance of these lands to the federal government for the Indians, which brings us to the constitutional and statutory provisions applicable to this sale insofar as they relate to questions which have arisen among the commissioners of public lands in proceeding with this matter.

A question has been raised as to the applicability of the following provision of art. X, sec. 8, Wisconsin constitution:

"Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; * * *"

This question was determined in the case of State ex rel. Owen v. Donald, 160 Wis. 21, where the court held at page 119:

"* * * that the term 'school and university lands' in secs. 7 and 8, art. X, of the constitution relating to the creation and power of the commissioners of public lands, does not include lands in the nature of school lands which were derived from the swamp land grants; that, as to such lands, such commissioners have only such power as the legislature may see fit to delegate to them. * * *"

Hence, so far as the above constitutional provision is concerned, no appraisal of these lands is required prior to sale.
The court, however, did go on to point out that "moneys arising from" such lands do become a part of the school fund created by art. X, sec. 2, Wisconsin constitution, and may not be diverted by the legislature from the purposes therein specified.

Perhaps it should be mentioned in passing that a valuation in the nature of an appraisal has been made by the land commission based largely on a survey and timber cruise made in 1929 and 1930 by the commissioners of public lands, which cruise was supplemented by spot checks of scattered forties selected at random as late as in September of 1943, with the assistance of the forest service of the United States department of agriculture, which showed considerably more timber than was revealed by the 1929-1930 cruise. This increase was doubtless occasioned largely by revised standards of cruising resulting from greater utilization of timber today and also by intervening timber growth.

The other question which has arisen is whether sec. 24.11 (3) is applicable to the proposed sale of the lands in question. This statute reads:

"Every contract, certificate of sale, or grant hereunder of public lands shall be subject to the continued ownership by the state, of the fee to all lands bordering on any meandered or nonmeandered stream, river, pond or lake, navigable in fact for any purpose whatsoever, to the extent of one chain on every side thereof, and shall reserve to the people the right of access to such lands and all rights necessary to the full enjoyment of such waters, and of all minerals in said lands, and all mining rights therein, and shall also be subject to continued ownership by the state of all water-power rights on such lands or in any manner appurtenant thereto. Such conveyance shall also be subject to a continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the removal of such mineral from such lands and to the proper exercise of such mineral rights, and shall be further subject to the continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the development, maintenance and use of any such water rights. Nothing contained in this section shall be construed to provide for the continued
ownership in the state of any stone used for building purposes nor of any sand or gravel."

It is obvious at a glance that the foregoing limitations are inconsistent with the continued use of the lands in question by the government as an Indian reservation. Also it was apparent to all concerned that other provisions of ch. 24, relating to the sale of public lands, would seriously hamper the commissioners in handling the kind of sale here proposed, e. g., appraisal of each parcel under sec. 24.08, sale at public auction under sec. 24.09, offering of parcels separately under sec. 24.10, and the limiting of any one purchaser to 160 acres under sec. 24.13. In fact, it would be impossible to sell to the government for the use of the Indians and at the same time observe the foregoing statutory provisions, despite the fact that there are a number of reasons why the lands and timber should be sold to the Indians or the government for their benefit. For example, the timbered areas involved are widely scattered throughout the reservation and should properly be made a part thereof as was originally contemplated by the treaty.

The sale of these lands to anyone else would seriously complicate the logging and lumbering operations conducted on the reservation by the government for the Indians. Without these lands it would be difficult to continue to operate the forests on a sustained-yield basis as contemplated by existing law (Act of March 28, 1908, 35 Stat. 51). On the other hand the acquisition of these lands for the tribe would increase the value of their timbered lands and be of substantial help to them in enabling them to continue to be self-supporting and thus not be required to ask for help from the public treasury.

Moreover, the government is pressing the consummation of the sale for the reason that the timber is urgently needed for war purposes and the Indians have their equipment near the timber which is to be purchased, whereas private lumbermen who might be interested in purchasing the timber would have no access to large areas of the land which is surrounded by other Indian lands of the reservation.

With such situation in mind the commissioners of public lands asked the 1943 Wisconsin legislature for an amend-
ment of the law, which was obtained in the form of ch. 106, amending sec. 24.09 (1) in part, as follows:

"* * * and except that lands located within the exterior boundaries of Indian reservations may be sold to the Indian tribe or tribes located on such reservations or to the United States for the benefit and use of such tribe or tribes upon prices, terms and conditions agreeable to said commissioners and without being subject to the restrictions and procedure otherwise provided by law for the sale of public lands. * * *

This amendment was drafted by the attorney general in collaboration with the United States department of justice and counsel for the Menominee Indians for the express purpose of covering the instant situation. The attorney general appeared before the legislative committees of both houses and presented the history of the matter and the general statutes involved and explained that the purpose of the special provision requested was to get away from the reservations mentioned in sec. 24.11 (3) among other restrictions, reservations, terms, procedures, appraisals, etc., provided either under ch. 24 of the statutes or elsewhere. Counsel for the Indians also joined in the attorney general's request for the amendment and it would be difficult to see how the desired authority could have been more broadly stated.

It is to be noted that the language of the amendment does two things so far as this type of sale is concerned.

1. It permits the sale to be made "upon prices, terms and conditions agreeable to said commissioners." This language is all-inclusive and does not permit of the insertion by implication of any additional terms or conditions over and above those which are agreeable to the commissioners.

2. Such sale is not "subject to the restrictions and procedure otherwise provided by law for the sale of public lands."

Thus, the situation was covered, both by a grant of affirmative powers to the commissioners, and secondly, by negativing the applicability of any statutory provisions which might in any way diminish the special powers ex-
Opinions of the Attorney General

pressly granted. Perhaps this latter was mere surplusage dictated out of an excess of caution, but in any event the subject was fully covered so as to eliminate any and all questions as to the applicability of general statutes which might otherwise in any way restrict the commissioners, either as to appraisal, price, terms, conditions or procedure.

It is, therefore, submitted that the appraisal provision of art. X, sec. 8, Wisconsin constitution does not apply to swamp lands and that such lands located in Indian reservations may under ch. 106, Laws 1943, be sold to the United States for the benefit and use of the Indians without regard to other or inconsistent statutory provisions relating to the sale of public lands generally.

WHR

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Cities — Police — Extradition — Under secs. 60.55 (22), 62.09 (13) and 361.03, Stats., a city police officer may go anywhere in the state to make an arrest, but may not be sent outside the state to return a fugitive who has waived extradition unless he be first sworn in as a deputy sheriff so as to be within the provisions of sec. 59.29.

February 15, 1945.

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

You inquire whether a city police officer may legally be dispatched to another state to return a fugitive who has waived extradition.

Sec. 361.03, Stats., provides that when a warrant has been issued against a person not in the county “the sheriff or other officer to whom such warrant may be directed may pursue and apprehend the party charged in any county in this state * * *.” Warrants of arrest are directed to
“the sheriff or any constable of said county” (sec. 360.36, Stats.) and city police officers are, in effect, constables for that purpose (sec. 62.09 (13), Stats.). So city police officers may go anywhere in the state to execute warrants but that is the limit of their authority.

Sec. 59.28 (34), relating to sheriffs, and sec. 60.55 (22), relating to constables, are practically identical so far as they bear on this point. They read as follows:

59.28 (34) "When any person accused of any criminal offense shall escape from custody or pursuit without fault or negligence of the sheriff, and the district attorney shall certify such pursuit was necessary and proper, and the county board shall be satisfied by proof that such escape was not the result of the carelessness or negligence of the sheriff, such board may, in their discretion, allow a fair compensation for the time and necessary expense incurred in such pursuit."

60.55 (22) "He shall also receive all his necessary disbursements actually made for board and conveyance of prisoners, to be settled by the county board; and when any person accused of any criminal offense shall escape his custody or pursuit, without fault or negligence of the constable, and the district attorney shall certify that such pursuit was necessary and proper, the county board may, in their discretion, on being satisfied by proof that such escape was not the result of the carelessness or negligence of the constable, allow a fair compensation for the time and necessary expense incurred in such pursuit. * * *"

The question whether sec. 59.28 (34) authorized a sheriff to go outside the state to apprehend a fugitive and to have his fees and expenses therefor allowed was decided in the negative in Northern Trust Co. v. Snyder, (1902) 113 Wis. 516, 536, 543-544, 89 N. W. 460, where the court said:

“A considerable portion of the disputed charges of the sheriff, both as to paid and unpaid bills, is for services and expenses rendered outside the state in the pursuit, arrest and return to Douglas county of persons accused of crime and triable there, and in obtaining witnesses from outside the state. In some cases the pursuit was successful and in some it was not. It is conceded by counsel for respondent that claims for such services and expenses were not chargeable to the county unless there is authority therefor, ex-
press or implied, in the statutes, and that there is no statute expressly authorizing the same. Manifestly, a sheriff cannot perform any official duty outside the state. It might be a very wise provision of law to lodge power in local communities, under such restraints as would be liable to secure discreet and efficient execution thereof, to pursue criminals that escape from the state, at local expense. Suffice it to say, however, that has not been done here up to this time, nor elsewhere, so far as we know, as regards a county board. That the general practice in Douglas county has been such that respondent sheriff believed and had some ground to believe that he could make excursions at will, or with the approval of the district attorney, beyond the confines of the state, in pursuit of offenders, at the expense of his county, is exceedingly unfortunate; but there is no power in the court to save him harmless from his mistake. He has neither a legal nor an equitable claim for compensation for services or expenses rendered or incurred on such excursions, whether he succeeded in his missions or not. No doubt as soon as an accused person was brought by him within the boundaries of the state, it was competent for the sheriff to arrest him on his warrant and to charge the legal fee for service of the warrant and for travel to and from the point of arrest, so far as the services performed were outside of Douglas county. In re Tisdale, 1 Dec. Comp. Treas. 127, and cases cited."

Clearly, if sec. 59.28 (34) does not authorize the sheriff to go outside the state and recover his expenses, neither does sec. 60.55 (22) authorize constables to do so. Sec. 59.29, originally enacted by Laws 1901, ch. 126, and not applicable to the charges involved in Northern Trust Co. v. Snyder, supra, provides as follows:

“(1) In all cases where by the laws of this state the governor is authorized to demand of the executive authority of any other state any fugitive from justice or any person charged with crime in this state and to appoint an agent to receive such person, and such person is apprehended in any other state by the sheriff or deputy sheriff of the county in this state where the warrant for such fugitive from justice is properly issued, or such crime was committed, and such person voluntarily returns with said sheriff to this state without requisition, such sheriff shall be entitled to eight dollars per day for the time necessarily expended in traveling to, apprehending and returning with such person and
his actual and necessary expenses for such time, which compensaton and expenses shall be allowed by the county board of such county upon the presentation thereto of an itemized and verified account, stating the number of days he was engaged, the number of miles traveled and each item of expense incurred in rendering such services, including the transportation and board of the person in his custody. No allowance whatever shall be made him as mileage.

"(2) The sheriff of any county having less than three hundred thousand population shall not receive the compensation provided for in subsection (1), unless the apprehension shall have been duly authorized in writing by the district attorney or by the county judge of the county wherein the crime was committed, which written authority shall certify that the ends of justice will be subserved by the apprehension and return of such person, and the sheriff shall attach such certificate to and file it with his itemized account of such services."

Under that section the sheriff or his deputy may be sent to get a fugitive who has waived extradition, but under subsec. (2) his fees cannot be allowed without the required certification by the district attorney and it seems he must also establish that the escape was not caused by his negligence, under the terms of sec. 59.28 (34). *Douglas County v. Sommer*, (1904) 120 Wis. 424, 432, 98 N. W. 249.

There being no equivalent to sec. 59.29 authorizing constables to go outside the state to return fugitives, it seems clear that they may not do so, except of course when they are appointed for the purpose by the governor under the criminal extradition law, secs. 364.22 and 364.24.

If it is desired to have constables or city police officers sent outside the state for this purpose, they should be sworn in as deputy sheriffs in order to come within the provisions of sec. 59.29.

WAP
Child Protection — Juvenile Court — No child under 16 may be prosecuted criminally.

Under sec. 48.01 (5) (a) and (am), Stats., juvenile court proceedings against a child who has committed an act in violation of the criminal law must be brought in the county where he resides or is present when the petition is filed, not where the act was committed.

Under sec. 48.11, Stats., juvenile court proceedings may be commenced by a warrant charging a child under 16 with crime or the violation of an ordinance.

February 20, 1945.

RAY J. HAGGERTY,
District Attorney,
Phillips, Wisconsin.

You state that during the recent hunting season a boy 14 years of age was hunting in your county and by mistake shot another hunter who subsequently died of his wound. A coroner's verdict finds that the boy "was negligent." The boy lives in another county and is not at present in your county nor is he likely to return there. You feel that it is a case of manslaughter and inquire whether the boy can be prosecuted in the circuit court or, if not, whether he can be brought before the juvenile court of your county as a delinquent child.

You have correctly indicated that the answer to the first question is obviously, "No." No child under 16 years of age can be criminally prosecuted in this state. See sec. 48.11, Stats.

The answer to your second question is that juvenile court proceedings against the boy will have to be brought in the county of his residence or some other county in which he is present. Sec. 48.01 (5) (a) 1 gives the juvenile court exclusive jurisdiction of proceedings involving "delinquency * * * of children residing within the county." Sec. 48.01 (5) (am) gives concurrent jurisdiction of such cases to the juvenile court of a county other than the county of resi-
dence if "either the child or the parent, guardian or custodian is at the time of filing of petition present within" such a county.

Neither the child nor his parents are present within your county and although the child was there at the time the act of delinquency took place, the statute requires that he be there at the time of the filing of petition. Sec. 48.11 provides as follows:

"When any child under sixteen years of age is taken into custody with or without warrant, charged with the violation of any law of this state, or the violation of any county, town, city or village ordinance, such child shall, instead of being taken before a justice of the peace or police magistrate, be taken directly before the juvenile court; and in any such case the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as provided in section 48.06; but in any case a petition shall be filed and the court shall require notice to be given and investigation to be made and may adjourn the hearing from time to time for this purpose."

The above-quoted section indicates that even though the child is under 16 a criminal warrant may be issued for his arrest and sent to the sheriff or a police officer or constable of the county where the boy resides, together with a statement that the accused is under 16 and hence must be taken before the juvenile court of that county. At the same time a communication from you to the district attorney of the county of the boy's residence would be in order, stating the facts and the nature of the proof. In this way you can perform your duty by commencing the proceedings in the only way open to you as an officer of Price county and from then on the case will be in the hands of the juvenile authorities of the county of his residence. Or you could merely write to the district attorney of that county and leave it up to him to commence the proceedings by petition in the ordinary way.

WAP
Highways and Bridges — Counties — Under sec. 83.03 (1), Stats., county board may voluntarily aid village in repairing bridge on county line which bridge is jointly maintained by the village and adjoining town in next county.

February 23, 1945.

Clarence E. Smith,
District Attorney,
Menomonie, Wisconsin.

You state that a village petitioned the county board for aid under sec. 81.38 in respect to repairs for a bridge on a county line street, which bridge is maintained by the village and the adjoining town in the next county. Payment of the funds has been withheld on your opinion that sec. 81.38 does not authorize county aid to villages, and the question has arisen as to whether county aid may be given the village under the provisions of sec. 83.03 (1).

Sec. 83.03 (1) reads as follows:

"The county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county."

This formerly constituted a part of sec. 83.03 (6), which with minor modifications was embodied in sec. 83.03 (1) and (2) by ch. 334, Laws 1943, section 95.

Sec. 83.03 (6) has been construed by the supreme court and also has been considered from time to time by this office.

In Schaettle v. State Highway Comm., 223 Wis. 528, it was held that the above statutory provisions authorized the county board to construct a minor bridge with county funds alone or with the aid of the town, village or city in which the bridge is located, but that construction of a bridge thereunder was not authorized where such a bridge was eligible for construction as a part of a state trunk or federal highway under sec. 87.02 (1) (b), which is now sec. 84.11 (1) (b). It is also important to note here that at the time of the Schaettle case the statute read:
“The county board may construct or improve or aid in constructing or improving any road or bridge in the county.”

This now reads:

“The county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county.”

This amendment is important for the reason that your question relates to repairs rather than to construction or improvement.

Also it is to be noted that the power of the county board to assess back 40 per cent of the cost to the town, village or city under that part of sec. 83.03 (6) which now constitutes sec. 83.03 (2) has been construed to apply only where the road is a county trunk highway. See XXX Op. Atty. Gen. 261, 262. This charge-back provision does not apply to town bridges. XXVI Op. Atty. Gen. 508. Subject to the limitations stated in the Schaettle case the county may aid in the construction of any bridge in the county if it desires to do so, but it cannot be compelled to do so. See XXIII Op. Atty. Gen. 778 and XXVI Op. Atty. Gen. 508, 510. See also II Op. Atty. Gen. 118, IV Op. Atty. Gen. 484, 680 and VIII Op. Atty. Gen. 741.

You are therefore advised that under sec. 83.03 (1) the county may aid the village in repairing a bridge located on a county line street and which is maintained jointly by such village and the adjoining town in the next county.

WHR
Blind — Poor Relief — Legal Settlement — Attendance of adult blind person at Wisconsin workshop for the blind does not of itself constitute support as a pauper or prevent such person from acquiring a legal settlement. Sec. 49.02 (4).

February 23, 1945.

JAMES D. HYER,
District Attorney,
Jefferson, Wisconsin.

Your predecessor in office submitted to us at the request of the director of your welfare department the following facts: A, a blind man who has legal settlement in X county, moves to Milwaukee county and enters the Wisconsin workshop for the blind, leaving behind a wife and dependent children who continue to reside in X county. A learns a trade at such institution and becomes self-supporting, although he continues to reside and work at the institution. He contributes nothing towards the support of his wife and children.

We were requested to answer the following questions: (1) Does attendance at the Wisconsin workshop for the blind preclude A from losing legal settlement in X county and gaining a new one in Milwaukee county, and (2) does A, under the facts submitted lose his legal settlement in X county and gain legal settlement in Milwaukee county?

The following portions of subsecs. (4) and (7) of sec. 49.02 are material:

“(4) Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village or city while supported therein as a pauper or while employed on a federal works progress administration project or while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program shall operate to give such person a settlement therein. The time spent by any person as an inmate of any home, asylum or institution for the care of aged, neglected or indi-
gent persons, maintained by any lodge, society or corporation, or of any state or United States institution for the care of veterans of the military and naval service shall not be included as part of the year necessary to acquire a legal settlement in the town, city or village in which said home, asylum or institution is located, nor shall such time so spent be included as part of the year necessary to lose a legal settlement in any other town, city or village of this state.

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

The answer to question (1) depends on whether attendance at the Wisconsin workshop for the blind constitutes "support as a pauper" or whether it falls within one of the exceptions contained in the portion of sec. 49.02 (4) above quoted. The Wisconsin workshop for the blind is an institution established pursuant to authority originally granted by ch. 432, Laws 1903. This act authorized and directed the state board of control, subject to approval of the governor, to acquire a suitable place in Milwaukee, rent, heat and light to be paid by the state, "in which any blind citizen of this state having learned a trade may, if practicable, pursue his vocation on his own account and receive for his own use the whole of the proceeds of his labor." It was also provided that while it was expected artisans availing themselves of the privileges of the act would furnish their own materials and tools required in their employment, the board might assist such workmen in cases of necessity "by furnishing for their use a limited amount of such tools." The board was also given discretion to provide means of instruction to any adult blind person resident of the state who desired to learn a trade "to enable such person to avail himself of the privileges and benefits conferred by this act." The purpose of the act is stated in the preamble which recites in substance that there are many blind persons in the state who have learned trades but are by reason of lack of sight
embarrassed in securing employment or are unable to compete successfully in the same trades with those having sight, that the state school for the blind is not and cannot be adapted to furnish adult artisans with proper facilities to pursue their trades without serious injury to the school, that it is believed that “if a place and some suitable appliances were furnished them, they could so compete and become self-supporting,” and that such act is adopted “to the end * * * that such reasonable aid may be extended to such persons as will enable them successfully to pursue their several vocations.”

In 1905 the legislature again turned its attention to this subject and enacted ch. 345, Laws 1905. In the preamble it is recited that the attempt, initiated by the board of control pursuant to the provisions of ch. 432, Laws 1903, to furnish facilities and employment for adult blind artisans so they could pursue their vocations and become self-supporting had proven a success. Ch. 345, Laws 1905, was enacted so that “such reasonable aid may be continued to such persons as will enable them to successfully pursue their vocations.” The board of control was directed to continue with the institution previously established, rent, heat, light and water to be paid by the state. The board was further authorized to furnish to such artisans as availed themselves of the facilities of the workshop “a limited amount of material and tools required in their employment.” The power to provide instruction for adult blind persons desiring to learn a trade so they could avail themselves of the privileges conferred by the act was carried over from the previous act and in addition it was provided that the board might make a reasonable allowance not to exceed $75 for board to any indigent blind artisans not residents of the city of Milwaukee, to enable them to attend the institution and learn a trade “and become self-supporting.” The board was also granted authority to furnish “means of transportation” to indigent blind artisans from any point within the state to Milwaukee, so as to enable them to avail themselves of the privileges of the act.

The 1907 legislature enacted ch. 506, Laws 1907. The preamble is similar to the 1903 and 1905 acts and again recites
that the purpose of the act is to enable such reasonable aid to be continued to adult blind persons so they can successfully pursue their vocations. The provisions contained in the 1905 act were re-enacted in substance.

In 1919 the sections of the statutes containing the provisions above referred to were revised and renumbered as secs. 47.05 and 47.06 by ch. 81, Laws 1919. Subsequent amendments were made by ch. 402, Laws 1925, ch. 309, Laws 1935, ch. 59, Laws 1939, and ch. 93, Laws 1943.

The specific provision for the Wisconsin workshop for the blind at Milwaukee is now contained in sec. 47.05 (3) (d), which provides:

"The state department of public welfare is directed to make provisions for the leasing of such suitable buildings or apartments as may be necessary, for the use of the Wisconsin workshop for the blind, to provide for the heating and lighting of such buildings or apartments and for such water as may be necessary to be used therein. The rent of such buildings or apartments and the cost of such heating, lighting and water shall be paid by the state under the direction of the state department of public welfare. The department is also authorized to furnish such workmen as avail themselves of the privileges of said workshop, a limited amount of materials and tools required in their employments."

Sec. 47.06 also provides:

"The said department may, in its discretion, provide means of instruction in such workshop to any adult blind residents of the state who desire to learn a trade; and may provide for or make a reasonable allowance for the board of indigent blind persons who are not residents of the city of Milwaukee, for a reasonable time so as to enable them to learn a trade and become self-supporting, such allowance not to exceed in any case the sum of $75. Said department may also provide means of transportation from any point within the state to Milwaukee for any indigent blind person who is a resident of the state and who desires to avail himself of the privileges of said workshop."

In view of the expressed purposes for which the Wisconsin workshop for the blind was established and is now op-
erated we are of the opinion that attendance at such institution standing alone does not constitute "support as a pauper." We believe this answer is indicated by the case of *Milwaukee County v. Hurley*, (1944) 245 Wis. 77, where the question was whether employment in camps established by the civilian conservation corps constituted support as a pauper. The court held not, pointing out that the purpose of the federal act creating the corps was to relieve distress and unemployment and to provide for the restoration of the country's depleted natural resources and advancement of an orderly program of public works. The act authorized the president under such rules and regulations as he might prescribe, to provide for the employment of unemployed citizens in works of a public nature relating to forestation of public-owned land. The minimum eligibility requirements for enrollment in the CCC required the applicant to be between 18 and 28 years of age, unmarried, unemployed, physically fit, and a United States citizen with needy dependents who was willing to allot a substantial portion of his monthly cash allowance to a dependent. The court pointed out that the purposes of the program were "not a mere relief project" and that it thought the many men enrolled in the CCC would be shocked to learn their employment constituted pauper support. The court said, page 83:

"The CCC program furnished the thousands of young men who enrolled in its organization food, clothing, shelter, medical attention in camp during their term, plus a cash allowance of $30 a month. In view of the purpose and objects sought to be attained under the CCC administration, it cannot be said that Severini's employment in the CCC camps from August, 1935, to July, 1936, constituted pauper support. * * *

The purposes for which the workshop for the blind were established bear a marked resemblance to some of the purposes for which the CCC was established. It is clear that the workshop for the blind was established primarily for the purpose of creating an establishment where adult blind persons could learn and pursue a trade and thus become
self-supporting. The state pays the cost of administering the workshop together with rent, heat, light and water. The compensation of those in attendance and the cost of materials is paid for out of the proceeds of the sale of merchandise produced at the shop. Likewise one, if not the principal purpose of the creation of the CCC, was to provide employment for unemployed young men and in so doing they were furnished with food, clothing, shelter, and medical attention, plus a cash allowance. If under the circumstances enrollment in the CCC does not constitute support as a pauper, we think it must also be considered that attendance at the Wisconsin workshop for the blind does not constitute support as a pauper.

The workshop is open to any blind male resident of the state. Admittance is dependent only upon there being a vacancy; there is no requirement that an applicant be in need or be indigent. Hence the situation here must be distinguished from the case where a person receives a blind pension as provided by sec. 47.08, which has been held to constitute pauper support (XXVII Op. Atty. Gen. 51), since a blind pension can be granted only to “any needy person of 18 years or more.” Likewise, cases where public assistance was granted by reason of indigency or dependency must be distinguished. Milwaukee County v. Waukesha County, (1940) 236 Wis. 233; Jefferson County v. Dodge County, (1940) 236 Wis. 238; Milwaukee County v. Oconto County, (1940) 236 Wis. 601.

If a case should arise where it appeared board or transportation were furnished a blind person on the ground of indigency as provided by sec. 47.06 or if it should appear that a person otherwise occupied the status of a pauper or was unable to support himself at the time of entering the workshop we would, of course, have an entirely different question than is presented under the facts submitted here and we refrain from expressing any opinion as to the result that might be reached should such case arise. See XXIX Op. Atty. Gen. 428.

We have also considered whether entrance in or attendance at the Wisconsin workshop for the blind falls within any of that portion of sec. 49.02 (4), Stats., previously
quoted, which provides in substance that no residence of any person while employed on a federal works progress administration project, or while enrolled in the civilian conservation corps or while residing in a transient camp or while “employed on any state or federal work relief program” shall operate to give such person legal settlement therein, and that the time spent by any person as an inmate in any “home, asylum or institution for the care of aged, neglected or indigent persons, maintained by any lodge, society or corporation, or of any state or United States institution for the care of veterans of the military and naval service” should not be included in the time necessary to lose legal settlement in one municipality and gain it in another. It is obvious from its context that the only portion of that part of sec. 49.02 (4) referred to which might be claimed to be applicable here would be that portion which excludes residence while “employed on any state or federal work relief program.” It is our opinion that the language used does not apply to the Wisconsin workshop for the blind and the activities carried on therein. While the workshop may be considered a “sheltered institution” and its purposes may in a broad sense be considered charitable in nature, it cannot properly be considered as being engaged in furnishing “work relief.” Madison v. Dane County, (1940) 236 Wis. 145, Milwaukee County v. Hurley, (1944) 245 Wis. 77.

We are unable to answer question (2) because there are not sufficient facts submitted. For example, it does not appear when A moved to Milwaukee county and how long he resided there. Neither are any facts given as to his financial status and background at the time of moving and we are given no information as to whether he received aid or not from some other source while in Milwaukee. Further, we are not informed whether he received an allowance for board or had transportation furnished to Milwaukee as provided by sec. 47.06.

WET
Constitutional Law — Appropriations and Expenditures — Legislature — A bill providing reimbursement to legislators for personal expenses in attending upon legislative sessions does not, as applied to present members of the legislature, increase their compensation contrary to art. IV, sec. 26, Wis. Const.

Bill 175,A applies to such present members, but it is not retroactive. It applies only to expenses which may be incurred following its passage and publication.

February 27,1945.

The Honorable, The Assembly.

I have received assembly resolution 16 requesting a statement of my views with respect to the following questions arising out of Bill 175,A:

"1. Does the bill apply, or can it apply, to the members of the present legislature?
   "2. If it does or can so apply, is the bill effective as of the beginning of the 1945 session?"

The bill proposes an amendment to the statutes providing reimbursement to legislators for their actual expenses in attending legislative sessions in an amount not to exceed $5 per day and limited to not more than 100 days of any regular session and not more than 50 days of a special session. Mechanics are provided for obtaining such reimbursement through filing a claim with the state treasurer. Only those legislators who signify by affidavit filed with the state treasurer the necessity of establishing a temporary residence at the state capitol for the period of a legislative session are entitled to such reimbursement. The bill also provides for reimbursement to legislators for transportation expenses incurred in going to and returning from the state capitol once each week during a regular legislative session. Such reimbursement, however, is limited to mileage at the rate of 3 cents for each mile traveled in going to and returning from the state capitol on the most usual route. Pro-
vision is made for obtaining such reimbursement through filing claims with the state treasurer.

The present provisions of the statutes relating to amounts to be received by legislators in connection with the performance of their legislative duties, so far as material, are:

"20.01 Legislative. There is appropriated from the general fund to the legislature, annually, beginning July 1, 1913, such sum as may be necessary to carry out its functions. Of this there is allotted:

"(1) Members. Compensation and mileage to each member of the legislature, as follows:

"(a) $100 per month, payable monthly.

"(b) For each special or regular session, mileage at the rate of ten cents per mile for every mile traveled in going to and returning from the state capitol on the most usual route.

"(c) Members of the legislature serving on any legislative or interim committee, the emergency board or on any other body all or a part of whose members are by law required to be members of the legislature shall be paid no additional compensation for such services but shall be reimbursed their actual and necessary expenses in attending any meeting of such committee or other body held while the legislature is not in session or during a recess of the legislature of one month or more in duration."

The question arises whether the provisions of the bill may be applied to present members of the legislature in view of art. IV, sec. 26 of the Wisconsin constitution, which reads:

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

This provision applies to compensation of legislators. *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 228 N. W. 593.

It is my opinion, based upon the interpretation of art. IV, sec. 26 by the Wisconsin supreme court, that the proposed
reimbursement would not, if applied to existing members of the legislature, violate the constitutional provision in question. This opinion is in accordance with the view of the courts of some states and is opposed to the view of other such courts.

The most recent statement of the law on the subject by our court is found in Milwaukee County v. Halsey, 149 Wis. 82, 136 N. W. 139. In that case the question was collaterally involved as to whether a statute providing an appropriation of $400 to each circuit judge for necessary expenses in conducting the affairs of his office was constitutional as applied to judges in office at the time the statute was enacted. Prior to the enactment of the statute there had been no such reimbursement. The court held that the word "compensation" as used in art. IV, sec. 26 was synonymous with the word "salary" in its more limited sense of a fixed annual compensation and did not include reimbursement for expenses incurred in the performance of official duties. There are several early decisions of the court which point in the direction of the Halsey decision and there is one which it might be argued, points the other way. However, that case, State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133, can be distinguished. Flat amounts totaling $2,500 were there appropriated to the superintendent of public instruction for traveling expenses and clerk hire to be paid to him in fixed amounts at certain periods. Such amounts were in addition to his salary of $1,200. As applied to an item of $1,000 for clerk hire, it was not contemplated that any part of the moneys paid him should be used by the superintendent for that purpose. The whole scheme was clearly a device to increase the salary of the superintendent of public instruction, and the court so found.

It may be pointed out here that the bill in question does not provide for payment of fixed amounts to legislators without regard to actual expense incurred. No claim can be advanced, therefore, that the bill attempts to place money in the pocket of legislators in addition to the salary heretofore fixed for them. It seeks only to permit them to save a greater part of their salary through reimbursing them for that part which they expend in the performance
of their legislative duties. Thus, any argument which arises in a flat expense allowance is avoided, since there can in no case be a greater allowance than amounts expended.

Since in the construction of the Wisconsin constitution the decisions of the Wisconsin supreme court are final, there can be little object in pursuing the inquiry at great length by considering the decisions of courts of other states. State ex rel. Todd v. Yelle, 7 Wash. (2d) 443, 110 P. (2d) 162, and Christopherson v. Reeves, 44 S. D. 634, 184 N. W. 1015, both deal with the identical question here presented and both are in accord with the view of the Wisconsin court. In both cases the Halsey case is cited as authority in support of the court’s conclusion. See also McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, and Taxpayers’ League v. McPherson, 49 Wyo. 251, 54 P. (2d) 897, for a general discussion of the problem from the standpoint of the opinion here expressed.

There are several decisions in other states holding to the contrary view. For the reasons indicated we do not think it necessary to go into these cases in great detail. In each of them the matter of legislative compensation was covered by a constitutional provision. The various constitutional provisions fixed a per diem plus mileage in going to and coming from legislative sessions, as the measure of amounts to be paid to legislators for performance of their duties. In each case it was held that the constitutional provisions were exclusive and permitted of no payments to legislators other than the per diem and mileage provided for in the constitution. Cases so holding may be found in a note to Dixon v. Shaw, 122 Okla. 211, 253 P. 500, 50 A. L. R. 1238. The note is supplemented in 60 A. L. R. 416. Additional cases are Gallarno v. Long, 214 Iowa 805, 243 N. W. 719; Jones v. Hoss, 132 Ore. 175, 285 P. 205; State ex rel. Boyd v. Tracy, 128 Oh. St. 242, 190 N. E. 463. See also State ex rel. Harbige v. Ferguson, 680 O. App. 189, 36 N. E. (2d) 500.

Our constitution contains no provision for compensating legislators, and consequently the rule relied on in other states that such a constitutional provision is exclusive does not apply here. This ground could distinguish the cases holding that legislators may not be reimbursed for their ex-
penses. However, it must be admitted that some of the cases go farther and hold that reimbursement for personal, as distinguished from official, expenses in fact constitutes an increase in compensation if made within a legislator's term. The cases are agreed that legislative expenses may be properly paid and that payments for such expenses may be increased. For example, the legislature may certainly furnish clerical help to legislators, and if such help is provided for the first time during a legislator's term, all the cases would agree that no increase in compensation would be involved. If legislators were permitted to employ clerical help and were reimbursed for such amounts, the same thing would hold true. Some of the cases, however, take the view that personal expenses such as meals and lodging in attending legislative sessions are not properly legislative expenses and cannot be provided for the first time during a member's term without increasing his compensation.

The difficulty with the various decisions is that from these two clear extremes the actual instances in which the statement of the rule is applied reflect a rather confused state of mind. For example, in Gallarno v. Long, the Iowa case cited, it seems to be held that a legislator's expenses, including hotel bills and meals, while traveling with a legislative committee outside the capitol, are properly legislative expenses, whereas his expenses while attending a regular legislative session at the capitol are personal and not legislative expenses. To my way of thinking, both expenses are personal and if payment of one is to be condemned, payment of the other should be condemned. The only difference is that one reimburses for personal expenses outside the capitol city and one reimburses for such expenses while within the capitol city. The principle, however, is precisely the same and neither expense is of the same character as that involving the employment of a clerk.

There are other cases, notably from Kansas and Oklahoma, which may be found in the notes to which I have referred, which are in accordance with the Iowa case. In my opinion the application of the rule as laid down in these cases is illogical. However, it is not particularly material, since the language of our court in the Halsey case indicates
that any reimbursement for personal expense is not compensation.

I should state, in order to remove any possible confusion, that there can be no question that payment of these so-called personal expenses would be for a public purpose. Wisconsin now furnishes an executive residence and it also furnishes a home for the president of the university. It could likewise furnish homes for legislators. The situation is in no sense different if instead of furnishing homes or meals, the state permits legislators to obtain reimbursement for those expenditures.

It is my opinion, therefore, that the legislature may constitutionally reimburse legislators for food, lodging and traveling expenses during their terms of office as here provided notwithstanding such reimbursement is in addition to amounts heretofore allowed by way of salary and mileage.

The second question is whether the bill applies to present members of the legislature and, if so, whether it provides reimbursement for expense incurred prior to the passage of the bill. The bill contains no reference as to whether it applies to present or future members. The rule that would ordinarily obtain is that if enacted, it would become effective immediately and would be prospective in its operation. In the absence of a constitutional objection which would require a restricted construction, I am of the opinion that the bill, if enacted, will apply to present members of the legislature. However, I do not believe that it provides for reimbursement for expenses incurred prior to its passage. Such a construction would involve a retrospective application of the law. The bill in substance empowers legislators to obtain reimbursement for expenses. A prospective operation of the law would mean that legislators could obtain reimbursement for expenses incurred following its effective date.

JWR
Constitutional Law — Appropriations and Expenditures — Soldiers, Sailors and Marines — Loans to Veterans — An appropriation for loans to returned veterans for rehabilitation purposes is for a public purpose. Such a loan is not a loan of the state's credit to an individual within the meaning of Art. VIII, sec. 3, Wis. Const.

March 2, 1945.

The Honorable, The Senate.

Resolution No. 8, S has been submitted to me requesting my opinion upon the following question:

"Is a legislative enactment valid which authorizes the Veterans' Recognition Board or some other state agency to make loans to war veterans out of state funds for the purpose of assisting such war veterans to reestablish themselves in civil life?"

My answer is in the affirmative. Except as prevented by express or implied constitutional limitations, the legislature may make such appropriation of public moneys as it deems best. An implied limitation upon legislative power is that appropriations must be made for a public purpose. An appropriation for the purpose here involved is clearly public. State ex rel. Atwood v. Johnson, (1919) 170 Wis. 218. We know of no other implied limitation which might be relevant.

So far as express limitations are concerned, the only one that has been suggested as being in point is the provision of Art. VIII, sec. 3, that "The credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." While it has been held in some states that raising money by means of bond issues for the purpose of providing gifts to veterans is a loan of credit, other courts, and among them the Wisconsin court, have held that no loan of credit is involved in gifts of money to veterans where the appropriation is of money in the treasury or to be raised by taxation without borrowing. State ex rel. Atwood v. Johnson, (1919) 170 Wis. 251.
The Wisconsin court in the two cases cited was dealing with a bonus to veterans. Here, instead of a gift, we have a loan, but the credit of the state is no more involved in the case of a loan to a veteran than it is in the case of a gift. In either case, where the funds involved are not borrowed, the gift or loan is of money and not credit. In Veterans' Welfare Board v. Riley, (Calif., 1922) 206 P. 631, a loan of money to veterans for purposes of rehabilitation was held not to be a loan of credit, and we refer you to that case for a more elaborate discussion of the problem.

While there have been many cases in other jurisdictions dealing with the broad subject of bonus legislation of one kind or another, we have found nothing in them which would justify a detailed consideration of the various cases and statutes involved.

JWR

Appropriations and Expenditures — Counties — War Records — Carving names and records of those in the armed services upon a granite plaque is a publication of war records within the meaning of sec. 59.08 (7), Stats.

March 3, 1945.

FREDRIC W. CROSBY,
District Attorney,
La Crosse, Wisconsin.

You have inquired as to whether the county board of supervisors may appropriate the sum of $5,000 to certain private corporations for the erection of a plaque to be inscribed with the names and service records of all persons from La Crosse county engaged in the armed service of the United States in the present war. The plaque is to be made of granite and the names and records are to be carved thereon.
You call attention to sec. 59.08 (7), Stats., which provides that county boards may appropriate money for the collection, publication or distribution of war records. We are inclined to think that inscribing such a record would be a publication within the meaning of the statute. The word "publication" is not defined and is to be interpreted in its ordinary sense. In its ordinary sense it may comprehend making public by writing, printing, inscription, etc., either on paper or other medium. There is a broad discussion of the word "publication" in Words and Phrases, but we do not think it necessary to consider the definitions at length. The foregoing discussion appears to be sufficient for present purposes.

JWR
Public Officers — Delegation of Power — Counties — Highway Employees, Appointment and Discharge of — A county board may delegate the power to appoint assistants for the county highway commissioner given by sec. 83.01 (4), Stats., either jointly to the county highway committee and county highway commissioner or to either such committee or commissioner. Such power may not be re-delegated by such committee or commissioner.

When a county board purported to delegate the power to discharge county highway employees to the county highway committee, the latter could not (assuming the county board has power to delegate such power) re-delegate such power to the county highway commissioner.*

March 6, 1945.

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

You advise us that at its annual meeting held on November 10, 1943 the county board of your county adopted a resolution delegating joint authority to the county highway committee and the highway commissioner to employ persons in certain capacities. Said resolution provided in part:

"* * * The county highway committee and the county highway commissioner are hereby directed to carry out the highway construction and maintenance for which provision is herein made, in the manner provided by law, and to employ such patrolmen, laborers, and foremen, as they may deem necessary for such purposes."

You also state that on May 26, 1944 one A, who was then a county highway employee, appeared before the county highway committee and complained of certain grievances which had arisen between himself and the county highway commissioner. The latter also appeared at the meeting and claimed A was guilty of insubordination. The minutes of the meeting, after reciting the fact that A had appeared be-

*See also opinion page 82 this volume.
fore it with a complaint, recite that the "committee left the matter in the hands of the commissioner." You inform us that it was the intent and purpose of the county highway committee to thereby delegate to the county highway commissioner any power it had with respect to employing or discharging county highway employes, leaving the matter entirely in his hands to act as he saw fit. Thereafter the county highway commissioner suspended A for a period of one week and upon his return attempted to permanently discharge him.

On June 8, 1944 it appears that the county highway commissioner appeared before a meeting of the county highway committee and reported the action taken by him, and the committee in substance reaffirmed the action taken by it on May 26, 1944.

Thereafter A appeared in person and by counsel at a meeting of the county board, which unanimously adopted a resolution that the matter: "* * *" be referred to the highway committee and that the committee be given authority to hear the case and their decision be final.

Pursuant to said resolution the committee met on July 25, 1944 and A appeared before the committee by counsel; a hearing was held and after full discussion a motion was made and carried to the effect that the matter concerning A be referred back to the highway commissioner to employ or discharge employes in his department as he saw fit. Counsel for A then appeared before the county board and claimed that A had thereby been deprived of a fair hearing. Following certain informal suggestions of the board the highway committee met again on September 15, 1944 and after a full hearing took final action by determining that A should not be reinstated and confirming the action theretofore taken by the commissioner in dismissing him.

You ask us to answer the following questions:

1. Did the highway committee have the power to re-delegate to the highway commissioner that portion of the authority delegated jointly to it and the highway commissioner by the Iron county board at its annual November 10, 1943, meeting?
2. If the answer to question No. 1 is "Yes," then did the highway committee re-delegate to the highway commissioner that portion of the joint power vested in it by the county board by virtue of the action taken at its meeting of May 26, 1944?

3. Could the highway commissioner in exercising the authority so vested in him by the county board and the highway committee legally dismiss A from any and all further employment?

As to question No. 1:

The answer to question No. 1 is "No." The power to appoint assistants for the county highway commissioner is vested in the county board. Sec. 83.01 (4), Stats. 1943. While it would seem settled from an opinion of this department appearing in XXI Op. Atty. Gen. 327, and from earlier opinions there cited, this power may be delegated to the county highway commissioner or to the county highway committee or to both jointly, it does not follow that power so delegated may be re-delegated. It is a general rule of law that delegated power cannot be delegated. Shankland v. Washington, 5 Pet. (U. S.) 390 at 395, 8 L. ed. 166. An agent ordinarily may not delegate any powers entrusted him which call for discretion or responsibility, although he may employ others to assist him in purely ministerial and unimportant details of his employment. Kohl v. Beach, 107 Wis. 409; 2 Corpus Juris 685. Such rule would obviously apply with equal if not greater force in cases where a county board or public officer attempts to delegate a power. See In re Giles, (D. C. Ga.) 21 F. (2d) 536. The powers delegated here by the resolution of the county board adopted November 10, 1943 involve the employment of highway employees. It is clear that such powers call for an exercise of discretion on the part of those to whom they are delegated, and we therefore conclude that under the facts you have submitted to us the county highway committee had no authority to re-delegate any authority delegated jointly to it and the county highway commissioner by the county board at its annual meeting held on November 10, 1943.

There are certain exceptions to the general rule above stated respecting the right of an agent to delegate his au-
authority. See 2 Corpus Juris 687. One such exception exists where the principal specifically authorizes the agent to appoint a sub-agent or otherwise delegate his authority. A question might arise whether such exception or any other exception would be applicable in cases involving delegation of power by a county board or public officer. The facts submitted here do not come within any of the exceptions to the general rule, and hence even if such exceptions would otherwise be applicable here, it is not now necessary to go into the question of their applicability.

As to question No. 2:
In view of our answer to question No. 1 it becomes unnecessary to answer question No. 2.

As to question No. 3:
The answer to question No. 3 is "No." For the purpose of answering this question we may assume without deciding that a county board may delegate the power to discharge a county highway employe. Cases having a possible bearing on such question are Richmond v. Village of Lodi, 227 Wis. 23; State ex rel. Sullivan v. Benson, 211 Wis. 47; State ex rel. Arnold v. Common Council, 157 Wis. 505. Here the county board, which has the power to discharge as an incident to its power to employ (Richmond v. Village of Lodi, supra), purported to delegate to the highway committee the power to determine whether A should be discharged. From what we have previously said in this opinion this power could not be re-delegated by the county highway committee to the commissioner. Its attempt to do so vested no authority in the latter to discharge A. The county board made no attempt at any time to delegate any power to discharge to the county highway commissioner, and hence it must be held that the commissioner had no authority to discharge A. The resolution of November 10, 1943 delegated to the highway committee and county highway commissioner jointly the power to employ assistants for certain kinds of work. This resolution made no attempt to delegate any power to discharge (assuming such power can be delegated) and hence it cannot be said to have given the county highway commis-
sioner any power to discharge A. Further, if it be assumed that the delegation of the power to employ by implication carries with it a delegation of the power to discharge, the latter power would necessarily have to have been exercised jointly by the county highway committee and the county highway commissioner, since the power to employ was delegated to them jointly. No claim is made here that they acted jointly in discharging A.

WET

State Board of Health — Vital Statistics — Illegitimate Children — Change of Name — A child need not retain the name recorded on his birth certificate. A change of surname is a "major" correction under sec. 69.335, Stats., and requires an affidavit of the person whose birth is recorded. The surname of an illegitimate child may legally be changed from that of the mother to that of the putative father and if this is done under the procedure of sec. 296.36, the birth certificate will be amended as a matter of course.

Putative father's name should not be entered on birth certificate of illegitimate child.

March 12, 1945.

Dr. Carl N. Neupert, Health Officer,
State Board of Health.

You have submitted a letter received by the bureau of vital statistics which you say is typical of a large number of requests reaching your office and inquire how the request should be handled so far as your legal responsibilities are concerned. The letter states that a child was born to an unmarried woman 19 years of age, the putative father being in the armed forces. It states that the father wished to come home to marry the mother but was prevented from doing so by reason of his military duties. Apparently the birth of the child was recorded under the surname of the
mother, and, of course, no father’s name was included in the certificate. The father has now been killed in action. The letter inquires whether there is any way to have the birth certificate changed in order “that the child will not have to face through life the shame of not having his father’s name.”

In the first place, it may be pointed out that the law does not compel a person to be known all his life by the name recorded on his birth certificate. If the recorded name is John Jones, the person may nevertheless be called John Brown or James Smith and unless such name is assumed for a fraudulent purpose it is to all intents and purposes the true name of the person involved. The common-law right to acquire a new name (38 Am. Jur. 610) has not been abrogated by statute in Wisconsin. XX Op. Atty. Gen. 627; XXI Op. Atty. Gen. 528.

Of course, it is desirable though not necessary, to have the correct name shown on the birth certificate. Certified copies of such certificates are used for many purposes and a discrepancy in the name considerably impairs the usefulness of the certificate.

Two possible questions are presented: (1) Whether the certificate may be amended to substitute the surname of the father for the surname of the mother, and (2) whether the deceased soldier may be recorded on the certificate as the father of the child. With reference to the second question, as you point out, your department has neither the facilities nor the funds to make investigations into the validity of such claims.

The statute under which birth certificates may be amended is sec. 69.335, which provides in part as follows:

“A person born in this state may request the state registrar or the register of deeds of the county of his birth or in cities the health officer of a city of his birth, to correct his birth record. Minor corrections in the record of his given name, or the spelling of his surname may be made upon filing a supplementary report signed by him or his parent, guardian, sister or brother. Major corrections of the record as to his surname, sex, date and place of birth may be made by the state registrar, the register of deeds or city health officer only upon filing his affidavit setting forth the correc-
tions to be made and the reasons therfor. All corrections shall be made in red ink on the original record without erasures. * * *"

A change of the surname of the person whose birth is recorded clearly amounts to a "major" correction in the meaning of the foregoing statute. Such corrections can be made only on the affidavit of the person whose birth is recorded, and since the child in question is only about 1 year old, he cannot make such an affidavit.

This office has pointed out in the past that a child's surname does not necessarily follow that of his parent. It is only by custom that a child takes the surname of his parents. 38 Am. Jur. 600-601; XXI Op. Atty. Gen. 528; see, XX Op. Atty. Gen. 627. If the mother had recorded this child as having the surname of the putative father, or some other surname, it would have been perfectly valid and regular. If the child were of sufficient age to make an affidavit in support of a request to have his surname changed on the certificate and it were shown that he is commonly known by the surname of the putative father rather than by the name recorded on the certificate, such a change could be made under sec. 69.335. But the age of the child, of course, precludes any such proceeding for a number of years to come.

But sec. 296.36, Stats., provides a remedy which is available at the present time. That section provides in part as follows:

"Any resident of this state, whether a minor or of full age, may, upon petition to the circuit court of the county where he resides and upon filing a copy of the notice, with proof of the publication thereof, as required by section 296.42, if no sufficient cause be shown to the contrary, have his name changed or established by order of said court. If the person whose name is to be changed is a minor under the age of 14 years, such petition may be made by: (a) both parents, if living, or the survivor of them; (b) the guardian or person having legal custody of such minor if both parents are dead or if the parental rights have been terminated by judicial proceedings; (c) the mother, if the minor is illegitimate. Such order shall be entered at length upon the records of the court and a copy thereof, duly cer-
tified, shall be filed in the office of the register of deeds of such county, who shall make an entry thereof in a book to be kept by such register. If the person whose name is changed was born in the state of Wisconsin, a notice shall be filed with the state registrar of vital statistics containing such information as the registrar shall require; the state registrar shall then add such information to the birth certificate or other records and direct the register of deeds and the local registrar to make similar additions. * * *"

If the mother were to petition the circuit court to change the surname of the child to be that of the putative father and the court should grant the petition, the change in the birth certificate would follow as a matter of course under the above statute. It is up to the mother to select any surname for her child which she may consider appropriate and to cause the change to be recorded in the manner provided by the foregoing statute. She may also change her own surname to agree with that selected for the child if she so desires, assuming, of course, that in either case “no sufficient cause be shown to the contrary.”

In answer to your question as to your legal responsibilities in the case presented and other similar cases, you are advised that the change in the child’s surname cannot be noted on the birth certificate in the absence of proceedings under sec. 296.36, and you should so inform those who make such inquiries as the one you have submitted to us. While you have no duty to suggest resort to sec. 296.36, there would be no objection to your making indirect reference to it by stating that unless that section is followed you cannot make the requested change.

The standard form of birth certificate provides on its face that no person shall be entered as the father of the child in cases where the mother is not married. This is a proper and necessary provision because the birth certificate constitutes prima facie proof of the facts therein recorded, and to permit the unmarried mother to designate the putative father on the birth certificate would enable her to create prima facie evidence that such person was guilty of a crime and is responsible for the support of the child. It would not be proper, therefore, to enter the name of the soldier as the father of this child. This will result in no dis-
advantage to the child since certificates recording illegitimate births are not open to public inspection without a court order under sec. 69.30, and the standard short form birth certificate does not contain the names of the parents. Sec. 69.29 (2), Stats.

WAP

Marriage — Minors — Under sec. 245.16, Stats., it is necessary to have the consent of both parents where a party to a marriage is between the ages of eighteen and twenty-one if a male, and between the ages of fifteen and eighteen if a female, except that the consent of but one parent is necessary where such parent has the actual care, custody and control of said party.

March 12, 1945.

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

You have inquired whether under sec. 245.16, Stats., it is necessary for a person under the marriageable age of consent to have the consent of both parents where the parents are living together and the child is living with them. Sec. 245.16, so far as material here, reads:

"No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the age of eighteen years and twenty-one years if a male, and between the age of fifteen years and eighteen years if a female, no license shall be issued without the consent of his or her parents or guardian, or of the parent having the actual care, custody and control of said party or parties, * * *."
Your question calls for an affirmative answer. The statute is clear and unambiguous. It specifically calls for the "consent of his or her parents" except in those instances where one parent has "the actual care, custody, and control of said party or parties" which takes care of the situation where the parents are separated or one of them is dead. If the legislature had intended that the consent of one parent only under any and all situations should be sufficient it could easily have said so. Its failure to say so cannot be glossed over by interpretation or construction without doing violence to the plain language of the statute. If the words of a statute express clearly its sense and intent there is no room for the application of rules of construction. They come in only where the intent is ambiguously expressed. See State ex rel. Associated Indemnity Corp. v. Mortensen, 224 Wis. 398 and numerous other Wisconsin cases to the same effect cited in Callaghan's Wisconsin Digest under sec. 103 of "Statutes."

WHR

Banking Commission — Banks and Banking. — A new bank may be chartered under the provisions of ch. 221, Stats., to do business in a city or village where a receiving and paying station established under the provisions of sec. 221.255, Stats., already exists and is in operation.

March 15, 1945.

Banking Commission.

Attention James B. Mulva, Chairman.

You inquire whether a new bank may be chartered under the provisions of ch. 221, Stats., to do business in a city or village where a receiving and paying station established under the provisions of sec. 221.255, Stats., already exists and is in operation.
We find no statute which would prohibit the granting of a charter for a new bank under ch. 221 under the circumstances mentioned in your inquiry, and we therefore answer your question "Yes." It is very clear from the provisions of sec. 221.01 that a charter may be granted a new bank to be located in a city, town or village served by banks already in existence. Sec. 221.01 (5), Stats. Hence it is difficult to see why there could be any objection to granting a charter to a new bank to be located in a municipality which is served by a receiving and paying station unless it appears there is an express statutory provision to the contrary. In addition to other sections of ch. 221, we have examined sec. 221.255 which is the specific section relating to receiving and paying stations, and find no express provision or any other provision which in our opinion could be construed in any way as placing any limitation upon the power of the banking commission and banking review board to take the steps necessary to issue a charter to a new bank in a municipality in which there is an existing receiving and paying station. The fact that a receiving and paying station is located in a municipality in which an attempt is made to charter a new bank is material because it is one factor to be considered by the banking commission as bearing on the question of whether "public convenience and advantage" would be promoted by permitting a new bank to become located in said municipality, as well as other questions to be determined by it in making its investigation under sec. 221.01 (5). It would also undoubtedly be a factor to be considered by it along with other facts in making its written report to the banking review board, as well as one to be considered by the banking review board in approving or disapproving of the organization of the proposed bank. Sec. 221.01 (6). But the existence of such fact does not *ipso facto* prohibit the chartering of a new bank in such a municipality, although it may be the basis for a denial of an application made under sec. 221.01.
Corporations — Credit Unions — Money Orders — A credit union organized under ch. 186 has no power to issue money orders to its members or third persons at their request upon their payment to it of an amount equal to the face amount of the money order to be obtained plus a fee, which money orders are payable to third persons designated by the person purchasing them.

March 15, 1945.

Banking Commission.
Attention A. J. Quinn, Commissioner.

You advise us that a certain credit union incorporated under the provisions of ch. 186, Wis. Stats., and doing business in this state is engaged in issuing money orders for a fee in the manner hereinafter stated, and inquire whether it has authority to engage in this type of business.

You state that said money orders are issued by the credit union to its members at their request, not as a method of withdrawing any funds which they may have in their share accounts, but rather upon their payment to it of an amount equal to the full amount of the money order to be issued, together with a fee which is approximately the same as the fee charged for bank money orders, which sums are paid to it for the specific purpose of obtaining said money order. Upon receipt of said amount together with said fee the credit union issues a document to the member, payable to the order of a third person designated by the purchaser of the money order, in form substantially as follows:

MONEY ORDER

No. __________

A_______  B_______ Employees’ Credit Union

Rmitter: ___________________________ _____________, Wis.

Pay to the order of ____________________________ $________

_____________________________________ Dollars

To: M__________ County Bank

A_______  B_______ Employees’ Credit Union

________________________________________

Authorized Signature
We are of the opinion that a credit union organized under ch. 186, Stats., has no authority to issue money orders in the manner above stated for a fee, either to its members or third persons. Corporations are creatures of statute without power except as may be expressly granted or may be necessarily implied. Northwestern Nat. Ins. Co. v. Freedy, 201 Wis. 51; Kappers v. Cast Stone Construction Co., 184 Wis. 627; Fleischer v. Pelton Steel Co., 183 Wis. 451.

There is nothing in ch. 186 which would expressly authorize a credit union to engage in the business of issuing money orders for a fee to either its members or third persons. Neither can we find any basis upon which the existence of an implied power to engage in such business could be based.

The purpose for which a credit union may be organized is stated in sec. 186.01, Stats., which provides as follows:

"The words 'credit union' shall mean a corporation formed under the provisions of this chapter for the purpose of promoting thrift among its members and loaning its funds to them for provident purposes. * * *

The scheme set up by the legislature to accomplish this purpose contemplates that capital obtained from sale of shares to members or surplus of the company be loaned to members and that earnings therefrom (after payment of expenses and deduction of any amount necessary to be set aside as a guaranty fund as required by sec. 186.17) be distributed to members in the form of dividends. Examination of the provisions contained in ch. 186 makes it clear that they supply a credit union with ample means not only of fulfilling the purpose provided by sec. 186.01 of promoting thrift among members and of loaning its funds to members for provident purposes, but also of providing people of good character having small resources with credit when in need thereof at the lowest rate economically feasible in accordance with the statement of policy contained in sec. 186.20. Obviously, a credit union need not have the power to issue money orders for a fee in order to accomplish the statutory purposes. The business of issuing money orders
for a fee to members or others is one which is entirely for-

eign to the type of business in which the legislature has au-

thorized a credit union to engage. We cannot see how it
can be said that such power is in any way necessary to en-
able a credit union to accomplish the purposes for which it
was created. It could in any event have at the very most
only a slight or remote relation to the accomplishment of
such purposes and not such direct and immediate relation
thereto as is necessary to create an incidental or implied
power. 6 Fletcher Cyc. Corporations (Perm. Ed.) § 2487.

We therefore conclude that a credit union has neither ex-
press nor implied power to issue money orders for a fee to
members or non-members in the manner stated in the facts
which you have submitted to us here. The facts submitted
do not cover a situation where checks or drafts are issued
by the credit union at the request of such member to the or-
der of third persons when a member withdraws money he
may have on deposit with the credit union in his share ac-
counts or where a dividend is paid. We make no attempt
here to express any opinion with respect to the latter
situation.

WET
Public Officers — Delegation of Power — Counties — Highway Employees, Appointment and Discharge of — Principal and Agent — Ratification — A resolution of a county board authorizing the county highway committee and county highway commissioner to carry out highway construction and maintenance work in the manner provided by law "and to employ such patrolmen, laborers and foremen as they may deem necessary," delegates joint authority to the county highway committee and county highway commissioner and requires joint action by them. Evidence tending to show a different intent on part of the county board in enacting said resolution, tending to vary or contradict the terms of said resolution which is required by law to be recorded at length by the county clerk in a book kept for that purpose, is inadmissible and cannot be considered in determining its meaning.

The question of ratification is one of fact depending on intent. This is true even though the facts are undisputed where varying inferences can be drawn from the facts.

Questions whose answer depends upon determination of questions of fact cannot be answered by the attorney general.

March 24, 1945.

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

We are in receipt of two letters from you dated March 8, 1945 which submit to us for answer two additional questions growing out of the same subject matter dealt with in our opinion dated March 6, 1945,* which questions may be stated as follows:

1. Did the county board by its resolution of November 10, 1943, which among other things in substance directed the county highway committee and the county highway commissioner to carry out highway construction and main-

*See page 68 this volume.
tenance work in the manner provided by law "and to em-
ploy such patrolmen, laborers and foremen as they may
deeem necessary," delegate joint authority to the county
highway committee and county highway commissioner re-
quiring joint action by them?

2. Did the action taken by the county highway commit-
tee at the meeting of June 8, 1944 constitute a ratification
of the action of the county highway commissioner in at-
temting to discharge A, so as to constitute joint action by
the county highway committee and county highway com-
missioner sufficient to discharge A?

The situation out of which the above questions arise and
the facts relating thereto are set out in some detail in our
previous opinion and we will not repeat them here. Certain
additional facts have been submitted by you in your letters
of March 8 and we will make such reference to them as may
be necessary as we answer each of said questions.

As to question No. 1:

In your request for our previous opinion you assumed the
resolution of November 10, 1943 delegated joint authority
to the county highway committee and county highway com-
issioner, and for purposes of that opinion we assumed this
to be true. Our present study of the question occasioned by
submission of the questions contained in your letters of
March 8, 1945 leads us to the conclusion that your assump-
tion was correct. In our opinion the resolution of Novem-
ber 10, 1943, the relevant portions of which are quoted in
our former opinion, is clear and unambiguous and delegated
joint authority to the county highway committee and county
highway commissioner. We are further of the opinion that
the power so vested cannot be exercised by either the county
highway committee or county highway commissioner acting
alone, but must be exercised by them jointly.

The facts stated in your letters do not in our opinion jus-
tify a different conclusion. They are to the effect that for
more than 20 years past custom and usage in your county
has sanctioned the practice of giving the county highway
commissioner full authority to hire and fire county highway
employees without consulting the county highway commit-
You also advise that the county board in enacting the resolution of November 10, 1943 did not intend that the county highway committee and the commissioner act jointly. Such facts cannot be resorted to for the purpose of showing that the county board intended to accomplish something different from that which is actually stated in the resolution. By statute, resolutions, orders and ordinances adopted or passed by a county board are required to be recorded at length in a book by the county clerk. Sec. 59.17 (2), Stats. Such record cannot be varied or contradicted by parol evidence. Bartlett v. Eau Claire County, 112 Wis. 237; annotations in 50 L. R. A. (n. s.) 99; 98 A. L. R. 1229. The facts referred to in your letters tend to contradict the language contained in the resolution adopted by the county board on November 10, 1943 and are inadmissible in evidence and cannot be considered here.

As to question No. 2:

The question of whether there has been a ratification is one of fact depending upon intent. District Nat. Bank v. Maiatico, (D. C. App.) 60 F. (2d) 1078. This is true even though the facts are not in dispute where varying inferences can be drawn from the evidence. National Surety Corp. v. City of Allentown, (D. C. Pa.) 32 F. Supp. 700. The answer to this question must depend upon a consideration of all the facts and inferences to be drawn therefrom and obviously must be made by a fact-finding body in a proper proceeding and cannot be made by this department.
Coroner — Inquest — Where coroner privately examines witnesses after inquest, he is not entitled to compensation under sec. 366.14, since it is neither an investigation to determine the necessity for taking inquest, nor proper procedure in the inquest itself.

March 27, 1945.

J. Norman Basten,
District Attorney,
Green Bay, Wisconsin.

You have requested an opinion relative to the propriety of certain claims for compensation made by the coroner of your county. With your request you submitted an itemized statement of the coroner’s claims. The case involves the death of a woman who was struck by a taxicab. On January 1, 1945 the coroner was called to the scene of the accident and viewed the body. On January 2, 1945, the coroner swore a jury and conducted an inquest. Subsequent to the latter date there are seven claims made, each on a separate date, running from January 9, 1945 to January 27, 1945. These seven claims involve such matters as investigation of police records of the cab driver, five separate statements from various witnesses to the accident, and a letter written to you as district attorney. For each of these last seven items, the coroner has filed a claim for compensation for one-half day, or $4, as well as mileage on several of the dates.

The question presented is whether the coroner is entitled to compensation for his activities after January 2, 1945, the date on which the inquest was held.

This question must be answered in the negative. Ch. 366, Wis. Stats., deals with inquests. The coroner is to receive compensation for taking inquests or making an investigation to determine the necessity to take inquest. He is to receive $8 for each day and $4 for each half day “actually and necessarily required” for that purpose. It is clear that a coroner can receive compensation only for (1) taking inquest or (2) making an investigation to determine the necessity to take inquest.
It is obvious that the claim for compensation on January 1, 1945 is correct. This constitutes an investigation to determine the necessity to take inquest. The claim for compensation for January 2, 1945 is likewise correct because that constitutes taking an inquest. It is clear that the coroner had called a jury and conducted an inquest. All the activity which he later itemizes certainly is no part of the inquest since there is no provision in the statutes or elsewhere which gives the coroner authority to go around conducting private examinations of witnesses. Such activity would be proper in the making of an investigation to determine the necessity of an inquest, but in that event it would necessarily have to be preliminary to the inquest itself. In other words, once the inquest has been started and the jury properly called, there is no further room for any preliminary investigation. It is apparent that the coroner had already determined that an inquest was necessary. Under no circumstances could this subsequent investigation and the taking of statements from witnesses by the coroner be considered a preliminary investigation.

Neither can such private examinations be deemed a part of the inquest because by sec. 366.02 the jury is to "inquire upon the view of the body" how and by what means the deceased came to her death. Taking statements from witnesses in the absence of the jury cannot be a part of the inquest. Sec. 366.07 provides for the witness' oath which is in part as follows: "You do solemnly swear that the evidence you shall give to this inquest * * *." This can only mean that the witness is present before the jury.

Sec. 366.08 provides in part:

"In all cases the testimony of all witnesses examined before the inquest shall be reduced to writing by the coroner * * * and subscribed by the witnesses. * * *"

The next sentence of that section provides that a stenographer may take "the testimony of all witnesses examined at any inquest * * *." Sec. 366.09 provides in part:
"The jury, upon the inspection of the body and after hearing the testimony of the witnesses and making all needful inquiries, shall draw up and deliver to the coroner their inquisition under their hands, * * * ."

Considering all of these sections together the conclusion is inescapable that an inquest is a proceeding whereby the coroner calls a jury of six to view the body and that all witnesses are to be examined before said jury. Although an inquest may be adjourned from time to time there can be no taking of testimony privately by the coroner after an adjournment. The witnesses must be examined at the inquest.

It is our conclusion, therefore, that all compensation for activity subsequent to the inquest, which according to the statement of facts was held on January 2, 1945, should be disallowed. The only valid charges are $4 for one-half day on January 1, and $8 for a full day on January 2, 1945. We assume that the charges for mileage on those days are correct.

ES

Constitutional Law — Licenses and Permits — Intoxicating Liquors — Statutes — Bill No. 87,A, as amended by amendments Nos. 2,A and 5,A, is a constitutional enactment applicable to the business of dealing in beer and intoxicating liquor.

March 28, 1945.

The Honorable, The Senate.

This is in response to your request for my opinion as to whether Bill No. 87,A in its present form is constitutional.

As originally introduced in the assembly, Bill No. 87,A provided for the revocation by the state treasurer of licenses to deal in beer and intoxicating liquor in cases where the licensee knowingly permitted certain gambling devices to be set up, kept or used upon the licensed premises
or in connection therewith. Provision for notice of any charge against a licensee and for a hearing thereon was made. Any order of revocation was appealable under ch. 227, Wis. Stats., dealing with administrative appeals, except that any such appeal would lie to the circuit court of the county in which the licensed premises were situated. No other license to deal in beer or liquor could be issued for one year from the time of revocation, either to the licensee or to anyone else covering the licensed premises. Amendment No. 2,A, however, struck out the provision restricting the issuance of a license to another person covering the premises for which a license had been revoked. In addition, the amendment corrected the original bill to make clear the intention that it was not to apply to certain relatively innocuous forms of gambling, such as card playing, matching coins for drinks, and the like.

We are of the opinion that the provisions of the bill as amended by Amendment No. 2,A were constitutional. Several objections have been urged against it, but none in our opinion is meritorious.

No person has a constitutional right to engage in the business of manufacturing or selling beer or intoxicating liquor. The state may prohibit such business entirely or may license it upon such terms as it deems proper. Such a license is not a contract and is not property protected by the due process clauses of the state and federal constitutions. A license once issued may be revoked for any cause which the legislature deems proper. In fact, it has been held, and we think properly, that a license once issued may under proper legislative authorization be revoked for no cause.

Two judicial statements will suffice to point out the accuracy of these general observations. In Weinberg v. Kluchesky, 236 Wis. 99, the Wisconsin Supreme Court said (p. 101):

"* * * the legislature in the exercise of the police power may entirely prohibit traffic in intoxicating liquors for use as a beverage, or may license such traffic conditionally by imposing such restraints or conditions upon licensees as it considers necessary and reasonable in its judgment
and discretion; even though the conditions coupled with the license may be so burdensome that the business cannot be conducted successfully thereunder. * * *

Another concise statement of the applicable principles was made in *La Croix v. Commissioners*, 50 Conn. 321, where the court said (p. 328):

"* * * the doctrine is too well established to be longer called in question, that a license of this character, whether revocable in terms or not, is neither a contract nor property, in any constitutional sense, but is subject at all times to the police powers of the state government. * * *"

It may be confidently asserted that the authorities generally, of which there are many, almost unanimously support these views.

The suggestion has been made that constitutional equal protection clauses are violated. The apparent basis for this contention is that beer and liquor licenses may not be revoked for permitting gambling devices upon the licensed premises without at the same time extending such a regulation to other businesses operated upon premises licensed under statutes applicable to such businesses. This contention is without merit. It may be conceded for the present purpose that some other businesses could be likewise regulated. However, equal protection does not require that a regulation properly applicable to a particular business be pronounced unconstitutional because it does not apply to all businesses which might likewise have been regulated. It is sufficient if the business regulated presents a proper field for such regulation and if the regulation does not discriminate among those to whom it is applicable. 1 *Callaghan's Wisconsin Digest, Constitutional Law, sec. 131.*

There can be no question but that as applied to the business of dealing in beer and intoxicating liquor, such a regulation is a proper one. In fact, other states at one time or another have practiced such a form of regulation. See cases cited in 33 Corpus Juris 566, note 17 (k). In New York, for example, prior to the adoption of the 18th Amendment, the law provided for the revocation of the liquor license of any
licensee permitting gambling on the licensed premises. The restriction was a very stringent one since it applied to all forms of gambling and, moreover, demanded the revocation of a license where the gambling was permitted by a bartender in the absence of a licensee. Matter of Cullinan, 84 N. Y. S. 492. The provisions of the New York law were said in Matter of Cullinan, 99 N. Y. S. 1097, to be a proper regulation of the liquor business.

There are considerations peculiar to the beer and liquor business which set it apart from any other business for purposes of such regulation. This is especially true of the business of retailing beer and liquor for consumption upon the premises. It is a matter of common knowledge that people tend to linger in such places where liquor and beer are sold and that the consumption of alcoholic beverages tends to promote reckless gambling.

The claim has been made that a license may not be revoked for a cause which was not specified by statute at the time the license was issued. Such a claim assumes that the license is a contract or a property right. As we have seen, it is neither, and there have been countless instances in which licenses have been affected by subsequent legislation.

Neither does the revocation of licenses by the state treasurer deny a licensee any right to a jury trial which exists under state law. In a comparable case where an excise board revoked a license, Peo. ex rel. Presmeyer v. Comrs. of Police et al., 59 N. Y. 92, the New York Court of Appeals said (p. 96):

"The counsel further insists that section 8 is unconstitutional, for the reason that it authorizes the conviction of a party of a crime without a trial by jury. But it authorizes nothing more than an inquiry into and determination of the question, whether the party licensed continues to be a suitable and proper person to sell intoxicating liquors, the statute itself determining that a violator of the excise laws, while holding a license, is not such a person. That the power to license the sale of intoxicating liquors and to cancel such license when granted is vested in the legislature, has been determined by this court. * * * The mode and manner in which this shall be done rests in the discretion of that body."
As to any claim that the revocation of licenses by the treasurer constitutes an unconstitutional exercise of judicial power, such clearly is not the case. Under the bill the legislature in substance revokes the license of licensees permitting the specified devices on their premises. The function of the treasurer is simply that of finding the facts as to whether such devices are permitted on a particular licensed premises. If he finds they are, he must issue an order of revocation. He has no discretion. Basically his function is one of fact finding and is comparable in all respects to the fact-finding functions exercised by many state boards and commissions. His function is undoubtedly quasi-judicial in nature, but there are many administrative officials who perform quasi-judicial functions.

There are many cases, such as *Peo. ex rel. Presmeyer v. Comrs. of Police, et al., supra*, illustrating statutes where licenses are revocable by administrative officials. They have been revocable in this state for years by local licensing officials, and so far as we know it has never been questioned and could not be questioned that an administrative official may revoke such licenses. See also 33 Corpus Juris 567, note 19.

