OPINIONS
OF THE
ATTORNEY GENERAL
OF THE
STATE OF WISCONSIN
VOL. XXXVI
January 1, 1947, through December 31, 1947

JOHN E. MARTIN
Attorney General

MADISON, WISCONSIN
1947
ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee________from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee________from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK,
  Geneva ____________________________from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison________from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point________from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh________from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay________from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee________from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown________from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona________from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam________from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON,
  Mineral Point________________________from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend________from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK,
  Manitowoc __________________________from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison________from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau________from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh________from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT,
  Neillsville __________________________from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison________from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT,
  Richland Center_______________________from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock________from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson_______________from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel____________from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee________from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison________from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay________from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee________from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston________from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee________from Jan. 2, 1939, to
ATTORNEY GENERAL'S OFFICE

JOHN E. MARTIN_________________________Attorney General
STEWART G. HONECK____________________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
BEATRICE LAMPERT______________________Assistant Attorney General
ROY G. TULANE________________________Assistant Attorney General
RICHARD E. BARRETT*___________________Assistant Attorney General
LEONARD BESSMAN**____________________Assistant Attorney General
EARL SACHSE__________________________Assistant Attorney General

* Appointed May 12, 1947.
** Appointed November 1, 1947.
Counties—Appropriations and Expenditures—National Forest Income—The portion of the national forest income allotted for highway construction and maintenance is to be expended under the supervision of county highway committee pursuant to sec. 59.07 (22), Stats.

The portion of the national forest income allotted for the benefit of public schools is to be used toward reduction of the general county tax levy required for common school aids under sec. 40.87 (4) (a), Stats.

January 3, 1947.

ALLEN C. WITTKOPF,
District Attorney,
Florence, Wisconsin.

You have asked how and when a county board is to disburse the portion of national forest income received by it pursuant to sec. 20.07 (10) of the statutes.

The directions as to method and time of distribution of the national forest income which are contained in sec. 20.07 (10) are addressed to state officials and apply only to distribution of such funds from the state treasury to the various counties.

The directions as to how the funds shall be further distributed after they have been paid to the county are contained in secs. 59.07 (22) and 40.87 (4) (a) of the statutes. These statutory provisions were enacted pursuant to the
federal statutes which require only that the funds are "to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated." See 16 USCA §500.

Sec. 59.07 (22) of the Wisconsin statutes provides:

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

Under the foregoing provision the 25 per cent which is allotted for highway construction and maintenance, in the event the income is over $500, is to be expended under the supervision of the county highway committee rather than turned over to the various towns.

The above quoted section also provides that the portion allotted for the benefit of the public schools is to be "used toward payment of county school aid" required under sec. 40.87 (4) (a). As pointed out in XXX Op. Atty. Gen. 115, this does not result in the distribution of the forest income as such among the various school districts, but rather in the reduction of the tax levy required to be raised by the county as a whole for common school aids under sec. 40.87 (4) (a).

The distribution of the common school aids is effected pursuant to sec. 74.03 as a part of the treasurer's tax settlement.
Soldiers, Sailors and Marines—Department of Veterans Affairs—Medical Service—Secs. 45.35 and 45.38, Wis. Stats., which authorize director of department of veterans affairs to provide medical and hospital treatment for veterans for service connected diseases or disabilities do not authorize him to employ the services of a private agency on a commission or brokerage basis for arranging and paying for such treatment.

January 4, 1947.

Leo B. Levenick, Director,
Department of Veterans Affairs.

We understand that a privately organized agency known as the Wisconsin Veterans Medical Service Agency has been set up for the purpose of enabling returned veterans to obtain medical service from doctors of their choice. Its proposed schedule of fees has been approved by the veterans administration and by the board of the department of veterans affairs.

You state that the plan of operation is as follows:

"The veteran calls upon the local doctor of his choice for medical services. The doctor makes out a Service Agency form which is forwarded to the agency here at Madison. When this form is received at the office at Madison it is ascertained whether the services are to be paid by the Veterans Administration, by the Wisconsin Department of Veterans Affairs, or by the veteran himself. When such decision has been made the services are rendered and the doctor renders his services to the agency on their prescribed form. The agency adds 10% to the service charge, bringing the amount up to the approved list, and bills this department for such cases as come under our law. The Department of Veterans Affairs, under this plan, will pay the agency one check at the end of each month, which check includes all cases which the department has assumed, such check made payable to the Wisconsin Medical Service Agency. Upon receipt of payment, the agency will then proceed to pay the individual doctors the amount due them for their services."

We are asked whether the department of veterans affairs may lawfully participate in such a plan.

Secs. 45.35 and 45.38, Stats., authorize the director of the department of veterans affairs to provide for medical and
hospital treatment for veterans for service connected diseases or injuries but nowhere do we find any authority for employing the services of an agent or broker to act as an intermediary in supplying such services or in acting as a disbursing agency for the state in paying for such services.

State departments and officers have only such powers as are expressly granted to them or are necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440.

The mere fact that the employment of an outside agency will decrease the work of a state department does not give rise to powers which are not otherwise to be found in the statute, and you are therefore advised that the powers of the director of the department of veterans affairs to furnish medical and hospital care under secs. 45.35 and 45.38 are to be exercised directly by the director or his deputies and may not be delegated on a commission or brokerage basis to a private agency or institution.

WHR

*Automobiles and Motor Vehicles—Motor Vehicle Department—State Treasurer—Safety Responsibility Act—Security Deposits*—State treasurer is mere custodian of security deposits placed with him under sec. 85.09, Stats. The form and amount of the security deposited is determinable by the commissioner of motor vehicles. Return of the security is to be made by the treasurer upon proper authorization by said commissioner. Application of deposit to payment of judgments is to be effected through ordinary court processes.

January 6, 1947.

John M. Smith,

State Treasurer.

An opinion has been requested as to the handling of security deposits made under the motor vehicle safety responsibility act, sec. 85.09, Stats. We are informed that
these deposits as delivered to the state treasurer are in variant form, including among others bank drafts, bank money orders, personal checks, certified checks, war savings stamps and cash.

Your primary concern is whether the cash, checks, money orders, drafts and other cash items are to be treated as state funds subject to deposit in the bank and the regular procedure of withdrawal by warrants of the secretary of state upon vouchers of the motor vehicle department. We fail to find anything indicating that, as you suggest, such was the intention of the legislature. There is nothing in sec. 85.09 or elsewhere in the statutes that either authorizes or permits it. Had such been the intention some language permitting the same would have been used. It may be that the legislature had reasons for not doing so. In any event in the absence of something to that effect this statute cannot be viewed as providing that these deposits shall be treated and handled as state funds.

Sec. 85.09 (10), Stats., specifically says that the security deposits made in compliance with that section “shall be placed by the commissioner in the custody of the state treasurer.” Accordingly when the state treasurer receives them upon transmittal by the motor vehicle department, as this statutory language necessarily implies is his duty, they come into his possession by virtue of his being the state treasurer, but solely for the purposes of custody. This is far from making them state funds. They remain private property that is put in his official custody for only the prescribed purposes that are set out in this statute.

Art. VIII, sec. 2 of the Wisconsin constitution specifically precludes any money from being paid out of the state treasury “except in pursuance of an appropriation by law.” Were these deposits state funds they would then be subject to this prohibition. But, in any event, whenever a special fund is set up in the state treasury the legislature has expressly provided therefor. As illustrative see ch. 25 and secs. 20.491 and 66.90 Stats. There being no similar provision it must be concluded that such was not the way the legislature intended to handle these funds.

Sec. 25.20, Stats., says that all moneys in the state treasury not designated as belonging to a fund go into and constitute
the general fund. Were these security deposits a part of the state funds then they would become a part of the general fund. But as previously pointed out they are not state funds in the sense that these words mean funds in which the state has a proprietary interest. They are not in the state treasury but merely in the custody of the state treasurer as an official. Furthermore, as funds in the state treasury and part of the general fund they would be subject to investment by the commissioners of public lands under sec. 14.67, Stats., which would be inconsistent with being "in the custody of the state treasurer."

It is our opinion that security deposits made under sec. 85.09, Stats., are not to be treated as state funds but retained by the state treasurer in his own custody. The details of just how he shall effectuate such custody are for the state treasurer to determine. As we view the matter the state treasurer is merely the custodian and his duties of receiving, safely keeping, and at the proper time disbursing or delivering the property deposited are ministerial only. The nature of the relationship of the state treasurer to these deposits is the same as that in respect to other deposits of securities or cash in his official custody by insurance companies, etc. See XXXV Op. Atty. Gen. 117. His relationship to these deposits is similar to his position in respect to the moneys of the state life fund under sec. 210.05 (2), Stats., and in respect to the annuity board funds. See XXII Op. Atty. Gen. 365. He holds the funds in trust for the purposes specified.

The next consideration is as to how the state treasurer is to perform his functions as such custodian. His duties and powers in receiving, keeping and disbursing or delivering them are those of a mere custodian and as set forth in this statute. Subsec. (5) of sec. 85.09, Stats., specifically makes the amount of security to be deposited a matter for the commissioner of motor vehicles to determine. The language in subsec. (9) that the security which must be deposited "shall be in such form and in such amount as the commissioner may require," not only commits to the commissioner the amount of the security to be deposited but the form in which it shall be. Subsec. (10) states that the property deposited as security shall be placed "by the commissioner in the custody of
the state treasurer." Therefore, the commissioner is the one to prescribe the amount and form of the security deposit, and in our opinion when he has accepted a deposit and transmits it to the state treasurer it is the duty of the latter to accept and receive the same regardless of what may be its form.

Having received the security deposit the duty of the treasurer then is to keep it safely in order to carry out the purpose of the deposit. Subsec. (10) of sec. 85.09, Stats., specifies that such deposited security "shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question." Such of said deposits as are transmitted to and received by the treasurer that are in a form other than cash, or what is usually treated as the equivalent thereof, may be kept by him in that form. He can then deliver them in kind when his official custody is ended. But such items as bank checks, drafts, money orders, personal checks and the like which are cash items are not susceptible of retention in that form and should be converted into cash. This may be effected by depositing all the cash and cash items with a bank in a trust account for the purposes of sec. 85.09, Stats., in the name of the state treasurer subject to withdrawal by checks signed by such official. In this way security deposits will be safely kept and in a form adaptable and available at all times to carrying out the purpose for which deposited. Not only is this a way which effectuates safekeeping of such liquid security but it is the usual method and one that is reasonable from a businesslike standpoint for it furnishes a method of easy transmission of such deposits when the occasion arises. To keep such items in cash and make return in that form would be both cumbersome and contrary to usual business practice. But the statute is entirely silent as to how such application shall be made. However, the subsection does provide for the disposition of the deposited security in all other cases. It expressly requires the return thereof whenever the commissioner has been furnished with evidence satisfactory to him that the requirements specified for such return are met. The statute gives the treasurer no power of decision in respect to return of the deposit but reposes the determination thereof solely in the commissioner.
As both the state treasurer and commissioner of motor vehicles have only such powers as are given them by the statutes and there is no provision giving them power or authority to apply the deposited security to judgments, neither of them has any such power.

In our opinion whenever the commissioner of motor vehicles in due form notifies the state treasurer that satisfactory evidence has been furnished to him of a release, a final adjudication of non-liability, a warrant for confession of judgment, an agreement for payment, or the passage of the time specified without the commencement of legal action for damages, the treasurer has no discretion but must act thereon and forthwith effect a conclusion of the deposit by returning the same. If the deposit was in property susceptible of being kept in kind then it is returned by a delivery thereof. To the extent it was not, but in cash items, return would be made by remittances in the form of a bank check or other appropriate medium.

There remains consideration of how application is to be made of a deposit to any judgment or judgments recovered. As previously pointed out there is nothing in the statutes giving anyone power or authority to act in this respect. However, sec. 85.09 (10), Stats., expressly says that these deposits are to be placed in the custody of the treasurer so as to be applicable to any judgment recovered. This statute containing provisions covering disposition in all other instances and placing the determination thereof in the commissioner, it is to be construed as not authorizing either the treasurer or the commissioner to initiate application of the deposit to judgments.

There are several considerations which may have motivated not giving such power or authority to these state officials. When the deposit might be in the form of bonds, stocks or tangible property, and as stated above the deposited security may be in whatever form the commissioner is willing to accept as sufficient, considerable difficulty would be experienced if the treasurer were to apply it in payment on a judgment. The judgment might be considerably smaller than the value of the deposited security, or there could be a number of judgments requiring allocation or proration. The only way would be to convert the deposited security into
money. The state treasurer not only has no facilities for doing this but is given no such authority by this statute. There is also the possibility of the judgment being satisfied during the interim involved in effecting application by the state officials and the confusion that would result were the payment made by them to the judgment creditor when not entitled thereto or in the event of reversal on appeal.

It is our conclusion that in the enactment of sec. 85.09, Stats., the legislature did not intend the state officials should effect application of the deposit to judgments recovered, but that such application was left to use of the ordinary court processes such as garnishment, seizure on execution or by court order, as may be appropriate. By that method the custody of the treasurer is terminated in a way that fully protects him and at the same time carries out the over-all purpose of sec. 85.09, Stats.

HHP
Counties—Zoning Power—District Attorney—Duties—

Portion of sec. 59.97 (3), Stats., which provides that an amendment to a zoning law referred to in said section “shall not be passed except by a three-fourths vote of the county board of supervisors” means a three-fourths vote of the members of the board present at the meeting assuming the existence of a quorum and not a three-fourths vote of the entire elected membership of the board.

It is not mandatory under sec. 59.47 (3) that a district attorney submit a question to the attorney general for an opinion when requested to do so by the county board. The district attorney should submit a question to the attorney general for an opinion only when he feels he is unable to arrive at a correct conclusion to any question before him and feels it is necessary that he receive the advice of the attorney general, or other circumstances exist which in the judgment of the district attorney warrant his seeking the advice of the attorney general. See also sec. 14.53 (3) relating to the duties of the attorney general.

EDWIN M. WILKIE,

District Attorney,

Madison, Wisconsin.

In a recent communication from your office we are asked for our opinion on two questions as follows:

1. Does that portion of sec. 59.97 (3) which provides that an amendment to a zoning ordinance referred to in that section “shall not be passed except by a three-fourths vote of the county board of supervisors” require a three-fourths vote of the entire elected membership of the county board or is a three-fourths vote of the members present sufficient?

2. Is it mandatory for a district attorney to submit a question to the attorney general for an opinion when requested to do so by the county board of supervisors?

In our opinion the portion of sec. 59.97 (3) referred to which reads that an amendment to a zoning ordinance mentioned in said section “shall not be passed except by three-fourths vote of the county board of supervisors” requires a vote of three-fourths of the members of the county board.
present at the meeting, assuming the existence of a quorum sufficient to enable the board to transact business, and not three-fourths of the entire elected membership of the board.

This conclusion is arrived at on the authority of the case of *St. Aemilianus Orphan Asylum v. Milwaukee County*, 107 Wis. 80. There the supreme court held that a statute which provided in effect that in any case in which the county contributes to the support of any child committed to any orphan asylum said county may "by a majority vote of its board of supervisors" remove said child from such institution, required a majority of the members of the board of supervisors present at the meeting, provided sufficient members were present to constitute a quorum, and not a majority of all the members of the board as held by the trial judge.

The applicable rules of law are stated and discussed at considerable length in said case and it would extend this opinion unduly to set them out or discuss them at length. In arriving at its conclusion in said case, the supreme court referred to and considered the effect of sec. 665, Stats. 1898, which was the predecessor of sec. 59.04 (3). This disposes of any argument which could be made against our answer to your first question, based on sec. 59.04 (3) or sec. 59.02 (2). The latter subsection does not, so far as the question here is involved, differ substantially from sec. 59.04 (3).

We also direct your attention to *Missouri Pacific Ry. Co. v. Kansas*, 248 U. S. 276, 39 S. Ct. 93, 63 L. ed. 239, where it is said that the provision of the federal constitution which requires a vote of two-thirds of each house to pass a bill over a presidential veto (art. I, sec. 7, ch. 2) means two-thirds of the members present, assuming there is a quorum, and not two-thirds of all the members. To the same effect are the *National Prohibition Cases (Rhode Island v. Palmer et al.)* 253 U. S. 350, 40 S. Ct. 486, 64 L. ed. 946; III Geo. Wash. L.R. 17 at 32.

We now turn to your second question which we answer in the negative. It is not mandatory that a district attorney submit a question to the attorney general for an opinion when requested to do so by the county board of supervisors. The district attorney should submit a question to the at-
Attorney general for an opinion only when he feels he is unable to arrive at a correct conclusion to any question before him and feels that it is necessary that he receive the advice of the attorney general, or other circumstances exist which in the judgment of the district attorney warrant his seeking the advice of the attorney general.

The office of district attorney is created by sec. 4, art. VI of our constitution but there is nothing in our constitution which sets forth the nature of his duties. To a considerable extent at least the duties of the district attorney may be and are fixed by statute. State v. Couhal, 248 Wis. 247; 27 C.J.S. 388. Not only have we been unable to find any statute which makes it mandatory for a district attorney to submit a question to the attorney general for opinion when requested to do so by the county board, but the only provisions which we have been able to find negative the existence of such duty.

The general duties of the district attorney are stated in subsections (1) to (10) of sec. 59.47. Other duties are imposed by other sections of the statutes. See XXV Op. Atty. Gen. 549 at 562 and following. The subsection which specifically deals with his duties with respect to the county board is subsection (3) of sec. 59.47 which provides in part that:

"The district attorney shall:

"** *(3)* Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers; ***

The duty to "advise" the county board means that the district attorney is the legal adviser of the board. In carrying out this duty, the district attorney is required to exercise legal skill and judgment. It is manifest that a district attorney does not properly fulfill his statutory duty in cases where, instead of considering and giving the county board his opinion based on his best judgment on any question submitted to him by the board, he simply relays the question to the attorney general for his opinion. It is also evident that if it were to be considered that it is mandatory for a district attorney to submit a question to the attorney general for opinion when requested to do so by the county board,
the effect will be to bypass the district attorney, which will as a practical matter operate in all such cases to nullify the subsection referred to which makes it the duty of the district attorney to give advice to the county board.

The question here under consideration, as well as certain other related questions, has been discussed by the attorney general in previous opinions. In an opinion appearing in X Op. Atty. Gen. 741, it is said at page 741:

"It seems to me that the district attorney should insist upon his prerogatives, among which is to act as legal adviser to the 'county board and other officers of his county.' Subsec. (3), sec. 59.47. When the district attorney is satisfied in his own mind as to the law on any question arising in connection with the official duties of county officers, he should advise them thereon and should refuse any request from them to counsel with the attorney general unless the district attorney perceives sufficient reasons which to him warrant conferring with the attorney general."

In a subsequent opinion appearing in X Op. Atty. Gen. 1014, it is also said at page 1015:

"Before taking up these questions, I avail myself of this occasion to say:

"** **

"(4) That county officers are entitled to the district attorney's advice, but they are not entitled to the attorney general's opinion, and when the district attorney is satisfied in his own mind that he has correctly advised or can correctly advise a county officer upon any official matter submitted, the district attorney should decline to submit that matter to this office and should insist that the county officer content himself with the opinion of his statutory legal advisor or seek advice elsewhere on his own account.

"(5) That it is not fair to the attorney general nor to the district attorney for the latter to be made a mere messenger or interrogator for county officials or others to the attorney general, and that to permit such practice is to cheapen and belittle the high and important office of district attorney ** **."

We recognize the duty imposed upon the attorney general to "consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office." Sec. 14.53 (3), Stats. However, as stated in an opinion of the attorney general appearing in XI Op. Atty.
Gen. 242, the district attorney should seek counsel from the attorney general (p. 244):

"** when he feels the need of it, and should refuse to submit questions, ** merely because he is asked to submit those questions. If he is satisfied that he knows the answer to a question which arises in the administration of county affairs, he should refuse to put the question to this office, except in unusual cases or where the circumstances rather compel such a course."

There are, of course, certain other principles which should be observed in connection with the relation between the attorney general and district attorneys which appear in XXVIII Op. Atty. Gen. and following but it is not here necessary to elaborate upon them.

WET

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Counties—Agricultural Lime—Section 59.08 (18), Stats., gives county board power to sell agricultural lime produced by it to a federal agency at cost under agreement whereby the federal agency will in turn sell all said lime to farmers at cost.

January 16, 1947.

HOWARD W. ESLIEN,
District Attorney,
Oconto Falls, Wisconsin.