About the only other constitutional objection that we have heard is that the treasurer may not be given authority to suspend licenses issued by another authority. This contention is so obviously without substance that it is difficult to answer. There is no conceivable constitutional reason why the treasurer would be precluded from revoking a license issued by another administrative official upon that ground.

This discussion disposes of about all the objections to the constitutionality of the bill prior to adoption of Amendment No. 5,A. We repeat, it is our opinion that the objections are without merit and that the bill was constitutional.

Amendment No. 5,A extends the revocation provisions of the bill beyond liquor and beer licenses to those issued "under any other provision of the statutes." The debates in the assembly would indicate that the sponsors of the amendment intended that it should apply to all licensed premises. However, we are extremely doubtful that the amendment accomplished that purpose. It will be noted that in its origi-
inal form the bill contained detailed provision for the revocation of liquor and beer licenses and in connection therewith provided when revocations were to become effective. Since all beer and liquor licenses are issued by the state treasurer or by municipalities, the effective time of revocations provided for in the bill was confined to licenses issued by such authorities. As a result, in the bill as amended no effective time is provided for revocation of licenses issued by state departments other than the state treasurer. In construing the bill one cannot assume that it was intended to include licenses for which no effective time of revocation was provided, particularly where the matter of effective time is covered in detail. In our opinion, the bill as presently amended relates only to such licenses other than beer and liquor licenses as may be issued by towns, cities and villages and the state treasurer under any provision of the statutes and which cover a designated place of business.

We are of the opinion that Amendment No. 5,A is unconstitutional. Assuming that it is proper to extend the revocation provisions of the bill to businesses other than the manufacture or sale of beer and liquor, it is very clear that the extension only to businesses for which licenses are issued by the state treasurer and municipalities is improper in that such licenses do not form a proper basis of classification. There is no valid reason for classifying and regulating businesses upon any such basis.

It would of course be possible to amend the bill by making it apply to licenses issued by all state departments as well as to those issued by local authorities and the state treasurer. However, such an amendment would only raise other serious constitutional questions. Without going into the matter at great length and considering each license law in detail, it may be said that businesses are licensed for different purposes. Some businesses are licensed to protect and promote the public health. Some are licensed for purposes of conservation of game and wild life. Some are licensed for purposes of revenue, and some for other purposes. The average business, unlike the liquor business, is an inherently lawful enterprise and cannot be prohibited. It may be regulated in the interest of the public welfare. However, such regulation must be based upon some tend-
ency which the business may have to affect the public welfare adversely, and the regulation must be germane to protecting the public welfare in such respects. There may be some licensed businesses to which a license revocation provision such as the one in question could be applied, but we are firmly of the opinion that it could not be applied to many businesses. Certainly it could not be applied to those businesses licensed for revenue purposes in which no element of regulation were involved. We would strongly advise against any effort to extend the provisions of the bill to other licensed businesses generally, and we think that such an extension would be wholly or in large part unconstitutional as a denial of due process or equal protection to the businesses affected.

It may be incidentally pointed out that the provision in the bill which prohibits beer and liquor licensees from obtaining a license within a year following revocation does not apply to other licensees. Consequently, it may be reasonably argued that the bill, so far as it applies to such other licenses, is not a regulatory measure at all but rather that it imposes a penalty upon such businesses. Presumably one of such other licensees could obtain a license the day after his license were revoked so that the only effect of the regulation would be to penalize him the cost of a new license. It may be doubted as to whether an administrative body could properly impose such a penalty and it is moreover clear that the penalty would not be uniform since it would depend in each case upon the amount of the license fee.

We are therefore of the opinion that Amendment No. 5,A is unconstitutional and that any further amendment of the bill to extend the revocation provisions to other businesses generally would be unconstitutional. However, we believe that Amendment No. 5,A is separable from the remainder of the bill and that as passed by the assembly the bill was a constitutional measure applicable only to beer and liquor licenses. It is unnecessary to discuss the question of severability at great length. The rule is clear that even without a severability clause the partial invalidity of a statute will not affect the remainder if the remainder can operate as a complete and workable law apart from the invalid portion and if there is evidence that the valid portion would have been
enacted without the invalid portion had the legislature been appraised of such invalidity. See cases in 5 Callaghan's Wisconsin Digest, Statutes, secs. 22, 23. There is ample evidence that the assembly intended the bill to be separable as applied to liquor and beer licensees and other businesses. Amendment No. 5,A did not purport to strike out the specific reference to beer and liquor licensees and insert instead a reference to all licensed businesses. Rather, it added a clause to incorporate other licenses in the provisions referring to such beer and liquor licenses. Again, as we have pointed out, unlike beer and liquor licensees, other licensees were not prohibited from obtaining a license within the year following a revocation. As the bill now stands, the beer and liquor licensee is treated on an entirely different basis from the other licensees.

This evidence of separate treatment and the fact that the bill may operate as a complete and harmonious enactment without the invalid portions, convinces us that it is a constitutional enactment as it now stands. Moreover, as a matter of common knowledge, the great majority of gambling devices are found in places which are licensed for the sale of beer or liquor and, as we have pointed out, there are considerations peculiar to the business of selling beer and liquor which justify such regulation apart from other businesses. We cannot assume that the assembly would not have enacted the bill as applied solely to beer and liquor licenses if it had known that it could not constitutionally apply it to other licenses. There is no evidence of such an intent.

As the matter now stands before the senate, Amendment No. 5,A is invalid and the remainder of the bill is valid. If the bill is enacted as passed by the assembly, it will in our opinion be a valid enactment. However, any question of severability cannot be determined with finality except by decision of the supreme court. Our opinion on the question of severability might not meet with the court's approval. A separability clause would remove any possible argument that the constitutional portions were not separable from the remainder of the bill.

JWR
Child Protection — Juvenile Court — Juvenile detention home is required by sec. 48.12, Stats., to be under supervision of a superintendent appointed by the juvenile court and to be fitted out and conducted as nearly as possible like a family home. It may not be a part of the jail under supervision of the sheriff. It is doubtful whether the legislative purpose can be achieved by using the top floor of the jail building, but we cannot say categorically that it could not comply with the statutory requirement under any circumstances.

Taking juveniles through the jail does not constitute "placing" them in it, in violation of sec. 48.12 (1), Stats.

March 29, 1945.

A. W. Bayley, Director,
Department of Public Welfare.

You state that the county jail of Waukesha county is composed of five floors, the top floor of which has been reserved for juveniles over 16 years of age. Juveniles in detention there do not come in contact with other prisoners, but access to these quarters is through the jail. You inquire whether these quarters would be prohibited for the detention of juveniles under 16 years of age.

It is impossible to say categorically whether or not the quarters are suitable for juveniles under 16 on the basis of the information you submit. One would have to know more about them to determine whether they meet the requirements 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, lockup, 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."
If the top floor of the jail building is a part of the jail under the control of the sheriff, it would fit the proviso of the above statute and be a proper place for the detention of juveniles 16 years old or more "whose habits or conduct are such as to constitute a menace to other children." Whether it would be a fit place for detention of children of that age group who are not a menace to other children depends on whether it is a suitable place for the detention of children under 16.

Sec. 48.12 (2) requires the county board to make provision for the detention of children either in a county detention home, in a private home subject to the supervision of the court or by a private institution or agency maintaining a suitable place of detention for children. Subsec. (3), paragraph (a) provides in part as follows:

"A detention home established as an agency of the court shall be furnished and conducted, as far as possible, as a family home in charge of a superintendent. The judge may appoint a superintendent and other necessary personnel for the personal care and education of the children in such home, subject to civil service regulations in counties having civil service. *

In order to meet the requirements of the statute for the detention of children under 16 and of children 16 to 18 who are not a menace to other children, the fifth floor of the jail building must meet two tests: (1) it must be conducted as far as possible as a family home and (2) it must be in charge of a superintendent appointed by the judge of the juvenile court. A further qualification which may be inferred from the statute is that it should be separate and distinct from the quarters used for the detention of children 16 years of age or more who are a menace to other children.

The statutory scheme seems to contemplate a place of detention entirely separate and distinct from the jail, not under the jurisdiction of the sheriff, where the children would be in an environment similar to a family home. The purpose appears to be in furtherance of the policy of treating juvenile delinquents on an entirely different basis from adult criminals. It is intended that they shall not acquire the epithet of "jailbird," shall be given no opportunity to
boast to their companions that they have been "in jail" and shall not receive any recognition from society as criminals or even quasi-criminals. The detention home should be as different from a jail as the juvenile court procedure is from a criminal trial. Whether this can be achieved in quarters located on the fifth floor of the jail building seems doubtful.

The purpose is also to segregate the juveniles from adult criminals, but this cannot be the sole purpose for that could be sufficiently accomplished merely by setting aside a juvenile ward in the jail.

Taking the children into the detention home through the jail does not violate the letter of sec. 48.12 (1). That does not constitute "placing in" a jail, since the verb "to place" implies more or less permanent location and excludes the idea of merely passing through.

Bearing in mind that the legislature evidently intended the juvenile detention home to be entirely separate from the jail, still we cannot say that quarters on the fifth floor of the jail building could not meet the minimum requirements of the statute if they are under the direction of a superintendent appointed by the court rather than of the sheriff, and if they are so fitted out and conducted as to resemble a family home, furnished much like a private apartment or flat. Other quarters, constituting part of the jail but separated from adult prisoners, might then be provided for those who are 16 or over and a menace to other children.

WAP
Highways and Bridges — Highway Commission —
Where it is the duty of the state to maintain and operate a bridge under sec. 84.10 (4), Stats., but the state avails itself of the provisions of that section which permit it to arrange with the city for such operation and maintenance, and a contract is made whereby the city takes over such activity under the supervision and control of the state with reimbursement to the city of the cost thereof, the city is not liable for damages to persons and property in the discharge of such function. The expenses of the city in defending any such claim may properly be considered as operating costs subject to reimbursement by the state.

March 31, 1945.

JAMES R. LAW, Chairman,
State Highway Commission.

Our attention is called to a contract made by the state highway commission relative to the operation and maintenance of a certain bridge in a city pursuant to the provisions of sec. 84.10 (4), Stats.

This section provides, among other things, that all matters relating to the maintenance and operation of such a bridge shall be under the control of the commission but that it may arrange with the city for the operation or maintenance thereof, or both.

By the terms of the contract in question the city agrees to operate the bridge under the general supervision of the state. The number of employes is specified in the contract, and the chief operator receives and carries out such orders and instructions as are given by the state pertaining to the proper operation and care of the bridge. The city agrees to terminate the service of any operator at the request of the state or upon its own initiative when it is of the opinion that the operator is negligent in his duty or is otherwise conducting himself in a manner detrimental to the best interests of the state or the city. The city furnishes the necessary supplies subject to reimbursement by the state except for such items as may be furnished direct by the state and
submits monthly statements to the state highway commission for reimbursement of operation costs.

In view of this arrangement you inquire if there is any liability on the part of the city for personal injuries or property damage arising out of the operation of the bridge, and if not, whether the city is entitled to reimbursement from the state for expenses incurred in defending any such matters.

As indicated above, the statutory duty of maintaining and operating the bridge, under sec. 84.10 (4) rests with the state. The city is merely acting as an agency of the state in operating and maintaining the bridge. The proposition is well established in Wisconsin that the state and its agencies are not liable in tort unless such liability has been specifically prescribed by statute. See Holzworth v. State, 238 Wis. 63, and authorities cited. However, it is unnecessary to decide here whether the immunity of the state and its agencies would extend to the situation where a city is performing services for the state pursuant to contract with the state authorized by law, since the non-liability of the city may be predicated upon independent grounds.

"* * * Municipal corporations are ordinarily engaged in the service of the public and are frequently authorized by the legislature to perform acts for the public good which operate injuriously to individuals; that which the legislature within the limits of its constitutional authority has authorized cannot be a tort, and consequently cannot be the foundation of an action against the municipality. Municipal corporations are not liable for injuries which result not from direct action, but as a consequence of the discharge of governmental powers. Such injuries are damnum absque injuria. * * *" 38 Am. Jur. 276.

It is true that the application of the foregoing rule may be limited by statute such as sec. 81.15, Wis. Stats., which imposes liability upon towns, cities, villages and counties for damages arising out of the insufficiency or want of repair of any highway which any such municipality is bound to keep in repair. While this statute applies to bridges, it has been held that though a county agreeing with the state highway commission to maintain state highways within
its boundaries as authorized by sec. 84.07 imposing the duty to maintain them upon the state, may have been bound by contract to do so, it was not “by law bound” to keep them in repair and therefore is not liable for injuries resulting from defects in such a highway. *Larsen v. Kewaunee County*, 209 Wis. 204. The same doctrine would undoubtedly apply in the case of a city operating and maintaining a bridge for the state pursuant to contract under sec. 84.10 (4), Wis. Stats.

The foregoing, however, does not apply in the case of injuries to employes of the city in maintaining and operating the bridge. While the city is an agency of the state in this matter, we think it is clear that under the decision of *Sauk County v. Industrial Commission*, 225 Wis. 179, the employes of the city remain such, regardless of the fact that the city is performing a function which is made by statute the responsibility of the state. Thus they remain city employes at all times regardless of the fact that the services they perform are for the carrying out of duties imposed upon the state. We note that the contract provides that monthly statements submitted by the city to the state may include the cost of workmen’s compensation insurance, which, of course, covers this particular problem. Even in the absence of express agreement such items under the above case would probably be held to be proper “operation costs” chargeable to the state under the contract.

While, as already indicated, there would appear to be no liability on the part of the city in operating and maintaining this bridge for the state, it is nevertheless true that suits may be prosecuted against the city on groundless claims for personal injuries or property damage and even though successful in defending the same expense would nevertheless be incurred by the city. We have found no authority directly in point on this question. There are cases holding that the “operating expenses” of railroads should be construed to include a claim for damage done to property in negligent operation of a train. *Smith v. Eastern Railroad Co.*, 124 Mass. 154-155. Also that current valid claims for loss of, or damage to, freight shipments in normal volume are in a broad sense “operating expenses.” *Loveland & Hinyan Co. v. Pere Marquette Railroad Co.*, C. C. A. Mich.,
2 Fed. (2) 948. In *Bereth v. Sparks*, C. C. A. Wis., 51 Fed. (2) 441, it was held that damages for injuries during a bank receivership caused by torts of the receiver's agent are part of "operating expenses."

As will be observed these cases deal with situations where liability existed and damages were actually paid. They do not reach the question of whether legal expenses incurred in defending claims where no liability exists should be classified as costs of operation. Logically, the result should be the same. Except for the operation and maintenance of the bridge, which is primarily no concern of the city but is a statutory function of the state, the defense of such lawsuits by the city would be unnecessary. Therefore, we are of the opinion that such items of expense, when they do arise, may properly be included in the city's reimbursement statements of operating costs to the state.

WHR

*Civil Service — Temporary Appointment — Motor Vehicle Department — Deputy Commissioner* — Where director of registration and licensing division of motor vehicle department is performing the duties of commissioner by virtue of appointment as deputy commissioner under sec. 110.02 during commissioner's absence, and takes leave of absence from position as director of registration and licensing, he may temporarily fill vacancy in directorship under sec. 16.20, Stats., and Rule XII of Rules for Administration of Civil Service Law. Such temporary appointee may thereupon be deputized and perform the duties of commissioner during period of appointment.

April 5, 1945.

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

You request guidance in making arrangements for the performance of your duties during a contemplated leave of absence.
You are now performing the duties of the office of commissioner of the motor vehicle department by virtue of sec. 110.02, Stats., which provides as follows:

"The commissioner shall appoint the director of the division of registration and licensing his deputy to act in his name, place and stead during his absence or disability."

No further express provision is made for succession to the commissioner's duties in the event his deputy is absent too. It is necessary, therefore, that the following steps be taken to meet the situation:

(1) In your capacity as deputy commissioner, performing the duties of commissioner, you would be authorized to make a temporary appointment to fill the position of director of the registration and licensing division for a period of not to exceed 90 days in accordance with sec. 16.20, Stats., and Rule XII of the Rules for Administration of the Civil Service Law as promulgated by the bureau of personnel.

(2) Such temporary appointee, thereby occupying the position of director of the registration and licensing division, would be eligible for appointment as deputy commissioner under sec. 110.02, Stats., and accordingly be empowered to execute the duties of the commissioner's office in your absence.

SGH
Constitutional Law — Trust Funds — School Fund — Appropriations and Expenditures — Public Deposits — State Deposit Fund — Sec. 20.055, Stats. 1933, is unconstitutional insofar as it provides for use of school trust funds under art. X of the constitution for deposit insurance.

The amendment to sec. 20.055 by ch. 348, Laws 1935, providing for an appropriation from the general fund to take care of payments for deposit insurance of school trust funds was prospective in operation and covered the period from July 1, 1934 to June 30, 1935. It did not provide for payments from the general fund for any premiums which may have accrued prior to July 1, 1934.

April 11, 1945.

COMMISSIONERS OF PUBLIC LANDS.

Attention T. H. Bakken, Chief Clerk.

You have presented a question which involves the validity of deductions from the school funds and the use thereof for the purpose of the public deposits law.

Under the public deposits law, ch. 34, Stats., a state deposit fund is set up to insure public funds against loss arising from the failure or reorganization of depositories. This fund is made up of specified quarterly percentage payments from the fund insured.

Section 20.055, Stats. 1933 (enacted by ch. 435, Laws 1933) provided:

“(1) All moneys paid into the state deposit fund under the provisions of section 34.06 are appropriated to the state board of deposits, to carry out the purposes of the creation of said fund and to be used as provided in said section 34.06.

“(2) There is appropriated from each state fund, from time to time, such sums as may be necessary for payment into the state deposit fund of amounts required to be paid upon the deposits of each of said funds, and the secretary of state shall draw his warrant and the state treasurer shall pay such amounts into the state deposit fund not later than the fifteenth day of January, April, July and October of each year. There is also appropriated from each state fund, on the effective date of this subsection, such sums as may be
necessary for payment into the state deposit fund of amounts required to be paid upon the deposits of each of said funds for the period beginning October 1, 1932 until June 30, 1933, and the secretary of state shall forthwith draw his warrant and the state treasurer shall pay such amounts into the state deposit fund."

Art. X, sec. 2 of the Wisconsin constitution specified that certain moneys

"* * * 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."

In 1935, sec. 20.055, Stats. 1933, was amended by ch. 348, Laws 1935, to provide, inter alia:

"* * * There is appropriated from the general fund such sums as may be necessary for payment into the state deposit fund of amounts required to be paid upon public moneys deposited by the state treasurer where such moneys are subject to state, federal or trust restrictions which prevent the use of such moneys or the interest therefrom for payments required by Chapter 34 * * *; and there is also appropriated from the general fund such sums as may be necessary for payment into the state deposit fund of amounts required to be paid on funds subject to such restrictions for the period beginning July 1, 1934 to June 30, 1935, * * *." (Italics supplied.)

Thus, by the above amendment of sec. 20.055 in 1935, provision was made for the payment from the general fund of the deposit insurance payments relating to state trust funds for all periods after July 1, 1934. The section as amended did not provide, however, for payment from the general fund for this purpose prior to that date.

During the fiscal year ending June 30, 1934, pursuant to the provisions of sec. 20.055, Stats., as above, the following
amounts had been deducted from such trust funds and transferred to the deposit insurance fund:

<table>
<thead>
<tr>
<th>Trust Fund</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>School fund</td>
<td>$31,999.52</td>
</tr>
<tr>
<td>Normal fund</td>
<td>14,850.12</td>
</tr>
<tr>
<td>Agricultural college fund</td>
<td>185.10</td>
</tr>
<tr>
<td>University fund</td>
<td>64.40</td>
</tr>
</tbody>
</table>

You inquire whether the above amounts were properly deducted from the school funds and appropriated to the deposit insurance funds, and if improperly withdrawn, what steps must be taken to restore the trust funds.

By the provisions of art. X, sec. 2, Wis. constitution, the school funds are constituted trust funds which are placed beyond the power of the legislature except to appropriate the same to the support and maintenance of the schools of the state. The legislature cannot divert school funds to any other use and any attempt to do so is an unconstitutional exercise of legislative power. *State ex rel. Sweet v. Cunningham*, (1894) 88 Wis. 81.

In *State ex rel. Owen v. Donald*, (1915) 160 Wis. 21, 151 N. W. 331, 162 Wis. 609, 157 N. W. 794, the court held unconstitutional and void an act of the legislature appropriating for a military reservation lands belonging to a constitutional fund. Similarly, that part of sec. 20.055, Stats. 1933, which provided for the appropriation from state funds to the state deposit insurance funds, insofar as it applied to constitutional trust funds, of which the school trust fund is one, is illegal and void. Any and all appropriations made from the school trust funds to the deposit insurance funds were in contravention of the constitution. Thus the transfers made pursuant to said appropriations were null and void and of no effect.

The question then arises as to the means by which the school trust funds can be reimbursed for the aforesaid improper appropriations. Since the deduction from the school trust funds and the consequent appropriations to the deposit insurance funds during the fiscal year ending June 30, 1934 were void and of no effect, the amounts involved still remain a part of the school fund as though no transfer had ever been made.
The amendment to sec. 20.055 in 1935 providing that state trust fund deposit insurance payments should be made from the general fund, applies prospectively only, except in respect to the specific period of July 1, 1934, to June 30, 1935. The specific mention of said past period precludes the operation of said amendment from being retrospective for other periods.

Thus, although the deposit insurance fund is entitled to payments to cover the protection afforded the school trust funds during the fiscal year ending June 30, 1934, there is no way to properly compensate the deposit insurance fund other than by an appropriation by the legislature from the general fund.

HHP

Public Welfare Department — The department of public welfare is charged with only such duties of the former departments of mental hygiene and corrections as were restored to the state board of control by ch. 413, Laws 1939. The department has no authority to carry on a program for the prevention of mental illnesses.

April 12, 1945.

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

You have asked: (1) Whether the state department of public welfare is charged with the duties of the department of mental hygiene and the department of corrections, which were created by ch. 9, Laws of special session 1937, and abolished by ch. 413, Laws 1939; (2) whether the department of public welfare has authority to start a program for the prevention of mental illnesses.

What the supreme court said in Union Indemnity Co. v. Smith, (1925) 187 Wis. 528, 205 N. W. 492 of the railroad commission and the insurance commissioner is also true of the public welfare department: That as agencies of purely
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statutory creation their power must be found within the four corners of the statutes creating them. Accordingly if the department of public welfare has authority to start a program for the prevention of mental illnesses, an affirmative grant of such authority must be found in the statutes either in express words or by necessary implication.

Among the powers which were granted to the department of mental hygiene by ch. 9, Laws of special session 1937, are “psychiatric field work, after care and community supervision and such functions, powers and duties in relation to prevention as the department may, within the limits of its appropriation, deem appropriate.”

Sec. 58.36 of the statutes charges the department of public welfare with the execution of all powers, duties and functions vested in the state department of mental hygiene and the state board of control “as they existed immediately prior to the creation” of the public welfare department. Sec. 58.37 (1) assigns, transfers and vests in the state department of public welfare “all of the powers, functions and duties exercised by the state department of mental hygiene (as created by ch. 9, Laws of special session 1937); the state department of corrections (as created by ch. 9, Laws of special session 1937).” These provisions were enacted by ch. 435, Laws 1939, and became effective on September 15, 1939. At that time the departments of mental hygiene and corrections were no longer in existence as separate departments. They had been abolished by ch. 413, Laws 1939, which restored to the former state board of control the functions which it had prior to the creation of the departments of mental hygiene and corrections. Such functions did not include the carrying on of a program for the prevention of mental illnesses. Since the functions of none of the specified departments as they existed “immediately prior” to the creation of the department of public welfare included authority for the prevention of mental illnesses, we do not believe that power is conferred upon the department of public welfare by secs. 58.36 and 58.37 of the statutes.

It may have some bearing upon the question of legislative intent to note that in sec. 36.227 of the statutes the legislature has directed the Wisconsin psychiatric institute to perform the following functions:
"(3) Operation; Duties. The board of regents shall house, equip and maintain as part of the university, the Wisconsin psychiatric institute. The institute shall:

"(a) Investigate medical and social conditions which directly or indirectly result in state care; develop and promote measures to relieve and prevent the need of state care; undertake special education and training, and generally seek by research and investigation to prevent conditions which result in state care."

BL

Poor Relief — Hospitalization in Milwaukee county hospital may under certain circumstances constitute "poor relief," and cost thereof may be recovered from county in which recipient has legal settlement in proceeding under sec. 49.03 (8a). Question of whether such hospitalization constitutes "poor relief" is one of fact dependent upon circumstances of each case.

April 16, 1945.

STATE DEPARTMENT OF PUBLIC WELFARE.

You advise us that Milwaukee county has served an original and copies of a complaint upon the department of public welfare in the manner prescribed by sec. 49.03 (8a), Stats., which complaint seeks recovery against Dane county and the city of Madison for the cost of hospitalization in the Milwaukee county hospital furnished a person allegedly having legal settlement in the city of Madison, Dane county. Your question is whether Milwaukee county can recover the cost of such hospitalization in the Milwaukee county hospital from the county in which a person has legal settlement in a proceeding under sec. 49.03 (8a).

We understand that you are satisfied that one essential element to the maintenance of any proceeding under sec. 49.03 (8a) is that the public aid or assistance, recovery of the cost of which from the municipality of the recipient's
It becomes apparent, therefore, that the real question presented by your inquiry is whether hospitalization furnished a person having legal settlement outside the county, at the Milwaukee county hospital at expense of the county, constitutes "poor relief." In our opinion the answer must depend upon the facts in each case. You have not furnished us with any facts out of which the inquiry submitted by you arises and hence we are unable to give a specific answer. We believe it possible that in certain instances hospitalization in the Milwaukee county hospital could be considered as constituting "poor relief." There can be no question but that such hospital is obliged to receive indigent patients for treatment. Secs. 49.145, 46.21, Stats. If it appears that an indigent person in need of medical attention or treatment is hospitalized in the Milwaukee county hospital at the expense of the county or of a town, city or village which authorizes such hospitalization in compliance with the duty to relieve and assist the poor imposed by secs. 49.03 (1), 49.04 or 49.15, Stats., it would be our opinion that such hospitalization could properly be deemed "poor relief." We have no doubt but that as a general proposition, medical aid or treatment furnished to one who is a poor person or a pauper standing in need thereof, constitutes "poor relief." This is specifically recognized by sec. 49.03 (1) which imposes a duty on towns, cities or villages to furnish aid to transient paupers and which provides as follows:

"When any person not having a legal settlement therein shall be taken sick, lame or otherwise disabled in any town, city or village, or from any other cause shall be in need of relief as a poor person and shall not have money or property to pay his board, maintenance, attendance and medical aid and shall make a sworn statement setting forth the facts relating to his legal settlement, the town board, village board or common council shall provide such assistance to such persons as it may deem just and necessary, and if he
shall die, it shall give him a decent burial. It shall make such allowance for such board, maintenance, nursing, medical aid and burial expenses as it shall deem just, and order the same to be paid out of the town, city or village treasury."

It is likewise clear that the duty imposed by sec. 49.01 upon every town, village and city to "relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof" includes a duty to furnish necessary medical attention or treatment. Coffeen v. Preble, 142 Wis. 183; St. Joseph's Hospital v. Withee, 209 Wis. 424; XX Op. Atty. Gen. 162; XX Op. Atty. Gen. 140. The same would be true where the county board has by resolution adopted the so-called "county system of relief" as provided by sec. 49.15 (City of Washburn v. Bayfield County, 235 Wis. 215; Reissmann v. Jelinski, 238 Wis. 462; XVIII Op. Atty. Gen. 8), and also in cases where sec. 49.04 is applicable, since that section places in the care of the county board of each county all poor persons in said county who have no legal settlement in a town, city or village where they may be, except as provided by sec. 49.03, and provides that the board "shall see that they are properly relieved and taken care of at the expense of the county." The latter phrase would, in view of its similarity with language contained in sec. 49.01, include necessary medical attention or treatment.

We also call attention to Milwaukee County v. Oconto County, 235 Wis. 601, and Carthaus v. Ozaukee County, 236 Wis. 438, which discuss problems growing out of the furnishing of medical aid or treatment under certain circumstances. The first case cited holds treatment and care rendered a wife of a poor and indigent person in a county tuberculosis sanatorium at expense of the county constituted "pauper support" to the husband.

In view of the foregoing, there would seem to be no question but that if a town, city, village or county fulfilled its duty to furnish medical aid or treatment to a poor or indigent person in need thereof by referring him to a private physician or hospital and paying the charge therefor, such aid would be considered "poor relief." Coffeen v. Preble,
142 Wis. 183. It may even be that such aid or treatment could be given at the expense of the county or other municipality to one who may not be entirely destitute, and yet constitute "poor relief." *Coffeen v. Preble*, *supra*; XXIV Op. Atty. Gen. 802; XX Op. Atty. Gen. 162. But it is not necessary for us now to go into the question of the degree of indigency or "need" that is essential to entitle a person to "poor relief."

In any event, if a county, instead of furnishing such aid at its expense through a private physician or hospital, furnished it by hospitalization in a county hospital, one would expect that the same answer would be given as in the case where it is furnished through a private physician or hospital. We are of the opinion in either case such medical aid or treatment, if furnished to one who is indigent or occupies the status of a poor person or pauper, constitutes "poor relief." We see no difference in principle between the case where a county furnishes medical aid or treatment to a poor or indigent person by sending him to a private physician or hospital and paying the bill therefor, and the case where it furnishes such aid at its expense in a county hospital. The reasons for holding such aid "poor relief" are certainly as strong as the reasons for the view that "made work" on a county program for relief recipients constitutes relief. *West Milwaukee v. Ind. Comm.*, 216 Wis. 29; *Madison v. Dane County*, 236 Wis. 145. Further, as above noted, aid given in a county hospital under such circumstances would constitute "pauper support."

It has been suggested that a distinction exists between public aid or assistance given in a public institution and that given outside an institution, it being claimed as we understand it that the so-called "institutional relief" cannot be considered "poor relief." While such distinction may be valid in certain cases, we do not feel this is such a case. Applied here, it would ignore the realities of the situation and would make a difference where none in reality exists.

There are certain cases such as where a person becomes ill of a contagious disease and is placed in an isolation hospital or where a person becomes mentally ill and is placed in an appropriate institution, where it might well be that
such hospitalization would not be considered "poor relief" but rather as for the purpose of protecting the public, and hence not recoverable under sec. 49.03 (8a). See Milwaukee County v. Oconto County, 235 Wis. 601 at 606-7.

Reference should also be made to sec. 49.18 which relates to emergency medical aid. Subsec. (2) would appear to be inapplicable to counties having a population of 250,000 or more. Despite this, there may still be a question as to whether subsec. (1) applies to counties having such population, but you advise us that we may assume that the hospitalization here was rendered under circumstances not involving such immediate or emergency care as to make that section operative in any event. Hence, we are not called upon to decide whether any part of sec. 49.18 is applicable to cases arising in Milwaukee county. Another question presented by said section grows out of the effect of the last sentence thereof which purports to give a municipality giving emergency medical aid a right to "recover" from the municipality of legal settlement as provided in sec. 49.03. Such question arises out of the statement of the court as to the meaning of the word "recover" in State Department of Public Welfare v. Shirley, 243 Wis. 276 at 286.

Before concluding this opinion one further point should be considered. In certain opinions of this department it has been held that the fact certain types of public assistance may in substance be a form of "poor relief" or "pauper support" does not mean that it may be the basis for a proceeding under sec. 49.03. XXXI Op. Atty. Gen. 294 at 299; XXX Op. Atty. Gen. 9. The theory upon which such opinions seem to be based is stated in XXXI Op. Atty. Gen. 294 at 299:

"* * * If the statutes governing the specific type of assistance provide for a different method of adjustment of claims, sec. 49.03 would not apply. * * *"

We do not find any such statute applicable to the Milwaukee county hospital or other county hospital. No such provision is contained in either secs. 49.145 or 46.21, which are the applicable statutes here. We have also examined sec. 46.10 and are of the opinion that it is not intended to
cover adjustments of claims between counties or other municipalities so as to ultimately compel the municipality in which an indigent patient has legal settlement to assume the costs of hospitalization in the Milwaukee county hospital. There are several reasons which might be advanced in support of this conclusion. In the first place, there is no attempt to make such section specifically applicable to the Milwaukee county hospital or county hospitals generally. By way of contrast specific reference was made to sec. 46.10 (prior to enactment of ch. 326, Laws 1943) in the statute applicable to county tuberculosis sanatoriums. Sec. 50.07 (3), Stats. 1941. In 1943 the statutes relating to county tuberculosis sanatoriums were amended. Sec. 50.11 was created by ch. 326, Laws 1943, to set up a plan for adjustment of claims growing out of hospitalization of patients in such sanatoriums, which section was obviously derived from sec. 46.10, and sec. 50.07 (3) was likewise amended to change the reference to sec. 46.10 contained in the 1941 statutes to sec. 50.11.

Secondly, the portion of sec. 46.10 which sets up the mechanics for adjusting claims of this nature is not adapted for use in adjusting claims between counties. Subsec. (1) of sec. 46.10 provides in substance that whenever any person shall be committed or admitted to "any charitable, curative, reformatory or penal institutions of the state, or of any county," except those for tuberculosis patients, the court, judge, magistrate or board "before whom such matter is pending" shall determine the place of legal settlement of such person and certify the same to the superintendent of the institution. It is then provided: "The county in which said legal settlement is located shall be chargeable with the support and maintenance in the manner and to the extent provided by law." In case such person has no legal settlement in this state such support and maintenance is made a state charge, provided certain requirements are complied with. The method of adjusting claims is given in subsecs. (2) and (3). Subsec. (2) requires the department of public welfare on July 1 of each year to prepare a statement of the amounts "due from the several counties to the state, pursuant to law" for maintenance, care and treat-
ment of inmates at such institutions. Such statement is required, among other things, to specify the name of every inmate in each state institution whose support is partly chargeable to some county, and the name of each patient in each county institution whose support is wholly chargeable in the first instance to the state and partly chargeable over to some county. The statement is also required to specify the amount due to the state from such county. After certification of the statement and filing with the secretary of state and compliance with certain other requirements, the secretary of state is required to charge to the several counties the amount so due which is certified, levied, collected and paid in to the state treasury with the state tax as a special charge. Subsec. (3) requires the superintendent or other officer in charge of such institution on July 1 of each year to prepare a statement of the amount due from the state to the county in which said institution is located, pursuant to law, for the maintenance, care and treatment of inmates at public charge. Such statement is required to cover the preceding fiscal year and, among other things, specify the name of each inmate whose support is partially chargeable to the state, or wholly chargeable in the first instance to the state and partially chargeable over to some other county, and the amount due the county from the state. Such amount is ultimately certified to the secretary of state who credits the aggregate amount due on the state tax next accruing from said county.

The most obvious reason why it can be said the provisions of sec. 46.10 are not adapted in cases involving hospitalization in a county hospital is that there is no statute making an appearance before a court, judge, magistrate or board necessary before a poor or indigent patient can be committed or admitted to such an institution, so as to make operative the first sentence of sec. 46.10 (1). By way of contrast, specific provision is made for application before a county judge in case a person who thinks he is unable to pay any part of his care desires to enter a tuberculosis sanatorium. Sec. 50.03 (2); sec. 50.07 (2). Further, it seems clear that subsec. (2) applies only with respect to amounts due from the several counties to the state for maintenance,
care and treatment of inmates in state or county charitable, curative, reformatory or penal institutions, and subsec. (3) applies only with respect to amounts due from the state to the county in which each institution is located for maintenance, care or treatment of inmates in such institution at public charge. There is no provision which in our opinion purports to cover a situation involving claims between counties or other municipalities themselves. Further, the portion of subsec. (2) which is applicable to county institutions would seem to direct itself to cases where the support of the inmates is wholly chargeable in the first instance to the state and partly chargeable over to some county, and in subsec. (3) the statute would seem to point only to cases where the support of the inmate is partially chargeable to the state or wholly chargeable in the first instance to the state and partially chargeable over to some other county. We are unable to find any statute which imposes the cost of care, maintenance or treatment of any patient in the Milwaukee county hospital or any other county hospital either in whole or in part as a charge against the state. We have examined the remaining subsections of sec. 46.10 and in our opinion they contain nothing which would lead to the conclusion that said section is applicable so as to authorize adjustment of claims between counties or other municipalities for support, maintenance or treatment in the Milwaukee county hospital or any other county hospital.

This opinion is intended to apply only to your question as it involves the Milwaukee county hospital and anything herein stated should not be construed as applying to any other hospital or institution as to which other statutes may be applicable.

WET
Constitutional Law — Trusts and Monopolies — Intoxicating Liquors — Price Stabilization — The price stabilization scheme contemplated by Bill No. 330, A. does not deprive those affected of due process under the state or federal constitutions, does not violate the Sherman anti-trust law and does not offend against the commerce clause of the federal constitution.

May 2, 1945.

THE HONORABLE THE SENATE.

You have requested my opinion as to the constitutionality of Bill No. 330, A. I understand the request is motivated by the thought that under a recent ruling by the United States supreme court the bill, if enacted into law, would be held unconstitutional as a violation of rights reserved to the federal government under the interstate commerce clause of the federal constitution.

Before discussing the constitutional problem I should point out that the bill in its present form is not properly drawn to accomplish its purpose and should be amended. Sec. 1 creates sec. 176.76 (1), Stats., which requires manufacturers or wholesalers engaged in the sale of intoxicating liquors to enter into fair trade contracts. Copies of these contracts are required to be filed with the beverage tax division of the state treasury department within 30 days after the effective date of the section. The contents of the required contract are not specified. Presumably the reference is to the fair trade contract provided for by sec. 133.25, but since such a contract may contain various provisions, it would seem difficult to require the execution of any such. It is implied that such a contract shall contain a resale price, but it is not expressly provided. Moreover, the requirement relates only to manufacturers or wholesalers. It may be argued that it is required that contracts be executed only between manufacturers and wholesalers and that there is no requirement that wholesalers enter into such contracts with retailers. Sec. 176.76 (2) implies that retailers shall be bound by such contracts and it is probable that it was intended that subsec. (1) should require wholesalers to enter
into contracts with retailers. However, the section does not so state. The first subsection should either be redrawn to take care of these objections or the reference to a fair trade contract should be omitted entirely and a provision made for the filing of minimum resale prices by manufacturers and wholesalers. It would appear that the purpose of the bill could be accomplished by requiring such a filing and by prohibiting a sale below such filed prices except in the instances permitted.

It is proposed to enforce the price regulation by providing for suspension of licenses in the manner referred to in sec. 176.76 (7). Without discussing this matter in detail I may say that so far as retailers’ licenses are concerned, the bill assumes that such licensees are required to register with the state treasurer. It is provided that he may suspend such registration and that such suspension, when communicated to the clerks of local licensing boards, will suspend the local license. No registration of retail licensees is required under state law and consequently the provision for suspension of such a registration is wholly ineffective. Either such a registration should be required or the provision for suspension should be omitted and direct provision made for suspension of local licenses. It may be pointed out that in practical operation the suspension of a registration required to be made with the state treasurer would amount to a suspension of the local license if the suspension of the registration results in suspension of the local license.

I also think the word “wholesalers” should be inserted in line 40, page 3 immediately before the words “class A” since it is apparently intended that wholesalers as well as retailers should be bound by prices filed.

So far as the constitutional question of price fixing is concerned, a similar regulation has been sustained. See Gaine v. Burnett, 122 N. J. L. 39, 4 A. (2d) 37. However, it does not seem to us that the bill is directed to general price fixing. A manufacturer or wholesaler may fix a price as high or as low as he wishes. The bill is not concerned with the question as to how high or how low the price may be so much as it is with the uniformity of minimum resale margins of those purchasing and selling intoxicating liquors. It proposes that there shall be no discrimination in the prices
at which liquor is sold to retailers and wholesalers and that there shall be no price cutting as between competitors in such resale. It is a measure designed to effect a degree of price stabilization without directly fixing prices or permitting them to be fixed at noncompetitive levels by a combination of competitors.

I know of no reason why such stabilization is not constitutionally permissible as applied to the liquor industry. In view of the peculiar nature of the liquor business, as pointed out in our opinion on the constitutionality of Bill No. 87, A.*, it is subject to almost complete regulation. It is within the police power to stabilize such prices and the method of stabilization does not deny to those involved any constitutional rights, nor does it otherwise violate any constitutional principles.

I do not believe that the United States supreme court case which prompted the request for this opinion is in point. That case was entitled The United States of America v. Frankfort Distilleries, Inc., et al., 324 U. S. 293, and was handed down March 5, 1945. The case involved a combination between manufacturers, wholesalers and retailers fixing noncompetitive prices for the wholesale and retail sale of intoxicating liquor in the state of Colorado. It was proposed through the combination to boycott those manufacturers who would not fix noncompetitive prices in accordance with prices agreed upon by the combination. The United States supreme court held that the combination violated the Sherman anti-trust law since it involved a combination in restraint of interstate commerce.

Bill No. 330, A. does not contemplate combinations by competitors to fix noncompetitive prices in interstate commerce. Such stabilization as results is brought about by state action. The Sherman Act does not apply to such state action, Parker v. Brown, 317 U. S. 341, 87 L. Ed. 315, since it is directed only at the agreement of private individuals and corporations. There would appear to be no further substantial federal questions.

JWR

*See page 87 this volume.
Conservation Commission — Fish and Game — Licenses and Permits — State conservation commission and its duly appointed agents under sec. 29.14 (2) have the sole authority to issue nonresident fishing licenses, and an agent appointed under this section may not appoint a subagent.

May 3, 1945.

E. J. Vanderwall,
Conservation Director,
State Conservation Department.

You have inquired whether the state conservation commission has complete control of the issuance and distribution of nonresident fishing licenses under sec. 29.14, Wis. Stats., and if an issuing agent, appointed by the conservation commission under the provisions of sec. 29.14 (2), may distribute nonresident fishing licenses to third persons or subagents for issuance.

Sec. 29.14 (2), so far as material here, provides:

"* * * Such nonresident may take, catch or kill fish, or fish for fish with hook and line or with rod and reel in inland waters only if a license has been duly issued to him, subject to the provisions of section 29.09, by the state conservation commission. * * * The commission may cause such licenses or coupons to be issued through agents for a compensation of 10 per cent of the license fee collected therefor; but no such compensation shall be paid to any of its regular deputies or other employes. * * *" (Emphasis ours)

We think it is clear from the above language that the state conservation commission and its duly appointed agents have exclusive authority to issue nonresident fishing licenses. Such construction was given to sec. 29.14 originally by this office in 1933 when the statute read substantially as it does now. See XXII Op. Atty. Gen. 878. No good reason suggests itself for departing from that ruling at this time.

It is true that sec. 29.14 (2) provides that these nonresident fishing licenses are to be issued subject to the provi-
sions of sec. 29.09, which in turn makes provision for issuance of resident hunting, trapping and fishing licenses by county clerks. However, after making the above provision in sec. 29.14 (2) the legislature immediately qualified this language by providing that the licenses are to be issued "by the state conservation commission." Thus the issuance of the licenses is subject to the provisions of sec. 29.09 only insofar as that section is applicable. To the extent that sec. 29.14 (2) makes the conservation commission and its agents the sole authority for issuing nonresident fishing licenses the provision of sec. 29.09 relating to issuance of licenses by county clerks is to be disregarded.

It should be pointed out, however, that there is nothing in sec. 29.14 (2) which would preclude the conservation commission from appointing a county clerk as agent for purposes of issuing nonresident fishing licenses. When acting as such agent he would be on the same footing as any other agent appointed by the conservation commission for such purpose, and his duties could not be exercised by his deputy since the appointment would have nothing to do with the statutory duties of the county clerk. In other words he would be acting as an individual and not by virtue of his office.

This brings us to the last part of your question having to do with the authority of an agent appointed by the conservation commission under sec. 29.14 (2) to appoint a subagent. The matter of issuing fishing licenses is purely statutory and the statute having provided for the appointment of agents by the conservation commission and not having provided for the appointment of subagents by such agents, no such power is to be implied. Moreover, it is a well settled rule of law, expressed in the maxim, delegatus non potest delegare, that the trust and confidence reposed in an agent by the terms of the power where he is to exercise his discretion, skill and judgment in the performance of his duties cannot be delegated to another without the consent of his principal unless from the nature of the agency it appears that the parties contemplate that the employment of subagents will be necessary. 2 C.J.S. 1357-8.

You are therefore advised that there is no authority whereby an agent appointed by the conservation commis-
sion to issue nonresident fishing licenses under sec. 29.14 (2), may properly appoint a subagent for that purpose. WHR

Public Welfare Department — Public Relations Employee — State department of public welfare is charged with the performance of functions which in the discretion of the department may properly necessitate the employment of a public relations man, and his travel expenses incurred in such publicity work and in editing a departmental magazine used to publish information contemplated by statute should be allowed where the expense voucher shows, pursuant to sec. 14.32, that such expenses were necessarily incurred in the performance of duties required by the public service.

May 4, 1945.

Fred R. Zimmerman,
Secretary of State.

You have asked for our advice as to the propriety of allowing an expense account of an administrative assistant of the state department of public welfare, incurred in traveling to give addresses before various church and club groups and in preparing a departmental magazine. This particular employe was hired pursuant to civil service regulations by the department primarily for public relations work. He provides newspapers with information about the department, gives addresses to service clubs, church groups, women’s clubs, et cetera, when invited to do so, and edits a monthly publication of the department, the “Public Welfare” magazine, which requires a certain amount of travel.

Sec. 14.32, Wis. Stats., provides among other things that the secretary of state shall not audit items of expenditure for expenses not necessarily incurred in the performance of duties required by the public service.
The state department of public welfare is charged with many rather broad functions under the statutes and by law is given the powers necessary to carry out such functions. Sec. 58.40 provides in part:

"The state department of public welfare shall be a body corporate and, in addition to the functions expressly authorized by law, shall have all powers necessary to the full and complete performance thereof. * * *"

Sec. 58.35 (1) creates several divisions within the department and par. (e) authorizes the department to create "such other divisions as may be found necessary by the board for the effective administration of the department."

Sec. 58.36 provides:

"The department of public welfare is charged with the execution of all powers, duties and functions vested in the following departments or divisions as they existed immediately prior to the creation of this department, namely:

"(1) The state department of mental hygiene;
"(2) The state department of corrections;
"(3) The state pension department in the industrial commission of the state of Wisconsin;
"(4) The public welfare department of the state of Wisconsin;
"(5) All functions, powers and duties vested in the state board of control;
"(6) The functions, powers and duties vested in the industrial commission relative to the adjudication of claims involving counties or other municipalities in disputes concerning the responsibility for relief under section 49.03 (8a)."

Among the powers of the state board of control, now exercised by the state department of public welfare, sec. 46.03 (11) provides:

"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."

This provision might, in the discretion of the department, properly entail a certain amount of educational and promotional work so as to justify travel expense in giving public addresses and in publishing a magazine.

In taking over the state pension department, formerly in the industrial commission, reference is made to sec. 49.50 relating to old-age assistance, aid to dependent children and blind pensions. Sec. 49.50 (2) provides in part:

"* * * The department shall also publish such information as it may deem advisable to acquaint persons entitled to any of these forms of public assistance and the public generally with the provisions of the laws governing the same."

This furnishes direct authority for incurring such expenses, travel or otherwise, as might be incidental to giving publicity to the information mentioned in the above section.

The state department of public welfare under ch. 57 is vested with considerable jurisdiction over probationers and parolees. In the effective placement of these persons, as well as of dependent and delinquent children under ch. 48, it may be important to enlist the interest of club or church groups and women's organizations. We deem that in all of the above matters the department of public welfare, except where especially directed by statute, is vested with wide discretion as to the personnel, methods and procedure to be employed in the discharging of the functions of the department. In addition to the broad statement of powers in sec. 58.40, quoted above, the department under sec. 46.03 (2) is charged with the promotion of the objects for which the state institutions mentioned in subsec. (1) are established.

As the very name implies, the state department of public welfare necessarily must have wide contacts with the public in order to promote and carry out anything like an effective, preventive and corrective program for the state's unfortunate citizens.
In our judgment the secretary of state, in auditing expense accounts, is not charged with the responsibility of passing upon the means employed by the state department of public welfare in carrying out its work, provided there is a showing on the face of the expense account that the items therein set forth were necessarily incurred in the performance of duties required by the public service. So far as the account in question is concerned it must be conceded that the supporting information furnished by the claimant is quite meager, particularly as to the first two items,—"Addresses at West Bend and Port Washington" and "Public Relations." We think some showing should be made which would indicate in greater detail what functions of the department of public welfare were involved here. The item listed as "Department Magazine Preparation" is probably sufficient without further explanation in view of the statutory authority of the department to publish certain types of information.

WHR

Constitutional Law — Navigable Waters — Section 27.115 is invalid as it now exists and as it would read if amended by Bill 133, S. of the 1945 Session of the legislature.

May 5, 1945.

LAWRENCE R. LARSEN, Chief Clerk, Senate.

Resolution No. 22, S. requests an opinion as to the constitutionality of sec. 27.115 as it appears now in the statutes and as it would appear if Bill No. 133, S of the 1945 Session were enacted.

Sec. 27.115 authorizes any city which has acquired title to submerged land constituting the bed of any lake to convey the same to an incorporated yacht club for the latter's
exclusive occupancy, use and enjoyment, or to exchange such land for other land owned by the club. Bill No. 133, S would amend the section so as to extend the same authority to a county as to a city.

It is our opinion that sec. 27.115 as applied to navigable lakes is unconstitutional both in its present form and in the form in which it would exist if the proposed amendment were enacted.

It has been repeatedly held by the supreme court of this state that the title to the beds of navigable lakes in Wisconsin is vested in the state "in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trusteeship is inviolable, the state being powerless to change the situation by in any way abdicating its trust." Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859.

Any attempt by the state to convey the lands constituting the bed of a navigable lake in violation of its trust is ineffective to cause a transfer of title. Priewe v. Wisconsin State Land & Imp. Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904. Likewise legislation which would restrict any of the rights in navigable waters which are common to all the people of the state is invalid. Rossmiller v. State, 114 Wis. 169, 89 N. W. 839.

The supreme court has indicated that there are some instances in which the state may convey its title to a portion of the bed of a navigable lake, but such instances are strictly limited. In Milwaukee v. State, 193 Wis. 423, 214 N. W. 820, 54 A. L. R. 419 the legislature authorized the city of Milwaukee to convey a portion of the bed of Lake Michigan to a private corporation which was a riparian owner on such lake, in exchange for land owned by that corporation which was necessary to the development of Milwaukee harbor. The court expressly stated that the rule there adopted would not apply to inland lakes nor to any grants for purely private purposes. We quote from the opinion:

"* * * For the State to attempt to cede to an individual or corporation a stretch of land under water adjoining the uplands of an inland navigable lake would on its
face clearly violate our constitutional provision; but when it comes to Lake Michigan, and when we consider the main purpose of this large body of water, such a cession, when made in the interests of navigation, presents an entirely different aspect. p. 447

"* * * 

"It may be conceded that a grant * * * could not in any view of the case be justified as a valid grant, because such grant would be a private grant for private and not public purposes. The reason, however, which lies at the basis of this grant to the Steel Company is not a private one, but is public in its nature, and the contemplated grant itself is a mere part and parcel of the larger scheme, purely public in its nature, designed to enable the city to construct its outer harbor in aid of navigation and commerce. * * * p. 451

"* * * it must always be borne in mind that in the present case the grant to the Steel Company was not authorized for the promotion of the interests of a private corporation, but in the interests of a public corporation, in aid of navigation. The private interests are merely incidental to the procurement of the public interests." p. 456

In Angelo v. Railroad Commission, 194 Wis. 543, 217 N. W. 570 the court held valid sec. 31.02 (5) of the statutes, which authorizes the public service commission to contract for the sale of materials from the beds of navigable lakes. The rule in that case was based on the theory that sale of materials from the lake bed did not affect the public right to the use of the waters, which is the object of the trust in which the state holds legal title to the bed.

A grant under sec. 27.115 would exclude the public from the exercise of the common rights in the navigable waters over the land subject to the grant, since the grant is for the exclusive occupancy, use and enjoyment of the grantee. Furthermore the section is not limited to grants made for public purposes, in aid of the common rights incident to navigation. While the section limits the grants to groups whose principal purposes are the development and enjoyment of navigation, it does not require that such purposes be in furtherance of the rights common to members of the public generally.

BL
Constitutional Law — Schools and School Districts — Transportation — Bill 439, A., Session of 1945, which would authorize school district meetings in suspended districts lying in towns, villages and cities of the fourth class, to provide transportation for children of district attending private elementary and high schools on same conditions as transportation may be authorized for children attending public elementary and union high schools, held to be unconstitutional.

May 11, 1945.

The Honorable, The Assembly.

By resolution adopted by your house you ask our opinion as to the constitutionality of Bill No. 439, A. This bill has been amended and whenever reference is made to it in this opinion such reference should be understood to be to the bill as amended. Said bill would amend sec. 40.34 (1), Stats., and would in substance authorize the school district meeting in suspended districts lying in towns, villages and cities of the fourth class to provide transportation for children of the district attending private elementary schools and private high schools on the same conditions as such transportation may be authorized for children attending public elementary and union high schools.

The bill is by its terms broad enough to permit transportation of pupils living in such districts to sectarian schools at public expense. The question as to the constitutionality of such legislation is one which has been considered in a number of recent decisions. It has been held in Delaware, New York, Oklahoma, Kentucky, Washington and New Jersey that legislation of this type is unconstitutional. State ex rel. Traub v. Brown, (1934) 6 W. W. Harr. 181, 36 Del. 181, 172 A. 835, writ of error dismissed 9 W. W. Harr. 187, 39 Del. 187, 197 A. 478; Judd v. Board of Education, (1938) 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789; Gurney v. Ferguson, (1942) 190 Okla. 254, 122 P. (2d) 1002, appeal dismissed and certiorari denied (1942) 317 U. S. 588, 87 L. ed. 481, 63 S. Ct. 34; Sherrard v. Jefferson County,

The conflict in the cases arises over the question of whether such transportation is a direct aid to sectarian schools or whether it is an aid to the child. The latter view is adopted by the supreme court of Maryland. A similar theory is adopted in the "free text book" cases. Borden v. Louisiana State Board of Education, (1929) 168 La. 1005, 123 S. 655, 67 A. L. R. 1183; Cochran v. Louisiana State Board of Education, (1929) 281 U. S. 370, 74 L. ed. 913. The child benefit theory is flatly rejected by the decisions of the other courts previously cited, which hold legislation providing for such transportation unconstitutional. There is no question but that these decisions represent the weight of authority on the point and are for the most part later in point of time than the cases adopting the child benefit theory.

All of the cases previously cited are decided under constitutional provisions somewhat different from those in the Wisconsin constitution. It is obvious the constitutionality of Bill No. 439, A. must depend upon a consideration of the applicable provisions in our constitution. In answering the question here we can profitably turn to the statement of Mr. Justice Cassoday in State ex rel. Weiss v. District Board, (1890) 76 Wis. 177 at 208:

"The question thus presented is not one of sectarian predilection, nor of religious belief, nor of theological conception, nor of sentiment, but one of fundamental law. It is no part of the duty of this court to make or unmake, but simply to construe this provision of the constitution. All questions of political and governmental ethics, all questions of policy, must be regarded as having been fully considered by the convention which framed, and conclusively determined by the people who adopted, the constitution more
than forty years ago. The oath of every official in the state is to support that constitution as it is, and not as it might have been. * * *

The following provisions of the Wisconsin constitution are material in answering the question submitted here. Art. 1, sec. 18, provides:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Art. X, sec. 3 provides:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

The case of State ex rel. Van Straten v. Milquet, (1923) 180 Wis. 109, is cited by many courts as holding that legislation providing for transportation of pupils to sectarian schools at public expense is unconstitutional. Thus, in Judd v. Board of Education, (1938) 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789, the New York court of appeals stated (p. 796):

"We have found but two decisions upon the precise question involved in this case (State ex rel. Van Straten v. Milquet, 180 Wis. 109, 192 N. W. 392, and State ex rel. Traub v. Brown, supra), in both of which it was held that the furnishing of transportation at public expense to private or parochial school children was prohibited by the provisions of their respective Constitutions which were similar to ours. To like effect was Report of the Minnesota Attorney-General, 1920, page 300."
We do not feel that this Wisconsin case goes this far. Strictly speaking it holds, in our opinion, that under the provisions of sec. 40.16 (1) (c) in force at that time, a school district which had suspended operation of its school had no authority to enter into a contract for transportation under which pupils could be and were transported to a sectarian school, although in its opinion the court did state (p. 115 of 180 Wis.):

"* * * The whole scope and purpose of the statute is to comply with the provisions of the constitutional mandate and that requires that free, non-sectarian instruction be provided for all persons of school age. The board is not authorized to expend public funds for any other purpose. The contract made by the district board whereby it attempted to provide transportation of pupils to a private school was an act beyond its authority and therefore invalid. * * *"

The fourth clause of art. I, sec. 18, provides in substance that no money shall "be drawn from the treasury for the benefit of religious societies or religious or theological seminaries." Art. I, sec. 18, was the subject of detailed analysis by Mr. Justice Cassoday in State ex rel. Weiss v. District Board, (1890) 76 Wis. 177 at 208 and following. He concludes (p. 215):

"* * * The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. * * *

In our opinion we would here have a case, in event Bill No. 439, A. were enacted into law and pupils were transported to sectarian schools at public expense by virtue of the authority therein contained, falling directly within the prohibition contained in art. I, sec. 18. The funds for payment of such transportation would come not only from the proceeds of taxes levied by the school districts but also from state aids paid from the state treasury as provided by sec. 40.34 (1a), Stats. The question then arises whether money thus paid out of the state treasury for the transportation of pupils to sectarian schools is for the benefit of religious societies or religious or theological seminaries within the mean-
ing of the fourth clause of art. I, sec. 18. We believe that such question must be answered in the affirmative. A sectarian school is considered a religious seminary within the meaning of that term as used in art. I, sec. 18. State ex rel. Weiss v. District Board, (1890) 76 Wis. 177 at 215. We also are of the opinion that such transportation must be considered to be for the benefit of the school. In arriving at this conclusion we follow the theory adopted by the great weight of authority to the effect that transportation of pupils to a private or sectarian school must be regarded as a benefit to the school and not the child, which we believe represents the sounder view. State ex rel. Traub v. Brown, supra; Judd v. Board of Education, supra; Gurney v. Ferguson, supra; Sherrard v. Jefferson County Board of Education, supra; Mitchell v. Consolidated School District, supra. Significantly, all courts passing on this question since 1938 have, so far as we are advised, adopted this view.


A difficult question is presented as to whether the proposed legislation here would be contrary to art. X, sec. 3. This section imposes a mandate upon the legislature to establish free non-sectarian common schools. The last clause provides: "and no sectarian instruction shall be allowed therein." The word "therein" obviously refers to the free common schools, the creation of which is provided for in said section of the constitution. Thus, art. X, sec. 3, by its terms only prohibits sectarian instruction in the common schools themselves. If such view is adopted, it would be difficult to see how transportation of pupils to a sectarian school in any way involves sectarian instruction in a public school, since it would in no way relate to the public school. However, an argument can be made to the effect that the provi-
sions of our constitution are designed to promote the establishment and maintenance of free non-sectarian schools and that by implication such system was to be exclusive and to furnish the only educational facilities to be supported by public funds. Views to this effect are expressed in *State ex rel. Van Straten v. Milquet*, supra, and in an opinion by Justice Paine in *Curtis’s Adm’r v. Whipple*, (1869) 24 Wis. 350 at 359-60. If such views are adopted, the legislation under consideration must be held to be in violation of art. X, sec. 3, of our constitution, since such transportation must under the authorities previously cited by us be considered as being directly for the benefit of the sectarian institutions to which pupils are transported.

There remains one further question. That is whether the proposed bill here would be unconstitutional because it would result in the appropriation of public funds for a private purpose. This is a question which relates to the constitutionality of the bill not only insofar as it would apply with respect to sectarian schools, but also as it would apply to non-sectarian private educational institutions. It is fundamental under constitution that a tax may be levied or an appropriation made only for a public purpose. *State ex rel. W. D. A. v. Dammann*, (1938) 228 Wis. 147; *State ex rel. American Legion v. Smith*, (1940) 235 Wis. 443; *State ex rel. Smith v. Annuity & Pension Board*, (1942) 241 Wis. 625. The question thus comes down to whether the appropriation or use of public funds for transportation of pupils to sectarian or non-sectarian private schools on the same basis as transportation furnished pupils attending public schools is for a public or private purpose. In our opinion the appropriation or use of public funds for the purpose contemplated here would be for a private purpose. Our conclusion is based upon the proposition established by the authorities previously cited that such transportation is for the direct benefit of the private educational institution and, further, upon the propositions referred to in the preceding paragraph of this opinion to the effect that the provisions of our constitution relating to education are designed to promote the establishment and maintenance of free non-sectarian schools and that by implication such system was to be exclusive and to furnish the only educational facilities
to be supported by public funds. It follows from these premises that any appropriation for the benefit of a private educational institution would necessarily be for a private purpose. In Curtis's Admin'r v. Whipple, supra, the court held unconstitutional an act authorizing a town to levy a tax to raise funds for the benefit of a private educational institution on ground it was not for a public purpose. Justice Paine in a concurring opinion stated (p. 359 of 24 Wis.):

"* * * Our constitution provides for a general system of public free schools, for normal schools, incorporated academies, and a state university. These are all to be supported largely by taxation. And from the general and extensive character of the provisions upon this subject, I think there is some implication that this system was designed to be exclusive, and to furnish the only public instruction which was to be supported by taxation. * * *"

In State ex rel. Van Straten v. Milquet, supra, there appears to be language in accord. In that case the court pointed out that the mandate given the legislature by our constitution requires that free non-sectarian instruction be furnished all persons of school age. The court held that a contract providing for transportation of pupils under which children could be and were transported to a sectarian school, was beyond the statutory power of the district meeting, stating (p. 116 of 180 Wis.):

"* * * A contention that a contract of the kind involved in this case is valid wholly ignores the underlying fundamental purpose of our educational system as set forth in the constitution."

Further, there is authority in other jurisdictions to the effect that the furnishing of transportation to children attending sectarian institutions at public expense constitutes an appropriation of public funds for a private purpose. See: Adams v. County Commissioners of St. Mary's County, supra (stating that it is "usually" so held); Sherrard v. Jefferson County Board of Education, supra; 16 New York University Law Quarterly Review, p. 141. The same rule would apply to any private educational institution.
There is no conflict between our conclusion here and that reached in the case of *State ex rel. W. D. A. v. Dammann*, supra. In that case the court referred to sec. 199.03 (1) and (2), Stats. 1937, authorizing the corporation to "promote" and "encourage" the organization of municipal power districts, certain cooperative associations or non-profit corporations and stated at p. 190 of 228 Wis. that it had no difficulty in construing such words as authorizing the corporation to engage in such educational activities "as are ordinarily proper for the state to engage in and to use the funds for this purpose." At p. 183 reference was also made to cases holding that an appropriation by the legislature must not merely be public in purpose but a proper expenditure by the state. Thus, it appears that the court in that case very definitely recognized that state funds could only be appropriated to a private corporation for educational purposes on the same plane and for the same purpose as the state could expend its funds for that purpose. Where as here formal education is concerned (as contrasted to general public education by informing the public as to matters of statewide public importance such as involved in the *W. D. A. case*), it would seem from the decisions of our supreme court previously referred to that the state would be limited in its expenditure of public funds to the support and maintenance of the free non-sectarian institutions as are provided and maintained by the legislature pursuant to the mandate laid down in our constitution and it would follow that any expenditure of public funds for the benefit of private educational institutions would be for a private purpose.

Our attention has been called to a decision by the Hon. James Wickham who was formerly judge of the circuit court for Chippewa county in a case brought in that court in 1940 and which was originally entitled "School Dist. No. 6 Town of Sigel, Chippewa County, Wisconsin, et al. v. Joseph Marek, et al." In that case an action was brought to determine the validity of a contract entered into by a school district which had closed its school to provide transportation of all children of school age residing in said district up to the 8th grade "to and from school in Cadott, Wisconsin." Some of the children transported attended the public schools in Cadott, others, a sectarian school. In holding such a con-
tract valid Judge Wickham disposed of the constitutional question involved on the child benefit theory which we have previously referred to. As previously stated, such theory is contrary to the weight of authority and has been unanimously rejected by the recent decisions on the subject. The majority of the cases have been decided subsequent to Judge Wickham's decision and had the case been before him for decision at this time it is possible an opposite conclusion would be reached. We might also add that cases which had been decided at the time of Judge Wickham's decision and which were contrary to his conclusion were not called to his attention.

WET

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**Actions — Statute of Limitations — Bonds — Public Officers — Banking Commission** — The time within which a surety on an official bond may be held liable in an action by the banking commission against it growing out of acts or omissions of an examiner covered thereby, occurring during the time said bond is in force, is determined by sec. 330.20 (2), Stats.

May 18, 1945.

**Banking Commission.**

Attention Mr. James B. Mulva, **Chairman**.

You inform us that pursuant to the provisions of sec. 220.025, Stats., examiners and others employed by the banking commission are required to furnish official bonds written in accordance with the provisions of sec. 19.01, Stats. You inquire as to how long the surety is liable to the banking commission under such a bond after it has been cancelled.

The following statutory provisions are material:

Sec. 330.14:
“The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued.”

Sec. 330.20 provides in part:

“Within three years:

“(2) An action by the state or any of its departments or agencies or by any county, town, village, city, school district or other municipal unit to recover any sum of money by reason of the breach of an official bond or the breach of a bond of any nature whatsoever, whether required by law or not, given by a public officer or any agent or employee of a governmental unit; such period to commence running when such governmental unit receives knowledge of the fact that a default has occurred in some of the conditions of such bond and that it was damaged because thereof.”

In Milwaukee v. Drew, (1936) 220 Wis. 511 at 529, it was held that the 3-year limitation prescribed by sec. 330.20 (2), Stats., was the only limitation applicable to actions on official bonds. At that time this subsection applied only to actions by any county, town, village, city or school district to recover any sum of money by reason of a breach of an official bond. It did not apply to actions by the state or any of its departments or agencies. When the statute was in this form the case of Banking Comm. v. Rothe, (1942) 239 Wis. 529, arose with the result therein noted. There was also a question as to whether this subsection applied to bonds not falling within the classification of official bonds. Cf. Banking Comm. v. National Surety Corp., (1943) 243 Wis. 542. Hence, in 1943 sec. 330.20 (2) was amended by ch. 351, Laws 1943 to make it apply to actions by the state or any of its departments or agencies as well as to actions by any county, town, village, city, school district or other municipal unit and also to any type of bond given by a public officer, agent or employee of a governmental unit, so that it would clearly now be applicable with respect to the bond referred to in your inquiry.

The date of cancellation is not necessarily a controlling date except as to acts or omissions of the principal which may have occurred after cancellation. The 3-year period re-
ferred to in subsec. (2) of sec. 330.20 does not necessarily terminate 3 years from the date of cancellation, since the time when such period commences to run depends upon the time the banking commission receives knowledge of the fact a default has occurred in some of the conditions of the bond and that it was damaged by reason thereof. It is possible to have a situation where the surety could be held liable on such a bond more than 3 years from the date of cancellation. Such a case would arise where an act or omission of the principal causing breach of condition of such bond occurred prior to the time of cancellation but the banking commission did not acquire knowledge thereof and of the fact it was damaged thereby until some date more than 3 years after date of cancellation. In such event the 3-year period commences to run on the date such knowledge was acquired. However, such situation could arise only with respect to acts or omissions of the principal which may have occurred prior to cancellation and while the bond was in force. Any act or omission which may have occurred after cancellation is simply not covered by the bond and on cancellation the surety is immediately freed from any liability growing out of any acts or omissions of the principal which may occur after cancellation.

In answering your inquiry we assume, without deciding, that the bond mentioned in your inquiry may be cancelled, either by mutual agreement of the parties or by reason of a specific provision in the bond so providing. In an opinion of this department appearing in XXXI Op. Atty. Gen. 367 it was held that a bond covering a special deputy commissioner of banking in charge of liquidating delinquent building and loan associations might be cancelled by mutual agreement between the banking commission and bonding company. The bond referred to was in the form prescribed by sec. 19.01 (2), Stats., and such right of mutual cancellation was affirmed notwithstanding the provisions of sec. 19.01 (6), Stats., providing in substance that official bonds continue in force and are applicable to official conduct during the incumbency of the officer filing it and until his successor is duly qualified and installed. The conclusion reached seems to be based largely on the fact that under sec. 215.33 (2) (c) in force at the time of said opinion the
banking commission had a discretion to determine the form and amount of the bond in question. However, subsequent to said opinion, the legislature enacted ch. 302, Laws 1943, and, among other things, created sec. 220.025, Stats., and amended sec. 215.33 (2) (c), as well as certain other sections, so as to make it plain that any bonds executed and filed by members of the banking commission and certain members of its staff, including examiners, shall be official bonds subject to the provisions of sec. 19.01. We therefore have at the present time a question whether a bond executed and filed under sec. 220.025 may be cancelled by mutual agreement of the banking commission and the surety. It may also be that some bonds may have an express provision contained therein providing for cancellation upon notice by the surety, as was the case in Lawrence v. American Surety Co., (1933) 263 Mich. 586, 249 N. W. 3, 88 A. L. R. 535.

It should further be noted that the question submitted by you inquires only as to the period the surety on such bond is liable to the banking commission. As we have previously pointed out, sec. 330.20 (2), Stats., is applicable to the state and its departments or agencies as well as other governmental units therein enumerated. It is not applicable with respect to actions by individuals or others not mentioned in this subsection and nothing herein should be construed as indicating in any way the period during which a surety on an official bond might be liable to individuals or others not included in sec. 330.20 (2), Stats.

WET
Constitutional Law — Actions — Statute of Limitations
— The legislature has power to enact legislation limiting time within which actions may be commenced to assert rights created by federal statute or by orders, rules and regulations promulgated by authority thereof in absence of a federal statute of limitation applicable thereto, provided a reasonable time is given to assert existing rights and provided further the federal cause of action is not discriminated against.

May 24, 1945.

THE HONORABLE, THE SENATE.

By resolution you have asked for an opinion as to the constitutionality of Bill No. 348, S. This bill, in substance, would make applicable the 1-year statute of limitation contained in sec. 330.22, Stats., to any action brought on a claim or cause of action which now has arisen or may hereafter arise under the provision of any federal statute or as a result of orders, rules or regulations prescribed by authority of federal statute or rights created or established by any such statute when no period of limitation has been prescribed by any applicable federal statute, irrespective of whether the claim or cause of action is penal or contractual in nature. The bill contains a savings clause with respect to claims or causes of action in existence on the date it may become effective and which are then more than 1 year old. In such case it is provided actions thereon shall be brought within 6 months after such effective date. Amendment No. 1, S would make applicable the 2-year statute of limitation contained in sec. 330.21, Stats., and provide that claims or causes of action in existence and more than 2 years old be commenced before January 1, 1946. Amendment No. 2, S would exempt from the provisions of the statute claims or causes of action arising under the Fair Labor Standard Act of 1938.

As a general rule, statutes which limit the time within which an action may be brought to enforce a right are constitutional if they allow a reasonable time after their enact-
ment for the assertion of existing rights or obligations. *Atchafalaya Land Co. v. Williams Cypress Co.*, (1921) 258 U. S. 190, 42 S. Ct. 284, 66 L. ed. 559; *Koshkonong v. Burton*, (1881) 104 U. S. 668, 26 L. ed. 886; *Terry v. Anderson*, (1877) 95 U. S. 628, 24 L. ed. 365; *Bekkedal v. Viroqua*, (1924) 183 Wis. 176. Where federal statutes conferring private rights fail to provide a time limitation within which such rights must be asserted, the state statutes of limitation must be applied. This doctrine finds its source in the Rules of Decision Act. Rev. St. sec. 721; 28 U. S. C. A. sec. 725. It applies although the cause of action arise solely under federal law and irrespective of whether the cause of action is one where jurisdiction is lodged exclusively in the federal courts or whether it is concurrent with the state courts. *Campbell v. Haverhill*, (1894) 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; *O’Sullivan v. Felix*, (1913) 233 U. S. 318, 34 S. Ct. 596, 58 L. ed. 980; 49 Yale Law Journal 738 (1940). However, if the state statute of limitation discriminates against the federal cause of action, it is questionable whether the Rules of Decision Act would apply. *Campbell v. Haverhill*, *supra*.

In view of the authorities cited we are of the opinion that the legislature has the power to adopt legislation which would, as here, apply uniformly to actions brought both in state and federal courts in this state and which would limit the time within which an action might be brought to assert any right created or established by federal statute or any order, rule or regulation promulgated thereunder, provided that a reasonable time be given to assert existing rights, and further provided that such legislation does not discriminate against the federal cause of action. We cannot say that the time fixed by Bill No. 348, S or Amendment No. 1, S thereto, within which actions must be commenced to enforce rights or claims created or established by federal statute or any order, rule or regulation thereunder is unreasonable, and we cannot say the bill would be unconstitutional on that ground.

Turning to the question as to whether Bill No. 348, S would discriminate against federal causes of action and the effect of such discrimination in event it exists, it should first be noted that the bill applies to all causes of action created
by federal statute or by federal orders, rules or regulations as to which no federal statute of limitation is applicable, except that Amendment No. 2, S would exclude claims or causes of action arising under the Fair Labor Standards Act of 1938. There are numerous causes of action created by federal law. See 49 Yale Law Journal 738 at 740; 42 Columbia Law Review 1346. The problem of determining whether any discrimination exists would involve not only the enumeration of all federal statutes or orders, rules or regulations promulgated thereunder which create causes of action in favor of private persons, but also would require that the Wisconsin limitation statutes now applicable to such causes of action or to similar non-federal causes of action be ascertained with a view of determining whether the period of limitation provided for in Bill No. 348, S would operate to discriminate against them. In event there is no discrimination, no constitutional question would in our opinion exist because the federal Rules of Decision Act would in any event make the state statute of limitation applicable. If there is a discrimination, there would in our opinion be a question as to the constitutionality of this bill. We find no decisions passing directly on this precise question and we are unable to state categorically that the bill would be unconstitutional in such event. However, the unconstitutionality of a somewhat similar Iowa statute was urged on this ground in Keen v. Mid-Continent Petroleum Corp., (D. C. Iowa, Jan. 11, 1945) 9 Labor Cases Par. 62525, but the court in its decision did not find it necessary to decide that question. In Campbell v. Haverhill, supra, the supreme court of the United States held as previously noted that a state statute of limitation was applicable in absence of a federal statute of limitation to a federal cause of action, the enforcement of which was exclusively in the federal court, by reason of the provisions of the Rules of Decision Act. The court raised a question as to whether that act could apply if the state statute of limitation discriminated against the federal cause of action, but found it unnecessary to decide that question because the statute before it made no such discrimination. 155 U. S. at 615. The federal Rules of Decision Act is of course the basis of the existing rule that state statutes of limitation are applicable as to federal
causes of action where there is no applicable federal statute of limitation. So long as that act is applicable there is, as we view it, no constitutional question as to the power of the state to enact a statute of limitation applicable to federal causes of action. If, however, such act is held inapplicable because of a discrimination against the federal cause of action, we would obviously have an entirely different question presented. We would then have a question of whether the state could constitutionally enact legislation which would engraft a limitation upon the time within which a cause of action created by federal statute could be asserted. In such event it could be argued that such state legislation in effect attempts to legislate with respect to subject matter in a field in which Congress has already legislated and reigns supreme, and that such legislation in effect attempts to limit benefits granted by the federal statute, which cannot be done. Leo Feist v. Young (CCA 7, 1943) 138 F. (2d) 972.

The foregoing disposes of all questions except that of whether discrimination against the federal causes of action exists which might invalidate the proposed law. As we have indicated, a determination of that issue would involve an extensive consideration of federal and state statutes which, as a practical matter, is impossible in the time allotted to us for preparing this opinion. Moreover, the law relating to the question as to what might constitute a discrimination is meager and obscure. It is our opinion that there is a substantial question as to whether discrimination exists, but in view of what we have said we do not feel that we are in a position to state that it does exist. In any event, the question is one which is not squarely covered by existing authorities and no decision adverse to the constitutionality of the bill should be made on this ground, except by a court after full presentation and argument of the case. WET
You call our attention to the amendment of sec. 29.09 (1) of the statutes effected by ch. 49, Laws 1945, which amendment reads as follows:

“For the duration of the present war (World War II) members of the armed forces of the United States when stationed in Wisconsin, or while on furlough or leave, shall be entitled to hunt or fish without a license.”

Our opinion is requested on several questions which have been raised by this amendment.

1. Are nonresident members of the armed forces who wish to ship fish to points without the state under the provisions of section 29.47, Wisconsin statutes, required to purchase coupons entitling them to make such shipments as provided in section 29.14 (2) ?

Sec. 29.47, which we will not take the space to set forth here, contains regulations for the transportation of fish, and most of these regulations are directed to the quantities of different species of fish which may be shipped by any one person and the time of shipment. Attention is called particularly to sec. 29.47 (2) (a) which reads:

“One shipment only of not more than one package, and containing not more than twenty pounds of game fish of any variety other than those named in paragraphs (c) and (d)
of this subsection, but not more than the bag limit for one
day, or containing in lieu thereof not more than one mus-
kellunge or two of any other fish of any weight, may be
transported by any resident to any point within the state, or
by any nonresident licensee to any point without the state
in each period of seven days."

With reference to shipments of fish outside the state by
nonresidents sec. 29.14 (2) requires an additional fee. This
section, so far as material here, reads as follows:

"Any nonresident over the age of 16 years shall have the
rights of a resident to take, catch or kill fish of any variety
with hook and line or with rod and reel in outlying waters.
Such nonresident may take, catch or kill fish, or fish for fish
with hook and line or with rod and reel in inland waters
only if a license has been duly issued to him, subject to the
provisions of section 29.09, by the state conservation com-
mission. The fee for each such license entitling the holder
to take, catch or kill fish with hook and line of any variety,
subject to the provisions of section 29.09, shall be $3, and
all such licenses shall be effective only from May 1 until the
next succeeding April 30. Upon payment of an additional
fee of $2 the original purchaser of such license shall be ent-
titled to receive 3 coupons entitling him to make 3 separate
shipments of game fish of 20 pounds or one fish of any
weight as provided in section 29.47, but no more. One cou-
pion shall be attached to each shipment so made. The agent
of any common carrier who shall accept any such shipment
without a coupon attached shall be guilty of a violation of
this chapter, and shall be punished by a fine of not less than
$25 nor more than $50. *

As above indicated if the nonresident makes a shipment
outside the state by delivering the fish to a common carrier
he must have the coupon called for by sec. 29.14 (2). How-
ever, if he retains the fish in his personal possession no
such coupon is required. XII Op. Atty. Gen. 575.

We would assume that the purpose of the amendment
provided by ch. 49, Laws 1945, was to give members of the
armed forces all of the privileges of a resident hunter or
fisherman but without requiring the payment of the regular
fees. It should be noted that under sec. 29.47 (2) a resi-
dent may, subject to certain limitations, transport fish to
any point within the state only, but that a nonresident
licensee may transport fish to any point without the state subject to certain restrictions. However, the above-quoted language of sec. 29.14 (2) makes it clear that coupons must be purchased for such out-of-state shipments and that an agent of a common carrier may not accept the shipment unless the required coupon is attached.

Exemption from hunting or fishing license requirements does not imply exemption from the statutory requirements regulating interstate shipment of game, fish, since an exemption from license fees is in derogation of common right and must receive a strict interpretation. No claim to exemption can be sustained unless it is clearly within the scope of the exempting clause. 37 C. J. 237. The right to hunt and fish in Wisconsin is freely granted to service men stationed in Wisconsin or on furlough or leave and such right may be fully exercised without adding thereto by strained construction the privilege of transporting fish outside the state without complying with the laws relating thereto.

You are therefore advised that service men are exempt from hunting and fishing license requirements for the duration of the present war by virtue of sec. 29.09 (1) as amended by ch. 49, Laws 1945, but that sec. 29.14 (2), which has not been amended, is applicable to out-of-state shipments of fish by such service men. In passing attention is called to the following language of sec. 29.14 (2):

"* * * Upon payment of an additional fee of $2 the original purchaser of such license shall be entitled to receive 3 coupons * * *." (Emphasis ours)

To the extent that this language implies that the purchase of a nonresident fishing license is a condition precedent to the purchase of coupons to attach to out-of-state fish shipments it is to be disregarded, since the purchase of such a license is no longer necessary in the case of service men by virtue of the operation of ch. 49, Laws 1945, as above indicated.

The second and third questions which you have asked are closely related and will be treated together.
2. Must a deer tag be purchased, as provided in section 29.10, by members of the armed forces before they may lawfully hunt deer?

3. Must a deer tag be attached to the carcass of lawfully killed deer, as provided in section 29.40, by members of the armed forces before they may legally have in possession and transport such deer?

Sec. 29.10 reads in part as follows:

"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 fee for each such license is $1.50. Such license does not grant the privilege of hunting deer unless the licensee is in possession of a deer tag which shall be issued to him by the county clerk on application and the payment of an additional fee of $1."

Sec. 29.40 (1) reads:

"Any person having lawfully killed a deer shall immediately attach and leave attached to the carcass, or part thereof, the deer tag corresponding to his license; and no person shall have in his possession or under his control, or have in storage or as a common carrier, any such carcass, or part thereof, without such tag attached."

Sec. 29.40 (2) reads:

"Any person residing in this state having lawfully killed a deer, may have in his possession and consume the meat thereof in his own family at any time, but must leave the tag attached thereto."

It is obvious from reading the foregoing statutory provisions that one can neither hunt deer nor have deer in his possession without a deer tag. Sec. 29.10 further provides that the number of the deer tag is to be placed in the upper righthand corner of the hunting license. In a sense the
license is validated only upon the purchase of the deer tag and the hunter may not hunt or possess deer without it.

Thus to all intents and purposes the deer tag is an essential part of the license to hunt deer. It would seem that the legislature, when it provided that a service man shall be entitled to hunt without a license, must have also intended an exemption from the deer tag requirement which is in effect a part of the license. This situation is in marked contrast to that previously discussed under sec. 29.14 (2) relating to interstate fish shipments. The right of a member of the armed forces to fish and possess fish in Wisconsin, the same as any resident but without payment of fees, is fully protected under the foregoing construction regardless of the requirement as to purchase of coupons for interstate fish shipments, whereas under secs. 29.10 and 29.40 there can be neither hunting, possession or transportation of a deer without a deer tag. As above indicated it is in effect a license or part of the license from which the legislature intended to provide an exemption for members of the armed forces.

You are therefore advised that service men meeting the requirements of ch. 49, Laws 1945, are not required to have either licenses or tags for hunting, possessing and transporting deer. Sec. 29.44 permits any person who has lawfully killed a deer in this state to take such deer into an adjoining state on his license only if the laws of other states so permit and to ship the same from any point in that state to any point within this state. The requirement as to license would of course be inapplicable to a service man under ch. 49, Laws 1945, as would the requirements of secs. 29.10 and 29.40 relating to deer tags.

WHR
Trust Funds — Normal School Fund — Public Lands — Public Land Commissioners — Indians — Sec. 24.145, Stats., places proceeds from sale of swamp lands owned by state in normal school fund referred to in article X, section 2, Wisconsin constitution.

Sec. 24.09 (1), Stats., authorizes commissioners of public lands to sell swamp lands lying within Indian reservation to the United States for the use of the Indians upon prices, terms and conditions agreeable to the commission regardless of restrictions and procedure otherwise provided by law for the sale of public lands.

May 31, 1945.

FRED R. ZIMMERMAN, Chairman,
Commissioners of Public Lands.

Pursuant to our conversation of this morning we are of the opinion that sec. 24.145, Wis. Stats., effectively places the proceeds from the sale of swamp lands owned by the state of Wisconsin, including swamp lands within the Menominee Indian Reservation, under the normal school fund. The Swamp Land Act of 1850 (9 Stat. 519) provides that the proceeds of said lands, whether from sale or by direct appropriation, shall be applied exclusively "as far as necessary" to the purpose of reclaiming said lands by means of levees and drains. By sec. 24.145, Wis. Stats., as created by ch. 212, Laws 1939, the legislature has determined and declared that none of the swamp lands and proceeds thereof not previously applied to reclamation purposes are any longer "necessary for the purpose of reclaiming any such swamp and overflowed lands by construction of levees and drains or otherwise." The act goes on to provide that such lands and the proceeds from the sale thereof shall be made a part of the normal school fund, although it is a little difficult to see how, technically speaking, lands themselves can be made the part of any fund since lands are not funds. But in any event there can be no question as to the proceeds. Constitutional authority for such legislative action is to be found in article X, section 2, Wisconsin constitution, which
provides among other things that "all moneys arising from any grant to the state where the purposes of such grant are not specified" shall be set apart as "the school fund" which must be used for the support and maintenance of common schools and the residue for academies, normal schools and suitable libraries and apparatus therefor.

Since the proceeds of the sale from swamp lands are no longer "necessary" for the purposes provided in the federal grant of 1850 said grant becomes one without a specified purpose within the meaning of article X, section 2, Wisconsin constitution and the proceeds are to be devoted either to the common schools or normal schools which is what the legislature has accomplished by the enactment of sec. 24.145.

Secondly, question has been raised as to the authority of the commissioners of public lands to accept as payment for the swamp lands in the Menominee Indian Reservation the amount of the judgment entered by the United States court of claims in favor of the Menominee Tribe of Indians and against the United States less attorney fees, which are a lien on said judgment. Attention is called to our opinion of February 7, 1945, XXXIV Op. Atty. Gen. 37, as to the history of this litigation. With reference to attorney fees the enabling act under which the Indians sued the United States provided:

"Upon the final determination of such suit, cause, or action, whether by judgment, compromise, or otherwise, the court of claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Menominee Tribe of Indians * * *. The fees decreed by the court to the attorney or attorneys shall be paid out of any sum or sums recovered in such suit or action or received by compromise and not otherwise. * * *


It has been decided to use the amount available from said judgment to purchase the lands from the state of Wisconsin for the use of the Indians. The amount of the judgment entered June 5, 1944 was $1,781,282.91, which includes $13,666.80 representing timber removed from the swamp lands, the proceeds of which were collected by the state of Wisconsin.
Wisconsin and $1,767,616.11, representing the present acquisition cost of the lands. The attorney fees allowed were ten per cent of the amount of the judgment, or $178,128.29, representing services rendered since 1930, commencing with work done by the law firm of Hughes, Schurman & Dwight of New York, headed by the Honorable Charles Evans Hughes. In 1937 this firm liquidated and the work was taken over by Dwight, Harris, Koege & Caskey, the present attorneys of record associated with Moyle & Wilkinson of Washington, D. C. The account of the work done by these attorneys, first in securing the adoption of a jurisdictional bill permitting the Indians to bring suit, and the investigational work and litigation involved is covered in a 25-page report of the commissioner appointed to determine the fees. This report was filed December 4, 1944 in the case of Menominee Tribe of Indians v. United States, No. 44294, in the court of claims of the United States.

It will be recalled that in conferences which this commission had in Washington in April of 1944 with representatives of the interior department and the department of Justice and with members of congress that it was pointed out that there was no possibility of congress passing an appropriation which would take care of the attorney fees in any other way than as provided in the jurisdictional act, because of the well-established precedent in matters of that sort.

Having in mind the fact that the net amount of the judgment would constitute the only existing source of funds available to the United States for the purchase of the swamp lands in question this commission agreed to the figure of $1,767,616.11 as the present acquisition cost of these lands and authorized the secretary of the interior to use the proceeds of such judgment, less the amount awarded as attorney fees, to acquire the lands with the understanding that under the contract between the attorneys and the Indians the attorney fees would not exceed ten per cent.

Ample authority for the sale on such terms exists in our opinion by reason of the provisions of sec. 24.09 (1), as amended by ch. 106, Laws 1943, which was enacted primarily with this particular situation in mind. See our opinion of February 7, 1945 for a further discussion of this
statute, which authorizes the sale of state lands in Indian reservations "upon prices, terms and conditions agreeable to said commissioners and without being subject to the restrictions and procedure otherwise provided by law for the sale of public lands."

It is scarcely necessary here to go into the various questions of policy pointing to the wisdom of the proposed sale for the net amount of the judgment, or to point out the fact that on prior occasions the commission has been willing to sell for a fraction of the present price available and has been willing to settle on an estimated swamp-land acreage of 26,270 acres or less, as compared to the present agreed figure of 33,870 acres which has been established largely through the efforts put forth by the attorneys for the Menominee Indians, as well as the fact that the proposed sale price includes many thousands of dollars for timber trespass, which it would be difficult or impossible to establish in court today. These are all matters with which you are familiar and we conclude, in view of the foregoing, that sec. 24.145 properly places the proceeds of the sale of swamp lands in the normal school fund and that this commission is authorized under sec. 24.09 (1) to sell to the United States for the use of the Menominee Indians state-owned swamp lands lying within the Menominee Indian Reservation at a price aggregating the amount of the judgment less attorney fees entered in the above-mentioned action, which was grounded upon the fact that the United States had violated the terms of its treaty of 1854 with the Menominee Tribe of Indians because of its prior grant of certain lands to the state of Wisconsin under the Swamp Land Act of 1850.

WHR
Acts of Legislature — Effective Date — When act does not expressly prescribe when it shall take effect, effective date shall be day after its publication as provided in sec. 370.05, Stats.

June 6, 1945.

B. L. Marcus, Deputy Commissioner, Motor Vehicle Department.

You ask when chapter 56 of the Laws of 1945 becomes effective. The act itself is silent as to the effective date. Section 370.05, Stats., reads as follows:

"Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication."

This section of the statute governs the situation, and chapter 56 of the Laws of 1945 became operative the day following its publication.

You point out that it is necessary for any operator desiring to take advantage of the provisions of chapter 56 to make application to your department to authorize such operation, for the reason that the requirements found elsewhere in the statutes respecting the filing of an insurance policy covering such additional operation must be complied with. For that reason you say you have decided that the law should be held to become effective commencing July 1, 1945, which is the new registration quarter. Such an interpretation is not only unwarranted in view of the general provision quoted above, but would not solve your problem, because after the new quarter has begun and the fee has been paid, an operator might then lease his equipment to another operator, which lease was not in contemplation when the vehicle was registered. It would seem advisable to adopt a rule requiring carriers to notify the department of intention to lease equipment and to file proper evidence of insurance covering the proposed operation.

SGH
Automobiles and Motor Vehicles — Registration — Dealer purchasing trucks from out of state for resale in the state who does not operate the trucks himself for the purposes for which they were constructed, must nevertheless register such vehicles according to gross weight scale and formula prescribed by sec. 85.01 (4) (c), Stats.

June 6, 1945.

B. L. Marcus, Deputy Commissioner,
Motor Vehicle Department.

You inquire whether, under the following described circumstances, it is permissible for a dealer to license a vehicle in the "truck" category for less than actual weight. Your question arises out of the discovery by an enforcement officer of the practice of a dealer who engages in the business of buying used trucks out of the state for resale in Wisconsin to register them by applying for and procuring "A" licenses when in fact the "gross weight" of such vehicles calls for "B," "C" or "D" licenses. The dealer, by way of explanation, asserts he does not operate the trucks for hire or for transportation purposes but merely has them driven to his place of business for resale. He registers the vehicles in this manner solely to obtain a Wisconsin certificate of title, and the purchaser subsequently registers the vehicle in its proper category.

Registration of motor vehicles is governed exclusively by chapter 85, statutes. Section 85.01 (4) (c), statutes, prescribes the fees payable for registration of trucks. The rates are graduated according to weight. The scale of rates is not pertinent here. The statute further prescribes the formula for determining the weight which in turn governs the amount of the fee. Insofar as material here, section 85.01 (4) (c) provides as follows:

"* * * The gross weight in tons shall be in every case arrived at by adding together the weight in pounds of the motor truck or motor delivery wagon when equipped ready to carry a load and the maximum load carried by the vehicle in pounds, and then dividing the sum of the two by 2,000. * * *"
There are no exceptions allowed by this statute, the test being the capacity and potential use of the vehicle, rather than its actual use. Were it otherwise it would be impossible for police officers to ascertain whether the licensing law was being violated. This is further borne out by sections 85.50 and 85.01 (4) (j) of the statutes, both of which manifest the legislative intent:

"85.50 No motor truck, truck tractor, tractor or bus, or trailer or semitrailer used in connection therewith, shall be operated upon any highway unless it shall have attached to or lettered upon each side thereof a sign giving its net weight, the tare weight and the gross weight of vehicle and load. The weights indicated on any such vehicles shall correspond with the weights for which said vehicle is registered under paragraph (c) of subsection (4) of section 85.01."

"85.01 (4) (j) If any motor truck, truck tractor, tractor, delivery wagon, passenger automobile bus, or trailer or semitrailer used in connection therewith, shall be registered at a lower gross weight than that indicated thereon as required by section 85.50, or if the gross weight of the vehicle is greater than that at which such vehicle is registered, or the owner wilfully gives an erroneous address in the application, the owner thereof shall be required to register the same in conformity with the actual gross weight of the vehicle and shall pay only the additional fee required for the increased carrying capacity of the vehicle, or shall be required to supply such correct address and in addition the penalties provided in subsection (12) of this section may also be imposed. Trucks, trailers and semitrailers may be registered in excess of the maximum gross weight according to the manufacturers' rating on payment of the proper fee for such weight but such registration shall not exempt such vehicle from compliance with all weight restrictions imposed by chapter 85."

The registration practices of the dealer in question are accordingly unlawful, rendering him liable to prosecution and imposition of penalties under sec. 85.01 (12), Stats. SGH
Justice Court — Attorney and Client — Unauthorized Practice of Law — Collection Agency — Collection agency or officer thereof not licensed to practice law may not prosecute claims of customers in justice court, either as agent of creditor or as assignee of creditor's claim without consideration other than agreement to share in proceeds. Such activities constitute the practice of law under sec. 256.30 (2), Wis. Stats., and one engaging in such business without being licensed to practice law may not claim immunity under sec. 301.20 or otherwise.

June 14, 1945.

JOHN F. DOYLE, Supervisor,
State Banking Department.

You have called our attention to the fact that a certain collection agency follows the practice of making collections by bringing garnishment actions in justice court. The name of the creditor appears as plaintiff in these actions and the manager or some other employee of the collection agency signs the garnishment affidavit under sec. 304.20 on behalf of the plaintiff. These cases are handled in justice court without the assistance of counsel so far as the plaintiff is concerned, and the question has been raised as to whether such procedure constitutes the unauthorized practice of law by the collection agency.

Art. VII, sec. 20, Wisconsin constitution provides:

"Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice."

While this provision has not been before our court for construction a similar provision in the Michigan constitution was construed in Cobb v. Judge of Superior Court, (1880) 43 Mich. 289, 5 N. W. 309, wherein it was held that a party to an action in a court of record could not appear therein by an "agent" not licensed as an attorney. The court said at page 310:
"If the word 'agent' as used in the constitution, is not to be construed as synonymous with the word attorney, what is to be the result? Parties may appear by an agent possessing no legal qualification, or even ordinary intelligence, and of the worst possible character; they may be minors, and may even be persons who have been disbarred and removed by this court from practicing as attorneys and solicitors. They could not practice as attorneys, possessing neither the legal nor moral qualifications for such a position, and yet they could appear as agents. They would possess the rights of attorneys, but not be subject to the responsibilities; their removal by the court, if they could be removed, would be a mere idle ceremony. Litigants might again employ them, and authorize them to appear and represent their interests, so that persons who could not practice as attorneys could as agents, with equal rights and powers. Such could not have been the intention of the framers of our fundamental law, or of the people in adopting it."

As above stated, our supreme court has not directly construed art. VII, sec. 20, but nevertheless it must have had this provision in mind in the Appeal of Cichon, (1938) 227 Wis. 62, 278 N. W. 1, 125 A. L. R. 1184 n., which involved the review of a contempt order for alleged unauthorized practice of law. The trial court had asked the defendant if he were appearing as agent for others and the supreme court said at pages 69-70:

"* * * In this connection it is to be noted that the word 'attorney' was not used by the [trial] court in the course of its inquiries, but rather the word 'agent,' which, while it may have substantially the meaning of 'attorney' when its constitutional and legislative history is fully considered, very likely would not mean the same to an ordinary layman. * * *" (Emphasis ours)

This language may be considered as implying approval of the reasoning in the Michigan decision although it cannot be regarded as settling the question in Wisconsin.

It is to be noted that the Michigan decision involved not a justice court but a court of record. With reference to justice court practice in Wisconsin, sec. 301.20 provides in part:
Any plaintiff or defendant, except persons under twenty-one years of age, may appear by an attorney, agent or in person and conduct or defend any action. A party authorized to appear by attorney or agent may appoint any person such agent, and his authority may be written or verbal and shall, in all cases, when required by the justice, be proved by the agent himself or by other competent testimony unless admitted by the opposite party."

In State ex rel. Jr. Ass'n. of Milw. Bar v. Rice, (1940) 236 Wis. 38, 294 N. W. 550 the court affirmed that part of the judgment which held that the defendant, an insurance adjuster, was engaging in the unauthorized practice of law when he appeared in a representative capacity before a justice of the peace. It was conceded by the defendant that so appearing was improper, so that there was no contention that this part of the judgment should not stand. It is doubtful that the Rice case can be considered as determining the question in view of the lack of consideration given the above point in the case. See 1941 Wis. Law Review, 577 at 579.

Answer to the problem must depend to a considerable extent at least upon the scope of the definition of the practice of law contained in sec. 256.30 (2), Wis. Stats., which reads as follows:

"Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

The first part of the definition makes it clear that appearing in a representative capacity in a court of record constitutes the practice of law, although this would not cover justice court practice. However, the words "give professional legal advice not incidental to his usual or ordinary business, or render any legal service" are broad enough to cover juc-
tice court practice as further discussion will show. It perhaps should be noted here in passing that a lay person may not engage in a business which involves the rendering of "legal service" and then claim immunity under sec. 256.30 (2) on the grounds that this is incidental to his usual or ordinary business. See Rice case, supra.

The Wisconsin statute defining the practice of law, sec. 256.30 (2) appears to be in line with the generally accepted definitions. While it is true that the boundaries of the practice of law are indefinite as to some transactions it is generally understood to include the doing or performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure; but it is not confined to performing services in an action or proceeding pending in courts of justice, and, in a larger sense, it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. 7 C. J. S. 703.

By the terms of our constitution justice courts in Wisconsin constitute a part of the judiciary. Art. VII, sec. 2, provides in part:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace.

* * *

Art. VII, sec. 15, Wisconsin constitution, provides that justices of the peace "shall have such civil and criminal jurisdiction as shall be prescribed by law."

It has been held that the office of justice of the peace is not a "court" in the common acceptance of that term, even though the justice has jurisdiction to try small cases, since there is no special pleading before a justice and the parties litigant in person or by agent have the right to participate in the proceedings. Rehm v. Cumberland Coal Co., (1935) 169 Md. 365, 181 A. 724. This decision, however, is not in accord with the weight of authority and its reasoning in part at least begs the question since the determination of
whether a given tribunal is a court should not be predicated upon the right or lack of right of laymen to practice therein, but rather such lay right to practice is contingent upon the determination first of whether or not the tribunal is a court. In effect the Rehm decision puts the cart before the horse.

In American law a justice of the peace has been generally defined as a judicial officer of inferior rank whose duties among other things include “holding a court not of record.” 35 C. J. 448. In some jurisdictions these courts are courts of record. 35 C. J. 449. The term “court” may include a justice. Katz v. Herschel Mfg. Co., 150 Fed. 684; Tissier v. Rhein, 130 Ill. 110, 22 N. E. 848; Webster v. Boyer, 81 Or. 485, 159 P. 1166, Ann. Cas. 1918D 988; Bunker v. State, 77 Tex. Cr. 38, 177 S. W. 103; Rex v. McLennan, 7 Terr. L. 309. And it has been held that justice courts are no less courts because they are not courts of record. State v. Whitehead, 88 Wash. 549, 551, 153 P. 349.

In Bessemer Bar Ass’n v. Fitzpatrick, (Ala., 1940) 196 S. 733 it was held that the unlawful practice of law before a justice of the peace is “contempt” of the circuit and of the supreme court. Likewise in the case of In re Morse, (1924) 98 Vt. 85, 126 A. 550, 36 A. L. R. 527 it was ruled that one undertaking without a license to practice before a justice of the peace may be punished for contempt. The defendant in this case operated a collection business in addition to other activities. The court said at page 531:

“It is claimed, too, that since the respondent’s operations were confined to the justice courts, he is not amenable to this court. But we think that, if he is answerable anywhere for the offense charged, it is to this court. He is not charged with violating a mandate of the inferior court, or with misbehavior in that court, but rather with intruding into an office of this court, pretending to act under the authority and with the sanction of this court.

“The right to act as an attorney is everywhere recognized as a privilege of a personal nature, not open to all, but limited to persons of good moral character, possessing special qualifications ascertained and certified after a long course of study, both general and professional. It is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard
study and good conduct. It is usually attested by a certificate of the authority, whence derived, and is further evidenced by the public records. It cannot be lawfully exercised, except by those who have complied with all statutory requirements, and the rules of court relating thereto. Authority to confer or withhold this privilege is usually confided to the courts. * * *"

It might at this point be noted also that the Wisconsin supreme court under art. VII, sec. 3, Wisconsin constitution, has a general superintending control over all inferior courts which doubtless would justify a holding in this state that unauthorized practice of law before a justice of peace is a contempt of the supreme court.

In *State v. Merchants' Credit Service*, (1937, Mont.) 66 P. (2) 337 it was held that a corporation engaged in the collection business could not practice in justice court despite the fact that sec. 8943 of the Montana statutes provides:

"If any person practice law in any court, except a justice's court or a police court, without having received a license as attorney and counselor, he is guilty of a contempt of court."

Sec. 9629 also provides:

"Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney."

It was pointed out in a concurring opinion that these unlicensed persons appearing in justice court were acting as attorneys the same as licensed attorneys, since they were performing the same duties as lawyers generally, and when so engaged would be necessarily practicing law.

In adjudging the defendants guilty of contempt the court also held that the collection agency which solicited assignments of debts for collection was not the "real party in interest" so far as accounts and claims other than negotiable notes were concerned, within the meaning of the statute similar to our sec. 260.13 which requires every action, with certain exceptions not material here, to be prosecuted in the
name of the real party in interest. Hence the collection agency was not entitled to sue on such assigned claims since when suing it was not representing itself but its assignors.

However, entirely aside from the question of contempt it has been directly held that justice court practice by a collection agency constitutes the practice of law and, as a matter of fact, this is really the ultimate question since whether or not there is a contempt must depend upon the determination first that the acts in question constitute the practice of law. If they do, it follows as a matter of course that the unlicensed practitioner is guilty of contempt and if they do not there can be no contempt of the kind contemplated in the foregoing decisions.

In Bump v. Barnett, (Ia., 1944) 16 N. W. (2) 579 wherein a collector was enjoined among other things from instituting and conducting actions in justice court, we quote at some length from the supreme court's opinion, pages 582-3:

“'And so with the right of a plaintiff to try his own lawsuit in any court. If it is really his own litigation the right is unquestioned and unquestionable. But if it is another's lawsuit or action, placed in plaintiff's name so as to enable him to render service to that other under the pretext of trying his own case, it does not come under the protection of the rule. And if it is done by one who engages in it as a business and holds himself out as peculiarly qualified or equipped, it comes under the ban of illegal practice of law. 

“So likewise with the argument that because our statute, section 10526, Code 1939, provides that in justice court either party may appear 'in person or by agent,' defendant is thereby permitted to engage in the practice regularly of representing clients in justice courts. The conclusion does not logically follow. The salutory purpose of the statute may not thus be perverted to encourage the growth of a class of 'justice court lawyers,' unfettered by the rules that bind licensed attorneys and without training in law and ethics. Such rules are just as important in justice courts as in courts of record—more important, perhaps, because the justice of the peace is often one untrained in such matters—and certainly such safeguards are not less important by reason of the fact, if it be a fact, that justice courts are 'poor men's courts.' The poor man is entitled to the same professional service as are more favored litigants.'
Incidentally the court pointed out that whether the question was raised in contempt proceedings or by injunction the same or similar issues are involved and that either form of proceeding is proper.

We think it is very clear from the foregoing cases that a collection agency which institutes and conducts litigation on behalf of its customers is necessarily giving "professional legal advice not incidental to its usual or ordinary business" and is rendering "legal service" within the meaning of sec. 256.30 (2) defining the practice of law. In the first instance by instituting the action it is impliedly advising that there is a valid cause of action at law. Also it is impliedly advising that the process and forms, which it drafts for commencements of the action, are legally adequate for the purpose as are other forms or procedures which it may employ in the course of the action or in enforcing the judgment. That "legal services are rendered" in these justice court actions by collection agencies is so clearly established by the cases hereinbefore mentioned as to call for no further discussion on our part.

You are therefore advised that a collection agency may not properly institute litigation in justice court on behalf of its customers when peaceful methods of collection have failed and that when it does make a business of appearing in such cases, either as agent of the creditor or as assignee of a creditor's claim without consideration other than an agreement to share in the proceeds, it is engaged in the unauthorized practice of law.

WHR
Criminal Law — Courts — Prisons and Prisoners — Sentence — Sentences in the state prison and the Milwaukee county house of correction may run concurrently.

June 15, 1945.

A. W. Bayley, Director,
State Department of Public Welfare.

You state that A was sentenced to 6 months in the Milwaukee county house of correction on an offense punishable by imprisonment in a county jail; that later the same court sentenced him to the state prison for a term of from 1 to 3 years and specifically provided that the later sentence should run concurrently with the sentence to the house of correction. You state that the prisoner finished his term in the house of correction and was then taken to the state prison. You wish to know whether the sentence to the state prison commences as of the date of the sentence, so that credit should be given for the time thereafter served in the house of correction, or whether it begins as of the later date when the prisoner completed his sentence in the house of correction.

In the absence of a prohibitory statute, a sentencing court has power to make sentences for two different offenses run concurrently if they are to the same institution. At common law preference was given to a construction which made two sentences concurrent rather than cumulative; and if there were any doubt as to a court's authority it was with respect to the right to make the sentences consecutive rather than concurrent. See Application of McDonald, 178 Wis. 167, 189 N. W. 1029; 24 C. J. S. 1236 et seq. The court in the case you report has left no doubt as to its intention that the sentence to the house of correction and that to the state prison should run concurrently. That intention will control unless it is beyond the power of the court either because prohibited by statute or for some other reason.

Very few of the cases decided in other states are helpful because of the great variation in statutory provisions. The
applicable statute in this case, sec. 359.07, provides that where the court has not specified in its judgment that the sentences are to be served consecutively “all sentences shall commence at twelve o'clock, noon, on the day of such sentence, but any time which may elapse after such sentence, while such convict is confined in the county jail or is at large on bail, or while his case is pending in the supreme court upon writ of error or otherwise shall not be computed as any part of the term of such sentence.” Under the statute the term is to be computed as beginning at noon of the day of the sentence unless one of the specified circumstances exists. The prisoner was neither out on bail, out while his case was pending in the supreme court, nor in a county jail. He was, however, in the house of correction for an offense punishable in county jail. Generally speaking, we think it would be beyond the power of the court to permit imprisonment in the county jail to expiate an offense which the statutes have made punishable only in the state prison. The opinion in United States v. Remus, 12 F. 2d 239 left the inference that a court has no power to authorize imprisonment in an institution of lower status to expiate an offense which the statutes make punishable only by confinement in a particular institution, although the case was decided primarily on the theory that the court did not intend the sentences to be concurrent. Furthermore, the status of the house of correction is something more than a county jail, since section 56.18 gives the courts the alternatives of sentencing either to it or the state prison for such an offense as the case here involved. Had the second sentence been to the house of correction instead of to the state prison the two would have run concurrently from the date on which the second was pronounced. The question arises whether the court, by specifying the state prison instead of the house of correction as the place of confinement for the second offense, has exceeded its power to make the sentences run concurrently as they would otherwise have done.

The opinion was given in XIX Op. Atty. Gen. 13 that two sentences, one to the state prison and one to the state reformatory ran concurrently even though the committing court did not make such specific provision. In Anthony v. Kaiser, 169 S. W. 2d 47, 350 Mo. 748 two sentences imposed
at different times to different institutions were held to run concurrently even though there was no express provision to that effect and no reference whatever was made in the second sentence to the prior one. The court said:

"Ordinarily sentences to different institutions are, in the very nature of things, cumulative and not concurrent. But we do not regard the circumstance that the petitioner's two sentences, as originally pronounced, were to different institutions is controlling as establishing their successive character for the reason the provisions of the intermediate reformatory act with respect to transferring prisoners from that institution to the penitentiary are written into every sentence pronounced under said act. After the revocation of his parole, petitioner was held under both sentences in the same institution and so, in legal contemplation his two sentences are to be treated as if both had originally designated the same institution."

The above opinion appears to have been based, partially at least, upon the existence of authority to transfer a prisoner from one institution to the other. We find in the Wisconsin statutes no express provision for free transfer of prisoners between the state prison and the Milwaukee house of correction except in sec. 53.28 which was apparently intended to apply only in the event that the Milwaukee house of correction became the Wisconsin house of correction by the purchase there authorized. Sec. 54.07 provides only for transfer from the house of correction to the reformatory and return, and sec. 56.18 (4) provides for transfer from the house of correction to the prison in certain cases. On the other hand, such provisions for transfer as have been included in the statutes, together with the right of courts to sentence either to the Milwaukee house of correction or to the state prison for the type of offenses involved in the case you report, indicate that the legislature intended for those cases to establish the two institutions as of equal grade, so that confinement in either should have efficacy to expiate the offense. We believe the confinement in the house of correction during the first part of the sentence should be regarded as constructive confinement in the state prison rather than in a county jail, so as not to fall within the pro-
hibition of sec. 359.07 against computing time while a convict is in a county jail as a part of his prison sentence; and that A's term should be calculated as beginning on the day of sentence pursuant to the intention of the sentencing court.

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Public Health — Upholstering — Sec. 146.04, Stats., refers to upholstered baby carriages and upholstered toy furniture.

June 15, 1945.

INDUSTRIAL COMMISSION.
Attention Helen E. Gill, Secretary.

You have requested our opinion with respect to whether certain articles fall within the provisions of sec. 146.04, Stats. The section relates to mattresses and upholstering and provides restrictions as to materials which may be used and labeling of materials. You desire to know whether the following fall within the provisions of the section:

1. Padded or upholstered parts of baby carriages. In our opinion, the answer is "yes." Subsec. (2), relating to upholstering, refers to covering and filling of upholstered articles. While the usual use of the word "upholstering" refers to furniture and the like, it is also commonly used with reference to seat coverings in automobiles and other articles in which padding and covering are used. In ordinary understanding people would refer to a baby carriage containing padding and covering as an upholstered baby carriage. Bearing in mind the purpose of the section to protect health, we can see no reason for limiting the meaning of the word "upholstering" to exclude baby carriages.

2. Toys padded or stuffed with cotton or other filling material. You refer to the fact that you are making the request because of a request to you from the National Asso-
ciation of Furniture Manufacturers for information with respect to articles included in the section. Bearing in mind the source of the request, we need not concern ourselves with articles such as baseballs, dolls, and the like. So far as toy chairs, beds, etc., are concerned, we are of the opinion they are included within the section. A toy chair may be upholstered in the same way that a chair of regular size may be upholstered. The reasons for requiring labeling of materials used in upholstering of such a chair are just as applicable in the one case as in the other.

JWR

Vital Statistics — Birth Certificate — Officials responsible for filing birth certificates do not have authority to alter completed certificates merely upon receipt of an order issued under sec. 48.07.

June 18, 1945.

STATE BOARD OF HEALTH.
Attention Carl N. Neupert, M. D., State Health Officer.

You inform us that the bureau of vital statistics has in its files a completed birth certificate for a certain child, showing the mother's husband as the father. You have since received a copy of an order from a juvenile court transferring the permanent custody of the child under sec. 48.07 of the statutes, in which order it was found that the child was illegitimate and that the statement in the birth certificate to the effect that the mother's husband was the father, is incorrect. You ask whether the birth certificate should be altered, or whether the order should be placed in your files.

The order referred to is not directed to the bureau of vital statistics, nor was the bureau made a party to the proceedings in which it was issued. We give no opinion as to whether the court would have had jurisdiction to impose a command upon the bureau of vital statistics, because it is apparent that the court has not endeavored to do so.
The functions and duties of the bureau of vital statistics are strictly statutory. What the supreme court said in *Union Indemnity Co. v. Smith*, 187 Wis. 528, 205 N. W. 492 with respect to the railroad commission and the insurance commissioner is also true of such statutory agencies as the bureau of vital statistics, i. e., that as agents of purely statutory creation their power must be found within the four corners of the statutes creating them. Accordingly, if the bureau of vital statistics has authority to alter a birth certificate filed with it pursuant to law, or to accept papers for filing as public records, a grant of such authority must be found in the statutes either in express words or by necessary implication.

Sec. 69.335 provides for correction of birth certificates only upon the application of the person whose birth is recorded, or of his parents. There has been no such application in this case. Secs. 69.25 and 69.27 provide for completion of certificates where necessary items of information were not supplied upon the original filing. Such missing information is presumably to be furnished by the informant who originally filed the certificate, or by the parents. In the case in question it does not appear that the certificate as originally filed was incomplete, nor has any information been offered by the parents, nor by the person who made the original certificate, to supplement it. Sec. 69.33 provides for alteration of a birth certificate upon receipt from the clerk of court of information of entry of an order of adoption, or upon receipt of information that a child has been legitimated by the subsequent marriage of its parents. There is, however, no statutory provision for alteration of a birth certificate by reason of an order entered under sec. 48.07. This omission by the legislature of authority for alteration of a birth certificate in such cases cannot be deemed without significance when similar authority has been expressly provided in other cases. The omission may be due to the fact that a transfer of permanent custody of a child does not ordinarily alter the parentage, but is often followed by adoption proceedings which do.

It is also possible that the legislative omission to provide for alteration of a birth certificate in such cases may be due to the legislative policy of discouraging the publicizing
of illegitimacy. This policy is manifested in sec. 69.30. Whatever may be the reason, we find no statutory authorization for the bureau of vital statistics either to alter a birth certificate by reason of an order of a juvenile court entered under sec. 48.07, or to file such an order. In the absence of such statutory provision we do not believe the authority exists.

It seems probable that in the case you have reported no substantive rights would be affected by an alteration of the birth certificate in accordance with the order of the juvenile court. The order of the juvenile court itself is adequate evidence in any proceeding in which the obligation of the parents may be involved, or in later adoption proceedings. In the event of adoption proceedings there is statutory provision for alteration of the birth certificate so as to accord with the permanent future parentage of the child as established by law.

BL

Actions — Bastardy — Minors — Guardian ad Litem —
A minor male entering into a settlement in illegitimacy proceedings under ch. 166, Stats., must appear by guardian ad litem as provided in secs. 260.22 and 260.23, Stats., since this is a civil action.

June 27, 1945.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

You have requested an opinion relative to the validity of a settlement agreement in an illegitimacy action wherein the putative father was a minor and no guardian ad litem had been appointed for him.

The agreement you referred to was made in accordance with the provisions of ch. 166, and particularly sec. 166.07, Wis. Stats. A complaint had been signed and filed and a
warrant issued for the arrest of the minor boy. Before his arraignment, he entered into a written agreement with the prospective mother whereby he agreed to pay a lump sum settlement. The agreement was approved by the girl's mother, by the boy and the girl, by the boy's father, and by yourself as district attorney. The circuit judge also approved the agreement, but no judgment has been entered thereon.

Illegitimacy proceedings are civil, although some of the procedure involved is the same as in criminal cases. For example, the action may be started by warrant as well as by summons. The proof necessary to establish guilt is the same as in criminal cases, viz., "beyond a reasonable doubt." Nevertheless, the remedy is civil. In Schuh v. State, (1936) 221 Wis. 180, 266 N. W. 234, the court said:

"* * * While an illegitimacy proceeding is a civil action, the law requires proof of guilt beyond a reasonable doubt."

It might be debatable whether the court intended to identify the proceedings as a civil action rather than a special proceeding. The language could be consistent with an intention to distinguish the proceeding from a criminal proceeding. However, the proceeding is either a civil action or a civil special proceeding and in either case under the provisions of ch. 260 it would be necessary to appoint a guardian in the case of a minor party. Sec. 260.22 provides:

"When a minor is a party he must appear by guardian ad litem, who may be appointed by the court or by a judge thereof."

The section is in the chapter relating to civil actions, although the chapter also relates to special proceedings of a civil character. Sec. 260.23, which treats with the appointment of guardians ad litem, provides in subsecs. (4) and (5) for compromise or settlement and voluntary appearance or waiver in cases where a guardian ad litem has been appointed in an action or a special proceeding. It is our opinion that secs. 260.22 and 260.23 must be considered to-
together and that both deal with civil actions and special pro-
ceedings. Whether an illegitimacy proceeding is a civil ac-
tion or a special proceeding, it is necessary to appoint a
guardian ad litem for a minor party.

In your request for opinion you also raise a question in
regard to the possibility of the boy who is now in the army,
making an allotment from his army pay for the support of
the illegitimate child. We do not feel that this department
is in any position to make a formal ruling on this question
because this involves an interpretation of army rules and
any opinion that we might give you certainly would not be
binding upon a federal agency. We suggest that you direct
an inquiry to the Office of Dependency Benefits, War De-
partment, 213 Washington Street, Newark, New Jersey.
ES
District Attorney — Mileage — Poor Relief — Old-age Assistance — Under sec. 59.15 (1) (c), Wis. Stats., part time district attorney who maintains part time office at county seat but who lives in another city where he also maintains an office, may charge for travel in the performance of his official duties whether such trip begins in the city of his residence or at the county seat, although he may not charge for travel between his home or private office and the county seat.

Attorney fees allowed district attorney under sec. 49.26 (7) in probating of old-age pensioners' estates must be turned over to county treasurer. This is true whether or not the county board has so provided by resolution.

Sec. 49.26 (7) does not cover attorney fees in securing certificates of heirship. It is proper to pay such fees either to part time district attorney or private attorney only where the value of the property exceeds the county's old-age assistance claim.

If the purchaser of property against which there is an old-age assistance lien insists upon merchantable title in administrator's or foreclosure sale, district attorney should take such steps as are reasonably necessary to perfect title in order to complete sale and secure payment of county's claim without charge, and county is entitled to no extra compensation out of the claim on division with state and federal governments by reason of the fact that it furnished the legal services of the district attorney in clearing up title defects.

July 14, 1945.

HENRY C. OAKEY,
District Attorney,
Osceola, Wisconsin.

You have asked for our opinion on several questions relating to the fees and allowable expenses of the district attorney. The first question reads as follows:

"1. Whether the amount of mileage payable to the District Attorney shall be determined from the county seat or the home of the District Attorney?"
"A resolution of the County Board provides the District Attorney shall be allowed actual travel expenses within and without Polk County when on official business according to the County Schedule. The County Clerk for the last twenty years knows of no County Schedule, so I presume it must be the Statutory Schedule.

"The facts involved in this case are that my home and office are at Osceola and the county seat is at Balsam Lake. The work of the office requires about twenty hours a week, of which about half is spent in Osceola. The other half is spent at Balsam Lake and at various other places where investigations are made and where inquests or justice cases may be held.

"I would prefer to figure from my home because the other seems too artificial, and I would be reluctant to file a bill for forty-four miles when I only traveled one mile from home. I believe it should be figured that way under 59.15 (1) (c) which provides 'expenses actually and necessarily incurred in traveling within and without his county.' However, one member of the finance committee feels possibly it should be figured from the county seat, and he has asked me to write you."

We do not find that the precise question here raised has previously been considered by this office and refer you to XXXII Op. Atty. Gen. 406 for the latest opinion we have rendered on travel allowance of the district attorney, together with citations to other opinions on the subject.

Sec. 59.15 (1) provides for the fixing of the annual salary of each county officer and that the salary so fixed shall not be increased or diminished during the officer's term and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"(c) Reimbursement to the district attorney of the amount of his expenses actually and necessarily incurred in briefing and arguing criminal cases before the supreme court, as required by subsection (7) of section 59.47, and in traveling within and without his county in the performance of his official duties;"

The foregoing provision as to salary is subject to sec. 59.15 (1) (ef) as repealed and recreated by ch. 37, Laws 1945, which is not material so far as the present discussion is concerned.
In any event it is clear from the quoted language that the district attorney is limited to his expenses "actually and necessarily incurred * * * in traveling within and without his county in the performance of his official duties." This would preclude payment in the instance you mention for 44 miles travel where the distance actually traveled was 1 mile. Where a statute provides for mileage for an officer in necessary travel no mileage accrues unless such officer makes the journey for which such mileage is provided. 46 C. J. 1018. See also 43 Am. Jur., Public Officers, sec. 369.

We are informed that under a similar statute relating to travel allowance for state employes, sec. 14.32, the secretary of state has followed the practice of allowing travel expense from the place of residence to the place where the service is performed rather than from the place where the employee's office is located in those instances where the office and place of residence are in different cities. For instance a state employee, whose office is in Madison but whose home is in Milwaukee, would be reimbursed for official travel from Milwaukee to La Crosse if his duties called him there, but if he made an official trip from his home in Milwaukee to the nearby city of Racine he would be paid only for that travel instead of from his office in Madison to Racine, assuming he went directly from Milwaukee to Racine.

This means that in some instances the travel allowance will be greater where the employee does not live in the same city where his office is located and in other instances the travel allowance will be less. But in no case is the employee permitted to charge for mileage which he does not actually travel, nor is he permitted to charge for travel between his home and his office. In VIII Op. Atty. Gen. 767 it was held that a supervising teacher may keep his residence at any place in his county and that when engaged elsewhere he is entitled to his actual and necessary expenses for travel.

While perhaps the foregoing construction of travel allowance statutes is not determinative it is at least entitled to great weight under familiar rules of statutory construction in the absence of anything more authoritative. See XXX Op. Atty. Gen. 392, 393. Moreover, in the case of the part time district attorney it must be contemplated that he is under no obligation to be at the county seat every day so as to
be expected to commence his travels on official business from that point in the absence of a directive by the county board under sec. 59.14 (1) requiring him to keep his office at the county seat in an office provided by the county. You are, therefore, advised that such district attorney who commences a trip on official business from his place of residence rather than from the county seat in another city is entitled to reimbursement under sec. 59.15 (1) (c) for his expenses actually and necessarily incurred in traveling in the performance of his official duties.

Secondly you call attention to the fact that the county board under sec. 49.26 (4) has designated and authorized the district attorney to collect old-age assistance claims but has passed a resolution providing that all fees collected by the district attorney’s office are to be turned over to the county treasurer. Under sec. 49.26 (7) the county court has in various instances authorized the payment of an attorney’s fee to the district attorney of 10 per cent but not in excess of $50 for legal work in connection with the administration of estates involving old-age assistance liens. You ask whether such fees are to be retained by the district attorney under sec. 49.26 (7) or paid over to the county treasurer pursuant to the resolution of the county board.

Attention is called to XXX Op. Atty. Gen. 275, XXXI Op. Atty. Gen. 57 and XXXIII Op. Atty. Gen. 102. In the first two of these opinions it was indicated that a part time district attorney would be permitted to retain fees allowed him for the performance of services in closing estates involving old-age assistance claims where such services are not required to be rendered on behalf of the county, but that such fees in the case of a full time district attorney must be turned over to the county. Thereafter sec. 49.26 (7) was created by ch. 374, Laws 1943, and in XXXII Op. Atty. Gen. 431 it was ruled that sec. 49.26 (7) contemplates that the payment of the fee of the district attorney is to be deducted from the county’s claim and is to be paid over to the county treasurer by the district attorney. Thus, even in the absence of a resolution such as that adopted by your county board, the attorney fee allowed to the district attorney under sec. 49.26 (7) for legal services rendered in collection of the old-age assistance claim on behalf of the county must
be turned over to the county treasurer. It is only where the part time district attorney renders services to the estate over and above those required in collecting the county's claim that he may receive compensation in his capacity as a private attorney, and of course there must be assets in excess of the amount required to pay the county's claim before any allowance for such services would be in order. See XXXIII Op. Atty. Gen. 102.

The third question reads as follows:

"3. In a number of cases, we have been able to avoid probate by the buyers securing a Certificate of Heirship and deeds from the heirs. This has saved considerable work for the Old Age Assistance Department besides about $65.00 for the expenses of publication, appraiser's fees and cemetery upkeep. However, the statute makes no provision for attorney's fees for the amount so collected, but if the regular attorney's fee is charged for a Certificate of Heirship and deed, there is still about $35.00 saved to the Old Age Assistance Department besides the travel and work of the administrator.

"In regard to the cases where the owner can procure a Certificate of Heirship and deeds, I believe we should permit him to do so and deduct the reasonable amount of this from the sale's value rather than sell at the sale's value and then pay out cemetery upkeep (Judge considers this a funeral expense) publication fees, and appraiser's fees, but I would like your opinion on this."

As you have indicated, sec. 49.26 (7) makes no allowance for attorney fees in obtaining a certificate of heirship. In line with our previous opinions on the subject of compensation for the district attorney in connection with old-age assistance liens, it is apparent that neither the full time nor part time district attorney is entitled to any compensation out of the proceeds of the property for any services which he may render in collecting the county's claim. However, to the extent that there may be a surplus payable to the heirs, after payment of the county's claim, we see no reason why the part time district attorney may not act as attorney for the heirs or the purchasers or all of them in obtaining the certificate of heirship and be paid by them for his services. Nor is there any reason why a private attor-
ney may not in such a case handle the proceedings, but in those instances where the value of the property does not exceed the county's claim it would be improper to have that claim diminished by deducting an attorney fee whether the work were to be done by the part time district attorney or some other attorney. In such a case it would appear to be the duty of the district attorney to take such steps as may be necessary to collect the county's claim in full without compensation to himself other than through the medium of his regular salary as district attorney.

The last question reads as follows:

"4. In some estates we find old defects in the title, and I believe that inasmuch as we only sell what title the deceased had and because of the rule of 'caveat emptor', it is no duty of the Old Age Assistance Department to correct defects in the titles but to sell only all right, title and interest, altho if it is just a matter of an affidavit, I have no objection to taking care of it.

"In regard to old defects in the title, is it your opinion that the Old Age Assistance Department should have them corrected or that this is up to the buyer as is the law under other administrator or foreclosure sales?"

As a practical proposition the question of clearing up defects in title is pretty largely a matter for negotiation between the parties. If the buyer is willing to take the title as is, no question arises. But if he insists upon merchantable title without expense to himself as a condition precedent to purchasing, it is up to the county to furnish such title or forego the sale and the chances of collecting its old-age assistance claim. In short, it is the duty of the district attorney to take such legal steps as are reasonably necessary to collect the county's claim and without charge to the county. Moreover, while it may appear that in equity and fairness the county should be entitled to reimbursement for the burden of furnishing the legal services of the district attorney in asserting claims which, upon recovery, are to be divided with the state and federal governments, it must be remembered that the whole subject is purely statutory and the county is limited to such benefits as the legislature has seen fit to provide in matters of this sort by sec. 49.26 (7).
If no reimbursement for the county is thus provided none is to be had under the well-known rule that the counties have only such powers as are expressly granted by, or necessarily implied from, the statutes. See *Dodge Co. v. Kaiser*, 243 Wis. 551, 557, and authorities there cited.

WHR

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*Normal School Regents — Lease of Real Estate* — Board of regents of normal schools has no power in absence of express authority from the legislature to lease real estate held by it.

July 16, 1945.

BOARD OF REGENTS OF NORMAL SCHOOLS,
Attention Edgar S. Doudna, Secretary.

In your letter of July 6, 1945 you submit the following facts: The La Crosse State Teachers College Housing Association, a domestic non-stock, non-profit corporation, proposes to acquire title to certain real estate on which there is located a house to be used for dormitory purposes for students attending the La Crosse state teachers college. The corporation then proposes to immediately convey the title to said real estate to the board of regents of normal schools who in turn will lease the property to the corporation for a nominal sum. We understand that after it is leased the corporation will operate the property for dormitory purposes for students attending said college and that the property will be leased for such period as will be necessary to amortize a real estate mortgage on the property, after which event the board of regents will directly manage the property for dormitory purposes.

The questions upon which you desire an opinion are: (1) May the board of regents of normal schools acquire title to said property in said manner, and (2) if and when title is
so conveyed and the property leased to said corporation, will any zoning ordinance of the city of La Crosse be applicable?

We will assume that your first question is intended to inquire into the legality of the entire proposed transaction between the La Crosse State Teachers College Housing Association and the board of regents of normal schools. It is evident that an essential part of such transaction as outlined in your letter is that after it acquires title to said real estate, the board of normal school regents lease the property to the corporation for a nominal sum for such period as will permit amortization of the mortgage. Assuming that the board has power to acquire title to said real estate by gift from the corporation we are of the opinion the board would not, after acquiring title, have power to lease the property to the corporation.

The board of regents of normal schools is by statute constituted a body corporate with certain specified powers. Such powers are enumerated in sec. 37.02, Stats. Subsec. (1) of said section, among other things, states that the board:

"* * * may purchase, in the manner provided by law, have, hold, control, possess and enjoy, in trust for the state, for educational purposes solely, any lands, tenements, hereditaments, goods and chattels of any nature which may be necessary and required for the purposes, objects and uses of the state normal schools authorized by law and none other, with full power to sell or dispose of such personal property in the manner provided by law, or any part thereof when in their judgment it shall be for the interest of the state; and shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. * * *"

The same subsection also contains limitations on such powers, including the following:

"* * * The board of regents shall not sell, mortgage or dispose of in any way any real estate, nor borrow money without the express authority of the legislature; * * *"

The provision of sec. 37.02 (1), Stats., immediately above quoted was construed in an opinion of this department dated July 27, 1917 appearing in VI Op. Atty. Gen. 527 and it was
there held that the board of regents of normal schools had no power in the absence of express authority from the legislature, to lease lands under its control for hospital purposes. The opinion would seem to have been based upon the theory that the term “dispose of” as used in the phrase “shall not sell, mortgage or dispose of in any way any real estate” included a lease of real estate. While there may be some conflict in the authorities as to the meaning of this term we believe that our former opinion is sound and should be adhered to. Support for this may be found in certain action taken by the legislature in respect to sec. 37.02 (1) in 1929. Prior to this time the subsection gave the board full power to sell or dispose of personal property which it had acquired. At the 1929 session the legislature amended said subsection so as, among other respects, to limit the power to sell or dispose of such property “in the manner provided by law.” Ch. 468, Laws 1929. Thus in 1929 the legislature specifically addressed itself to legislation regarding the power of the board of regents of normal schools to sell or dispose of property held by it. It must be presumed that the legislature was aware of the opinion of this department appearing in VI Op. Atty. Gen. 527. However, it made no attempt to broaden the power of the board of regents of normal schools so as to make it clear that it could lease or otherwise dispose of any real estate held by it. The only change was with respect to the power of the board to sell or dispose of personal property and the change there was in the direction of limiting such power. Under the circumstances it must be considered that the construction given the portion of sec. 37.02 (1) which is material here, by our former opinion, has been approved by the legislature.

We find no act of the legislature which might be construed as giving the board of regents of normal schools express authority to lease the property which is the subject matter of the above transaction to the La Crosse State Teachers College Housing Association and we therefore are of the opinion that the board has no authority to lease such property to said corporation.

In view of the foregoing it is not necessary that we discuss other problems raised by your first question or to an-
You submit to us for answer four questions which arise since the enactment of ch. 152, Laws 1945, which amends certain subsections of sec. 59.51 relating to the duties of the

Clarence Simon,

District Attorney,

Medford, Wisconsin.

July 23, 1945.
register of deeds to record deeds, mortgages and other documents and to file bills of sale, chattel mortgages and other documents. Your questions and our answers are as follows:

Question 1. "May the register of deeds record instruments which fail to have the names of witnesses and the notary public printed thereon?"

Answer: The answer is "No." This is clear from the context of subsec. (1) of sec. 59.51 as amended by ch. 152, Laws 1945, that the duty of the register of deeds to receive for record the documents therein mentioned is conditioned upon the fact that they have printed thereon the names of the grantors, grantees, witnesses and notary and unless such condition is complied with the register of deeds is under no duty to and should refuse to record such instrument. Said subsection as amended provides as follows:

"59.51 Register of deeds; duties. The register of deeds shall:
“(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose, provided such documents have plainly printed or typewritten thereon the names of the grantors, grantees, witnesses and notary."

Question 2. "In recording instruments which comply with chapter 152 should the register of deeds record the name of the witnesses twice where the name is typed under the written signature?"

Answer: The answer is "Yes." The duty imposed upon the register of deeds by sec. 59.51 (1), Stats., is to "correctly and legibly" record or cause to be recorded in suitable books to be kept in his office, all deeds, mortgages, maps, instruments and writings authorized by law to be recorded. The word "correct" is defined in Funk & Wagnall's New Standard Dictionary to mean, among other things, "accurate" or "exact." We think that the word "correctly" is used in this sense in sec. 59.51 (1), Stats., and that this subsection therefore imposes upon the register of deeds the duty
to make an exact or accurate, as well as legible, record of
the instrument offered for record, assuming, of course, that
such instrument is one which by law is authorized to be
recorded. This makes it necessary that the register of deeds
record the name of the witness twice, where the name is
typed or printed under the signature because if this were
not done the record would not constitute an exact or accu-
rate copy of the original document. The same would also be
true where the names of the grantors, grantees or the notary
are printed or typed under their signatures as required by
sec. 59.51 (1), Stats.

It should also be noted that another reason in support of
the conclusion reached by us in answer to this question is
that if the register of deeds in recording an instrument
copies the names of witnesses, etc. twice, examination of the
record will show that the original instrument complied with
the requirements of sec. 59.51 (1) and that it was properly
received for record.

Question 3. "Is it necessary that the name of the notary
be printed under his signature where he is also a witness
and his name is printed below his signature as witness?"

Answer: The answer is "Yes." As previously noted, the
statute (sec. 59.51 (1) ) imposes as a condition to recording,
that the document have "plainly printed or typewritten
thereon the names of the grantors, grantees, witnesses and
notary." No exception is made for a case where one person
takes the acknowledgment of the person or persons signing
the instrument as notary and also signs as a witness. In so
acting he would, in our opinion, be acting in two capacities,
i.e. as witness and as notary, and since the statute specifi-
cally requires that the names of both witnesses and notary
are to be plainly printed or typewritten on the instrument
before it is entitled to be recorded, we think that where one
person signs both as notary and witness his name must be
printed or typed on the deed twice.

Question 4. "Must the names of the grantors signing an
instrument to be recorded also be printed below the signa-
ture line if the names appear in the body of the instrument?"
Answer: Literally the language of sec. 59.51 (1) would seem to be satisfied if the name of the grantor is printed or typewritten in the body of the instrument, and hence it could be argued that it should not be necessary under such circumstances to print or type in the name of the grantor below his signature or on some other portion of the instrument. However we feel to adopt such view would be contrary to the purpose of the legislature in enacting ch. 152, Laws 1945, which amended sec. 59.51 (1), Stats., so as to impose the requirement that all documents otherwise authorized by law to be recorded must have plainly printed or typewritten thereon the names of the grantors, grantees, witnesses and notary before being entitled to record. In enacting legislation of this kind the legislature clearly had in mind the well-known fact that in many instances the signatures on deeds and other instruments are so written as to be virtually illegible, and its purpose and intent in imposing such requirement was obviously to provide a means of enabling third persons to accurately ascertain the name of any person signing such an instrument when it is signed in such a manner that the signature cannot otherwise be deciphered. If the view that it would be sufficient if the name of the grantor is printed or typed in the body of the instrument be adopted it would not give full effect to the evident purpose and intent of the legislature, since it is not unusual for the name of the grantor as it appears in the body of a deed to vary from the name as it is actually signed by the grantor. In such cases reference to the printed or typed name would not provide an accurate means of ascertaining the name of the grantor as actually signed by him. We are of the opinion that the legislature intended that the typed or printed name correspond exactly with the name as actually signed, and it is clear that this might or might not be the case if it were to be held that the name as typed or printed in the body of the instrument is sufficient, and we therefore are of the opinion the fact the name of a grantor appears in the body of an instrument is not a sufficient compliance with sec. 59.51 (1), Stats. In our opinion the legislative purpose would best be accomplished by causing the typed or printed name to be inserted immediately below the signature to which it refers although there may be other
methods of complying with sec. 59.51 (1), Stats. The typed or printed name should accurately give the name of the grantor as actually signed by him.

WET

Appropriations and Expenditures — University — No portion of university revolving fund appropriations provided for in sec. 20.41 may be diverted by regents of university of Wisconsin to the purpose of paying any part of the cost of general university administrative overhead.

July 25, 1945.

A. W. Peterson, Director,
Business & Finance,
University of Wisconsin.

You have called our attention to those provisions of sec. 20.41, Wis. Stats., which relate to university appropriations of various revolving funds. University activities which produce these funds account for approximately one-third of the total operating budget of the university. The management and direction of these activities include, among other things, the processing of pay rolls, requisitions, invoices and vouchers, the maintenance of accounting and personnel records, auditing of accounts and the deposit of receipts by the central administrative offices of the university. Also the president, director of business and finance, the secretary of the regents and others are responsible to the regents for the over-all administrative direction of the activities supported by these revolving funds.

Heretofore only the costs of furnishing the personnel services, supplies and equipment under the direct supervision of the head of the activity concerned, have been charged to the revolving appropriation for that activity. The costs of providing central university administrative
service and general administration have been charged to the appropriations made by sec. 20.41 (1) (a) and (e) for general university operation.

The regents now propose to prorate the costs of general university administrative service and general administration between the activities supported by revolving appropriations and other non-income producing functions financed by specific appropriations from the state general fund. Thus each of the revolving appropriations would be charged with an equitable part of the cost of providing the activity in question with central office administration and supervisory service, with the result that there would be a saving in the costs charged to specific general fund appropriations and corresponding decrease in the net amount available for direct support of activities supported in whole or in part by revolving funds.

We are asked whether such proposed procedure may be properly followed with reference to the following revolving appropriations:

20.41 (1) (l) Store division
20.41 (3) (k) Receipts from sales and agricultural development
20.41 (5) (a) Dormitories
20.41 (5) (c) Athletic council
20.41 (5) (d) Memorial Union
20.41 (5) (e) Dramatic and theatrical activities
20.41 (10) (a) Hospitals

Article VIII, section 2, Wisconsin constitution provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *"

This constitutional provision is strictly construed. II Op. Atty. Gen. 10, 11. Presumably the revolving appropriation statutes above mentioned have been correctly interpreted and followed in the past when they were not so construed as to permit the siphoning off of any part of such funds for general university administration and service. At any rate the university budget has been presented to the legislature
every two years on that basis, and we are unaware of any principle of law which would justify the regents in increasing the appropriation to one department of the university at the expense of some other department after the budget has been adopted and the respective appropriations have been made by the legislature. The revolving funds referred to are appropriated back to the regents directly for the departments which have taken in these receipts in the first instance and these appropriations are directed generally to be used for the operation, maintenance and capital expenditures of these departments. Nothing is said about allocating any portion of such funds to general university administration which has always been paid for directly out of the appropriations for general university operation without any attempt to allocate the expense on a cost accounting basis as between the different departments of the university.

Where the legislature has intended some other procedure to be followed in appropriation statutes it has done so by appropriate provisions such as, for instance, those contained in sec. 20.43 (3) relating to the state board of health. Only 95 per cent of its revolving funds are appropriated back to the board for the purpose of carrying out the provisions of the law which produced the money. Of the 95 per cent so appropriated to the board there is allotted to the board a sum sufficient for administrative overhead charges but not in excess of 7 per cent of the total net receipts. The balance is available as a nonlapsible appropriation for the various divisions of the board which produced the revenues, said balance to be used by them in carrying out their respective functions.

Similarly sec. 20.20, relating to conservation commission appropriations, provides that receipts are appropriated to the commission for the execution of its functions "to be allotted for administration and operation, property repairs and maintenance, and permanent property and improvements, including the purchase of land, as the commission may determine" subject to certain specific allotments thereafter enumerated.

The regents have been given no such broad discretion in dividing revolving funds between administration and the direct carrying on of the activities producing such funds.
If the legislature had intended to permit any comparable deductions from university revolving funds for general administrative overhead it could have easily so provided.

Having in mind the rule of strict construction of appropriation statutes, the long-standing administrative interpretation which has heretofore been given to the statutes in question, and the further fact that deductions from revolving fund appropriations for administrative overhead charges, where followed at all in state service, arise from specific statutory provision such as in those instances mentioned above, we are constrained to rule that the regents may not divert any portion of the various revolving fund appropriations contained in sec. 20.41, Wis. Stats., from the direct purposes therein specified to general university administrative or supervisory purposes.

WHR

Counties — Park Commission — Circuit Court — District Attorney — It is doubtful that sec. 59.44 (3), authorizing circuit court on application of county board to appoint an attorney to assist the district attorney when there is an unusual amount of civil litigation involving the county, is broad enough to justify the hiring of special counsel to assist the county park commission in acquiring flowage easements to restore a lake in a county park where no condemnation proceedings or other litigation may be required.

July 25, 1945.

LYMAN K. ARNOLD,
District Attorney,
Elkhorn, Wisconsin.

You have asked numerous questions about the employment of special counsel by the county for the purpose of assisting the county park commission in the acquisition of
lands needed in restoring a lake in connection with the establishment of a county park.

The funds have been provided under sec. 27.06, Wis. Stats., and the county board adopted a resolution requesting the circuit court to appoint a certain attorney as special assistant district attorney under sec. 59.44 (3), Wis. Stats., to perform legal duties for the park commission, such as examining abstracts, easements, conducting hearings, advising the commission and carrying through such condemnation proceedings as may be necessary to acquire flowage easements. Payment of these legal services is to be made out of funds supplied by the park commission under sec. 27.06.

The questions raised read as follows:

"1. Can the County Park Commission employ and pay out of the funds provided for its use under Section 27.06, Statutes, an attorney to represent it in the proceedings incident to the acquisition of flowage rights and the raising of the water level of 'Whitewater Lake'?"

"2. Would such attorney be qualified legally to prosecute in the name of Walworth County necessary condemnation proceedings for the acquisition of lands for the creation of the proposed park and the raising of the water level under Sections 27.05, 27.065 and other related provisions of the Wisconsin Statutes?"

"3. In view of the above mentioned resolutions of the County Board, adopted Nov. 16, 1931, March 20, 1940, and May 10, 1945, can the Circuit Court legally appoint a special assistant district attorney for the purpose of representing the Park Commission and the County in connection with such project?"

"4. If such special assistant district attorney may be legally appointed by the Circuit Court, can his fees and expenses be paid out of the funds provided under Section 27.06 for the use of the Park Commission or must they be paid by the district attorney from his own salary?"

"5. Can the fees of such special assistant district attorney be paid on a per diem basis, the reasonableness thereof to be determined by the Circuit Court or by the Park Commission, or must a regular monthly salary be fixed in advance of the rendition of the services?"

The special tax provided for in sec. 27.06 is "to be paid out only upon the order of the county park commission for
the purchase of land and the payment of expenses incurred in carrying on the work of the commission." Sec. 27.05 (3) empowers the county park commission

"To acquire, in the name of the county, by purchase, land contract, lease, condemnation, or otherwise, with the approval and consent of the county board, such tracts of land or public ways as it may deem suitable for park purposes;

(See Vaudreuil Lumber Co. v. Eau Claire County, 239 Wis. 538, holding that county board may also institute condemnation proceedings to acquire flowage easements in such cases.)

So far as the above sections are concerned there would appear to be ample authority for hiring counsel to aid in the purchase or condemnation of park lands and to pay him out of the taxes raised under sec. 27.06 as an expense incurred in carrying on the work of the commission. However, there are other statutes relating specifically to the employment of legal counsel by the county which must be considered. In this instance sec. 59.44 (3) is relied upon. This section reads:

"When there is an unusual amount of civil litigation to which the county is a party or in which it is interested, the circuit court may, on the application of the county board, by order filed with the clerk of said county, appoint an attorney or attorneys to assist the district attorney, and fix his or their compensation."

We take it from your statement of the facts as to the wording of the resolution that much of the legal services contemplated do not relate to "civil litigation" as provided in sec. 59.44 (3). It may well be that no litigation whatsoever will be involved if the commission succeeds in acquiring the necessary property by purchase and that consequently it cannot be said that there is "an unusual amount of civil litigation" within the meaning of sec. 59.44 (3) so as to justify the employment of special counsel under that section. We do not mean to imply, of course, that sec. 59.44 (3) must be so narrowly construed as to limit payment of
counsel to services performed in actual litigation only, since as a proper incident of condemnation litigation there may well be considerable legal work by way of preparation therefor in examining abstracts, easements, etc., and in consulting with the park commission, but it is quite another thing to employ a special assistant district attorney under sec. 59.44 (3) when no "unusual amount of civil litigation" is pending or may ever be commenced.