In your letter of January 6, 1947 you ask our opinion as to whether a county may sell agricultural lime to an agency of the federal government known as the production and marketing administration of the United States department of agriculture for distribution to the farmers of Oconto county. The plan is to sell agricultural lime produced by the county to said federal agency at cost. Apparently farmers then will order said lime from the federal agency. Delivery is to be
made by the county to the farmers directly but the farmers will pay the federal agency. The price will be identical to that charged the federal agency by Oconto county.

The answer to your question is "Yes." The county board has only such powers as are expressly conferred upon it or which may be necessarily implied from those expressly given. *Dodge County v. Kaiser*, 243 Wis. 551. The statute which gives the county board power to enter into the transaction outlined above is sec. 59.08 (18) which provides that a county board shall have power:

"To provide for and engage in the manufacture, sale and distribution of agricultural lime to be sold at cost to farmers and to acquire lands for such purposes. All moneys received from such sale shall be paid into the county treasury. For the employment needed for such purposes preference shall be given to the unemployed of the county. The county board shall appropriate such sums as shall be needed to carry out the provisions of this subsection."

Under the transaction proposed here, the county does not sell the lime direct to farmers. However, that is not necessary under the statute. The statute gives the county board full power to provide for and engage in the manufacture, sale and distribution of agricultural lime to be sold at cost to farmers. The "sale" first referred to does not necessarily refer to and need not be included in the transaction by which the lime is sold to the farmer. They may be separate and distinct transactions and a "sale" of agricultural lime by the county board to A under an arrangement whereby A agrees to sell it to farmers at cost complies with the statute. This is in essence the kind of transaction involved here and we are of the opinion the county board has authority to enter into it.

We assume that all the lime sold by the county to the federal agency will be resold by it to farmers at cost. This is an essential element of the transaction and the authority of the county board to enter into it depends upon its existence.

The word "sale" as used in the second sentence of the foregoing subsection can refer to a sale to a third person for purposes of resale to farmers on the basis above outlined as well as a sale by the county direct to farmers.
Soldiers, Sailors and Marines—Department of Veterans Affairs—Grand Army Home for Veterans—Control and management of the Grand Army Home for Veterans at King is vested in the director of the department of veterans affairs as statutory administrator, subject to the power of approval of the board of managers of that home.

The board of managers of the Grand Army Home is a policy forming body, advisory in nature, with authority to carry out its policies solely through the statutory administrator.

Files of the home transferred by the adjutant general, former administrator, to the director as new administrator are properly in his possession.

Budget estimates for the Grand Army Home for Veterans should be prepared by the department of veterans affairs.

January 17, 1947.

C. A. Dawson, Chairman,
Board of Veterans Affairs,
Wisconsin Department of Veterans Affairs.

You state that the board of managers of the Grand Army Home for Veterans at King, Wisconsin, has passed certain resolutions and regulations concerning the management of the Grand Army Home and directing the director of the Wisconsin department of veterans affairs to transfer certain records and files in his possession to the commandant of such home.

You request a definition of the respective powers and duties of the director of the department of veterans affairs and the board of managers of the Grand Army Home for Veterans at King, as provided by the applicable statutes of Wisconsin for 1945. The applicable portions of the statutes read as follows:

"45.07 (1) There is created a board of managers of the Grand Army Home for Veterans located at King. The said board shall be composed of 5 ex officio members, the adjutant general, the state surgeon, the chief quartermaster, the department commander of the Grand Army of the Republic and the department commander of the United Spanish War Veterans, and 4 persons appointed by the governor for terms of 6 years. All such appointive members shall be mem-
bers of the Grand Army of the Republic, the Women's Relief Corps, the United Spanish American War Veterans or auxiliary, the American Legion or auxiliary, the Veterans of Foreign Wars or auxiliary or the Disabled American War Veterans or auxiliary. Before making such appointments, the governor may request the Wisconsin Department of the Grand Army of the Republic and the other organizations above mentioned to submit the names of no less than 2 persons whom they recommend for such appointments, which recommendations shall be given consideration by the governor, but he shall not be confined in making appointments to the persons so recommended. No member of said board shall be compensated by the state for his services as such member, but shall be reimbursed the actual and necessary expenses incurred in the discharge of his duties."

"45.37 (1) The director of the Wisconsin department of veterans' affairs with the approval of the board of managers, shall operate and conduct the Grand Army Home for Veterans and employ such officers, nurses, attendants and other employes as may be necessary for the proper conduct of the said home.

"* * *

"(5) It shall be the duty of the director with the approval of the board of managers, to cause to be kept a true and accurate account of the disbursements of all moneys derived from all sources for said home, and annually to make report in writing to the governor, giving a true and itemized account in such form as he may require or prescribe, of all expenditures made of moneys appropriated or in any manner derived from the state, and also of the names and number of members of the home, the date of admission, time of occupancy, age and residence of each, the regiment, company, battery or other similar organization in which such member served, or of the person on account of whom such member was admitted to the home, and also the names, number and salaries of the officers, employes and laborers employed in said home, and the fund from which they are paid, and also the total amount of the receipts and expenditures of the said Grand Army Home for Veterans, and such other detail pertaining to or affecting expenditures for its maintenance or benefit, as may be required by the governor. Such report shall cover the period of the fiscal year ending June 30, and be submitted on or before September 1 of each year.

"(6) The members of the board of managers of the Grand Army Home for Veterans shall, not less than 4 times in each year, visit the said home and shall carefully examine into the management of said home, its system of accounts and of keeping books and the methods of purchase of supplies therefor, and the manner of their issuance and expenditures, and care and keeping of the members of said home,
the provisions made for the comforts of such members, their treatment by officers and employes, and such other details of the management of the said home as they may deem proper to inquire into and as shall be thought likely to promote the objects for which the same is maintained; and they shall make full report thereon to the governor, with their recommendations upon any of the matters which they are herein enjoined to investigate. It shall be the duty of the director and the officers and employes of said home to facilitate such examination and inquiries by disclosing all facts in relation to the same, and exhibiting all books, papers and vouchers affecting the expenditure of moneys."

"20.036. Wisconsin department of veterans' affairs. There is appropriated to the Wisconsin department of veterans' affairs:

"* * *

"(7) Grand Army Home For Veterans. From the general fund, for the Grand Army Home for Veterans:

"* * *

"(f) Annually, beginning July 1, 1943, for a period of 10 years, all moneys received by the state from the federal government as aid for veterans of any war or military expedition of the United States who have been admitted to and are cared for at the Grand Army Home for Veterans as a nonlapsible appropriation, to be used by the board of managers of the Grand Army Home for Veterans exclusively for the erection of a modern building or buildings or adequate housing facilities, inclusive of such other land as may be necessary therefor, and equipment at said home to replace the present inadequate and dangerous housing accommodations."

Summarizing the above statutes:

Sec. 45.07 created the board of managers.

Sec. 45.37 (1) states that the director, with the approval of the board of managers, shall operate and conduct the home.

Sec. 45.37 (6) outlines visitorial duties of the board of managers and directs the board to report to the governor with recommendations.

Sec. 20.036 appropriates all funds for the operation of the home to the department of veterans affairs.

Sec. 20.036 (7) (f) states that one specific item of such appropriation is to be used by the board of managers exclusively for the construction of buildings and purchase of additional land.
An inspection of the foregoing statutes reveals at the outset that there is no statutory definition of the powers and duties of the board of managers such as is customarily made in the case of all other state boards and commissions. Neither is there an accurate description of the powers and duties in regard to the Grand Army Home of the director of the department of veterans affairs.

It is elementary that any administrative agency has only such powers as are expressly conferred upon it by statute.

"** No proposition of law is better established than that administrative agencies 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 four corners of the statute under which the agency proceeds. * * **" American Brass Co. v. State Board of Health, 245 Wis. 440, 448.

The only powers conferred upon the board of managers by the foregoing statutes are: (1) Power to approve the actions of the director; (2) power to visit the home and report to the governor with recommendations; (3) power to use the appropriation in sec. 20.036 (7) (f), for building facilities and purchasing land.

The powers and duties conferred upon the director are: (1) The power to operate and conduct the Grand Army Home and employ such officers, nurses, attendants and other employes as may be necessary; (2) to keep an annual account and make an annual report to the governor.

It is obvious that the foregoing statutes do not clearly outline and distinguish between the duties of the board of managers and the director. The crux of the whole matter is the interpretation of the phrase "the director * * * with the approval of the board of managers, shall operate and conduct the Grand Army Home," as this is the only provision of the statutes which confers any substantial powers on either the board or the director.

In interpreting this provision it is necessary to consider its history and the history of the Grand Army Home in order to determine just what powers the legislature intended to vest respectively in the board and in the director.

The present Grand Army Home was originally operated by a private non-stock, non-profit corporation, organized
March 10, 1887 with the title "Board of Trustees of the Wisconsin Veterans' Home" for the purpose of maintaining the veterans' home. Members of this corporation were the members in good standing of the Grand Army of the Republic for the Wisconsin Department. Since its inception this home has received support by appropriations from the state legislature. Laws 1887, ch. 513, sec. 1; sec. 1529a, Stats. 1898, *et seq.* The home continued to be managed by this private corporation through the year 1915. Sec. 1529a-1, subsec. 4, Stats. 1915, provided in part:

"The state board of control, *** shall, *** cause the said Wisconsin Veterans' Home to be visited by a committee of at least two of the members of such board ***. But this section shall not give to the said state board of control any power of direction or any authority to interfere with the management of the said home by the said board of trustees thereof, established and provided in accordance with the articles of organization and by-laws thereof; ***.”

By ch. 68, Laws 1917, sec. 1529a, later renumbered sec. 45.07, Stats. 1917, was amended to read as follows:

"(1) The department commander of the Grand Army of the Republic for the department of Wisconsin and six persons appointed by the governor shall constitute and shall be known as 'Board of Managers of the Wisconsin Veterans' Home.' Said board shall have the control and management of the veterans' home located at Waupaca, Wisconsin. ***”

By this enactment, the legislature in effect divested the old board of trustees of control and management of the home and expressly conferred such control and management upon a state board appointed by the governor. This board continued to have the control and management of the home until 1929.

By ch. 514, Laws 1929, several changes were made:

1. The name of the home was changed to “The Grand Army Home for Veterans.”

2. The old board of managers of the Wisconsin Veterans' Home was abolished.

3. The appropriations previously made to the board of managers for the conduct of the home were given to the adjutant general for the conduct of the home.
4. There was created a new section 45.07 (1) which provided: "There is created a board of managers of the Grand Army Home for Veterans located at Waupaca * * *" and this section continued to designate the manner of choice of the board in a form similar to sec. 45.07 (1), Stats. 1945.

5. A new section 45.08 (1) was created which provided: "The adjutant general with the approval of the board of managers in matters of general policy, shall operate and conduct the Grand Army Home for Veterans. * * *"

6. Sec. 45.08 (4) was amended so that the visitorial duties at the home, formerly imposed upon the state board of control, were now imposed upon the members of the new board of managers of the Grand Army Home for Veterans.

Ch. 514, Laws 1929, sec. 5, closes with the following statement:

"Section 5. The transfer of the conduct of the Grand Army Home for Veterans from the present board of managers of the Wisconsin Veterans' home to the adjutant general shall take effect October 1, 1929. * * *"

The general tenor of ch. 514, especially the closing provision in sec. 5, makes it unmistakably clear that the control and management of the Grand Army Home which had been originally vested in a board of trustees of that home, transferred in 1917 to a statutory board of managers of that home, had, by ch. 514, been transferred not to the new board of managers, but to the adjutant general, subject to the approval of the new board.

The adjutant general was vested with the operation and conduct of the home until 1945. By ch. 580, Laws 1945, the previous section 45.08 (1), which had vested operation and conduct of the home in the adjutant general, was renumbered 45.37 (1) and amended to read:

"45.37. Veterans' home; management; who entitled to maintenance and burial. (1) The director of the Wisconsin department of veterans' affairs with the approval of the board of managers, shall operate and conduct the Grand Army Home for Veterans and employ such officers, nurses, attendants and other employees as may be necessary for the proper conduct of the said home."

The only interpretation which can be given to this amendment is that it transferred to the director of the department
of veterans affairs such powers and duties in regard to the home as had been previously exercised by the adjutant general as described above. The effect of this statute is to make the director the statutory administrator of the home, successor to the adjutant general, to the old board of managers, to the original board of trustees, with full power of management and control except as limited by the power of approval vested in the board of managers.

The principal remaining question is then to determine what is included in this power of approval.

In our opinion the power to approve of necessity includes the power to withhold approval and may be properly construed as authority to approve or disapprove not only particular acts or procedures but failure to act or proceed in accordance with any specified policy. Viewed in this light the board of managers is a policy making body with the authority to enforce its policies. It may, consistently with the statutes, dictate the general principles which shall govern the administration and operation of the home. The statutes have authorized it no employees, and have given it no appropriation in its own name but only the right to use the appropriation set forth in sec. 20.036 (7) (f).

The director of the department of veterans affairs is by statute made the administrator of the home and the sole agent through which the board can carry out its policies. In simple language, the board can tell the director what to do, but not how, or through whom to do it. The manner of performance is vested in the discretion of the director. We direct attention at this time to the fact that prior to 1945 the adjutant general, the statutory administrator of the home, was also a member of the board of managers of that home and sometimes served as president thereof. For this reason he probably maintained no separation between those records which he maintained in his capacity as administrator of the home and those which he maintained as president of the board of managers of the home. Since his principal responsibility in regard to the home was as administrator rather than as president of the policy forming board, it would seem presumptively that his records and files were kept as such administrator and that such records and files as he has turned over to the new administrator, the director of
the department of veterans affairs, should remain in his possession.

Further, since the director of the department of veterans affairs is a statutory administrator and the board of managers has no statutory authority for any employes of its own, we are of the opinion that any attempt to create a liaison officer who is not a member of the board of managers to act as an agent between the board and the director must fail. This is especially true when the person tentatively designated as such liaison officer is a subordinate of the director of the department of veterans affairs.

Some further question has been raised as to the duty and authority to represent the Grand Army Home at budget hearings. The appropriations for the home are made neither to the board of managers nor to the director, but to the department of veterans affairs. Accordingly, under the provisions of secs. 15.06 and 15.10 it would seem that the department of veterans affairs is the proper agency to prepare the budget.

From the foregoing the inadequacy of the controlling statutes is readily apparent. Any clarification which would provide for better coordination between the board, director, and the department of veterans affairs can best be obtained from the legislature.

RGT
Airports—Register of Deeds—Plans and specifications for protection of an airport filed pursuant to sec. 114.135 (2), Stats., need not be entered in tract index.

Register of deeds entering any instrument in a tract index is entitled to the fee provided in sec. 59.57 (1) (b), Stats.


HENRY E. STEINBRING,
District Attorney,
Eau Claire, Wisconsin.

You state that the city of Eau Claire, in compliance with sec. 114.135 (2), Stats., intends to file with the register of deeds plans and specifications for the protection of a municipal airport, and inquire (a) whether such plans must be entered in the tract index maintained pursuant to sec. 59.55, and (b) in the event the city requests that the plans be so entered against every parcel of land affected, whether the register of deeds is entitled to make a charge for such entry under sec. 59.57 (1) (b).

Your first question is answered in the negative.

Sec. 114.135 (2) states that the plans and specifications therein mentioned may be filed with the register of deeds without charge.

Sec. 59.55 (1) states in substance that the register of deeds shall keep a tract index in which he shall enter the volume, class of records, and page upon which any deed, mortgage or other instrument affecting the title to or mentioning such tract shall be recorded or entered.

It is clear that the plans and specifications which have been filed have not been recorded. The question then remains whether the plans have been entered within the meaning of sec. 59.55 (1) in any volume in the office of the register of deeds. In our opinion they have not. While it is true that sec. 59.53, Stats., requires the maintenance of a general chronological index in which every instrument recorded or filed must be entered, the context in which the term "entered" is used in sec. 59.55 (1) indicates clearly that it refers to entry in a volume of records, or in a volume of abstract entries of certain filed instruments prepared pursuant to sec. 59.54, Stats., and not to entry in a general index.
Referring to the type of instruments to be entered in the tract index, sec. 59.55 (1) states that the register shall designate "mortgages by the letter M, deeds by the letter D, and miscellaneous by the abbreviation Mis., and the register of attachments, sales and notices by the letter R." Sec. 59.54 provides for entering in a volume abstracts of three classes of instruments which have been filed, that is, writs of attachment, certificates of sales, and notices of lis pendens. Applying the principles of ejusdem generis and expressio unius est exclusio altenus to the construction of these two provisions, we conclude:

1. That the entry referred to in sec. 59.55 (1) is entry in a volume of records which sets forth the substance of the instrument verbatim or abstracted and not entry in the index referred to in sec. 59.53.

2. Since sec. 59.54 specifically describes certain filed instruments which are to be entered in a volume of records, all other filed instruments not so described are of necessity excluded.

This conclusion is in accord with our prior opinion in XXVII Op. Atty. Gen. 385 in which it was held that plans and specifications for a sewerage system filed in the office of the register of deeds need not be entered in the tract index.

Your second question is answered in the affirmative. Attention is directed to the fact that the filing of plans and specifications under sec. 114.135 (2) creates a restriction or servitude upon the premises therein named for which the owner may recover compensation if he acts within 6 months. While the statute provides that the owner must be given notice of the filing of the plans and specifications, a purchaser from such owner may have no notice of these restrictions unless they are entered in the tract index. If in good faith, for the purpose of providing notice to such prospective purchaser, the municipality requests the register of deeds to enter the plans and specifications in the tract index against all property involved, we feel that the conclusion is inescapable that the register is entitled to the fee specifically provided by sec. 59.57 (1) (b), Stats.

RGT
Taxation—Counties—Schools and School Districts—Common School Tax—The words "previous school year" in sec. 59.075 (1), Stats., refer to the school year ending in the spring or summer immediately before the November meeting of the county board also referred to in said subsection.

There is no specific date fixed by statute at the present time by which the certificate of the county or city superintendent of schools referred to in sec. 59.075 (2) must be made and delivered as therein provided. Such certificate should be made and delivered to the county clerk as soon as possible in advance of the November meeting of the county board and preferably early in October.


LARRY D. GILBERTSON,
District Attorney,
Black River Falls, Wisconsin.

You ask for our opinion on two questions as follows:
1. To what year does "the previous school year" in sec. 59.075 (1) refer?
2. At what time shall the report required by sec. 59.075 (2) be made?

The words "for the previous school year" were inserted in sec. 59.075 (1) by ch. 435, Laws 1945, which also amended sec. 40.87 (1). These words refer to the school year ending in the spring or summer immediately before the November meeting of the county board also referred to in sec. 59.075 (1). This is the administrative interpretation adopted in the office of the state superintendent of public instruction after the enactment of ch. 435, Laws 1945, and the language of the statute clearly justifies such construction.

There is at the present time no specific date fixed by statute by which the certificate of the county or city superintendent of schools referred to in sec. 59.075 (2) (which we assume is what you mean by your reference to "the report" in your second question) must be made and delivered as therein provided.

The statute states the county or city superintendent of schools, as the case may be, shall make the certification called for "at the time of the other certification." The certificate
last referred to is the certificate of the state superintendent of public instruction mentioned in subsection (4) (a) of sec. 40.87. There is no definite time fixed for making said latter certificate, but the state superintendent usually makes and has it in the hands of the various county clerks as early in October of each year as possible following his receipt of a certificate showing equalized valuations from the department of taxation.

Likewise, the certificate of the county or city superintendent of schools under sec. 59.075 (2) should be made and delivered to the county clerk as early as possible in advance of the November meeting of the county board and preferably early in October. It is essential that this be done as early as possible so that the others mentioned in said subsection who must do certain acts following the certification made by the county or state superintendent will have ample time in which to do them, so that the matter can be laid before the appropriate county board at its annual November meeting and a tax levied by said board as provided in said sec. 59.075 (2). Another reason why said certificate of the county or city superintendent of schools should be made and delivered as early as possible in advance of the November meeting of the county board, as above indicated, is to enable any county having to levy a tax as provided in sec. 59.075 (2) to include such item in its budget and to comply with the Thomson Budget Law. Sec. 65.90.

WET
Counties—Insurance—Group Insurance—County having population of less than 250,000 has no power to pay all or part of the insurance premiums on a policy of group insurance issued to certain employees of the county which would be in addition to wages paid said employees. Sec. 59.08 (14), Stats., applies at present time only to Milwaukee county. Question whether said section if applicable would authorize county board to pay all or part of such premiums not determined.


Edward P. Herald,
District Attorney,
Oconto Falls, Wisconsin.

Your predecessor in office asked us for our opinion as to whether a county has power to pay all or part of the insurance premiums on a policy of group insurance issued to certain employees of the county, which would be in addition to the wages paid said employees.

Three proposed plans were submitted. The first and third contemplate that the county pay part of the premium. Under the second, the county agrees to pay the premium to the insurer and then deduct the amount thereof from the employee's salary or wages, the amount to be deducted not to exceed a stated amount each month.

A county has only such authority as is conferred upon it by statute. It can exercise only such powers as are expressly conferred by statute or which may necessarily be implied from the powers expressly granted. Spaulding v. Wood County, 218 Wis. 224; Dodge County v. Kaiser, 243 Wis. 551.

In counties having a population of 250,000 or more, the county board has power to provide for group insurance for officers and employees of such counties and to make the necessary regulations therefor. Sec. 59.08 (14). This subsection at the present time applies only in case of Milwaukee county. Hence it is not necessary and we do not answer the question whether said section if applicable would authorize the county board to pay all or part of such premiums one way or the other. We have been unable to find any other statute which either expressly or by implication authorizes the county or
any agency thereof to pay part or all of said insurance premiums. We therefore answer your question "No" and advise you that in our opinion the county has no authority to agree to pay all or part of the premiums as called for by the first and third plans submitted.

We have not been furnished with enough facts to enable us to express an opinion whether the county would have power to participate in proposed plan number two. The only information we are given is that the employer, that is, the county, *agrees* to pay the required premium to the company and to deduct the amount paid from the employee's wage or salary, not to exceed a certain stated amount each month. This would seem to indicate the county is a party to and is bound in some degree at least to perform certain obligations under the contract. If that is correct, it would also seem questionable whether the county has power to enter into plan number two. See XXX Op. Atty. Gen. 222 holding that the county board of Brown county had no power to enter into an arrangement which would provide group insurance for county employees. There the plan contemplated that the employees covered sign a payroll deduction card authorizing the county to deduct from their salary an amount sufficient to cover the amount of their premium. The proposed contract which was to be entered into between the county and the insurer further provided that premiums were payable solely by the employer, that is, the county, who was also required to furnish certain reports to the insurer. The county did not ultimately sustain the burden of paying such premiums but reimbursed itself from the amount deducted from employees' salaries so it appeared that the county in that case did not participate financially in the plan.

On the other hand, if plan two contemplates merely that the county make the deductions at request of the employees and pay them over to the insurer, another question might be presented. See XXIX Op. Atty. Gen. 1.

WET
Co-operative Associations—Accountants—Upon the evidence submitted it does not appear that Co-operative Auditing Service, Inc., a Minnesota co-operative association, is operating in Wisconsin in violation of ch. 135, Wisconsin statutes.


C. H. Lichtfeldt, President,
Board of Accountancy.

You have inquired whether the Co-operative Auditing Service, Inc., of Minneapolis, Minnesota, by reason of its operations in the state of Wisconsin, is violating the provisions of ch. 135 of the Wisconsin statutes.

The organization was incorporated in January, 1935 as a co-operative association under the provisions of the general co-operative statute of Minnesota. The incorporators were farmers, not accountants. Each incorporator represented a farmers' co-operative association. It appears that the idea of this co-operative originated with a group of creamery associations, whose members were situated in localities where it was difficult to secure the type of auditing and accounting services to fit their particular needs. It was believed that if a large group of these farm organizations could act together and retain full time accountants trained in the field of co-operative agricultural marketing, it would be possible to secure services which otherwise would not be available.

Each member of the Co-operative Auditing Service, Inc., is a bona fide local co-operative association and no person, association, or corporation is admitted to membership except such an association. Each member is represented at the meetings of the co-operative by a delegate selected according to its own choice. The board of directors and officers are all farmers chosen from among the delegates.

The organization operates strictly upon a co-operative basis. It does not furnish or offer to furnish auditing services to anyone other than its own members. It makes a uniform charge for its services and these charges constitute its gross income. After deducting all expenses of operation, setting aside necessary reserves for future operations, the
entire net income is distributed to the members annually on the basis of patronage. The co-operative has no property other than a small amount of office equipment, and no capital from which dividends or interest are payable. The Co-operative Auditing Service, Inc., has its office in the building of the Midland Co-operative Wholesale, 739 Johnson Street N. E., Minneapolis, Minnesota, and maintains no other office, although the articles and by-laws indicate that the main office and principal place of business were to be at Wadena, Minnesota.

The board of directors hires a manager who is responsible to the board. The present manager, who has acted since the organization of the company, is not a certified public accountant but is an accountant with considerable experience who has devoted much of his life to co-operative enterprises. He hires accountants who, generally, are not certified public accountants, and trains them in the particular work of this co-operative. The manager and his staff audit the books of the members and render business advisory service in the field of co-operative marketing and furnishing of farm products and farm supplies. The audits furnished by the Co-operative Auditing Service, Inc. to its members are generally made in its own name.

Ch. 135, Wisconsin statutes, relates to the state board of accountancy, and sections 135.02, 135.03 and 135.06 provide in part:

"135.02. A person shall be deemed to be in practice as a public accountant, within the meaning and intent of this chapter:

"(1) Who holds himself out to the public in any manner as one skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation; or

"(2) Who maintains an office for the transaction of business as a public accountant, or who, except as an employee of a public accountant, practices accounting, as distinguished from bookkeeping, for more than one employer; or

"(3) Who offers to prospective clients to perform for compensation, or who does perform on behalf of clients for compensation, professional services that involve or require an audit or certificates of financial transactions and accounting records; or

"(4) Who prepares or certifies for clients reports of audits, balance sheets, and other financial, accounting and re-
lated schedules, exhibits, statements or reports which are to be used for publication or for credit purposes, or are to be filed with a court of law or with any other governmental agency, or for any other purpose; or

“(5) Who, in general or as an incident to such work, renders professional assistance to clients for compensation in any or all matters relating to accounting procedure and the recording, presentation and certification of financial facts.

“* * *”

“(9) Nothing contained in this chapter shall apply to any persons who may be employed by more than one person, partnership or corporation, for the purpose of keeping books, making trial balances or statements, and preparing audits or reports, provided such audits or reports are not used or issued by the employers as having been prepared by a public accountant.”

“135.03 * * *”

“(3) From and after December 1, 1935, no corporation and no officer or employee thereof may lawfully practice in this state as a public accountant either in his name, or as an employee or under an assumed name, unless such person and corporation has been granted by this board a certificate of authority as a public accountant and unless such person or corporation, jointly and severally, has complied with all the provisions of this chapter, including annual registration as herein provided.”

“135.06 * * *”

“(3) The board may issue certificates of authority to corporations to practice as public accountants who:

“(a) Upon passage of this act are corporations legally organized under the laws of this state, with power to practice as public accountants within the meaning of this chapter; and

“(b) On or before December 1, 1935, shall furnish satisfactory evidence to the board that such corporation was legally incorporated under the laws of this state at the date of taking effect of this chapter; and

“(c) Whose manager and whose board of directors shall each have received either a certificate as a certified public accountant or a certificate of authority to practice as a public accountant as provided in this chapter.

“* * *”

It is conceded that the Co-operative Auditing Service, Inc. has not been granted a certificate of authority by the Wisconsin state board of accountancy and never was qualified to receive such a certificate under sec. 135.06 (3) because it
was never legally organized as a corporation under the laws of this state, and its manager and board of directors never received either a certificate as a certified public accountant or a certificate of authority to practice as a public accountant as provided in ch. 135, Wisconsin statutes.

The answer to your inquiry depends upon whether the Co-operative Auditing Service, Inc. may be deemed to be a "person * * * in practice as a public accountant" within the meaning and intent of ch. 135, Wisconsin statutes, and whether its members may be deemed to be "employers" within the meaning and intent of said chapter.

Sec. 370.01, subsecs. (1) and (12) provides:

"In the construction of the statutes of this state the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

"(1) All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.

"* * *

"(12) The word 'person' extends and applies to bodies politic and corporate.

"* * *"

A corporation by legal fiction is a person. *Milwaukee Toy Co. v. Industrial Commission*, 203 Wis. 493, 234 N.W. 748. A corporation is for many purposes a juristic person. *Milbrandt v. State*, 138 Wis. 354, 120 N.W. 252. A corporation is generally considered as a "person" within the meaning of such word in statutes. *State ex rel. Torres v. Krawczak*, 217 Wis. 598, 259 N.W. 607. In the case of *Norwich Pharmacal Co. v. Abaly*, 133 Wis. 530, 113 N.W. 963, it was held that a general statute relating to parties to actions included corporations although the words "person" and "he" and similar designations, in their literal sense pointing to natural persons only, were used. See also: *Vulcan Last Co. v. State*, 194 Wis. 636, 217 N.W. 412, which held that in view of sec. 370.01 (12) a corporation was included within the provisions of sec. 103.18, Wisconsin statutes of 1925, which prohibited any "person" from attempting to influence a voter.
in the manner therein prescribed. In the case of *Yakima Fruit Growers Association, et al. v. Henneford*, 182 Wash. 437, 47 P. (2d) 831, it was assumed that co-operatives were included within the meaning of a statute granting a tax exemption to certain "persons."

In view of sec. 370.01 (12) and the foregoing cases, it is our opinion that the Co-operative Auditing Service, Inc. is a person within the meaning of sec. 135.02, Wisconsin statutes.

The articles of incorporation of Co-operative Auditing Service, Inc., provide in part as follows:

"**ARTICLE II.**

"The purposes for which the association is formed are:
"(1) To arrange for the engagement of competent accountants to audit the books and prepare reports of said audits to its members and render any and all necessary technical help in promoting better accounting records for its members.

"**ARTICLE V.**

"Any cooperative association of this or any other state is eligible to membership when such cooperative association shall have complied with the rules, regulations and by-laws of this association.

"The membership fee in this association shall be the sum of One Dollar ($1.00), payable in advance. There shall be but one class of membership, namely, participating membership."

"**ARTICLE VI.**

"Membership in this association shall at once cease and terminate when a member ceases to have audits made by the association, provided, however, that in such event, the member shall be entitled to receive all such sums paid as membership fee to the association, but without interest, and then only upon the surrender of the certificate of membership duly endorsed to this association. Certificates of membership are not transferable."

To "employ," according to Webster's dictionary, means: "To make use of the services of; * * * to give employment to; to entrust with some duty or behest * * ."

Under the facts submitted and the articles of incorporation of Co-operative Auditing Service, Inc., the members of said corporation appear to be its employers, as they make
use of its services and entrust it with the duty of preparing their respective audit reports.

Attention is now directed to the provisions of sec. 135.02 (9) of the statutes, which is quoted above. Under this subsection Co-operative Auditing Service, Inc. would not be prohibited from furnishing this auditing service to its members, even though they were its “employers” if it is a person who is “employed by more than one * * * corporation, for the purpose of keeping books, making trial balances or statements, and preparing audits or reports, provided such audits or reports are not used or issued by the employers as having been prepared by a public accountant.”

After referring to this statute in Wangerin v. Wisconsin State Board of Accountancy, 223 Wis. 179, 270 N.W. 57, the court stated:

“A person may under contract act as bookkeeper for as many persons or firms as he chooses. It is when he holds himself out to the public as one skilled in the profession of accounting that he comes within the statute. * * * Ch. 135 leaves the occupation of a bookkeeper untouched. A bookkeeper can do anything now that he could do before the chapter was enacted, except that he cannot represent himself to be a public accountant. He can render the same service to his employers as any other accountant may render, but it cannot be put before the public as work of a public accountant or a certified public accountant. Ch. 135 deals solely with the relation of the practice of accountancy to the public, not to private individuals and firms. * * *.” (p. 187)

In Adams v. Fieges, 206 Wis. 183, 239 N.W. 446, the court also held that a statute which prohibited representing oneself as an architect unless registered as such, does not prohibit the performance of architectural services by one not registered as an architect. The court previously took the position that “the evident purpose of the statute was the protection of the public from misrepresentation and deceit and * * * its prohibition is no broader than is called for by such purpose.” Fischer v. Landisch, 203 Wis. 254, 234 N.W. 498.

A copy of one audit report prepared by Co-operative Auditing Service, Inc., for one of its member associations has been furnished. That report does not represent that it was
prepared or issued by a certified public accountant or a public accountant; and no statement or evidence has been supplied which tends to prove that the member associations use or issue the audits or reports prepared by Co-operative Auditing Service, Inc., as having been prepared by a public accountant. Since upon the evidence before us it appears that the only activities engaged in by Co-operative Auditing Service, Inc., consist of furnishing bookkeeping and auditing services which are specifically excepted from regulation under sec. 135.02 (9) and Wangerin v. State Board of Accountancy, supra, we cannot hold that said corporation is operating in violation of the provisions of ch. 135, Wisconsin statutes.

The conclusion reached in this opinion is based upon the statement of facts as submitted; it is not to be extended by inference or applied to any situation embracing different or additional facts.

JRW

Courts—Clerk—Fees—Sec. 59.42, Stats., governs clerk's fees in actions appealed from justice court to circuit court or county court of Columbia county.

In actions in county court for Columbia county on change of venue from justice court, clerk's fees are assessed in accordance with circuit court practice when $100 or more is involved and in accordance with justice court practice when less than $100 is involved.


William Leitsch,
District Attorney,
Portage, Wisconsin.

You ask (1) what clerk's fees are due on an action appealed from justice court to the circuit court or county court of Columbia county; and (2) what clerk's fees are due upon an action in county court in Columbia county brought there
upon a change of venue, pursuant to sec. 36, ch. 574, Laws 1919, created by sec. 2, ch. 511, Laws 1921, and amended by secs. 2 and 3, ch. 381, Laws 1933.

You state that a claim has been advanced that the $2 fee prescribed in sec. 306.02 (1) is the total clerk’s fee on any appeal from justice court.

Clerk’s fees in circuit court are governed by the provisions of sec. 59.42 which, by its terms, applies to all causes without any distinction because of the manner in which they arrived in such court; i.e., the clerk is entitled to each named fee for each service rendered regardless of how the cause or action was initiated in circuit court, unless otherwise provided by law, and there is no statute exempting actions appealed from justice court.

While in our opinion the statute, sec. 59.42, is clear on its face, the foregoing conclusion is reinforced by consideration of the legislative history of the requirement for a $2 payment which is now set forth in sec. 59.42 (40), sec. 306.02 (1), and sec. 306.12 (1).

Sec. 306.02 (1) as contained in sec. 3754, R.S. 1878, read in part as follows:

“* * * and the appellant must, at the time of presenting such notice and affidavit to the justice, pay him his fees in the action, together with one dollar for his return, and one dollar for state tax; * * *.”

Sec. 747, R.S. 1878, which is a forerunner of the present section 59.42 governing the fees of the clerks of circuit court, contains no provision for an advance payment of two dollars.

Provision for such a payment was made by ch. 166, Laws 1887. Sec. 1 of this chapter provided in part:

“There shall be paid to the several clerks of the circuit courts at the time of the commencement of each action * * * or upon the filing of the original papers in any suit or proceeding in said courts upon appeals from inferior courts * * * or upon a change of venue * * * except in criminal cases, the sum of two dollars, in addition to the state tax now required to be paid, which sum shall apply on the clerk’s fees in such case.”

By sec. 3 of this same act, sec. 3754 (now sec. 306.02 (1)) of the statutes was amended to require the justice to collect
in addition to $1 for the state tax "two dollars for clerk's fees for the clerk of the court appealed to" and by sec. 4 of such act sec. 3763, the present section 306.12 (1), was also amended to require the justice to transmit the $2 collected to the clerk of circuit court. This act shows on its face that the $2 fee collected "shall apply on the clerk's fees in such case" and there is no evidence of an intention that this was to be the total fee in cases appealed from justice court. Sec. 1, ch. 166, Laws 1887 became sec. 747a, R.S. 1889, and continued with little change of form until the passage of ch. 695, Laws 1919. Sec. 97 of this act amended the old sec. 747a to its present form and renumbered it sec. 59.42 (40). In the amendment the requirement that the sum shall apply on the clerk's fees was stricken. Since ch. 695 was a revisor's bill, the rule that no change in the law is intended by such a bill unless such intention is expressly stated is applicable.

Accordingly, it is our opinion that the $2 referred to in sec. 59.42 (40) are to be applied on the clerk's fees in the case and that the $2 referred to are the same which must be collected and transmitted by the justice of the peace under secs. 306.02 (1) and 306.12 (1).

The same rule would apply in actions appealed to the county court of Columbia county pursuant to the authority granted by sec. 4, Laws 1919, ch. 574. That act, which provided civil and criminal jurisdiction for the county court of Columbia county and is herein referred to for brevity as the "enabling act," provided in sec. 20:

"All costs, fees and disbursements shall be taxed and allowed the prevailing party in the same manner and to like amounts as they are taxed and allowed in circuit court, except as herein otherwise provided. * * *"

The above opinion gives full consideration to the provisions of sec. 34 of the enabling act created by sec. 2, ch. 511, Laws 1921, which will be further discussed in the answer to your second question.

The answer to your second question concerning the amount of clerk's fees to be charged in an action brought to county court upon a change of venue from justice court depends upon whether the amount in controversy is more or less than $100.
The enabling act as originally passed, ch. 574, Laws 1919, contains no provision for a change of venue from justice court to county court of Columbia county. Neither does this original act confer jurisdiction upon such county court of civil actions where the amount in controversy is less than $100. Provision for such change of venue was made by sec. 2, ch. 511, Laws 1921, which same act in sec. 1 conferred jurisdiction of controversies where less than $100 was involved.

Sec. 2 of this act also added the following provision:

“Section 34. In every civil action involving less than one hundred dollars and in all criminal prosecutions and proceedings which under the general statutes are within the jurisdiction of a justice of the peace, costs and fees shall be taxed and allowed in the same amount as would be allowed in justice court, except clerk's fees shall be taxed at a sum not to exceed five dollars and the taking down of evidence shall not be charged for or taxed.”

While this provision on its face might seem to include actions brought to county court on appeal from justice court, in our opinion the act must be construed as a whole in view of the purpose expressed in its title which is “conferring civil and criminal jurisdiction on the county court of Columbia county.” So construed, sec. 34 would apply only to actions initially brought in county court or to actions brought there upon a change of venue from justice court.

As applied to such actions, it seems clear from sec. 34, supra, that in a civil action involving less than $100, only such fees can be collected as could be collected in justice court. Statutes relating to fees in justice court have no provision equivalent to sec. 59.42 (40) providing for an advance fee of $2 and hence none can be collected.

This conclusion is reinforced by the amendment to the enabling act created by ch. 381, Laws 1933.

Sec. 2 of such amendment provides in part as follows:

“* * * And if when an action is originally commenced in said county court, there be filed with the summons therein a complaint the demand for judgment in which does not exceed the sum of one hundred dollars exclusive of interest and costs, then the plaintiff shall pay upon the filing of such summons and complaint one dollar state tax, and need not pay any clerk's fees * * *.”
Sec. 3 of such act provides that at the time of requesting the removal:

"* * * the defendant * * * shall * * * pay to said justice one dollar for state tax which said dollar such justice shall transmit to the clerk of said county court with the papers in the case, and upon receipt thereof such clerk shall file said papers and enter said case in his records as a case in said county court."

There is no mention in section 3 of payment of $2 to the justice as a prerequisite to removing the case to county court and, accordingly, the right of the clerk to such $2 can only be determined from the other provisions of the enabling act. Since by sec. 20 costs are taxed as in circuit court except as in other cases provided, and since the only exception as to clerk's fees is the exception created by sec. 34 for actions involving less than $100, we are of the opinion that in all actions involving more than $100, the fee created by sec. 59.42 (40) must be paid, and in all actions involving less than $100, governed by sec. 34, it need not be paid.

RGT

State Board of Health—Public Health—Mental Health Program—Under public law 487 of the 79th congress, the Mental Health Act, the state board of health is the proper agency to act as the "state mental health authority."


DR. CARL N. NEUPERT,
State Health Officer.

You have called our attention to public law 487 of the 79th congress, known as the National Mental Health Act, and which provides for research relating to psychiatric disorders as well as aid in the development of more effective
methods of prevention, diagnosis and treatment of mental disorders. The allocation of federal funds to the various states is to be made to the state mental health authority of each state. According to section 3 (m) of the act:

“(m) The term ‘State mental health authority’ means the State health authority, except that, in the case of any State in which there is a single State agency, other than the State health authority, charged with responsibility for administering the mental health program of the State, it means such other State agency.”

While the federal funds for this aid have not yet been appropriated, the United States public health service which is the federal agency to administer the act, has requested you to furnish it with a statement from the governor or attorney general designating the state agency which under state law would be considered the state mental health authority.