We therefore conclude that it is extremely doubtful whether special counsel may be appointed pursuant to sec. 59.44 (3) under the circumstances mentioned. This being true it becomes unnecessary to consider the balance of the questions propounded. Your attention is invited to sec. 59.44 under which an assistant district attorney may be appointed for the purposes mentioned.

WHR

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Poor Relief — Old-age Assistance — Funeral Expenses —
Sec. 49.30 limits the amount which may be paid by a county for funeral expenses of an old-age assistance recipient to $100. It leaves to the discretion of county administrators the question whether, and to what extent, contribution may be made by friends or relatives for services additional to those compensated by the county.

July 31, 1945.

A. W. Bayley, Director,
State Department of Public Welfare.

You have asked two questions involving the interpretation of sec. 49.30 of the statutes:

1. "If the administrator of old-age assistance in a county authorizes funeral expense of up to $100 as permitted under section 49.30, may such allowance be supplemented by relatives or friends to additional payment to the undertaker in
order to provide the deceased with a better funeral than the $100 would permit?"

2. "Is it the intent of this section that the county officer administering old-age assistance must permit such supplementation in addition to the established county allowance for funeral expenses or does the section accord such administrative officer such discretion as to permit his refusing to make an allowance for funeral expenses which, taken together with contributions from relatives or friends or an insufficient sum from the estate of the deceased, will not together total more than $100?"

You have referred to XXI Op. Atty. Gen. 281 construing sec. 45.16 of the statutes and expressing the opinion that where funeral expenses of a war veteran total $200 and the United States government contributes $100 toward expense of burial, the county may not contribute an additional $100. While that opinion may have some relevancy in the construction of sec. 49.30, it is not controlling because it involves interpretation of a different statutory provision. Not only is the wording of sec. 45.16 dissimilar to that of sec. 49.30 but it is part of a different statutory scheme which may or may not have similar objectives. The meaning of each particular statute depends upon the legislative intent in its enactment and that intent is to be ascertained wherever possible from the language used.

Under sec. 45.16, if the family of a veteran is unable to provide burial, the public authorities are directed to do so. If the public authorities provide the burial, a maximum price is fixed. It is not a question of contribution for burial expense, but of providing a burial. If one is provided, the maximum expense is fixed at $100; if none is provided, then no contribution is made.

The case differs from that of a burial under sec. 49.30. Under the latter section the provision is for contribution to be made to burial expense rather than to provide a public burial.

The language of the restriction in sec. 49.30 is "provided that these expenses do not exceed $100." The use of the term "these expenses" refers back to the previous use of the
term “expenses” which is in the phrase “such reasonable funeral expenses for burial * * * as the county judge may direct.” The expenses which are limited to $100 would seem to be subject to all the modifying words in the last-quoted phrase, and if that is true would include only those expenses directed by the county administrator to be paid by the county. In order to hold the limitation applicable to expenses other than those which the county administrator directs to be paid would involve reference of the term “these expenses” to only a portion of the preceding phrase, using part of the modifying words and omitting others.

Apart from the actual language of the section, a construction of sec. 49.30 which would absolutely prohibit county officials from making payments where a contribution from an outside source raises the total of what might be classed as funeral expenses above $100 would raise some practical problems in enforcement. A construction which would limit all payments for funeral expense to $100 would place upon county officials not only the burden of ascertaining whether any other person had made or intended to make any expenditure for the funeral of a recipient of old-age assistance, but also the duty of determining whether such expenditure constituted a “funeral expense.” The latter question has caused considerable difficulty for courts of law, since it is usually held that what may be classed as a funeral expense varies with the official and financial standing of the decedent, his religious beliefs and the usages prevailing in his community. Were funeral expense necessarily limited to the amount paid to a single funeral director, it might not be difficult for county officials to ascertain their true extent. Many and varied items have been classed as funeral expenses, however, including cemetery plots, perpetual care of such plots, headstones, markers and monuments, apparel in which the body is buried, mourning apparel for widows, and ceremonies and accompaniments appropriate to religious beliefs of the deceased. Another enforcement problem which might be presented by such a construction could arise from the fact that some of the contributions from outside sources, for such purposes as markers or perpetual care, might be made after the county had expended the maximum.
Where there is room for difference of opinion as to the meaning of a statute it has been recognized that the practical interpretation given the statute by officials responsible for its administration will carry substantial weight with the courts. *Mauel v. Wisconsin Auto Ins. Co., Ltd.*, 211 Wis. 230, 248 N. W. 121; *State ex rel. Green v. Clark*, 235 Wis. 628, 294 N. W. 25; *State ex rel. Lathers v. Smith*, 238 Wis. 291, 299 N. W. 43. A recent survey by your department shows that, in at least 51 of Wisconsin's 71 counties, the officials responsible for administration of old-age assistance have not in practice regarded sec. 49.30 as preventing supplementation by friends and relatives for such items as ministers, singers, and the like, even though the total of such contributions plus the expense paid by the county exceeds $100.

The foregoing considerations, together with the fact that the legislature has in sec. 49.20 declared old-age assistance to be "for the more humane care of aged dependent persons" leads us to the belief that the legislature did not intend to lay down an arbitrary rule which would absolutely prevent counties from exercising their discretion so as to pay funeral expenses up to $100 in the event that additional contributions are made by friends or relatives for such items as religious ceremonies which would not otherwise be furnished by the county.

As pointed out in XXIX Op. Atty. Gen. 344 and XXIX Op. Atty. Gen. 436 the language of sec. 49.30 appears to give the county administrator considerable discretion subject to the limitations that the funeral expenses paid by the county must be for the burial of a beneficiary of old-age assistance, must be "reasonable," and may not exceed $100. Where any payments by the county would, when added to voluntary contributions by relatives or friends, exceed $100 the county administrator would be under no obligation to direct such payments. It appears to us that the legislature has left to the county administrators the questions whether and to what extent the county may pay funeral expense up to the amount of $100 when there is supplementation by friends and relatives of the old-age assistance beneficiary.

BL
Appropriations and Expenditures — Industrial Commission — Workmen's Compensation — Repeal of ch. 363, Laws 1933, by ch. 159, Laws 1945, operated to make unavailable that portion of a grant of $2,592.96 made by the emergency board under sec. 20.74 (1), Stats., to the industrial commission to supplement an appropriation made under ch. 363, Laws 1933, remaining unexpended as of the effective date of ch. 159, Laws 1945.

July 31, 1945.

INDUSTRIAL COMMISSION.

Attention Harry A. Nelson, Director of Workmen's Compensation.

You advise that under the provisions of ch. 363, Laws 1933, the industrial commission was allotted funds for payment of benefits to emergency relief administration workers who sustained an injury while working on work relief projects, in accordance with a plan adopted by the commission for that purpose.

The legality of certain aspects of this plan was approved by this department in opinions appearing in XXIII Op. Atty. Gen. 568, 585 and 623. The payment of benefits to such workers injured while working on relief projects was considered as a form of "relief" within the meaning of the applicable provisions of ch. 363, Laws 1933.

On October 3, 1934 the industrial commission requested the emergency board to provide funds for the administration and payment of such benefits and on November 1, 1934 said board allotted out of the appropriation for relief the sum of $490,000 for that purpose. Subsequently it developed that this was more than was necessary and $351,000 was transferred back to said appropriation so that the amount actually allotted and not transferred back was $139,000. The total actual amount paid out to injured workers or their dependents was $138,928.45. On March 5, 1945 a review of the remaining cases on which benefits were still payable indicated that an additional sum of $2,592.96 would be necessary to carry out provisions of orders providing for benefits to injured workers and their dependents.
After certain conferences and upon petition of the commission the emergency board on March 28, 1945 made a grant of said sum to the industrial commission for that purpose. Thereupon the commission proceeded to make additional payments of benefits to those entitled to benefits under such plan.

On June 22, 1945 the secretary of state advised that because of the enactment of ch. 159, Laws 1945, effective May 19, 1945, which among other things repealed ch. 363, Laws 1933, he was of the view that payment of any such benefits could no longer be made and for that reason returned a certificate presented to him by the commission for payment of the sum of $36.49 representing certain instalments on benefits which have or would become due for the month of July, 1945.

The question on which you wish our opinion is whether the allotment of $2,592.96 made on March 28, 1945 by the emergency board to the industrial commission is still available for the purpose of paying instalments which become due on orders for benefits previously made, after the effective date of ch. 159, Laws 1945.

The certificate of the emergency board making the grant or allotment of $2,592.96 here under consideration to the industrial commission recites that it is made "to supplement the appropriation made by ch. 363, Laws of 1933 to comply with the federal government's demand that the state provide workmen's compensation for persons injured in relief work as a condition precedent for receiving federal aid."

After the repeal of ch. 363, Laws 1933, by ch. 159, Laws 1945, there was no longer any appropriation which the grant of the emergency board could supplement. This being true, we are of the opinion that the portion of said grant remaining unexpended as of the effective date of ch. 159, Laws 1945, is not available for the purpose of paying instalments on orders for benefits previously made which became payable after the effective date of the latter chapter.

We do not regard sec. 20.77 (5) as being applicable here because the orders providing for payment of benefits do not constitute an "indebtedness."

Sec. 6, ch. 159, Laws 1945, contains a provision to the effect that secs. 370.03 and 370.04 of the statutes apply to re-
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peals made by it. Ch. 159 repeals, in addition to ch. 363, Laws 1933, a number of other chapters and sections. While the context of secs. 370.03 and 370.04 is such that they might be applied to some of these repeals, they cannot be applied to the repeal of ch. 363, Laws 1933, made by ch. 159, Laws 1945, and offer no assistance in furnishing the proper rule of construction to be applied here.

WET
Trade-marks and Labels — Secretary of State — Any registration of trade-mark, etc., made under sec. 132.01, Stats., after effective date of ch. 259, Laws 1945, to December 31, 1945 or thereafter, is effective for 20 years from date of registration with right of renewal as therein provided. It is not necessary that registration filed after effective date of ch. 259, Laws 1945, to December 31, 1945 be renewed within 1 year following January 1, 1946 but it may be renewed within 6-month period next preceding expiration of said 20-year period.

Elimination of last sentence of sec. 132.09 by ch. 259, Laws 1945, takes from secretary of state power and duty existing under previous statute to refuse to record any label, etc., which might reasonably be mistaken for anything previously filed under ch. 132. As a result of such legislative change secretary of state must accept all applications for registration of labels, etc., irrespective of whether they are identical or similar to others previously filed. In case of conflict remedy is that provided in sec. 132.01 (8).

A firm name may be registered under sec. 132.01 (1) as amended by ch. 259, Laws 1945.

Secretary of state may not require as a condition of registration of a firm name that applicant furnish proof of compliance with sec. 343.722.

Sworn statement or application for registration under ch. 132 may be made by agent or attorney. Secretary of state is entitled to demand proof of agent or attorney’s appointment and authority before filing such sworn statement or application.

Secretary of state has no authority to set up classes of commodities as to which trade names may be registered and require separate applications for each class of commodity.

July 31, 1945.

Fred R. Zimmerman,
Secretary of State.

You advise that the enactment of ch. 259, Laws 1945, effective June 9, 1945, relating to trade-marks raises certain questions as to which you desire our opinion. The questions submitted by you and our answers are as follows:
(1) Does the language of section 132.01 (6) require registrants filing under section 132.01 (1) between now and December 31, 1945, to file a renewal within 1 year following January 1, 1946, or do those registrants filing applications during the balance of this year, have protection for 20 years from date of registration?

Subsec. (6) of sec. 132.01 provides as follows:

“Registrations recorded under this section shall be effective for 20 years, and shall be renewable for like periods upon application to the secretary of state and payment of the fee specified in subsection (3). Registrants of labels, trade-marks, terms, trade names, patterns, models, designs, devices, shop marks, drawings, specifications, designations or forms of advertising heretofore recorded under this section shall be notified by the secretary of state at their last-known address of the necessity of renewal and notice shall also be given by publication in the official paper once each month for 3 months following January 1, 1946. Application for renewal may be made within one year following January 1, 1946 or within the 6 months period next preceding the expiration of 20 years from the date of registration.”

It is clear from the foregoing that any registration made in the period commencing with the effective date of the act to December 31, 1945 or thereafter would be effective for 20 years from date of registration with the right to renewal as therein provided. It is not necessary that such registrants file a renewal within 1 year following January 1, 1946. Such renewal may be made within the 6-month period next preceding expiration of said 20-year period. The provision for renewal in the year following January 1, 1946 is designed to protect registrants who had filed under sec. 132.01 (1) prior to the enactment of ch. 259, Laws 1945, as to which registration there was previously no limit on the period when a registration was effective.

(2) Does the deletion of the last sentence of section 132.09, by ch. 259, Laws 1945, divest the secretary of state of all discretionary power in rejecting trade-marks offered for registration which are identical or of such near resemblance thereto as may be calculated to deceive, which may reasonably be mistaken for anything heretofore filed under
the provisions of chapter 132? Is he now obliged to accept any number of identical or similar trade-marks which may be offered for registration?

Prior to the enactment of ch. 259, Laws 1945, the last sentence of sec. 132.09 provided as follows:

"The secretary of state shall not record any label, trade-mark, term, design, device or form of advertisement that may reasonably be mistaken for anything theretofore filed in his office under the provisions of this chapter."

This section was amended by ch. 259, Laws 1945, and among other things the portion of sec. 132.09 above quoted was eliminated from that section. In addition, in enacting ch. 259, Laws 1945, the legislature created among others subsec. (8) of sec. 132.01, which provides in part as follows:

"Any person, firm, copartnership, corporation, association or union of workingmen who claims a right to the use of subject matter conflicting with any registration by another, may bring action against such other in the circuit court for the county in which such other resides, or in the circuit court for Dane county, and in any such action the right to the use and registration of such subject matter shall be determined as between the parties, and registration shall be granted or withheld or cancelled by the secretary of state in accordance with the final judgment in any such action. * * *"

It is evident that by elimination of the last sentence of sec. 132.09 by ch. 259, Laws 1945, the legislature intended to take from the secretary of state the power and duty which he previously had to refuse to record labels, etc., which might reasonably be mistaken for anything previously filed under ch. 132. The legislature obviously intended to set up in place of the former system whereby the secretary of state could in his discretion refuse to record an application for registration on ground of similarity with one previously filed, a new one which would require that all applications be recorded by the secretary of state irrespective of identity or similarity with another label, trade-mark, etc., and that the question of identity or similarity as well as any other ques-
tions created thereby, affecting the rights of the parties growing out of such conflict, would be determined in the circuit court as provided in sec. 132.01 (8). The result of this is to compel the secretary of state, after the effective date of ch. 259, Laws 1945, to accept for registration all applications for registration of labels, etc., irrespective of whether they are identical or similar to others previously filed, assuming the application for registration is otherwise in proper form. In the event a situation should arise where there is a conflict between labels, etc. so recorded, the remedy of any person who claims the right to the use of the label, etc. as to which such conflict arises is that provided in sec. 132.01 (8).

(3) Can a sole trader or copartnership, doing business as Badger Products Co. register the name “Badger Products Co.” under section 132.01 (1), as a “service” or “business”? If so, what protection is given, and must this office require proof of compliance with section 343.722 before doing so?

In an opinion of this department appearing in VII Op. Atty. Gen. 141, dated March 5, 1918, it was held the term “Fond du Lac School Supply Company” could not be recorded either as a trade-mark, trade name or form of advertisement under sec. 1747a, Stats. This opinion was based on an earlier opinion to the same effect (Op. Atty. Gen. 1906 page 756) and proceeded on the theory that to be recordable the statute at that time required that any trade-mark, trade name or form of advertisement must be appropriated for the purpose of designating, making known or distinguishing any goods, wares, merchandise or other product of labor or manufacture, and that a designation such as “Fond du Lac School Supply Company” was not so appropriated but was applied to the firm or person carrying on the business. Ch. 259, Laws 1945, amends sec. 132.01 (1) among other respects by adding the words “service” and “business” following the word “merchandise” so that said subsection now provides in part:

“Any person, firm, copartnership, corporation, association, or union of workingmen, which has heretofore adopted or used or shall hereafter adopt or use any label, trade-
mark, trade name, term, design, pattern, model, device, shop mark, drawing, specification, designation, or form of advertisement, for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, service, business or other product of labor or manufacture.

In so amending this subsection the legislature evidently had in mind our previous opinions and intended to make it clear that a trade name, term or designation (as well as labels, etc. mentioned in sec. 132.01 (1) ), which referred to a service or business as contrasted to goods, wares or merchandise might now be registered under ch. 132. Hence we are of the opinion that a name such as “Badger Products Co.” is now registerable under ch. 132. There is a further question regarding the designation under which it may be registered, i. e. as a trade-mark, trade name, term, design, designation, etc. It is extremely questionable whether a name such as “Badger Products Co.” could be recorded as a trade-mark but it is unnecessary for us to go into that question here since in our opinion the term could be registered under other provisions of sec. 132.01 (1). We would have no doubt but that it could be recorded as a “term” or “designation” since these words are broad enough to include a name such as “Badger Products Co.”

This being true, the question as to whether such name could be recorded as a trade name becomes academic since to record the name as a trade name would give the registrant no greater rights than would result from registration of such name as a “term” or “designation.” There is, however, authority to the effect that the term “trade name” may be used in the sense of a firm name, i. e. the name under which a business is carried on. Derenberg Trade-Mark Protection and Unfair Trading, page 228. Further, in view of the change made in the statute by ch. 259, Laws 1945, broadening the scope of the subject matter to which labels, trade-marks, trade names, etc. can be appropriated to a “service” or “business,” it is logical to conclude that the term “trade name” as now used in sec. 132.01 (1) includes a business or firm name.

You also ask us, in view of the conclusion we have arrived at in the preceding paragraph, to state the nature and ex-
tent of the protection, if any is afforded one registering a name such as "Badger Products Co." This is a question which does not directly affect your department or your administration of ch. 132, but rather involves rights of registrants as to which as a legal proposition they are alone interested and which would probably depend upon the facts in each particular case. To fully answer all the questions of law which might possibly be raised by your inquiry would require extensive research on questions which have not been decided by our supreme court, a discussion of which would extend this opinion to an unwarranted length. We therefore refrain from answering such question but in the event you have a specific question we would be glad to answer it.

You also inquire whether proof of compliance with sec. 343.722 should be required by you before registering a name such as "Badger Products Co." The statute referred to is a criminal statute which makes it unlawful for any person or persons to engage in or advertise any mercantile or commission business under a name purporting or appearing to be a corporate name and which name does not disclose the name or names of one or more of the persons engaged in said business, with intent to obtain credit without first filing a verified statement with the register of deeds disclosing the names of all persons using said name. Sec. 132.01, Stats., contains a statement of various matters that must be set forth in an application for registration and we find nothing in said subsection which would in our opinion justify as a condition to registration the imposition of a requirement that applicant prove compliance with the provisions of sec. 343.722.

(4) May an individual acting as an agent or attorney for a person, firm, copartnership, corporation, etc., make a sworn application under chapter 132 in behalf of such person, firm, etc.? If so, is the secretary of state authorized to demand proof of agent's or attorney's appointment and authority before accepting application for registration?

We are of the opinion that the sworn statement or application to which you refer may be executed, verified and filed by an agent or attorney in behalf of a person, firm, copart-
nership, corporation, association or union of workingmen desiring to file the same. We find nothing in sec. 132.01 (1) or elsewhere that would indicate an intention to require that such sworn statement be executed or filed by the registrant personally. It should be noted, however, the secretary of state is given power by sec. 132.01 (1) as amended by ch. 259, Laws 1945, to prescribe the form of the sworn statement or application. This would include the power to prescribe the form of the verification, which form would undoubtedly require that the person executing the verification have personal knowledge of the facts or at least be informed as to the facts by some third person. Any agent or attorney executing the statement would, of course, be required to verify the same. It is possible to conceive a case where the agent or attorney would not be possessed of sufficient facts to enable him to verify the statement in which event he could not properly execute or file the same. As an incident to the power to prescribe the form of the verification the secretary of state would have power to require that when executed by an agent or attorney the verification contain a statement of the facts showing the authority of the agent or attorney to execute, verify and file the sworn statement or application.

We are further of the opinion that independent of this the secretary of state may, before accepting a sworn statement or application for registration executed and verified by an agent or attorney, require proof of appointment and of the extent of authority delegated. We believe such power may be implied from the undoubted right of the secretary of state to satisfy himself of the identity of the person, firm, copartnership, corporation, or association in whose name the application is presented and to satisfy himself of the fact that such person, firm, etc. is in fact submitting the application for filing.

(5) Has the secretary of state any authority to set up classes of commodities (similar to those in the federal trademark law) as to which the trade-marks may be registered and require separate applications for each general class of commodity, or is he obliged to accept one application covering any number of commodities?
We are of the opinion that the secretary of state has no authority to set up classes of commodities as to which trademarks may be registered and require separate applications for each class of commodity. We are unable to find any statute which grants such authority either expressly or by implication. In fact, sec. 132.01 (1) seems to contemplate that the sworn statement or application for registration may be one for one or more classes of goods, since it is there provided that the sworn statement contain, among other things, a statement of the "class of merchandise and a separate description of the goods to which the same has been or is intended to be appropriated." We interpret this to mean that an applicant may include in the sworn statement a designation of one or more classes of merchandise to which the trade-mark is to be appropriated but that applicant is required to state separately the goods to which it has been or will be appropriated.

The fact that under the federal trade-mark law separate classes of commodities are set up requiring separate applications for each class can be no basis for any precedent under our statutes since there is a specific act of Congress so providing. Act of May 4, 1906. 34 Stat. 169, 15 U. S. C. A., sec. 131.
WET
Public Health — Quarantine — Local boards of health may not establish quarantines without the consent of the state board of health. The same is true as to the powers of a city health commissioner to establish quarantines insofar as he has under sec. 141.02 (2) the powers and duties of local boards of health and local health officers. However, additional power granted a city health commissioner by said subsection to submit to the common council such rules and regulations as shall be necessary to prevent the spread of communicable diseases, which rules or regulations have the force and effect of an ordinance if approved by a majority of the council, authorizes him to submit a rule or regulation providing for a special quarantine.

August 3, 1945.

STATE BOARD OF HEALTH.

Attention Carl N. Neupert, M. D., State Health Officer.

You request our opinion upon the following question:

May local boards of health establish special quarantines without the consent of the state board of health?

The board or council of every town, village and city in which the appointment of a health officer is not otherwise provided for is required within a certain specified time to organize as a board of health or to appoint wholly or partially from its own members a suitable number of competent persons as a board of health for such town, village or city. Sec. 141.01 (1), Stats. After being organized the board is required to elect a chairman, clerk and health officer. The latter is an ex officio member of the board with the power to vote and its executive officer. Sec. 141.01 (3), Stats.

Such boards, commonly referred to as local boards of health, have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the statute under which such boards proceed. American Brass Co. v. State Board of
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Health, (1944) 245 Wis. 440. The same would be true with respect to the state board of health and also to the local health officer.

The general powers and duties of the local board of health and the local health officer are set forth in sec. 141.01, Stats. Subsecs. (5) and (7) of sec. 141.01 provide in part:

"(5) The board shall take such measures and make such rules and regulations as shall be most effectual for the preservation of the public health. * * *"

"(7) The health officer under the direction of the deputy state health officer shall:

"(e) Enforce the health law and the rules and regulations of the state board of health."

The duties of the local board of health and health officer in event of the appearance of a communicable disease are stated in the various sections of ch. 143 entitled "Communicable Diseases." Sec. 143.03 provides in part:

"(1) Every local health officer, upon the appearance of any communicable disease in his territory shall immediately investigate all the circumstances, make a full report to his board and also to the state board of health; he shall at all times promptly take such measures for the prevention, suppression and control of any such disease as he deems needful and proper, subject to the approval of his board, and shall report to his board the progress of such diseases and the measures used against them, with such frequency as to keep the board fully informed, or at such intervals as the secretary may direct. * * *

"(2) Local boards of health may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control epidemics, * * *

"(3) If the local authorities fail to enforce the communicable disease statutes and rules, the state board of health shall take charge, and expenses thus incurred shall be paid by the municipality."

It will be noted that the above subsections give the local boards of health and the local health officer broad powers to take reasonable or necessary steps for the prevention,
suppression or control of disease. However, there is a specific section relating to quarantine. As amended by ch. 335, Laws 1945, sec. 143.05 provides in part:

“(1) The state board of health may establish quarantine, or such modified forms of it as may be necessary. Communicable diseases where public safety require may be quarantined, placarded, isolated or otherwise restricted, as to which that fact is determined by the state board of health by rule.

“(2) Local boards of health with the consent of the state board may establish quarantine within their territory, and for cities within five miles of the limits.

“(3) When a health officer shall suspect or be informed of the existence of any communicable disease, he shall at once investigate and make or cause such examinations to be made as are necessary. The diagnosis (report) of a physician, or the notification or confirmatory consent of a parent or caretaker of the patient, or a reasonable belief in the existence of such disease shall be sufficient evidence and having any of these the health officer shall immediately quarantine, placard, isolate or require restrictions in such manner and upon such persons and for such time as the state board of health provides in its rules. * * *”

The portions of the above subsections which appear in italics were inserted by ch. 335, Laws 1945. Sec. 143.05 also contains other provisions relating to the duties of health officers in event of appearance of certain communicable diseases, which we do not set forth here.

The general powers of the state board of health appear in sec. 140.05, Stats. Subsecs. (1) and (3) provide in part as follows:

“(1) The state board of health shall have general supervision throughout the state of the health and life of citizens, * * * It shall have power to execute what is reasonable and necessary for the prevention and suppression of disease. * * *

“(3) The board shall have power to make and enforce such rules, regulations and orders governing the duties of all health officers and health boards, and as to any subject matter under its supervision, as shall be necessary to efficient administration and to protect health, * * * The
rules and regulations shall bear the seal of the board, be attested by the state health officer, and be published in the official state paper and distributed in pamphlet or leaf form to all health officers and any citizen asking for the same. They shall not be effective until thirty days after publication. All rules and regulations so adopted and published and all orders issued by the board in conformity with law shall be valid and in force, and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose or until altered or revoked by the board."

The board is also given certain powers by sec. 143.02, Stats., which provides in part:

"(3) The board may close schools and forbid public gatherings in schools, churches, and other places when deemed necessary to control epidemics.

"(4) The board may adopt and enforce rules and regulations for guarding against the introduction of any such disease into the state, for the control and suppression thereof within it, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by such disease, * * * Any rule and regulation may be made applicable to the whole or any specified part of the state, or to any vessel, railway car or other public vehicle. Rules of general application shall be published in the official state paper; but rules, regulations or orders may be made for any city, village or town by service thereof upon the local health officer. Rules, regulations or orders hereunder shall supersede conflicting local rules, regulations or ordinances.

"(5) All public officers and employees shall respect and enforce the rules and regulations made hereunder, and they and persons in charge of institutions, buildings, vessels and vehicles within this section, shall co-operate with the state board of health in carrying out its provisions, and if such co-operation be refused or withheld the state board may execute its rules and regulations by agents of its own appointment, and expenses incurred in so doing shall be paid by the county, city, town or village, except they are incurred for the prevention and control of Asiatic cholera and the state has created a fund for that purpose."

It is apparent that there is considerable conflict as well as duplication in the various sections above quoted. Construing them all together, we are of the opinion (1) that the
state board of health is given power to establish a quarantine or such modified form of it as may be necessary, (2) that local boards of health may establish a quarantine with consent of the state board of health, (3) that local health officers, in event they discover or have reasonable belief in the existence of a communicable disease, have power to quarantine, placard, isolate or require restrictions in such manner and upon such persons and for such time as the state board of health provides in its rules, (4) that except as stated in (2) and (3) local boards of health and local health officers have no power to establish quarantines or modified forms thereof.

The first three conclusions readily follow from the provisions of subsecs. (1), (2) and (3) of sec. 143.05, as amended by ch. 335, Laws 1945, to which we have previously referred. Our fourth conclusion is based on the familiar rule of construction that a statute applicable to a specific subject matter will govern with respect to that subject as against a general provision which might otherwise be applicable. State v. Washburn Waterworks Co., (1923) 182 Wis. 287. Subsecs. (1), (2) and (3) of sec. 143.05 specifically relate to the power of the state board of health, local health boards and local health officers with respect to the establishment of quarantine or modified forms thereof, and for that reason any other provisions of the statutes, such as secs. 141.01 (5), 143.03 (1) and (2), which standing alone might otherwise be considered as being broad enough to authorize local boards of health or health officers to establish quarantine when necessary to control or suppress disease, cannot be so construed. The power of local boards of health or health officers to establish quarantine is given by sec. 143.05 and it must be subject to the limitations contained in that section.

In a sense the question as to the power of local boards of health or health officers to adopt a quarantine, special or otherwise, without consent of the state board of health is somewhat academic. If a local board of health officer should adopt a quarantine contrary to the best judgment of the state board of health, the latter board could exercise the power granted it by sec. 143.02 (4) and adopt what it
deemed to be a proper rule or regulation under the circumstances. In such event the rule or regulation adopted by the state board of health would supersede any conflicting local rule, regulation or ordinance. Sec. 143.02 (4), Stats.

The board could also, in event it is of the opinion that any rule or regulation of a local board of health or health officer is unsound, rectify matters by exercising its rule-making power under sec. 140.05 (3), Stats., and adopt such rule, regulation or order as is called for under the circumstances, which would obviously take precedence over any rule or regulation of a local board or health officer.

While your question is directed to the power of the local boards of health to establish a special quarantine, you have orally asked us to answer that question with respect to the power of a city health commissioner. The powers of a city health commissioner are stated in subsec. (2) of sec. 141.02, which provides as follows:

“(2) The commissioner shall have the powers and duties provided for boards of health and local health officers and he shall provide such additional rules and regulations as shall be necessary for the preservation of health, to prevent the spread of communicable diseases, and to cause the removal of all objects detrimental to health and to enforce the health laws. All proposed rules and regulations shall be by him reported to the council, and if the council shall approve the same by a vote of a majority of its members, they shall have the force and effect of ordinances, including penalty for violation. He shall from time to time, recommend to the council such sanitary measures, to be executed by the city as shall seem to him necessary, and shall discharge such other duties, as may be imposed upon him by the council by ordinance or resolution.”

It should be noted that in addition to being granted the powers and duties provided for local health boards and local health officers, the health commissioner is given the power to make such rules and regulations as shall, among other things, be necessary for the preservation of health and to prevent the spread of communicable disease, subject to approval by a majority vote of the common council, in which event they have the force and effect of ordinances.
Insofar as the health commissioner has the powers and duties of local boards of health and local health officers our conclusions as to the power of local boards of health and local health officers to establish a special quarantine would be equally applicable with respect to the powers of the health commissioner.

We are of the opinion that the power to make rules or regulations to prevent the spread of communicable disease, subject to approval by a majority vote of the common council, would authorize the health commissioner to submit a rule or regulation providing for a special quarantine and which if adopted by a majority vote of the common council would have the force and effect of an ordinance. However, in the event the common council by majority vote adopts a rule or regulation providing for a special quarantine, it would be superseded by any rule or regulation adopted by the state board of health as provided by sec. 143.02 (4) in event of conflict. The state board of health might also be able to take care of the situation in event of conflict by exercising its rule-making power granted by sec. 140.05 (3), Stats.

WET
Public Welfare Department — Poor Relief — Old-age Assistance — Funds recovered by a county in satisfaction of, or for the release of, its old-age assistance lien, may not be applied by the state department of public welfare in payment of subsequently accruing claims to the exclusion of claims existing at the time of the recovery and secured by the lien.

August 3, 1945.

A. W. Bayley, Director,
State Department of Public Welfare.

You have asked two questions in connection with the allocation of funds recovered by counties in payment or partial payment for old-age assistance granted. Your first question is:

“(1) When a recovery has been made and a lien has been released during the lifetime of the recipient and the releasing county’s claim satisfied to the date of release, are subsequent claims for old-age assistance, burial expenses, institutional care, etc. furnished by the same or different counties entitled to participate in, or constitute prior claims on, the collection made by the first county?”

There are several instances under which a claim for old-age assistance might be satisfied, or settled in part, during the lifetime of the beneficiary of the assistance, and further old-age assistance later given to the same beneficiary.

A. Where personal property is transferred to the county administrator under sec. 49.26 (1), old-age assistance may be discontinued during the lifetime of the beneficiary whereupon the county retains out of the personal property an amount sufficient to reimburse it for aid given and the balance is returned to the beneficiary.

B. A lien on real estate under sec. 49.26 (4) may be satisfied through voluntary payment of the amount of the old-age assistance claim, either by the beneficiary or his representatives.

C. A lien under sec. 49.26 (4) may be released by the county administrator so as to permit the transfer of the real
estate, subject to the condition that the amount of the equity of the old-age assistance beneficiary in such property be paid to the county.

D. The lien under sec. 49.26 (4) might be foreclosed upon transfer of the property during the lifetime of the beneficiary of the assistance.

You state that your practice has been to prorate the collections between the federal, state and county governments at the time of the collection; but that later, if further aid is given either for burial or otherwise, to re-allocate the collection between the federal, state and county governments so as to permit the claims accruing after the collection to participate in the funds collected.

The terminology of secs. 49.25 and 49.26 by which old-age assistance is made a claim against the beneficiary's property in favor of the county granting the assistance and by which a lien is created to secure the claim, imply a debtor-creditor relationship to which the common-law rules with respect to application of payments would normally apply in the absence of a superseding statutory provision. Your practice of applying the collections when made and of later re-applying them to permit participation of subsequently accruing claims is contrary to common-law principles with respect to application of payments. The legislature could, of course, supersede these rules for the purpose of allocating the proceeds collected on old-age assistance claims. It was said, however, in State ex rel. Schwenker v. District Court, 206 Wis. 600, 240 N. W. 406 that statutes should be construed as far as possible in harmony with the common law.

Before examining the statutory provisions, we will give a brief summary of the rules with respect to application of payments which we believe would govern the situations described in A, B, C and D above in the absence of contrary statutory provision.

It was stated in Nelson v. Davison, 152 Wis. 567, 570, 140 N. W. 334:

"* * * In general, where money is paid by one person to another, the latter having several money demands against the former, and makes no specific application to any demand in preference to others, the payee may apply the money upon whichever of the demands he sees fit."
There are limitations upon this rule which are hereinafter discussed, but we do not believe that even the rule as above quoted would of itself warrant the practice followed by the state department of public welfare in first applying collections in one way and later re-applying them to include subsequently accruing claims. This is for the reason that the statutes do not apparently denominate the state as the creditor with respect to the claims. So far as any intent is shown in the statute the county administrator occupies the position of creditor with respect to the claims and the liens against the estates of beneficiaries of old-age assistance. Sec. 49.25 provides that the county administrator of the county from which old-age assistance was received shall be the one to file the claim. Sec. 49.26 (4) refers to the “rights of the county” and to “the county in whose favor such lien exists.”

There are, moreover, under the common law a number of limitations upon the right of a creditor to make application of payments as he sees fit. It was held in International Harvester Co. v. Holmes, 165 Wis. 506, 162 N. W. 925, 927, that a creditor cannot apply a payment upon a debt not due at the time the payment is made, to the exclusion of one due or overdue. This rule applies to voluntary payments and would therefore prevent allocation in the cases described in B above so as to include claims accruing after the date of the payment.

In the cases of Jenkins v. Gunnison, 50 Wis. 388, 7 N. W. 256, 423 and The First National Bank of Milwaukee v. Fieck, 100 Wis. 446, 452-454, 76 N. W. 608 it was held that the proceeds of collateral pledged to secure a specific debt can be applied only to the satisfaction of such debt. It would seem that such rule would prevent the application of collections under the situations described in A, C and D above to any claims other than those actually secured by the transfer of personal property, or by the lien on realty. It could not logically be contended that assistance, granted after the satisfaction of a lien, is secured by the previously satisfied lien.

The statutory provision upon which you rely primarily appears in sec. 49.25: “Of the net amount recovered pur-
suant to the provisions of this section or section 49.26, one-
half shall be paid over to the United States government, and
the remainder shall be paid into the treasuries of the state
and its political subdivisions, in the proportion in which
they respectively contributed to the old-age assistance re-
covered.” This, together with the clause of sec. 49.38 (1)
authorizing the state department of public welfare to make
“any necessary audit adjustments for any month or months
of current or prior fiscal years,” you regard as authoriza-
tion for re-allocating collections so as to include claims ac-
cruing subsequent to the collections.

There can be no dispute that the direction contained in
sec. 49.25 supersedes the common-law rules with respect to
application of payments to the extent that it is inconsistent
therewith. Since the legislature has elected a system of
county administration, which includes the collection of
claims with the state department functioning only in a su-
ervisory capacity, the mandate of sec. 49.25 is directed in
the first instance at least to the county administrator who
effects the recovery. The provision does not provide that the
payment of the proceeds by the collector shall be deferred
until the death of the old-age assistance beneficiary in cases
where the collection is made during his lifetime. It appears
to us that the obligation of the county to apply the proceeds
in accordance with the above mandate arises immediately
upon the recovery of the funds. If that is so, the intent of
the statute must have been to provide for division of the
proceeds proportionately with respect to the claims which
have accrued at the time of the collection. Such a construc-
tion is in harmony with the common-law rules which con-
template the application of a payment to debts due at the
time it is made rather than to debts later becoming due, and
which contemplate the application of proceeds of security to
the claim for which the security was given.

We do not believe there is any language in the sentence
quoted from sec. 49.25 which is inconsistent with such a
construction. The reference to the “net” amount recovered
doubtless contemplates that there shall be reductions for the
cost of collection or the cost of foreclosing the lien. The use
of the plural term “political subdivisions” of the state prob-
ably indicates only the legislative consciousness of the fact that it was dealing not alone with one claim but with many claims in which, collectively speaking, many political subdivisions would be concerned. If more than one political subdivision had contributed to the assistance granted a single beneficiary prior to the time of the recovery, then naturally all those so participating would be entitled to share proportionately in the proceeds according to sec. 49.25, but in such case each county would have to file its separate claim or lien.

While sec. 49.38 authorizes the state welfare department to make audit adjustments, it contemplates that such adjustments shall be in pursuance of the functions otherwise imposed upon the department.

In answer to your first question, it is our opinion that when monies collected on an old-age assistance claim have once been applied and distributed pursuant to sec. 49.25 of the statutes they are not subject to re-allocation by the state department of public welfare in post-audit adjustments.

Your second question is:

“(2) After a recovery has been made (and claims for assistance up to that time have been satisfied) and a lien released in recipient’s lifetime, must distribution be made or can the proceeds be held in trust until it is known whether there will have to be public expenditures for burial and last illness?”

Statutory agencies such as the state department of public welfare must find all powers they possess within the statutes, either expressly or by necessary implication. We find no express authorization for the department of public welfare to hold proceeds collected by a county in trust so as to determine whether there may be further claims, nor do we believe such a power may be implied. It is a general rule that what cannot be done by direction cannot be done by indirection. We have previously given our opinion that collections effected by counties cannot be applied to subsequently accruing claims, to the partial exclusion of those existing prior to the collection.

BL
Juvenile Court — Probation Department — Judge of juvenile court may require probation department of his court to receive money and keep a record thereof under sec. 48.07 (6) (a) as well as under sec. 48.03.

August 3, 1945.

Rudyard T. Keefe,
District Attorney,
Oshkosh, Wisconsin.

You state in your request for opinion that it has been the practice for many years in your juvenile court to have the probation department keep full records and accounts of money collected from persons under its supervision. This has been done in accordance with sec. 48.03, Stats. The probation department has also kept records and handled funds collected under sec. 48.07 (6) (a) where the juvenile court has adjudged that the parents of a child be required to pay the support of such child while in a private home or institution. You state that the probation department in your juvenile court now contends that collections under the latter section are not within the statutory duty of that department and that such collections should be made by the clerk of the juvenile court.

Sec. 48.01, Stats., gives to the juvenile court exclusive jurisdiction over neglected, dependent and delinquent children. Sec. 48.02 provides for the appointment of probation officers for the juvenile court. In Winnebago county such appointment is covered by subsec. (2) thereof. This subsection provides in part that "* * * the judge of the juvenile court shall appoint such officer or officers to serve in said court." Sec. 48.03 defines the duties of probation officers, among which are, making investigations, keeping written records thereof, and keeping complete accounts of money collected from persons under its supervision.

There is nothing in secs. 48.02 or 48.03 to indicate that such investigations and reports by the probation department are confined to delinquent children. It seems clear
that the legislature intended the probation department to serve as the investigatory and record-keeping arm of the court.

Sec. 48.07 contains the following language:

"(1) If the court shall find that the child is delinquent, neglected or dependent, it may: *
"* * *
"(6) (a) * * * after giving a parent a reasonable opportunity to be heard, adjudge that such parent shall pay in such manner as the court may direct such sum as will cover in whole or in part the support of such child at the county home for dependent children or at any private home or private institution in which such child is being cared for, and if such parent shall willfully fail or refuse to pay such sum he may be proceeded against as for contempt of court."

We believe that the language underlined above clearly indicates that it is within the discretion of the court to direct that these payments be made to the probation department and that adequate records thereof be kept by such department. There is nothing in the section above quoted to indicate that the legislature intended the funds collected to be handled exclusively by the clerk of the juvenile court.

It is perfectly clear that investigations would often be necessary in cases involving neglected and dependent as well as delinquent children. Where those children falling in the first two classes are placed in a foster home and the parents required to pay part of the support, investigations might frequently be required. As pointed out above, the probation department is the investigatory arm of the court. Should a parent fail to pay the support as ordered by the court, it seems quite obvious that the probation department would be in a much better position to collect this default than would the clerk of the juvenile court.

The jurisdiction of the juvenile court is, in fact, not limited to children. Sec. 48.01 (5) (c) extends the jurisdiction of the juvenile court to any adult who has been guilty of contributing to the delinquency, neglect or dependency of any child. The juvenile judge could certainly call upon his probation department to assist him in carrying out the provisions of this section.
It is our conclusion, therefore, that the juvenile judge may require the probation department to receive money and keep a record thereof, under sec. 48.07 (6) (a) as well as under sec. 48.03, for the reason that the jurisdiction of the juvenile court extends to neglected and dependent children as well as to delinquent children and that all these classes could, by the direction of the judge, be under the supervision of the probation department.

ES

*Industrial Commission — Fire Prevention* — Industrial commission has authority under sec. 101.10 (5a) to regulate the storage of flammable liquids on farms.

August 7, 1945.

**INDUSTRIAL COMMISSION.**

Attention Helen E. Gill, Secretary.

You have requested an opinion in regard to your authority under sec. 101.10, Wis. Stats., to make and enforce safety orders in connection with the storage of flammable liquids on farms.

Sec. 101.10, Stats., is entitled "Other powers, duties and jurisdiction of commission." Subsecs. (3), (4) and (5) thereof empower the commission to prescribe safety devices and reasonable standards for the construction and maintenance of "places of employment." These subsections are, therefore, not applicable to farms, since under the definitions found in sec. 101.01 (1) and (2), farms are excluded. However, subsec. (5a) of 101.10 makes no reference to place of employment and is, therefore, applicable to farms. This subsection deals specifically with combustible or explosive materials and inflammable conditions, and reads as follows:
“To make reasonable orders for the repair or removal of any building or other structure which for want of repair or by reason of age or dilapidated condition or for any other cause is especially liable to fire, and which is so situated as to endanger other buildings or property and for the repair or removal of any combustible or explosive material or inflammable conditions, dangerous to the safety of any building or premises or the occupants thereof or endangering or hindering firemen in case of fire.”

This subsection was enacted by ch. 501, Laws 1917. It transferred certain fire prevention functions from the insurance department to the industrial commission. The general provisions now contained in sec. 101.10 (5a) were formerly found in sec. 1946f, Stats. 1915. At the time the change in the statutes was made, the definition of “place of employment” already excluded farms. See sec. 2394-41 (1), Stats. 1915. In transferring the provisions of sec. 1946f to sec. 2394-52, Stats. 1917, the legislature revised some of the language. In other words, the legislature must be presumed to have known at the time subsec. (5a) was adopted that farms were excluded from some of the other subsections in 301.10. If the legislature had intended to exclude farms from the industrial commission's supervision in regard to control over inflammable conditions, it would have been a simple matter to so provide.

The subsection under consideration specifically mentions combustible and explosive material and inflammable conditions dangerous to the safety of any building or its occupants. It also apparently has as one of its objectives the prevention of conditions which would endanger or hinder firemen in case of fire. We perceive no reason why the legislature should not have intended to protect farmers, their families and firemen fighting farm fires as well as persons similarly situated in urban areas.

In view of the fact that the legislature expressly excluded farms and farmers from other provisions of sec. 101.10, and did not do so in subsec. (5a), set out in full above, it is our opinion that said subsection is applicable to farms and therefore gives to the industrial commission the authority to make provision in its present code on flammable liquids governing the storage of such liquids on farms.
Poor Relief — Old-age Assistance — Where an old-age assistance recipient has a life estate in real property with power to sell or encumber but does not exercise such power during his lifetime, the old-age assistance lien as provided for in sec. 49.26 (4), Stats., is not enforceable after the death of the beneficiary.

The same result follows where the real property is held in trust for the life tenant with power in the trustees to sell or encumber for the benefit of the life tenant, but attention is called to the possible application of sec. 232.23, Stats.

August 11, 1945.

A. W. Bayley, Director,
State Department of Public Welfare.

You have requested an opinion relative to the enforceability of certain old-age assistance liens as provided in sec. 49.26 (4), Wis. Stats. In your request you set forth several situations which have confronted your department.

The first situation involves an old-age assistance recipient who holds a life estate in realty coupled with a power to sell or encumber. You inquire whether, on his death, it is possible for the county to enforce the old-age assistance lien.

Sec. 49.26 (4), Stats., provides in part that after the filing of a certificate the lien imposed by the statute

"* * * shall attach to any and all real property of the beneficiary presently owned or subsequently acquired, including joint tenancy interests, in any county in which such certificate is filed for any amounts paid or which thereafter may be paid under sections 49.20 to 49.51, and shall remain such lien until it is satisfied. * * * Such liens shall be enforceable by the county filing the certificate after transfer of title of the real property by sale, succession, inheritance or will, in the manner provided by law for the enforcement of mechanics' liens upon real property. * * *"

There is no question that a life estate in realty is real property, therefore, the lien for old-age assistance attaches to this property interest as soon as the certificate provided for in the statutes has been filed. There can be no question
that a life tenant can sell or encumber his interest during his lifetime. However, the lien is not enforceable unless the beneficiary attempts to dispose of his interest by one of the methods enumerated in the subsection quoted above. In the situation before us, the life tenant has attempted no sale during his lifetime, therefore that method of disposition is not pertinent. It is obvious, of course, that a life estate cannot pass by succession, inheritance or will, since it vanishes the instant the life tenant dies.

In *Goff v. Yauman*, (1941) 237 Wis. 643, 648, 298 N. W. 179, 134 A. L. R. 952, the court pointed out that the lien would be enforceable after but not before a transfer of the beneficiary's title:

"** * * ** So long as he retains his interest in the property which is subject to the lien he is not to be disturbed. It is only when he parts with his interest and as the result thereof can no longer look to the property as his place to live or for income that the lien is enforceable."

Upon the death of the life tenant, the remainder passes by force of the instrument creating the life estate and through no act of the life tenant. Therefore, since the old-age assistance recipient has done nothing in his lifetime to dispose of his interest nor has his interest passed to anyone on his death, it is our conclusion that the lien on the life estate is unenforceable. It is immaterial that the instrument creating his life estate also gave to him a power to sell or encumber because an unexercised power is not an interest in real property. See I Simes, *Law of Future Interests* 462, sec. 263.

In your request you set forth a second situation which involves real property held in trust with a life estate in the old-age assistance recipient but with power in the trustees to sell or encumber for the benefit of the life tenant.

Here, again, the life tenant has died and no action was taken by the trustee during the tenant's lifetime to exercise the power of sale or encumbrance. The result would be the same as in the first situation discussed above because the unexercised power disappears with the life estate on the death of the life tenant. However, we call your attention to sec. 232.23, Stats., which provides as follows:
"Every trust power, unless its execution or nonexecution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled by action for the benefit of the parties interested."

Under this section, the trustee of the power could probably be forced to exercise the power for the benefit of the life tenant, but this clearly must be done during the lifetime of the tenant.

ES

Automobiles and Motor Vehicles — Trailer Trains — Combination of motor vehicle drawing or having attached thereto more than one other vehicle is prohibited by sec. 85.45 (2) (c), Stats., unless permit granted under subsec. (3). Granting of permit is to be controlled by considerations of public safety on the highway, rather than convenience to operator or economy of operation.

August 17, 1945.

B. L. Marcus,
Deputy Commissioner,
Motor Vehicle Department.

You state a commercial organization engaged in "drive-away" delivery of automobiles and trucks is using a new method of delivering truck chassis. This method consists of using one truck chassis as the pulling unit, mounting the motorized front end of a second chassis upon the rear of the pulling unit, and repeating the arrangement by mounting the front end of a third chassis upon the second chassis. The rear wheels of each chassis thus mounted follow in the track of the pulling unit, much in the manner of a tractor-trailer combination. You do not indicate the over-all length of the combination. You ask whether this type of operation over the public highways is in violation of the statutes.
Sec. 85.45 (2) (c), Stats. provides as follows:

"No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one other vehicle, and in no case shall the over-all length of such combination of vehicles exceed forty-five feet except as provided in subsection (3) of this section."

The exception provided in subsec. (3) provides:

"Permits for trailer trains. The commissioner of public works of any city of the first class or in other units of government the officer in charge of the maintenance of the highway desired to be used, is authorized to issue permits for the operation of trains consisting of truck tractors, tractors, trailers, semitrailers or wagons when such train does not exceed a total length of one hundred feet on such highways as may be designated in the permit. When highways outside of the corporate limits of cities and villages are used, such permit shall have the approval of the state highway commission. Whenever a trailer train operating under this subsection or under a special permit crosses an intersection of an artery for through traffic or a street railway, such intersection shall be flagged. This subsection does not apply to wagons used in connection with seasonal agricultural industries."

It is our opinion that in the absence of a permit procured pursuant to subsec. (3), the combination of vehicles described is prohibited by sec. 85.45 (2) (c), and accordingly is illegal. This is true irrespective of the over-all length of the combination.

While your request does not specifically reach the proposition of whether this combination may be the subject of a permit, we may safely anticipate that if the operator is barred from the use of Wisconsin highways by reason of this opinion, a permit will be sought. The grammatical construction of the sentence which comprises the whole of subsec. (2) (c) is such that the exception of subsec. (3) seems to apply only to the over-all length limitation of 45 feet, and not to the first clause limiting the number of vehicles in combination. But a reading of subsec. (3), which refers to "trains" of vehicles not exceeding 100 feet, shows that such exception was intended by the legislature to extend to the
number of vehicles in combination as well as the over-all length. The constitutionality of this subsection was upheld in *State v. Wetzel*, 208 Wis. 603, where, at page 614, our Supreme Court said:

"* * * It is * * * plain that the discretion to issue permits is to be exercised with regard to the subject of public safety upon the highways. It is essential to the practical administration of such a law that there be some such discretion vested in the highway authorities. It is impossible for the legislature to anticipate all of the very many details and contingencies that may arise in the handling of such a complex problem as regulating traffic upon the public highways." (Emphasis ours)

While the discretion conferred upon the highway commission and municipal officers is absolute in the situation, the court has indicated that its exercise is to be controlled by considerations of public safety upon the highways. The reason for the discretionary power granted being the practical inability of the legislature to anticipate the many details and contingencies that may arise in the handling of highway traffic, it would seem to us that it was intended to reach situations over which the operators of the vehicles have little, if any, control. An example of such an instance would be where the peculiar physical construction of the cargo precludes literal compliance with safety regulations. But, as in the present instance, where the factors are merely convenience to the operator and economy of operation, at the possible expense of safety, the granting of a permit would not seem to be indicated.

SGH
Insurance — Standard Fire Policy — But one form of standard fire insurance policy is contemplated by secs. 203.01 to 203.08, Wis. Stats., as amended by ch. 474, Laws 1945, and the amount of insurance for each basic coverage should be specified in the space provided in the standard policy form for listing amounts of insurance, etc.

August 20, 1945.

MORVIN DUEL,
Commissioner of Insurance.

You have inquired whether the commissioner of insurance may approve and keep on file more than one form of standard fire insurance policy under secs. 203.01 to 203.08, Wis. Stats., as amended by ch. 474, Laws 1945.

Sec. 203.03 (1) as amended reads:

“(1) The commissioner of insurance shall keep on file printed forms in blank of the standard policy of fire insurance, containing the provisions, agreements and conditions specified in this section. The following policy form is declared to be and shall be known as the ‘Standard Policy.’”

The standard policy form set forth in ch. 474 provides among other things a blank space with the following wording in parenthesis:

“(Space for listing amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached.)”

In this space certain companies desire to use substantially the following form, which we shall designate as “Form A”:

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Amount</th>
<th>Rate</th>
<th>Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fire</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Fire and Extended Coverage</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Windstorm and Hail Coverage</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Additional Coverages</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
</tbody>
</table>

Total Premium $
This form has been approved by the commissioner and is now in use. Other companies have requested the use of a different form which we shall designate as "Form B" and which reads as follows:

<table>
<thead>
<tr>
<th>AMOUNT</th>
<th>TOTAL PREMIUM</th>
</tr>
</thead>
</table>

Insurance is provided only against such perils and for coverages indicated below by a premium charge and against other perils and for other coverages when endorsed hereon or added hereto.

<table>
<thead>
<tr>
<th>Rate</th>
<th>Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>$</td>
</tr>
<tr>
<td>$</td>
<td>$</td>
</tr>
<tr>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

If this form is to be permitted in addition to Form A, as set forth above, it will require the filing and approval of two forms of standard fire insurance policies, which forms will be identical except as to the differences indicated.

We do not believe that it is contemplated under the standard fire policy law, as amended by ch. 474, Laws 1945, that optional forms are to be used and moreover it is questionable that Form B fully complies with the intent of the statute. Throughout the statute refers to the "standard policy" of fire insurance rather than "standard policies." The statute sets up but one form of policy and while it is true that as to the material here under discussion the details are not prescribed, there is nevertheless a mandate at least as to the minimum information which is to be furnished in the space in question by virtue of the wording of the statute "space for listing amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached." (Emphasis supplied)

In saying this we are not unmindful of the rule of statutory construction that unless such construction would be inconsistent with the manifest intention of the legislature, every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing and every word importing the plural num-
ber only may extend and be applied to one person or thing or several persons or things. See sec. 370.01 (2). We believe, however, that in this instance when the legislature used the singular in referring to "the standard policy" of fire insurance and used the plural in referring to "amounts" and "basic coverages" it did so advisedly and pursuant to a rule of public policy to which reference is hereinafter made. A plain reading of the statutory direction as to information to be inserted in the space above referred to would require the amounts of each basic coverage to be stated separately as provided in Form A rather than to be lumped together in one form as contemplated in Form B. Form B is ambiguous and misleading. Suppose the sum of $5,000 were to be inserted in the blank under "Amount" in this form. How is the policyholder to know whether he has $5,000 fire coverage and $5,000 wind storm coverage or merely a total of $5,000 to be apportioned among the various risks according to some formula unknown to him? Perhaps an analysis of the figures under "rate" and "premium" would furnish the key to the answer, but the average policyholder is unfamiliar with rates and might be lulled into a false sense of security by thinking that the one figure under "Amount" was applicable to each coverage, whereas such might not be the case at all.

The standard fire policy law declares a rule of public policy. Prentiss-Wabers v. Millers M. F. Ins. Ass'n., 192 Wis. 623. That public policy apparently is to secure uniformity and eliminate ambiguity. Sec. 203.06 (2) (a), relating to the matter which may be inserted in the space indicated therefor or which may be added by written agreement or endorsement, further bears out such view. Among these items is the following:

"4. Any matter necessary to express all the facts and conditions relating to insurance on any particular risk."

It seems clear that the amount of the coverage for each particular risk is a "matter necessary to express all the facts and conditions" thereof.

In view of the foregoing you are advised that but one form of standard fire insurance policy is contemplated un-
der secs. 203.01 to 203.08, Wis. Stats., as amended by ch. 474, Laws 1945, and that in the space for listing amounts of insurance, rates and premiums for the basic coverage insurance, the amount of insurance for each coverage should be specified.

WHR

Countsies — Schools and School Districts — Vocational and Adult Education — Ch. 143, Laws 1945, creating sec. 59.08 (49), Wis. Stats., which authorizes county boards to appropriate money to local boards of vocational and adult education rendering services to residents of the county, does not authorize the conducting of classes outside the limits of the vocational school district.

August 21, 1945.

C. L. GREIBER, State Director,

Vocational and Adult Education.

You have called our attention to ch. 143, Laws 1945, creating sec. 59.08 (49), Wis. Stats., and which authorizes county boards:

"To appropriate money to be paid to local boards of vocational and adult education which render services to residents of the county. * * *"

We are asked whether this provision authorizes local boards of vocational and adult education to carry on instruction outside of the municipality and outside of the county for certain types of students such as volunteer firemen and for the training of various workers for federal agencies. In the case of volunteer firemen village boards in many instances have indicated a willingness to contribute to the cost of such instruction if the service is rendered to the volunteer firemen in their local community. In the case of federal workers for a federal agency the agency would pay
50 per cent of the cost of instruction and the balance would be paid by the state board to the local boards from federal aids.

Ch. 143, as above indicated, increases the special powers of county boards under sec. 59.08, but it in no way amends the powers and duties of local boards of vocational and adult education under ch. 41 of the statutes. Consequently the opinions of the attorney general to which you refer, XIII Op. Atty. Gen. 481 and XXVII Op. Atty. Gen. 147, to the effect that a vocational school district must be confined to one town, village or city and may not conduct schools in other municipalities, are not subject to modification by reason of anything contained in ch. 143, Laws 1945.

Ch. 143 gives rise to no conflicts with existing statutes relating to the powers of local boards of vocational and adult education. The “services to residents of the county” for which the county board may appropriate money presumably can be rendered within the limits of the local vocational education district. Sec. 41.19 authorizes the local board to charge tuition for nonresident pupils at a rate of not to exceed 50 cents for each day or evening of actual attendance. This remains unchanged, but since the tuition charge is not mandatory the local board receiving county aid would be at liberty to forego the tuition charge either wholly or in part should it decide to do so. Also county aid under ch. 143 might be used as an incentive for local boards of vocational education in the offering of services to residents of the county for which the maximum statutory charge of 50 cents per day for nonresident tuition might otherwise be inadequate.

Should it be deemed desirable to empower local boards of vocational and adult education to offer services outside the local district and outside the county, additional legislation amending the statutory powers of such boards is in order, and we do not consider that such result has been accomplished by indirection or implication through legislation which merely increases the powers of county boards with reference to aiding local boards of vocational and adult education.

WHR
Public Welfare Department — Counties — Insane — A partial payment recovered by a county of more than 500,000 population in full settlement of its claim for maintenance of a patient in its hospital for the insane may be allocated proportionately over the whole period of maintenance so as to reduce proportionately the state aid to be allowed for the entire period.

One making voluntary partial payments for such maintenance may specify that it should apply on current rather than past items.

August 27, 1945.

STATE DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, Director.

You have asked whether the state department of public welfare may prorate partial collections made by Milwaukee county for maintenance of patients at Milwaukee county hospital for mental diseases and its hospital for chronic insane so as to divide such collections between the state and the county proportionately to the amounts contributed by each for such maintenance over the whole period covered by the entire claim.

The practical importance of the question arises because under sec. 51.24 (2), Stats., the state gives aid at one rate while a patient is classified as acute and at another when he is classified as chronic so that the percentage of its contribution for one period might vary from that applicable to another or to the entire period of the maintenance.

You have mentioned sec. 46.10 (2), (3) and (7). These provisions direct the state department of public welfare to give proper credit to counties for their share of recoveries effected by the state and do not in terms apply to moneys collected by a county. Milwaukee county is the only one which, as a county of more than 500,000 population, effects its own collections under the terms of sec. 46.10 (1) and (7). We find no statutory provision directing what portion of these recoveries shall be turned over to the state. With respect to payment of state aids to such a county, however, we find the following limitations in sec. 51.24 (6).
"(6) No such county shall be entitled to such credit or any compensation whatever from the state for the care of any person who has not been duly adjudged to be insane and properly committed as such, nor for the care of any insane person whose support is not properly a public charge."

It could not fairly be said that the support of an insane person is a public charge for any period for which the county has been compensated out of the patient's estate or by a relative or representative of the patient. The county should not be entitled to retain both state aids and the recoveries effected for the same period. Accordingly, whether it be considered a matter of determining for what period a county is entitled to state aid, or to what portion of the recovered funds the state is entitled, there is still involved the question to what periods partial recoveries should be allocated. You have submitted that question with respect to two situations:

"First, has the state department of public welfare the power to recognize a cancellation or reduction of charge to a particular patient where circumstances warrant, and in the case of a reduction accept a pro-rata settlement on the basis of collection actually made as per the established ratio of per capita contribution by the state and county".

We are assuming that this is a situation in which the county as the creditor has compromised its entire claim for maintenance of a patient upon a voluntary payment of a portion of the amount due. Since your question is restricted to such a settlement "where circumstances warrant" we are postulating this opinion upon a valid compromise agreement by the county. It should be observed, however, that the county's authority to compromise in such a case is far from plenary. Sec. 46.10 (7) authorizes recovery of actual per capita costs of maintenance as defined by rule of the state department of public welfare. It was apparently the legislative intent in creating the last two sentences of that subsection by ch. 548, Laws 1943, to create a liability for the total cost.

"* * * The legislature intends, and so intended at the time this subsection was enacted by chapter 336, laws of
1935, to impose, exclusively by this subsection and no other, a liability for care in those institutions to which this subsection has application, upon the person receiving such care, upon his estate, and upon the relatives named herein and upon their estates. The words ‘may be recovered’ appearing in this subsection are and were intended to impose this liability.”

If this is so, the county is obligated to collect the entire account where possible in accordance with the rule discussed in IV Op. Atty. Gen. 648, that where public rights are involved a statutory direction to public officials is mandatory. The right of public officials to compromise a claim of the government is discussed in XXX Op. Atty. Gen. 480. In accordance with the authorities there cited, a compromise by the county of a claim for maintenance under sec. 46.10 (7), if it is effective to release the balance of the claim, would have to be predicated upon a genuine doubt as to collectibility of all or a part of the account. Since that opinion was published the legislature has made specific provision relative to compromise of institutional claims by a county. See subsec. (4) of sec. 49.26 of the statutes as amended by ch. 522, Laws 1943.

While it has been held in this state that partial payments on open, running accounts will generally be applied to the earliest items in the absence of any application or agreement by the debtor or creditor (Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335, Hannan v. Engelmann, 49 Wis. 278, 5 N. W. 791, Yellow River Improvement Co. v. Arnold, 46 Wis. 214, 49 N. W. 971) these cases all involve situations where the partial payment is intended and received merely as such and not for the extinguishment of the entire indebtedness. Where, for purposes of compromise and settlement, the claim is dealt with as an entirety and no item cancelled, and a partial payment is given in settlement of the whole, it seems clear that it was not intended as payment of the earliest items, but rather as a proportionate satisfaction of the whole. We see no reason under such circumstances why the payment should not be regarded as applicable to the whole period and the state aid prorated in proportion to the maintenance given at public charge.
"Secondly, where charges are made according to the straight per capita cost for a period of time and subsequently reduced, may the state department of public welfare in its discretion apply collections made subsequent to such reduction to the period of such reduction rather than crediting the payment on unpaid earlier indebtedness when the charges were being made at the standard rate?"

Sec. 46.10 (7) gives a claim for the actual per capita cost of maintenance "as defined by rule of the state department of public welfare." We find no authority in the county to reduce this charge in the sense that it may erase the liability for the balance. On the other hand, subsec. (1) of sec. 46.10 permits acceptance of a part of the cost of the maintenance, and we believe that the county's authority to effect collections must include the incidental power to accept partial payments.

It is said that "under all ordinary circumstances the debtor and creditor have a perfect right by agreement to control the application of payments between themselves." F. A. Patrick & Co. v. Deschamp, 145 Wis. 224, 129 N. W. 1096. While there are undoubtedly restrictions upon the rights of a county to act as a proprietary creditor, since it is not a natural person but rather a creature of the state whose acts must accord with the purpose of an enabling statute, we see nothing to prevent a person who is making a voluntary payment for the maintenance of an insane patient at a county institution from prescribing that the payment be applied to the current items of the maintenance rather than to past ones. Under those circumstances, we believe that the state aid should be given accordingly for the portion of each period which is at public charge.

This opinion applies only to the two circumstances described, that is, where there is a valid compromise agreement in which the county accepts a partial payment in settlement of the entire claim; second, where voluntary payments are made by a relative or representative of an insane person to be applied for a specified period of his maintenance.

BL
Fish and Game — Indians — Under sec. 29.09 (1), Stats., Indians are not subject to game laws while hunting, fishing or trapping on lands of any reservation, whether they reside there or not. Tests of who are "Indians" within the meaning of the statute discussed.

August 27, 1945.

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

You state that an Indian who is a member of a tribe in the western part of the state was arrested for possession of beaver and muskrat hides on the Lac du Flambeau Indian Reservation. His defense is that he is an Indian, carried on the tribal roll, but not on the roll of the Lac du Flambeau reservation. You refer to sec. 29.09 (1), Stats., and inquire whether an offense has been committed and whether it is within the jurisdiction of the state courts.

Sec. 29.09 (1), Stats., provides in part as follows:

"* * * Indians hunting, fishing or trapping off Indian reservation lands are subject to all provisions of this chapter. * * *"

It is apparent from the above that the legislature intended the game laws to apply to "Indians" only when "off Indian reservation lands." Such classification is clearly constitutional, in view of the peculiar legal status of Indians, and the only question is one of construction of the statute.

If the legislature intended the immunity of Indians to apply only to the reservations on which they lived, it could easily have said so. On its face, the statute extends immunity to any Indian on any reservation.

It is true that the test of who is an "Indian" varies with different tribes and on different reservations. Thus it may be that the Indian in question, though enrolled as a member of the tribe on his home reservation, may not be of sufficient Indian blood to be recognized as an Indian by the Lac du Flambeau Indians. However, that is a matter to be determined by each tribe for itself, and so far as state and fed-
eral laws are concerned the tests of an Indian appear to be "* * * (1) preponderance of blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian." Ex parte Pero, (C. C. A. 7th, 1938) 99 F. 2d 28, 31. Cf. Famous Smith v. United States, (1894) 151 U. S. 50, holding that a person who was an Indian in appearance and blood and appeared to have been enrolled and participated in payment of "bread money" to the Cherokees, was legally an Indian in the absence of a showing that he had severed his tribal relations and taken up residence permanently with whites.

You do not submit sufficient data to say with certainty that the defendant in this case is an Indian within the above tests, but the fact that he is an enrolled member of some tribe would seem to make out a prima facie defense under the statute.

In view of the foregoing it is unnecessary to decide whether the state courts have jurisdiction of crimes committed by Indians on other reservations than those on which they reside.

WAP

Appropriations and Expenditures — University — Regents of the university of Wisconsin may lease additional space needed in Milwaukee for extension division classrooms and instructors' offices where facilities of present building used for that purpose are inadequate, and the rental may be paid out of appropriations made by sec. 20.41 (2) (a) and (ab), Wis. Stats.

August 27, 1945.

A. W. Peterson, Director,
Business and Finance,
University of Wisconsin.

You state that the university of Wisconsin extension building in Milwaukee is inadequate to take care of the demand for classes and inquire if the regents may legally rent needed space for classrooms and offices, charging such
costs to the appropriation made by sec. 20.41 (2) (a) and (ab) of the statutes.

Sec. 20.41 (2) (a), as amended by ch. 293, Laws 1945, reads:

“(2) University extension. For educational extension and correspondence teaching:

“(a) Operation. On July 1, 1945, $198,600, and annually, beginning July 1, 1946, $202,800 for operation.”

Paragraph (ab) provides:

“Revolving appropriation. All moneys received as university extension fees, laboratory fees, including fees for correspondence study instruction, class instruction, lecture instruction, medical extension, visual instruction materials, musical and dramatic materials, extension texts and bulletins, traveling instructors, and extension teachers serving local continuation schools and other organizations, and for duplicating service rendered by the extension division to be used as a revolving appropriation for operation, maintenance and miscellaneous capital, and replacement of laboratory equipment.”

An appropriation covering “operation” is apparently broad enough to justify the expenditure of money for rentals incidental to operation. The courts have generally held compensation for rent is an operating expense. Schmidt v. Louisville, C. & L. Ry. Co., 119 Ky. 287, 84 S. W. 314, 318; Commonwealth v. Phila. & E. R. Co., 164 Pa. 252, 30 A. 145, 146; St. Louis Union Trust Co. v. Texas Southern Ry Co., (Texas) 126 S. W. 296, 300.

You are, therefore, advised that sec. 20.41 (2) (a) and (ab), Wis. Stats., is sufficiently broad to cover the payment of rent for classrooms and offices for the Milwaukee extension division of the university.

Under sec. 36.17 the regents are authorized to carry on university extension class work in communities throughout the state and the usual practice has been to rent the necessary space. The mere fact that the regents own a building in Milwaukee for such purpose would not, in our opinion, preclude them from renting additional space when needed,
Reference is made to XXVI Op. Atty. Gen. 555 for a general discussion of the authority of the regents to enter into leases.

The director of purchases has called our attention to sec. 15.37 (1), which provides:

"The director of purchases shall have power and it shall be his duty:

"(1) To lease all quarters required for the performance of the duties of state offices and officers outside of state-owned buildings, subject to the approval of the governor."

As we understand it the application of this section in practice has been limited pretty largely to the leasing of additional office space by state departments which cannot be fully accommodated by the facilities afforded by the state capitol and state office building. We are not requested to render an opinion as to the applicability of this statute in the present instance and we merely mention it in passing with the thought that you may give it proper consideration.

WHR
Public Health — Tourist Lodgings — Tourist cabins and cottages wherein sleeping accommodations are offered for pay to tourists or transients are tourist rooming houses within the meaning of sec. 160.01 (4) regardless of whether such cabins are rented by the day, week, month or season.

September 7, 1945.

L. J. BRUNNER,
District Attorney,
Shawano, Wisconsin.

You have requested an opinion relative to the application of ch. 35, Laws 1945. This chapter revised and consolidated chapters 131 and 160 of the 1943 statutes and will appear in the 1945 statutes as chapter 160. Your question is whether the term "cottages" as defined in sec. 160.01 (4), 1945 statutes, includes cottages rented by the week, month or season.

Sec. 160.01 (4) provides as follows:

"'Tourist rooming house' means and includes all lodging places and tourist cabins and cottages, other than hotels, wherein sleeping accommodations are offered for pay to tourists or transients. It does not include private boarding or rooming houses, ordinarily conducted as such, not accommodating tourists or transients."

The definition of tourist rooming houses as contained in the 1943 statutes, sec. 160.15, referred only to tourist cabins and did not include cottages. Otherwise the section is essentially the same as sec. 160.01 (4) of the 1945 statutes.

The words "tourists" or "transients" have no special legal signification and we must look to the ordinary definitions of these words to determine the meaning. Webster's Dictionary defines "tourist" as "One who makes a tour; esp., one who travels from place to place for pleasure or culture." The same authority defines "transient" as one "passing over; staying for a short time; not regular or permanent."

Under these definitions a tourist or transient is any person who is traveling away from his home and who does not remain permanently at the cabin or cottage where he stays
during his vacation. A tourist is not necessarily limited to an overnight stay at a cabin. There is nothing in the language of sec. 160.01 (4) to indicate that a cottage rented by the week or month was not to be included within the definition of a tourist rooming house. The legislature expressly excepted private rooming or boarding houses which were not used for tourists or transients. Since anyone who is not permanently located at a place is a transient, we see no reason why the statute should not be applied to the rental of cottages or cabins for periods extending from one day to several weeks or a month.

It might be argued that the legislature did not intend to extend the statute to cover a single cottage privately owned which was rented by the owner to a friend for the entire season. However, there is nothing in the statute to exclude such a situation. If the language of the statute fails to set clear and definite standards, it is up to the legislature to correct the defect and not the function of this department to create such standards by construction and interpretation. The statute clearly covers any tourist cabin or cottage where sleeping accommodations are offered for pay to tourists or transients. If the legislature had intended to exclude summer cottages rented by the month or season, it would have been a simple matter to so provide.

We have been unable to find any very helpful judicial authority in this field. In Cantieny v. Boze, 209 Minn. 407, 296 N. W. 491 (1941) the court discusses tourist camps at page 493 of 296 N. W.

It is our conclusion that anyone who rents a cabin or cottage, whether by the day, week, month or season, to a tourist or transient, is liable to the provisions of ch. 160 and must apply for a license to the state board of health.

ES
Corporations — Credit Unions — Community Currency Exchange — Banking Commission — A credit union has no power to engage in the business included within the term "community currency exchange" as defined by sec. 218.05 (1) (b) and the banking commission has no power to issue a certificate of authority permitting a credit union to engage in such business.

September 7, 1945.

Banking Commission.

Attention A. J. Quinn, Vice Chairman.

You advise us that two credit unions have submitted applications for certificates of authority to engage in business included within the designation "community currency exchange" as defined by sec. 218.05 (1) (b), Stats., as created by ch. 240, Laws 1945, published June 6, 1945. The business so designated is that of engaging in and providing facilities for cashing checks, drafts and money orders for a fee or service charge or that of engaging in selling or issuing money orders, or both. The questions upon which you desire our opinion are:

1. Has a credit union organized under the provisions of ch. 186, Stats., power to engage in such business?

2. What power does the banking commission have with respect to issuing certificates of authority permitting credit unions to engage in such business?

On March 15, 1945 we rendered an opinion (page 79 of this volume) to the banking commission holding that a credit union has no power to issue money orders for a fee or charge. For the reasons therein stated we are of the opinion that a credit union would likewise not have power to engage in that type of business embraced within the term "community currency exchange" unless the legislature has made some change in the law since that time which requires a different conclusion.

Two new acts have been enacted into law since the date of our opinion relating to credit unions. The first is ch. 58, Laws 1945, published April 22, 1945, and the second is ch. 240, Laws 1945, published June 6, 1945. We find nothing in
ch. 58, Laws 1945, which could be said to grant to credit unions power to engage in business covered by the term "community currency exchange" either expressly or by implication. There is, however, certain language contained in sec. 218.05 (1) (b), as created by ch. 240, Laws 1945, which requires further consideration.

Chapter 240, Laws 1945, creates a new section of the statutes known as sec. 218.05. The new section in brief provides that no person, firm, association or corporation shall engage in the business of operating a "community currency exchange" after July 1, 1945 without first securing a license to do so from the banking commission as provided in said section. The term "community currency exchange" is defined by sec. 218.05 (1) (b) as follows:

"'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this state and national banks organized pursuant to the laws of the United States, and any credit union operating under Chapter 186, Wisconsin Statutes, which has or shall obtain a certificate of authority from the Banking Commission of Wisconsin to engage in the business and functions herein set forth, engaged in the business of and providing facilities for cashing checks, drafts, money orders and all other evidences of money acceptable to such community currency exchange for a fee or service charge, or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name or any other money orders (other than United States Post Office money orders, American Express money orders, Postal Telegraph money orders, or Western Union money orders), or engaged in both such businesses.

The portion of the above subsection appearing in italics was inserted by Amendment 1, A to Bill 42, S, which bill became ch. 240, Laws 1945. The amendment was offered April 24, 1945 by the assembly committee on judiciary. The question is whether it can be construed as granting credit unions power to engage in business of the type included in the designation "community currency exchange." We conclude not. We are of the opinion that the italicized portion of said subsection must be regarded simply as a clause ex-
cepting credit unions therein mentioned from the definition of the term "community currency exchange." There is no attempt to create or grant credit unions power to engage in such business. The most that can be said is that by making such exception the legislature thought that credit unions organized under ch. 186 had the power to engage in such business upon obtaining a certificate of authority from the banking commission. See State ex rel. Lamb v. Cunningham, 83 Wis. 90 at 155. This might constitute a legislative construction of the statutes relating to the powers of credit unions but this is decidedly different from legislation which would directly create or give a credit union power to engage in a certain type of business. It cannot, in our opinion, be considered as creating a power which did not previously exist. Durkee v. Batcheller, 39 R. I. 45, 97 A. 378, L. R. A. 1916E 545.

For these reasons we conclude that the legislature has not made any change in the law since the time of our former opinion which would require a conclusion different than reached there. You are therefore advised that a credit union organized under ch. 186 has no power to engage in the business which is embraced within the definition "community currency exchange."

In view of this conclusion we must answer your second question by advising that the banking commission has no power to issue a certificate of authority permitting a credit union to engage in such business.

WET
Salaries and Wages — Banking Commission — Public Officers — Constitutional Law — Member of the banking commission is public officer within the meaning of art. IV, sec. 26, Wisconsin constitution, and is thereby prohibited from receiving increase in salary given by ch. 523, Laws 1945, enacted after said member was appointed and qualified.

September 7, 1945.

JAMES B. MULVA, Chairman,
Banking Commission.

You call our attention to the fact that the salary of the members of the banking commission was raised from $5,000 to $6,000 per annum by reason of an amendment of sec. 20.53 (1) (a), Stats., made by ch. 523, Laws 1945, published August 3, 1945, and ask whether you are now entitled to receive the increased salary.

The records in the office of the secretary of state show that on March 31, 1943 the governor appointed you to be a member of the banking commission for a 6-year term commencing April 1, 1943. The records further show that the appointment was confirmed by the senate on March 31, 1943 and that you took your oath of office on the same day.

The amendment to sec. 20.53 (1) (a), Stats., made by ch. 523, Laws 1945, would by its terms be applicable so as to increase your salary unless such a construction would be in conflict with the last clause of art. IV, sec. 26, Wisconsin constitution, which provides as follows:

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

The question which arises in your case is whether you are a public officer within the meaning of the above provision of our constitution. This department has for many years been of the opinion that one occupying a position such as member of the banking commission is a public officer within
the meaning of that term as used in art. IV, sec. 26. For opinions adopting such view see: Biennial Report and Opinions 1912, p. 882; I Op. Atty. Gen. 433; II Op. Atty. Gen. 672; XIV Op. Atty. Gen. 387. On October 25, 1943 this department in an informal opinion advised a member of the highway commission that he would be considered a public officer within the meaning of this constitutional provision and that he would thereby be prohibited from receiving an increase in salary granted members of that commission by enactment of ch. 551, Laws 1943, which act became effective after said member had been appointed by the governor, confirmed by the senate and had taken his oath of office.

The view taken by this department is, in our opinion, in accord with the decisions of the Wisconsin supreme court and also with the great weight of authority elsewhere. There is one Wisconsin case which contains language which might be taken as authority for the proposition that art. IV, sec. 26, applies only to constitutional officers receiving a salary from the state. If this were true, art. IV, sec. 26, would not be applicable in your case and you would be eligible to receive the increase in salary. However, in Martin v. Smith, (1941) 239 Wis. 314 our supreme court at page 332 quoted with approval certain language from another case indicating that a public office may be created by the constitution or by legislative act. For that reason we believe that our supreme court would at the present time hold that the term "public officer" as used in art. IV, sec. 26, applies not only to constitutional officers receiving a salary from the state, but also to persons occupying a position such as member of the banking commission. We are of the opinion that art. IV, sec. 26, of our constitution applies in your case and operates to prevent you from receiving, during the balance of your present term of office, the increase in salary made by ch. 523, Laws 1945.

In your letter you raise a question as to whether the insurance commissioner and members of the public service commission received the increase in salary from $5,000 to $6,500 per year granted by ch. 551, Laws 1943. We have checked in the office of the secretary of state and find that the insurance commissioner, who on the effective date of ch. 551, Laws 1943, had already been appointed and had quali-
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fied for a term expiring on June 30, 1947, has continued to be compensated at the former rate of $5,000 per annum. Likewise, members of the public service commission who on the effective date of ch. 551, Laws 1943, had already been appointed and had qualified for terms expiring on the first Monday of March in the years 1945, 1947 and 1949 continued to be compensated at the former rate of $5,000 per annum. The present member of the commission who was appointed for a new term to commence at the expiration of the term of office expiring on the first Monday of March, 1945, which, of course, was after the effective date of ch. 551, Laws 1943, is being compensated at the rate of $6,500 per annum. The same act also increased the salary of members of the highway commission from $5,000 to $6,500 per annum. As already indicated members who had been appointed and qualified prior to its effective date continued to be compensated at the rate of $5,000 per annum for the balance of their term, while members appointed and who qualified since that date have received the increased salary.

WET

Counties — Cemeteries — A county operating on an annual budget under sec. 65.90, Stats., may not authorize acceptance of deposits for perpetual care of burial lots under ch. 157 of the statutes, without making provision pursuant to sec. 65.90 for payment of interest.

September 10, 1945.

Earl F. Kileen,
District Attorney,
Wautoma, Wisconsin.

You have asked whether a resolution by a county board, which authorizes the county treasurer to accept deposits for perpetual care of burial lots at 3 per cent interest pursuant to ch. 157 of the statutes, was validly enacted where it was adopted by less than two-thirds of the members of the
board and where such board was operating on an annual budget pursuant to sec. 65.90, Stats.

We assume from your question that the budget did not make provision either by way of a contingent fund or otherwise for the payment of interest by the county. Sec. 65.90 of the statutes provides that after the budget has been adopted no changes may be made in the amount of tax to be levied, or in the amounts or purposes of appropriations therein provided, except by a two-thirds vote of the entire membership of the board. While the mere acceptance of deposits pursuant to ch. 157 would not constitute an alteration of the budget, any appropriation for payment of interest in 1945 which was not previously covered by the budget would constitute an alteration.

While sec. 157.11 of the statutes in terms authorizes the action here taken by the county board without restriction as to the vote required, that section must be read with other provisions of the law regulating action by the county board, and all such provisions given effect unless their terms are so inconsistent that they cannot exist together. Sec. 157.11 can be read, without doing violence to its terms, so as to empower the county board to authorize the acceptance of deposits and payment of interest thereon only by such procedure as is required in order to make a valid appropriation; that is, payment of interest on deposits as prescribed in sec. 157.11 could be authorized either by making provision therefor in the annual budget or by changing the annual budget pursuant to a two-thirds vote.

The situation is the same as that involved in Indiana Road Machine Co. v. Lake, 149 Wis. 541, in which it was held that authority given by one section of the statutes to a town board to purchase machinery “must be read in connection with other statutory provisions, and when so read it means that such power may be exercised when the electors have made provision to meet the expenditure and have in fact or in effect authorized it.” Paraphrasing the above case, the authority given by sec. 157.11 to accept deposits and pay interest must be read in connection with sec. 65.90, and when so read means that such power may be exercised when provision has been made pursuant to the latter section for payment of interest.
You have also asked "whether part of this resolution has been passed and part not; that is, the amount that would have to be raised by taxation for the purpose of paying the interest on these notes."

It is well settled that county boards have no authority except such as emanates from an authorizing statute. See Dodge County v. Kaiser, 243 Wis. 551, Spaulding v. Wood County, 218 Wis. 224 and Frederick v. Douglas County, 96 Wis. 411. The wording of sec. 157.11 indicates that a determination whether deposits shall be accepted is left to the discretion of the county board, but, if the discretion is so exercised, the language of the statute respecting the payment of interest is mandatory. The county board must operate in strict accordance with the authorizing statute and if the deposits are to be accepted it must make due and legal provision for the payment of the interest therein required.

It is our opinion that the resolution which you have described is ineffective.

BL

Soldiers, Sailors and Marines — Veterans Recognition Board — Ch. 443, Laws 1943, does not authorize the veterans recognition board to pay for treatment given prior to the effective date of the law.

September 10, 1945.

Veterans Recognition Board.

You have asked:

"May the Veterans Recognition Board pay for the hospitalization and care of honorably discharged World War II veterans in county or state institutions prior to enactment of Chapter 443, Laws of 1943?"

The provisions of ch. 443, Laws 1943, under which the veterans recognition board is authorized to provide hospitalization and care read:
"The board may provide treatment for any physical or mental disease or injury or the consequent result of such disease or injury, which is directly or indirectly traceable to the military or naval service, for any men or women who performed active duty in the military or naval forces of the United States at any time since August 27, 1940, and who received an honorable discharge therefrom or who served under honorable conditions. Such person must have been a resident of this state for not less than 5 years next immediately preceding his application for treatment or must have been a resident of this state at the time of enlistment or induction into service."

The above-quoted law does not expressly authorize the board to pay for treatment previously given, but uses the prospective wording that the board "may provide treatment." It also contemplates that "application for treatment" is to be made to the board which, inferentially at least, means that the treatment is not to be given until after the application has been approved by the board upon the finding that it fulfills the conditions set out in the law relating to the residence of the applicant and the source of the disease or injury.

It is the general rule of construction that legislation is addressed to the future and not to the past, particularly when new rights are created. It was held in Chicago, M. & St. P. R. Co. v. Railroad Commission, 187 Wis. 380, that a law authorizing the railroad commission to require railway companies to contribute to the cost of highway crossings was not applicable to crossings the construction of which was commenced prior to the enactment of the law. In Estate of Pelishek, 216 Wis. 176, it was held that a law authorizing the state to recover the cost of maintenance of an indigent in a public institution from property coming into the possession of the indigent at any time after receipt of the maintenance, did not apply to maintenance furnished before the effective date of the law. While the right created in the latter case was in favor of the state, the principle that a law creating a new right is not to be construed as retrospective would be no less applicable where the law creates a private right.

We do not believe, therefore, that ch. 443, Laws 1943, authorizes the veterans recognition board to pay for treatment given prior to the effective date of the law.
Poor Relief — Tuberculosis Sanatoriums — Counties —
The county has no claim against the estate of a deceased husband for maintenance of his wife in a county tuberculosis sanatorium where the wife was committed at public charge and no proceedings have been taken to charge the husband pursuant to secs. 50.10 and 49.11 of the statutes.

September 10, 1945.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

You have asked whether the cost of maintenance of a woman committed to a county tuberculosis hospital by a county court, at public charge, pursuant to secs. 50.03 (2), 50.07 (2) and 50.11 (1), Stats., may later be collected from her husband's estate without any proceedings having been had during the husband's lifetime as prescribed in secs. 50.10 and 49.11 of the statutes.

You have called our attention to State Department of Public Welfare v. Shirley, (1943) 243 Wis. 276, which appears to hold categorically that where there is a complete statutory scheme for recovery of claims for various forms of public assistance granted, as there is in chs. 46-52 of the statutes, a relative of the person assisted cannot be held liable unless expressly made so by some provision of the statutes. The court there negated the existence of a common law liability, saying:

"* * * It is considered therefore that the liability of relatives for maintenance must be rested upon the statutes and not upon the common law." (page 289)

Secs. 50.10 and 49.11 of the statutes, together with those above referred to, are the only provisions we find under which liability could be imposed upon a relative of a person receiving care in a public tuberculosis hospital.

Sec. 46.10 makes provision for recovery from relatives for maintenance in other types of public institutions but excepts tuberculosis hospitals. In making a commitment to a tuberculosis sanatorium the court is required by secs. 50.03 (2),
50.07 (2) and 50.11 (1), to consider the financial ability of the patient and of any person liable for his support and to determine the chargeability of any such person. If the court finds any relatives chargeable, sec. 50.11 (1) directs that it order proper proceedings to be brought for the enforcement of such liability. As we understand the facts you have reported, the committing court considered such question but made no provision for charging the husband of the patient; on the contrary the court affirmatively provided that the maintenance should be wholly at public charge. It might be argued that such action by the committing court was *res adjudicata* on the question of liability so as to preclude a later proceeding to charge a relative of the patient. That question, however, is immaterial in this case since no proceedings to charge the husband have been attempted under secs. 50.10 and 49.11.

The procedure under sec. 49.11 has been prescribed in our statutes for many years. It was held in *Saxville v. Bartlett*, 126 Wis. 655, that the statutory procedure there prescribed [at that time contained in secs. 1502 to 1505, inclusive, R. S. 1898] was prospective in character, contemplating only the issuance of an order holding the relatives liable for future support and not authorizing recovery for aid after it has been given. While the statutory provisions have been amended from time to time since that decision, the amendments would seem to strengthen rather than to alter the rule of the above case. Sec. 49.11 (4) now provides that the court may order relief and maintenance by relatives only "if living and of sufficient ability." That phrase would, of itself, preclude the application of sec. 49.11 to proceedings first brought against the estate of a deceased relative. Furthermore, the fact that the order issued under sec. 49.11 is enforceable in "proceedings as for a contempt" shows that the proceedings must be brought personally against the individual sought to be charged.

The supreme court commented in *State Department of Public Welfare v. Shirley*, supra, that

“There are many persuasive reasons why the right of a state or municipality to recover for care furnished to the insane and incompetent should be limited. * * *” (page 291)
The legislature has apparently recognized in the statutes that there are reasons for a similar policy in the case of patients suffering from tuberculosis. In ch. 104, Laws 1945, it is provided that persons having a legal settlement in this state shall be entitled to care in a tuberculosis sanatorium at public charge without liability either to himself or his relatives regardless of the question of financial ability. This law, of course, did not become effective until after the maintenance you have described was given, and so would not be applicable to this case. It is cited, however, because it may throw some light on the trend of legislative policy with respect to chargeability for the type of maintenance here involved. Even before this amendment was adopted, sec. 50.03 (2) provided that in determining chargeability for maintenance in a tuberculosis hospital either as against the patient or as against his relatives, the court should "give due consideration to the desirability of isolating the patient because of the contagious character of the disease."

We believe you are correct in your opinion that the county has no claim against the estate of the deceased husband for the care of his wife in the county's tuberculosis sanatorium.

In view of the above answer it would probably not be necessary to discuss your questions with respect to authority to compromise the claim. In view of the fact, however, that the county might have a claim under sec. 49.10 of the statutes against any property which the wife realizes from her husband's estate, we shall merely call your attention to sections of the statutes which have some bearing on how such a claim could be compromised. The state department of public welfare has no function with respect to the collection of such claim. Sec. 46.10 expressly excepts from its scope matters relating to tuberculosis sanatoriums. Whatever administrative functions rest in any state department with respect to a county tuberculosis hospital appear by sec. 50.09 to reside in the state board of health. These functions, however, do not include collections of county claims under sec. 49.10. The board in charge of the institution may sue for and collect such claims and would presumably have such incidental powers as the public officials charged with public collections usually have unless the county board has taken specific action under the last three
sentences of sec. 49.26 (4). The grounds upon which a public officer is justified in compromising a claim of the government are discussed in XXX Op. Atty. Gen. 480.

BL

Conservation Warden — Pensions — Ch. 551, Laws 1945, creating sec. 23.14 (7a), Stats., relating to return of contributions from state conservation warden pension fund in the case of wardens leaving the service is prospective in application and does not apply to wardens who have left the service prior to the effective date of said act.

September 10, 1945.

E. J. Vanderwall, Director,
State Conservation Commission.

You have called our attention to ch. 551, Laws 1945, which created sec. 23.14 (7a) of the statutes to read as follows:

"Any conservation warden leaving the state conservation warden service for any cause whatsoever prior to his eligibility for retirement under the provisions of section 23.14 shall receive from the conservation warden pension fund all amounts he has paid into the same. In the event any conservation warden becomes deceased prior to his eligibility for retirement under the provisions of section 23.14, all amounts he has paid into the conservation warden pension fund shall be paid to his heirs."

We are asked whether this applies to wardens who have left the service prior to the effective date of ch. 551, Laws 1945, or whether it is applicable only to wardens leaving the service subsequent thereto. In other words the question is whether the law is to be given a retroactive or retrospective effect or whether it is prospective only in its operation. A retrospective statute is one which gives a right where none before existed. 59 C. J. 1159. Such legislation is not favored.
"* * * Hence, it is a well-settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. * * * *" 59 C. J. 1159-1161. (Citing State v. Cary, 186 Wis. 613; Vanderpool v. La Crosse, etc., R. Co., 44 Wis. 652; Austin v. Burgess, 36 Wis. 186; Finney v. Ackerman, 21 Wis. 268; Seamans v. Carter, 15 Wis. 548, 82 Am. D. 696; State v. Atwood, 11 Wis. 422.)

See also Read v. City of Madison, 162 Wis. 94.

The statement above quoted is contingent upon the absence of any words expressing a contrary intention, or, more specifically, unless the purpose and intention of the legislature to give them a retrospective effect is clearly and unmistakably expressed. 59 C. J. 1162-1164. Chicago, M. & St. P. R. Co. v. Railroad Comm., 187 Wis. 380; Filipkowski v. Springfield Fire & Marine Ins. Co., 206 Wis. 39; Town of Bell v. Bayfield Co., 206 Wis. 297; State ex rel. Teweles v. Public School Teachers' Annuity & Retirement Fund Trustees of City of Milwaukee, 235 Wis. 385.

It is true that the language here used "leaving the state conservation warden service" is general enough to include past transactions as well as future ones, but the intention that a statute should act retrospectively is not to be assumed from the mere fact that general language is used which might include both past and future transactions. Such general language is to be deemed as used in view of the established rule that statutes are to be construed as relating to future and not to past transactions. Seamans v. Carter, 15 Wis. 548; Finney v. Ackerman, 21 Wis. 268; Vanderpool v. La Crosse & Milw. R. R. Co., 44 Wis. 652.

But regardless of the foregoing the ambiguity which may exist by the use of the words "leaving the state conservation warden service," so far as applicability to past transactions is concerned, is clarified when read in connection with the other provision of the act relating to return of contributions "in the event any conservation warden becomes deceased prior to his eligibility for retirement * * * *." Obviously this could be prospective in operation only, and it is not to be presumed that the legislature intended the act to be prospective in one part and retrospective in another in the absence of a very clear mandate to that effect. When
read in its entirety the enactment cannot be said to contain
the language necessary to take it out of the scope of the
general rule of statutory construction above set forth.

Moreover, a much stronger presumption against retro-
spective effect of a statute exists when it deals with rights
of property than when it deals merely with remedies. *In re
Estate of Pelishek*, 216 Wis. 176.

Another point which might be mentioned in support of
the position taken here is that if the statute were intended
to be retrospective it would give rise to a constitutional
question in that under art. IV, sec. 26, Wisconsin constitu-
tion, the legislature is prohibited from granting any extra
compensation to any public officer, agent, servant or con-
tractor after the services shall have been rendered or the
contract entered into. Generally speaking, pension funds to
which public employes have contributed are considered to
be public moneys to which said employes have no vested
rights even as to their contributions in the absence of ex-
press statutory provision to the contrary. See *State ex rel.
Risch v. Trustees*, 121 Wis. 44, and *In re Goodwin*, 57 F. (2)
31. In the *Risch* case, *supra*, the court, at page 49, in com-
menting on contributions by the Milwaukee policemen to
their pension fund, said that the effect thereof was to scale
down the salaries of the officers in form by so much as
measured the contribution by each to the pension fund and
to really fix such salaries at the amount actually paid. If
this is true it gives rise to the argument that any return of
such contributions other than in the form of pensions as
provided in the pension law in effect at the time the service
was rendered would constitute the granting of extra com-
ensation to public officers after the services had been ren-
dered in contravention of the constitutional provision above
cited.

However, in view of the fact that our conclusion as to the
interpretation of ch. 551 is amply supported by the general
rules of statutory construction above mentioned we do not
deem it necessary to dispose of your question on constitu-
tional grounds or to explore that point any further at this
time but reserve it for more detailed consideration at such
time as it may be squarely presented.

WHR
Industrial Commission — Apprentices — The industrial commission may not issue a special order requiring that all apprentices in a given trade be indentured exclusively to a joint committee organized in that trade and by such order exclude indentures between apprentices and individual employers.

The industrial commission may not delegate authority to approve or disapprove an indenture or to suspend or cancel an indenture to a joint committee organized in the trade.

September 10, 1945.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, Chairman.

In your letter of July 27, 1945 you enclose certain material dealing with the administration of the apprenticeship law which is contained in ch. 106 of the statutes and ask us to answer two specific questions relating thereto. Before stating the questions submitted we will as briefly as possible refer to some of the material which you have supplied to us. It is to the effect that under the apprenticeship law the practice for many years has been to indenture the apprentice to an individual employer and that fully 95 per cent of the indenture agreements so provide; that in many instances, due to various reasons, individual employers were or are unable to offer reasonably continuous employment to the apprentice; that to remedy such situation the law was amended by enactment of ch. 274, Laws 1937, so as to permit apprentices to be indentured to “any organization of employes, association of employers or other similar responsible agency in this state.” Sec. 106.01 (5i), Stats. By way of illustrating the manner in which the new law operates you state that all carpentry apprentices in one city in the state were indentured to the Master Carpentry Association of that city. The contractor who had an apprentice assigned to him would keep the boy as long as he had work for him. When he ran out of work the secretary of the association would be notified and the boy assigned to another contractor who had work. Thus the apprentice not only was kept employed, but in addition received a more diversified type of
training than would have been possible under a single contractor.

You further advise that in the construction trade and service occupations, you have designated for the various trades joint apprenticeship committees composed of equal representatives of employers and employees which act in an advisory capacity to the industrial commission with respect to matters relating to apprenticeship, which committees function on a state-wide level and whose functions in part at least are to set up state-wide standards for training of apprentices in the particular trade they represent; that there are also local area or district committees for each trade made up of an equal number of representatives from employers and employees which follow standards set up by the state committee; that after amendment of the law in 1937 you have approved some indentures whereby the apprentice is indentured to such a committee of employers and employees on the theory they fall within the designation "other similar responsible agency in this state" as used in sec. 106.01 (5i), Stats.; that the plan has received popular acceptance especially in the building trades, but that in your opinion the original plan of indenturing apprentices directly to individual employers will still remain the most common method; that fully 95 per cent of all apprentices are now and in the future probably will continue to be indentured to individual employers.

You further inform us that recently some employer and employe groups have asked that all apprentices be indentured to the local apprenticeship committees and that the industrial commission refrain from approving indentures which would indenture the apprentice to an individual employer, the purpose of such suggestion, according to the information you have given us, being to exclude every other indenture agreement now permissible under the law. You further state that some of the trade groups in the construction industry have proposed that the commission issue a special order requiring that all apprentices in such trades be indentured exclusively to such joint committees.

The questions you submit to us are as follows:

1. Under the present law may the commission issue a special order requiring that all apprentices in a given trade be
indentured exclusively to a joint committee organized in that trade and by such order deny to an individual employer the right to enter into an apprenticeship indenture?

2. May the commission delegate complete authority to such joint committee to approve or disapprove an indenture or to suspend or cancel an indenture?

The first question must, in our opinion, be answered in the negative. Under the present statute it is specifically recognized that an apprentice may be indentured to an individual employer. Sec. 106.01, Stats. This being true, it is plain the industrial commission could not issue an order, special or otherwise, which would require that all apprentices in a given trade be indentured exclusively to a joint committee organized in the trade and which would deny an individual employer the right to enter into an apprenticeship indenture. The power of the commission to issue orders relating to the apprenticeship law is limited to those necessary to carry out the intent and purposes of sec. 106.01. Sec. 106.01 (9), Stats., provides in part as follows:

“(9) It shall be the duty of the industrial commission, and it shall have power, jurisdiction and authority, to investigate, ascertain, determine and fix such reasonable classifications and to issue rules and regulations, and general or special orders and to hold hearings and make findings and render orders thereon as shall be necessary to carry out the intent and purposes of section 106.01. * * *

An order which would deny an apprentice the right given by statute to be indentured to an individual employer must be held contrary to the intent and purposes of sec. 106.01, since it is contrary to the plain provisions of the statute. This is particularly emphasized by the fact that at the present time fully 95 per cent of all indentures in this state are entered into between apprentices and individual employers. If it were held that the industrial commission could by order require that all apprentices be indentured to such a joint committee, it would in effect result in a modification or change in the present statute by order of the commission, which obviously cannot be done.
The second question must also be answered in the negative. The power to approve or disapprove an indenture or to suspend the indenture is specifically given by statute to the industrial commission. Sec. 106.01 (5i) (a), (5j). Exercise of such power would necessarily involve the exercise of judgment or discretion by the commission. Such power cannot be delegated by the commission to a joint committee such as mentioned in your inquiry or to anyone else. *Lord v. City of Oconto*, (1879) 47 Wis. 386; *School Dist. v. Callahan*, (1941) 237 Wis. 560; XX Op. Atty. Gen. 1080.

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*Normal School Regents* — Board of regents of normal schools has power to acquire title to real estate suitable for dormitory purposes under plan whereby non-stock, non-profit corporation having title thereto would convey the title to said board subject to its retaining possession and use for such a period as would enable the corporation by operating the property as a dormitory for state teachers college students to amortize a real estate mortgage thereon, after which event said board of regents of normal schools would directly manage said property. Such transaction examined and held to be legal.

September 10, 1945.

**BOARD OF REGENTS OF NORMAL SCHOOLS.**

Attention Edgar G. Doudna, *Secretary.*

In your communication of August 4, 1945 you refer to our opinion dated July 16, 1945*, holding illegal a proposed plan whereby the La Crosse State Teachers College Housing Association, a domestic non-stock, non-profit corporation, proposed to acquire title to real estate on which there was located a house which was suitable for dormitory purposes for students attending said college and would then immedi-

*Page 178 of this volume.
ately convey the title to the board of regents of normal schools who would in turn lease the property to the corporation for a nominal sum for such a period as would enable the corporation, by operating the property for dormitory purposes, to amortize a real estate mortgage on the property, after which event the board of regents would directly manage the property for dormitory purposes. The basis for our opinion that such scheme was illegal was that the board of regents of normal schools would have no power to lease said property to the housing corporation after acquiring title to it, and this being an essential part of the transaction, the entire plan must fall.

You now ask whether the board of regents of normal schools may acquire title to said real estate under an arrangement whereby the housing association would retain the possession and use until the mortgage thereon has been paid.

We will assume by this question that you intend to inquire into the legality of a plan which would be the same as that originally submitted with the exception that instead of having the board of regents lease the real estate to the housing corporation as originally contemplated, the housing corporation would convey the title to said real estate to the board of regents subject to the right of the housing corporation to retain the possession and use thereof for such a period as might be necessary to amortize said mortgage.

We are of the opinion the plan as modified would be legal. Subsec. (1) of sec. 37.02 provides in part that the board of regents of normal schools:

"* * * may purchase, in the manner provided by law, have, hold, control, possess and enjoy, in trust for the state, for educational purposes solely, any lands, tenements, hereditaments, goods and chattels of any nature which may be necessary and required for the purposes, objects and uses of the state normal schools authorized by law and none other, with full power to sell or dispose of such personal property in the manner provided by law, or any part thereof when in their judgment it shall be for the interest of the state; and shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. * * *"
The power to "purchase, in the manner provided by law, have, hold, control, possess and enjoy" would authorize the board of regents of normal schools to acquire said real estate by gift. The word "purchase" as used with respect to acquiring title to land is defined in Zartner v. Holzhauer, (1931) 204 Wis. 18 at 22:

"* * * 'In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law.' 3 Washburn, Real Property (6th ed.) p. 3, § 1824. * * *"

The board would under the facts submitted acquire a fee simple with a postponement of the right to possession and use for a period necessary to amortize the mortgage thereon. See Restatement of the Law of Property, Vol. 1, Sec. 26. It would, under our statutes, be considered an estate in expectancy (secs. 230.07, 230.08, Stats.) and would fall within the designation "lands, tenements, hereditaments" as used in sec. 37.02 (1), Stats. Secs. 230.35, 230.05, 230.02, 230.01, Stats. See also Hester v. Sawyers, 41 N. Mex. 497, 71 P. (2) 646, 112 A. L. R. 536 at 539. The real estate involved would be adapted for use as a dormitory for students at the La Crosse state teachers college and hence would be used for educational purposes. From oral information supplied us we feel justified in stating that the necessity of acquiring such real estate for such purpose could be established and that it is required for that purpose.

We therefore are of the opinion that the board of regents of normal schools would have power to acquire title to said real estate as provided in said modified plan and that said transaction would be legal. The latter conclusion follows, we believe, not only from what we have already stated, but also finds support from the decision of our court in Aberg v. Moe, (1929) 198 Wis. 349. In that case the owners of certain real estate located in the city of Madison conveyed title to the board of regents of the university of Wisconsin subject to a mortgage thereon. The regents in turn leased
the property back to the former owners for a 30-year term, one condition of the lease providing that the lessee pay as rent the existing mortgage on the premises. The purpose of the transaction was to exempt the property from real estate taxes during the 30-year period. The court said, page 356:

"* * * Whatever may be said of the transaction in question it is clearly not so void as to be a nudum pactum. The plaintiffs certainly had the power and authority to convey the land and the Board of Regents had power and authority to accept the conveyance. It cannot be denied that in a proper case the Board of Regents has power to make a valid and binding lease; nor can it be denied that the plaintiffs have the power and authority to enter into a lease. Therefore, until some one who has an interest in the property in question attacks the validity of the transaction it must stand as an accomplished fact.

"What challenges one’s attention here is not so much the strictly legal aspects of the situation as the fact that the Board of Regents has exercised a power vested in it in an unexpected and unusual way. Whether it should, in exchange for the tax-exemption privilege, seek to acquire property as it has done in this case, is a matter of conscience for the Board of Regents. We are charged with no duty to scrutinize its conclusions, and certainly we cannot substitute our judgment for that of the board charged by the law with the duty and responsibility of making a decision. If the board acts within its powers and thereby accomplishes a purpose which should not be accomplished in that manner, it is responsible to its creator, the legislature, and not to the courts."

There would seem to be no question as to the power of the La Crosse State Teachers College Housing Association to convey title to the real estate owned by it subject to its retaining possession and use until the existing mortgage is paid off. The articles of incorporation of this corporation provide, among other things, that its business and purpose is:

"* * * to forthwith convey title to any property acquired to said Board of Regents of Normal Schools of the State of Wisconsin; to enter into contracts and perform all acts and deeds necessary or appropriate to accomplish such purpose."
Likewise here, as we have previously indicated, the board of normal school regents would have power to accept the conveyance. While, as in the above case, we may have here a case where the regents would exercise their powers in an unexpected or unusual way, it is clear this they can do since the statute (sec. 37.02 (1) ) provides, among other things, that the board of regents of normal schools shall, in addition to enumerated powers, "possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."

In the above case the court also recognizes that a person interested in the property might attack the transaction. In the present case we assume the housing association has title to the real estate involved, free and clear from any claim of anyone else. This being true, we cannot see how anyone could possibly attack the transaction. Neither the board of regents nor the housing association could attack a transaction into which they have voluntarily entered. Likewise, a member of the housing association, which is a corporation, could not complain of said transaction since the transfer of said real estate is specifically authorized by the articles of incorporation of the corporation. However, before making such transaction it would be best that sec. 180.11 be complied with, or better yet, that all members join in the deed or otherwise assent to the transfer in writing, to preclude any possible objection by a member.
Soldiers, Sailors and Marines — Counties — County Board — Veterans' Service Officer — Member of county board which elects county veterans' service officer is ineligible to be elected to or hold such position for the balance of his term as member of the county board. Such disability extends for the entire term for which the member of the county board is elected and it cannot be evaded by resigning. In event of resignation the disability continues until the expiration of the time when his term of office as member of the county board would have expired had there been no resignation.

September 11, 1945.

THE ADJUTANT GENERAL.

You ask our opinion on the following questions:

1. Can a member of a county board be appointed to the office of county service officer while still a member of the board?

2. If he cannot, how long a time before the board meets must he resign as member of the board?

Your request was submitted to us shortly prior to the publication of ch. 550, Laws 1945, on August 21, 1945. Ch. 550 repeals and recreates sec. 59.08 (23), Stats., which subsection formerly provided for the creation of the position known as the county service officer. It also, among other things, amends sec. 45.12 to provide for a county veterans' service commission and creates sec. 45.40* to provide for the election of a county veterans' service officer by the county board.

In view of the changes in the statutes we will answer your questions so far as necessary insofar as they would be applicable to the position of county veterans' service officer. As noted in the previous paragraph the statute provides the county board shall elect a county veterans' service officer. Sec. 45.40* (1), Stats. A member of the county board which elects such an officer would be ineligible either to be elected

*Said section was renumbered 45.43 by ch. 587, Laws 1945, approved September 26, 1945.
to or to hold such position for the balance of his term as member of the county board. This is clear from the provisions of sec. 66.11 (2), Stats. which reads:

“(2) Eligibility of other officers. Except as expressly authorized by statute, no member of a town, village or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, provided that the governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives.”

We find no statute which would expressly authorize a member of the county board which elects a county veterans' service officer to be elected to or hold the latter position.

In previous opinions this department has ruled that the disability imposed by sec. 66.11 (2), Stats., extends for the entire term for which a member of the county board is elected. A member of the county board cannot evade the disability by resigning. Even when he does so the disability continues until the expiration of the time when his term of office would have expired had there been no resignation. XXX Op. Atty. Gen. 433; XXVI Op. Atty. Gen. 52 and 349.

In view of the foregoing it is not necessary that we answer your second question.

WET
Criminal Law — Lotteries — "Foto-Pay-Day" — "Foto-Pay-Day" is a lottery under sec. 348.01, Stats.

September 14, 1945.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

You have submitted the following statement to us:

"The sponsors of 'Foto-Pay-Day, Inc.' have presented to this office their plan which they claim is different in some respects to the plan which was the subject of an opinion in 31 OAG 121. They indicate that they desire to sponsor such a plan in a local theatre and I have advised them that in my opinion the plan is unlawful and contrary to the provisions of Section 348.01 of the Statutes for substantially the same reasons as set forth in your opinion in 31 OAG 121 and the bank night case therein cited.

"The proposed plan works as follows: The theatre patron purchases his admission ticket and is entitled to select an envelope from a certain tray in the theatre lobby. Each envelope contains at least one penny and some of the envelopes contain vouchers of which the following is a copy:

"'FOTO-PAY-DAY

"'The undersigned hereby authorizes the ___________ Theatre of ___________ to use my photograph for advertising purposes in the lobby, front and canopy of the Theatre. In consideration thereof the said Theatre will upon acceptance of this offer pay said party the sum or $10.00 for said photograph and said advertising rights.

"'This offer, signed by the offeror, must be presented to the above Theatre for acceptance within 72 hours after receipt thereof.

Signed at ___________________ By ___________________
Dated ___________________
ACCEPTED: ___________ BY ___________________
Theatre
Manager'
Some coupons provide for the payment of $1.00, $5.00, $10.00 and an unspecified amount, the patron agreeing to a use of his photograph varying in extent of use depending upon the consideration set forth upon the face of his coupon. For example, the $1.00 coupon allows the use of the photograph in "the lobby" of the theatre, the $5.00 coupon allows the use of the photograph in "the lobby and front" of the theatre, the $10.00 coupon allows the use of the photograph in "the lobby, front and canopy" of the theatre and the coupon with the unspecified amount allows the use of the picture "for any and all advertising purposes it may choose."

It will be seen that the form of the coupon contained in some of the envelopes differs from that set forth in the opinion referred to in that the signature of the patron is first required and then the acceptance by the theatre of the offer signed by the patron is required before the deal or contract is completed. In the coupons used in the set-up referred to in the opinion, the coupon was merely signed by the manager and in addition contained a form of receipt to be signed by the patron upon receipt of the money.

We understand that the sponsors of the plan concede that the elements of chance and consideration are present, but they deny that the element of prize is involved apparently for the reason that one who selects an envelope containing a voucher is entitled only to offer his photograph for sale and the theater may reject the offer. Thus, they would argue that anyone can make such an offer which may be accepted or rejected and that one who selects a voucher is in no better position than one who does not.

If such an argument were to be accepted, then indeed would justice be blind. The bare outlines of the plan cannot be considered apart from its actual operation, and any controversy presented to the courts involving the plan should supplement its outline by its actual operation. It is evident from a casual examination that its value to the theater lies in the fact that it induces patrons to attend by reason of the chance that those selecting vouchers may thereby be entitled to sell their photographs. Obviously if anyone, whether he attended the theater or not, or whether he obtained a voucher or not, were entitled to the same opportunity, the
plan would have no value, and as a matter of fact would bankrupt any theater owner engaging in it, since he certainly could not afford to buy all pictures offered him by patrons at the rates specified.

An examination into the facts will undoubtedly disclose that in all cases where vouchers are selected and where those who select them desire to exercise the privilege of offering their photographs for sale, the offers are accepted. Even if there might be a few instances where offers were rejected for purposes of the record, the facts would certainly disclose that the overwhelming majority of such offers were accepted. On the other hand, there undoubtedly are few if any instances in which such vouchers are not selected where people offer their photographs for sale and are accepted. Here again there may be one or two instances where such offers and acceptance may be shown for purposes of the record, but the facts will undoubtedly show that there are few such instances.

The element of prize can be shown by showing that in practice those who select vouchers receive a prize consisting of the acceptance of an offer which they are entitled to make and which is for practical purposes denied to others. We do not believe that the scheme could be properly presented to a court without an inquiry into the actual operation, and we do not believe there is any question as to what must be the result if its actual operation is shown. We believe the scheme would clearly constitute a lottery within the meaning of sec. 348.01, Stats.

JWR
Register of Deeds — Fees — Where an instrument is offered for recording which differs from the standard instruments described in sec. 59.57 (1) (a) of the statutes only by reason of additional acknowledgments, the recording fee for the entire instrument should be computed at 10 cents per folio pursuant to sec. 59.57 (1) (b).

September 14, 1945.

LESTER R. JOHNSON,
District Attorney,
Black River Falls, Wisconsin.

You have asked whether a register of deeds may charge an additional recording fee of 25 cents for each extra acknowledgment on such documents as deeds and mortgages. We are assuming that you refer to additional acknowledgments on forms which are in all other respects standard instruments for which the fees are fixed in sec. 59.57 (1) (a) of the statutes.

There is, so far as we can discover, no statutory authority for a charge of 25 cents for each additional acknowledgment. The absence of statutory authority precludes such a charge. It has often been held by the supreme court of this state that a public officer takes his office cum onere and is entitled to no compensation either in the way of salary or fees except such as is provided by law. Henry v. Dolen, 186 Wis. 622; Outagamie County v. Zuehlke, 165 Wis. 32; State v. Cleveland, 161 Wis. 457; Quaw v. Paff, 98 Wis. 586; Parsons v. Waukesha County, 83 Wis. 288; Crocker v. Supervisors of Brown County, 35 Wis. 284.

You then ask, if such a charge is not proper, what should be the basis of the recording fee for an instrument which is standard except for acknowledgments additional to those provided on the form. The statutes provide three alternative bases for the computation of fees for recording such instruments as deeds and mortgages.

(1) For standard forms the fees are fixed in sec. 59.57 (1) (a).

(2) For "other instruments" a charge of 10 cents a folio is fixed by sec. 59.57 (1) (b). The term "other instruments"
appears to include deeds and mortgages which are not standard, inasmuch as subsec. (1) (b) specifically fixes minimum fees for such documents.

(3) Sec. 235.16 (3) provides that where there is offered for record any instrument for which a form is approved which instrument varies from the approved form, there shall be a charge of one and one-half times that specified for the standard form.

All of the standard forms for which fees are provided in sec. 59.57 (1) (a) contain a single acknowledgment except Forms 34 and 36 which have two each.

The fees fixed for standard forms in sec. 59.57 (1) (a) were reached on the basis of a folio count and a computation at 10 cents per folio, allowing two folios for description. Prior to the enactment of ch. 467, Laws 1939, the statutes contained no fixed total charge, but provided that it should be arrived at by a computation at 10 cents per folio, subject to specified minimums. The 1939 amendment was, in effect, a general statutory computation on the same basis as had been previously required in each specific case. It was apparently intended not as an alteration of the compensatory scheme but rather to avoid the possibility of error and consumption of time involved in separate computations for each recording. The specified fees provided in sec. 59.57 (1) (a), together with the provision for a folio charge at the same rate for other instruments in sec. 59.57 (1) (b), would seem to indicate a legislative intent that registers should be compensated for all recording services performed in proportion to the length of the instrument recorded.

Sec. 59.57 is concerned solely with the provision of a just and adequate scheme of compensation for service rendered. Sec. 235.16 (3), on the other hand, provides a different type of recording fee for instruments which vary from the standard form. At the time sec. 235.16 was adopted, the recording fee for standard forms was computed under sec. 59.57 only on a per folio basis. The 50 per cent additional fee provided by sec. 235.16 in effect amounted to a 15 cent per folio charge. It did not necessarily have any direct relation to the additional amount of recording service required since the section might be invoked by reason of the variance of only a few words in one case and of several paragraphs in another.
If sec. 59.57 (1) (b) and sec. 235.16 (3) are to be regarded as applicable to the same instruments, there would be a conflict between the two sections. If the conflict could not be reconciled, we believe sec. 59.57 (1) (b) would supersede sec. 235.16 (3) for several reasons. Sec. 59.57 (1) as it now exists was a later enactment, having been adopted by ch. 467, Laws 1939, whereas sec. 235.16 has existed in the same form since 1919. Under sec. 370.02 (2) of the statutes sec. 59.57 (1) would also prevail with respect to fees, since it is contained in the chapter in which fees are fixed and sec. 235.16 is a part of the chapter relating to the alienation of property.

It is, however, a general rule that inconsistent statutory provisions should be reconciled if possible so that they can both exist together. The fact that sec. 235.16 provides a fee which is not necessarily related directly to the service to be rendered may indicate that the legislature intended it as a sort of penalty to act as a deterrent to variances in the substance of instruments which would create ambiguities and legal problems in the interpretation of such instruments. Where the variance is not one of substance but one of practical necessity, to provide for cases where there are additional parties to a conveyance whose acknowledgments cannot be taken at one time, no reason appears for the imposition of a penalty or for the imposition of any fee which is not strictly compensatory. We believe, therefore, that additional acknowledgments on standard forms should result in the application of sec. 59.57 (1) (b) by which the recording fee for the entire instrument would be determined at the rate of 10 cents per folio.

It is not necessary to decide whether sec. 235.16 might be applicable in cases where the variance from the standard instrument is of a different nature.
Insane — Retrial — Residence — The word "reside" as used in sec. 51.11 (1), Stats., means the established dwelling place or abode of the person adjudged insane at the time of filing the petition for retrial or re-examination of the question of sanity. A person confined in an insane asylum does not by his presence in such institution acquire a residence therein.

September 14, 1945.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

In your letter of August 21, 1945 you refer us to subsec. (1) of sec. 51.11, which provides as follows:

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

You state that one X was committed to the Winnebago state hospital several years ago from county A. Thereafter he was transferred to the county asylum in county B. His legal settlement at the time of his original commitment was in county A. The problem which has arisen is whether the judge of the county court of county B may properly act upon a petition for a re-examination of X on the question of sanity, and to assist in answering such problem you ask us to give our opinion as to the proper construction of the word "reside" as used in the above subsection.

We are of the opinion that the word "reside" as used in this subsection means the established dwelling place or abode of the person adjudged insane at the time of filing the petition for retrial or re-examination of the question of sanity. In the case of In re Edmundson, 109 Pa. Super. 495, 167 Atl. 502, the applicable statute providing for the ap-
pointment of guardians for insane persons and others imposed a jurisdictional requirement that the petition for appointment of the guardian be presented to the court of common pleas of the county in which such person "resides." The court said, page 503:

"* * * By this is not meant the place where he may be sojourning at the time the petition is presented, but his established place of abode, his permanent dwelling place, and is practically synonymous with 'domicile.' In re Appointment of Guardian for Belle N. Nicholls, 86 Pa. Super. Ct. 38; 54 C. J. 703, § 3. * * *"

In several cases our supreme court has quoted with approval similar definitions of the words "reside" or "residence." Hall v Hall, 25 Wis. 600; State ex rel Wood County v. Dodge County, 56 Wis. 79; Kempster v. City of Milwaukee, 97 Wis. 343; Miller v. Sovereign Camp W. O. W., 140 Wis. 505; De Laval Separator Co. v. Hofberger, 161 Wis. 344. We believe that if called upon to construe the meaning of the term "reside" as used in sec. 51.11 (1), Stats., our court would reach a conclusion similar to that reached by the Pennsylvania court in construing the Pennsylvania statute in the case cited.

We are further of the opinion that under the facts submitted it must be held that X never acquired a residence in county B. A person confined in an insane asylum does not by his presence in such institution acquire a residence there. The general rule is that removal to an insane asylum does not change or destroy the former residence of the party confined. Kennan on Residence and Domicile, p. 540. A person cannot establish a new residence while insane. In re Jones (Pa.), 19 A. (2d) 280. It is also held that a person committed to prison cannot gain a residence where the prison is situated. Note in 48 Am. St. Rep. 711 at 717. See also Grey v. Waupun, 185 Wis. 157 at 160.

The theory is that to lose one residence and acquire another there must be an exercise of volition free from restraint by the person involved. In addition such person must have sufficient mental capacity to be capable of acting for himself. Kennan on Residence and Domicile, p. 541. The reason for the rule in cases where a person is confined in a
penal institution are stated in *United States v. Gronich*, (D. C. Wash.) 211 Fed. 548. In that case the court was required to construe section 15 of the Act of June 29, 1906, which made it the duty of United States district attorneys in certain circumstances to institute proceedings to cancel a certificate of citizenship on the ground of fraud or on other grounds. The statute provided in effect that such proceedings be brought in any court having jurisdiction to naturalize aliens "in the judicial district in which the naturalized citizen may reside at the time of bringing the suit." The court said, page 550:

"* * * But, whether the word 'reside,' as used in section 15, be taken to require a domicile, or merely an abode, it contemplates choice upon the part of the naturalized citizen, a voluntary sojourning upon his part, and can in no sense be held to apply to an imprisoned convict, who is incarcerated wholly without his consent, or choice. Am. Surety Co. v. Cosgrove, 40 Misc. Rep. 262, 81 N. Y. Supp. 945, 946; Grant v. Dalliber, 11 Conn. 234." WET
Counties — Insane — Physicians — In event a county board acts to establish a fee for a medical examination made in connection with the commitment of persons alleged to be insane or senile at a sum greater than $4 as provided by sec. 51.07 (2), the increased fee could only be paid for examinations made and certificates furnished after effective date of such action by the county board.

The county in which the person examined resides must reimburse the county from which such person is committed at rate established by county board of the latter county, even though such rate is higher than the rate established by the county board of the county where such person resides.

September 14, 1945.

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

In your letter of August 23, 1945 you direct our attention to subsec. (2) of sec. 51.07 as amended by ch. 342, Laws 1945, and also to subsec. (4) of sec. 51.07, which relate to medical examinations made in connection with the commitment of persons alleged to be insane or senile. Said subsections provide:

“(2) Each of the examining physicians shall receive a fee of not less than $4 nor more than $10 as previously determined by the county board for his examination and certificate, and 10 cents per mile for necessary travel in complying with the requirements of his appointment; and in any contested matter arising under this chapter or in any case where the judge, in his discretion, shall postpone the examination of such person, a fee of not less than $4 nor more than $10 as previously determined by the county board for each day he may be required by the county judge to attend before him on such examination.

"* * *"

“(4) If the insane or senile person is a resident of any county in this state other than the county from which he was committed, the commitment shall not be invalid for that reason, and the county in which such person resides shall reimburse the county from which he was committed all law-
ful expenses of the examination and commitment, payment thereof to be enforced in the manner that charges for the maintenance of such persons are enforced."

The questions which you wish us to answer are as follows:

(1) When and if the county board acts to establish the medical fee at a sum greater than $4, would such fee be retroactive to all examinations occurring subsequent to the date of the enactment of the law, or merely to those examinations made after the county board had established the fee?

(2) Would the county of residence of the person examined have to pay the medical fee at the rate established by the county board in which the examination was made, even though that rate is higher than the rate established by the county board in the county of residence?

In our opinion in the event the county board acts to establish a fee for the examining physician as provided by sec. 51.07 (2), Stats., as amended by ch. 342, Laws 1945, at a sum greater than $4, the increased fee could only be paid such a physician for examinations made and certificates furnished after the action taken by the county board in increasing the fee becomes effective. This construction follows from the words "as previously determined by the county board" as used in said subsection, which by their context made it plain that the right to receive a fee in a sum greater than $4 must be preceded by action by the county board. The presence of these words in this subsection precludes the possibility of adopting a construction having a retroactive effect so as to permit payment of the higher fee for examinations made prior to action by the county board in increasing the fee, even though the latter construction were otherwise permissible, as to which we express no opinion here.

We are further of the opinion that the county in which the person examined resides must reimburse the county from which said person was committed at the rate established by the county board of the latter county even though
that rate is higher than the rate established by the county board of the county where such person resides. In our opinion the language of sec. 51.07 (4) is so clear on the point that no further comment is necessary.

WET

Municipalities — Pensions — Sec. 66.90 (9), Wis. Stats., did not impair the authority which a municipality had to dispense with the services of an employe.

September 17, 1945.

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

You have inquired whether the compulsory retirement provision of the Wisconsin municipal retirement fund ""* * * impairs in any respect the authority which previously existed under which a municipality could dispense with the services of an employe for various reasons."

The Wisconsin municipal retirement fund is found in sec. 66.90, Wis. Stats. Subsec. (1) provides:

"Purpose. The purpose of this fund is to provide for the payment of annuities and other benefits to employes and to beneficiaries of employes of municipalities in the state, thereby enabling such employes to provide for themselves and their dependents in case of old age, disability and death, and thereby effecting economy and efficiency in the public service by furnishing an orderly means whereby employes who become aged or otherwise incapacitated may, without hardship or prejudice, be retired from active service."

The compulsory retirement provisions of the law are found in subsec. (9), which reads:

"Any participating employe who attains the age of 65 shall be retired from active service at the end of the month in which such age is attained, unless:
“(a) At such time, the amount of the retirement annuity to which a person who was an employee of any municipality on the effective date is entitled shall be less than 25 per cent of the final rate of earnings of such employee, in which event such employee shall be retired at the end of the first month in which the amount of such annuity equals or exceeds 25 per cent of such final rate of earnings; or,

“(b) Written notice is received by the board certifying that the governing body of the municipality by which such employee is employed has, because of some special qualification of the employee, specifically authorized such employee to continue in employment for a period not to exceed one year beyond such date, or one year beyond the date of expiration of any previous certification date, or until the end of the ensuing term if chosen for a definite term, in which event such employee shall be retired at the expiration of the period designated in the last certification for such continuance on file with the board.”

There is nothing in sec. 66.90 (1) which indicates that the Wisconsin municipal retirement fund was intended to be, in any sense, a civil service or tenure law.

Subsec. (9) is entitled “Compulsory retirement” and requires that a participating employee who attains the age of 65 “shall be retired” unless certain conditions exist. It is one of the fundamental principles of most retirement systems that when an employee reaches a certain age, it probably will be for the best interests of his employer, and very often for the best interests of the employee as well, that he be retired. Municipalities need not be subject to the provisions of the Wisconsin municipal retirement law; they become subject to it by election. Sec. 66.90 (4). If they do elect to become subject to the provisions of the law then they must abide by the policy of that law, which requires the municipality to retire participating employees who attain age 65 except as provided in 66.90 (9), (a) and (b).

The provision of 66.90 (9) (a), with reference to the amount of the retirement annuity being 25 per cent of the final rate of earnings, applies only to a person who attains the age of 65 and at such time happens to be a participating employee. Many persons who become participating employees will leave the service of the municipality voluntarily prior to the time that they reach age 65. Others may be discharged for good cause, or released because the work for
which they were employed has been finished and there is no need for their services in any other capacity.

It is our opinion that sec. 66.90 (9) does not, and was not intended to, compel a municipality to retain any person in its service merely because he has become a participating employee, or to impair in any respect the authority which the municipality had, prior to the passage of 66.90, to dispense with the services of any employee.

JRW

Banks and Banking — Banking Review Board — Bank Receiving and Paying Stations — When banking review board acting under sec. 221.255 (4) approves the establishment of a bank receiving and paying station it may not thereafter rescind or reconsider its action.

The question of whether a proposed receiving and paying station to be located in a county other than that in which the home bank is located is within the trade area of the home bank as provided by sec. 221.255 (1) is one of fact which the banking review board has jurisdiction to determine. Its determination of such fact is conclusive and cannot be questioned unless set aside in an appropriate and timely proceeding for judicial review of the final order or determination of the board in approving or disapproving the establishment of a receiving and paying station under sec. 221.255.

The legality of action of the banking review board in approving the establishment of a bank receiving and paying station cannot be questioned in absence of a direct attack against its final order or determination by appropriate and timely proceedings for judicial review.

September, 17, 1945.

Banking Commission.

Attention James B. Mulva, Chairman.

In your letter of August 22, 1945 you ask in behalf of the banking review board our opinion as to whether the banking review board acted in accordance with the law in ap-
proving the establishment and maintenance of a receiving and paying station by the Marion State Bank of Marion, Wisconsin at Bear Creek, Wisconsin.

In your letter you advise us that the village of Marion is located 8 miles northwest of the city of Clintonville. Reference to a map shows both are located in Waupaca county. The village of Bear Creek is located slightly more than 9 miles practically south of Clintonville, and in Outagamie county. You further advise that on a previous occasion a bank in Clintonville was offered the opportunity of establishing a receiving and paying station at Bear Creek, but declined it.

On February 5, 1945 the Marion State Bank made application to the banking commission for permission to establish and maintain such a station as provided by sec. 221.255 (2), Stats. You state that the commission thereupon caused an investigation to be made as provided by sec. 221.255 (3) and after holding conferences or hearings with delegations of citizens from Bear Creek the commission was of the unanimous opinion such a station was desirable and necessary and made a written report to the banking review board as required by sec. 221.255 (4), Stats., whereby it recommended the board issue a permit to the Marion State Bank to establish and maintain such a station. The banking review board thereupon issued said permit. The minutes of the board show that action was taken on May 25, 1945 as follows:

"Upon motion made by Mr. Rose, seconded by Mr. Dickinson and unanimously carried, the establishment by the Marion State Bank, Marion, Wisconsin, of a paying and receiving station at Bear Creek, Wisconsin was approved."

In your communication to us you state that one of the members of the board had been informed by residents of Bear Creek or vicinity that the action of the board was illegal and for that reason the chairman of the banking review board requested that you communicate with this office and secure our opinion as to the legality of the action of the banking review board in this matter.

There is no question but that there are certain standards or requirements which are contained in sec. 221.255, Stats.,
which must be met before the banking review board has power to approve the establishment of a receiving and paying station. One requirement which is applicable in the instant situation grows out of the fact that the proposed receiving and paying station here is to be located in the village of Bear Creek, Outagamie county, while the home bank is located in the village of Marion, Waupaca county. The population of Outagamie County exceeds 16,000. Therefore in such situation it becomes necessary that such station be located in the “trade area of the home office of the bank and not more than 25 miles from such home office.” Sec. 221.255 (1). From correspondence we have examined we are satisfied that the only question which has been raised as to the legality of the action taken by the banking review board in this case is predicated upon the assertion that the village of Bear Creek is not within the trade area of the home office of the bank in Marion.

The functions of the banking commission and banking review board after an application is filed by a bank for permission to establish and maintain a receiving and paying station are stated in subsecs. (3) and (4) of sec. 221.255, as follows:

“(3) The banking commission shall thereupon estimate from the best sources of information at its command and by such investigation as it may deem necessary whether public convenience and advantage will be promoted by allowing such station to be established and maintained, and the commission shall also investigate the management and the solvency of the applicant bank, the adequacy of existing banking facilities and the surrounding territory from which the patronage would be drawn.

“(4) After completing such investigation, the commission shall make written report to the banking review board stating the results of its investigation and its recommendation. The said board shall consider the matter, conducting any hearing it may deem necessary, and shall promptly make its decision approving or disapproving the establishment and maintenance of the proposed station. The decision of the banking review board shall be final.”

In the present case following the recommendation of the banking commission the banking review board, by action recorded in its minutes, approved the establishment of the
paying and receiving station at Bear Creek by the Marion State Bank on May 25, 1945. Having taken such action the banking review board may not now reconsider or rescind its action. We find no statute giving it any such power and in the absence of such a statute such power does not exist. *Baken v. Vanderwall*, (1944) 245 Wis. 147.

We are also of the opinion that the legality of the board's action may not, in view of the present state of the record, be considered as an open question at the present time. Although subsec. (4) of sec. 221.255 states that in a case such as here "the decision of the banking review board shall be final," it must be recognized that the determination of the board in approving or disapproving the establishment and maintenance of a receiving and paying station is subject to review in circuit court as provided in ch. 227, Sec. 220.035 (3), Stats. We are advised that to date there has been no attempt to institute any proceeding to obtain a judicial review of the action of the banking review board approving the establishment of the station in this case.

There is no doubt that because of the location of the villages involved and the fact the population of Outagamie county exceeds 16,000, a paying and receiving station could be established in the village of Bear Creek by the Marion State Bank only if it is in the trade area of the home office of the bank in Marion, and that compliance with such requirement is a necessary prerequisite. Nevertheless, the question whether the proposed station would or would not be within such trade area is one of fact, the determination of which is within the jurisdiction of the banking review board. Once having determined such fact the determination of the board is final or conclusive and it is not subject to attack, except directly by an appropriate and timely proceeding for judicial review. This is true even though the board may have made a mistake in its determination because, as is often said, jurisdiction to hear also includes jurisdiction to err. The finding of the board is subject only to direct attack in a proper and timely proceeding for judicial review of the order or determination of the board, and even then it must stand unless it appears that it is unsupported by substantial evidence in the entire record.
In view of the action by the banking review board in the instant case approving establishment of a paying and receiving station in the village of Bear Creek it must be assumed that the board found as a fact that the village of Bear Creek was in the trade area of the home office of the bank at Marion. At the present time neither the correctness of this finding nor the legality of the action taken by the board in this matter can be questioned in the absence of a direct attack against the action of the board by appropriate and timely proceedings for judicial review of its final order or determination in such matter. See *Corstvet v. Bank of Deerfield*, (1936) 220 Wis. 209.

In view of the foregoing it becomes unnecessary at the present time to further answer the inquiry submitted by you.

WET

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*Public Health — Nurses — Under secs. 149.05 and 149.055, examination questions prepared by the board of examiners for nurses are not required to have the approval of the committee on nursing education.*

September 19, 1945.

Leila I. Given, Director,

*Bureau of Nursing Education.*

You inquire whether written questions prepared by the board of examiners for nurses for use in licensing examinations for registered nurses and licensed attendants are subject to the approval of the committee on nursing education, under secs. 149.05 and 149.055, Wis. Stats.

Those sections provide in part as follows:

"149.05 The board of examiners for nurses shall prepare written questions and prescribe rules and regulations, subject to the approval of the committee on nursing education, for conducting examinations, and the preservation of the examination papers for two years. * * *"
"149.055 The board of examiners for nurses shall also prepare written questions and prescribe rules and regulations, subject to the approval of the committee on nursing education, for the examination of those desirous of becoming licensed attendants, and the examination papers of all such applicants shall be preserved for 2 years. * * *

The general rule in the interpretation of statutes is "that qualifying or limiting words or clauses are to be referred to but the next preceding antecedent unless the context or evident meaning of the enactment requires a different construction." State v. Carroll, (1942) 239 Wis. 625, 632, 2 N. W. 2d 211.

Applying this rule to the above sections, it follows that unless there is some reason for construing them differently, the presumption is that the words "subject to the approval of the committee on nursing education" apply only to the next preceding antecedent ("prepare written questions") and not to the more remote antecedent "prepare written questions." Thus the preparation of questions would not be subject to the approval of the committee.

No reason for giving a different construction appears. The history of the statute confirms the idea that the written questions were not required to be submitted to the committee for approval. Sec. 149.05 was originally enacted by ch. 365 (as amended by ch. 590, sec. 6) of the Laws of 1921 and read in part as follows:

"The board of examiners for nurses shall prepare written questions on all subjects for examination; prescribe rules and regulations, subject to the approval of the committee on nursing education, for the conduct of the examination of nurses, for the promotion of the efficiency of the examination system, and to secure fair markings of papers, and for the preservation of the examination papers for a period of two years."

This statute was renumbered sec. 149.05 and revised to its present form by a revisor's bill, ch. 448, sec. 78, Laws of 1923. The revision was apparently intended only to shorten the section and hence did not have the effect of working a substantive change in the law. State v. Maas, (1944) 246 Wis. 159, 164, 16 N. W. 2d 406.
The fact that the provision for preparing written questions was originally separated by a semicolon from the provision for prescribing rules and regulations "subject to the approval of the committee on nursing education" strengthens and confirms the construction that the requirement of approval was not intended to apply to the preparation of questions. Moreover, the words "subject to the approval of the committee on nursing education" in both the original act and the present statutes, are interposed between the clause granting the power to prescribe rules and regulations and the clause stating the purpose for which such rules are to be prescribed. They are thus an integral part of the grant of rule-making power and to make them apply also to the provision for preparation of questions would render the statute grammatically awkward. The natural use of language would require the words "subject to the approval" etc. to precede the verb "shall," if intended to apply to both preparation of questions and prescribing rules and regulations.

This construction is further confirmed by the fact that the minutes of the committee on nursing education fail to disclose that the examination questions were ever submitted to the committee for approval. Such administrative practice under the statute is entitled to considerable weight in case of ambiguity.

Sec. 149.055, relating to licensed attendants, was enacted by ch. 304, Laws 1943, and is copied directly from sec. 149.05, relating to registered nurses. Obviously it would receive the same construction.

WAP
Banks and Banking — Bank Receiving and Paying Stations — A state bank may not sell or assign its permit to establish and maintain a receiving and paying station to another state bank with approval of the banking commission or otherwise.

A bank to which a charter has just been issued may not take over the assets and assume the deposit liability of a receiving and paying station already located in its community by agreement with the parent bank and with approval of the banking commission.

September 20, 1945.

Banking Commission.
Attention James B. Mulva, Chairman.

You submit two questions to us for an opinion as follows:

1. May a state bank with approval of the banking commission sell and assign its permit to maintain a receiving and paying station to another state bank which latter bank would, as part of the transaction, take over the assets and assume the deposit liability of the former bank at said station?

2. In the event a new charter is issued to a new bank may it take over the assets and assume the deposit liability of a receiving and paying station already located in the same community by agreement with the parent bank and with the approval of the banking commission?

We are of the opinion that a bank which has been granted a permit to establish and maintain a receiving and paying station cannot sell or assign such permit with approval of the banking commission or otherwise. Under sec. 221.255, Stats., any bank desiring to establish such a station is required to make application to the banking commission. The commission is then required to “estimate from the best sources of information at its command” and by such investigation as it deems necessary whether public convenience and advantage will be promoted by the establishment and maintenance of such station. The statute further provides it is
also to investigate the management and solvency of applicant bank, the adequacy of existing banking facilities and the surrounding territory from which patronage would be drawn. After completing its investigation the commission is required to make its written report to the banking review board stating the results of the investigation and its recommendation. The statute then provides that the board shall consider the matter, conducting any hearing it deems necessary, and further provides it “shall promptly make its decision approving or disapproving the establishment and maintenance of the proposed station.” From the foregoing it is evident that the procedure set up by the statute would be entirely circumvented if one bank could sell or assign its permit to establish and maintain a station to another bank. This would be true irrespective of whether the transfer is approved by the banking commission or not. Even in case of approval by the banking commission adoption of such a rule would result in a most obvious by-passing of the requirements of the statute, because the matter would not be passed on by the banking review board, which is by statute given the ultimate power to approve or disapprove an original application for such a permit. Further, the banking commission like all other administrative agencies has only such power as is expressly granted to it by statute or may be necessarily implied therefrom. American Brass Co. v. State Board of Health, (1944) 245 Wis. 440. We find nothing in sec. 221.255 or elsewhere which could, in our opinion, be said to either expressly or by implication authorize the banking commission to approve the transfer of such a permit by one bank to another. As previously noted the banking commission is given certain powers in event a bank files an application for a permit to establish and maintain a paying and receiving station. It is also given power to make rules and regulations concerning the operation of such a station after it has been permitted to operate, as well as certain other powers with respect to the revocation or cancellation of a permit. But nowhere is there any provision giving the commission power to approve the sale or transfer of any such permit.

We are also of the opinion that such a permit could not be transferred even if approved by the banking review
board. The only power given the board by sec. 221.255 is to approve or disapprove an application by a bank for a permit to establish and maintain a paying and receiving station following investigation and recommendation by the banking commission as provided by subsecs. (3) and (4) of said section. The filing of an application is necessary to set in motion the machinery by which the banking review board ultimately approves or disapproves the establishment of a receiving and paying station. An application by a transferee bank for approval of the transfer of a permit to establish and maintain a receiving and paying station from another bank to it could not be considered the equivalent of an original application under sec. 221.255. To hold otherwise would be in complete disregard of sec. 221.255 (2), which provides in effect that such application shall be made in such manner and in such form as shall be prescribed by the commission, giving such information as the commission may require and shall be accompanied by a fee of $25 to defray costs of examination by the commission.

The foregoing conclusions also require that we answer your second question in the negative.

WET
Platting Lands — Deeds — State Board of Health — Register of Deeds — Where plat has been recorded by mistake without formal approval by city council as required by sec. 236.06 (1) (f) such recording has no validity whatever by virtue of sec. 236.06 (3), but said plat upon being approved by council may be re-recorded with all the effect of an original recording.

Approval of state board of health not required under sec. 236.06 (1) (g) where stream flows through plat, if plat does not adjoin stream or provide access to it.

Conveyances using descriptions from plat not entitled to record are nevertheless effective.

Register of deeds subject to forfeiture of $50 to $100 to city under sec. 236.06 (5) for recording plat without evidence of council approval.

September 24, 1945.

L. C. Youngman,
District Attorney,
Barron, Wisconsin.

You have raised several questions relating to the validity of a recorded plat arising out of the following circumstances: In 1944 the owner of certain property in the city of Barron, platted the same. Apparently everything was in order except that through some oversight the plat was not formally approved by the city council prior to recording although the signatures of the mayor, clerk and council members were affixed to the plat before it was recorded.

Sec. 236.06 (1) (f) provides that no plat shall be valid or entitled to be recorded until it has been submitted to and approved by the common council. Sec. 236.06 (2), (3), (4), (5) and (6) provide:

"(2) The owner shall cause the final plat to be recorded within thirty days of the date of the last approval thereof, together with the evidence of approvals required, which shall be a certified copy of each ordinance or resolution adopted by the governing body approving the same attached to the final plat."
“(3) Any final plat not approved or not accompanied by proper evidence of its approval, or which shall not be offered for record within thirty days after the date of the last required approval, or which shall not be offered for record within ninety days after the date of the first approval, shall not be recorded or received for record and shall have no validity whatever.

“(4) Any person causing his final plat to be recorded without submitting such plat for approval as herein required, or who shall fail to present the same for record within the time prescribed after approval, shall forfeit not less than one hundred dollars, nor more than one thousand dollars, to each city, village, town or county wherein such final plat should have been submitted.

“(5) Any register of deeds who shall record any final plat without the evidence of its approval attached thereto, as herein provided, or after the time herein prescribed, shall forfeit not less than fifty dollars, nor more than one hundred dollars.

“(6) All forfeitures incurred under this section shall be sued for or recovered in the name of such cities, villages, towns and counties and paid into the local school fund.”

We understand that the common council has now approved the plat.

You inquire first whether it is now possible to correct the original plat by adding a certified copy of the resolution recently passed and to re-record the plat.

It is apparent from the above statutory provisions that the first recording had no validity whatsoever. The individual signatures of the mayor, clerk and councilmen would be of no effect since the statute requires the approval of the council as a body. Consequently the re-recording of the plat, together with the certified copy of the ordinance or resolution adopted by the common council approving the same within the time specified by sec. 236.06 (2) would operate in all particulars as an original recording.

Secondly, you call attention to the fact that a stream flows through one block of the plat although it is not a boundary of the plat nor is any access to the stream provided by the plat. Under these circumstances you ask whether the approval of the state board of health is required under sec. 236.06 (1) (g), which provides that no plat for lands lying in any subdivision adjoining any lake or stream shall be
valid or entitled to be recorded until it has been submitted to and approved by the state board of health. Since under the facts stated this plat neither adjoins the stream nor provides access to it, the statute does not apply.

While your inquiry is concerned primarily with the duties and liabilities of the register of deeds under the facts stated, you do nevertheless mention that the sale of lots in the plat involves thousands of dollars and we take it that there may be some local concern as to the validity of these conveyances.

Our supreme court has held that although a plat not entitled to be recorded does not operate as a grant to the public of lands therein designated as streets, yet it may be resorted to for the purpose of identifying land conveyed by reference to it. Fleischfresser et al. v. Schmidt, 41 Wis. 223; Rau v. Freund, 165 Wis. 27. In support of this conclusion the court in the Fleischfresser case at page 227 quoted from Coats v. Tuft, 12 Wis. 389-391, as follows:

"We do not understand the law to require that a deed should on its face ascertain the limits or quantity of the estate, or the particular property conveyed; but it will be sufficient if it refers to certain known objects or things, and provides definite means by which the same may be readily ascertained and known."