It is to be noted under the terms of the federal statute quoted above that the state health authority, which in Wisconsin would be deemed the state board of health, is the agency in question unless it can be shown that there is some other single state agency charged with the responsibility for administering the mental health program of the state.

There are a number of statutes which have possible bearing on a mental health program in Wisconsin.

Sec. 36.227, Stats., provides in part:

“36.227. Psychiatric institute. (1) PART OF UNIVERSITY; EXCEPTION. The Wisconsin psychiatric institute established under section 51.235 (excepting the Wisconsin memorial hospital) shall be maintained as a department of the university of Wisconsin.

“(2) PROPERTY. All property used by the Wisconsin psychiatric institute (except real property used by said institute, and except the property of the Wisconsin memorial hospital) is transferred to the university of Wisconsin and the board of regents shall hold such property for the use of the institute.

“(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.

“(b) Render a specialized service to the state institutions under the jurisdiction of the state department of public welfare, the superintendent of public instruction, and the state board of health, such service to be available at all times to said department, officer or board, and to the institutions under their jurisdiction. Such state institutions are open to the institute for research investigation.

"* * *

“(d) Exercise the powers granted under section 51.235 provided that the transfer of any insane person from the psychiatric institute to any hospital or asylum for the insane, or from any other state or county institution under the jurisdiction of the state department of public welfare to the psychiatric institute, shall be made only by approval of said department and the director of the psychiatric institute.”

Sec. 46.03 relating to the state board of control (now the department of public welfare) provides in part:

"46.03 General functions of the board. The said board shall:

“(1) Maintain and govern the Mendota state hospital, the Wisconsin psychiatric institute for the treatment of insane persons, the Winnebago state hospital, the central state hospital, the state prison, and the state prison farms, the Wisconsin state reformatory, the Wisconsin home for women, the Wisconsin school for boys, the Wisconsin school for girls, the Wisconsin institute for blind artisans, the state public school, the Wisconsin home for the feeble-minded, the southern Wisconsin home for the feeble-minded, and all other charitable, curative, reformatory and penal institutions that may be established or maintained by the state except the Wisconsin state sanatorium, the northern state sanatorium and the state tuberculosis camp.

"* * *

“(10) The state board of control may give such instruction in occupational therapy or vocational training at such institutions under its control as it shall deem wise; such instruction shall consist of vocational advice and technical training necessary for the proper qualifications of the inmates of such institutions for present and future usefulness.”

Secs. 58.36 and 58.37 charge the department of public welfare with execution of the powers, functions and duties formerly exercised by the state department of mental hy-
giene, although in XXXIV Op. Atty. Gen. 106 it was considered that this did not authorize the carrying on of a program for the prevention of mental illnesses.

Sec. 146.18 (1) provides that the state board of health shall prepare and submit to the proper federal authorities a state plan for maternal and child health services which plan is to conform with all requirements governing federal aid for such purpose. Sec. 146.18 (3) provides that the state board of health and vital statistics shall use sufficient funds from the appropriations made by sec. 20.43 (1) and (13) for the promotion of the welfare and hygiene of maternity and infancy to match the funds received by the state from the federal government. We understand that the maternal and child health program carried on pursuant to the foregoing provisions includes mental as well as other phases of maternal and child health and that mental health is encompassed within the purpose of the appropriation of federal aids made available to the state board of health by sec. 20.43 (2) which reads:

"(2) FEDERAL AID FOR PUBLIC HEALTH. All moneys received by this state as federal aid for public health services, to be expended for the purposes specified in the acts of congress pursuant to which such federal aid is given and in accordance with plans prepared by the board of health and approved by (a) the United States Children's Bureau, (b) the United States Public Health Service for public health assistance to the states, (c) the United States Public Health Service for venereal disease control and (d) the United States Public Health Service for tuberculosis control. Any federal funds matched by state funds and remaining available to the state at the end of each quarter shall be transferred on certificate of the secretary of the state board of health to the appropriation made by section 20.43 (13) (b)."

Presumably the public schools of the state may also be carrying on some phases of a mental health program incidental to their general educational program. See sec. 40.22 which requires the teaching of physiology, sanitation and hygiene, which may well include mental hygiene. Likewise, under sec. 41.01 (4) the director of the bureau for handicapped children, who is appointed by the state superintendent of public instruction, "is responsible for the services established under the state department of public instruction
for children who are crippled, blind, partially seeing, deaf, hard of hearing, defective in speech, cardiopathic, malnourished, otherwise physically handicapped or who are mentally handicapped.” (Emphasis ours)

Perhaps these illustrations could be extended by a further search of the statutes but we do not deem that to be necessary since it is apparent from all of the foregoing that it cannot be said that under the Wisconsin statutes there is any “single state agency, other than the state health authority, charged with responsibility for administering the mental health program of the state.” It is clear that so far as the state has a mental health program certain phases thereof are conducted by the state board of health, other phases by the state department of public welfare, some by the regents of the university of Wisconsin through the psychiatric institute, although sec. 46.03 (1) indicates that there is a conflict as to whether this is under the jurisdiction of the regents or the state department of public welfare,—a conflict which it is unnecessary for us to resolve for the purposes of answering the present inquiry, since there are still other agencies charged with the responsibility of administering certain phases of the mental health program of the state such as the bureau of handicapped children and the public school system generally.

In the absence of a single agency being charged by our statutes with the responsibility for administering the mental health program of the state, you are advised that the state health authority, which is the state board of health, should be deemed the “state mental health authority” under section 3 (m), public law 487 of the 79th congress, and you should so inform the United States public health service.

WHR
Schools and School Districts—Counties—County Superintendent of Schools—Sec. 39.01 (5), Stats., disqualifies members of county board of supervisors who come from cities having a city superintendent of schools, from voting on resolution fixing location of office of county superintendent of schools under sec. 59.14 (1).

February 1, 1947.

Edward P. Herald,
District Attorney,
Oconto, Wisconsin.

You ask us to advise you whether members of your county board of supervisors who are elected from the cities of Oconto and Oconto Falls, whose school affairs are managed by a board of education, may vote on a resolution fixing the location of the office of county superintendent of schools under the provisions of sec. 59.14 (1), Stats., which reads in part as follows:

"(1) Every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices provided by the county or by special provision of law; or if there be none such, then at such place as the county board directs. The county board may also require any elective or appointive county official to keep his office at the county seat in an office to be provided by the county. * * *"

It has been held by reason of authority granted by sec. 59.07 and the foregoing subsection, that the county board has power not only to require that any elected or appointed county official referred to in the second sentence of said subsection keep his office at the county seat in an office provided by the county, but also has power to provide that such office be kept at a location designated by it other than at the county seat. Linden v. Babcock, 241 Wis. 209; XXVIII Op. Atty. Gen. 339.

You state the argument advanced in support of the position that the supervisors elected from such cities should not be permitted to vote on such a resolution is to the effect that because the school affairs of said cities are managed
by a board of education said cities "do not pay toward the schools located in the rest of the county."

Our supreme court has stated that at common law members of a legislative body or municipal board are disqualified to vote on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent. *Board of Supervisors v. Hall*, 47 Wis. 208, 213. There are other authorities which state the rule in somewhat broader terms. Thus in *State v. Pinkerman*, 63 Conn. 173, 28 Atl. 110, the court said in sections 1784, 1789 and 1844 of Cushing's Law and Practice of Legislative Assemblies that it is said that the common parliamentary rule is that no member of a legislative assembly shall vote on any question involving his own character or conduct, his right as a member or his pecuniary interest. See also Annotation 133 A.L.R. 1257; 2 McQuillin Municipal Corporations (2nd Ed. Revised Volume) Sec. 629; XXXII Op. Atty. Gen. 65 at 66. There is at least one exception to the general rule, which exception is stated in *Board of Supervisors v. Hall*, supra.

A pecuniary interest sufficient to disqualify exists only where it is one which is personal or private to the member, not such an interest as he has in common with all other citizens or owners of property, nor such as arises out of the power of the municipality to tax his property in a lawful manner. Annotation 133 A.L.R. 1257 at 1261 citing *Erie City v. Grant*, 24 Pa. S. Ct. 109. Such an interest "only exists where it is immediate, particular and distinct from the public interest." *State v. Pinkerman*, supra.

The reason advanced here for claiming that the members of the county board who come from the cities mentioned should not vote is obviously insufficient to disqualify under the common law rules. The question then is whether there is any statute which prevents such members from voting. The only statute we have been able to find is sec. 39.01 (5), which reads as follows:

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, shall bear no part of the expense connected with the office of county superintendent of schools; and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."
The location of the office of the county superintendent of schools is a "question or matter connected with or arising out of said office." It follows from the foregoing subsection that if the cities of Oconto and Oconto Falls or either of them have a city superintendent of schools, the supervisor from such city or cities having such city superintendent will be disqualified from voting on a resolution fixing the location of the office of the county superintendent of schools. If one or both of said cities does not have a city superintendent of schools, the supervisors from either or both not having such city superintendent will not be disqualified from voting on such resolution.

February 3, 1947.

Adolph Kanneberg, Secretary,
Spring Valley Flood Disaster Committee.

You have referred to ch. 467, Laws 1943, relating to a flood disaster committee and providing relief for victims of the Spring Valley flood of September 17, 1942, and have called attention to our opinion construing this act, XXXII Op. Atty. Gen. 420, wherein it was ruled that certain provisions of the act were in conflict with art. VIII, sec. 10, Wis.
Const., which prohibits the state from engaging in works of internal improvement.

You now state that the village of Spring Valley has in mind that the committee use the money appropriated to it for either or all of the following purposes:

1. To repair damage to the village park caused by flood waters which have deposited sand, gravel and boulders in the park;
2. To improve the school grounds which were damaged by flood waters;
3. To lay a pavement on state trunk highway No. 29 through the village. This street has not heretofore been paved. Some of it is on a relocation that has been planned by the highway commission but has not yet been constructed;
4. To build either one or two bridges within the village.

We are asked if the committee may legally use any part or all of the funds appropriated by ch. 467, Laws 1943, for the foregoing purposes, if in its opinion it should favor such expenditures.

Sec. 79.20 (3) (now 87.20 (3)) created by ch. 467, Laws 1943, provides:

“In addition to such emergency relief, the committee may make such expenditures from said appropriation as it may deem necessary in the interest of the public health and welfare for the restoration, reconstruction and repair of residential properties, business establishments, streets, roads and public utility facilities damaged or destroyed by such flood. In co-operation with the public service commission and state planning board it shall provide adequate flood control including the removal of buildings to new sites if in the judgment of the committee such action is necessary.”

Bearing in mind the well established principle that appropriation statutes are strictly construed it is to be noted that except for the item for “emergency relief” which is not involved in the present inquiry, the power to expend the money appropriated depends upon the existence of the following factors, among others:

(a) That it be for “restoration, reconstruction and repair” of damage caused by the flood, and
(b) That the subjects of restoration, reconstruction and repair fall within the classification of “residential properties,
business establishments, streets, roads and public utility facilities damaged or destroyed by such flood."

Also, it is to be remembered that subsection (3) quoted above was considered to be unconstitutional insofar as it attempted to appropriate funds for the restoration, reconstruction and repair of residential properties, business establishments and public utility facilities damaged or destroyed by the flood. XXXII Op. Atty. Gen. 420.

We can find nothing in subsection (3) quoted above or in subsection (2) relating to emergency relief for the inhabitants of Spring Valley which would authorize the expenditure of any part of the appropriation for repairing damage to the village park or school grounds since these items do not fall within the classification "residential properties, business establishments, streets, roads and public utility facilities." Moreover, with reference to the school grounds it is to be noted that "to improve" is not to restore, reconstruct or to repair damage done by the flood.

Likewise, the committee has no power to expend any money to lay a pavement on state trunk highway No. 29 through the village. This highway has not heretofore been paved and hence such work could not be considered as restoration, reconstruction or repair of any damage caused to the highway by the flood. It is new construction and part of it would be on a highway that has not even been laid out.

Lastly, the committee does not have the power to expend money in building either of the two proposed bridges. We understand that there are now bridges in use where the new ones are planned and that the existing bridges suffered no appreciable damage from the flood. Again, this is a case of new construction rather than restoration, reconstruction or repair of damage caused by the flood. You are therefore advised that none of the proposed projects falls within the language of the statute by which monies were appropriated for flood relief.

WHR
Architects and Engineers—Partnership or Corporation—Firms owned in majority by registered architects or registered professional engineers may practice architecture, professional engineering, or both such professions.

February 6, 1947.

Charles A. Halbert,
State Chief Engineer.

You request an interpretation of sec. 101.31 (6), Stats., regulating the practice of architecture and professional engineering by partnerships and corporations, specifically directed to the following three questions:

1. May a firm owned wholly or in majority by registered architects practice professional engineering?
2. May a firm owned wholly or in majority by professional engineers practice architecture?
3. May a single firm practice both architecture and professional engineering if a majority interest is owned by registered persons?

In considering these questions, it is always necessary to bear in mind the distinction made by sec. 101.31 (6), Stats., between the ownership interests in the firm that engages in architecture or professional engineering and the supervision of the work that is carried on by the firm. The statute is abundantly clear that architecture can only be carried on under the supervision of a registered architect, and professional engineering can be carried on only under the supervision of a registered engineer. With these requirements firmly in mind, we pass to a consideration of the requirements of the statute as to ownership of a firm which engages in either or both professions.

In our opinion, subject to the compliance by such firms with the requirement for supervision, the answer to all three questions is "Yes."

The statute in question provides as follows:

"101.31 * * *
"(6) (a) A firm, or a copartnership, or a corporation, or a joint stock association may engage in the practice of architecture or professional engineering in this state only provided such practice is carried on under the responsible
direction of one or more registered architects or professional engineers. Any and all plans, sheets of design and specifications shall carry the signature of the registered architect or registered professional engineer who is in responsible charge.

"(b) No such firm, or copartnership, corporation, or joint stock association shall offer to practice the profession of architecture or the profession of professional engineering in this state, or to use in connection with its name or otherwise assume, use or advertise any title or description tending to convey the impression that it is engaged in the practice of the profession of architecture or the profession of professional engineering, nor shall it advertise to furnish architectural or professional engineering services, unless firm members or copartners owning a majority of the capital interest in such firm or copartnership, or unless the executive director and the holders of the majority of stock of such corporation or joint stock association are duly registered under the provisions of this section."

These subsections may be summarized:

1. (a) Architecture carried on by a firm must be under responsible supervision by one or more registered architects.
   (b) Professional engineering carried on by a firm must be under responsible supervision by one or more registered professional engineers.

2. A firm carrying on either profession must be owned in majority by registered persons.

Your questions arise because of the ambiguity in subsec. 101.31 (6) (b) which renders it susceptible of the interpretation that a firm practicing architecture must be owned in majority by architects, similarly with a firm carrying on professional engineering, and that a single firm could not carry on both architecture and engineering since it would be impossible for both architects and engineers to own majority interests.

In our opinion the legislature did not so intend to restrict the practice of architecture and engineering for the following reasons:

First: Such an intent could have been clearly evidenced by adding the words "architects or professional engineers, respectively," after the words "duly registered" in the last line of subsec. (6) (b), quoted above.
Second: The close alliance between the professions of architecture and certain branches of engineering is indicated by the fact that they are made the subject of one regulatory statute, under the jurisdiction of one single regulatory board of two divisions, and that certain activities, such as the design and planning of industrial buildings, have been considered by the board to be a field open to the practice of both architects and professional engineers. Minutes of the board, June 2, 1939, June 16, 1939, and October 9, 1940. The educational requirements of both professions in the fields of science and mathematics tend to overlap. Neither an architect nor a professional engineer can be truly competent in his own field without an extensive knowledge of the principles and practices of the other. Under these circumstances, the public interest is better served if architects and engineers work together than if they are kept apart. Any ambiguity in the statute arising because of the terminology "a firm * * * may practice architecture or professional engineering" must be resolved in light of the whole statute and the public interest to be subserved, and in our opinion the statute taken as a whole indicates that a single firm could practice both professions both before and after the enactment of ch. 387, Laws of 1943, if the practice of each profession were under the responsible supervision of members of that profession.

This conclusion is not changed by the provision regulating ownership created by ch. 387, L. 1943. This provision may be roughly summarized: "No firm shall practice architecture or professional engineering unless firm members owning a majority interest are duly registered under the provisions of this section." This section does not bear on its face any requirement that the owners must be registered in the profession or in both professions which the firm is carrying on, and no such requirement can be added by construction when it would defeat that unity of interest among the professions set forth above. The evil sought to be remedied by the provision as to ownership was the carrying on of the profession by firms of persons who were not registered and who would obtain an architect's or engineer's certificate of approval as a mere formality. This evil is substantially eliminated by requiring that a majority of the owners be registered persons
with a personal interest and a professional reputation to protect. The legislative purpose on this point can be fully effectuated without going to the length of compelling separation of two professions that are naturally and usefully allied. RGT

Counts — Public Assistance — Dependent Children — Where county board has by ordinance created a county pension department to administer within the county all laws relating to aid to dependent children as well as those pertaining to other subjects, said county pension department is by reason of the definition contained in sec. 49.51 (5), the agency which in that particular situation is referred to by the word “judge” as it appears in sec. 49.19 (6).

February 10, 1947.

HENRY E. STEINBRING,
District Attorney,
Eau Claire, Wisconsin.

In your recent letter you ask that we advise you as to the interpretation which should be placed on the word “judge” as used in sec. 49.19 (6), Stats., in light of the provisions of sec. 49.51 (5) which reads as follows:

“The use of the words ‘county court,’ ‘county judge,’ or ‘juvenile judge’ in any statute relating to old-age assistance, aid to dependent children, and blind aid, unless the context indicates otherwise, means the county court, county judge, juvenile judge, county department of public welfare, or county pension department, whichever has been designated by the county board under this section to administer assistance and aid in the county.”

The subject covered by sec. 49.19 is aid to dependent children. Subsection (1) (b) reads as follows:

“Any person having knowledge that any child is dependent upon the public for proper support or that the interest
of the public requires that such child be granted aid may bring the facts to the notice of a judge of a juvenile court or of a county court of the county in which the child has a settlement."

The procedure to be followed, the circumstances under which aid can be granted, and the amount thereof are stated in subsequent subsections. Subsection (6) reads as follows:

"The judge may require the mother to do such remunerative work as in his judgment she can do without detriment to her health or the neglect of her children or her home; and may prescribe the hours during which the mother may work outside of her home."

The word "judge" as used in subsection (6) means the judge of a juvenile court or of a county court referred to in subsection (1) (b). *Thornapple v. Callahan, 244 Wis. 266.*

The words "judge of a juvenile court or of a county court" referred to in the latter subsection are defined in *sec. 49.51 (5)* and may mean the county court, county judge, juvenile judge, county department of public welfare or the county pension department depending upon which has been designated by the county board to administer aid for dependent children.

The legislature has power to define a word or words and when it has done so the statutory definition must be followed. *Hass v. Hass, 248 Wis. 212; Maloney v. Ind. Com., 242 Wis. 165; McCarthy v. State, 170 Wis. 516.*

The power to administer laws relative to old-age assistance, aid to dependent children and blind aid on a county level is in those designated by these statutes. *Sec. 49.51 (1)* reads in part as follows:

"The county administration of all laws relating to old-age assistance, aid to dependent children and blind aid shall be vested in the officers and agencies designated in the statutes. * * *"

The Eau Claire county board has by ordinance, which we assume was adopted as provided in *sec. 49.51 (2) (b)*, created a county pension department for the purpose of administering within the county all laws relating to old-age assistance, aid to dependent children and blind persons.
The Eau Claire county pension department is therefore the agency which now has authority to administer aid to dependent children in Eau Claire county and by reason of the definition contained in sec. 49.51 (5) is the agency which in this particular situation is referred to by the word "judge" as it appears in sec. 49.19 (6), and in the instant case said county pension department has the powers granted by the latter subsection.

The language of sec. 49.19 (6) is identical to some of the language contained in sec. 48.33 (8), Stats. 1943. Under the 1943 statute the word "judge" appears to have referred to a judge of a juvenile or county court. Sec. 48.33 (8), Stats. 1943, was repealed and sec. 49.19 (6) was created by enactment of ch. 585, Laws 1945, which made a general revision of the statutes relating to relief, old-age assistance, aid to dependent children, blind aid and other like statutes. Because of these facts you indicate there are some who are of the view that the word "judge" as used in sec. 49.19 (6) can now mean only the judge of a county or juvenile court.