Also in Noonan v. Lee, 67 U. S. 499, in a case involving the Wisconsin platting law the United States supreme court said at page 504:

"* * * As regards the statute, the plat was fatally defective and afforded no warrant to the recording officer for putting it on record. Nevertheless, its being there was a fact, and whether there or elsewhere, the reference to it in a deed for the purpose of fixing a boundary, is sufficient. 'That is certain which can be rendered certain.' Where a map or plat is thus referred to, the effect is the same as if it were copied into the deed. * * *"

The duties and liabilities of the register of deeds are set forth in sec. 236.06 (5) and (6) and call for no particular comment here. If the forfeiture therein prescribed is to be invoked it will have to be at the suit of the city and would
Building and Loan Associations — Sec. 215.14 (3), Stats., authorizes building and loan associations to make loans to members for the purpose of repairing, modernizing or altering an existing structure in exchange for a note repayable in not to exceed 36 monthly instalments. The note need not be secured by collateral.

September 24, 1945.

Banking Commission.
Attention E. W. Tamm, Secretary.

In your letter of September 11, 1945 you refer to subsec. (3) of sec. 215.14, Stats., which section was repealed and recreated by ch. 246, Laws 1945, and ask whether building and loan associations may now make unsecured loans for the purposes mentioned in said subsection.

The section of the statutes referred to provides:

"215.14 Loans. Associations are authorized to make loans to their members as hereinafter provided:

"(1) On the security of their share accounts or on the security of first liens on real estate in the manner and upon the terms prescribed in the rules and regulations or in the by-laws; provided the security offered be satisfactory to the board of directors.

"(2) Secured or unsecured loans which are insured or guaranteed in any manner by the United States or any agency or instrumentality thereof, or for which there is a commitment to so insure or guarantee.

"(3) For the purpose of repair, modernization or alteration of an existing structure and take as security therefor a note repayable in not exceeding 36 monthly instalments."

We are of the opinion that the context of subsec. (3) requires that it be construed so as to authorize associations to
make loans to members for the purpose of repairing, modernizing or altering an existing structure, in exchange for a note repayable in not to exceed 36 monthly instalments. The note need not be secured by collateral. The subsection requires only that the note itself be given as "security." As a practical matter this would amount to making what is ordinarily regarded as an unsecured loan.

The word "security" appears to be used in subsec. (3) to mean an evidence of debt. While it may be unusual to use this word in such sense, there is precedent supporting such use. Barry v. Harding, (1844) 1 Jones & LaTouche 475 at 483. In Wisconsin it has been held a judgment note is a "security." McCaul v. Thayer, (1887) 70 Wis. 138 at 144.

Appropriations and Expenditures — University — Sewage Disposal — The board of regents of the university is authorized to pay charges imposed by the city of Madison pursuant to sec. 66.06 (22) for sewage disposal service, out of the appropriation for general operation.

September 28, 1945.

A. W. Peterson,
Director of Business and Finance,
University of Wisconsin.

You have inquired whether there is any prohibition against the city of Madison making charges against the university for sewage disposal services, or against the payment of such charges by the university.

The city’s plan is to constitute its sanitary sewerage service into a utility system and to finance the entire service by sewerage rentals pursuant to sec. 66.06 (22) (b) of the Wisconsin statutes. Such a utility charge would be made on the same principle as the charge which has been made for water service, which we understand has been paid by
the university to the city for many years. It is fairly well established that a city may charge the state for public utility service rendered to it unless the statutes prescribe that such service shall be rendered free. See *Opinions of the Justices*, (N. H.) 39 A. 2d 765, and cases there cited. It has been held by the supreme court of this state that a sewerage system may properly be classified as a public utility. See *Payne v. Racine*, 217 Wis. 550.

There may be some doubt with respect to the city's authority to charge the state for the sewage treatment and disposal service which is operated by the metropolitan sewerage district and paid for by the city pursuant to sec. 66.20 (15) of the statutes, and which is available to Madison residents only through use of the city's collection and transmission facilities. We do not, however, find anything in the statutes which obligates the city to permit the state to use its sewerage facilities free of charge or which would prevent the city from refusing to continue to render sewerage service to the university if the charge were not paid. If the university desire the service, it may be assured of receiving it only through payment of the established rates.

You have also asked whether the money appropriated under sec. 20.41 (1) (a) for general operation would be available for payment of sewage disposal charges, pointing out that you are now paying the city water department from funds so appropriated. Since a charge for sewage disposal service is analogous to the charge for water supply and is imposed upon the same principle, we see no reason why it would not be covered by an appropriation for the expense of operating an institution in which such services are required.

BL
Conservation Commission — Fish and Game — Circuit Court — Statutes — Sec. 29.596 (2) (b) providing for determination of deer damages by circuit judge where claimant and conservation commission cannot agree is directory rather than mandatory so far as the 5-day period for making and filing the award is concerned.

October 2, 1945.

FRED R. ZIMMERMAN,
Secretary of State.

You state that the conservation commission has certified to you for payment a claim for deer damage by an owner of an orchard. This claim arose under sec. 29.596, Stats., which reads:

“(1) Any person claiming damage to his property caused by deer or bear shall file a verified statement of his damage with the state conservation commission within ten days from the time such damage is alleged to have been incurred. No person, however, shall be entitled to any damages under this section who shall have posted his lands against hunting.

“(2) (a) The state conservation commission shall investigate and settle all such claims.

“(b) In all cases where the commission and the claimant cannot agree upon the amount of the damage sustained, the commission shall upon not less than ten days’ notice in writing, exclusive of Sundays and holidays, to such claimant, apply to the judge of the circuit court of the county wherein the claimant resides to hear, try and determine all issues raised in said matter. At the time set therefor such judge shall hear the parties, and in such manner as he may in his discretion determine, inform himself in respect to the matter, and within five days make his award in writing and file the same, and his findings shall be final.

“(c) All witnesses necessary to such proceedings shall receive the same pay for services as is paid to witnesses in a court of record.

“(3) The director or assistant director of the state conservation commission shall file all approved claims and a statement of witness fees with the secretary of state. Such claims and fees shall be paid out of the fund provided in subsection (19) of section 20.20.”
In this case the conservation commission and the claimant were unable to agree upon the amount of the damages and the commission, under sec. 29.596 (2) (b), applied to the circuit judge for a determination. The matter was heard on March 9, 1944 but no decision was rendered until August 31, 1945, some 17 months later. In view of the provision of the statute requiring such award to be made within 5 days you inquire whether this award may now be lawfully paid.

The general rule is that the provisions of a statute which confer a new right are mandatory. 59 C. J. 1075; Schaut v. Joint School District, 191 Wis. 104. However, there is another and apparently contrary rule as to statutes prescribing the time within which public officers are required to perform an official act. Such a statute is held to be merely directory unless it denies the exercise of power after the time prescribed, or the nature of the act, or the statutory language shows that the time was intended to be a limitation. See State v. Industrial Comm'n., 233 Wis. 461 and cases cited at page 466. We consider this decision to be controlling here and you are advised that the claim should be paid.

WHR
Loans — Interest — Insurance — Banking Commission
— Lenders licensed either under sec. 115.07 or sec. 115.09 who are also insurance agents may not, where the borrower is charged the maximum amount which under said sections may be imposed by way of interest and other charges, receive in addition a commission upon insurance which as a condition to obtaining the loan the borrower is required to obtain on property pledged by the borrower as security therefor even where the premium for said insurance is at the manual rate and the borrower is given the right to select the insurance agent and voluntarily selects the lender as his agent.

October 8, 1945.

BANKING COMMISSION.

Attention James B. Mulva, Chairman.

You refer to our opinion to the banking commission dated January 18, 1945 (page 15 of this volume) and particularly our answer to question No. 8 which was to the effect that lenders licensed either under sec. 115.07, sec. 115.09 or ch. 214, who are also insurance agents, may not receive any commission on insurance which the borrower must obtain on property which constitutes security for the loan. In answering the question it was assumed that the maximum legal rate of interest was charged on each loan and further that the requirement of insurance was made in good faith and that the premiums charged are not in excess of what is usually charged and that the requirement of insurance was not imposed with intent to evade the usury laws.

You now inquire whether lenders licensed under secs. 115.07 and 115.09 and who are also agents of insurance companies may, where the borrower is charged the maximum amount which under sec. 115.07 (3) or sec. 115.09 may be imposed by way of interest and other charges, take in addition a profit from placing insurance on property pledged by the borrower as security for the loan, the premium for said insurance being at the manual rate, where after the loan application has been approved the lender grants the borrower the right to select any insurance agent but the
borrower voluntarily selects the lender as his agent to write
the insurance.

In our former opinion appearing at page 15 of this vol-
ume we have in effect construed secs. 115.07 (3) and 115.09
as fixing a maximum limit or ceiling upon the amount which
a lender can impose against a borrower by way of interest
or other charges. Such a construction was also adopted in
the opinion of this department appearing in XXXII Op.
Atty. Gen. 133, where the following appears (p. 138):

"* * * Under secs. 115.07, 115.09 and ch. 214, various
schemes are provided for the licensing and regulation of
lenders of money, which provide for certain charges to be
made in addition to the ten per cent limit prescribed by sec.
115.05. It will be noted that in each of these laws rigid
limits for any charges in addition to interest are fixed."

It was on this theory that we ruled in our opinion appear-
ing at page 15 of this volume that in cases where the max-
imum limit has been charged by the lender neither sec.
115.07 (3) nor sec. 115.09 permits a lender licensed under
such sections who is also an insurance agent to receive a
commission upon insurance which the borrower is required
to obtain upon property pledged as security for the loan,
since receipt of such commission by the lender would enable
him to receive in the aggregate a sum in excess of the maxi-
num allowed by statute out of the transaction with the bor-
rower. This finds direct support in the statement of our su-
preme court in State ex rel. Ornstone v. Cary, (1905) 126
Wis. 135, where the court sustained the constitutionality of
ch. 278, Laws 1905, which contained provisions similar to
those in sec. 115.07 (3). The court said (p. 140):

"Contracts made in connection with the transaction
of loaning money, under a scheme whereby the lender or his
authorized agent receives payments of money or its equiva-

tent in excess of the legal rate of interest, have been held to
be prohibited by the law and not enforicible as valid obliga-
tions. McFarland v. Carr, 16 Wis. 259; Ottillie v. Waechter,
33 Wis. 252; Payne v. Newcomb, 100 Ill. 611; Dunham v.
Gould, 16 Johns. 367; Claque v. Creditors, 2 La. 114; Miller
v. Life Ins. Co. 118 N. C. 612, 24 S. E. 484. * * *"
Your present inquiry differs from the question on which our former opinion is based only in that one additional factor has been introduced. In your present inquiry it is assumed that the lender grants the borrower the right to select the insurance agent and then the borrower voluntarily selects the lender as the agent to write the insurance. Even in such event it is self-evident that despite this understanding between the lender and borrower the fact remains that the lender would receive a commission on such insurance and hence, under the assumptions in your inquiry, the lender would receive in the aggregate an amount which exceeds the maximum amount provided for interest and charges under secs. 115.07 (3) and 115.09. Your present inquiry therefore is ruled by our former opinion and we hold that the lender, whether licensed under sec. 115.07 (3) or sec. 115.09, cannot act as insurance agent for the borrower and receive commissions on the insurance written even though the borrower is given the right to select the insurance agent and voluntarily selects the lender.

The material which you have submitted to us in connection with your inquiry cites four cases. The first three are *Auto Owners’ Finance Company v. Coleman*, (1938) 89 N. H. 356, 199 A. 365, *Martorano v. Capitol Finance Corp.*, (1942) 289 N. Y. 21, 43 N. E. (2d) 705, and *Maellaro v. Madison Finance Co.*, (1943, N. J. Sup. Ct.) 31 A. (2d) 485. None of these three cases involves situations where the lender was an insurance agent and received a commission on insurance written on property pledged by the borrower as security for the loan, and hence they are not in point here. In the case last cited the insurance was written under a master policy issued by an insurer to the lender, but it was stipulated that while the premium charged was in accord with the standard uniform rate, the lender “did not share therein to any extent.” The case of *State v. Bankers Finance Corporation*, (1942) 41 Del. 566, 26 A. (2d) 220, involved among other things the question as to whether the fact a lender received a commission on insurance on property pledged by the borrower as collateral violated the Delaware Small Loan Act. There is no question but that the views adopted by the court in that case are directly contrary to the conclusions we have reached in answering your
present inquiry. We do not feel free to follow the Delaware case. It not only is based on a theory contrary to that adopted by this department in the opinions previously referred to, but is also in our opinion contrary to views expressed by our supreme court. See State ex rel. Ornstone v. Cary, (1905) 126 Wis. 135, and cases cited; XXXII Op. Atty. Gen. 133; XXXIV Op. Atty. Gen. 15; XXIX Op. Atty. Gen. 10.

WET

Automobile and Motor Vehicles — Finance Companies — Licenses and Permits — Banking Commission — The fact that one licensed under sec. 218.01, Stats., as a motor vehicle dealer and sales finance company sells retail instalment contracts on motor vehicles at a discount to a national bank not licensed as a sales finance company under said section does not constitute a ground for the suspension or revocation of said license or licenses. The provisions of sec. 218.01 (3) (a) 13 cannot legally be applied under such circumstances.

Banking Commission.
Attention A. J. Quinn, Vice Chairman.

You ask us whether the fact that one licensed under sec. 218.01, Stats. as a motor vehicle dealer and a sales finance company sells retail instalment contracts on motor vehicles at a discount to a national bank not licensed as a sales finance company, constitutes a ground for the suspension or revocation of said license either as a motor vehicle dealer or sales finance company, or both.

The provisions of sec. 218.01 are administered in part by the state motor vehicle department and in part by the state banking commission. Motor vehicle dealers’ licenses are issued by the motor vehicle department. Sales finance company licenses are issued by the banking commission. Sec. 218.01 (1a). You advise that the banking commission has
interpreted the law to the effect that if a motor vehicle dealer sells motor vehicles on an instalment contract he becomes a retail seller as defined in sec. 218.01 (1) (f), and any person, firm or corporation engaging in the business in whole or in part of acquiring retail instalment contracts from such dealer by purchase or by way of a loan on the security thereof becomes a sales finance company. Sec. 218.01 (1) (d). Likewise, the motor vehicle dealer selling motor vehicles on an instalment contract also becomes a sales finance company as defined by sec. 218.01 (1) (d) and is required to obtain a license as a sales finance company from the banking commission. Sec. 218.01 (2). Suspension or revocation of either of said licenses operates ipso facto to suspend or revoke the other. Sec. 218.01 (1a).

On December 12, 1944 this department in an opinion directed to the banking commission, published in XXXIII Op. Atty. Gen. 264, ruled that a national bank may engage in the business of acquiring retail instalment contracts on motor vehicles by purchase or discount without first obtaining a license as a sales finance company pursuant to the provisions of sec. 218.01 (2), Stats. The term “sales finance company” is defined by the statute broadly enough to include national banks engaged in such business, but for the reasons stated in the opinion the licensing provisions of sec. 218.01 could not be applied to national banks. The obvious practical effect of such opinion is to enable national banks to acquire retail instalment contracts on motor vehicles from motor vehicle dealers licensed as such and also as sales finance companies, without first obtaining a license as sales finance companies, thus enabling such national banks to enjoy certain competitive advantages over licensed sales finance companies.

Your inquiry as to whether the license of one licensed as a motor vehicle dealer and sales finance company may be revoked in event such licensee sells retail instalment contracts on motor vehicles to an unlicensed national bank is based on the following provisions of sec. 218.01 (3) (a):

"(3) Licenses, how denied, suspended or revoked. (a) A license may be denied, suspended or revoked on the following grounds:

"* * *"
"13. Having sold a retail instalment contract to a sales finance company not licensed hereunder."

The precise meaning of sec. 218.01 (3) (a) 13 is not clear. We will assume that the correct construction of this subsection is to the effect that a license may be denied, suspended or revoked in event a licensee sells a retail instalment contract to one engaged in the business falling within the designation "sales finance company" and who is not licensed as such. In view of this assumption a literal application of this subsection to the situation presented by your inquiry would (if such application is legally permissible) result in a conclusion that the sale of retail instalment contracts on motor vehicles by one licensed as a motor vehicle dealer and sales finance company to a nonlicensed national bank, would be ground for suspension or revocation of such license or licenses. The real question, however, is whether this subsection may be legally so applied under the circumstances here.

There is authority to the effect that the state legislature cannot prohibit national banks from accepting deposits or directly impair their efficiency in that regard. First National Bank of San Jose v. California, (1923) 262 U. S. 366, 67 L. ed. 1030. In the case cited the supreme court held a California escheat statute unconstitutional as applied to national banks. The decision was based on the proposition that the particular state statute involved operated in such a manner as to deter depositors from placing or keeping their funds in national banks. In Anderson National Bank v. Luckett, (1943) 321 U. S. 233, 88 L. ed. 692, the Kentucky escheat statute was sustained on the ground it did not have such effect. In our previous opinion we held that a national bank has charter power under sec. 5136 of the national bank act to acquire retail instalment contracts on motor vehicles by purchase or discount. Thus the same rule would apply as in the cases involving the right to accept deposits and it must be considered that the state legislature could not prohibit national banks from acquiring retail instalment contracts on motor vehicles by purchase or discount or impair their efficiency in that regard. First National Bank of San Jose v. California, supra; Anderson National Bank v. Luckett, supra.
Application of sec. 218.01 (3) (a) 13 under circumstances stated in your inquiry would unquestionably result in a direct impairment of the right of a national bank to acquire such paper by purchase or discount because it would tend to eliminate a principal source from which national banks obtain such paper in this state. This is self-evident since no one licensed as a motor vehicle dealer or sales finance company would sell or discount a retail instalment contract with a national bank if his license were subject to revocation by reason thereof. The resulting impairment of the ability of the national bank to engage in the business of acquiring this type of paper under such circumstances would be no different in principle than the impairment of the right of a national bank to engage in the business of receiving deposits caused by the California escheat statute in First National Bank of San Jose v. California, supra, where that statute was held unconstitutional because it operated to deter people from making or keeping deposits in the national bank. We therefore conclude that the license of one licensed as a motor vehicle dealer and sales finance company under sec. 218.01 cannot be suspended or revoked on the ground such licensee sold a retail instalment contract to a nonlicensed national bank. The provisions of sec. 218.01 (3) (a) 13 cannot legally be applied under such circumstances.

WET

Insurance — State — The use of the standard fire policy is not required for insurance in the state fire fund.

October 9, 1945.

Morvin Duel,
Commissioner of Insurance.

You have requested our advice as to whether you are required to use the standard fire policy for insurance in the state insurance fund. The standard policy is provided for by sec. 203.01, Stats. It is clear from the language of the
section including the provisions of the policy that it relates to a company or companies issuing policies of insurance. Sec. 203.06 provides that no persons, with certain exceptions, shall issue fire insurance policies except upon the standard form. It is provided, however, that the name of the company, its location or place of business, the date of its incorporation or organization, etc. may be printed on the policy. All such provisions and other provisions relating to the use of the policy refer to companies. The word "company" is defined by sec. 201.01 for purposes of statutes relating to insurance as including "all corporations, associations, partnerships, and individuals engaged as principals in the business of insurance, except mutual benefit societies."

The state might be considered as a corporation for some purposes, but it is very clear that the corporations referred to in sec. 201.01 are those insurance corporations provided for by ch. 201. Under familiar rules of construction the state would probably not be considered subject to any such regulation in the absence of specific inclusion. Where as here the scope of the application of the regulation has been specifically defined and the state is not included, there can be no doubt that it is intended to be excluded.

The provisions relating to the state fire fund in ch. 210 contain no reference to the standard form of policy and in the absence of such a provision and in view of what we have already said, we are of the opinion that the use of the standard form is not required.

JWR
Securities Law — Trusts — Corporations — A Wisconsin corporation organized under the provisions of ch. 180, Stats., cannot act as trustee under the provisions of sec. 189.13 (4).

October 9, 1945.

Edward J. Samp, Director,
Department of Securities.

You have requested our opinion with respect to the following:

"The Wisconsin securities law provides in Section 189.13 (4), with respect to the registration of certain securities by the Department of Securities, that the indenture under which such securities are issued shall provide among other things that:

"'(a) There shall at all times be one or more trustees thereunder, at least one of whom shall at all times be a corporation organized and doing business under the laws of the United States or of any state or territory thereof or of the District of Columbia (herein called the institutional trustee) which (1) is authorized under such laws to exercise corporate trust powers and (2) is subject to supervision or examination by federal, state, territorial or District of Columbia authority; provided, that in any case where it shall appear to the department that the requirement of an institutional trustee may work a hardship, the department may, upon such terms and conditions as it deems necessary in the public interest or for the protection of investors, dispense with such requirement and permit the trustee under the indenture to be an individual or other person.'"

"This department respectfully requests your opinion as to whether a domestic corporation, organized pursuant to the provisions of Chapter 180 of the Wisconsin Statutes, meets (A) the requirement of the foregoing subsection reading: ' (1) is authorized under such laws to exercise corporate trust powers * * *' and (B) whether such domestic corporation constitutes what may be included in the phrase: 'or other person' as that phrase is used in the last line of the said subsection.'"

For the purpose of this opinion we may assume that a Wisconsin corporation organized under the general incor-
poration law may act as trustee for certain purposes. It is usually held that corporations may be trustees as an incident to carrying out the purposes of the corporation.

We do not believe, however, that a private corporation organized under ch. 180, Wis. Stats., can engage in the business of being a trustee. The corporate trust business is covered by ch. 223 and sec. 221.04 (6), Wis. Stats., providing for trust company banks and state banks with trust powers. Although not particularly material, sec. 222.21 also relates to certain limited trust powers by savings banks. The corporate trust business is classified as a banking business in the sense that corporations exercising such powers are classified as banking corporations under Wisconsin statutes. The provisions of sec. 180.01 relating to incorporation under the general law exclude banking corporations. Provision having been made for this particular class of corporations as banking corporations, they may not be organized under the general incorporation law.

It might be a very nice question as to just how far a general business corporation might claim that it was entitled to act as trustee as an incident to the transaction of its general business purposes. It might also be interesting to speculate as to whether a corporation organized under ch. 180 could be specifically granted power to act as trustee to a limited extent. It might be argued that so long as the grant of power to act as trustee was not extensive but limited to particular types of trusts associated with the business of the corporation, it would not conflict with the legislative intent to confine the corporate trust business to banking corporations. However this may be, we think the question here must be resolved by considering the legislative intent as expressed in sec. 189.13 (4) to which you have referred. That statute requires that except as excused by the department of securities, one of the trustees under a bond issue shall be a corporation. A corporation is denominated an institutional trustee. In order to qualify as a trustee it must (1) be authorized to exercise corporate trust powers and (2) be subject to supervision or examination by the authority which created it.

Wisconsin conforms to the general practice in its handling of trust companies. Many states provide for corporate
trust companies in a similar manner. While the mechanics vary somewhat, the usual pattern is to specifically provide for the organization of corporate trust companies as a special class of corporations and to subject them to close supervision. In several instances, as in the case of this state, deposits with public authorities are required in order to insure the performance of the trust obligation. There is no doubt in our mind that it was the purpose of sec. 189.13 (4) to require, so far as Wisconsin corporations are concerned, that they be organized under ch. 223 or authorized to exercise trust powers under ch. 221. In this connection it may be noted that the provisions of sec. 221.04 (6) relating to empowering state banks to act as trustees are entitled "trust powers."

This conclusion is necessitated by the fact that it would require considerable straining to say that the usual private business corporation, whatever incidental power it might have to act as a trustee, is a corporation exercising corporate trust powers. There are several classes of private business corporations that are supervised or examined for one purpose or another, but the provision of sec. 189.13 (4) relating to supervision or examination certainly does not mean any kind of supervision or examination. It means supervision or examination so far as the execution of the trust function is concerned and that is consistent only with the class of corporations which are organized for the execution of trust powers and which are supervised and examined as trustees.

A trust under a bond issue requires the application of rules relating to trusts generally as well as such rules as may be specified in the trust indenture. Therefore it is consistent and logical that such functions should be performed by corporations organized to act as trustees and which presumably are both experienced and responsible.

We do not believe that a private business corporation falls within the language "or other person." Thus, in the event the department decides to dispense with an institutional trustee it may nevertheless not permit a general business corporation to act as trustee. The word "person" is defined for purposes of ch. 189 by sec. 189.02 (2). It refers to "an individual, a corporation, a partnership, an association"
and certain other entities. It is the purpose of sec. 189.13 (4), as specified therein, to require a trustee to be a corporation except as excused by the department. If a corporation is trustee, it must meet certain requirements. If those requirements impose hardship, then the commissioner is authorized to permit the trustee to be "an individual or other person." The words "other person" must be considered together with the entire context. They must be considered with reference to the fact that the institutional trustee or corporation has been excluded by excuse of the department. The trustee may then designate an individual or other person, the other person meaning someone other than an individual or a corporation.

JWR

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**Intoxicating Liquors — Licenses and Permits — Corporations** — A wholesale intoxicating liquor permit may not be issued to a foreign corporation under the provisions of sec. 176.05, Stats.

October 9, 1945.

**BEVERAGE TAX DIVISION,**

**Office of State Treasurer.**

Attention F. J. Mattingly.

On August 23 you inquired by a written communication as to whether a wholesale intoxicating liquor permit may be issued to a foreign corporation under the provisions of sec. 176.05, Wis. Stats.

It is indicated that such a license may be issued to a foreign corporation under the provisions of sec. 176.05 (13) which specifies that "No corporation organized under the laws of this state or of any other state or foreign country, shall be given a license to sell in any manner any intoxicating liquor unless" the corporation appoints an agent and vests in him control of the premises described in the license.
and of the conduct of the business on such premises. This language, while negative in character, would imply that a license may be granted to a foreign corporation.

On the other hand, sec. 176.05 (9) provides that no license or permit shall be granted to any person who is not of good moral character and a full citizen of the United States and of this state and who has not resided in this state continuously for a year prior to the date of filing the application. The subsection also states that no license shall be granted to any person who has habitually been a petty law offender or has been convicted of an offense against the laws of this state punishable by imprisonment in the state prison, unless he has been duly pardoned. It is then stated that the provisions of the subsection shall not apply to a Wisconsin corporation, but shall apply to all officers and directors of any such corporation.

The import of sec. 176.05 (9) is that licenses shall be granted to natural persons only, since a corporation cannot very well be a person of good moral character nor can it be a full citizen of the state nor can it reside in the state. The proviso as to Wisconsin corporations makes it clear that notwithstanding the limitation as to natural persons, a license may be issued to a Wisconsin corporation provided the officers and directors of the corporation measure up to the qualifications imposed on natural persons who are eligible for licenses.

Whatever indication there may be that licenses may be issued to a foreign corporation under the provisions of sec. 176.05 (13) is overcome by the clear provisions of sec. 176.05 (9). The language is positive in character and contains an absolute prohibition against the issuance of licenses to anyone other than natural persons except in the specified instance of Wisconsin corporations whose officers and directors would be eligible for license.

The statute has been so construed from the time of its origin and so far as we know it has not been the practice to grant licenses to foreign corporations. The administrative interpretation is correct in our judgment and we do not think licenses can lawfully be issued to foreign corporations. JWR
Soldiers, Sailors and Marines — Department of Veterans Affairs — The board of veterans affairs has power to make loans to veterans as defined in sec. 45.35 (5a) in an amount not to exceed $750 in the aggregate to each veteran for the purpose of educating such veteran; to aid or assist such veteran in the purchase of real estate, personal property or a business. The power to grant loans for the purpose of granting aid or assistance in purchasing real or personal property carries with it power to grant loan to enable veteran to acquire real or personal property necessary to rehabilitate himself or to establish himself in business. The board is also given specific power to make loans to veterans for purposes of their rehabilitation. This includes both physical and economic rehabilitation and the board has power to grant loan to enable veteran to pay unpaid doctor and hospital bills and other miscellaneous obligations if board finds such loan will aid or promote the economic rehabilitation of the veteran. The question is one of fact to be determined by the board in view of the circumstances surrounding each case.

October 9, 1945.

DEPARTMENT OF VETERANS AFFAIRS.
Attention Leo B. Levenick, Director.

You ask our opinion on the following question:

"Does the Wisconsin Department of Veterans Affairs have the right and the power to make loans to duly qualified Wisconsin World War II veterans for purposes of education, payment of bills, (such as doctor bills, hospital bills and other accumulated miscellaneous bills) purchase of real estate, personal property, and for the purpose of buying furniture and setting themselves up in business and for other necessities required to rehabilitate themselves after returning to Wisconsin from honorable service in the armed forces of the United States during World War II?"

The Wisconsin department of veterans affairs is created by sec. 45.35 (2), Stats., as created by ch. 580, Laws 1945. Said department consists of a board of veterans affairs, a director and administrative staff. Sec. 45.35 (2). Your question is directed toward the power of the Wisconsin de-
department of veterans affairs to make loans for certain purposes to duly qualified world war veterans. We assume, however, that you intend to ask as to the power of the board of veterans affairs to make such loans since the power to make loans to veterans granted by sec. 45.35 (8b) as created by ch. 409, Laws 1945, seems to be given solely to the board as contrasted to the department of veterans affairs.

The subsection referred to (sec. 45.35 (8b) ) provides in part as follows:

"The board may make loans in its own name and on its own behalf to veterans for the purposes of their rehabilitation, education or for the purpose of aiding and assisting them in the purchase of property or a business, not to exceed $750 to each such veteran, on such terms as the board may deem desirable. * * *"

The word "veteran" as used in sec. 45.35 is defined by sec. 45.35 (5a) as created by ch. 580, Laws 1945, and we will assume that the loans referred to in your question would be made to World War II veterans who come within the definition of the word "veteran" as therein defined.

Also material in answering your question are the provisions of sec. 45.35 (1) as amended by ch. 580, Laws 1945, which now reads as follows:

"The legislature declares that it is the policy of the state of Wisconsin to assume responsibility for the health, educational and economic rehabilitation and hospitalization of returning members of the armed forces of the United States in World War II, and their dependents, who are bona fide residents of this state. The legislature further declares that the state intends by the enactment of this section to render all possible aid and assistance to such returning members of the armed forces, servicemen officially reported as missing in action and their dependents, when aid and assistance has not been provided. A liberal construction of this section is intended."

It is clear from the context of sec. 45.35 (8b) that the board has power to make loans not to exceed $750 in the aggregate to each veteran as that word is defined in sec. 45.35 (5a) for the purposes of (a) the education of such veteran, (b) aiding or assisting such veteran in the purchase of (1)
real estate, (2) personal property, (3) a business. The power to make a loan for the purpose of aiding or assisting the veteran to purchase real estate or personal property would carry with it power to make a loan to aid or assist a veteran to acquire real or personal property necessary to rehabilitate himself or real property or personal property such as furniture necessary to establish a business. The foregoing enumeration is given for the purpose of answering your question and is not intended to be exclusive. The board is also given power to make loans to veterans for the purpose of their rehabilitation. This, of course, covers a very broad field and it is not feasible in this opinion to attempt to discuss all the possible purposes for which a loan might be authorized thereunder.

Your question also inquires as to whether the board is given authority to make loans for the purpose of paying unpaid doctor and hospital bills and other miscellaneous obligations. The board is given no specific power to make loans for this purpose, and any power to do so must be found in that portion of sec. 45.35 (8b) authorizing loans to veterans for “the purposes of their rehabilitation.” The word “rehabilitation” as used in said subsection must in view of the declaration of legislative policy and intent contained in sec. 45.35 (1) be construed to include both physical and economic rehabilitation. We are of the opinion that the board would have power to make a loan to a veteran for the purpose of enabling him to pay unpaid doctor and hospital bills and other miscellaneous obligations if it appears to the board that such loan would aid or promote the economic rehabilitation of the veteran. The question of whether a loan is necessary for such purpose and whether it will have the effect of aiding or promoting the economic rehabilitation of the veteran is one of fact for the board to determine, which depends upon the circumstances surrounding each individual case. Each application for a loan for this purpose must be judged by the board upon its own merits. If the board finds that such a loan will aid or promote the economic rehabilitation of the veteran the board has power to make the loan. If the board finds otherwise a loan for such purpose cannot be made.

WET
Register of Deeds — Constitutional Law — Opinion of attorney general under date of July 23, 1945, construing sec. 59.51 (1) and (11), Stats., as amended by ch. 152, Laws 1945, reaffirmed.

Sec. 59.515 created by ch. 586, Laws 1945, is a curative statute and does not change the duties of the register of deeds under ch. 152, Laws 1945.

Ch. 152, Laws 1945, is a valid law.

Instrument to be recorded may be signed by printed lettering instead of written lettering where signer has adopted such a form of signature and if such signature is plainly printed the instrument may be recorded under sec. 59.51 without having the name typed underneath such signature as is normally done pursuant to sec. 59.51 in the case of written signatures.

October 20, 1945.

O. L. O'Boyle, Corporation Counsel,
County of Milwaukee,
Milwaukee 3, Wisconsin.

You have referred to our opinion of July 23, 1945 to the district attorney of Taylor County, construing ch. 152 of the Laws of 1945, which amended sec. 59.51 (1) and (11) of the statutes relating to the duties of registers of deeds. In this opinion it was concluded among other things that unless the name of the grantor, grantee, witnesses and notary public are plainly printed or typed on a deed or other instrument as required by sec. 59.51 (1), the register of deeds is under no duty to and should refuse to record the same.

Our attention is now directed to ch. 586, Laws 1945, which was enacted after the above opinion was written. While ch. 586 is a correction bill it nevertheless creates several new sections of the statutes, one of which is sec. 59.515, reading as follows:

"Effect of certain omissions in registers' records. The validity and effect of the record of any instrument in the office of register of deeds shall not be lessened or impaired by the fact that the name of any grantor, grantee, witness or notary was not printed or typed on the instrument."

"O. L. O'Boyle, Corporation Counsel, County of Milwaukee, Milwaukee 3, Wisconsin."
You have asked whether the effect of sec. 59.515 is to make optional with registers of deeds the acceptance of instruments in which the names are not typewritten or printed.

Ch. 586 does not repeal ch. 152. It is merely curative in nature although unlike most curative statutes affecting the recording of instruments, such as sec. 235.18 relating to omission of seals, and sec. 235.20 relating to defective execution of deeds, no period of time is prescribed which must elapse before the defect in the recorded instrument is deemed to be cured. Sec. 59.515 was drafted at the request of the joint committee on revisions, repeals and uniform laws, and, while there is nothing in the legislative history of the bill on file in the legislative reference library which throws any light on the reasons for introducing the bill, it is a fair assumption that the request for the curative act arose out of the fact that instruments had been recorded subsequent to the passage of ch. 152 without being in compliance therewith, and that since under sec. 235.49 instruments which have not been recorded as provided by law are void against subsequent purchasers in good faith for valuable consideration, it was deemed desirable to cure such defective recordings as well as others which might occur in the future by appropriate legislation.

You have further raised a question as to the constitutionality of ch. 152 and suggest a number of hypothetical situations where the rights of parties might be adversely affected by reason of the non-recordability of an instrument not in compliance with ch. 152.

Having in mind the long-established policy of this office not to hold any law unconstitutional unless its unconstitutionality is so plain and glaring as to leave no room for reasonable doubt (1912 Op. 'Atty. Gen. 84) we do not consider that any extended discussion of this question is necessary. Undoubtedly the legislature has the authority to prescribe reasonable regulations relating to the recording of instruments. It has been held, for instance, that the legislature
may forbid the recording of a deed unless accompanied by a certificate that the taxes due on the land have been paid, although there is authority to the contrary. See 12 C. J. 947.

Also the application to instruments executed prior to the passage of registration acts requiring the recording of deeds or mortgages within a reasonable time after the passage of such acts does not render such statutes void as impairing vested rights. 12 C. J. 967. If the legislature may prescribe, as it has done, that a deed must be witnessed and acknowledged in order to be recorded we can see no good reason why it may not also provide that the names of the parties, witnesses and notary shall be printed or typewritten. This is certainly a reasonable requirement in the interests of insuring greater legibility of recorded instruments. Moreover, it should be noted in passing that even though a deed is not witnessed or acknowledged so as to be entitled to record it may nevertheless be effective so far as conveying title is concerned. Tenney Tel. Co. v. U. S., 82 F. (2) 788 and Wisconsin cases cited. Doubtless the same would be true in the case of an instrument failing to meet the requirements of ch. 152. Accordingly we do not consider the validity of ch. 152 to be open to serious question.

Lastly you raise a question as to what constitutes "printing" under ch. 152 as distinguished from "writing" and you point out that certain individuals, particularly of the younger generation, have been taught to print their names rather than write them.

Ch. 152 uses the words "plainly printed" or "typewritten." There is no requirement that the names to be "plainly printed" must be printed by any mechanical means. Presumably it may be done by hand providing it is done "plainly."

Sec. 370.01 (19) provides among other things that where the written signature of any person is required by law it shall always be the proper handwriting of such person, or in case he is unable to write, his proper mark or his name written by some person at his request and in his presence. Under sec. 235.01 conveyances are required to be signed by the person from whom the estate or interest is intended to pass. We do not believe, however, that the effect of the foregoing statutes is to preclude the adoption of a signature in
printed form by an individual as his proper signature or handwriting. In *Weston v. Myers*, 33 Ill. 424 the defendant had issued a number of instruments bearing his promise to pay certain sums of money. He printed his name instead of writing it and denied any liability on the instruments. The court pointed out that it made no difference, so far as his liability was concerned, whether he wrote his name in script or Roman letters or whether such letters were made with a pen or with type, or whether he printed, engraved, photographed or lithographed them so long as he adopted and issued the signature as his own.

However, entirely aside from the question of the validity of an instrument in which the signature is made by printed letters instead of written letters, no difficulty is presented so far as recording is concerned. Ch. 152 requires the name of the grantor to be “plainly printed” or typewritten. If the signature is “plainly printed” the instrument meets the call of the statute so far as that particular name is concerned and moreover it apparently would not be necessary to have that name appear twice as is normally done under ch. 152 where the name of the party is written and the same name is typed underneath the written signature.

In view of the foregoing we reaffirm our prior opinion construing ch. 152. There is nothing in ch. 586 which is in conflict therewith, the latter chapter being curative only, and we do not consider ch. 152 to be open to serious question on constitutional grounds or that any difficulties are presented in the recording of an instrument where the signer has adopted for a signature printed lettering instead of written lettering.

WHR
University — Soldiers, Sailors and Marines — Regents of university of Wisconsin are not prohibited by sec. 36.16 (1) (a), Wis. Stats., or otherwise from accepting nonresident tuition from veterans administration on behalf of resident veteran trainees enrolled at university in accordance with conditions specified by veterans administration for payment of such nonresident tuition.

October 20, 1945.

A. W. Peterson, Director,
Business and Finance,
University of Wisconsin.

You state that the regents of the university of Wisconsin have asked you to obtain an attorney general’s opinion as to the proper charge to be made for tuition of resident veterans at the university of Wisconsin paid by the veterans administration under public law No. 346, 78th congress.

We have been furnished with the following information as to the events which have given rise to this request for an opinion:

At about the time public law No. 346 was under consideration in congress a conference was held in the office of the state superintendent of public instruction and was attended by representatives of the university, the state teachers' colleges, the state board of vocational and adult education and the office of the superintendent of public instruction. The question of fees to be charged the veterans administration was discussed and it was the opinion of those present that the educational benefits of the G.I. bill were properly a part of the cost of the war which should be paid by the federal government and not by the states individually. It was agreed, therefore, that the publicly supported institutions in the state of Wisconsin should ask the veterans administration to pay tuition or fees that would approximate the cost of instruction.

About a year ago at a conference of business officers representing various universities in this area it was agreed that the publicly supported institutions should receive more than the regular resident fees because the regular schedule
of fees charged residents does not pay anywhere near the actual cost of instruction. Experience with the army and the navy in operating under contracts that provided reimbursement to the university on an actual cost basis indicated that it was advisable to stay away from any actual cost contract for veterans' education inasmuch as it is almost impossible to determine the actual cost of instruction for veterans because in contrast with the highly specialized programs of the army and navy the veterans will be enrolled as regular university students and will be taking a variety of courses just as ordinary civilian students do.

The administrator of veteran affairs, General Hines, requested a number of persons connected with educational institutions to serve as an advisory committee to the veterans administration in determining operating policies under the G.I. bill. The members of that advisory committee included the civilian members of the joint army-navy board for contract negotiations, which established the policies for the war training courses contracts of the army and navy. That advisory committee recognized the inequity of allowing state supported universities the regular resident tuition only and since the army and navy had made contracts with state universities on the basis of the payment of nonresident tuition in addition to regular fees it was felt that this would be a fair arrangement for the payment of fees and tuition under the provisions of the G.I. bill.

Under date of March 7, 1945 the veterans administration accordingly issued a letter of instructions for the guidance of all concerned on the subject of whether under public laws No. 16 and No. 346, 78th congress, there is authority to pay a charge for instruction of trainees in excess of that paid by other students for identical courses of instruction. Paragraph A, item (2) of that letter reads as follows:

"In the case of state and municipal schools, colleges, or universities, and other approved institutions which have nonresident tuition fees, the charges for such tuition, laboratory, library, health, infirmary and other similar fees which were in effect prior to June 22, 1944, or as may be established after said date if applicable to all classes of students are determined as the customary charges for all veteran trainees except that the charge for the tuition fee of a
full-time veteran trainee shall be not less than $15.00 per month ($45.00 per quarter or $60.00 per semester), provided that the charges are not in conflict with existing laws or other legal requirements. Under this provision a school may not charge to a resident veteran such part of a nonresident tuition fee as will result in a charge in excess of $500 for an ordinary school year."

This paragraph, read in its entirety, definitely contemplates the payment of nonresident tuition fees as the customary charges for all veteran trainees as a general proposition. We understand that some stress is laid on the words "provided that the charges are not in conflict with existing laws or other legal requirements" by the veterans administration as raising some doubt on the question of whether or not nonresident tuition can be paid for resident veteran trainees. It would seem that such words could not have been intended to nullify the effect of the language in the first part of the paragraph determining the nonresident fees to be the customary charges for all veteran trainees subject to the $500 maximum limitation.

If we are to give meaning to the entire paragraph in question and to carry out the apparent intention of those who participated in formulating the program, the applicability of the words "provided that the charges are not in conflict with existing laws or other legal requirements" must be restricted to those cases and those cases only where "existing statutes or other legal requirements" definitely forbid the university from accepting any sum in excess of the resident tuition and fees for resident students. This, then, leads us to an analysis of the Wisconsin statute relating to tuition at the university of Wisconsin.

Sec. 36.16 (1) (a) provides that a Wisconsin resident shall "be entitled to exemption from fees for nonresident tuition, but not from tuition, incidental or other fees in the university." It is to be noted that this does not prohibit the university from accepting more than the resident tuition if the student or someone on his behalf is willing and has offered to pay tuition at nonresident rates. In other words the Wisconsin resident is entitled to the exemption, but he is not forced to claim the exemption, and of course if he claims the exemption he must pay his fees in advance the
same as other students and he would not be entitled to books at cost or to have special records kept in his behalf as is done in the case of veteran trainees. If the statute read that "in no case may a Wisconsin resident waive such exemption and in no case may the university accept more than the resident tuition from or on behalf of a Wisconsin resident" there would be force to the suggestion that nonresident tuition could not be paid or accepted on behalf of Wisconsin veterans.

We understand that the university has been accepting resident veteran trainees upon a nonresident tuition basis as contemplated by the provisions of the veterans administration service letter above mentioned and we conclude that the acceptance of these students upon such basis is not "in conflict with Wisconsin laws or other legal requirements" so as to preclude the university of Wisconsin from receiving tuition from such trainees on a nonresident basis.

WHR

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Insane — Re-examination — Under sec. 51.11 (1), Stats., an insane person may be re-examined in only two places: (1) The county where he resided at the time of his commitment; (2) the county in which he was adjudged insane.

JAMES D. HYER,
District Attorney,
Jefferson, Wisconsin.

You have requested an interpretation of sec. 51.11, Wis. Stats., which deals with re-examination of insane persons. The situation confronting you involves the following facts.

L. D. was committed while an infant to the state public school at Sparta as a neglected and dependent child by the juvenile court for Jefferson county. Later he was transferred to the Southern Wisconsin Colony and Training
School at Union Grove as a mentally deficient person. The legal settlement of L. D. is in Jefferson county. A petition for re-examination has been made and the question is, where the same shall be held.

This question was passed upon in XXXII Op. Atty. Gen. 167 and the conclusion reached that under sec. 51.11 (1), Stats., an inmate of a county asylum could have re-examination of his sanity before the judge of any court of record in the county of his residence or where he was adjudged insane and that for this purpose he did not acquire "residence" by being an inmate of the asylum. The term "residence" means the place of his residence when he was adjudged insane. See also opinion of September 14, 1945, page 273 of this volume.

The provisions governing re-examination of insane persons appeared in the statutes of 1898 as section 587. That section read in part:

"Upon the receipt by the judge of any court of record of the county in which any insane person is confined, or the county from which he was committed, of a petition verified by the oath of any resident of the county wherein such judge holds court or resides."

This section was amended by ch. 163, sec. (1), Laws 1901. As amended the section appears in the 1906 Supp. in part as follows:

"Any person adjudged insane may have a re-examination before the judge of any court of record of the county in which such person resides or in which he was so adjudged to be insane or in which the hospital or asylum for the insane is located in which he is detained."

The section was again amended by ch. 197, Laws 1909, and the following language was dropped:

"or in which the hospital or asylum for the insane is located in which he is detained, if he is so detained."
It is therefore clear that the legislature specifically removed the provision for having a re-examination in the county where the institution was located.

It is our conclusion, therefore, that re-examination of an insane person may be had in only two places: (1) The county where he resided at the time of his commitment, or (2) the county in which he was adjudged insane.

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Soldiers, Sailors and Marines — Certificates of Service — Register of Deeds — Notice of separation of service issued to enlisted personnel by the navy at the time of the issuance of a certificate of discharge is a certificate of service within the meaning of sec. 45.21, Wis. Stats., and may be recorded under that section.

October 30, 1945.

Charles P. Curran,
District Attorney,
Mauston, Wisconsin.

This is in response to your letter of October 19 in which you request our opinion as to whether a document entitled “Notice of Separation from the U. S. Naval Service” may be recorded under the provisions of sec. 45.21, Wis. Stats. Prior to the present session of the legislature the section made provision for recording a certificate of discharge or release of a person serving in the armed forces. By ch. 141, Laws 1945, the provisions of the section were enlarged to refer to persons serving in the armed forces even though they may not have served in time of war. The provisions as amended also permit recording a certificate of service as well as a certificate of discharge or release.

You point out that the purpose of the statute was to preserve certain information which is needed by veterans in
connection with obtaining benefits under state and federal law. The discharge certificate issued by the navy does not contain the necessary information and a recording of the certificate would not accomplish the purpose intended to be accomplished in providing for the recording. The army discharge certificate contains the required information.

The notice of separation of service which is issued to one discharged from the service by the navy, while it is not in form a certificate, is a written document signed by authorized navy officials and, so far as we are advised, is issued at the time of discharge. For all practical purposes it takes the place of the information provided for in the army discharge. Whether the notice of separation of service can be termed a part of the discharge is debatable, but we think that it may properly be called a certificate of service within the meaning of sec. 45.21, as amended. The recording statute should receive a liberal construction to accomplish its purposes and as so construed it will permit of the recording.

JWR

Banking Commission — Building and Loan Associations — Liquidation — The proper procedure to be followed by banking commission in making distribution of funds held by it under sec. 215.33 (13) (a), where there is doubt as to proper claimant or conflicting claims is to require an order of the circuit court authorizing and directing payment as provided by sec. 215.33 (13) (d).

October 31, 1945.

Banking Commission.

Attention E. W. Tamm, Secretary.

In your letter of October 19, 1945 you advise us as follows: That following the order for final distribution in liquidations of building and loan associations there has been deposited in state banks to the credit of the banking com-
mission a sum or sums representing the amount of unclaimed liquidating dividends and funds remaining unpaid in the hands of the special deputy commissioner of banking at or about the time of the final order of distribution, which funds are held in trust for the several shareholders and creditors entitled thereto. Any claimants to said funds are required to make claim therefor to the banking commission. Recently you have had a number of cases where building and loan association shares were issued in the name of two persons, and it appears that one of said persons has died and the survivor makes claim therefor. You state that it is often difficult to determine whether the share was held by said persons as tenants in common or as joint tenants. There is also a question as to rights of other possible claimants in said shares.

You ask that we advise you as to the proper procedure to be followed in such cases, so that the banking commission will be protected in event of doubt as to who is entitled to collect on such shares.

The procedure to be followed is set forth in sec. 215.33 (13) (d), Stats. Said subsection was formerly sec. 215.33 (13) (b), but was renumbered as sec. 215.33 (13) (d) by ch. 438, Laws 1945. It reads in part as follows:

"The banking commission may pay over the moneys so held by it to the persons respectively entitled thereto, upon being furnished satisfactory evidence of their right to the same. In case of doubt or conflicting claims, it may require an order of the circuit court authorizing and directing the payment thereof. * * *"

In view of the foregoing, the banking commission should require that any claimant obtain an order of the circuit court as provided in the above subsection in any case where there are conflicting claims or it is in doubt as to whether such claimant is entitled to collect from said fund or funds. The banking commission will be fully protected in event it makes payment pursuant to such an order, assuming that all statutory requirements which must be followed in order to obtain such an order are fully complied with.

WET.
Building and Loan Associations — Change of Location —
Where proposed location of local building and loan association would be more than a mile from present location provisions of sec. 215.01 (3) (e) are applicable (except in cases enumerated in sec. 215.01 (11) ) so as to make it necessary that need for an additional association in the new locality be shown, before the change in location is approved by the banking commission.

The decision to make an application and the making of an application for change in location under sec. 215.01 (9) may be by appropriate action of board of directors of the association. Amendment of articles of incorporation to show the change in location need not be made until after the banking commission has approved the proposed change.

October 31, 1945.

Banking Commission.
Attention E. W. Tamm, Secretary.

In your letter of October 19, 1945 you submit for our opinion two questions concerning the right of a local building and loan association to change the location of its place of business from one place to another in the same city.

Your questions are as follows:
1. Where the proposed location would be more than a mile from the present location, are the provisions of sec. 215.01 (3) (e), Stats., applicable so as to make it necessary that need for an additional association in the new locality be shown before the change in location is approved by the banking commission?
2. What procedure must be followed by a local building and loan association which proposes to change its location from one place to another in the same city, as provided by sec. 215.01 (9), Stats., prior to the time the matter is referred to the banking commission, as provided in said subsection?

As to question 1: This question must be answered “Yes.” This follows from the plain language of sec. 215.01 (9), which provides as follows:
"Any association, which shall have determined to move its office or place of business to some other location in the same town, village or city, shall make application to the banking commission. In the event that the proposed location is more than one mile from its then location the provisions of this section as to application, location, need, notice, hearing, fees (not to exceed the cost of investigation) and approval of new location are hereby made applicable to and imposed upon such association making application to change the location of its office or place of business."

The foregoing makes applicable, among others, the provisions of sec. 215.01 (3) (e), which provides:

"Applicants must show the need of an additional association in the locality in which they intend to locate."

It should be noted that sec. 215.01 (11) makes sec. 215.01 (9) and (10) inapplicable in certain situations which do not appear to be applicable here.

As to question 2: We understand that the point in question is whether the procedure to effect a proposed change in location under sec. 215.01 (9) should be initiated by the board of directors of the local building and loan association which proposes the change in location, or whether it should be disposed of by amendment of the articles of incorporation. We are of the opinion that the decision to make an application and the making of said application for change in location under sec. 215.01 (9) may be by appropriate action of the board of directors of the association. The first sentence of sec. 215.01 (9) reads as follows:

"Any association, which shall have determined to move its office or place of business to some other location in the same town, village or city, shall make application to the banking commission."

Except as provided otherwise in ch. 215, the general laws relating to corporations are applicable to building and loan associations. Sec. 215.02, Stats. The power to determine to make and to actually make such application is lodged in the board of directors by that portion of sec. 180.13 (1) which reads as follows:
"The property, affairs and business of every such corporation shall be under the care of and be managed by a board of directors."

It is not necessary that any steps be taken to amend the articles of incorporation to reflect the proposed change in location until the proposed change has been approved by the banking commission. It seems to us only logical to withhold action on amending the articles until it is determined whether the commission will approve the proposed change. If the approval is withheld, no amendment is necessary. If the approval is granted, the articles should then be amended as provided by sec. 180.07 to show the new location. The provisions of sec. 180.07 would in our opinion be applicable with respect to amendment of articles of incorporation of building and loan associations. Sec. 215.02 Stats.

WET

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Motor Carriers — Assignment of Common Motor Carrier Certificate — The word "assignment" as used in sec. 194.04 (1) (b), Stats., does not include a mortgage or lease of a common motor carrier certificate.

October 31, 1945.

PUBLIC SERVICE COMMISSION.

Attention Edward T. Kaveny, Secretary.

In your letter of October 16, 1945 you refer to the provisions of sec. 194.25 (2), Stats., which provide as follows:

"No right, privilege, certificate or license held, owned or obtained by any common motor carrier under the provisions of this chapter shall be sold, assigned, leased, transferred or mortgaged either by voluntary or involuntary action, except after a finding by the commission that the same is not against the public interest."
and ask our opinion as to whether a mortgage or a lease of a common motor carrier certificate constitutes an assignment of such certificate within the meaning of that portion of sec. 194.04 (1) (b) which provides:

"* * * Every application for approval of an assignment of a certificate * * *, shall be accompanied by a filing fee of twenty-five dollars. * * *"

We are of the opinion that the word "assignment" as used in sec. 194.04 (1) (b) cannot be construed to include a mortgage or lease of a common motor carrier certificate referred to in sec. 194.25 (2). The latter subsection refers to a sale, assignment, lease, transfer and mortgage. All are words of recognized legal meaning. However, sec. 194.04 (1) (b) refers only to an assignment and omits any reference to the other types of transactions referred to in sec. 194.25 (2), i. e. sale, lease, transfer or mortgage. We regard this omission significant and for that reason are of the opinion that the word "assignment" as used in sec. 194.04 (1) (b) does not include a lease or mortgage of a common motor carrier certificate. It is possible that the word "assignment" as used in sec. 194.04 (1) (b) might include a transfer of such a certificate, but that question is not now before us and we refrain from expressing an opinion thereon.

WET
Juvenile Court — Indians — Under secs. 48.06, 48.07 and 48.11, Stats., state juvenile court has jurisdiction of acts of juvenile delinquency committed off the reservation by tribal Indian children.

November 1, 1945.

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

You state that a number of Indian children under 16 years of age residing on the Lac du Flambeau Indian reservation and maintaining tribal relations have been committing various offenses such as breaking and entering both on and off the reservation. You refer to XXVIII Op. Atty. Gen. 455 and inquire whether the juvenile court has jurisdiction of these children by reason of offenses committed off the reservation.

The opinion to which you refer ruled that although juvenile court proceedings are expressly declared by ch. 48, Stats., not to be criminal proceedings, nevertheless they are sufficiently in the nature of criminal proceedings to make applicable the principles of law relating to exclusive federal jurisdiction over offenses committed by Indians. Such exclusive federal jurisdiction applies only to offenses committed by tribal Indians on Indian reservations. When an Indian is off the reservation, it is well established that he is subject to the criminal laws of the state in which he commits an offense to the same extent as a non-Indian resident or alien would be. Cohen, Handbook of Federal Indian Law (pub. by U. S. Dept. of Interior) p. 119; State v. Johnson, (1933) 212 Wis. 301. See 18 USCA sec. 548.

The opinion in XXVIII Op. Atty. Gen. 455 was directed primarily to the matter of dependency rather than delinquency. It expressly refers to “actions of an Indian on the reservation,” and is impliedly limited thereto. You are therefore advised that the juvenile courts have jurisdiction under secs. 48.06, 48.07 and 48.11 of acts of juvenile delinquency committed by tribal Indians not on the reservation. Any other rule would give rise to an intolerable situation
where no court could control or prevent crimes and depredations committed by juvenile Indians off the reservations.

WAP

November 5, 1945.

WALTER F. KAYE,
District Attorney Pro Tem,
Rhinelander, Wisconsin.

You submit for our opinion a question concerning the effect of changes in sec. 77.13, Stats., made by ch. 396, Laws 1945, which alter the procedure and conditions under which lands registered by a county as forest crop lands can be withdrawn as such.

You advise that when county owned forest crop lands are withdrawn for private sale the changes in sec. 77.13 made by ch. 396, Laws 1945, might be construed to require that there be repaid to the state all moneys previously advanced in the form of contributions from the state and whereas under the law the town treasurer has been required to distribute any such contributions received from the state in the proportion of 20 per cent to the county, 40 per cent to the town and 40 per cent to the various school districts, the following question arises:

"When the county withdraws such land from registration as county forest crop land for private sale and repays to the state all contributions previously made by the state with respect to said lands, is the county, which has received only 20 per cent of such contribution entitled to receive from the
towns and school districts the 80 per cent which they have received so as to enable the county to come out even after it has reimbursed the state?"

Your question is based on the assumption that ch. 396, Laws 1945, is applicable to forest crop lands registered as such prior to its effective date. We direct your attention to sec. 77.03, Stats., which provides in part as follows:

"From and after the filing of the order with the officers mentioned in subsection (3) of section 77.02 the lands described therein shall be 'Forest Crop Lands,' on which taxes shall thereafter be payable only as hereinafter provided. The passage of this act, petition by the owner, the making and recording of the order hereinafter mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing. * * *

A county is an "owner" as that term is used in ch. 77. Sec. 77.13 Stats. This department has previously recognized that when county owned lands are registered, as provided by ch. 77, as forest crop lands, a contract is created between the county and the state by virtue of the provisions of sec. 77.03. Thus, in XXV Op. Atty. Gen. 655 it is said (p. 657):

"We are therefore constrained to rule that a county, by virtue of having entered into a contract with the state under sec. 77.03, is bound by the provisions thereof, * * * ."

In view of the provisions of sec. 77.03 set forth above we must conclude that the changes in sec. 77.13 made by ch. 396, Laws 1945, are not applicable to county owned lands registered as forest crop lands prior to the effective date of said act, except as the conservation commission and the county might otherwise expressly agree in writing.
You advise us that all lands owned by Oneida county registered as forest crop lands were registered more than 2 years ago. It therefore becomes unnecessary to answer your question, as the changes made by ch. 396, Laws 1945, would not apply to such lands.

WET

Poor Relief — Old-age Assistance — Counties — Public Welfare Department — Sec. 49.26 (10) as amended by ch. 588, Laws 1945, leaves to the discretion of county authorities the question whether tax certificates shall be purchased on property on which the county has an old-age assistance lien. The state welfare department may not require county authorities to purchase such certificates.

November 5, 1945.

STATE DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, Director.

You have asked two questions with respect to the taking of a tax deed by a county on property against which an old-age assistance lien has been filed.

1. Does the county pension department have a duty to check up on unpaid taxes and prevent the loss of old-age assistance lien interests by paying delinquent taxes where the lien interest fairly exceeds such taxes?

2. If the county agency has such a duty, does the state department of public welfare have any means of enforcing such duty by hearings under sec. 49.50 (9), or rules and regulations under sec. 49.50 (2), Stats. 1945 (ch. 585, Laws 1945), or other provisions of law?

Since the enactment of ch. 588 of the Laws of 1945, the statutory provision relating to a county’s powers and duties in that respect is contained in sec. 49.26 (10) as follows:
"The county agency with the consent of the county board may from its appropriation for old-age assistance make and pay for necessary and essential repairs or purchase tax certificates or pay balances due on land contracts so as to enable a recipient of old-age assistance to receive a deed, or pay and cause to be satisfied existing mortgages or any other prior liens on property on which the county has an old-age assistance lien, and such expenditures shall be deducted and returned to the appropriation as a priority in determining the net amount recovered to be shared by the federal, state and county governments under section 49.25."

The language used in the above-quoted section is permissive rather than mandatory in form which, contrasted with the mandatory language in the last sentence of sec. 49.25 requiring the filing of an old-age assistance claim against the estate of a deceased beneficiary and in sec. 49.26 (4) requiring the filing of a certificate of lien against real estate, would appear on the surface to indicate a legislative intent to leave to the discretion of county authorities the determination as to whether the expenditures enumerated in sec. 49.26 (10) should be made. The use of permissive language is not conclusive because it has often been held that permissive language authorizing a public official to take certain action imposes a duty upon him to take such action, particularly where it is for the benefit of third persons so that they have a right to demand its performance. We do not believe in this case that the provision was enacted primarily for the benefit of third persons but rather for the benefit of the county filing the certificate of lien. It is true that the federal and state governments have an interest, in that if the lien is collected they are entitled to a certain percentage of the proceeds. The law does not, however, expressly make either the state or federal government co-owners of the lien prior to its collection nor give them any status with respect to its enforcement, but imposes all duties in connection with its collection, whether discretionary or mandatory, upon the county administrators. The interest of the state and federal governments appears to be not so much to insure collection of the claims on their own behalf as to insure that if collection is effected the county may not retain both the collection and the aid granted. It seems that the legislature intended the substantive provisions, with respect to filing claims
against estates of deceased beneficiaries and filing certificates of lien, to be mandatory, and the procedural provisions, with respect to what may be done for the protection of the lien, to be discretionary.

There are several practical considerations which might have led to such a legislative policy. The payments for the expenditures enumerated in sec. 49.26 (10) must come from an appropriation to be made by the county board for old-age assistance. It is entirely conceivable that if a considerable number of liens have been filed, expenditures for tax certificates could amount to such a substantial sum as to cripple the county’s ability to pay direct aid to aged dependent persons, which is the primary purpose of the law. It is conceivable also that there may frequently arise a difference of opinion as to whether the value of the county’s lien at the time for enforcement, which may be many years after the lien accrues, will be sufficient to warrant expenditures of further sums for its protection. These matters we believe the legislature intended to leave within the discretion of county authorities when it provided that the county agency “may” purchase tax certificates “with the consent of the county board.”

In answer to your first question, therefore, we do not believe that the county pension department is required by law to purchase tax certificates on property on which old-age assistance liens have been filed.

In answer to your second question, we do not believe that the state department of public welfare could impose such a duty by rule. Sec. 49.50 (2) provides that the department may adopt rules “not in conflict with law.” Any rule which would attempt to impose an obligation where a statute granted a discretionary power would be in conflict with law. The state welfare department’s authority under sec. 49.50 (9) of the statutes to insure proper administration by terminating payment of state aid or federal aid “on any grant of old-age assistance * * * which may have been improperly allowed or which is no longer warranted due to altered conditions” would not, generally speaking, be sufficiently broad to enable the department to compel county authorities to take tax deeds. It might be that if the amount of an old-age assistance grant in a particular case had been
fixed on the basis that a certain portion was needed by the beneficiary for payment of taxes, it could be considered that the grant was no longer warranted if the beneficiary failed to pay such taxes and the state might take steps to terminate its aid for the particular case under the provisions of sec. 49.50 (9).

Despite the fact that we do not believe the provisions of sec. 49.26 (10) with respect to purchase of tax certificates are mandatory, it is always true that public officials are required to exercise good faith in the performance of their duties and the exercise of their powers. In any case where an official acts deliberately in bad faith for the purpose of defeating state and federal interests, we believe there would be a remedy. The extent and nature of the remedy, however, would be dependent upon the facts in the specific case and cannot be anticipated.

BL

Vital Statistics — Register of Deeds — Marriage — Filing of Certificate — Under sec. 245.24 (4), Stats., an out-of-state marriage certificate may be filed only with the register of deeds or city health officer of the county or city where one of the parties resided at the time of the marriage.

November 10, 1945.

CARL N. NEUPERT, M. D.,

State Registrar of Vital Statistics,
State Board of Health.

You have enclosed with your letter of inquiry a certified copy of a marriage record of the state of Kentucky showing the marriage of a man resident of Hayward, Wisconsin and a woman resident of Superior, Wisconsin. It appears that this certified copy has been offered for filing with the register of deeds for Milwaukee county under sec. 245.24 (4), Stats. The register of deeds doubts that he has authority to accept it for filing and you inquire as to how the filing of
out-of-state marriage certificates should be handled. Sec. 245.24 (4) was added to the statutes by Laws 1943, ch. 503, sec. 66, and provides as follows:

"When a marriage is entered into outside of this state and either of the parties resides in Wisconsin, they may file their certificate of marriage with the register of deeds or city health officer, and thereafter that certificate shall be filed, forwarded and recorded as though the marriage had occurred in this state."

It will be observed that the foregoing statute does not say that the certificate may be filed with any register of deeds or city health officer, but says that it may be filed with the register of deeds or city health officer. It is apparent that the statute applies only to marriages wherein at least one of the parties was a resident of Wisconsin at the time of the marriage and in view of the use of the definite article "the" in the statute it must be assumed that the register of deeds or city health officer of the county or city of residence of one of the parties is intended.

The certificate which you submitted with your letter is eligible for filing in either Hayward or Superior or with the register of deeds of Sawyer or Douglas county.

WAP

District Attorney — Juvenile Court — District attorney has a duty under sec. 59.47 (1), Stats., to appear in juvenile court proceedings under ch. 48, Stats., if he has notice of such proceedings.

November 16, 1945.

RONALD F. NORTH,
District Attorney,
Chippewa Falls, Wisconsin.

You inquire as to the duty of the district attorney to participate in juvenile court proceedings instituted under ch. 48, Stats. Sec. 59.47 (1), Stats., provides in part as follows:
"The district attorney shall:
"(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party * * *.

You express doubt that the foregoing section applies to a juvenile court case "this proceeding being neither civil nor criminal." In Lueptow v. Schraeder, (1938) 226 Wis. 437, 444, the supreme court said, referring to delinquency proceedings in juvenile court:

"* * * In our view, such a proceeding, strictly speaking, is neither a criminal nor a civil action. It is a special proceeding with certain incidents common to both civil and criminal actions." (Italics supplied.)

It will be observed that the court did not say that the proceeding was "neither civil nor criminal." It said it was not an "action" but a "special proceeding." Under our statutes, court proceedings are either "actions" or "special proceedings." Sec. 260.02. Title XXV, Stats., entitled "Procedure in Civil Actions," is expressly made applicable to special proceedings "unless the context otherwise requires." Sec. 260.01. While special proceedings are not expressly declared to be civil proceedings, they are generally so regarded. Juvenile court cases are therefore probably civil proceedings, though partaking of some of the incidents of criminal actions.

Giving to the court's language its literal interpretation, it would seem to hold that such proceedings are both civil and criminal, rather than neither. As such they would be within the terms of sec. 59.47 (1) on both counts.

But even if it were true that they are neither civil nor criminal proceedings they would still be within the scope of the district attorney's duties. In our opinion, the words "civil or criminal" in sec. 59.47 (1), Stats., were not intended to be words of limitation, but were inserted in the statute by way of amplification, to avoid any possibility that the duties of the district attorney might be considered to be limited to criminal actions. It is doubtful that the legislature anticipated that newly created proceedings might be held to be neither civil nor criminal. In this connection it
should be pointed out that sec. 59.47 (1) is derived from ch. 10, sec. 63, Stats. 1849, and that in its original form it contained the words “civil, or criminal” just as they appear in the present statute (except for the comma). Since the juvenile proceedings have “incidents common to both civil and criminal actions,” they would seem to be well within sec. 59.47 (1).

In VII Op. Atty. Gen. 625, at a time when sec. 59.47 (1) (then numbered sec. 752) applied only to cases in the circuit court, this office stated that the district attorney should appear in juvenile court proceedings in the county court if the judge requested him to do so or if he was of the opinion that the county might be improperly burdened with expense in such matters. That opinion was based on the general ground that the county is the district attorney’s client and he should see that its interest is properly taken care of and represented in such cases.

In XXV Op. Atty. Gen. 549, 551-552, a general discussion of the duties of the district attorney, this office stated as follows:

“(12) The question is often raised whether, under sec. 59.47, subsec. (1), Stats., it is the duty of the district attorney to appear at various hearings, such as hearings for the determination of insanity, sec. 51.02, appointments of guardians for the mentally incompetent or aged, sec. 49.31 (2), juvenile delinquency hearings, sec. 48.06, matters concerning indigents, sec. 49.11, and similar proceedings.

“(13) In proceedings of this sort the county or state, and often both, are interested. In many of these matters they are interested directly since the financial burden for support may fall on either or both of these governments. Aside from the financial interest there is also the general public interest to insure proper and fair treatment of those persons who have become or may become public charges in whole or in part. And often it is important that the state and county be represented in proceedings which may not be criminal to show why certain persons should be confined to institutions or otherwise cared for as a protection to the rest of the citizens.”

The opinion then quoted from the former opinion in VII Op. Atty. Gen. 625 and set forth the following conclusion:
“(16) From these general statements the following rule is set forth regarding such proceedings: It is the duty of the district attorney to attend to, and represent the state and county in these matters where he is so requested by some officer or official body of the state or county; or if he has notice that such a proceeding is to take place, and he is of the opinion that the interests of the state or county, whether financial or the broader interests of the public welfare, require his attention to the matter, it is his duty to attend thereto, even though there has been no request by state or county officers.” (Page 553)

In *In re Terrill*, (1942) 240 Wis. 53, 58-59, error was assigned because of the participation of the assistant district attorney in a proceeding brought under sec. 51.01 (1), Stats. 1941, for the determination of the mental condition of Alice Terrill, alleged to be feebleminded. The court held the contention was without merit. After quoting sec. 59.47 (1), Stats., the court said, “Both the state and the county are interested in these proceedings.” Thereafter the court quoted with approval paragraph number (13) in XXV Op. Atty. Gen. 549 above quoted.

In *Lueptow v. Schraeder*, (1938) 226 Wis. 487, 444 the court said, “The [juvenile court] proceeding is quite analogous to an insanity or lunacy proceeding which too is a special proceeding.”

It is hardly necessary to cite authority for the proposition that the state has an interest in all juvenile court proceedings. It is frequently named as a party in the title of the proceedings. See *Harry v. State*, (1944) 246 Wis. 69. If the state and the county are so interested in insanity hearings that it is the duty of the district attorney to appear therein, as held in *In re Terrill*, (1942) 240 Wis. 53, it is even clearer that the state and county have a like interest in juvenile court proceedings. It is therefore the duty of the district attorney to participate in such proceedings if he has notice that they are pending. The extent of his participation may be left to his good judgment, depending on the circumstances of each case.

WAP
Intoxicating Liquors — Licenses and Permits — Towns — Residence — For the purpose of determining the number of inhabitants as a basis for issuing liquor licenses under sec. 176.05 (21) (a), Stats., inmates of charitable and penal institutions shall not be counted irrespective of whether such institution is located in a city, village or town.

November 19, 1945.

RICHARD F. GAFFNEY,

District Attorney Pro Tem,

Neillsville, Wisconsin.

You have requested an interpretation of sec. 176.05 (21) (a), Wisconsin statutes. The facts confronting you are as follows:

The Clark county hospital for the mentally ill is located in the town of Hoard. The population of the town is approximately 800. This institution has approximately 400 inmates. There are now two taverns in the town and your question is whether another tavern license may be issued by including in the population the inmates of the institution.

The statute in question reads in part:

“(21) (a) No governing body of any town, village or city shall issue more than one retail ‘Class B’ liquor license for each five hundred inhabitants or fraction thereof, * * * Inmates of charitable and penal institutions shall not be considered as inhabitants of cities or villages for the purposes of this subsection.”

The last sentence quoted above provides that inmates of charitable and penal institutions shall not be counted as inhabitants of cities or villages. You have concluded that since towns are not included in this enumeration the inhabitants of the charitable institution if it is located in the town may be considered when computing population for the purpose of issuing liquor licenses.

It is our opinion that under no circumstances shall inmates of penal and charitable institutions be considered. The last sentence of the subsection quoted in part is merely declaratory of the law in this state and hence is really nothing more than surplusage.
The statutes define "inhabitant" as "resident." See sec. 370.01 (6) which provides that "the word 'inhabitant' shall be construed to mean a resident in the particular locality in reference to which that word is used." In order to establish a residence, two factors are necessary: (1) Physical presence; (2) intention. The element of freedom of choice is of course, clearly present. Obviously an inmate of an institution who has been committed there has exercised no choice in selecting such a place as his residence. It is clear that no inmate of the Clark county hospital who has been committed there by court order could possibly be considered as a resident of the town of Hoard. Likewise, any patient in the hospital who came there voluntarily for treatment would be there for a temporary purpose only, and, therefore, could not be considered a resident of the town of Hoard.

It is our conclusion therefore that inmates of charitable and penal institutions are not to be considered as inhabitants whether such institution is located in a city, village or town.