The general rule is that where a statute has been repealed and then wholly or partially re-enacted, the re-enacted portion of the statute will be regarded as a continuation of the old. *Estate of Hood*, 206 Wis. 227 at 233. However, the rule applies only if the old statute is re-enacted in the same or substantially the same words. *Fullerton v. Spring*, 3 Wis. 667; *Appeal of Van Dyke*, 217 Wis. 528; *Gull River Lumber Co. v. Brock*, 7 N. D. 135, 73 N. W. 430. While language in sec. 49.19 (6) is identical to some of the language contained in sec. 48.33 (8), Stats. 1943, the simultaneous creation of sec. 49.51 (5) containing definitions by ch. 585, Laws 1945, in effect modifies the language contained in the old statute so as to make the general rule inapplicable. Further, the purpose of the general rule above referred to, like that of every other rule of statutory construction, is to aid in discovering and giving effect to the legislative intent. If said rule were to be applied here, it would fly in the face of the definition appearing in sec. 49.51 (5) and would be contrary to the legislative intent as indicated by the definitions adopted by it. Under such circumstances, the rule of statutory construction, if applicable, must be ignored and effect given to the legislative intent. *State ex rel. Board of Regents v. Donald*, 163 Wis. 145.
Counties—County Board—County board does not have authority under sec. 59.02 (2), Stats., or otherwise to fine a member for absence from meeting or for not voting.

February 10, 1947.

Edward A. Krenzke,
District Attorney,
Racine, Wisconsin.

You have directed our attention to the following rule in a resolution adopted by your county board of supervisors:

“Rule VI. Every member present except the Chairman shall vote on every question unless excused by the Board. Any member who shall refuse to vote and shall not be excused by a majority of the members elect shall be fined by the Chairman the sum of $5.00 which sum shall be deducted by the County Clerk from the next pay installment due such member. The Chairman may vote on any question and shall vote whenever his vote can change the result of the ballot. Any member not present at roll call of County Board or at a committee meeting shall be fined $5.00 unless excused by the Chairman of the Board of the committee.”

We are asked whether the county board has the power to enforce such a rule. Where the matter is not covered by statute the county board has the power to make reasonable rules and regulations for the government of its proceedings. 15 C. J. 460. Sec. 59.02 (2), Stats. provides:

“Ordinances and resolutions may be adopted by any county board by a majority vote when a quorum is present, or by such larger vote as may be required by law in special cases.”

It is not considered, however, where a matter has been covered by statute that the county board is at liberty to deviate therefrom by ordinance or resolution.

“Orderly procedure requires some rules for the proper dispatch of business and deliberation in the conduct of the council. The proceedings when regulated and fixed by charter or by general law cannot be changed by the council or governing body of a municipality.” 43 C. J. 504.

As you have pointed out, sec. 59.04 (4) very specifically provides the procedure to be followed in securing the at-
tendance of an absent supervisor. This section provides in part:

"* * * If any member of the board absents himself from any meeting of the board without good cause or without being first excused by the board, the chairman is authorized to issue a warrant requiring the sheriff or some constable of the county forthwith to arrest such member and bring him before the board * * *.""}

The legislature by expressly providing a procedure for dealing with absent county board members has impliedly negatived the use of any different procedure set up by a county board rule under the well known principle of *expressio unius est exclusio alterius*—the expression of the one results in the implied exclusion of another.

So much for the provision as to absentees. We next consider the provision for a $5 fine of a member who refuses to vote, unless excused. In the case of *The Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, to which you refer, it was held that members of the county board are disqualified from voting on a proposition in which they have a direct pecuniary interest adverse to the county, and the action is void where the vote of such member is necessary to make up the number of votes required to pass the measure. A rule for compulsory voting runs contrary to all concepts of democratic procedure in deliberative bodies. As is stated in Robert's Rules of Order (Rev. Ed.) page 193:

"* * * While it is the duty of every member who has an opinion on the question to express it by his vote, yet he cannot be compelled to do so. He may prefer to abstain from voting though he knows the effect is the same as if he voted on the prevailing side * * *.""

Moreover, sec. 59.10 provides:

"NEGLECT OF DUTY. Any supervisor who refuses or neglects to perform any of the duties which are required of him by law as a member of the county board of supervisors, without just cause therefor, shall for each such refusal or neglect forfeit a sum of not less than fifty nor more than two hundred dollars."

Thus the legislature has prescribed the penalty for the refusal or neglect of a supervisor to do his duty. Hence, assuming it were the duty of a member to vote on a measure
and he fails, refuses or neglects to do so, it seems clear that the penalty prescribed by the legislature governs rather than any inconsistent penalty established by county board rule.

In view of the foregoing you are advised that the rule in question is invalid, and it becomes unnecessary to discuss the further question which you have raised as to whether a forfeiture or fine levied pursuant to the invalid rule would constitute a reduction of salary during the term of office.

WHR

Counties—Highways—Encroachment—Where highway right-of-way has been acquired by a county pursuant to sec. 83.07, Stats., and a building is located thereon which the owner refuses to remove the highway authorities may take such steps as are reasonably necessary to remove the same and are entitled to injunctive relief if the owner interferes. Sec. 86.04, Stats., provides an alternative but somewhat less expeditious procedure for removing the encroachment.

February 15, 1947.

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

You state that Brown county has acquired an easement pursuant to sec. 83.07 (4), Stats., in connection with the relocation of a certain state trunk highway and that a building is located on the exact line through which the relocated highway will run. Although requested to do so, the owner of the building has neglected to remove the structure and you inquire whether the building may be dismantled and placed to one side or whether it is permissible for the county to sell the building to a purchaser who is willing to remove the same.
The answer to this question is dependent in part upon the nature of the legal rights acquired by the county in highway acquisition proceedings under sec. 83.07. Subsec. (1) provides that the county highway committee may acquire any lands or interest therein needed to carry out the provisions of ch. 83. Subsec. (4) provides a procedure where the committee or board is unable to acquire needed lands or rights by contract. They may upon not less than 5 days' notice to the owner apply to the county judge to appraise the value of the property sought to be taken. Upon payment or tender of the amount of the judge's award to the owner, title to the property and the rights sought to be acquired vest in the county for the uses and purposes of the acquirement.

Thus it will be seen that the authority granted the county highway committee is very broad. It "may acquire any lands or interest therein." In this case it is recited in the petition to the county judge that it was necessary "to acquire a right-of-way" over the lands in question; that the county highway committee "had endeavored to contract for the purchase of the necessary right-of-way" and had been unable "to purchase the said necessary right-of-way." The committee then went on to petition the judge "to appraise the value of the real estate hereinafter described which is necessary to be taken for the right-of-way hereinabove mentioned." The certificate of the county judge under sec. 83.07 (4) refers to the award which he made as compensation "for the taking for the use of highway No. 41" of the parcel of land in question. The landowner refused the tender of the amount of the award and the county judge proceeded to certify as follows:

"* * * and that this certificate is made in accordance with Paragraph 4 of Section 83.07 of the Statutes of Wisconsin of 1943 and that, by virtue of the provisions of said Paragraph 4, the title to the property above described and rights sought to be acquired by the County of Brown vest in the County for the uses and purposes of changing the course and widening U. S. Highway No. 41 between the Outagamie County Line and De Pere and that from and after said January 7, 1944, said real estate belongs to and is the property of the County of Brown for all highway purposes, including the right to go upon and construct a highway on and over said real estate."
While it is entirely competent for the legislature to provide for the taking of the fee of the land appropriated and divesting the owners of all proprietary interest therein, yet to accomplish that purpose it is necessary plainly to declare an intention so to do. 39 C.J.S. 1072. Assuming, but not deciding, that sec. 83.07 is broad enough to authorize the acquisition of fee title rather than a mere easement for purposes of public travel it seems apparent from the proceedings in question that the right or title acquired by the county was one for purposes of public travel only, as the petition upon which the proceedings were based was for acquisition of "right-of-way" merely and not fee title. Hence title to the fee remains in the abutting landowner who may make such reasonable use of it as does not interfere with the rights of the public. 

Hustisford v. Knuth, 190 Wis. 495. See also Spence v. Frantz, 195 Wis. 69.

The general rule appears to be that the title of the owner, subject only to the easement, remains perfect, not only as to the land covered by the highway, but to all material within its boundaries, except such as may be needed to build or to maintain the road. 39 C.J.S. 1075. While under this rule title to the material in the building in question probably remains in the landowner he is without authority to prevent the public from making use of its easement for the purposes of travel. Presumably the highway authorities and their contractors and employes may take possession and proceed with the contemplated highway construction using such means as may be reasonably necessary to remove the building from the highway if the owner refuses to do so. See XXVII Op. Atty. Gen. 645 where in addition to other remedies it was suggested that if necessary, an injunction could be sought to restrain the owner from interfering with the highway authorities and their contractors and employes in taking possession of the premises.

In view of the foregoing you are advised that it is doubtful that the county has authority to sell the building to a third party who will remove it, but that the county may take such steps as are reasonably necessary to clear the right-of-way for purposes of construction and public travel including the removal of the building. We do not see that there is any particular obligation on the county as to the manner of re-
moval. If it is more convenient to dismantle the building than it is to remove it as is, we see no reason why this should not be done, particularly since the owner has taken no steps to remove it himself. There is the further question of the location to which the building is to be removed. The county officials have no right to trespass on adjoining lands of the owner and if the building or lumber can be placed to one side of the right-of-way where it will not interfere with traffic but will still be within the right-of-way limits we would suggest that this be done.

We also call attention to sec. 86.04 relating to highway encroachments. Subsec. (1) provides:

"(1) If any highway right of way shall be encroached upon, under or over by any fence, stand, building or any other structure or object, and including encroachments caused by acquisition by the public of new or increased widths of highway right of way, the state highway commission (in case of a state trunk highway), the county highway committee (in case of a county trunk highway), or the city council, village or town board (in case of a street or highway maintained by or under the authority of any city, village or town) may order the occupant or owner of the land through or by which such highway runs, and to which the encroachment shall be appurtenant, to remove the same beyond the limits of such highway within 30 days. The order shall specify the extent and location of the encroachment with reasonable certainty, and shall be served upon such occupant or owner."

Subsec. (2) sets up the procedure to be followed in case of non-removal and reads:

"(2) If the occupant or owner upon whom the order is served shall not deny such encroachment, as provided in subsection (3), and the encroachment is not removed within 30 days after the service of such order, the occupant or owner shall forfeit $1 for every day after the expiration of that time during which such encroachment shall continue. An action to recover such penalty may be brought in any court of record or justice court in the county. In all cases where a judgment is rendered, the judgment shall order that the occupant or owner remove the encroachment within the time fixed by the judgment, and if he fails to obey the order, the state highway commission, county highway committee, or city council, village or town board, as the case may be, may remove the encroachment and recover from the occupant or owner the cost thereof."

The remaining subsections of sec. 86.04 set up the procedure to be followed in the case of denial of the encroachment by the owner. It will be seen that while sec. 86.04 provides a complete remedy for encroachments its use may result in considerable delay and if immediate removal of the building is imperative it may be desirable to proceed summarily in the manner hereinbefore indicated.

WHR

Criminal Law—Justice Court—Costs—Fees of witness in criminal case who testified only on counts of which defendant was acquitted are not taxable against him on conviction and fine on other counts, under sec. 353.25, Stats. Witness fees in criminal case in justice court are not subject to $15 limitation in sec. 307.02 (1). Jurors’ fees are taxable costs against defendant in justice court criminal case.

February 20, 1947.

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

In your letter you state that a certain defendant was charged with three counts for violation of the state game laws, demanded a jury trial, and upon his trial in justice court was found guilty of the first count only. Witnesses from considerable distances away attended the trial and one of them testified only on the two counts as to which the jury acquitted the defendant. Several questions have been raised by the defendant with reference to taxable costs.

The defendant’s attorney contends:

(1) That no witness fees should be taxed for the witness who testified only in reference to the two counts on which defendant was acquitted.
(2) That witness fees are limited to $15 by sec. 307.02
(1), Stats.

(3) That there is no provision for taxing jurors' fees.

Section 353.25 provides as follows:

"When a fine is imposed as the whole or any part of the
punishment for any offense by any law the court shall also
sentence the defendant to pay the costs of the prosecution
and the costs incurred by the county at request of the de-
fendant, and to be committed to the county jail until the fine
and costs are paid or discharged; but the court shall limit
the time of such imprisonment in each case, in addition to
any other imprisonment, in its discretion, in no case, how-
ever, to exceed six months; and the court may also issue an
execution against the property of the defendant for said
fine and costs. 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."

Section 307.02 provides in part as follows:

"The justice shall also tax the following as costs in favor
of the party recovering judgment:

"(1) Witness fees for travel and attendance, not exced-
ing $15, unless the justice, by an order entered in his docket,
directs that a larger sum (not exceeding $25) be taxed, in
which case he shall state in his order the reasons for making
it, and fees of jurors at the rate of $2 per day and 5 cents
for each mile necessarily traveled to attend the trial, both
coming and going, for each juror in attendance, less the
amount advanced by the opposite party when the jury was
demanded by him. Jurors' fees, when collected, shall be
paid by the justice to the jurors.

"(2) Fees for serving subpoenas and travel in serving
them. But no witness fees or fees for serving subpoenas
shall be taxed for travel or attendance on the return day ex-
cept in actions where either party is entitled to proceed to
trial on such day, unless an adjournment is had for cause
or the trial is had on the return day.

"(3) All other lawful fees and charges of any officer for
services rendered in the action pursuant to law."

Subsections (4) and (5) provide for taxing attorneys'
fees.

Section 307.02 is part of title XXVIII of the statutes, en-
titled "Courts of Justices of the Peace and Proceedings
Therein in *Civil Actions.*" Except for the fact that sec. 307.01, relating to fees of justices, includes fees in criminal cases as well as for performing marriages, everything in title XXVIII relates exclusively to civil actions.

The history of sec. 307.02 conclusively shows that it was intended to apply only in civil cases. Its origin is in ch. 88, sec. 69 and ch. 131, secs. 16, 25 and 28, R. S. 1849. Ch. 131, sec. 16 provided "In all civil cases at law, unless otherwise provided, the party in whose favor judgment is given shall recover costs, and the justice's court may give or refuse costs on all motions, at their discretion, unless otherwise directed." This became ch. 133, sec. 21, R. S. 1858.

At the same time, ch. 89, secs. 33 and 34, R. S. 1849, required the justice (and the circuit court in case of appeal) to enter judgment, in case of a criminal conviction, "for the fine and costs against the defendant." In ch. 121, sec. 30, R. S. 1858 the provision was "for a fine and *costs of prosecution.*" Both these provisions were omitted from the revision of 1878, when by sec. 4633 (now 353.25) the taxing of costs in all criminal courts was provided for.

By ch. 238, Laws 1862, a proviso was added to sec. 21, ch. 133, R. S. 1858 (relating to costs in *civil* actions) limiting costs "in any case tried in a justice's court" to $15. This was again amended by ch. 188, Laws 1865, to make the $15 limitation apply only to witness fees. But no equivalent limitation was provided for criminal cases.

Chapter 131, sec. 28, R. S. 1849, provided in part that each juror sworn in any action in a justice court should be entitled to twenty-five cents to be paid in the first instance by the party requiring such jury. The equivalent provision in ch. 133, sec. 33, R. S. 1858, provided: "Each juror sworn in any action in a justice's court, * * * shall be entitled to fifty cents for each day's attendance to be taxed against the losing party, and when in any action before a justice of the peace (except in criminal cases) any of the parties to the action shall demand a jury trial, each party shall, before being entitled to the empaneling of a jury, pay jury fees for half a day's attendance in advance."

The provision for taxing attorneys' fees in justice court actions was created by ch. 30, sec. 2, Laws 1870, as amended by ch. 142, Laws 1871, ch. 99, Laws 1872, ch. 182, Laws 1873.
and ch. 96, Laws 1876. It applied to cases of judgments “in favor of any party for damages and costs, or either.”

From the foregoing it appears that all of the provisions now included in sec. 307.02 are derived from early session laws dealing with taxation of costs in civil cases. The provisions relative to taxing costs in criminal cases in justice court were included in an entirely different part of the revised statutes of 1849 and 1858. The limitations on costs in civil cases as well as the provision for taxing attorneys’ fees had nothing to do with criminal cases.

The statutes authorizing the taxation of costs against defendants in criminal cases have never defined with particularity what items of costs are to be included. Section 353.25 from its original inception (R. S. 1878, sec. 4633) used only the term “the costs of the prosecution,” to which was later added, “and the costs incurred by the county at the request of the defendant.” Apparently it was intended to cover all of the costs which the county would have to pay if the defendant was acquitted or if for other reasons the costs could not be collected from him. Costs in criminal cases have been defined as “those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense.” 20 C.J.S. 677—Costs § 435.

In XII O.A.G. 288 this office ruled that the county judge’s per diem fee of $5 payable from the county treasury in a case where the defendant requests to be taken before the county judge in order to plead guilty is a part of the costs of prosecution and also is a cost incurred by the county at the request of the defendant within the meaning of sec. 353.25. It would seem that that section contemplates that the defendant would be taxed with all the costs necessarily incurred by the county in connection with his prosecution, without limitation by sec. 307.02.

It is significant that the statute providing for taxation of costs against the complainant in justice court, where the accused is acquitted and the justice certifies that the complaint was wilful and malicious, has always expressly included “all the costs that shall have accrued to the court and sheriff or constable, and jury” (R. S. 1849, ch. 89, sec. 20), to which witness fees have since been added. See sec. 360.22 (1), Stats. It is unlikely that the legislature intended the con-
vicited defendant to be liable for less costs than the complainant would have had to pay under sec. 360.22 in case of an acquittal and a finding that the complaint was malicious.

Taking up the contentions made by the defense attorney, you are therefore advised as follows:

(1) Where the witness fees are capable of being separated, so that it is possible to allocate a portion of them to counts on which the defendant has been acquitted, it would seem proper not to tax such witness fees against the defendant. No authority has been found for that proposition, but in view of the strict rule of construction applicable to statutes imposing costs in criminal cases, such construction would seem to be proper. An analogous case is that where several defendants are jointly tried and some are acquitted, those convicted cannot be required to pay the costs of prosecution of those acquitted. 20 C.J.S. 681—Costs § 438.

(2) Witness fees are not limited to $15, since sec. 307.02 has no application.

(3) Jurors' fees in justice court are "costs of the prosecution" within the meaning of sec. 353.25. Cf. sec. 360.22 (1).

WAP

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Counties—Insane—Expenses of Examination—Section 51.07 (4), Stats., does not authorize charge of expenses of examination to county of residence where alleged insane or senile person was discharged.

February 20, 1947.

HERBERT A. BUNDE,
District Attorney,
Wisconsin Rapids, Wisconsin.

You have inquired whether under sec. 51.07 (4) the expenses of a mental examination can be recovered from the county of residence when the examination results in the discharge of the alleged insane or senile person who is a non-
resident of the county in which the examination was held. You indicate that your opinion is that the county where the hearing was held cannot be reimbursed by the county of the subject's residence in such cases. Your conclusion is correct.

Proceedings for the examination and commitment or discharge of alleged insane or senile persons and for the payment of the expenses of examination and of maintenance in the institution are purely statutory. If there is no statute authorizing the charging of the expenses of the hearing to the county of residence, then no right to make such charge exists. Section 51.07 (4) provides as follows:

"(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 lawful 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 foregoing statute applies only in cases where the subject was committed. Subsection (3), which requires the expenses of the proceedings to be paid in the first instance by the county in which they are held, expressly applies to both cases of commitment and cases of discharge. The omission of all reference to cases of discharge in subsection (4) seems to have been intentional and under the rule expressio unius est exclusio alterius that subsection must be regarded as limited to cases of commitment only.

WAP
Courts—Probation—Insane—Under sec. 357.13, Stats., the trial court has jurisdiction to determine insanity or feeble-mindedness of person on probation under sec. 57.04. In case court commits him to central state hospital, county of legal settlement is chargeable with part of his maintenance under secs. 51.08 and 51.23 (1).

February 25, 1947.

LEWIS J. CHARLES,
District Attorney,
Medford, Wisconsin.

Your predecessor, Mr. Clarence Simon, requested an opinion with reference to the following facts: A certain defendant in a nonsupport case pleaded guilty and was put on probation to the state department of public welfare under sec. 57.04, Stats. It is thought that he may be insane or feeble-minded and the question is whether the criminal court has jurisdiction to determine that question under sec. 357.13 (1) which provides as follows:

“If the court shall be informed, in any manner, that any person indicted or informed against for any offense probably is, at the time of his trial, or after his conviction and before commitment, insane, or feeble-minded and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof by a jury or otherwise as it deems most proper.”