Prisons and Prisoners — Wisconsin Home for Women — Public Welfare Department — Persons sentenced to the Wisconsin home for women pursuant to sec. 54.03 (1) of the statutes may be released before the end of their term only by pardon or by parole, although parolees may later be discharged by the state department of public welfare with the approval of the governor. Persons sentenced to the Wisconsin home for women pursuant to sec. 54.03 (3) may be released by discharge by the state department of public welfare as well as by parole or pardon.

November 19, 1945.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, Director.

You have asked to whom discharges from the Wisconsin home for women should be referred since the creation of that institution by consolidation of the Wisconsin prison for
women and the Wisconsin industrial home for women by ch. 343, Laws 1945.

You have referred to sec. 54.03 (2). The terms of this section, however, are not applicable to inmates of any institution but the Wisconsin state reformatory.

Under sec. 54.03 (1), amended by ch. 343, Laws 1945, it is provided that the sentences to the state reformatory and the home for women shall have the force and effect of a sentence for the maximum term "subject to the power of actual release from confinement by parole by the state department of public welfare or by pardon as provided by law." There is a variance between the wording of this provision and that of sec. 359.05 relating to sentences in state prison, in that the latter provides that the sentence shall have the force and effect of the sentence of the maximum term "subject to the power of actual release from confinement by the state department of public welfare or actual discharge of the governor upon recommendation of the state department of public welfare or by pardon as provided by law." Since sec. 54.03 (1) as amended by ch. 343, Laws 1945, follows generally the form of sec. 359.05, the omission from sec. 54.03 (1) of the underlined words above quoted from sec. 359.05 must have been intended to have some significance. If that omission is given any significance, it would follow that authority to discharge an inmate from the Wisconsin home for women does not exist except as it may be given by some other provision of statutes.

Sec. 54.03 (3) as amended by ch. 343, Laws 1945, reads:

"In lieu of the penalty provided by statute, or city or village ordinance, under which said offender is tried, the court may commit any female person except those convicted of murder in the first or second degree to the home for women for a general or indeterminate term, which term shall not exceed 5 years in any case, subject to the power of release from actual confinement, by parole or absolute discharge by the state department of public welfare or by pardon, as provided by law."

The above-quoted provision is authority for discharge of persons committed under that section by the state department of public welfare without reference to the governor or
Opinions of the Attorney General

any other official. It does not, however, supply such authority with respect to persons sentenced under sec. 54.03 (1).

Sec. 54.03 (1) in its present form specifically provides that a sentence thereunder shall be subject to the power of the state department of public welfare to release upon parole. Under sec. 57.06 (1) (b) the state department of public welfare may with the approval of the governor discharge a prisoner paroled from the "prison for women." Sec. 57.06 (1) (b) was in existence prior to the enactment of ch. 343, Laws 1945, and was not changed by the latter so as to refer to the Wisconsin home for women rather than the prison for women. We believe, however, the term "prison for women" as used in sec. 57.06 may be construed generically and that the section was intended to apply to the institution functioning as the place of imprisonment for women regardless of the change in its specific designation.

It is our opinion, therefore, that persons sentenced to the Wisconsin home for women pursuant to sec. 54.03 (1) may be released prior to the end of their terms only by parole or pardon. If after release upon parole the state department of public welfare is satisfied from the conduct of the parolees that discharge is desirable, the discharge may be effected with the approval of the governor.

BL
Counties — Taxation — Surpluses — Wisconsin counties have no authority to tax for the purpose of accumulating surpluses otherwise than as provided in section 59.08 (53) of the statutes of 1945.

Surpluses remaining in the county treasury at the end of a year must be applied toward reduction of the ensuing tax levy, except as to funds provided pursuant to section 59.08 (53).

The property tax levied for any year must be in substantially the same amount as that shown in the budget to be required to meet proposed expenditures.

It is not within a county's power to include in a budget an appropriation to create a surplus by the device of loose or false designation of purposes.

November 19, 1945.

LYMAN K. ARNOLD,
District Attorney,
Elkhorn, Wisconsin.

You have asked several questions relating to the levy of county taxes with respect to counties operating under the budget law and have given your opinion concerning the proper answers. Your conclusions seem to us sound and your reasoning convincing. We shall, therefore, direct this opinion primarily to supplying such additional authorities as we have been able to discover to support your conclusions.

Question 1: Are counties in Wisconsin empowered to accumulate surpluses, exclusive of ch. 418, Laws 1945, creating sec. 59.08 (53), which authorizes a levy limited in amount and use, in 1945?

You have indicated that you believe the answer is negative, with which we agree.

It is stated in State v. Peal, 13 P. (2d) 302, 305, 136 Kan. 136:

"* * * it may be fairly implied, without express language, that it was the purpose and intent of the legislature to limit the power to the levying of such taxes only as may,
in the judgment of the board of county commissioners, be sufficient to pay the charges and expenses of the county government for the ensuing taxing year.

"It may be stated at the outset that the power to levy taxes was never intended for the purpose of accumulating funds for the remote future, or for contingencies which may never occur, or for the purpose of enriching the public treasury. The unnecessary accumulation of money in the public treasury is unjust to the taxpayers "

The Illinois Supreme Court said in *People v. 110 S. Dearborn St. Bldg. Corp.*, 372 Ill. 459, 24 N. E. (2d) 373, 375:

"* * * The proposition that taxing bodies should not establish a rate which would result in unnecessary accumulation of public funds is thoroughly established * * *"

See, also, *People ex rel. Leaf v. Roth*, 389 Ill. 287, 59 N. E. (2d) 643, 645 where it was said:

"The law is well settled that questions as to what projects may be erected and the amount to be raised for such purposes are committed to the discretion of the governing body of the municipality but it is not authorized to make levies to accumulate a fund for some project to be developed at some indefinite future time. * * * Levies for such indefinite purposes are condemned for the reason that the unnecessary accumulation of money in the public treasury is unjust to the people, in that it deprives them of the use of their money for a period of time, and, in that the accumulation of money in excess of needs, furnishes a temptation to those in charge to expend public funds recklessly and more than is needed."

In *Grubb v. Smiley*, 142 Okla. 19, 285 P. 38, 43, the court said:

"* * * a tax levy in excess of an amount necessary to produce the funds that are required is illegal and void. * * *"

Another statement of the rule appears in *State ex rel. v. St. Louis & San Francisco Railroad Co.*, 321 Mo. 35, 10 S. W. (2d) 918, 922 where the court in discussing *State ex rel. Johnson v. Bank*, 279 Mo. 228, 213 S. W. 815, said:
"The ruling was that exactions of taxes in advance of any needs of the government was condemned by sound public policy and violative of fundamental rights guaranteed by the organic law. * * *

Question 2. The municipal budget law, sec. 65.90 (as amended by chs. 88 and 418, Laws 1945), does not specifically provide that all funds on hand must be included in the budget (exclusive of .5 mill on assessed valuation per year, which does not enter into the surplus picture until the end of 1946), and thereby automatically enter into the calculation of county property tax levies. Despite this fact, must these funds on hand, by implication, be included in the 1946 budget, and be deducted in full from the amount of money to be raised by property taxes and set forth in this manner on the budget form?

It would seem to follow as a necessary corollary of the rule that it is contrary to public policy to permit taxation for the purpose of accumulating surpluses, that any surplus remaining in the public treasury at the end of a year must be utilized for reduction in the ensuing tax levy. If that were not so, it would be possible to render the rule against accumulation meaningless in practice.

The majority of cases we have found on this question support your opinion that surpluses existing at the end of the year must be utilized as assets in the budget for the following year so as to reduce the tax rate.

In People ex rel. Nash v. Westminster Building Corp., 361 Ill. 153, 197 N. E. 573, 576, the court said:

"* * * In levying taxes to meet the requirements of expenditures the amount of money on hand and in the process of collection should be considered. The unnecessary accumulation of money in the public treasury is unjust to the people, and it is against the policy of the law to raise taxes faster than they are likely to be needed * * *"

Likewise in Stuart Arms Co. v. City and County of San Francisco, 203 Cal. 150, 263 P. 218, 219, the following statement appears:

"* * * The presumption would be that the moneys collected for a definite fiscal year have been expended in
payment of municipal demands which accrued during the year for which the fund was provided. If there was an excess the presumption is that it was carried over into the next year and entered into the computation of the fixing of the rate for said following year. No presumption of irregularity or failure to perform official duty may be indulged.

The Oklahoma courts have held that this rule applies with respect to surpluses in a municipal water utility fund, without any express command of statute. See In re Bliss, 142 Okla. 1, 285 P. 73, 78, where the following appears:

"* * * If the municipal officers elect to handle the water plant separate and apart from the current expense fund and that plant produces a net surplus or balance, the taxpayers of the municipality are entitled to have that net surplus or balance considered in making the levy for current expense or for the sinking fund to the end that the necessary tax levies may be reduced. We have no sympathy with the contention here made that a municipality may carry a net balance in any department and refuse to apply that net balance to the reduction of the necessary tax levies. The operation of such a plan could result in the accumulation of an immense amount of money belonging to the taxpayers without the reduction of the tax upon their property. Such a plan is contrary to the principles of our government. * * * In any event, the surplus or balance on hand at the end of the fiscal year must be considered as a resource in determining the amount of money to be raised by ad valorem taxation."

We have discovered only one case in which a contrary rule was followed, and that we do not consider as authority under the Wisconsin statutes for the reason that the court there indicated that the statutes clearly provided that a surplus need not be applied to reduce a levy. See In re City Affairs Committee of Jersey City, 30 A. (2d) 581, 129 N. J. L. 589.

We find no statute in Wisconsin authorizing the accumulation or retention of surpluses. Since counties' powers with respect to taxation are not inherent, but are derived from statute, the absence of statutory authorization is as effective a prohibition as express words.
Question 3: Must the property tax actually levied be the same amount that is arrived at in the budget?

You have indicated that you believe the answer is affirmative. We agree, but would modify your conclusion slightly by stating that the tax actually levied must be substantially the same amount as is arrived at in the budget.

As a practical matter it is probably mathematically impossible to fix a rate which will produce to the penny the amount designated in the budget as necessary for the year's expenditures. The following rule in Rogge v. Petroleum County, 80 P. (2d) 380 (Mont.) seems to be followed by the majority of courts:

"Of course, it does not follow that the county commissioners have no discretion in determining the rate of taxation which, in their judgment, is necessary to produce the required revenue needed for any fiscal year. In other words, they are not obliged to do the impossible, that is, levy such a rate of taxation that will produce exactly enough money for the various needs of the county, and no more.

"The test usually applied in determining whether a levy is excessive, is whether it is so grossly excessive as to constitute a constructive fraud upon the taxpayers. State ex rel. Johnson v. St. Louis-San Francisco Ry. Co., 315 Mo. 430, 286 S. W. 360; People ex rel. Browne v. Chicago & E. I. Ry. Co., 306 Ill. 402, 138 N. E. 127." (page 381)

In Southern Service Co. v. Los Angeles County, (Cal.) 82 P. (2d) 397, 402-403, it was said:

"* * * It is of course true that no formula can be applied to produce the exact estimate to the penny. Even with a rate fixed in terms of four decimal places, there is usually a slight excess, and this is allowable. But certainly there is no justification for so enlarging the rate by fixing it in even terms of the specified unit of value without including fractions, that a material and unreasonable surplus is produced. This court, in the case of Otis v. Los Angeles County, 9 Cal. 2d 366, 70 P. 2d 633, said (p. 637) : 'It seems clear that after the valuations are fixed, and the sources of income and the amounts thereof are known, and after the board determines the amount to be spent, the fixing of the tax rate involves no discretion at all. After all the factors are known, the fixing of the rate is merely mathematical calculation. The board has no "legislative" or other kind of
discretion to make this calculation other than the science of mathematics dictates. Nor has it “discretion” to make a mathematical error. Nor has it power to raise by taxation materially more than is required for expenditures except as permitted by law. It is true that any tax rate, made up as it is of various items each assessed separately, and expressed in a rate of four decimal places, will not produce exactly the amount of all the appropriations. There is usually a slight excess—but that is made necessary because of the limitations of the formula applied, and to the extent of that excess the levy is valid.’

"It would seem that under the statute the rate, whether expressed in terms of even cents, or carried to three, four, five or more decimal places, will result in a valid levy if the application of that rate will produce approximately the budget requirement, with no more than a slight excess allowable to cover the limitations of the formula. * * * But the rate will be held to result in an invalid levy if its application will produce a material and unreasonable excess over the estimated requirement. What amount constitutes the allowable slight excess, and what amount constitutes a material and unreasonable excess, is always a question of fact for the trial court. * * *"


In State ex rel. v. St. Louis & San Francisco Railroad Co., 321 Mo. 35, 10 S. W. (2d) 918, 922, 923.

"The rule is stated by Cooley, in Section 1031, as follows: 'In fixing the amount or rate, the levying body has considerable discretion. The rate necessary to produce the amount required is largely within the discretion of the levying officers, since it is uncertain what the deficiencies in collection will amount to. But, while local authorities have a reasonable discretion in providing in advance for necessary taxes, the courts may interfere, if the discretion is abused by raising taxes faster than they are needed. A levy for future needs is invalid as excessive only when so excessive as to show a fraudulent purpose in making the levy.' (page 922)

"* * *

"* * * As was said by the Supreme Court of Illinois, what may be a levy so excessive as to constitute an abuse of the discretionary power of the levying body is a question to be determined upon the facts. * * *" (page 923)
In *State v. Peal*, 13 P. (2d) 302, 306, 136 Kan. 136, the following quotation may be found:

"* * * The cost of government is not a fixed charge, nor are the assets out of which taxes are to be raised always uniform. The county commissioners must take into consideration, in making a levy, any change that will be apparent in the needs of a particular fund, the amount of taxes that may be received from miscellaneous sources, and the amount of taxes that may not be paid. It was their responsibility, and they had the authority to determine the amount necessary to maintain the county government, and, in the absence of a clear abuse of this discretionary power, their action cannot be interfered with, unless the amount is so grossly excessive as to show a fraudulent purpose in making the levy. * * *" 

Question 4: Is it within the actual or implied statutory power of a county to include in the budget an appropriation for very generally designated items and thus to perpetuate surpluses?

You have indicated in your opinion that the answer is negative, and we believe you are correct, subject to the qualification that exact foresight is not to be expected of budget-making bodies and the courts would doubtless permit a certain amount of flexibility to allow for the fact that budget making is, at best, a process of estimation.

Sec. 65.90 (2) of the statutes requires that the budget list all proposed expenditures "*for each department or activity during the ensuing year,*" and subsec. (5) provides that the amounts and purposes may be changed only by a two-thirds vote of the entire membership of the governing body.

A grossly excessive estimate of expenditure for any purpose would, we believe, be within the prohibition of the rule against taxation for the purpose of accumulating surpluses. If the actual purpose of taxation is not within the power of the county, it cannot be made so by false recitals.

In *People ex rel. Clark v. B. & O. Southwestern Ry. Co.*, 353 Ill. 492, 187 N. E. 463, 464, the court said:

"* * * A tax levy largely in excess of the amount required for the purpose for which it is made, with the inten-
tion of creating a surplus to be used for another purpose, is not a legal tax levy, even though the rate is within the limit fixed by statute."

See, also, People v. Chicago, St. P. and P. R. Co., 381 Ill. 58, 44 N. E. (2d) 566; People v. Signode Steel Co., 380 Ill. 633, 44 N. E. (2d) 555; and People v. New York Central & St. L. R. Co., 353 Ill. 518, 187 N. E. 443, 444, in all of which cases it was held that the right of a taxpayer to have separately and accurately stated the purpose for which public funds are appropriated is a substantial one which cannot be evaded by levies so insufficient that they do not apprise him of the objects for which the money is to be expended. The Illinois statute involved in the foregoing cases specifically required the tax levy to be itemized in detail. The same requirement appears in the portion of sec. 65.90 (2), above quoted. One of the objects of budget law is to apprise the taxpayer in advance of the purposes for which his tax moneys are to be used. See Dyer v. City of Des Moines, 230 Ia. 1246, 300 N. W. 562, 566, in which it is said:

"* * * The budget law gives to the taxpayer the right to know in advance the amount of money that the city is going to ask to be levied as taxes, the purpose for which the funds are to be expended. * * *"

As previously indicated, however, absolute particularity in determining future needs is impossible. If a general designation of purposes is used in good faith to allow for reasonable contingencies and the amount involved is not large, it seems unlikely that the courts would interfere. See the discussion in Marshall County v. Barkley, 165 Miss. 198, 147 So. 341, 342, which reads:

"The budget law in its general purpose and effect is a wise piece of legislation and has doubtless saved thousands of dollars to the taxpayers in preventing extravagance, waste, and in many cases losses to the counties which would involve criminal offenses. But it must have been as well known and appreciated by the members of the Legislature in enacting the budget law, as it is by every other reasonable person, that it would require a superhuman foresight on the part of members of the boards to say that for all the varied expenses of a county the board could a year in advance esti-
mate with infallible accuracy exactly what would be re-
quired for every item of the numerous outlays which the in-
terests of a sound county government would later require to 
be made. It will be observed that the language of the budget 
chapter is not couched in such rigid terms as to make the 
law a hindrance rather than an aid to good government. 
Appellant county in adopting its budget in September, 1931, 
evidently placed the several items as low as it was thought 
practicable. Appreciating what has above been said that 
the estimates cannot possibly possess the quality of infalli-
bility, and that some small matter here and there would 
probably be underestimated or that unforeseen circum-
stances would surely arise that might interfere with the 
functions of a complete county administration unless some 
allowance or leeway should be provided therefor, the board 
at its said September, 1931, meeting inserted in the budget 
this further item or provision, 'Miscellaneous Administra-
tive Expenses, $2,000,' and the testimony discloses that it 
was the purpose in inserting this provision to take appro-
priate precaution, although small in amount, against just 
such unexpected or subsequently developed contingencies as 
we have above mentioned. The said miscellaneous item was 
small in comparison with the total budget, so small that it 
cannot be for a moment claimed that by means thereof there 
was an evasion of the purposes of the budget law. * * *"

Fish and Game — Counties — A county board is not au-
thorized to pass ordinances prohibiting use of rifles in a 
county where the state conservation commission has estab-
lished open season for hunting deer pursuant to sec. 29.174, 
Stats.

Andrew P. Cotter,
District Attorney,
Montello, Wisconsin.

You have asked for our opinion as to the validity of the 
following ordinance:

"WHEREAS, there is to be an open season for hunting 
deer in Marquette County, and WHEREAS, it has been pro-
posed to allow the use of rifles for deer hunting, and
WHEREAS, the use of rifles would be dangerous to life and property.

"NOW THEREFORE IT IS ORDAINED AS FOLLOWS: It shall be unlawful for any person to discharge any rifle in Marquette County between the dates of November 23, 1945 and December 1, 1945. Any person violating the provisions of this ordinance shall be punished by a fine of not more than $100.00 or by imprisonment in the County Jail for not more than 6 months or by both such fine and imprisonment. It is further ordered that a copy of this ordinance be published in the Central Union and Montello Express immediately and shall be effective upon passage and publication. It is further ordered that a copy of this ordinance be mailed to the Conservation Department at Madison, Wisconsin."

At the outset we wish to refer you to XXXII Op. Atty. Gen. 370, where the conclusion was reached that exclusive authority to regulate hunting and fishing and to establish open or closed seasons for the entire state or for any county or part of a county is vested in the state conservation commission by sec. 29.174, subsections (1) and (2), Stats., but that villages, cities, and Milwaukee county, in furthering the interests of public peace and safety, may adopt ordinances relating to the use of firearms which have the incidental effect of restricting hunting privileges within their boundaries despite the open season therein established by conservation commission order.

The foregoing opinion covers your question also except for the fact that Milwaukee county, which was discussed in the above opinion, has much broader powers than your county by virtue of the provisions of sec. 59.083, Stats.

It is clear that your county is without authority to legislate in the field of firearm regulation whether or not such regulation is designed to circumvent state conservation commission orders regulating hunting. Our supreme court has long held that counties have only such powers as are expressly granted or necessarily implied from the statutes and that if there is a fair and reasonable doubt as to an implied power of a county board it is fatal to its being. Frederick v. Douglas County, 96 Wis., 411; Spaulding v. Wood County, 218 Wis., 224; Dodge County v. Kaiser, 243 Wis., 551; See also 14 Am. Jur., p. 200, sec. 28; 15 C. J., p. 457, sec. 103; 1 Dillon, Mun. Corp. (5th Ed.) p. 67, sec. 37.
We find nothing in the statutes relating to the powers of the county board which either expressly or by implication authorize regulation of the use of firearms. In fact, the implications are all to the contrary so far as hunting is concerned by reason of the delegation of authority to the state conservation commission to regulate hunting.

See also XXVII Op. Atty. Gen. 690 to the effect that a county board may not pass an ordinance prohibiting the sale and use of fireworks within a county.

Without expressing any opinion on the matter here, your attention is invited in closing to a consideration of the question of false arrest or imprisonment as involved in the enforcement of the county ordinance in question.

WHR

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**Public Health — Restaurants — Licenses and Permits**

A tavern in which sandwiches are served to patrons by delivering such sandwiches from a sandwich shop requires a permit under the provisions of ch. 160, Stats. A permit is also required in the event the proprietor of the tavern purchases the sandwiches in wrapped form and resells them.

November 23, 1945.

STATE BOARD OF HEALTH,

Hotel and Restaurant Division.

This is in response to your inquiry of November 19th, in which you desire our opinion as to whether taverns in which sandwiches are served to customers are required to obtain a restaurant license where (a) the proprietor of the tavern orders the sandwiches in wrapped containers and sells them to his customers, or (b) where a sandwich shop fills orders by telephone from such taverns and serves sandwiches to tavern patrons in the tavern.

In our opinion a restaurant permit is required in either case. “Restaurant” is defined by sec. 160.01 (2) Stats. as “any building, room or place wherein meals or lunches are prepared or served or sold to transients or the general pub-
lic, and all places used in connection therewith." Soft drinks, ice cream, milk drinks, ices and confections are excluded from the term "meals or lunches."

A tavern in which sandwiches are sold or served to the patrons is a building in which meals are sold or served to the general public.

This does not mean that every place in which sandwiches are consumed or ordered from a sandwich shop must obtain a restaurant permit. The question depends in any case on whether service is made to the general public at the place of delivery. For instance, if sandwiches are ordered by a person in his office and consumed there one could not say that they were served to the general public in that place. They are clearly served only to the occupant of the office and anyone who joined with him for lunch. The general public is not served in such an office in the sense that any member can call in and order a sandwich served to him.

JWR

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_Dairy, Food and Drugs — Criminal Law — Corporations_ — Corporation violating sec. 97.27, Stats., is subject to a fine and may be prosecuted by information under sec. 359.10.

Individuals responsible for corporation's violation of sec. 97.27 may be prosecuted as principals under sec. 353.05, Stats. 1945, created by ch. 260, Laws 1945.

November 26, 1945.

WALTER F. KAYE,

_District Attorney,

Rhinelander, Wisconsin._

You state that you have been asked to prosecute a manufacturer for violation of sec. 97.27, Stats., by using saccharine in the manufacture of soft drinks. You state that that section does not apply to the officers or agents of the manufacturer and that the manufacturer in this case "is a corporation (which cannot be criminally proceeded against)." You inquire what procedure to follow.
The penalty for violating sec. 97.27 is fixed by sec. 97.72 (4) as follows: "by a fine of not less than $25 nor more than $100, or by imprisonment in the county jail not less than 30 days nor more than 60 days, or by both such fine and imprisonment."

Clearly, violation of sec. 97.27 is a crime. Since it is punishable by fine as well as by imprisonment, the corporation can be prosecuted under sec. 359.10 by indictment or information, and the judgment can be collected as in civil cases, pursuant to sec. 359.11. See IV Op. Atty. Gen. 240 and XXV Op. Atty. Gen. 451. The only time a corporation cannot be prosecuted criminally is when the sole punishment prescribed by law is imprisonment. *State ex rel. Kropf v. Gilbert, (1933) 213 Wis. 196, 212-213, 251 N. W. 478.*

Moreover, notwithstanding that sec. 97.27 on its face applies only to the manufacturer, not to the officers, agents, servants or employes thereof, the latter could nevertheless be prosecuted as principals on the ground they are aiders and abettors. *State ex rel. Kropf v. Gilbert, (1933) 213 Wis. 196, 213, 251 N. W. 478; State v. Maas, (1944) 246 Wis. 159, 16 N. W. (2nd) 406.* (See particularly the concurring opinion of Fowler, J.)

In this connection your attention is invited to sec. 353.05, Stats. 1945, created by ch. 260, Laws 1945, which provides as follows:

> "Every person concerned in the commission of an offense, whether he directly commits the offense or aids or abets in or hires, counsels or otherwise procures its commission, may be indicted or informed against as principal and tried thereon either separately or with others concerned, and may be convicted of and sentenced for any degree of the offense charged or any offense included in the charge, whether the person directly committing the offense has been convicted or acquitted, or convicted of some other degree of the offense or of some other offense based upon the same occurrence, or has not been apprehended or is not amenable to justice or for any other reason has not been tried, or is a corporation not subject to prosecution for the offense. It shall not be deemed a variance if a person indicted or informed against for the commission of an offense shall be proved to have aided or abetted in or hired, counseled or otherwise procured its commission by another, nor shall proof of the guilt or innocence of the person directly com-
mitting the offense be required for the conviction of any other person concerned therein."

You may therefore prosecute the corporation by information as provided in sec. 359.10, and also prosecute the guilty individuals in the usual way.

WAP

_Elections — Primary Notice_ — In publishing the list of candidates as required by sec. 5.08 (4) the respective county clerks are not required to follow any particular order in printing the party designations or headings (under which the title to each office and the names and addresses of the various candidates running as candidates for nomination for such offices under such party designation are listed) but they may print such party designations or headings in such order as each may desire.

November 26, 1945.

_Fred R. Zimmerman,_

*_Secretary of State._*

You have submitted for our opinion a question regarding the form of the published list of candidates at primary elections which each county clerk is required by sec. 5.08 (4), Stats., to publish prior to the primary election, which question is submitted by you because of the enactment of chs. 220 and 267, Laws 1945, which amend secs. 5.13 (1) and 6.23 (2), Stats., respectively. These amendments relate to the order in which party tickets are to be arranged on the primary ballot and to the order in which the party columns for the respective parties are to be printed on the general election ballot. Your question is as follows:

"Must the county clerk’s newspaper publication of the list of candidates, required by section 5.08 (4) of the statutes, list the parties in (1) alphabetical order; (2) the same order as the primary ballots prescribed by section 5.13 (1) as amended by Chapter 220; or (3) any order directed by the county clerk?"
In answering your inquiry reference obviously should first be made to sec. 5.08. This section in effect provides that after nomination papers have been filed as provided in sec. 5.05, the secretary of state shall transmit to each county clerk not less than 28 days before any September primary a certified list of the name, (given and surname) residence and post office address of each person for whom nomination papers have been filed in his office and who is entitled to be voted for at such primary. Said list also is required to contain a designation of the office for which each of said persons is a candidate as well as that of the party or principle he represents. Such list is required to designate the order in which the names of the candidates shall be printed on the primary ballot in each assembly district. The manner of determining the order of printing the names is given in subsecs. (2) and (3). Subsecs. (4) and (5) of sec. 5.08 read as follows:

"(4) Such clerk shall forthwith upon receipt thereof publish under the proper party designation, the title of each office, the names and addresses of all persons for whom nomination papers have been filed, giving the name, including given and surname, and address of each, the date of the primary, the hours during which the polls will be opened, and state that the primary will be held at the regular polling places in each precinct. The caption shall be set in twelve point bold face caps and the body of the notice in eight point type of which the party headings shall be in caps and the names of the several offices in bold face type as set forth in the model form printed in appendix to election laws. The columns shall not exceed two and one-sixth inches in width. The fee for such publication shall be paid for by the square as defined in section 6.82.

"(5) It shall be the duty of the county clerk to publish such notice once each week for two consecutive weeks prior to said primary."

After amendment by ch. 220, Laws 1945, sec. 5.13 (1) (as corrected by ch. 506, Laws 1945) reads as follows:

"At all primaries there shall be an Australian ballot made up of the several party tickets herein provided for, all of which shall be securely fastened together at the bottom and folded and there shall be as many separate tickets as there are parties entitled to participate in said primary election."
The party ticket of the party which had the greatest number of votes cast at the preceding general election for governor shall be the topmost ticket of the ballot, the other party tickets to follow in their order in accordance with the number of votes cast in each respective party at such preceding election for governor. The names of all candidates at the September primary, and the names of all nonpartisan candidates at city primaries, shall be arranged as provided in sections 5.08 and 5.11.”

After amendment by ch. 267, Laws 1945, sec. 6.23 (2) reads as follows:

“The several regular party tickets nominated by conventions or by regularly constituted and authorized committees or primaries shall be printed each in a separate column under the appropriate party designation, the columns to be arranged from left to right, according to rank in obtaining votes at the last preceding general election for governor, that is the party receiving the largest vote will be placed on the left, thence the other parties from left to right according to their rank at such election. To the right hand of the party columns shall be one or more columns for independent nominations.”

After considering the foregoing we are of the opinion that in publishing the list of candidates as required by sec. 5.08 (4) the county clerk is not required to follow any particular order in printing the party designation or headings (under which the title of each office and the names and addresses of the various candidates running for nomination for such offices under such party designation are listed) and that in printing such list the respective county clerks may have the party designation or headings printed in such order as each may desire. We base this on the fact that while sec. 5.08 (4) prescribes with particularity the contents of such list, the size and kind of type to be used, including that for the party headings which are to be in eight point type in caps, and the maximum width of the columns to be used, there is nothing in said subsection or elsewhere relating to the order in which the party headings must be printed. In view of this it is permissible to consider that had the legislature intended that the party headings be printed in any particular order, it would have specifically so provided either in sec. 5.08 (4)
or elsewhere. This is especially true here because in prescribing the form and contents of the notice in sec. 5.08 (4) the legislature did go into detail as to certain other matters. In addition in subsecs. (2) and (3) of sec. 5.08, the legislature prescribes in detail the method of determining the order in which the names of the candidates should be printed upon the primary ballot in each assembly district.

We do not think that in determining the order of printing the party headings in the notice provided for by sec. 5.08 (4) the respective county clerks need follow the method of determining the order in which party tickets are to be assembled on the primary ballots and the order in which the columns for the respective parties are to be printed on the general election ballot adopted by secs. 5.13 (1) and 6.23 (2) as amended by chs. 220, 506 and 267, Laws 1945. To hold otherwise would not only result in applying the language contained in secs. 5.13 (1) and 6.23 (2) to a situation not justified by their context but would also require that there be read into sec. 5.08 (4) something that does not there appear.

WET
Highways and Bridges — Counties — County Highway Commissioner — If a county board or county highway committee by appropriate action taken pursuant to authority granted by sec. 83.01 (7) (b), directs a county highway commissioner to participate in activities of a state association of county highway commissioners in the course of which said commissioner is elected an officer of such association and is required to attend meetings of the board or of the entire association, and makes it a part of his official duties to do so, the county highway commissioner may be reimbursed for his out-of-pocket traveling expenses incurred in attending such meetings, assuming they are reasonable in amount and are necessary and provided that appropriate action is taken by the county board to authorize their reimbursement as provided by sec. 59.15 (3).

November 28, 1945.

E. J. SCHMIEDER,
District Attorney,
Chilton, Wisconsin.

You ask for our opinion on the following question:

The county highway commissioner is elected an officer of the state organization of county highway commissioners and it is necessary for such officer to attend meetings of its board and state meetings of its entire organization. Can the county of his residence reimburse him for his travel expense?

The general rules of law applicable in cases such as that presented by your inquiry have been recently set forth in Dodge County v. Kaiser, 243 Wis. 551.

In your letter you suggest that it might be possible to find authority to pay such travel expense in sec. 83.01 (6), Stats., which provides in effect, among other things, that the salaries, expenses of maintaining an office and "the necessary traveling expenses" of the county highway commissioner, assistants and special highway patrolmen in counties having them may be paid monthly out of the general fund.
after being audited and approved by the county highway committee. However, it is not now necessary to determine the effect of this subsection by reason of the provisions of subsecs. (3) and (4) of sec. 59.15, Stats., which section was repealed and recreated by ch. 559, Laws 1945. Said subsec-
tions read as follows:

“(3) The county board may at any regular or special meeting provide for reimbursement to any elective officer, deputy officer, appointive officer, or employee of any expense out-of-pocket incurred in the discharge of that person's duty as such officer or employee in addition to the salary or compen-
sation for such person, including without limitation because of enumeration, traveling expenses within or without the county or state, and in furtherance of this authority the county board may establish standard allowances for room and meals, the purposes for which such allowances may be made, and determine the reasonableness and necessity for any and all such reimbursements, and also establish in ad-
vance a fair rate of compensation to be paid to the sheriff for the board and care of prisoners held in custody in the county jail at county expense.

“(4) In the event of any conflict between the provisions of this section and any other provisions of the statutes the provisions of this section to the extent of such conflict shall prevail.”

It is evident from the foregoing that the county board may take action to reimburse a county highway commis-
sioner for any out-of-pocket expense incurred by him in the dis-
charge of his duties as county highway commissioner “in-
cluding * * * traveling expenses within or without the county or state,” and in so doing may determine the neces-
sity of the expense and the reasonableness of the amount thereof. Your inquiry therefore resolves itself into a deter-
mination of whether a county highway commissioner is en-
gaged in performing his official duties in acting as an officer of a state organization of county highway commissioners and in attending meetings of its board and state meetings of its entire organization.

The duties of the county highway commissioner are state-
ed in sec. 83.01 (7), Stats. Many are expressly stated. There is nothing in such enumeration from which it could be said that participation in the activities of a state organi-
zation of county highway commissioners, whether as officer or otherwise, is part of the official duties of the county highway commissioner. However, there is a provision in sec. 83.01 (7) (b) which provides in part that:

"He [county highway commissioner] shall perform all duties required of him by the county board and by the county highway committee * * * ."

The legislative history of sec. 83.01 (7) (b) makes it clear that the above should be construed to mean that the county highway commissioner shall perform all duties required of him by the county board or county highway committee. Before the revision made by ch. 334, Laws 1943, sec. 83.01 (7) (b) was sec. 82.04 (2). The latter subsection found its origin in a consolidation and revision of certain sections of the 1921 statutes made by ch. 108, Laws 1923. That portion of sec. 82.04 (2) which contained the language now contained in sec. 83.01 (7) (b) which is quoted above was taken from sec. 1317m-7, Stats. 1921. The latter subsection provided in part that "the county highway commissioner shall perform all duties required of him by the county board, as well as all the duties that may be required of him by the county committee * * * ." The bill (No. 1,S, 1923 Session) which became ch. 108, Laws 1923, was a revisor's bill. The rule of construction is stated in sec. 370.01 (49) which provides:

"A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction. And where the revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent."

The revisor's note at the end of sec. 127 of Bill No. 1,S, 1923 Session, which section consolidated and renumbered certain sections of the 1921 statutes and revised them as sec. 82.04, stated that no substantive change was proposed except with respect to one matter not here material. The result is that the portion of sec. 83.01 (7) (b) previously re-
ferred to must be understood in the sense as it appeared in sec. 1317m-7, Stats. 1921.

We do not think that sec. 83.01 (7) (b) gives a county board or county highway committee unlimited power to require a county highway commissioner to do anything it may direct him to do. However, it must be conceded that sec. 83.01 (7) (b) vests considerable discretion in the board or committee in defining the duties of the county highway commissioner other than those expressly enumerated, and we cannot say that either would be exceeding its authority if either directed a county highway commissioner to participate in the activities of a state association of county highway commissioners in the course of which said commissioner is elected an officer of said association and is required to attend meetings of its board or of the entire association, and made it a part of his duties for him to so do. Participation in the activities of associations of this kind is generally thought to be of value in enabling members thereof to better perform their technical duties.

We therefore are of the opinion that if a county board or county highway committee by appropriate action taken pursuant to authority granted by sec. 83.01 (7) (b), directs a county highway commissioner to participate in the activities of a state association of county highway commissioners in the course of which said commissioner is elected an officer of such association and is required to attend meetings of the board or of the entire association, and makes it a part of his official duties to do so, the county highway commissioner may be reimbursed for his out-of-pocket traveling expenses incurred in attending such meetings, assuming that they are reasonable in amount and are necessary, and provided that appropriate action is taken by the county board to authorize their reimbursement as provided by sec. 59.15 (3).
State — Adjutant General — An arrangement cannot be entered into permitting the village of Camp Douglas to use the sewerage disposal plant or water system at Camp Williams, there being no statute authorizing it.

November 29, 1945.

THE ADJUTANT GENERAL.

You advise us that you have before you an inquiry by a representative of the village of Camp Douglas as to whether it would be possible to enter into some arrangement whereby the village could participate in the use of the sewerage disposal plant and water system located at Camp Williams.

This could be done only if there is a statute which expressly authorizes such an arrangement. Even the use of Camp Williams by the United States for military purposes rests upon an express statute so providing. Sec. 21.04 (2), Stats. The question here is also somewhat analogous to that presented when the city of Madison and Dane county were discussing the possibility of purchasing steam produced in the capitol heat and power plant from the state for the purpose of heating a proposed city hall and court house. It was evidently considered that before this could be done it was necessary to obtain legislation so providing, and at the last session the legislature adopted ch. 62, Laws 1945.

We find no statute which would authorize any arrangement whereby the village of Camp Douglas could participate in the use of the sewerage disposal plant or water system located at Camp Williams. Your inquiry must therefore be answered in the negative.

WET
Constitutional Law — State — Schools and School Districts — Stout Institute — A plan or plans proposed by the board of trustees of the Stout Institute to replace certain dormitories of wood construction located on land owned by the board as trustee for the state, with a fireproof structure, on a self-liquidating basis, would not be lawful under the constitution of this state and existing statutes.

November 29, 1945.

Verne C. Fryklund, President,
The Stout Institute,
Menomonie, Wisconsin.

You inquire in behalf of the board of trustees of the Stout Institute whether it would be lawful for the board to replace certain dormitories of wood construction located on land owned by the board as trustee for the state, with a fireproof structure, on a self-liquidating basis. You advise that it is planned to issue board of trustee bonds or use such other means as would make it possible to construct such a building and pay for it through rental collections.

A plan such as suggested would not be legal under the constitution of this state and the statutes as they now exist. To accomplish what your board desires would require the enactment of a statute comparable to that which appears as sec. 36.06 (6) and (7) under which dormitories and other buildings and structures were built or equipped at the university of Wisconsin. The legality of the various plans adopted at the university under such statute was sustained by the supreme court in Loomis v. Callahan, (1928) 196 Wis. 518. The necessity for such legislation appears from this case and also from an opinion of this department appearing in XI Op. Atty. Gen. 715, which opinion appears to contain the suggestion from which sec. 36.06 (6) and (7) was derived.

Recently the board of regents of normal schools has asked our opinion concerning the legality of certain plans whereby a dormitory could be acquired at the La Crosse state teachers college. Our opinions are dated July 16, 1945 and September 10, 1945 and are published at pages 178 and 260 re-
spectively of this volume. The last plan proposed was held valid in the latter opinion referred to. The plan approved differed essentially from that proposed by your board and the opinion is not helpful in solving your problem.

WET

Appropriations and Expenditures — Public Health — Nurses — Appropriation to committee on nursing education made by sec. 20.43 (3a), Stats., as created by ch. 242, Laws 1945, is available only to promote the professional education of registered graduate nurses in the ways specified in sec. 149.01 (5), Stats., also created by ch. 242, Laws 1945, and may not be used to carry on a counseling and placement service conducted by the Wisconsin State Nurses' Association.

November 29, 1945.

MISS LEILA GIVEN, Director,
Bureau of Nursing Education,
State Board of Health.

You have inquired whether funds appropriated under sec. 20.43 (3a), Stats., created by ch. 242, Laws 1945, may be used by the committee on nursing education to finance a counseling and placement service which is sponsored by the Wisconsin State Nurses' Association.

The appropriation made by sec. 20.43 (3a) is to be used only as provided in sec. 149.01 (5) also created by ch. 242, Laws 1945, and which reads:

"The committee in its discretion may promote the professional education of graduate nurses registered in Wisconsin, through creation of scholarships available to such graduate nurses, by foundation of professorships in nursing courses in Wisconsin colleges and universities, by conducting educational meetings, seminars, lectures, demonstrations and the like open to registered nurses, by publica-
tion and dissemination of technical information, or by other similar activities designed to improve the standards of the nursing profession in this state. For the execution of its functions under this subsection the committee may recommend the use of such portion of the fund created by section 20.43 (3a) as it deems necessary."

We understand that in general the functions to be accomplished by the counseling and placement service consist of listing and compiling credentials of nurses applying for placement, the giving of information to nurses concerning available positions, the supplying of information concerning the placement and counseling service to schools of nursing, the collecting of records on requests for nurses, the serving as a center for locating nurses in time of disaster, and the development of a public relations program as well as the compiling of information of value in the carrying on of the foregoing program.

This program appears to be quite separate and distinct from the purposes of sec. 149.01 (5) which is to promote the professional education of graduate nurses in Wisconsin by the various means specified in that statute.

Having in mind the well-established principle that appropriation statutes are to be strictly construed and having in mind further that it is proposed to have the funds in question used by a private organization rather than by the committee on nursing education to which the appropriation is made, we are constrained to rule that the funds appropriated by sec. 20.43 (3a) are not available for the purposes indicated in your inquiry.

WHR
Automobiles and Motor Vehicles — Registration — Corporations — Motor vehicles must be registered in the name of the lawful owner. Where a corporation does business under a combined corporate name, the one corporation owning and operating the second corporation, the vehicles of the corporation under whose name business is transacted must be registered in the latter's name. On the other hand, if owned by the successor corporation, the vehicles may be registered in the combined name. Disclosure of true identity of successor corporation when combined name is used does not violate sec. 343.722, Stats.

November 30, 1945.

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

You request our opinion as to the legality of registering motor vehicles in the name of an existing corporation, either organized under Wisconsin law or licensed to do business in this state, where such corporation does business under another name, and desires to show both its own and such other name in the registration. The example you cite is the application for registration of vehicles owned either by the Borden Company, or by some corporation owned and operated by the Borden Company.

In recent years it appears that your department has registered vehicles at the request of the Borden Company under the following name: "Borden Company, d/b/a Galloway West Co."

You indicate that in 1940 the Galloway West Co. transferred these vehicles to the Borden Company, and that the assignment was to the Borden Company, d/b/a Galloway West Co. The Borden Company is a New Jersey corporation, licensed to do business in Wisconsin; the Galloway West Co. is a Wisconsin corporation. The Borden Company now seeks to register such vehicles under the name "Borden Company, d/b/a Sessions Ice Cream Company." You suggest that the proper method of handling this would be to show the Borden Company as owner and the Galloway West Co.
as the lessee, inasmuch as they are two separate corporations. You ask whether it is permissible for the Borden Company to register vehicles under names as given above where the Borden Company operates some other corporation. The facts as you have stated them involve two separate and distinct chapters of the statutes. Sec. 85.01 (2) requires that application for registration of a motor vehicle shall be made by the owner in the form prescribed by the motor vehicle department. The section mentioned concludes with the following sentence: "If the motor vehicle department has doubts about the facts stated in the application it may require such further evidence of ownership as it may consider necessary."

Subsec. (3) of the same statute prescribes the contents of the title and registration certificate. This, too, indicates that they shall contain the name, place of residence, and address of the owner. Once you have ascertained to your satisfaction the true identity of the owner of a motor vehicle sought to be registered, the vehicle must be registered in the name of such owner. What that owner's name is or how he chooses to describe his method of doing business is another question. Ordinarily, business is conducted in the names of individuals, or individuals associated together in a partnership, or by a corporate entity. If an individual does business under a firm name or style where his sole proprietorship is clearly made known by the name of his business, you encounter no difficulty. Corporations ordinarily operate under the name contained in their articles of organization and charter. There are specific statutory provisions governing the change of corporate name.

Sec. 343.722 provides as follows with respect to the use of a corporate name:

"Penalty for unlawful use of corporate name. Any person or persons who shall engage in or advertise any mercantile or commission business under a name purporting or appearing to be a corporate name, with intent thereby to obtain credit, and which name does not disclose the real name or names of one or more of the persons engaged in said business, without first filing in the office of the register of deeds of the county wherein his or their principal place of business may be, a verified statement disclosing and showing the
name or names of all persons using such name, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment in the county jail not more than one year. The register of deeds shall be entitled to a fee of $1 for each such filing."

Sec. 343.723 provides as follows:

"Use of, evidence of obtaining credit. The adoption of and advertising of any business under any name in its form corporate and not disclosing the name of one or more persons connected with said business, shall be legal evidence that such name is or was adopted or used for the purpose of obtaining credit."

Testing the registrations sought to be made by the Borden Company by the foregoing statutes, it would appear that the use of the name "Borden Company, d/b/a" is a full and complete disclosure of the real name of the person engaged in business as "Galloway West Co." or "Sessions Ice Cream Company." The thought conveyed by the use of a name such as these suggests that the Borden Company is the successor of the firm under whose name it is doing business. There is no attempt to mislead anyone as to who the real owner is and from the standpoint of the criminal statute we see no objection to the practice.

Undoubtedly the names "Galloway West Co." or "Sessions Ice Cream Company" have good will value and the Borden Company seeks to perpetuate such good will by retaining the name of the local corporation, under whose name it purports to do business. This is a worthy motive and perfectly legal when confined to the limited state of facts on which this opinion is based. It is possible that the use of two corporate names combined in this manner may lead to some confusion and contrary contentions where the identity of the corporation obligating itself on some legal instrument is questioned. That is not involved here and our opinion does not presume to anticipate such question.

It has been held in an opinion of this department, XX Op. Atty. Gen. 830, that a foreign corporation licensed to do business in Wisconsin may use a trade name other than the
name of the corporation. Cases and text matter cited in that opinion amply support the conclusion. See also 6 Fletcher, Cyclopedia Corporations (Perm. Ed.), pp. 87-91, § 2442.

There is another phase of the question, however, that may affect your decision as to how to register these vehicles. If the Galloway West Co. is still doing business as a Wisconsin corporation, under the ownership and direction of the Borden Company, that is to say the Borden Company owns and votes its stock, it is entirely probable that the vehicles in question are still owned by the Galloway West Co. The ownership of all of the stock of a corporation by one or more individuals or other corporations, does not give the owners of stock the title to the corporate property. It would seem advisable that you communicate with the Borden Company and ascertain whether the ownership of the vehicles which they seek to register is in the Borden Company by virtue of a bill of sale or other adequate transfer of title, or whether such ownership remains in the corporation being operated by the Borden Company. If the latter is the fact then the vehicles must be registered under sec. 85.01 (3) in the name of the real owner. Your letter requesting this opinion does not adequately disclose such facts.

SGH

Insurance — Fire Department Dues — Premiums upon which fire department dues are payable under secs. 200.17 (2) and 201.59 (1) (a), Stats., include all assessments levied during the year.

November 30, 1945.

Morvin Duel,
Commissioner of Insurance.

You have asked our opinion as to the meaning of the word "premiums" as used in secs. 200.17 (2) and 201.59 (1) (a), Stats., in providing the base upon which fire department dues are computed. The question is whether such dues
are to be computed merely upon the total advance premiums of the prior year or upon the total of all considerations passing from the insured to the insurer for the insurance which would include all assessments and policy fees as well as advance premiums.

Sec. 200.17 (2), Stats., provides:

“(2) Every company effecting fire insurance in any city, village or town entitled to any fire department dues shall, before the first day of March in each year, file with the commissioner a statement, showing the amount of premiums upon said insurance, and pay to him the total amount of such fire department dues. Return premiums, as defined in section 76.30, may be deducted in determining the premium on which the fire department dues are computed.”

Sec. 201.59 (1) (a), Stats., provides:

“(1) (a) Every city, village or town maintaining a fire department, as herein provided, shall be entitled, for the support thereof, to two per centum upon the amount of all premiums which, during the preceding calendar year, shall have been received by, or shall have been agreed to be paid to any company, for insurance, including property exempt from taxation, against loss by fire in such city, village or town.”

Over the years up to 1941 your department consistently construed and applied these provisions as including assessments as well as advance premiums in the base for computation of fire department dues. It appears that in 1941 it was urged that these sections should be construed as calling for fire department dues computed only upon advance premiums. This was upon the theory that the word “premiums” is commonly used and understood as meaning advance premiums and not including assessments, and therefore as these sections contain only the word “premiums” they intend that the base is composed only of the advance premium and does not include assessments. This view was allowed to prevail and a change was made so that starting with fire department dues collected in 1942 on 1941 business you have since computed them upon advance premiums exclusively.
Presently you question the correctness of this change in view of the decision in *Duel v. State Farm Mutual Auto Ins. Co.*, (1942) 240 Wis. 161, wherein it was held that "premium" as used in secs. 201.18 (1) and 204.27, Stats., in reference to unearned premium reserves means and includes the total consideration paid by the insured for the insurance protection.

Further, you note that in administering the provisions of sec. 76.30, Stats., imposing a license fee or tax on insurance companies computed at a percentage "on the amount of the gross premiums received" during the preceding year, your department has consistently interpreted and applied that section so that the amounts paid thereunder have been uniformly computed upon a base that includes all assessments as well as all advance premiums.

There does not seem to be any reason for giving the word "premiums" any different meaning in secs. 200.17 (2) and 201.59 (1) (a), Stats., than when used in secs. 76.30 or in secs. 201.18 (1) and 204.27, Stats. Unless there is something indicating to the contrary, a word when used in several statutes should be given the same meaning throughout, and particularly where the statutes in which it appears are related or deal with the same or a closely allied subject.

On the contrary the reference in sec. 200.17 (2) to sec. 76.30 in and of itself furnishes a clear indication that the word "premiums" as used in both is intended to mean the same thing and to be given consistent interpretation. Sec. 200.17 (2) says that the base for computation of fire department dues is "the amount of premiums" less a deduction of return premiums as the latter is defined in sec. 76.30. (It is to be noted that the section reference should be to sec. 76.31 as it originally was subsec. (3) of sec. 76.30 before it was given a separate section number of its own and obviously is the provision intended by this cross reference. See XXI Op. Atty. Gen. 291.) This seems to us to show that the word "premiums" is intended to mean the same in the fire department dues provision as in the provisions respecting the license fee or tax to be paid. This meaning which has been given over the years to the word "premiums" in sec. 76.30, and likewise as given to it in the application of secs. 200.17 (2) and 201.59 (1) (a) prior to 1941, is the
same as given to it in the interpretation of the unearned premium reserve statutes by the decision in *Duel v. State Farm Mutual Auto. Ins. Co.*, supra.

We find nothing in the language used, or in the history of these statutes, that justifies giving the word "premiums" any different meaning in secs. 200.17 (2) and 201.59 (1) (a) from that in these other related statutes. It is therefore our opinion that fire department dues under these sections are to be computed upon the total of all considerations paid by the insureds to the company for insurance which includes all assessments as well as advance premiums less any of the returns specified in sec. 76.31, Stats.

There next arises the question as to what assessments are included in the base. As we view the language in sec. 201.59 (1) (a) there can be but one answer. In contrast to the provisions in sec. 76.30 which says the license fee or tax is "on the amount of the gross premiums received" the language of sec. 201.59 (1) (a) is that fire department dues are "upon the amount of all premiums which * * * shall have been received by, or shall have been agreed to be paid."

Reference to the history of this statute discloses that this particular language has been in it continuously since initially enacted by ch. 56, Laws 1870. An obligation to pay an assessment arises immediately upon its levy because the insured upon taking out the insurance agreed to pay all future assessments. Therefore, as soon as an assessment is made it becomes and is a premium which has been "agreed to be paid." Accordingly, under this language of sec. 201.59 (1) (a) the premiums upon which fire department dues are computed include not just the assessments levied during the year which have been collected but all assessments levied during the year regardless of whether they have been collected or not.

It is therefore concluded that the premiums, upon which fire department dues payable under sec. 200.17 and 201.59 are computed, are the entire amounts that have been paid to or agreed to be paid to the company during the preceding year, which would include all assessments levied during the year.

HHP
Automobiles and Motor Vehicles — Licenses and Permits — Driver's License — Where revocation of operator's license has been stayed pending appeal to supreme court from judgment of conviction for operating under influence of intoxicating liquor upon trial de novo in circuit court (following appeal from inferior court pursuant to justice court practice) and such circuit court judgment is affirmed by supreme court, it is mandatory for motor vehicle department to revoke such operator's unrestricted license for 1 year following receipt of notification of affirmance of judgment by supreme court. Assuming operator's ability to satisfy requirements of sec. 85.08 (25c), Stats., he may petition the judge of the circuit court who convicted him for an order directing issuance of an occupational license.

November 30, 1945.

B. L. Marcus, Commissioner,
Motor Vehicle Department.

You state the following facts as a basis for the opinion requested thereon: One Maurice J. Fitzgerald of Milwaukee was convicted in the superior court of Dane county on a charge of operating a motor vehicle while under the influence of intoxicating liquor in violation of an ordinance of the city of Madison on June 12, 1944. He failed to appear on the return day of the summons, and forfeited bail. Subsequently he moved for a new trial, which was granted. The new trial took place on July 11, 1944, when he was convicted of the offense stated. At the July 11th trial, on defendant's application, your department was ordered to issue a restricted or so-called "occupational" motor vehicle operator's license. Your department complied on July 14, 1944. Mr. Fitzgerald thereupon took an appeal from the superior court judgment of conviction to the circuit court of Dane county. After the appeal was perfected, and on July 21, 1944 the circuit court of Dane county made an order requiring your department to restore defendant-appellant's unrestricted license. Your department complied with this order, and procured the return from licensee of the "occupational" license issued on July 14th. A trial de novo was had in cir-
cuit court on December 7, 1944, the facts being stipulated, and he was again convicted of the same offense and a fine imposed. He thereupon appealed to the supreme court from the judgment of conviction in the circuit court. The circuit court made an order restraining your department from revoking his operator’s license pending the disposition of the appeal. The supreme court affirmed the judgment of conviction of the circuit court on June 15, 1945.

Upon these facts you request an answer to the following questions:

(1) Since more than 1 year has elapsed since the original conviction in superior court, what is your duty in the premises as regards revocation of Mr. Fitzgerald’s motor vehicle operator’s license?

(2) If revocation is mandatory, what is licensee’s status as regards the occupational license ordered issued by the superior court on July 11, 1944 and subsequently surrendered to the department on restoration of his unrestricted license as ordered by the circuit court during pendency of appeal?

In answer to the first question we are of the opinion that you are under the mandatory duty to revoke Mr. Fitzgerald’s motor vehicle operator’s license for a period of 1 year from the time you receive notification of affirmance of the circuit court judgment of conviction by the supreme court. Sec. 85.08 (25), Stats., enumerates the offenses which make mandatory the revocation of a motor vehicle operator’s license, one of which is conviction for “operation of a motor vehicle while under the influence of intoxicating liquor, * * *”

Sec. 85.08 (30), Stats., prescribes the time limitation, and reads as follows:

“No license shall be suspended for a period of more than one year. After revocation the department shall not grant a new license until the expiration of one year after the date of such revocation.”

The superior court conviction of July 11, 1944 became a nullity when the appeal to circuit court was perfected. The conviction to be regarded as the basis for revocation is the
circuit court conviction of December 7, 1944, affirmed by the supreme court on June 15, 1945. The appeal from superior court to circuit court was pursuant to justice court practice, there having been a trial *de novo*. The conviction in superior court was accordingly nullified upon the taking of an appeal to the circuit court. This is true by authority of *State v. Haas*, 52 Wis. 407, 9 N. W. 9, cited with decisions to like effect in XXXIII Op. Atty. Gen. 70. The restoration of licensee's unrestricted license during the pendency of the appeal, therefore, was in accordance with his rights under the circumstances. Your department was prevented from revoking the license in question until you received notification of the result of the circuit court trial. When you were in a position to act upon such notification, the circuit court again restrained you from acting pending disposition of the appeal in supreme court. Having since received such notification respecting affirmance of the circuit court judgment, you may now act.

As to your second question, when licensee's unrestricted license was ordered restored on July 21, 1944, his so-called "occupational" or restricted license became a nullity. This would be true without regard for the order from the circuit court directing its restoration, because of nullification of the superior court conviction by the perfection of the appeal to the circuit court. Since the circuit court did not order issuance of an occupational license at the trial conducted by it, Mr. Fitzgerald's right to an occupational license must be established by meeting the requirements of sec. 85.08 (25c), which provides in part:

"* * * Any operator who was denied an occupational license at the time of his conviction, who has since gained employment requiring him to operate a motor vehicle, may petition the convicting judge or justice for an occupational license."

While it is true that at the time of his conviction, Mr. Fitzgerald was not *denied* an occupational license in the literal sense of the word, he having retained his unrestricted license during pendency of the appeal to the supreme court, we nevertheless deem him eligible to apply to the judge of
the circuit court of Dane county who convicted him on December 7, 1944, for an occupational license if he is able to satisfy the judge that his employment requires him to operate a motor vehicle. Prior to the 1943 amendment to this section, there was no provision for a defendant convicted of operating a motor vehicle while under the influence of intoxicating liquor to procure an occupational license at any time other than the time of trial and conviction. The obvious intent of the statute is to permit an application to be made to the judge whenever, during the revocation year, the defendant can qualify therefor.

SGH

Towns — Elections — Primary — Nomination Papers — Notwithstanding the provisions of ch. 227, Laws 1945, the dates provided for the filing of nomination papers for the 1946 and 1947 spring primary elections by ch. 128, Laws 1945, govern in the conduct of those elections.

December 1, 1945.

ROBERT C. ZIMMERMAN,
Assistant Secretary of State.

In your letter of November 2, 1945 you call our attention to an apparent conflict between the last date fixed for filing nomination papers by candidates for elective town offices in certain towns as provided by sec. 5.27 (4) (a) as amended by ch. 227, Laws 1945, and the dates prescribed for filing nomination papers for the 1946 and 1947 spring primary elections as provided by sec. 11.90 (12) and (16) as created by ch. 128, Laws 1945, and ask us to advise you which statute governs. Ch. 128, Laws 1945, re-enacts and amends sec. 11.90 and in general changes the election laws to facilitate voting by Wisconsin electors in the armed forces at special elections in 1945 and all elections in 1946 and 1947. Among other things ch. 128, Laws 1945, creates sec. 11.90 (12) and (16). These subsections provide in part as follows:
“SPRING PRIMARY AND ELECTION—1946

“11.90 (12) The date of the spring primary election preceding the April election of 1946 shall be February 5, 1946. The dates for the performance of acts in preparation for such primary election are changed as follows:

“1945

** * *

“Dec. 17 (5 p. m.)—Last day for filing nomination papers for spring primary.

** * *”

“SPRING PRIMARY AND ELECTION—1947

“11.90 (16) The date of the spring primary election preceding the April election of 1947 shall be February 4, 1947. The dates for the performance of acts in preparation for such primary election are changed as follows:

“1946

** * *

“Dec. 16 (5 p. m.)—Last day for filing nomination papers for spring primary.

** * *”

The changes made by sec. 11.90 are effective until completion of the election on April 1, 1947 at which time said section expires. Sec. 11.90 (21) as enacted by ch. 128, Laws 1945.

Sec. 5.27 (4) (a) provides in effect that in towns in counties having cities of the first and second class where the electors by referendum vote have affirmatively approved the same or in any town having a population of 2,500 or more where the electors have approved the same by referendum vote or at the town meeting “every candidate for an elective town office shall be nominated at a nonpartisan primary” conducted as prescribed in ch. 5 of the statutes and as more particularly provided in sec. 5.26. Provision is made for giving of notice of primary and the number of electors that must sign nomination papers. Said subsection as amended by ch. 227, Laws 1945, then provides:

“** * * Such nomination papers shall be filed in the office of the town clerk not less than 20 days before the date upon which said primary is to be held and not later than 5 p. m. central standard time on said last day for filing.”
It is apparent that the last day fixed by sec. 5.27 (4) (a) as amended by ch. 227, Laws 1945, for filing nomination papers in the office of town clerk by those seeking nomination as candidates for elective town offices in cases where such candidates must be nominated at a nonpartisan primary as provided in said subsection as amended, is later in point of time than the last date for filing nomination papers for the 1946 and 1947 spring primary, as fixed generally by sec. 11.90 (12) and (16). However, the prior act is special in the sense that it applies to the 1946 and 1947 elections only and was intended to change the dates otherwise provided by the general election laws in matters relating to the holding of elections in order that absentee servicemen might be permitted to participate in elections. If the later act were to be given effect at this time, it would mean that the purpose of the prior act would be in part nullified. We do not believe there was any intent to nullify any provision of the prior act. There is no specific provision and none should be implied. It is the rule that conflicts are to be avoided in construing statutes if it is possible to do so, and that implied amendments or repeals are not favored. It is possible to give both laws effect by holding that the latter amends the general law but that the former supersedes the general law for purposes of the 1946 and 1947 elections. We think this is the proper view and we therefore advise you that the date specified by ch. 128 governs with respect to the spring election.

JWR
State Board of Medical Examiners — Licenses and Permits — Physicians — No license application fee may be charged of an applicant for a medical license by reciprocity under sec. 147.17 (1), Wis. Stats., the fee provided for in that section being payable only if a license is issued. Consequently the entire fee paid by an applicant for such a license should be refunded to him if his application is denied.

December 6, 1945.

DR. C. A. DAWSON, Secretary,
State Board of Medical Examiners.

You state that an applicant for a medical license by reciprocity paid a fee of $50 under sec. 147.17 (1), Wis. Stats., and submitted his credentials to the state board of medical examiners. He was refused a license and has applied for a refund of $35 under a board resolution adopted in 1926 and which reads as follows:

"The board discussed the matter of making certain refunds on the examination and reciprocity fees. It was the sense of the meeting that the board should receive some remuneration for their work in reviewing these credentials. Likewise the board felt that the present fee of $2.00 for endorsement charges was not sufficient, nor in keeping with the fees charged by reciprocating states. Dr. Murphy then moved, seconded by Dr. Linn, that in the future the board would make a refund on reciprocities of $35.00 and on examination of $15.00. Motion carried."

Sec. 147.17 (1) so far as material here reads:

"* * * The board may license without examination a person holding a license to practice medicine and surgery, or osteopathy and surgery, in another state, if in such state the requirements imposed are equivalent to those of this state, upon presentation of the license and a diploma from a reputable professional college approved and recognized by the board, or an honorably discharged surgeon of the army or navy, or of the federal public health service, upon filing of a sworn and authenticated copy of his discharge. Fee for license without examination shall be fixed by the board at
not less than the reciprocity fee in the state whose license the applicant presents, and in no case less than fifty dollars.

* * *

Apparently the board has been proceeding under a misunderstanding of the above provision. You will note that the only fee chargeable in reciprocity cases is for the license. No fee is required to be paid in submitting an application or credentials for a license by reciprocity. This provision is in marked contrast to the provisions of sec. 147.15 relating to application for license upon examination and which provides in part:

"* * * The application shall be accompanied by a fee, to be fixed by the board at not more than $20 and $5 additional for license if issued. An immigrant applicant shall present satisfactory evidence of having first citizenship papers, and if his professional education was completed in a foreign college, the application shall be accompanied by a fee of $50, and the further fee of $5 upon issuance of license shall not be required; * * *"

The state board of medical examiners being a statutory board has only the powers given it by statute and it may not by resolution change the provisions made by law for license fees or application fees. Its powers are administrative, not legislative. The statutes make no provision for charging any fee for filing an application for a medical license by reciprocity and therefore none may properly be charged by the board. Since the $50 fee which has been deposited in the state treasury was paid in error it may be refunded under sec. 20.06 (2) which appropriates from the proper respective funds from time to time such sums as may be necessary for refunding monies paid into the state treasury in error, upon the written approval of the governor, secretary of state, state treasurer, and attorney general.

WHR
State — Mileage — Airplanes — The statutes do not authorize payment of a per-mile allowance to a state officer or employe for the use of his own airplane.

December 6, 1945.

FRED R. ZIMMERMAN,
Secretary of State.

You have asked whether you may audit and approve for payment an item of 4 1/2 cents per mile for transportation of a member of a state commission to attend a commission meeting in Madison, when the transportation was effected by use of the commissioner’s own airplane.

Since the transportation allowance requested is at the rate of 4 1/2 cents per mile it may be on the theory that sec. 14.71 (6) relating to allowance for the use of automobiles is applicable. Apart from the question whether other conditions imposed by sec. 14.71 (6) are present, we do not believe that the section is applicable to the use of an airplane. It provides only for compensation for the use of an automobile, and that term in its most generic sense is limited to vehicles suitable for travel on highways. See the definitions in Webster’s New International Dictionary, 2d Ed., and Funk & Wagnalls New Standard Dictionary of the English Language.

Any question with respect to compensation to be paid public officers or employes must commence with the proposition that the right of such a person to receive reimbursement either in the form of salary, fees, or expenses, is dependent upon an affirmative statutory authorization. State v. Cleveland, 161 Wis. 457, 152 N. W. 819, 154 N. W. 980; Quaw v. Paff, 98 Wis. 586, 74 N. W. 369; Parsons v. Waukesha Co., 83 Wis. 288, 53 N. W. 507; Crocker v. Supervisors of Brown Co., 35 Wis. 284.

The provisions of sec. 14.31 (3) of the statutes limit the payment of claims by requiring that receipts shall be presented for all items of expenditure of $1 or more unless other satisfactory evidence is accepted by the auditing officer, and by requiring that all items of traveling expenses must be certified to have been incurred in the performance
of duties required by the public service and to have been actually paid out. These provisions appear to limit reimbursement for traveling expenses to out-of-pocket payments except where specific statutory authority is made for a blanket allowance as for the use of automobiles under sec. 14.71 (6). If a blanket allowance for the use of an automobile were otherwise permissible under other sections of the statutes, the legislature would probably not have deemed it necessary to make specific provision therefor in sec. 14.71 (6).

Expenditure of state funds is subject to more restrictive safeguards than the test whether the auditing officer believes the individual claim before him to be fair and equitable, since to permit an allowance in an individual case where it is equitable might open the door for similar allowances in other cases where the equities are not so clear. The question is whether the legislature has affirmatively authorized payment under the circumstances described. Under art. VIII, sec. 2 of the constitution no money may be paid out of the treasury except in pursuance of an appropriation by law.

It is therefore our opinion that the statutes do not authorize you to approve a claim for a per-mile allowance for the use of a private airplane.

BL
Covporaiions — Securities Law — Sec. 189.13 (3) (c), Stats. 1945, requires that the department of securities examine the articles of incorporation, etc. to determine as an original proposition whether they contain provisions contrary to applicable statutes and court decisions and also whether they are unfair, inequitable or fraudulent.

Provision in articles of incorporation that affirmative vote or consent of at least two-thirds of preferred stock shall be necessary to make any change relating to said stock is contrary to sec. 182.13 (3), Stats. 1945, specifying a three-fourths vote.

Provision therein that upon liquidation the 5 per cent cumulative preferred stock of a $25 par value shall receive $25 per share plus all unpaid dividends accumulated and accrued to date of payment before any distribution on common stock is contrary to sec. 182.13 (1), Stats. 1945, allowing a preferred stock preference not exceeding the par value thereof.

Provision in by-law giving authority to board of directors to “sell both real and personal property, in its discretion,” to the extent it authorizes a sale of the entire corporate property, is contrary to sec. 180.11 (2), Stats. 1945, interpreted as at least requiring a prior majority vote of stockholders for such a sale.

December 12, 1945.

DEPARTMENT OF SECURITIES.

Attention Mr. Edward J. Samp, Director.

In your recent letter you advise that Research Products Corporation, a Wisconsin corporation incorporated on August 25, 1938, has made application for registration of its $25 par value 5 per cent cumulative preferred stock under the Wisconsin securities law. Subsec. (3) of sec. 189.13, Stats., provides among other things that the department of securities, after applicant has paid the expense of investigation, shall by order register a security if the following, among other things, “shall be made to appear to the department”: 
You ask our opinion on three questions which we will set forth and answer in the order submitted.

I

The articles of organization contain this provision: "The affirmative vote or consent of the holders of at least two-thirds of the number of shares of 5 per cent cumulative preferred stock at the time outstanding shall be necessary to permit the corporation to effect any one or more of the following," referring among other things to matters which would make a change in relation to that preferred stock.

Query: Is this provision of the articles of organization contrary to law within the meaning of 189.13 (3) (c)?

In our opinion the question must be answered in the affirmative. We construe the provisions of sec. 189.13 (3) (c) as meaning that the department is required to register a security if it shall be made to appear to the department that the articles of incorporation of the corporation or other documents mentioned therein are not contrary to applicable statutes or court decisions and do not contain provisions that are unfair, inequitable or fraudulent, assuming of course, that all other statutory requirements for registration have been met. We think such construction is the one which naturally follows from the context of the statute. Further, it is in accord with the consistent practice followed by your department since enactment of the present Wisconsin securities law in 1941 (See 1942 Wisconsin Law Review, p. 457) which fact is entitled to weight in interpreting the statute. Mauel v. Wisconsin Automobile Ins. Co., Ltd., (1933) 211 Wis. 230.

We also feel such construction must necessarily be adopted to enable the department to carry out the purposes
for which it was created and the Wisconsin securities law enacted. It has been said the Wisconsin department of securities is in effect the investment counsel for the people of the state. In this respect it differs completely from the securities and exchange commission whose function is simply to compel disclosure of the truth and not pass on soundness. See A. C. Frost & Co. v. Coeur D'Alene M. Corp., (1941) 312 U. S. 38, 61 S. Ct. 414, 85 L. ed. 500. Both functions are performed by the Wisconsin department and even though a security has been registered with the Wisconsin department of securities and a full disclosure of facts made, "the department must still satisfy itself that the terms of the issue are not unfair or inequitable and that the sale would not be contrary to the interests of investors." 1942 Wisconsin Law Review, p. 449. Obviously to properly exercise that function it is essential that the department determine for itself whether the articles of incorporation and other documents are in accord with applicable statutes and court decisions. Hence the question narrows itself down to a determination of whether the portion of the articles of organization above referred to is contrary to the provisions of subsec. (3) of sec. 182.13. There can be no question but that this question must be answered in the affirmative. This is plain even from a casual reading of said subsection which (after being amended by ch. 467, Laws 1945) now provides as follows:

"182.13 (3) No change in relation to any preferred stock referred to in this section shall be made, except by amendment to the articles adopted by a vote of three-fourths of the preferred and of the second issue of preferred stock, if any, each voting as a class, and three-fourths of the common stock, provided, that no vote of the first issue of preferred stock shall be required to increase the second issue of preferred stock or to decrease the dividend rate of such second issue of preferred stock."

It has been argued that while at the present time the portions of the articles of incorporation here under consideration cannot now be controlling or operative because they conflict with the provisions of sec. 182.13 (3), Stats., they were inserted for the purpose of establishing a minimum
requirement applicable only in case the legislature should ever amend sec. 182.13 (3) to provide for such a change by less than a two-thirds vote of the preferred stock, and until the legislature does so, can be disregarded as mere surplusage.

The argument made concedes that the portions of the articles of incorporation here under consideration are contrary to sec. 182.13 (3), Stats., and hence such argument is contrary to the construction of sec. 189.13 (3) (c) which we have adopted herein. We must therefore reject such argument.

There would be no purpose in having a statutory provision such as that contained in sec. 189.13 (3) (c) if it were to be held that a provision contained in the articles of incorporation which concededly conflicts with an applicable statute, can be ignored on the theory that the statute governs in any event. If such view were accepted there would be no need for the department to make any inspection to determine whether the articles of incorporation complied with the statutes, as on the theory advanced that question would have to be answered in the affirmative as a routine matter since the statute would in any event control. It has been urged that there would always be a question as to whether the corporation was formed for a lawful purpose and that the power of the department under sec. 189.13 (3) (c) to determine whether the articles are contrary to law should extend to an inquiry into that and like matters. We cannot agree. We do not think that the legislature intended that the department have such narrow or limited power. In our opinion sec. 189.13 (3) (c) requires that the department inspect the articles of incorporation and other documents and determine as an original proposition whether they comply with the applicable statutes and court decisions as well as determine whether they contain any provision that is unfair, inequitable or fraudulent. This is in the nature of a direct as distinguished from a collateral attack. The question is not whether provisions in the articles of incorporation which conflict with the statutes are or are not subject to a collateral attack. The question is whether as an original proposition, the articles of incorporation contain provisions contrary to applicable statutes or court decisions.
If they do the department must refuse to register the security.