Under sec. 57.04 the court retains considerable control over probationers and it may be said that the case is pending in the court while the defendant is on probation. The defendant is not “committed” when he is placed on probation. Although the conclusion may possibly be otherwise with reference to adult felons on probation under sec. 57.01, Stats., it seems that where probation is under sec. 57.04 the court would have jurisdiction to determine insanity or feeble-mindedness of the probationer pursuant to sec. 357.13 on the ground that the period of probation is “after his conviction and before commitment.”

Sec. 357.13 is extremely broad and general and is entitled to a liberal construction to effectuate its humane purpose. It is in aid of the common law and is intended to place a
safeguard around the accused at all stages of the case. See *Steward v. State*, (1905) 124 Wis. 623, 630-631. It is considered that the conclusion here reached is required by that principle.

The second question is whether the cost of his maintenance would be paid by the county or the state in case the court should commit him under sec. 357.13. Under secs. 51.23 (1) and 51.08 a portion of the cost of maintenance is chargeable to the county of his legal settlement. See XXIII Op. Atty. Gen. 9.

WAP

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**Counties—Highways and Bridges**—A county is not authorized to remove snow from private roads or driveways.

The compensation received by the county for highway work done for a municipality under sec. 59.08 (35), Stats., is a matter of contract between the two governmental units and may include such item as insurance on the equipment.

February 25, 1947.

DAVID H. SEBORA,

*District Attorney*,

Chilton, Wisconsin.

We have your recent request for an opinion in regard to the circumstances under which the county highway committee may do highway work for municipalities in the county, and whether under any circumstances it may do highway work for private individuals.

In your request you stated that you had reached the conclusion that no work such as snow removal could be done by the county for private individuals and corporations. We fully agree with that conclusion since there is no provision in the statutes authorizing this type of work.
In connection with county assistance to towns for snow removal, you refer to sec. 83.03 (1), Wis. Stats. We do not believe this section is applicable since it limits the county to construction, improvement, or repair of highways and bridges. Snow removal does not fit into any of these categories. It is, rather, maintenance, as pointed out in XXV Op. Atty. Gen. 702, 703.

However, sec. 59.08 (35), Stats., does empower the county board to provide by ordinance that the county, through its highway committee, may enter into contracts with cities, villages and towns within the county for the purpose of constructing and maintaining streets and highways in such municipalities. Sec. 20.49 (8) grants highway funds to the municipalities and empowers them to employ the county to carry out highway maintenance work, and this includes snow removal. It is therefore clear that the county may perform highway work including snow removal, for municipalities within the county.

The compensation the county charges for this work is covered by the contract with the municipality and the charges may well include such items as insurance, depreciation of equipment, and the wages of the county employees for the time they are engaged in work for the municipality.

We conclude, therefore, that (1) neither the county on its own accord, nor the county at the request of a town, may remove snow from private roads or driveways; and (2) that the county is authorized to include the cost of insurance in determining the compensation to be charged to municipalities for snow removal work done by the county.

ES
Marriage — Divorced Persons — Under sec. 245.15 the county clerk has power and duty to determine whether facts stated in application for marriage license present any reason why a lawful marriage could not be entered into in the state by parties making such application.

Texas statute providing in effect that neither party to divorce granted on ground of cruel and inhuman treatment shall marry any other person within year after divorce is granted has no extraterritorial effect and will not under facts stated prevent one of the parties to a Texas divorce from entering into a lawful marriage in Wisconsin with a third person, before the expiration of a year from the date of the Texas divorce. Facts do not bring case within provisions of secs. 245.03 (2) or 245.04 (1) or (2).

February 25, 1947.

Francis J. Garity,
District Attorney,
Jefferson, Wisconsin.

You advise that a woman resident of Texas was granted a divorce in that state on the ground of cruel and inhuman treatment in June 1946. The Texas statute (Vernon’s Texas Statutes 1936, Art. 4640) then and now in force provides as follows:

“Neither party to a divorce suit, where a divorce is granted upon the ground of cruel treatment, shall marry any other person for a period of twelve months next after such divorce is granted, but the parties so divorced may marry each other at any time. In all other cases either party may marry again after the dissolution of the marriage.”

You further advise that said woman came to Wisconsin recently to marry a Wisconsin resident in this state and that said parties intend to reside in Wisconsin after their marriage. You ask our opinion on the following question: Under the facts stated, can a Wisconsin county clerk issue a marriage license to these parties before the expiration of one year from the date of the Texas divorce?

The Wisconsin statute (sec. 245.15) provides, among other things, that an application for a marriage license contain
a statement under oath as to certain specified data concerning the parties applying for such a license, including a statement "that the contemplated marriage will be lawful" and of "any prior marriage of either party and the manner of the dissolution thereof." It is then provided: "If there be no legal objection thereto the county clerk shall issue a marriage license."

The right to determine if any legal objection to the marriage exists, necessarily gives the county clerk the power and duty to determine whether the facts stated in the application present any reason why a lawful marriage could not be entered into in the state of Wisconsin by the parties making such application. If he concludes that the facts stated disclose no reason why a lawful marriage could not be entered into by the parties in this state, he must issue the license on payment of the necessary fee and on compliance with all other requirements. If he arrives at the opposite conclusion, he must refuse to issue a license.

The answer to your inquiry, therefore, depends on the answer to the following question: Can the parties referred to in said inquiry enter into a lawful marriage in the state of Wisconsin before the expiration of one year from the date of the Texas divorce?

At the outset, it is important to determine the exact effect of the Texas statute previously cited. So far as we can discover, there is no criminal penalty or other punishment provided for its violation. The statute does not specifically provide that a marriage entered into in violation of its provisions is void, and the supreme court of Texas has held that such a marriage contracted in that state is voidable and not void. *Ex parte Castro*, 115 Tex. 77, 273 S. W. 795; *Evans v. Hunt* (Tex. Civ. App.), 195 S. W. (2d) 710.

A decree for divorce in Texas is absolute from the date of its entry unless set aside or appealed from. *Vickers v. Faubion* (Tex. Civ. App.) 224 S. W. 803. It has also been held that a decree of divorce granted on the ground of cruel and inhuman treatment is not interlocutory but is effectual to dissolve the bonds of matrimony. *Coast v. Coast* (Tex. Civ. App.), 135 S. W. (2d) 790. It would appear, therefore, that the Texas statute, unlike those in some other states, does not operate to maintain the marriage in effect until the expira-

Said Texas statute will not operate to prevent one of the parties to the divorce mentioned in your inquiry from marrying a third person in Wisconsin. The general rule is that statutes of a state which only prohibit remarriage within a specified time after a divorce have no extraterritorial effect and cannot prevent one or both of the parties to the divorce from lawfully marrying a third person in another state in conformance with the laws of the latter state. Loughran v. Loughran, 292 U. S. 216, 78 L. ed. 1219, 54 S. Ct. 684; Fisher v. Fisher, 250 N. Y. 313, 165 N. E. 460, 61 A.L.R. 1523; Annotation 32 A.L.R. 1116 at 1139; 2 Nelson on Divorce and Annulment (2d Ed.) § 20.07; 2 Beale on The Conflict of Laws § 130.1. The general rule has been recognized and followed in Wisconsin. Frame v. Thormann, 102 Wis. 653 at 672, affirmed 176 U. S. 350, 44 L. ed. 500, 20 S. Ct. 446. See also Lanham v. Lanham, 136 Wis. 360 at 366; Owen v. Owen, 178 Wis. 609 at 613; Fitzgerald v. Fitzgerald, 210 Wis. 543. It has also been referred to with approval by a Texas court. Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803. We, therefore, are of the opinion that said Texas statute will not operate to prevent the parties referred to in your inquiry from entering into a lawful marriage in Wisconsin and that the county clerk can issue a marriage license to said parties provided they make proper application therefor and pay the necessary fee and, provided further, that no other reason exists why a lawful marriage could not be entered into between the parties in this state.

In arriving at the foregoing conclusion, we assume that the time for appeal from the Texas divorce decree has expired and that the divorce decree contains no provision prohibiting the parties from remarrying within a year, and that the woman involved in the instant case who was divorced in Texas is no longer a resident of Texas but is a resident of Wisconsin, which facts may or may not be important.
As you have pointed out in your letter to us, the prohibition contained in sec. 245.03 (2) would have no application here since that subsection applies only to parties to an action for divorce in any court in this state. Fitzgerald v. Fitzgerald, 210 Wis. 543 at 547. It is also obvious that this case is not one which falls within the scope of either subsecs. (1) or (2) of sec. 245.04. We find no other Wisconsin statute which applies.

In the course of writing this opinion, we have examined the cases of Lanham v. Lanham, 136 Wis. 360, Severa v. Beranak, 138 Wis. 144, and Elies v. Elies, 289 Wis. 60.

The Lanham case involved a situation where a woman who was a Wisconsin resident obtained a Wisconsin divorce and then left the state and went into Michigan for the purpose of evading sec. 2330, Stats. 1898, now sec. 245.03 (2), and was remarried in that state. She and her new husband immediately returned to this state where they lived until his death. The court refused to recognize the Michigan marriage and held it void and further held that no common law marriage existed. The case is readily distinguishable and at page 366 of 136 Wis. the court distinguished statutes like the Texas statute here involved from the Wisconsin statute there involved. The second case cited presented a factual situation similar to that in the Lanham case except that the second marriage took place in Illinois, which also had a statute which prohibited remarriage within a year with certain exceptions which were not applicable, and also declared such a marriage void. The Elies case can be disposed of by referring to the per curiam opinion filed December 13, 1941 (239 Wis. 60) withdrawing the statement previously made as to the effect of a subsequent marriage of a party to a Wisconsin divorce in the state of Iowa contrary to the provisions of sec. 247.37 (1), Wis. Stats.

We have also read Hall v. Industrial Comm., 165 Wis. 364. It is possible that our supreme court in the subsequent decisions hereinbefore cited has receded from the position taken in this case. In any event it can be distinguished on the ground that the Wisconsin and Illinois statutes there involved differ from the Texas statute here involved.
Bureau of Purchases—Parking Space—Bureau of purchases has authority to procure parking space for state-owned automobiles when ready availability of such automobiles is essential to the performance of the duties of any particular office.

February 25, 1947.

F. X. Ritger,
Director of Purchases.

You inquire whether the bureau of purchases may procure parking space for state-owned vehicles and make payment for such space from state funds.

Procurement of such space might be classed as a contract for storage in the case where the automobile is delivered to the parking lot owner and he assumes the normal responsibilities of a bailee to such vehicle, or as a pure rental of land in the case where the owner of the vehicle retains full control. Hogan v. O'Brien, 206 N. Y. S. 831.

In either event, any power of the bureau of purchases to procure such space must be based upon express statutory provisions which confer such power.

The applicable sections of the statutes are as follows:

"15.28 The director of purchases shall have authority and is hereby directed to purchase and may delegate to special designated agents the authority to purchase:

"(1) All necessary materials, supplies, paper, coal, fuel, stationery, apparatus, furniture, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature for all state offices. All such materials, services and other things and expense furnished to any such office shall be charged to the proper appropriations of the offices to whom furnished, as provided in section 20.10 of the statutes."

"15.26 (4) The words 'contractual services' include gas, electricity, steam, telephone, telegraph, freight, express, drayage, towels, drinking water, postage, printing, binding and similar services."

"15.37 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.

"* * *

If the procurement of parking space be considered as a contract of bailment, it would be necessary to justify it within the provisions of sec. 15.28 (1). If it is a pure rental of space, it must come within the provisions of sec. 15.37 (1).

There are two named items in sec. 15.28 (1) which might be considered to include such power: (1) “contractual services”; (2) “all other expense of a consumable nature.”

In our opinion the contract for storage in a parking lot or otherwise does not come within the class of contractual services. In construing this term, as defined in sec 15.26 (4), the doctrine variously referred to in the Wisconsin reports as noscitur a sociis or ejusdem generis, is applicable. Properly speaking, the maxim noscitur a sociis states that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. Broom's Legal Maxims (9th Ed. 1924), p. 373. The maxim ejusdem generis, which is a specific application of the broader rule, declares that when general words follow specific words the meaning of the general words may be ascertained by referring to the preceding special words. Analyzing the specific words of sec. 15.26 (4) in the light of this doctrine, we find that they refer to utilities, transportation of commodities and incidental services and expenses connected with the maintenance of an office where personnel are employed. There is nothing even remotely analogous to the storage of personal property outside the office. The rule of ejusdem generis is especially applicable because of the express statement of the statute that it authorizes “similar services.” Accordingly, we hold that “similar services” as defined in sec. 15.26 (4), does not include contracts for the storage of motor vehicles.

The above construction is inapplicable to the phrase in sec. 15.28 (1) “all other expense of a consumable nature.” See Broom's Legal Maxims, loc. cit. p. 375. Inclusion of this phrase shows an intent to include something over and above the consumable materials and the contractual services.
previously named, and it may properly be extended to include car storage or parking.

While the following conclusion is not free from doubt, we are of the further opinion that if the procurement of parking be considered a pure rental of space it may be justified under sec. 15.37 (1), Stats. This section authorizes procurement of "quarters required for the performance of the duties of state offices." Since at the time this statute was passed many state offices had authority to and did own state automobiles, it must have been within the contemplation of the legislature that these automobiles would have to be kept somewhere on state property. If the above term is not broad enough to authorize the rental of garage space or parking lots, there is no such apparent authority in the statutes. While in some connotations the term "quarters" is considered to include space in buildings or dwellings, in its original military usage from which it is derived, the term "quar- tering" is used to refer to the allocation of space on the ground, as opposed to billeting, which refers to lodging of troops in cantonments or barracks.

Whether procurement of parking space be considered as a contract of bailment or a rental of real property, it is clear that such space can be acquired only when it is essential for the performance of the duties of the particular office. The mere fact that the employee furnishes storage space at his own home or that it would be more convenient for him in traveling between his home and his state office, is insufficient. Each department head desiring the procurement of such parking space should show that it is essential that the employee involved have his automobile readily available and that the existing facilities in the city streets are inadequate.

RGT
Municipal Court — Clerk — Salaries and Wages — Sec. 59.15, Wis. Stats., does not authorize the county board of Winnebago county to change the compensation of the clerk of the municipal court for the city of Oshkosh and the county of Winnebago.

Under sec. 20 (1), ch. 43, Laws 1935, the county board of Winnebago county may change the annual compensation of such clerk as fixed by said section, but said board may not deprive the clerk of any clerk's fees granted to him by sec. 22 of that act.

February 26, 1947.

RUDYARD T. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

Since 1935 the clerk of the municipal court for the city of Oshkosh and county of Winnebago has been collecting and retaining clerk's fees in civil matters before that court. The question now arises whether the county board of Winnebago county may take any action which will operate to deprive the clerk of such fees.

Ch. 43, Laws 1935, provides in part:

"Section 20. (1) The said judge of the municipal court shall enter an order in writing appointing a suitable person to act as clerk of said court who shall serve at the will of the judge of said court until his successor shall have been appointed and qualified. *** Said clerk of the municipal court shall receive as compensation the sum of two thousand four hundred dollars per annum, until otherwise fixed by the Winnebago county board, apportioned and paid monthly, two-thirds out of the county treasury of said county and one-third out of the treasury of the city of Oshkosh, the same to be in full for all services rendered by said clerk of the municipal court. ** * * ."

"Section 22. All fines and costs assessed and paid into said court in state and civil cases shall by the clerk of said court be paid monthly to the county treasurer of Winnebago county; and all fines and costs assessed and paid into said court in city cases shall by the clerk of said court be paid monthly to the city treasurer of the city of Oshkosh, except, however, that the clerk may retain 'clerk's fees' collected in civil matters."
The clerk of the municipal court has been retaining "clerk's fees" collected in civil matters by virtue of the provisions of section 22, quoted above.

You have referred to sec. 59.15 (1) (b) and (2) of the statutes, which provides:

"(1) * * *

"(b) Any officer authorized or required to collect fees appertaining to his office shall keep a complete record of all fees received in such form as the county board shall prescribe and shall place a record of the total annual receipts on file in the county clerk's office within 20 days of the close of the calendar year or at such other times as the county board may require. Any officer on a salary basis or part fees and part salary shall collect all fees authorized by law appertaining to his office and shall remit all such fees not specifically reserved to him by enumeration in the compensation established by the county board pursuant to paragraph (a) to the county treasurer at the end of each month unless a shorter period for remittance is otherwise provided by law. * * *

"(2) (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 employe 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.

"(b) The county board at any regular or special meeting may abolish, create or reestablish any such office, board, commission, committee, position or employment, and in furtherance of this authority may transfer the functions, duties, responsibilities and privileges to any other existing or newly created agency including a committee of the county board except as to boards of trustees of county institutions.

"(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, employe or deputies to elective officers * * *."

Sec. 59.15 was repealed and recreated by section 1 of chapter 559, Laws 1945. Sec. 59.15 (1) is entitled "Elective Officials," and 59.15 (2) is entitled "Appointive Officials,
Deputy Officers, and Employees.” Usually the titles of sections and subsections of the statutes are inserted by the revisor of statutes and reflect his judgment of what constitutes an appropriate title. However, in chapter 559, Laws 1945, the legislature itself included the titles which now appear at the beginning of subsecs. (1) and (2) of sec. 59.15 in the statutes. Although under sections 35.19 and 370.01 (48) the titles do not form any part of the statute itself, it appears clearly to have been the legislative intent that sec. 59.15 (1) (b) was intended to apply only to elective officials. Since the clerk of the municipal court for the city of Oshkosh and county of Winnebago is not an elective official, that statute would not be applicable to him.

Sec. 59.15 (2) (a) grants certain powers to the county board with reference “to any office * * * created by or pursuant to any special or general provisions of the statutes.” The office of clerk of the municipal court for the city of Oshkosh and county of Winnebago was not created by any special or general provision of the statutes, but was created by a local law known as chapter 43, Laws 1935. Consequently, sec. 59.15 (2) (a) does not apply to the clerk of the court created by that act.

Sec. 59.15 (2) (b) which refers to “any such office” applies to an office “created by or pursuant to any special or general provision of the statutes” mentioned in sec. 59.15 (2) (a). If this paragraph applied to the office of the clerk of the municipal court for the city of Oshkosh and county of Winnebago, it would be possible for the county board of Winnebago county to abolish this office notwithstanding the manifold duties specifically imposed upon such clerk by subsec. (2) of sec. 20 of chapter 43, laws 1935, and notwithstanding the fact that under subsec. (1) of said section the clerk is appointed by the judge of said court and serves at the will of said judge until his successor is appointed and qualifies. If the county board could abolish the office of the clerk of said court it could seriously impair, if not destroy, the value of that court.

The authority of the county board of Winnebago county to change the compensation of the clerk of said court must be found within the provisions of chapter 43, Laws 1935. Under sec. 20 (1) of said act the county board of Winnebago
county is given authority to fix the compensation of the clerk of the municipal court which, until so fixed, was set by said act at the sum of $2,400 per annum and which was to be “in full for all services rendered by said clerk of the municipal court.” Neither sec. 22 of chapter 43, Laws 1935, which states that “the clerk may retain ‘clerk’s fees’ collected in civil matters” nor any other part of said chapter authorizes the county board of Winnebago county to take action which would deprive the clerk of the municipal court of any fees granted him by the act. Therefore, it is our opinion that the county board of Winnebago county, solely by virtue of sec. 20 (1) of chapter 43, Laws 1935, has authority to change the annual compensation of such clerk from $2,400 per annum to a different amount, but that it does not have the right to deprive said clerk of any fees granted him by sec. 22 of said chapter.

It does not appear proper to close this opinion without mentioning the apparent inconsistency between sec. 20 (1) of chapter 43, Laws 1935, which states that the compensation of $2,400 per annum or such other compensation in lieu thereof as may be fixed by the Winnebago county board, shall “be in full for all services rendered by said clerk of the municipal court,” and that part of sec. 22 of said act which states that “the clerk may retain ‘clerk’s fees’ collected in civil matters.” Apparently it has been assumed that the clerk’s fees collected in civil matters which are to be retained by the clerk, belong to him as part payment for his work as clerk; certainly the act does not specify what shall be done with these fees if they do not belong to the clerk. On the other hand, if these fees belong to the clerk for services performed by him, then the annual compensation of $2,400 cannot be said to be in full for all services rendered by said clerk. Since it was not necessary to do so in order to answer your question, this office is not attempting, in this opinion, to render an interpretation of these seemingly inconsistent provisions of chapter 43, Laws 1935.

JRW
Taxation—Schools and School Districts—Charitable and Penal Institutions—The words "agricultural land" as they appear in sec. 70.117, Stats., include improvements on the land as well as the soil itself.

Land owned by the state, used exclusively for buildings and grounds of the various state curative, penal and correctional institutions under supervision of the state department of public welfare, is not subject to any tax levied for school purposes as provided by sec. 70.117, Stats.

February 28, 1947.

STATE DEPARTMENT OF PUBLIC WELFARE.

Attention H. B. Evans, Chief Accountant.

You ask our opinion on two questions which involve an interpretation of sec. 70.117, Stats., which questions are as follows:

1. Are taxing authorities to levy school taxes on agricultural land only exclusive of all improvements?
2. Is institutional land used exclusively for buildings and grounds of the institution exempt from this special school tax?

The statute referred to (sec. 70.117) reads as follows:

"Notwithstanding any provision of section 70.11, all agricultural land owned by the state and operated by the state department of public welfare in connection with state curative, penal and correctional institutions under its supervision shall be subject to any tax levied for school purposes the same as other real estate. If such taxes are not paid, the real estate shall be subject to tax sale as are privately owned lands."

The state of Wisconsin owns or rents about 22,000 acres of land which are devoted to carrying on farming activities in connection with the operation of the various state curative, penal and correctional institutions which are under the supervision of your department. It is stated that this farm program has a three-fold purpose: (1) To aid the patients or inmates of the various institutions; (2) to supply the various institutions with fresh and pure farm and dairy
products; and (3) to reduce the cost of food for such institutions. Wisconsin Blue Book 1946, p. 331.

The language of sec. 70.117 which was enacted by ch. 398, Laws 1945, indicates that the primary purpose of the legislature was no doubt to make state-owned land used in carrying out said farm program, subject to any tax levied for school purposes the same as other real estate. The language used, however, is broad enough to possibly include lands owned by the state and operated by the state department of public welfare in connection with state curative, penal and correctional institutions under its supervision, not strictly within said farm program but which are used for agricultural purposes.

In construing the statute the words “all agricultural land” must be given their usual and ordinary meaning and mean land used for agricultural purposes. Hence, the statute must be construed to mean that all land owned by the state and used by the state department of public welfare for agricultural purposes in connection with the operation of the various state institutions under its supervision shall be subject to any tax levied for school purposes the same as any other real estate.

Improvements on land used for agricultural purposes must be considered part of the land as well as the soil itself. Sec. 70.03 states the words “real property,” “real estate” and “land” when used in a statute relating to taxation “shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto.” The legislative intention to make this rule apply to the agricultural land mentioned in sec. 70.117 appears from the fact that it is there said that said land shall be subject to any tax levied for school purposes “the same as other real estate.” We therefore answer your first question “No.”

In answering your second question, we understand that the land to which you refer as being used exclusively for building and grounds is land owned by the state and used exclusively for buildings and grounds of the various state curative, penal and correctional institutions under the su-
pervision of the state department of public welfare, and that no part of said land is used for agricultural purposes. Such land is clearly not made subject by sec. 70.117 to any tax levied for school purposes because such lands do not fall within the designation "agricultural lands."

WET
Divorce—Divorce Counsel—Fees—Service of notice of appearance by divorce counsel in divorce action does not entitle him to a fee prescribed in sec. 247.17, Stats., which is payable only where an action is tried and where the divorce counsel is required to appear by secs. 247.14 and 247.15, namely, in default cases and when the court is satisfied that the issues are not contested in good faith.

March 5, 1947.

HENRY E. STEINBRING,
District Attorney,
Eau Claire, Wisconsin.

You state that the divorce counsel in your county has been serving a notice of appearance in all divorce cases upon the attorney for the plaintiff and also upon the attorney for the defendant if the defendant is represented by counsel. He then proceeds to make his investigation and apparently takes the position that he is entitled in all cases to the $10 fee provided by sec. 247.17, Stats. We are asked if this interpretation is correct.

The office of divorce counsel is purely statutory and such officer may collect only the fees provided by statute. For example, this office has expressed the opinion that the county board may not abolish the position nor regulate the compensation. XXII Op. Atty. Gen. 744, 748.

Sec. 247.17, so far as material here, provides that in each case in which the divorce counsel appears he shall receive the sum of $10 to be paid by the county wherein the action was tried upon the order of the presiding judge and by certificate of the clerk of the circuit court. Extra compensation is allowed in cases occupying more than one day of the divorce counsel's time. It is apparent under the wording of sec. 247.17, without examining other statutes, that there are some cases in which the divorce counsel is not entitled to the $10 fee, assuming for the moment, but not conceding, that the word "appears" can be construed to cover all cases in which a notice of appearance has been served. Payment in any event is restricted to those cases in which "the action was tried." This would automatically rule out all cases which never come to a trial.
However, we consider that the word "appears" as used in sec. 247.17 is further restricted by the language of secs. 247.14 and 247.15 which limits the types of divorce actions in which divorce counsel is authorized to appear.

Sec. 247.14 provides that such counsel shall appear in the action when the defendant fails to answer or withdraws his answer before the trial; also, when the defendant interposes a counterclaim and the plaintiff neither supports his complaint nor opposes the counterclaim; and, lastly, when the court is satisfied that the issues are not contested in good faith by either party. Sec. 247.15 goes on to provide that no divorce decree shall be granted in any action in which the divorce counsel is required by sec. 247.14 to appear, until the divorce counsel shall have appeared in open court on behalf of the public and made a fair and impartial presentation of the case and fully advised the court as to the merits of the case, the rights and interests of the parties and of the public, and until the proposed findings and judgment shall have been submitted to him.

We find nothing in the statutes which requires the divorce counsel to serve a notice of appearance on counsel for either party in a divorce action nor which provides any compensation for the service of such a notice. He has a duty to appear only in default cases and where the court is satisfied that the issues are not contested in good faith. Sec. 247.17, with reference to payment of fees in those cases which are tried and in which the divorce counsel appears is in pari materia with secs. 247.14 and 247.15 wherein the duty to appear is prescribed, and it seems reasonably clear that no fee is to be paid for an unauthorized appearance. It is elementary that a public officer takes his office cum onere, and he may receive only the compensation provided by law. If no compensation is fixed by law for a particular service the implication is that the service is gratuitous, 43 Am. Jur. 139, and it may well be that investigations will be made by the divorce counsel in some cases where he will never be entitled to a fee. It perhaps should be added in closing that this opinion does not purport to cover in any way the fees to which divorce counsel may be entitled under sec. 247.29 in alimony matters.

WHR
Cities—Elections—Vacancies—Although death of supervisor created a vacancy one day after the last date for filing papers to nominate a successor under sec. 11.90 (17), nevertheless, his successor for residue of the unexpired term must be elected at the spring election pursuant to sec. 17.23 (1) (a) and (b), Wis. Stats.

March 11, 1947.

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

In the regular election held on the first Tuesday of April, 1946, a county board supervisor was elected from one of the wards in the city of Rhinelander for a two-year term. Said supervisor died on the 11th of February, 1947, thus creating a vacancy in that office. Sec. 17.03 (1) Wisconsin statutes.


Sec. 17.23 (1) provides as follows:

"Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

"(a) In the office of mayor, except as provided in section 10.44, by appointment by the common council. In the office of aldermen in cities of the first class, by the mayor, and in cities of the second, third and fourth class, by the common council, except in both cases as provided in section 10.44. A person so appointed shall hold office until his successor is elected and qualified. His successor shall be elected for the residue of the unexpired term on the first Tuesday of April next after the vacancy happens, in case it happens thirty days or more before such day, but if such vacancy happens within thirty days before such first Tuesday of April, then such successor shall be elected on the first Tuesday of April of the next ensuing year; but no election to fill a vacancy in such office shall be held at the time of holding the regular election for such office.

"(b) In the office of any other elective officer, except the judge of a municipal court created by special act with jurisdiction throughout the city only, and except as provided in section 10.44, by appointment by the mayor subject to confirmation by the council. except that in case of vacancies in the office of any such officer of a city of the first class who
is authorized by law to have a deputy, such deputy shall have full power and authority and it is hereby made his duty to exercise the office and perform the duties of such office, and he shall be entitled to the emoluments of such office during the remainder of the term. A person so appointed and confirmed shall hold office until his successor is elected and qualifies. His successor shall be elected as provided in paragraph (a)."

Emergency statutes, known as sec. 11.90 (17), (18) and (21), also provide:

"(17) The dates for the performance of acts in preparation for the April election in 1947 are changed as follows:
"* * *
"Feb. 10 (5 p. m.) . . . Last day for nonpartisan candidates for town, city and village office to file nomination papers, when no primary has been held.
"* * *
"Apr. 1 . . . Spring election held.
"(18) All other dates or time for the performance of acts in preparation for any election to which this section applies are advanced proportionately when necessary to conform to the changes in dates made in subsections (12) to (17). The secretary of state shall determine what advancements of such dates or time are necessary and give such notice thereof as he may deem advisable.
"(21) This section shall expire after the completion of the election on April 1, 1947."

No primary election for the purpose of nominating candidates is held in the city of Rhinelander. It thus appears that the vacancy in the office of supervisor occurred the day after the last day for filing nomination papers for that office had expired.

It is the duty of the mayor and common council to fill the vacancy as provided in sec. 17.23 (1) (a). Since the vacancy occurred more than 30 days before the first Tuesday of April, 1947, the successor to the deceased supervisor ordinarily would be elected for the residue of the unexpired term at the election of April 1, 1947. However, whether the mayor or council do, or do not, appoint some one to fill the vacancy, as contemplated by sec. 17.23 (1) (b), the name of a duly nominated candidate to be elected for the residue of the unexpired term cannot appear on the ballot since the
vacancy occurred one day after the last date for filing nomination papers.

You have called our attention to the fact that if the successor to the deceased supervisor is to be elected for the residue of the unexpired term at the election to be held April 1, 1947, it will be impossible to carry out the intention of sec. 11.90 which was to give members of the armed forces the right to vote for a duly nominated office seeker whose name appears on the ballot. Because the time for filing nomination papers had expired before the vacancy occurred, no name will appear on the ballot in the place provided for the names of candidates duly nominated to fill the vacancy in that office.

Prior to the passage of sec. 11.90 this situation could not have arisen because a candidate desiring to fill this vacancy could have filed nomination papers for such purpose not more than 20 nor less than 15 days before the spring election. Sec. 5.26 (6).

The secretary of state has not made any attempt, pursuant to the provisions of sec. 11.90 (18), to change the provisions of sec. 17.23 which require the election of a successor in case a vacancy happens 30 days or more before the spring election, and it is at least very doubtful whether any such action could be taken. Attention is also called to the fact that sec. 17.29 provides in part:

“The provisions of this chapter supersede all contrary provisions in either the general law or in special acts * * *”

While it is true that members of the armed forces situated in foreign countries will not have an opportunity to vote for a duly nominated candidate to fill this vacancy, this is likewise true of the electors who are actually living in the ward in which the successor is to be elected. Moreover, sec. 11.90 (1) recites that that statute was passed “to facilitate so far as practicable the voting by its qualified electors who are serving in the armed forces of the United States”.

Very possibly the legislature did not foresee the manner in which the provisions of sec. 11.90 might operate under the present conditions, and although it has been the general pattern of the election statutes that the voters shall have
an opportunity to vote for a duly nominated candidate, there are other circumstances under which the electors can fill an office only by writing in or pasting in the name of the individual for whom they wish to vote. It is our opinion that there is nothing ambiguous in the provisions of secs. 17.23 and 11.90 (17) which requires an interpretation to the effect that a person may not be elected at the April 1 election for the residue of the unexpired term which the deceased supervisor was to serve; therefore he should be elected at such time.

JRW

State—Bureau of Personnel—Salaries and Wages—State Employees—Director of personnel is required to determine whether or not persons are "employed" before issuing certificate pursuant to sec. 16.27.

Employes appearing in court or before administrative tribunal in matters relating to their employment should not be removed from pay roll on days they are so occupied.

March 11, 1947.

A. J. Opstedal,
Director of Personnel.

You state that certain employes of the motor vehicle department, who attended the hearing before the personnel board in the matter of the appeal of the employes of the Milwaukee branch office who were temporarily laid off at the time the office quarters were moved, were removed from the state pay roll for the day on which they attended the hearing. You state further that these employes have protested against their removal from the pay roll; that the motor vehicle department has taken the position that the legality of the removal must be determined by the bureau of personnel and that a record of their protest and of the action of the motor vehicle department has been transmitted to you by the Milwaukee office of such department.

You inquire: (1) Is the bureau of personnel required to determine whether or not the removal from the pay roll was
(2) Is it good personnel procedure and contemplated by law that employees be removed from the pay roll on days when they are attending hearings in matters relating to their employment?

In answer to your first question, under sec. 16.27 (1) the director of personnel is required to certify on the pay roll that a person is employed. Under subsec. (2), if a person who is employed is denied such a certificate as a basis for subsequent payment of wages from the state treasury, he is entitled to bring mandamus against the director to compel such certification. In the ordinary course of events the director will make his determination as to employment from the pay roll as submitted by the particular department. When the facts are brought to the attention of the director as they are in the present case, that an employee has a claim for payment which is not shown by the pay roll, the director must of necessity determine whether or not such claim is valid, whether the employee is entitled to be certified, or whether the director chooses to defend a mandamus action brought by the employee. Action of the director can be reviewed by the personnel board under sec. 16.05 (5), Stats.

In answer to your second question, personnel procedures or policies of any department are generally the responsibility of that particular agency, but as far as the legality of the removal from the pay roll is concerned, we are of the opinion that this matter is controlled by our prior opinion, XXX Op. Atty. Gen. 214, at pp. 217-218:

"* * * the administration of justice being a course of mutual benefit to everyone in the state, each is under obligation to aid in furthering it as a matter of public duty, including the state itself as an employer, and * * * the state should not, therefore, penalize its own employees by withholding their compensation when they are compelled to be absent from their duties to testify in court on matters relating to such duties."

The employees in question in the present case were present before an administrative tribunal of the state and engaged in a successful defense of their rights as civil service employees of the state. We are of the opinion that in so defending their civil service rights they were engaged in matters
relating to their employment and hence are employed within the meaning of sec. 16.27 and are entitled to be certified on the pay roll as being so employed.

RGT

Legislature — Criminal Law — Lotteries — Adoption of resolution No. 28, A., relating to bingo games is within the province of the legislature. Such resolution does not change the law and if it invites violation is not "within the province of the legislature."

Such resolution would have no legal effect on the duties of enforcement officers.

MEMBERS OF THE ASSEMBLY.

Under date of March 12, 1947 you requested our opinion on the following questions:

1. Whether or not it is within the province of the legislature to adopt joint resolution No. 28, A., relating to a legislative opinion on bingo games operated by certain patriotic, educational, religious, charitable, agricultural, civic or fraternal organizations.

2. If the legislature should adopt said joint resolution No. 28, A., what effect, if any, will it have on the duties of district attorneys, sheriffs and other law enforcement officers?

If it is "the sense of this legislature that bingo games sponsored and conducted under the auspices and control of religious, charitable, fraternal, educational, agricultural, civic or patriotic organizations are violating no moral law and should not be subject to the regulations and penalties applicable to lotteries under section 24 of article IV of the constitution and the provisions of sections 340.01 to 348.08 of the statutes," then that in itself is within the province of the legislature. However, the result of such a resolution would naturally tend to make law enforcement more difficult and encourage violations of the law as it now stands, people believing that they had your approval in the matter.
Its adoption, although it does not change the law, could be construed as an invitation to violate. This is not "within the province of the legislature."

As to the second question, if the legislature should adopt such a joint resolution, you ask what effect, if any, it would have on the duties of district attorneys, sheriffs and other law enforcement officers. We wish to advise that it would have no legal effect on any of their duties but might discourage them in the enforcement of the sections of the statutes covering lotteries.

If they fail to enforce the statutes as they now are, they would still be subject to removal for neglect of duty.

JEM

Banks and Banking—Receiving and Paying Stations—
National Banks—Section 5155 (c) of the National Bank Act (12 USCA § 36 (c)) authorizes a national bank situated in a city in Wisconsin to establish a paying and receiving station as provided by sec. 221.255, Wis. Stats., in another village located in the same county, its right to establish such a station being subject to restrictions as to location imposed by state law on state banks.

The words "restrictions as to location imposed by the law of the state on state banks" as they appear in said sec. 5155 (c) mean restrictions on geographical location.

Said national bank need not obtain authority from the state banking review board before it establishes and commences to operate a paying and receiving station in Wisconsin but must obtain the approval of the comptroller of the currency before it can establish and commence to operate such a station in this state.

March 19, 1947.

STATE BANKING COMMISSION.
Attention James B. Mulva, Chairman.

You have asked us to advise you with respect to the legality of the action of the Waukesha National Bank in establishing a place of business at Butler, Wisconsin, and to give you our recommendations and advice with respect thereto.
This place of business which we will hereinafter refer to as the Butler station was opened for business on February 17, 1947 following written approval and consent given by C. B. Upham, acting comptroller of the currency, on December 2, 1946.


"* * * The extent of the powers of national banks is to be measured by the terms of the Federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted, or such incidental powers as are necessary to carry on the business for which they are established. * * *

The court also said at page 492:

"National banks are brought into existence under Federal legislation, are instrumentalities of the Federal government, and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States. * * *

The general business of each national bank is required to be transacted in the place specified in its organization certificate "and in the branch or branches, if any, established or maintained by it" in accordance with the provisions of sec. 5155 of the National Bank Act. R. S. sec. 5190; 12 USCA §81.

The National Bank Act provides, inter alia, that a national bank may with the approval of the comptroller of the currency, establish and operate new branches (1) within the limits of the city, town or village in which said bank is situated, if such establishment and operation are at the time authorized to state banks by the law of the state in question, and (2) at any point within the state in which the national bank is situated, if such establishment and opera-
tion are at the time authorized to state banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the state on state banks. R. S. sec. 5155 (c); 12 USCA §36 (c). A national bank located in a state having a population in excess of one million, can establish a branch outside the city, town or village in which it is situated only if it has a paid in and unimpaired capital stock of not less than $500,000, with one exception not here applicable. R. S. sec. 5155 (c); 12 USCA §36 (c).

The term "branch" as used in sec. 5155 of the National Bank Act (12 USCA §36) is defined so as to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. R. S. sec. 5155 (f); 12 USCA §36.

It is also provided that the aggregate capital of every national bank and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banks situated in the various places where such bank and its branches are situated. R. S. sec. 5155 (d); 12 USCA §36 (d). No national bank can now be organized with capital less than $100,000 except in places with a population not exceeding 6,000 persons, in which cases a national bank may be organized with capital of not less than $50,000. The statute also contains certain other provisions applicable in cases where it is desired to organize a national bank in cities the population of which exceeds 50,000 persons, which have no application here. R. S. sec. 5138; 12 USCA §51.

The city of Waukesha had a population of 19,242 persons according to the last federal census and the village of Butler had a population of 778 so that if new national banks were to be established in Waukesha and Butler at the present time they could be organized with capital of $100,000 and $50,000, respectively.

At all times which are material here, the Waukesha National Bank had and now has paid in and unimpaired cap-
ital stock of $540,000. It therefore appears that said bank
could establish and operate a branch, using that word in the
sense it is defined in sec. 5155 (f), at a place in this state
outside of the city of Waukesha if at the time Wisconsin
state banks are given the right to establish and operate
branches (again using that word as defined in sec. 5155 (f))
by specific statutory language, and subject to the restric-
tions as to location imposed by the law of this state on state
banks.

Wisconsin specifically prohibits branch banking. Secs.
221.04 (1) (f), 221.255 (10). Wisconsin does permit state
banks under certain circumstances to establish and main-
tain what are known as receiving and paying stations. This
right is granted by specific statutory provision. Sec. 221.255.*

A Wisconsin state bank can establish and maintain a re-
ceiving and paying station only in event certain statutory
requirements are met, including those involving location.
A Wisconsin state bank desiring to establish a paying and
receiving station must first make application to the banking
commission which is thereupon required to determine
whether public convenience and advantage will be promoted
by allowing a station to be established and maintained as
well as certain other facts mentioned in sec. 221.255 (1) and
(3) and make its reports and recommendations to the bank-
ing review board. The latter board is then required to con-
sider the matter, hold any hearing that it may deem neces-
sary, and make its decision approving or disapproving the
establishment and maintenance of the proposed station.