Furthermore, there is authority to the effect that provisions like those in sec. 182.13 (3) do not admit of any deviation. This would render untenable the contention that the provisions in the articles in the instant case may be given effect merely as minimum requirements. *Benintendi v. Kenton Hotel,* (1945) 294 N. Y. 112, 60 N. E. (2d) 829. We also call attention to the decision of our supreme court in *Milwaukee Sanitarium v. Lynch,* (1941) 238 Wis. 628. Here the question was as to the right of the stockholders to amend its articles so as to insert a provision among others which would deprive stockholders of their pre-emptive right. The court said page 636:

"However, the question under consideration is no longer an open one in Wisconsin. The right of the stockholders in good faith to so amend its articles is definitely settled by the holding of this court in *Johnson v. Bradley Knitting Co., supra.* [228 Wis. 566, 280 N. W. 688] It is there held that a corporation may amend its articles in any respect which might have been originally provided in its articles, subject, of course, to the required statutory vote." (Emphasis supplied)

Our attention has been called to that portion of sec. 180.07 (1), Stats., which provides as follows:

"(1) Any corporation organized for any of the purposes authorized by this chapter, may, by a vote of two-thirds of all the stock outstanding, and entitled to vote, unless a greater vote shall be required in its articles, amend its articles."

This strengthens our position that it would not be permissible to include a provision in the articles requiring a greater affirmative vote than that required by sec. 182.13 (3) to amend the articles so as to make a change therein with respect to preferred stock. There is no language in sec. 182.13 (3) similar to that contained in sec. 180.07 (1) which appears in italics above. Failure of the legislature to include such a provision in sec. 182.13 (3) must be considered significant. It obviously lends support to the view that
the articles may not contain a provision requiring a different affirmative vote to amend them with respect to preferred stock than that specified by sec. 182.13 (3).

II

The articles of organization provide furthermore as follows: "In the event of any liquidation, dissolution or winding up of the corporation, whether voluntary or involuntary, then, before any distribution or payment shall be made to the holders of the common stock, the holders of the 5 per cent cumulative preferred stock shall be entitled to be paid in cash an amount equal to $25 per share, plus all unpaid dividends accumulated and accrued to the date of payment."

Query: Is this preference contrary to the provisions of sec. 182.13 (1)?

In our opinion this question also must be answered in the affirmative. Subsec. (1) of sec. 182.13 provides:

"182.13 (1) Any corporation may, in its original articles, or by amendment thereto adopted by a three-fourths vote of the stock, provide for preferred stock; * * * for a preference of such preferred stock not exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits; * * *"

It has been held in a case where a corporation went into voluntary liquidation that the limitations contained in sec. 182.13 (1) and in sec. 182.19 (1) relating to payment of dividends were applicable and prohibited preferred stockholders from receiving a preference over common stockholders out of corporate assets, other than those represented by profits, which would exceed the par value of the preferred stock. Hull v. Pfister & Vogel Leather Co., (1940) 235 Wis. 653; Welch v. Land Development Co., (1944) 246 Wis. 124. Since these decisions, sec. 182.19 (1), Stats., has been amended by ch. 350, Laws 1945. Among other things it permits in addition to payment of dividends out of net profits or as provided in sec. 182.19 (2), payment of dividends out of capital surplus under certain circumstances.
There was no change in sec. 182.13 (1). We think in view of the plain language contained in sec. 182.13 (1) that our court would, even after the amendment of sec. 182.19 (1), hold that in event of distribution of the assets of the corporation the preference accorded preferred stockholders over common stockholders in the distribution of assets other than profits must be limited to the par value of their stock. We express no opinion as to whether any preference may be given preferred stock in the distribution of corporate assets which may remain after common stockholders have been paid the par value of their shares.

The par value of the 5 per cent cumulative preferred stock here involved is $25 per share. In event of liquidation holders of this type of stock would be entitled to a preference over common stockholders in the distribution of corporate assets other than that represented by profits in an amount not to exceed the par value of their stock. The portions of the articles of incorporation here involved which provide that in event of liquidation, etc., the holders of the 5 per cent cumulative preferred stock shall be entitled to be paid (in addition to the $25 in cash) all unpaid dividends accumulated and accrued to date of payment before any distribution or payment be made to common stockholders, are contrary to statute unless such payment is made out of profits. We hold that unless this portion of the articles referred to in your inquiry is amended to provide that accrued and unpaid dividends be paid only out of assets represented by profits, it is contrary to law.

III

Article III, sec. 6 of the by-laws of the instant corporation gives power and authority to the board of directors to buy and sell both real and personal property in its discretion. It provides:

"The Board of Directors shall have general control of and direction over all the affairs and business of the corporation and shall make such rules for the conduct of its officers and employees as it may deem wise and expedient. The Board of Directors is also authorized to do all acts necessary to promote and carry on the business for which the corporation is
organized; to borrow money in the name of the corporation; to buy and sell both real and personal property, in its discretion; and to enter into any agreements or contracts which shall in the discretion of the Board be deemed wise to promote the business of the corporation * * *.” (Emphasis supplied)

Sec. 180.11 (2) and (3) provide:

“(2) Every corporation may, by a vote of a majority of the stock entitled to vote, sell and convey or authorize to be conveyed, all or any portion of the property owned by it, or mortgage or lease any such property whenever it shall be necessary for its business or the protection or benefit of its property.

“(3) But any corporation organized to deal in real property or in fixtures, improvements or chattels real, or to mortgage, pledge or dispose of the same in any manner whatsoever, may sell, mortgage, pledge, or otherwise dispose of the same by instruments executed in the manner provided by section 235.19 or in such manner as shall be provided in the articles of incorporation, without further authorization by the members of any such corporation.”

Query: Is this by-law, to the extent that it grants general and complete authority to the board of directors to sell, convey, mortgage or lease any or all of the property of the corporation, including both real and personal property, at any time and upon such terms as it determines, in conformity with the provision of sec. 180.11 (2) above quoted?

As we understand it the articles of organization of this corporation contain no provisions that would bring it within the language of sec. 180.11 (3) and thus our consideration of the validity of this by-law is without regard to what might be the case if sec. 180.11 (3) were applicable.

Taken literally the language of sec. 180.11 (2) precludes any power in the board of directors to dispose of any property of the corporation, real or personal, whether it be all or a part thereof, except upon a majority vote of the stockholders. But our supreme court has considered this statute and interpreted it as not having that broad application.

In Consolidated Water Power Co. v. Nash, (1901) 109 Wis. 490, 85 N. W. 485, it was held to preclude the officers of
a corporation from making a binding contract to sell all of
the operating property of the corporation prior to a ma-
ajority vote of the stockholders in favor thereof. Then, less
than 7 months later, in Marvin v. Anderson, (1901) 111
Wis. 387, 87 N. W. 226, the court held it did not preclude a
conveyance by the corporation to one of its stockholders of a
parcel of real estate not used in the corporate business
where the sale was made without any formal action by the
directors as a board or by the stockholders but upon their
unanimous individual determination and acquiescence in the
transaction. A trustee in bankruptcy of the corporation, ap-
pointed in proceedings commenced almost 2 years after the
sale, in which the only claims were those of said acquiescing
stockholders, sued to set aside the conveyance upon the
ground that it was void because a prior formal vote of the
majority of the stockholders in favor thereof had not been
had. The court affirmed a dismissal of the action, saying at
pages 392-4:

"* * * This court has never held, as counsel seem to
think, that a majority vote of stockholders of a corporation
is necessary to every transfer of real estate made by it in
the regular course of its authorized business. * * *"

"We should hesitate in any case to give to sec. 1775, Stats.
1898, the meaning contended for by appellant's counsel. To
say that the legislature intended to require corporate action
by a majority vote of stockholders at some general meeting,
or special meeting called for the specific purpose, as a con-
dition precedent to every sale of corporate property, real or
personal, so that every dealer with a corporation would be
bound to inform himself as to whether such condition had
been fulfilled, would convict the legislature of such an ab-
surd piece of lawmaking that no court would venture to do
it without first seeking diligently for some construction of
the law within the reasonable scope of the language used
that would avoid such meaning. Corporations, in the very
nature of things, as to their ordinary affairs, must be per-
mitted to conduct business the same, substantially, as indi-
viduals. The confusion that would result from a law that
would invalidate every transfer of corporate property, real
or personal, unless the act of the corporate officers in the
transaction could be referred for authority to some specific
vote of a majority of the stockholders formally authorizing
it, would be incalculable. The whole trend of modern deci-
sions is against impeachment of executed corporate transac-
tions except by punishment of the corporation at the suit of the state.

"Waiving the question of whether a vote of stockholders was necessary in this case in order to strictly comply with the law, the presumption of due authority, arising from the acts of the corporate officers and the consent individually given by all the stockholders, is so strong that it cannot be overcome by mere proof that formal action was not taken as to the particular transaction. General authority, regularly given by stockholders of a corporation to its officers, to act in the sale of property and convey the same accordingly in the transaction of corporate business, would satisfy the statute."

From these cases it cannot be successfully argued that sec. 180.11 (2) is entirely inoperative. On the contrary the Consolidated Water Power Co. case not only recognized that this statute has operative force but made it the controlling basis of the decision. There the property sold was the entire corporate physical property, which in effect the court said in Marvin v. Anderson is the type of disposition that is covered by these provisions. In that case the property sold was a piece of real estate that admittedly was not used in the corporate business, but the court refused to hold the conveyance void and sustained it. Even though careful consideration of the case leads one to the conclusion that in a large measure the ultimate result rests upon an estoppel, it would not have been necessary for the court to discuss this statute unless the statute had some operative scope. As further supporting some effectiveness in this statute is the fact that what is now sec. 180.11 (3) was added to the statutes by ch. 201, Laws 1911, which was almost 10 years after these cases. This enactment can only be explained on the ground that the legislature enacted it in recognition of the fact that sec. 180.11 (2) had some application. We find no cases subsequent thereto which interpret this section.

Historically it appears to have been the common law that neither the officers nor the board of directors had power to convey the entire property of a corporation. Such was regarded as not being within operation of the business of the corporation, but in derogation thereof and therefore contrary to the purpose for which the corporation was formed. It was deemed to result in a fundamental change like that
effected upon a change in purpose of the corporation which
was organic and required unanimous approval of the stock-
holders. The power of the board of directors was limited to
the carrying on and operating of the business of the corpo-
ration, and some cases indicate that the sale of real estate,
and particularly that not used in the business operations,
was not within the power of the board of directors but was
solely a matter which the stockholders alone could deter-
mine. See Fletcher, Corporations, Revised 1931 Ed., Secs.
2100 et seq., 5791 and 5797. Apparently the provisions here
under consideration were initially enacted into our corpora-
tion law so as to establish that a corporation could sell all of
its property, and if the same rule was applicable in the case
of a disposition of only a part thereof then sell such part,
upon the vote of a majority of the stockholders rather than
only upon unanimous approval as apparently was required
at common law. As such the provisions are intended for the
protection and benefit of the stockholders only and should
be construed accordingly. Thus it is that it has been gener-
ally accepted that it is only the stockholders who can invoke
its provisions and attack a sale or conveyance upon failure
to comply therewith. 5 Fletcher, Corporations, Revised 1931
Ed., Sec. 2106.

It is of considerable significance that the bar generally
accepts these two cases as establishing that these provisions
do not require a showing in an abstract of title of a prior
vote of the majority of the stockholders as a condition prece-
dent to every conveyance by a corporation appearing in the
chain of title, and as supporting the practice of accepting
corporate conveyances as sufficient if executed in conformity
with all other statutory requirements as to the form and
method of execution of corporate conveyances. It seems to
us that this is the correct result which follows therefrom
and particularly upon the basis of the presumption of regu-
larility laid down in Marvin v. Anderson. As we see it a cor-
porate conveyance of real estate is not rendered void by the
absence of a showing that a majority vote of the stockhold-
ers specifically authorizing it was had prior thereto because
there is a presumption of regularity of such conveyance, and
title in the hands of the vendee of the corporation is good
and remains so unless and until it has been voided at the
suit of some stockholder on the ground of failure to comply with this statutory requirement. This carries out the basic purpose of the statute as intended solely for the protection of the stockholders. Acceptance of the statements in Marvin v. Anderson, even though they would appear to be dicta, restricts the applicability of sec. 180.11 (2) to conveyances of the entire property of a corporation. But even such a conveyance if regularly executed effects a transfer of the title to the vendee which is valid until set aside upon suit by a stockholder for failure to comply with this statute and once the vendee has made a transfer to a third person as a bona fide purchaser for value he would acquire a valid title under Marvin v. Anderson.

Whether or not a stockholder who had individually approved and acquiesced in the sale at the time could bring a timely suit is an open question and not necessary here to consider. However, in view of the decision in Kappers v. Cast Stone Construction Co., (1924) 184 Wis. 627, 200 N. W. 376, it would seem that this provision in sec. 180.11 (2) means that the approval of a majority of the stockholders to be effective must be by a vote taken at a meeting of stockholders and individual action is not sufficient.

Thus, it would only be one buying from a corporation who would be concerned with whether there had been compliance with the provisions of sec. 180.11 (2). A cautious and careful attorney for such a person would require a showing of compliance at the time of taking title regardless of whether the conveyance was of the entire property or not so as to preclude the possibility of some stockholder taking action to avoid the transaction upon the claim that this statute applies equally to a conveyance of only a part of the property.

To the extent the provisions of sec. 180.11 (2) have force today as above they operate to effect the intended purpose and design of furnishing protection to the stockholders against conveyance away of the entire corporate property without at least their having had an opportunity to vote thereon. This is of significance in the instant situation, for the very purpose of your making an examination into the affairs of a corporation asking for registration and a permit to sell its stock to the public, is to render a measure of protection to prospective purchasers of such stock. This is the
basic purpose of the securities law in requiring registration in advance of public offerings, and the provisions calling for a finding by your department that the articles, by-laws, etc., are not contrary to law is the means designed to accomplish the objective of practical protection. The argument that the adoption of this by-law some years past constitutes action by vote of a majority of the stockholders in favor of a conveyance that satisfies the requirements of sec. 180.11 (2), completely overlooks what is deemed to be the purpose of such provisions and the objective of the provision in the securities law requiring you to examine into the Corporation’s affairs.

The present application for registration necessarily contemplates sales or transfers of the stock to persons other than the present stockholders and the furnishing of protection to them is the underlying purpose of the securities law. Such prospective stockholders have not voted on whether or not the entire corporate property shall be sold. Yet, as we see it, sec. 180.11 (2) declares, for the purposes of the securities law in requiring registration as a prerequisite to sales to them, that they shall have the right to vote along with other stockholders upon that question. Sec. 180.11 (2) would furnish prospective purchasers of the stock no protection in that field if the by-law were to be effective as a commitment adopted by prior stockholders which would be binding upon the prospective stockholders in negation of the very right which the statute says they shall have. Where a corporation asks for registration not only for its presently outstanding stock but also for new stock to be issued, either because it has not previously issued up to its authorized limit or by reason of an increase in the amount of its authorized capital, that any such provision in a by-law cannot be effective to affect in any way the rights of purchasers of newly issued stock is perhaps more apparent. Clearly after new stock has been issued it cannot be said that the prior adoption of such a by-law provision by those who were stockholders prior to the issuance of the new stock was a vote of these new stockholders. Certainly the least this provision requires is a majority vote of the stockholders entitled to vote at the time the property is disposed of. The situation is parallel where the registration is only as a re-
quirement to sell presently outstanding stock and no additional or new stock is to be issued. It is contemplated there will be a change in the stockholders. Such new stockholders likewise in no measure have voted in respect to a disposition of property that takes place after they have become and while they are stockholders. We see no difference in the two situations when viewed from the standpoint of future stockholders.

It is therefore our conclusion that to the extent this by-law authorizes the board of directors to sell the property at any time and upon such terms as they determine in instances coming within the operative scope of sec. 180.11 (2), which as previously indicated appears to be only where there is a disposition of all of the property of the corporation, it is contrary to the provisions of sec. 180.11 (2).

In connection with our consideration of the above legal question concern has been expressed as to whether, even if not technically contrary to sec. 180.11 (2), these by-law provisions are not unfair as contrary to the spirit of the securities law which is to furnish stockholders protection against the corporate property being sold away without their having an opportunity to address themselves to the desirability thereof and be heard thereon. This appears to be tenable, for retention of the by-law as fully effective would result in the new stockholders being bound thereby. Perforce of the stock being sold to them as fully registered, they would be entitled to rely on this statute as giving them the rights indicated and that there existed nothing to deny or destroy such rights. Unless they checked into the by-laws they would have no occasion to suspect that this statutory protection would not be fully effective. The very purpose of the registration and issuance of a permit to sell is to avoid this very kind of pit-fall or legal trap so that the general public may purchase the securities with some semblance of confidence that their investments therein and their rights in respect thereto are relatively safe and will not be dissipated or destroyed without some knowledge or acquiescence on their part.

WET/HHP
Soldiers, Sailors and Marines — Department of Veterans Affairs — Powers and duties of board of veterans affairs under sec. 45.35 (8), Stats., discussed.

December 15, 1945.

Leo B. Levenick, Director,
Department of Veterans Affairs.

You advise that there are residents of this state, veterans of World War II, who have been in active military or naval service of the United States since August 27, 1940 and who, after their discharge and return to this state, have developed either physical or mental disease directly or indirectly traceable to their military or naval service which requires treatment in a hospital or institution. You also refer to an opinion of this department dated September 10, 1945 and published at page 249 of this volume, which holds that the veterans recognition board had no authority to pay for the hospitalization or institutional care given honorably discharged veterans of World War II in county or state institutions prior to the enactment of ch. 443, Laws 1943, published July 3, 1943.

You now ask for our opinion on the following questions:

1. Does the board of veterans affairs (successor of the veterans recognition board) have power to pay for cost of treatment received by a qualified World War II veteran as defined in sec. 45.35 (5a), Wis. Stats., in a state or county hospital or institution for a physical or mental injury or disease directly or indirectly traceable to military or naval service, when such treatment has commenced after the effective date of ch. 443, Laws 1943, and where the veteran entered the hospital or institution either voluntarily or involuntarily without filing an application with the veterans recognition board or the director performing the administrative functions for the board or where admitted after the effective date of ch. 580, Laws 1945, without filing an application with the board of veterans affairs or the director who has charge of the administrative functions of the board, and/or without the prior knowledge of whichever board or director was functioning at the time of admittance?
2. If the foregoing question is answered in the affirmative, then is the board of veterans affairs compelled to pay for the cost of treating every World War II veteran in a state or county hospital or institution for a service-connected physical or mental disease or injury, or has the board a discretion with respect to such matters so that it can decide each case on its merits and pay for such treatment in such cases as it may determine that it is necessary and proper so to do, having in mind the provisions of sec. 45.35 (1), Wis. Stats.?

In your request you state that in connection with question 1 it is your belief that the board of veterans affairs has no authority to make payment for service rendered without individual applications having been filed by the veteran or prior authority having been granted by the director in accordance with existing board policy. This position has been taken by the board in view of the provisions of Sec. 45.35 (1), Wis. Stats. The board takes the position that if treatment or hospitalization has been furnished either by private or public institutions, by private or public funds, the last mentioned subsection prohibits the board from furnishing such services, because then aid or treatment has already been furnished.

The first comprehensive legislation enacted in Wisconsin for the purpose of furnishing aid or assistance to World War II veterans was ch. 443, Laws 1943, published July 3, 1943, creating the veterans recognition board and defining its powers. At the 1945 legislative session Bill 552,A. was passed and became ch. 580, Laws 1945, published August 27, 1945. In place of the veterans recognition board it created a Wisconsin department of veterans affairs consisting of a board of veterans affairs whose functions are policy forming, a director in whom all administrative functions are placed, and an administrative staff. Sec. 45.35 (2), (4) and (5). Ch. 580, Laws 1945, made certain other changes in sec. 45.35. Subsec. (1) was amended to read as follows:

"The legislature declares that it is the policy of the state of Wisconsin to assume responsibility for the health, educational and economic rehabilitation and hospitalization of returning members of the armed forces of the United States
in World War II, and their dependents, who are bona fide residents of this state. The legislature further declares that the state intends by the enactment of this section to render all possible aid and assistance to such returning members of the armed forces, servicemen officially reported as missing in action and their dependents, when aid and assistance has not been provided. A liberal construction of this section is intended."

Subsec. (8) was repealed and recreated to read as follows:

"The board may provide treatment for any veterans for any physical or mental disease or injury or the consequent result of such disease or injury, which is directly or indirectly traceable to the military or naval service, or may provide such treatment for any dependent of a serviceman officially reported as missing in action. The powers conferred by section 45.37 in connection with the furnishing of treatment for veterans of World War I are, so far as applicable and not in conflict with this section, conferred on the board in carrying out the provisions of this subsection."

The legislature also repealed and recreated sec. 45.35 (12) so as to provide that all expenditures for execution of functions under sec. 45.35 should be made from the postwar rehabilitation trust fund pursuant to the appropriation made by sec. 20.036.

In our opinion the foregoing statutory provisions lead to the following conclusions:

(1) The board of veterans affairs has power to provide treatment for veterans of World War II as defined in sec. 45.35 (5a) for any physical or mental disease or injury or condition resulting therefrom which is directly or indirectly traceable to their military or naval service.

(2) As an incident to such power the board has power to pay for the cost of such treatment by those competent to give it.

(3) The power of the board to provide such treatment and to pay therefor as stated in (1) and (2) exists only in cases where necessary aid and assistance has not otherwise been provided through some other source.

The board also has certain powers with respect to furnishing aid or assistance to dependents of servicemen missing in
action. We do not discuss this phase of its power as that is beyond the scope of the questions submitted.

The first proposition above stated clearly follows from the provisions of sec. 45.35 (8) as repealed and recreated by ch. 580, Laws 1945. The second also follows from the portion of the same subsection, which provides “the board may provide treatment” etc. We need not consider all possible ways in which this could be done. Clearly one way and probably the most obvious way for the board to carry out the power granted to it by statute would be for it to pay for the cost of treatment furnished by those competent to furnish it. The authority to make such expenditure and the necessary appropriation therefor are found in secs. 45.35 (12) and 20.036.

The last proposition is based on the provisions of secs. 45.35 (1) and 45.35 (8), Stats., which must be construed together in determining the scope of power given the board of veterans affairs by the latter subsection. Prior to its amendment by ch. 580, Laws 1945, said subsection (1) of section 45.35 reads as follows:

“(1) The legislature declares that it is the policy of the state of Wisconsin to assume responsibility for the rehabilitation and hospitalization of returning members of the armed forces of the United States in World War II, who are bona fide residents of this state, in cases where the federal government fails or refuses to provide such rehabilitation and hospitalization. The legislature further declares that the state intends by the enactment of this section to render all possible aid and assistance to such returning members of the armed forces, when adequate provision is not available from the federal government, in order to prevent want or distress. A liberal construction of this section is intended.”

The above subsection was amended in a material manner by ch. 580, Laws 1945. The full scope of the changes made can be ascertained from an examination of the amended subsection which has been previously quoted in full in this opinion. Among other things the legislature by adoption of Am. 2, S. to Substitute Am. 1, A. to Bill 552, A. struck out from the 1943 statute the words “in cases where the federal government fails or refuses to provide such rehabilitation and hospitalization” when they appeared in the first sen-
tence and also struck out the words "adequate provision is not available from the federal government, in order to prevent want or distress" where they appeared in the second sentence. In place of the words stricken in the second sentence there were inserted the words "aid and assistance has not been provided." The effect of these changes is clear. They indicate clearly the present legislative intent to provide aid and assistance for qualified World War II veterans and anyone else entitled thereto only to cases where comparable aid and assistance has not otherwise been provided.

We now proceed to apply the foregoing propositions to the specific factual situations referred to in your first question. We are of the opinion the board of veterans affairs would have no power to pay for the cost of treatment furnished a veteran of World War II under the assumptions contained in that question. We think that if treatment is given a World War II veteran in any hospital or institution, whether supported by private or public funds, in cases where the veteran was admitted either at his own request or at the request of some person acting in his behalf without first obtaining some indication from the board of veterans affairs that such treatment has been authorized and will be paid for by the board, the situation would be one where comparable aid and assistance has been otherwise provided. It must be presumed the hospital or institution admitting such veteran under such circumstances has made the necessary arrangements to take care of the cost of treating such veteran at the time he is admitted. It may be that the veteran had an income or funds of his own and agreed to pay the bill himself. Perhaps relatives agreed to assume the cost. On the other hand the veteran or his relatives may have been without means and it was necessary to hospitalize such veteran in a state or county institution at public expense. It is very obvious that in any of these situations the veteran would receive treatment from a source other than the veterans recognition board or board of veterans affairs and that under such circumstances we do not have a case where "aid and assistance has not been provided."

The power of the veterans recognition board was not limited to the same extent by sec. 45.35 (1), Stats. 1943, as that of the board of veterans affairs by sec. 45.35 (1), Stats.
1945, where aid and assistance was otherwise provided. The power of the veterans recognition board to provide treatment for qualified World War II veterans was limited only to cases where the federal government failed or refused to provide rehabilitation or hospitalization or where adequate provision was not available from the federal government to prevent want or distress. Hence there was considerable basis in our judgment for concluding that under sec. 45.35 (8) and (1), Stats. 1943, the veterans recognition board did have power up to the effective date of ch. 580, Laws 1945, to pay for cost of treatment afforded World War II veterans who met the qualifications stated in said subsections, irrespective of whether such treatment was afforded in hospitals or institutions at public or private expense and irrespective of whether it was commenced with or without prior authorization of the board, for any physical or mental disease or injury directly or indirectly traceable to military service, provided the federal government either failed to provide or had not provided therefor. It is possible to conceive of a case where the veterans recognition board did approve or authorize such treatment either before or after it was commenced, which treatment was not paid for by the veterans recognition board out of its appropriation prior to the time it went out of existence upon ch. 580, Laws 1945, becoming effective, in which case there might be a question as to the power of the board of veterans affairs to now pay such bill. However, we are not certain whether that question is one that faces you, since the veterans recognition board may have paid for the cost of all treatment authorized or approved by it prior to the effective date of ch. 580, Laws 1945. If it does you can advise us and we will be pleased to give you our opinion thereon.

We now turn to your second question. Despite the fact that sec. 45.35 (8) Stats. 1945, uses the word "may" in the phrase "The board may provide treatment for any veterans" etc., it is our opinion that the power granted the board by that subsection is one that must be exercised by it in all cases where the board has power to act and where a veteran meets all statutory requirements entitling him to treatment and also complies with all applicable rules or regulations of the board or its director. Usually the word "may" is re-
The natural and ordinary significance of the word ‘may’ is permissive, but it is sometimes construed to mean ‘must’ or ‘shall’ in statutes where necessary to give effect to the legislative purpose. In Cutler v. Howard, 9 Wis. 309, Mr. Chief Justice DIXON fully discusses the rule of construction here applicable, and says:

‘That rule as deduced from all the authorities is, to use the clear and explicit language of Chancellor KENT in Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. 113, “that the word may means must or shall only in cases where the public interests or rights are concerned; and where the public or third persons have a claim de jure that the power should be exercised.”

‘Where a third party may insist upon the exercise of such a power it must appear that he has a right de jure, the enjoyment of which depends upon the exercise of the power. As stated in the syllabus in Kelley v. Milwaukee, 18 Wis. 83: ‘Where an authority is conferred upon a city council in permissive language, it is still imperative upon them to exercise it, if other persons have an absolute right to have it exercised.’ Many cases are reviewed to illustrate this rule in Cutler v. Howard, supra, and further elaboration for that purpose is unnecessary, although Barber Asphalt Paving Co. v. Oshkosh, 140 Wis. 58, 121 N. W. 603, may be referred to.”

In Cutler v. Howard, supra, referred to in the above case, the court said (page 312 of 9 Wis.):

‘The cases fully establish the doctrine that when public corporations or officers are authorized to perform an act for others, which benefits them, that then the corporations or officers are bound to perform the act. The power is given to them not for their own, but for the benefit of those in whose behalf they are called upon to act; and such is presumed to be the legislative intent. In such cases they have a claim de jure to the exercise of the power. But where the act to be done is not clearly beneficial to the public or third persons, the exercise of the power is held to be discretionary.”
Application of the foregoing rules here requires that the word “may” as used in that portion of sec. 45.35 (8), Stats. 1945, which reads “The board may provide treatment for any veterans” etc., be construed to mean “must” or “shall.” This also finds support in the provisions of sec. 45.35 (1), Stats. 1945, which have been previously referred to. That subsection states that it is the policy of the state of Wisconsin “to assume responsibility for the health, educational and economic rehabilitation and hospitalization” of qualified World War II veterans and their dependents and further that by enactment of said section the state intends “to render all possible aid and assistance” to such veterans, servicemen officially reported as missing in action and their dependents “when aid and assistance has not been provided.” It is further stated, “A liberal construction of this section is intended.” This indicates pretty clearly that the legislature intended the board shall act and give all possible aid and assistance to all qualified World War II veterans and their dependents, and full effect would not be given to such intent if the word “may” as used in the phrase in sec. 45.35 (8) Stats. 1945, previously referred to, were construed other than as being mandatory. The foregoing must, of course, be qualified by the proposition already stated to the effect that the board can grant aid or assistance and act only under circumstances where it has power to do so and where the applicant therefor meets all applicable statutory and administrative requirements of the board or its director, entitling him to receive the same.

The board also has power to review the facts in every case and determine for itself whether under the circumstances disclosed the board has power to act, and whether the applicant has met all applicable statutory and administrative requirements entitling him to aid under sec. 45.35 (8). The board’s determination as to such matters will, like that of every other administrative body, be conclusive if founded upon some rational basis so that its determination cannot be said to be arbitrary or capricious. It should be further noted that after it is determined that a veteran is entitled to aid under sec. 45.35 (8) there still rests in the board a discretion to determine the various details as to where, how or
when the treatment therein mentioned shall be furnished and other related matters.

We also direct your attention to secs. 45.41 and 45.35 (8a). However, the questions submitted by you are designed to obtain a determination as to the power of the board of veterans affairs under sec. 45.35 (8) and hence we do not deem it necessary at this time to enter into a discussion as to the effect of either.

WET

Schools and School Districts — Vocational and Adult Education — Sec. 41.21 (3), Stats., applies in situations where teachers are employed through circuit relations committee of Wisconsin schools of vocational and adult education to teach in several local schools of vocational and adult education under arrangement whereby said teachers spend 1 day each week teaching in each local school. Such teachers are employees of each of said local schools, being employees of each local school on the day or days they teach therein. As a result sec. 41.21 (3), Stats., prevents payment of state aids to said local schools receiving the services of such teachers, commencing with school year 1945-1946, unless contracts containing provisions such as are therein specified have been entered into.

December 15, 1945.

C. L. GREIBER, Director,

Vocational and Adult Education.

You call our attention to the provisions of sec. 41.21 (3), Stats., as created by ch. 122, Laws 1945, which reads as follows:

"Commencing with the school year 1945-1946 no state aid shall be paid for or on account of any school of vocational and adult education for any year during which such school of vocational and adult education shall employ any teacher, administrator, principal or supervisor not under a contract providing for leave of absence of the teacher, administrator,
principal or supervisor by reason of personal sickness, without deduction of salary of such teacher, administrator, principal or supervisor at the rate of at least 5 days per year and for accumulation of at least 30 days of unused sick leave from year to year."

You ask whether the foregoing subsection applies in the situation which arises with respect to the teachers employed through the circuit relations committee of the Wisconsin schools of vocational and adult education and who, under an arrangement hereinafter referred to, teach in several local schools of vocational and adult education, usually by spending 1 day in each school.

The answer to your inquiry depends on whether such teachers are employed by the local schools of vocational and adult education. If they are, the foregoing subsection is applicable, and no state aids can be paid to such schools commencing with the 1945-1946 school year unless contracts containing provisions such as are therein specified have been entered into.

The circuit relations committee is composed of nine directors of local schools of vocational and adult education who are appointed annually by the president of the Wisconsin vocational directors' association. The boards of the local schools of vocational and adult education have adopted a resolution authorizing the circuit relations committee to employ teachers who meet standards set up by the state board of vocational and adult education, which teachers are assigned by the committee when there is a demand for their services to teach in the local schools. None of the teachers so employed teaches full time in a single school. It may be that one teacher will teach in four or five different schools of vocational and adult education, traveling from city to city, spending every day teaching in a different school. After being employed by the circuit relations committee and assigned to work, each teacher is paid by the local schools in which he works. The committee determines the amount of compensation to be paid by the various local schools.

You further state that the circuit relations committee is a device whereby more efficient service can be rendered by the Wisconsin schools of vocational and adult education, that the committee serves as the device which provides for the
employment of teachers on a joint basis which would otherwise be impossible. You also make the following comment: "The minute these teachers are employed, however, they are given specific assignments with individual schools and become the part time employes of schools to which they are assigned."

The foregoing leads us to the conclusion that such teachers must be considered as employes of each of said local schools of vocational and adult education, being employes of each local school on the day or days they teach therein. Murphy Supply Co. v. Ind. Comm., 206 Wis. 210; Western W. & I. Bureau v. Ind. Comm., 212 Wis. 641. In arriving at such conclusion we rely on the foregoing facts which you have given us. You should understand that there may be cases where there are some other or additional facts which might call for a different result.

We are therefore of the opinion that sec. 41.21 (3) is applicable where teachers are employed through the circuit relations committee to teach in several local schools of vocational and adult education on a part time basis under the arrangement herein set forth. From this it follows that commencing with the school year 1945-1946 no state aids can be paid such local schools receiving the services of such teachers unless contracts containing provisions such as are therein specified have been entered into.

WET
Criminal Law — Municipalities — Public Welfare Department — Probation and Parole — Violation of municipal ordinance is not a "misdemeanor" within the meaning of sec. 57.04, Stats., relating to probation, even if the act forbidden by the ordinance is also a violation of the state criminal law. Accordingly, the state department of public welfare has no authority to receive and supervise on probation persons convicted of violating municipal ordinances.

December 15, 1945.

PAUL D. YOUNT, Director,
Division of Corrections,
State Department of Public Welfare.

You state that the bureau of probation and parole has received for supervision on probation a person charged and convicted of operating a motor vehicle while under the influence of intoxicating liquor contrary to a city ordinance. The defendant was sentenced to 30 days in the county jail and sentence was stayed for 6 months on condition that he pay a fine and costs. You inquire whether the bureau is authorized to supervise such a case on probation.

Sec. 57.04, Stats., provides in part as follows:

"(1) When any adult is convicted in any court of record of a misdemeanor or of any violation of section 351.30 the court, in its discretion, may by order 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, including the payment of any fine imposed, as it shall determine, so that the defendant may be given the opportunity to pay the fine, if one is imposed, within a reasonable time. Upon payment of the fine the judgment shall be satisfied and the probation cease.

"* * *

"(5) 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; and shall receive for such services the compensation provided by law for
certifying copies of papers in his custody, which shall be paid out of the treasury of the county in which the probationer was convicted."

The answer to your question is that the bureau has no right to receive this defendant on probation under the above statute. The section clearly applies only to criminal cases. This is very clearly shown by subsec. (5) above quoted which refers to certified copies of the information or indictment and the plea, which are not applicable to civil actions under municipal ordinances.

The question is whether the violation of a municipal ordinance is or may be a "misdemeanor" in the meaning of subsec. (1) above quoted. The authorities are clear that it is not. In Waukesha v. Schessler, (1941) 239 Wis. 82, 86-87, the court held that an action in the name of a city for violation of its disorderly conduct ordinance was a civil action and not a criminal prosecution. The court explained all language in prior decisions to the effect that such cases are "quasi criminal," as meaning only that the acts involved partake in some way or degree of moral turpitude or are similar to acts prosecuted criminally—not that the action is a criminal one. Referring to certain earlier cases the court said:

"* * * The statements in these opinions to the effect that an act is a misdemeanor if punishable by 'fine and imprisonment, or by fine or imprisonment,' manifestly refers to acts forbidden by statute and not to acts forbidden by ordinance."

Nor is it material that the same act constitutes a violation of the state criminal law. If prosecuted under a municipal ordinance, the act is not a "misdemeanor" merely because it is also punishable criminally. Ogden v. Madison, (1901) 111 Wis. 413.

WAP
Criminal Law — Insane — Counties — Where trial court commits accused to a hospital for mental examination pursuant to sec. 357.12 (3), Stats., the county is liable for the expenses thereof as part of the costs in the criminal case under sec. 353.25, Stats.

December 15, 1945.

Leon L. Brenner,
District Attorney,
Waukesha, Wisconsin.

You inquire whether the county should be charged by the Wisconsin general hospital where a person accused of crime has been committed to that hospital by a municipal court for mental examination before proceeding with the trial. Sec. 357.12 (3), Stats., provides in part as follows:

"Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under section 357.13. * * *"

No express provision is made by the above statute for payment to the hospital. Sec. 357.12 (1), Stats., which provides for appointment of expert witnesses by the court, expressly provides that "the compensation of such expert witnesses shall be fixed by the court and paid by the county upon the order of the court as a part of the costs of the action." No similar provision is necessary with reference to the hospital expenses for the reason that the same are fixed by law and no court order is required.

Sec. 353.25, Stats., provides in part as follows:

"* * * In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury."
It is quite clear, and is the practice followed throughout the state so far as we are advised, that the hospital expenses in such cases are to be paid by the county and treated as a part of the costs of the criminal case.

WAP

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**Taxation — Motor Carriers** — Cement mixer permanently mounted on a motor truck chassis is a “dump body” within meaning of sec. 194.47 (4), Stats., and if remaining requirements of that subsection are satisfied, the vehicle is exempt from taxes provided in secs. 194.48 and 194.49, Stats.

December 15, 1945.

B. L. Marcus, Commissioner,

*Motor Vehicle Department.*

You ask whether a cement mixer, permanently mounted on a truck chassis, may be considered a “dump body” within the meaning of that term as used in sec. 194.47 (4), Stats., thereby affording exemption to the motor vehicle to which it is attached from assessment of taxes provided in secs. 194.48 and 194.49, Stats.

You state that the dump body in question is a rotating mixer equipped with a mechanical arrangement for pouring the concrete which is mixed therein en route to the site of construction where it is to be used.

Sec. 194.47 (4) provides as follows:

“All motor vehicles equipped with dump bodies while engaged exclusively in the transportation of dirt, sand, gravel, stone, asphalt, cinders, ashes or cement for highway and building construction and maintenance, not more than 20 miles from the point of loading, and all such motor vehicles while operated empty for the purpose of moving such vehicles from one location to another.”

There is no statutory definition of the words “dump body.” Words in a statute are to be given their ordinary
meaning. *Wiese v. Polzer*, 212 Wis. 337, 343. The ordinary meaning of “dump body” is to be found in the second edition of Webster’s New International Dictionary, where it is given as follows:

“Dump body. A motor truck body that can be manipulated to discharge its contents by gravity.”

The mixer being permanently mounted on a truck chassis having the characteristics of the foregoing definition and the cargo being cement, we are of the opinion that the motor vehicle to which it is attached falls within the exemption provided by subsection (4) of sec. 194.47, Stats. This presumes, of course, that the other statutory requirements as to purpose for which the cement is to be used and that it be within a 20-mile radius from point of loading, are satisfied.

SGH

_Criminal Law — Indians — Courts — Coroner — District Attorney_ — Jurisdiction of federal courts over crimes committed by non-Indians on Indian reservations, under 25 USCA sec. 217, is not exclusive but is concurrent with state courts. Duties of district attorney and coroner under sec. 366.01, Stats., with respect to inquest in case of homicide on Indian reservation are no different from cases occurring elsewhere unless it is known that the guilty party is a tribal Indian.

December 15, 1945.

L. J. Brunner,

*District Attorney,*

Shawano, Wisconsin.

You have inquired as to the duty of the coroner with reference to homicide committed on the Menominee Indian Reservation about seven townships of which lie in Shawano county. You express doubt as to whether the coroner ought to investigate deaths occurring on the reservation for the reason that “any offenses committed upon the Indian reser-
vation between a white man and Indian, or between an In-
dian and an Indian, are subject to the exclusive jurisdiction
of the United States courts."

The statutes applicable to your question are the following:
25 USCA sec. 217 provides as follows:

"General laws as to punishment extended to Indian coun-
try. Except as to crimes the punishment of which is ex-
pressly provided for in this title, the general laws of the
United States as to the punishment of crimes committed in
any place within the sole and exclusive jurisdiction of the
United States, except the District of Columbia, shall extend
to the Indian country."

25 USCA sec. 218 provides as follows:

"Exceptions as to extension of general laws. The preced-
ing section shall not be construed to extend to crimes com-
mited by one Indian against the person or property of an-
other Indian, nor to any Indian committing any offense in
the Indian country who has been punished by the local law
of the tribe, or to any case where, by treaty stipulations, the
exclusive jurisdiction over such offenses is or may be se-
cured to the Indian tribes respectively."

18 USCA sec. 548 provides as follows:

"Indians committing certain crime; acts on reservations;
rape on Indian woman. All Indians committing against the
person or property of another Indian or other person any of
the following crimes, namely, murder, manslaughter, rape,
icest, assault with intent to kill, assault with a dangerous
weapon, arson, burglary, robbery, and larceny on and within
any Indian reservation under the jurisdiction of the United
States Government, including rights of way running
through the reservation, shall be subject to the same laws,
tried in the same courts, and in the same manner, and be
subject to the same penalties as are all other persons com-
mittting any of the above crimes within the exclusive jur-
diction of the United States: Provided, That any Indian
who commits the crime of rape upon any female Indian
within the limits of any Indian reservation shall be impris-
oned at the discretion of the court: Provided further, That
as herein used the offense rape shall be defined in accord-
ance with the laws of the State in which the offense was
committed."
Sec. 366.01, Wis. Stats., as amended by ch. 198, Laws 1945, provides as follows:

"Whenever the district attorney shall have notice of the death of any person and from the circumstances surrounding the same there is good reason to believe that murder, manslaughter, negligent homicide, excusable or justifiable homicide has been committed, and the venue of such offense is in his county, he shall forthwith order and require the coroner, deputy coroner, or in the event of the absence or disability of the coroner or deputy coroner, some justice of the peace to take an inquest as to how such person came to his death. In any inquest ordered by the district attorney he shall appear in the inquest representing the state in presenting the evidence. For the purpose of taking such inquest deputy coroners may perform all the duties and exercise all the jurisdiction and powers conferred upon such coroners by this chapter and shall be entitled to the same fees as such coroner for the performance of like duties, except as hereinafter provided. Nothing herein contained shall be construed as preventing such coroner from holding an inquest under the circumstances hereinafore specified without being first notified by the district attorney so to hold such inquest. Such inquest may be held in any county, if within this state, in which there would be venue for the trial of the offense."

In the first place it is unquestionably true that a prosecution for homicide committed by an Indian on the reservation is exclusively triable in the federal courts under 18 USCA sec. 548, above quoted. But a homicide committed on the reservation by a white person or other non-Indian is within the concurrent jurisdiction of the state and federal courts. It has long been held that "the words 'sole and exclusive' in [R. S.] sec. 2145 [25 U.S.C.A. sec. 217, quoted above], do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." In Re Wilson, (1891) 140 U. S. 575, 578; Ex parte Nowabbi, (1936) 60 Okla. Cr. 111, 61 P. (2d) 1139, 1150. The reservation is part of the state of Wisconsin and as such subject to its criminal laws except as to crimes committed by tribal Indians.

Therefore the question whether the venue of a prosecution for homicide would lie in your county or exclusively in the federal court depends upon whether the person guilty thereof is a tribal Indian or not.
The duties of the district attorney as prescribed by sec. 366.01, Stats., above quoted, are mandatory, except that in any case where the facts surrounding the homicide are known or the guilty person has been apprehended and has confessed, the district attorney and the coroner may be justified in refusing to put the county to the expense of an inquest. XVIII Op. Atty. Gen. 349.

If a person is found dead on the reservation under circumstances suggesting homicide, the identity of the person responsible for the death may or may not be immediately known.

If it is known that the guilty party is a tribal Indian, there is no reason for the state to concern itself in the case, as exclusive jurisdiction is in the federal courts. But if the identity of the guilty party is not known, or if it is known that he is a non-Indian, the duties of the district attorney and the coroner are no different from cases occurring off the reservation. If the case is ultimately prosecuted in the federal court, the information obtained by the coroner should, of course, be made available to the federal prosecutor.

It may be added that in any case where federal officers have begun an investigation before the case comes to the attention of yourself or the coroner, it would be proper to refrain from taking any action, on the ground that the federal officers have concurrent jurisdiction of the matter under the above-quoted federal statutes.

WAP
Motor Vehicle Department — Traffic Officers — Police —
The body of state traffic officers appointed pursuant to sec. 110.07, Stats., may be properly denominated as state traffic police and cars operated by them in the performance of their official duties may be properly identified by an insignia carrying those words.

December 20, 1945.

B. L. Marcus, Commissioner,
Motor Vehicle Department.

You have requested our opinion as to whether you may properly identify automobiles operated by your traffic officers by an insignia carrying the words "State Traffic Police."

The traffic officers are appointed pursuant to sec. 110.07, Stats., which in substance gives you the right to employ not to exceed 55 traffic officers to enforce and assist in the administration of the provisions of chs. 85, 110 and 194, or orders, rules or regulations issued pursuant thereto. These officers are given the powers of a sheriff in enforcing these laws and orders. It is provided that the officers shall constitute a state traffic patrol to assist local enforcement officers wherever possible in the regulation of traffic and the prevention of accidents upon the public highways and that no officer shall be used or take part in any controversy involving a labor dispute and shall not be required to serve civil processes.

It is quite clear that these traffic officers are invested with police powers in the enforcement of state traffic regulations. It is therefore appropriate that they be designated collectively as a state traffic police since that is precisely what they are.

The statute provides that these officers shall constitute a state traffic patrol, but it cannot be construed as requiring that they be identified by that name and by no other. That language must be considered in its context and construed to mean that the officers shall constitute a state traffic patrol or detachment or body for the purposes specified. It is the purpose of the language to make clear that the duties of the
officers are primarily those of a state traffic regulation unit, that they are provided as a means of supplementing enforcement by local officers and that they have no other functions. In order to insure that they shall not be used in labor disputes or to serve civil process, it is expressly provided that they shall not be used for these purposes.

Since in our opinion it is proper to identify the group as state traffic police, we know of no reason why an appropriate insignia carrying those words may not be placed on automobiles operated by the officers as an identification. In the performance of their official duties it is proper that their cars be identified.

JWR

Schools and School Districts — Counties — Salaries and Wages — Supervising Teachers — Elective Officers — A county board, notwithstanding the provisions of sec. 59.15, Stats., as amended by ch. 559, Laws 1945, must conform to the provisions of sec. 39.14 in fixing the salary of a supervising teacher.

A county board may not fix the salaries of officers to be elected at an ensuing election after the earliest time for filing nomination papers as provided by sec. 59.15 (1) (a).

December 20, 1945.

ROBERT M. SPEARS,
District Attorney,
Washburn, Wisconsin.

Sec. 59.15, Stats., as amended by ch. 559, Laws 1945, reads in part:

“(1) Elective officials. (a) The county board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county or part thereof (other than county board members and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid such officer (exclusive of reimbursements for expenses out-of-pocket provided for in 59.15 (3) ). * * *
Appointive officials, deputy officers, and employees. (a) Notwithstanding the provisions of any general or special law to the contrary the county board shall have the powers set forth in section 59.15 (2) and (3) as to any office, board, commission, committee, position, or employee in county service (other than elective offices included under section 59.15 (1), county board members and circuit judges) created by or pursuant to any special or general provisions of the statutes, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

"(2) Appointive officials, deputy officers, and employees. (a) Notwithstanding the provisions of any general or special law to the contrary the county board shall have the powers set forth in section 59.15 (2) and (3) as to any office, board, commission, committee, position, or employee in county service (other than elective offices included under section 59.15 (1), county board members and circuit judges) created by or pursuant to any special or general provisions of the statutes, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

"(c) The county board at any regular or special meeting may provide, fix, or change the salary or compensation of any such office, board, commission, committee, position, employee, or deputies to elective officers without regard to the tenure of the incumbent (except as provided in paragraph (d) ) * * *

"(3) * * *

"(4) In the event of any conflict between the provisions of this section and any other provisions of the statutes the provisions of this section to the extent of such conflict shall prevail."

Sec. 39.14 (2) provides that the county board shall fix the salary of supervising teachers at an amount which shall not be less than the teacher is entitled to under a schedule set up by the state superintendent of public instruction as provided in sec. 39.14 (7). That subsection, as amended by ch. 579, Laws 1945, provides that the state superintendent of public instruction shall adopt a salary schedule for supervising teachers which shall provide for a salary range from $1,550 to $3,000 per year varying with length of service and professional training. The section also provides for reimbursement by the state to counties for amounts paid to supervising teachers as salaries, but not to exceed the amount to which the teacher is entitled under the salary schedule adopted by the state superintendent.

You ask whether a county board is required to fix the salary of a supervising teacher as specified by sec. 39.14 (2). Our answer is "Yes."
Sec. 59.15, as amended, does not purport to grant authority to county boards to fix the salary of officers and employees without regard to any other provision of the statutes. It is the rule in interpreting statutes that conflicts are to be avoided wherever possible, and this rule must necessarily be applied in determining whether the provisions of sec. 59.15 govern over other sections of the statutes since they do not govern unless there is a conflict.

There is no conflict between sec. 59.15 as amended and sec. 39.14. The provision in sec. 59.15 (2) (c) that the county board "at any regular or special meeting may provide, fix, or change the salary or compensation of any such office, board, commission, committee, position, employee, or deputies to elective officers without regard to the tenure of the incumbent," except as otherwise provided, must be read in connection with statutes such as sec. 39.14 which provides the limits within which county boards may function. Within such limits the county board at any regular or at any special meeting may provide or fix salaries and may change any such salary which it has fixed without regard to the tenure of the incumbent, except as otherwise provided. By giving the language this interpretation conflicts are avoided, and if the language is susceptible of that interpretation, it must be given in order to avoid the conflict.

The provision in sec. 59.15 (2) (a) that the grant of powers in that subsection shall be limited only by express language does not affect the situation. In the first place, in our judgment the section does not otherwise confer the unlimited power to fix salaries, as we have pointed out, and consequently the provision that the power given shall not be limited except by express language is not applicable, since there is no question of limiting it within the field in which it is operative. However, if it be argued that the effect of applying sec. 39.14 is to limit any power granted by sec. 59.15, then the grant is limited by express language in that sec. 39.14 expressly limits the power of the county board to the payment of the minimum salaries there provided.

There can be no reimbursement of the county where the salary fixed is below the schedule set up by the state superintendent. XXVII Op. Atty. Gen. 232.
You also inquire as to whether counties may fix the salaries of elective officers after the earliest time specified by law for filing nomination papers for such offices. The statute provides that salaries shall be fixed prior to that time. The answer is "No." *Feavel v. Appleton*, (1940) 234 Wis. 483, 291 N. W. 830.

JWR

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**Marketing and Trade Practices — Unfair Sales Act**

Under sec. 100.30 (2) (j), Stats., an offer to give 2 gallons of gasoline free upon payment of only the tax, with every 7 gallons purchased, constitutes an offer of two separate items.

Since the 7 gallons and the 2 gallons are separate items, each must be sold at not less than cost plus a 6 per cent mark-up, as provided in sec. 100.30 (2) (a).

District attorney may apply for injunctive remedy as provided in sec. 100.30 (5) even though the violation of the unfair sales act has been discontinued at the time the proceeding in equity is instituted.

December 21, 1945.

John S. Barry,

*Deputy District Attorney*,

Milwaukee, Wisconsin.

You have requested the opinion of this department in regard to an alleged violation of sec. 100.30, Wisconsin statutes, entitled the "unfair sales act."

The situation confronting you involves the following facts: An advertisement appeared in the Milwaukee Journal October 5, 1945, as follows:

"SPECIAL OFFER
Friday Through Monday
2 GALLONS GASOLINE
(You pay only the tax of 5½¢ a gallon)
With Each 7-Gallon Purchase of Tankar Super Gasoline Oct. 5th Through Oct. 8th

NOW Higher Octane
More Mileage
Smother Performance
Once You Try It — You'll Always Buy It

TANKAR STATIONS
4129 W. National Ave. 735 W. Walnut St.
5736 W. Beloit Rd. 55th and Center
2401 S. 13th St. 3117 S. K. K.

Sec. 100.30 (2) (j) provides as follows:

"(j) When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purposes of this section be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of paragraph (a) or (b) of subsection (2) hereof."

One question arising out of the advertisement is this: Does the offer of 7 gallons of gasoline at the regular price plus 2 gallons at a price of 51/2 cents per gallon (the tax) constitute two separate items? We believe that it does. One item is 7 gallons of gasoline at the regular price. The purchase of this item entitles the buyer to an additional 2 gallons by paying only the tax of 51/2 cents per gallon. It is obvious that the 2 gallons are sold at less than cost since only the tax is collected.

You have raised a question as to whether the price collected for the 9 gallons should be used to determine whether the gasoline was sold at cost, plus a 6 per cent mark-up, as defined in subsec. (2) (a). We believe it is improper to combine the two items and then take the average cost per gallon because subsec. (2) (j) quoted above specifically provides that "each and all of said items shall for the purposes of this section be deemed to be * * * offered for sale * * *"
and the price of each item named shall be governed by the provisions of paragraph (a) or (b) of subsection (2) hereof." Therefore, since the 7 gallons and the 2 gallons are each separate items, each must be sold at not less than cost plus a 6 per cent mark-up.

You have also raised the question as to whether the injunctive remedy provided in the statutes is available in view of the fact that the company has discontinued the violation. Sec. 100.30 (4) provides a penalty by fine ranging from $10 to $500. Subsec. (5), entitled "Special remedy," provides in part as follows:

"In addition to the penalties provided, the courts of this state are invested with jurisdiction to prevent and restrain violations of this section, and it shall be the duty of the several district attorneys to institute proceedings in equity to prevent and restrain violations. * * *

Under the authority of the provision above quoted, the district attorney may institute a proceeding in equity. The statute, of course, does not make it mandatory for the court to grant the injunction. Historically, the granting of this remedy has been at the discretion of the court. However, there is authority to the effect that even though an act has been abandoned or discontinued, the remedy of injunction may, nevertheless, be granted by the court.

The court in Hecht Company v. Bowles, (1943) 321 U. S. 321, 327-328, 64 S. Ct. 587, 591, 88 L. ed. 754, 759, said:

"We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction under § 205 (a). But we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks."

The court concluded that the circumstances in this case did not warrant the granting of an injunction to restrain further violations of the emergency price control act.

There are numerous other federal cases of similar nature. See, for example, Walling v. Peavy-Wilson Lumber Co., (1943) 49 Fed. Supp. 846, 894, where an injunction was
granted although the violation of the fair labor standards act had ceased before suit was filed.

In *Walling v. Builders' Veneer & Woodwork Co.*, (1942) 45 Fed. Supp. 808, 810, the district court for the eastern district of Wisconsin granted an injunction after violations had ceased. In *Eugene Dietzgen Co. v. Federal Trade Comm.*, (1944) 142 Fed. (2d) 321, 330, the federal trade commission had issued a cease and desist order after the plaintiff company had abandoned its unlawful practice. The federal court sustained the commission's action.

In *Walling v. Florida Hardware Co.*, (1944) 142 Fed. (2d) 444, the court denied relief by injunction on the ground that there appeared to be no danger of a repetition of the unlawful conduct. A similar result was reached in *Bowles v. Minish*, (1944) 56 Fed. Supp. 153.

It is our opinion that your office may make application for an injunction as provided in subsec. (5) even though the violation may have been discontinued at the time the proceeding is instituted. Whether the injunction will be granted is a matter peculiarly within the discretion of the court as indicated in the cases cited above.

We conclude, therefore, (1) that the offer contained in the advertisement set out above constitutes a violation of sec. 100.30 (2) (j); and (2) that your office may apply for the special remedy of injunction provided in sec. 100.30 (5) even after the violation has ceased.

ES
Poor Relief — Old-age Assistance — Counties — County Judge — Counties are not entitled to reimbursement under sec. 49.51 (3) of the statutes for any part of the salary of a county judge who administers old-age assistance.

December 22, 1945.

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

You have asked the following question:

"In counties where no separate administrative agency has been set up for the social security aids under sec. 49.51 (2) (a) or (b), Stats. 1945, do the county and juvenile judges serve cum onere, or should their salaries be considered in whole or any part in computing reimbursement under sec. 49.51 (3) (a) or (b) and the related appropriation sec. 20.18 (6) (a) or (b), Stats. 1945."

Sec. 59.15 (1) of the statutes as amended by Ch. 559 of the Laws of 1945, provides that the county board shall fix the total annual compensation for services to be paid county officers. In Hoffman v. Lincoln County, 137 Wis. 353, 355, 118 N. W. 850 the court said with respect to the annual compensation fixed by the county board for the county judge:

"* * * In the absence of other specific provisions the salary so fixed would doubtless constitute his sole compensation for all services which the law requires of him. * * *"

Sec. 253.03 of the statutes provides that a county court, in addition to enumerated functions, "shall have and exercise such other jurisdiction and powers as are or may be conferred by law." If no other provision is made by counties under sec. 49.51 of the 1945 statutes, old-age assistance is to be administered in each county by the county judge under the provisions of sec. 49.20. No statutory provision is made for additional compensation for such administration.

Sec. 49.51 of the statutes provides for reimbursement of counties by the state for certain expenditures incurred in the administration of old-age assistance, aid to dependent
children and blind aid. Where the county judge administers such aids, he is compensated for that service by the annual compensation fixed by the county board for his office. It is true that the county board in fixing the amount may have taken into consideration the additional burden involved by such service, and on that basis it might be argued that a part of the compensation paid the judge constitutes an expenditure incurred in administration of the aids. The statute, however, contemplates the fixing of the annual compensation of the county judge as an entirety and makes no provision for allocating portions to the various functions of the office. The entire compensation is paid to the county judge by reason of his incumbency in that office, and is not severable.

We are of the opinion that reimbursement cannot be made to counties under section 49.51 of the statutes of 1945 for any portion of the salary paid to a county judge.

BL
Counties — County Board Member — Public Officers — Malfeasance — Actions — County board member who sells gasoline and oil to the county in excess of $100 per year is guilty of malfeasance under sec. 348.28, Stats., notwithstanding he may have acted as agent for another and the transaction may have been without corrupt intent on his part.

Action will lie against board member and oil company severally to recover moneys paid out under such illegal contract.

Upon conviction of malfeasance office of county board member is vacated under sec. 17.03 (5), Stats.

December 22, 1945.

ALLAN M. STRANZ,
District Attorney,
Crandon, Wisconsin.

You state that a member of the Forest county board of supervisors is being prosecuted for violation of sec. 348.28, Stats. (malfeasance). The charge grows out of sales of more than $100 worth of gasoline and oil to Forest county during a calendar year. The defendant is a bulk station operator for a large oil company with division offices in Minneapolis. He had sold petroleum products to the county in amounts ranging up to about $1,200 worth per year for many years before becoming a member of the board and while he was a member of the board his sales to the county neither increased nor decreased. He billed the county on invoices of the oil company and the county checks were made payable directly to the oil company and delivered to the board member, who sent them to the oil company without endorsing them. You inquire whether on these facts there has been a violation of sec. 348.28, Stats.

The statute in question provides in part as follows:

"Any officer * * * of any county * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal or real property * * * made by, to or with him
in his official capacity or employment, or in any public or official service, * * * shall be punished by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by a fine not exceeding $500; but the provisions of this section shall not apply to * * * contract for the sale of printed matter or any other commodity, not exceeding $100 in any one year * * *. Any contract, to which the state or any county, city, village, town, school board or school district is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the state, county, city, village, town, school board or school district shall incur no liability whatever thereon. * * *”

We assume that there is some contract of agency or other arrangement between the oil company and the county board member whereby the latter is paid for selling the oil and gasoline. It is not necessary to constitute a violation of the above statute that the officer deal in his own name as principal. If he was merely an agent, nevertheless he violated the law if he had a pecuniary interest in the transaction. See Bissell L. Co. v. Northwestern C. & S. Co., (1926) 189 Wis. 343, 347. The statute has been held to apply to insurance agents selling insurance to cities in which they hold offices. 31 Op. Atty. Gen. 93, 95.

Nor is it material that the sales were not made corruptly, if that be the case. The statute prohibits a member of the board from any manner of interest in contracts exceeding $100 with the county, even though entered into in good faith without solicitation by the board member and even though the county was saved considerable inconvenience by the sale. Arbuthnot v. Kelley, (1917) 165 Wis. 362. See also State ex rel. Dinneen v. Larson, (1939) 231 Wis. 207, 221 (on rehearing).

Your next question is whether or not the county can recover in a civil action the amounts paid to the board member for gasoline and oil sold by him. This question is answered in the affirmative on the authority of Arbuthnot v. Kelley, (1917) 165 Wis. 362 and Reetz v. Kitch, (1939) 230 Wis. 1, 21-22. It would seem that such action will lie severally against both the board member and the oil company for whom he acted as agent. Bissell L. Co. v. Northwestern C. & S. Co., (1926) 189 Wis. 343, 347 (holding that the princi-
pal is bound by the illegal acts of its agent and the contract is void as to the principal as well as the agent). See also Chippewa Bridge Co. v. Durand, (1904) 122 Wis. 85, 108-109.

It may also be pointed out that laches is no defense to such an action short of the statute of limitations. Arbuthnot v. Kelley (1917) 165 Wis. 362; Reetz v. Kitch. (1939) 230 Wis. 1.

Your next question is as to your duties with reference to removal proceedings against the county board member under secs. 17.14 (2) (c) and (3), Stats. But those statutes need not be considered for the reason that under sec. 17.03 (5) the conviction of any public officer by a state or United States court of any felony or other crime of whatsoever nature punishable by imprisonment in any jail or prison for 1 year or more causes a vacancy in his office. In case this defendant is convicted of the offense charged his office will, therefore, become vacant automatically without resorting to removal proceedings. Formerly there was a special malfeasance statute (sec. 692, Stats 1917) applicable only to county board members and other county officers, which expressly provided that any supervisor violating its provisions should be deemed to have vacated his office. When this was repealed by a revisor's bill, ch. 695, sec. 139, Laws 1919, the revisor's note indicated that the subject was covered by sec. 348.28 and sec. 17.03 (5).

WAP
Criminal Law — Licenses and Permits — Christmas tree dealer — A Christmas tree dealer's license is required by sec. 348.386 (3), Stats., from anyone who ships or transports evergreen or coniferous trees, branches, boughs, bushes, saplings or shrubs outside the county where they were cut without regard to whether such trees, etc. were cut from his own land or from the land of someone else.

December 22, 1945.

RUDYARD T. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

You have requested our opinion with respect to the construction of the licensing provisions of sec. 348.386 (3), Stats.

The first sentence of the subsection provides that no person shall cut for sale in its natural condition

“any evergreen or coniferous tree, branch, bough, bush, sapling or shrub, from the lands of another without the written consent of the owner, whether such land be publicly or privately owned.”

The remainder of the section appears to be designed to enforce the quoted provisions. It is provided that the consent of the owner shall be carried by any person in charge of cutting any such trees, branches, etc. and shall be exhibited to any officer, forest ranger, etc. at any time. The officers are authorized and empowered to stop any vehicle or means of conveyance found to be carrying any trees, branches, etc. upon any public highway for the purpose of making an inspection and investigation, and they may seize and hold subject to the order of the court any such trees, branches, etc. being found cut, removed or transported in violation of the subsection. It is then provided that

“No person shall ship or transport any such trees, branches, boughs, bushes, saplings or shrubs outside the county where the same were cut unless he shall first have obtained from the conservation commission a license as a Christmas tree dealer.”
It is provided that the annual fee for the license shall be $5.00. No dealer shall purchase or receive any Christmas trees until the vendor shall have given the dealer either a statement in writing that the trees were cut from his own lands or has filed with the dealer written consents from the owners of the land from which the trees were cut. In making a shipment of Christmas trees by railroad or truck dealers are required to attach to the outside of each package, box, bale, truckload or carload so shipped a tag or label on which shall appear the name of the dealer, his address and the number of his license. Common carriers are prohibited from receiving any such trees, branches, boughs, bushes, saplings or shrubs unless the tag or label is attached thereto. Any violation of the provisions of the section carries a penalty of fine or imprisonment or both.

You desire our opinion as to whether one who cuts trees upon his own land and ships or transports them outside the county where they were cut is required to obtain a license.

The question depends upon the proper construction of the language “such trees, branches, boughs, bushes, saplings or shrubs” as used in the licensing provisions. There can be no doubt but that the language refers back to the first sentence of the subsection. At this point, however, there appears to be some difference of opinion. On the one hand, the word “such” may refer to evergreen or coniferous trees, branches, etc. or, so it is argued, it may have a broader meaning. In XX Op. Atty. Gen. 1106, in what appears to have been an effort, conscious or otherwise, to soften the application of the statute to an extreme case, it was held that the word “such” referred only to trees cut for sale and did not include trees which were not cut for that purpose. In order to hold that a license is not required in the present case it would be necessary to go one step further and to say that the language refers only to trees cut for sale from the lands of another. The trouble with this argument is that if it is sound, it should be applied with full force and the language “such trees,” etc. should refer only to evergreen or coniferous trees, etc. cut for sale from the lands of another without the written consent of the owner. There can be no justification for going beyond the words “evergreen or coniferous trees”
and stopping short of applying every qualifying phrase in the sentence.

If it were to be held that the language “such trees,” etc. refers only to evergreen or coniferous trees, etc. cut for sale from the lands of another without his consent, then the statute would indeed be a ridiculous one. The inspection provisions, referring as they do to “such” trees, would not permit of the inspection of trees except in the case where they had been cut in violation of law. The whole purpose of inspection of course is to determine whether they have been cut in violation of law.

Such a construction of the language “such trees” would require a license only in case trees cut in violation of law were transported. The purpose of the section is not to license the transporting of illegally cut trees but to license the transportation of all trees in order to enforce the provisions against illegal cutting.

In our opinion the language “such trees,” etc. refers to evergreen or coniferous trees, and one shipping or transporting such trees outside the county where the same were cut is required to obtain a license.

JWR

Appropriations and Expenditures — Historical Society — State historical society has no power to enter into a contract with a private book company whereby said company would publish and distribute a book written by an employe of the society as part of her regular duties and in return the society would receive a royalty on each volume.

December 27, 1945.

STATE HISTORICAL SOCIETY.
Attention Mr. Edward P. Alexander, Director.

You advise us as follows: The state historical society about a year ago issued a mimeographed history book of about 220 pages entitled “Our Own Wisconsin,” prepared especially for fifth grade school children or children about
that age. The manuscript was written by an employe of the society as part of her regular duties. About 1,500 copies were mimeographed and practically all have now been distributed. The society has been intending to issue this book in regular printed form as there is a considerable demand for it. Recently you have been approached by representatives of a book company who have suggested that the society allow them to print and distribute this book on a royalty basis. Such an arrangement would be very beneficial to the society in that the book company has the facilities to distribute the books and the society would, in event such an arrangement were entered into, be relieved of all the work incidental to such distribution.

You ask our opinion on the following questions:

1. Has the society power to enter into a contract with a private book company whereby it would be agreed that said company would publish and distribute said book and in return the society would receive a royalty on each volume?

2. Could a part of the royalty be paid by the society to its employe who wrote the manuscript?

The society cannot in our opinion enter into a contract such as is proposed by your first question. There is no statute which gives it any such power and the circumstances are such that no such power can be implied. Implied powers are derived only from powers which are expressly granted. They exist only when necessary to effectively execute the express powers conferred. *Butler v. Milwaukee*, (1862) 15 Wis. 493 at 497. See to the same effect, *Chittenden v. Jarvis*, (1941) 68 S. D. 5, 297 N. W. 787 at 789. We may here assume that the society has the power not only to arrange for the preparation of manuscripts, such as that which gives rise to your inquiry, but also that it has power to have the same printed and distributed. However, the power to enter into a contract such as is proposed here cannot be implied therefrom because such a contract is not necessary to enable the society to carry out such power. The legislature appropriated to the state historical society on July 1, 1945 the sum of $62,100 and annually beginning July 1, 1946 the sum of
$67,400 "to carry into effect the powers, duties and functions of said society." Sec. 20.16 (1) (a), Stats. The legislature has thus indicated its judgment that this amount is sufficient to enable the society to carry into effect its powers, duties and functions, and this negatives the necessity of a contract such as proposed. Cf. Flannagan v. Buxton, (1911) 145 Wis. 81. We must presume the society can print and distribute the book out of the fund appropriated.

In view of the foregoing it becomes unnecessary for us to answer your second question.

WET

Building and Loan Associations — Banking Commission

— A local building and loan association may, subject to approval of the banking commission, purchase a building for office purposes standing on leased land.

In determining whether it will approve or disapprove a proposal by a local building and loan association to purchase or construct a building for office purposes as provided in sec. 215.256. Stats., the commission must base its determination upon the facts in each case. The commission must also act in good faith and there must be some rational basis for the result reached by it so it cannot be said the commission has acted in an arbitrary or capricious manner in arriving at its determination.

December 27, 1945.

BANKING COMMISSION.

Attention Edward A. Tamm, Secretary.

You ask us whether a local building and loan association may purchase for office purposes a building standing on leased ground.

The statute which relates to the power of a local building and loan association to purchase or construct an office building is sec. 215.256, which provides as follows:

"With the approval of the commission, any association may invest a sum of money not exceeding $150,000, but not
to exceed one-half of its contingent fund, for the purchase or construction of a building to be occupied by the association as its office.”

In answering your inquiry we will assume that the land on which the building which you have referred to is located is leased under a long term lease. We doubt whether any question would ever arise where the lease is for only a short term since as a practical matter it is improbable that any association would ever consider buying a building for office purposes standing on leased land when the lease would expire in only a few years.

As a pure question of law we see no reason why a local building and loan association may not, subject to approval of the banking commission, purchase a building for office purposes standing on land which is under a long term lease, assuming of course that the association acquires the lease on the land. There is no express provision in the statute which would prohibit an association from purchasing an office building on leased land, and we do not think such a prohibition can be supplied by implication. In Brown v. Schleier, (CCA 8) 118 Fed. 981, a national bank leased certain land for a term of 99 years. The bank further agreed to erect on said land by a certain date a substantial building not less than four stories high and to cost not less than $100,000. The lease provided the building was to become part of the realty and that the lessee was to have no right to remove the building. The lessee was given an option to renew for a term of 50 years at the same rental at the expiration of the 99-year term. In ensuing litigation it was urged this lease was void for several reasons, one of which was that the power conferred on national banks by sec. 5137, R. S. to purchase and hold such real estate “as shall be necessary for its immediate accommodation in the transaction of its business” did not include power to lease property with a view of erecting a building thereon for its accommodation in the transaction of its business and also did not give it the right to lease property for a longer period than it was to exist as a corporation. The court said (p. 983):

“We entertain no doubt that the power conferred on national banks by section 5137 of the Revised Statutes to purchase such real estate as is needed for their accommodation
in the transaction of their business includes the power to lease property whereon to erect buildings suitable to their wants. The power to purchase land is larger than the power to lease by as much as a fee simple estate is larger than a term for years, and the greater power includes the less. In the larger towns and cities of the United States, national banks usually find it necessary to locate themselves in the business centers, where property is most in demand and likewise most valuable. In the large cities it will doubtless sometimes happen that a bank cannot locate itself in a quarter where its business interests demand that it should be located, unless it leases property for a term of years and agrees with the owner to erect a building thereon suitable to its wants. That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the language of the statute, and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate.

The foregoing case was affirmed by the supreme court in Brown v. Schleier, 194 U. S. 18, 24 S. Ct. 558, 48 L. ed. 857.

As above noted the right of any local building and loan association to use its funds to the extent provided in sec. 215.256 for the purchase or construction of a building to be occupied by it as an office, is subject to approval by the banking commission. Such approval is necessary in every case where an association proposes to use any of its funds for that purpose, whether the building to be purchased is on leased ground or otherwise. The banking commission has a considerable discretion as to whether it will approve or disapprove a proposal by a local association to use its funds for the purchase or construction of an office building. The commission must base its determination upon the facts in each case. The commission must also act in good faith and there must be some rational basis for the result reached by it so it cannot be said that the commission has acted in an arbitrary or capricious manner in arriving at its determination.

In event the commission is requested by a local building and loan association to approve the investment of its funds
for the purchase of a building located on leased land to be used by it for office purposes, we do not think the commission can refuse to give its approval on the ground the association could not as a matter of law use its funds to purchase a building so situated. There may be, however, a question as to whether it would be a sound business practice for an association to purchase a building located on leased land for office purposes. That of course is one fact for the banking commission to consider in determining whether it will approve or disapprove the request of the association to so invest its funds in the purchase of such a building so located, and it is a matter as to which we can express no opinion.

WET
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