The business which can be transacted in a paying and re-
ceiving station is limited by subsection (6) of sec. 221.255,
which reads as follows:

"No banking business shall be transacted in any such sta-
tion other than receiving and paying out deposits, issuing
drafts and travelers' checks, handling and making collec-
tions, and cashing checks and drafts."

The banking commission is given authority to prescribe
rules and regulations governing the operation of receiving
and paying stations by sec. 221.255 (7). Such rules and reg-
ulations appear in the 1944 Red Book at page 106 and fol-
lowing.

At this point two legal questions are presented: (1) In authorizing a national bank to establish and operate "branches" under the circumstances stated in sec. 5155 (c) of the National Bank Act, does said section authorize a national bank to establish a paying and receiving station as contrasted to a true branch bank (See Marvin v. Kentucky Title Trust Co., 218 Ky. 135, 291 S. W. 17, 50 A. L. R. 1337 and XXII Op. Atty. Gen. 562 at 563) where the state law authorizes state banks to establish and maintain paying and receiving stations under certain circumstances but forbids state banks from establishing or maintaining true branch banks; and (2) in event the first question is answered "Yes," does said sec. 5155 authorize a national bank to establish a paying and receiving station where the state law authorizes state banks to do so only after receiving authority to do so from the state banking review board, which authority may or may not be granted.

The first question must in our opinion be answered in the affirmative. The word "branch" as used in said section is defined by subsection (f) of said sec. 5155 so that it includes what is known in Wisconsin as a paying and receiving station. Said subsection (f) reads as follows:

"The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

The second question must in our opinion also be answered in the affirmative. Notwithstanding the fact that the Wisconsin statute permits a state bank to establish a paying and receiving station only after receiving authority to do so from the state banking review board, which authority may or may not be granted, such statute meets the requirement of sec. 5155 of the National Bank Act to which reference has previously been made to the effect that national banks may with the approval of the comptroller establish and operate branches at any point within the state in which it is situated if such establishment and operation are at the time authorized to state banks by the "statute law of the state in question by language specifically granting such
authority affirmatively" and not by implication or recognition. Approval of the state banking review board is not required, approval by the comptroller of the currency being sufficient. We arrive at the foregoing conclusions on the authority of the case of *Rushton ex rel. Comr. of Bkg. v. Michigan Nat. Bank*, 298 Mich. 417, 299 N. W. 129, 136 A. L. R. 458, which holds that a Michigan national bank could establish branches as provided by sec. 5155 (c) of the National Bank Act where sec. 23.762 of the Michigan statutes annotated provided: “Any bank having a capital of at least fifty thousand dollars ($50,000) may establish and maintain branches within any village or city other than in which it was originally chartered upon obtaining permission in writing from the commission,” and sec. 23.897 Michigan statutes annotated provided in effect that in event of consolidation of banks therein mentioned the consolidated bank “may, with the written permission of the commission, establish and operate as branches the consolidated bank or banks” and which further provided that such permission should not be granted by the commission unless certain stated requirements as to capital and surplus are met and “the commission is satisfied as to the sufficiency of the capital and surplus of such bank or association, and the necessity for the establishment of such a branch or branches, and the prospects of successful operation if established.” The court held that approval of the comptroller of the currency was alone required for the establishment of such a branch by a national bank in Michigan. Referring to sec. 5155 (c) of the National Bank Act and the state statutes there involved, the court said at page 465 of 136 A. L. R.:

“There is here no suggestion that an unqualified or unconditional right need be given by state law to state banks to establish and operate branches before national banks may do likewise without the sanction of the administering state banking office. Rather the thought was to place both banking systems upon an equal competitive plane.

* * * *

* * * The state has 'by language specifically granting such authority affirmatively and not merely by implication or recognition' provided for state branch banking by state banks. Under Section 114 of the Public Acts of 1937, No. 341, state banks may consolidate and with the written permission of the Commissioner of State Banking establish and
operate as a branch or branches the consolidating bank or banks. By the federal enactment equal privileges are available to national banks with the approval of the Comptroller of the Currency. 'Only where the States make the competition possible by letting their own institutions have branches' are national banks to have branches. Having made the competition possible, national banks as corporate instrumentalities of the United States created for public purposes need look only to the terms of the National Bank Act for guidance and approval of their actions." [Emphasis ours]

This Michigan case is a carefully considered and well reasoned case which has been cited by this department in at least one occasion in the past and we believe it accurately expresses the law on the subject and applies in the present case. The Michigan statutes involved in the case cited permitted the establishment of branch banks by state banks in event of a consolidation only upon obtaining permission from the state banking commission which could give its permission only if satisfied that statutory requirements as to capital and surplus had been met and, further, if it was satisfied of "the necessity for the establishment of such a branch or branches, and the prospects of successful operation if established." This is comparable with some of the requirements contained in sec. 221.255 (1) and (3) which must be passed upon by the banking commission and banking review board before a permit to establish and operate a paying and receiving station can be granted. You should understand, however, that there is no decision of the Wisconsin supreme court on the point and until there is one it is impossible to state with certainty the exact result which would be reached in this state. The foregoing does express our considered judgment on the question.

Our over-all conclusion is that at all times material here sec. 5155 (c) of the National Bank Act did and now authorizes the Waukesha National Bank to establish and operate a paying and receiving station as provided by sec. 221.255, Wis. Stats., its right to establish such a station being subject to restrictions as to location imposed by the state law on state banks. For reasons hereinafter stated, we need not determine at this time whether the law requires that its manner of operation be subject to the same limitations as are imposed upon state banks operating such stations. We
also conclude that said national bank need not obtain authority from the state banking review board before it establishes and commences to operate such a station but must obtain the approval of the comptroller of the currency before it can establish and commence to operate such a station in this state.

In our judgment the provisions of sec. 221.255 which provide that a paying and receiving station may be established in any community not having adequate banking facilities and which require the banking commission to determine whether public convenience and advantage will be promoted by the establishment of a station as well as the other factors which must be considered before a state bank can establish such a station as provided in sec. 221.255 do not apply because sec. 5155 (c) of the National Bank Act says that a national bank may with approval of the comptroller of the currency establish and operate new branches at any point within the state where it is established if state banks are affirmatively authorized by state law to establish and operate branch banks by specific statute and "subject to the restrictions as to location imposed by the law of the state on state banks." [Emphasis ours] Ordinary rules of statutory construction would indicate that this is the only restriction applicable to state banks which would apply to a national bank whenever a state by specific statute affirmatively authorizes state banks to engage, establish and operate branches, using that term as defined in sec. 5155 (f).

The words "restrictions as to location" in our opinion mean restrictions on geographical location, such as the three-mile limit imposed by sec. 221.255 (1), and not to any restriction of the kind imposed upon state banks seeking a permit to establish a receiving and paying station by subsections (1) and (3) of the same section to the effect that a station can be established and maintained only in a community not having banking facilities or where public convenience and advantage would be promoted by its establishment, which would if answered in the negative prevent the establishment in any particular location. To hold otherwise would make it possible to nullify the evident intent of congress in enacting sec. 5155 (c). As shown by the case previously cited, the broad over-all intent of congress in enact-
ing sec. 5155 as it now appears, was to permit national banks to have branches (using the word in the sense in which it is defined by sec. 5155 (f)) when the state by statute permits state banks to have branches. To repeat again what was said in the Michigan case cited (p. 465 of 136 A. L. R.): "'Only where the States make the competition possible by letting their own institutions have branches' are national banks to have branches. Having made the competition possible, national banks as corporate instrumentalities of the United States created for public purposes need look only to the terms of the National Bank Act for guidance and approval of their actions." [Emphasis ours] If it were to be said that the "restrictions as to location imposed by the law of the state on state banks" should include in addition to restrictions as to geographical location, such matters as the question whether the community has adequate banking facilities or whether public convenience and advantage would be promoted by establishment of a station, we would then be in a position where national banks could be denied the right to establish a branch in a community and compete with state banks because the area already had adequate banking facilities. If such a construction were adopted, it would be possible to have a situation where no national bank in the state could establish a branch even though the state law specifically and affirmatively permits state banks to establish branches, in event it appeared that all communities in the state already had adequate banking facilities. It is very evident that congress never intended any such result.

Furthermore, even if the matter of adequate banking facilities or public convenience and advantage are to be included in "restrictions as to location," these questions would have to be passed upon by the comptroller of the currency and not the state banking commission or banking review board. The case of Rushton ex rel. Comr. of Bkg. v. Michigan Nat. Bank, supra, is authority for this proposition. It would also seem to follow from the context of sec. 5155 (c) which specifically states that a national bank may with the approval of the comptroller of the currency establish and operate new branches under the circumstances therein stated. There is no requirement of approval by any state
banking authority and such omission must be regarded as significant.

The acting comptroller of the currency has given his written approval and consent to the establishment of the Butler station here involved on December 2, 1946 and if the matters whether Butler already had adequate banking facilities or whether public convenience and advantage would be promoted by establishment of a station in that village as well as any other matters other than those relating to geographical location are included in the words “restrictions as to location” as they appear in sec. 5155 (c), all such matters must, in view of the action of the acting comptroller, be deemed to have been resolved in favor of the right to establish the station.

The formal document evidencing such approval reads in part that: “Approval and consent are hereby given to the said ‘The Waukesha National Bank’ to establish and operate a branch in the village of Butler, at the location above mentioned, as provided in sec. 5155, as amended, and sec. 5190, as amended, of the Revised Statutes of the United States.” The word “branch” as used in the foregoing must, of course, be deemed to be used in accord with the definition contained in sec. 5155 (f) and would include what is known as a paying and receiving station in this state.

This leaves only the following question: Were the provisions of sec. 221.255, Wis. Stats., regarding geographical location complied with by the Waukesha National Bank in establishing the Butler station?

The entire village of Butler is located in Waukesha county which is the same county in which the Waukesha National Bank is located. We are informed it is more than three miles from any other bank or paying and receiving station. It, therefore, meets all requirements of sec. 221.255 as to geographical location.

We have inquired into the manner in which the Butler station of the Waukesha National Bank has been and now is being operated. It appears from the facts presently before us that it is being operated in all respects in accord with sec. 221.255 (6), Wis. Stats., and the applicable rules and regulations of the Wisconsin banking commission. That being true, there is no need at the present time to answer
the legal question whether the Waukesha National Bank in operating its Butler station is required to observe the limitations imposed by sec. 221.255 (6) or the applicable rules or regulations of the Wisconsin banking commission. Should you find some time in the future that they have changed their method of operation, you can advise us and we can then give you our advice and opinion on that question.

We are obliged to advise you that at the present time it is our opinion that the establishment and operation of the Butler station of the Waukesha National Bank is in accord with law and that you could not on the basis of present known facts successfully maintain legal proceedings to compel the discontinuance of said station.

WET

_Schools and School Districts—Safety Patrols—_School safety patrols may use flags to direct children crossing highways and to warn traffic.

_MOTOR VEHICLE DEPARTMENT._

You have asked for an opinion as to the legality of the use by school safety patrols in connection with their duties under sec. 40.89 of the statutes of 24” yellow flags attached to short bamboo poles. You have indicated that the flags would be 24” square and would contain the word “school.” You state that it is not contemplated that these flags should be used for the direction of vehicular traffic.

Sec. 85.14 (1) which prohibits generally the display of unauthorized traffic signs or signals has been amended by ch. 5, Laws 1947, to add the following provision:

“* * * excepting that a federal yellow flag, 24” x 24”, bearing either the words ‘Safety Patrol’ or ‘School’, attached to a light weight pole 8’ or less in length, may be used by members of school safety patrols standing adjacent to but off the highway to warn traffic that children are about to cross the street.”

The quoted section is valid and unquestionable authority for the use of the flags in the manner you have indicated. RGT
Banks and Banking—Receiving and Paying Stations—Weights and Measures—Distance—The words "within three miles" as used in sec. 221.255 (1), Stats., mean three miles as measured over the ordinary usual and shortest route of public travel between the points involved and not as the crow flies.

March 21, 1947.

BANKING REVIEW BOARD.
Attention G. R. Keyes, Secretary.

You have asked us to advise you whether the words "within three miles" as they appear in sec. 221.255 (1) mean three miles as the crow flies or three miles as measured along the shortest existing public highway.

The subsection referred to provides that any bank may establish and maintain a receiving and paying station provided certain conditions therein mentioned exist, and further provides, inter alia:

"* * * but no bank shall be permitted to establish, maintain or operate * * * any such station within three miles of any other existing bank or an authorized receiving and paying station of any other bank; * * *

The question as to the proper method of measuring distance when mentioned in a statute or written document is one that has been discussed in a number of cases. See Annotations in 54 A. L. R. 781 and 96 A. L. R. 778. No Wisconsin cases are cited. In the annotation in 54 A. L. R. 781, it is said, pages 783–4:

"It appears that the decisions are not in accord as to the proper method of determining distance in the construction of constitutional provisions or statutes. In some jurisdictions a straight line on the horizontal plane has been considered the proper method of measurement.

"* * *

"In some jurisdictions the courts have recognized other means than the straight line as media for measuring distances. * * *"

The best general statement on the subject that we can find is that of the Illinois supreme court in Stark County v. Henry, 326 Ill. 535, 158 N. E. 116, 54 A. L. R. 777 at 780:
When the distance sought to be ascertained is the distance between two designated points, and there is nothing in the context or subject-matter to indicate the manner in which the measurement is to be ascertained, distance is to be measured in a straight line, on a horizontal plane (5 Am. & Eng. Enc. Law, 704; 18 C. J. 1287; Lake v. Butler, 5 El. & Bl. 92, 119 Eng. Reprint, 416; Jewel v. Stead, 6 El. & Bl. 349, 119 Eng. Reprint, 895). Where, however, the distance is between cities, where mileage is to be computed, or where the context indicates that the distance is to be traveled, the distance is to be computed over the ordinary, usual, and shortest route of public travel, and not the distance measured by a mathematically straight line.

The basic purpose for the enactment of sec. 221.255 authorizing establishment of paying and receiving stations as therein provided, was to provide some form of banking service to communities otherwise not adequately served in this respect. This follows not only from that portion of sec. 221.255 (1) which provides that paying and receiving stations may be established in any community not having adequate banking facilities (provided that all other requirements mentioned in the statute are complied with) but also from the fact that sec. 221.255 (3) also provides that when an application for a station is received the banking commission is required to ascertain certain facts including whether "public convenience and advantage will be promoted by allowing such station to be established and maintained" and then make its report to the banking review board which makes the ultimate decision on the matter, as well as from the fact that the very portion of the statute we have under consideration here provides that no station shall be established, maintained or operated within three miles of any existing bank or other authorized station of any other bank.

The public must patronize a paying and receiving station like any other place of business by using the ordinary routes of travel. The distance is one that must be traveled. In conformity with the rule as stated in the Illinois case heretofore cited, we conclude that the words "within three miles" as used in sec. 221.255 (1) mean within three miles as measured over the ordinary, usual and shortest route of public travel between the points involved and not as the crow flies.
It is also important to note that if the distance mentioned in sec. 221.255 (1) is to be measured "as the crow flies" it would preclude a community not having banking facilities from securing a paying and receiving station if located within three air miles of another community which already has a bank or a paying or receiving station of another bank, even though geographical conditions may be such that the distance between the two communities by the ordinary, usual and shortest route is many more times that distance. We do not believe that the legislature ever intended such a result.

There is an opinion of this office appearing in XXIII Op. Atty. Gen. 191 at 207 which holds that the distance mentioned in the portion of sec. 176.30 (3) which prohibits the sale of intoxicating liquor within one mile of any state hospital for the insane should be measured by air line and not by road. We do not feel that such ruling, involving as it does the construction of a statute regulating the sale of intoxicating liquor, is of any particular significance so far as our present question is involved.

The business of selling intoxicating liquors has always been placed in a special class by the law and subjected to restrictions not imposed upon ordinary trades and business. See, for example, State ex rel. Henshall v. Ludington, 38 Wis. 107; Zodrow v. State, 154 Wis. 551. In 48 C. J. S. (Intoxicating Liquors) §191, it is said in part:

"Restrictions on sales of liquor as to territory, population, location, number of dealers, and other details, established by the legislature through delegated agencies of government are for the purpose of strict surveillance and control of the liquor industry, in order to minimize the evils inherent in the liquor traffic and to insure the collection of a tax thereon. * * *"

Statutes prohibiting the trafficking in liquor within a limited distance of churches, schools and the like are, as a general rule, liberally construed in favor of such institutions and strictly against those applying for a liquor license. 33 Corp. Jur. p. 542 note 16 [a].
For the same reasons, we likewise believe that the cases cited in the annotation in 96 A. L. R. 778 should not be considered as being in point so far as the present question is concerned.

WET

Constitutional Law—State—Salaries and Wages—State Employees—Statute authorizing temporary salary increases cannot operate retroactively by reason of art. IV, sec. 26, Wisconsin constitution, prohibiting legislature from granting extra compensation after services shall have been rendered.

March 22, 1947.

Fred R. Zimmerman,
Secretary of State.

You ask my opinion as to how to compute the salaries of state employes for the period March 1, 1947 to March 18, 1947, inclusive, in view of the fact that ch. 8, Laws 1947, did not become effective until March 19, 1947.

A consideration of the following facts and the history of the action taken by the emergency board, the state budget director and the state personnel board prior to the enactment of ch. 8, Laws 1947, is necessary to properly answer your question.

Section 16.105, Stats., provides for the establishment of standard salary ranges for all positions and employments in the state service to which ch. 16 applies.

Section 14.71 (1n) was enacted in the 1945 legislative session to provide an "initial basic cost of living bonus" in relationship to the December 15, 1944 United States department of labor (for Milwaukee) index as a base index, with provision for annual adjustments on July 1 of ensuing years.

Standard basic salary ranges for the biennium expiring June 30, 1947, were fixed and established as of July 1, 1945. These standards included the increases granted by sec. 14.71 (1n).
Section 14.71 (1m) provides a method of salary increases. Pursuant to the authority of this section, salaries were increased temporarily for the period April 1, 1946 through December 31, 1946.

By ch. 2, Laws Special Session 1946, a means was provided for effecting a further increase in salaries of state employees in both the classified and unclassified service receiving a base pay of $200 per month or less, which increase, denominated a "bonus" was effectuated by appropriate resolution dated September 16, 1946. This increase, by the terms of the resolution, was to be paid to and inclusive of February 28, 1947.

On December 19, 1946, acting pursuant to its authority under sec. 16.105 (4), Stats., the emergency board and state budget director adopted a resolution approving a recommendation of the state personnel board to continue in force until February 28, 1947, the temporary increase for classified employees approved in the resolution of April 9, 1946, and which, but for such extension, would have expired December 31, 1946.

The authority of the personnel board, with the approval of the director of the budget and the emergency board, to make changes in the compensation schedule for the classified service, is limited by sec. 16.105 (4) to the period of time when the legislature is not in session.

"16.105 (4). The standard salary ranges submitted by the director, as may be modified by the joint committee on finance, shall, for the ensuing biennium, constitute the state's compensation plan for positions in the classified service; provided, that the personnel board, with the approval of the director of the budget and the emergency board, while the legislature is not in session, may change the compensation schedule for any grade and class when such action is made desirable by changing employment and economic conditions."

The legislature convened January 8, 1947. By Assembly Bill No. 96, adopted as ch. 8, Laws 1947, sec. 20.74 (3) of the statutes was created. The act reads as follows:

"To create 20.74 (3) of the statutes, relating to a continuation to April 30, 1947 of the April and September 1946 emergency salary adjustments for state civil service employees, and making an appropriation."
"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"20.74 (3) of the statutes is created to read:

"20.74 (3) In addition to all other appropriations, $175,000 to continue from March 1, 1947, to April 30, 1947 the 2 emergency salary adjustments for state civil service employes, each for $10 per month, effective respectively from April 1 and September 16, 1946 to March 1, 1947 and authorized by resolutions of the emergency board dated respectively April 9, 1946 and September 16, 1946, the former authorization having been continued from December 31, 1946 to March 1, 1947 and the latter authorization having been granted under chapter 2, laws of special session 1946.

"This act originated in the Assembly.

"Approved March 18, 1947."

This act was published March 18, 1947, and became effective March 19, 1947 by virtue of sec. 370.05, Stats.

On March 1, 1947, the salaries in question dropped back to the July 1, 1945 level (plus, of course, any automatic step increases which became operative on July 1, 1946). As time progressed to and inclusive of March 18, 1947, the employes' right to compensation and the state's liability as employer for the payment of same depended upon such action as had been taken prior to July 1, 1945 which resulted in the fixing and determination of the basic standards for the then ensuing biennium. All subsequent action with respect to temporary increases resulted in the automatic termination of such increases by the lapse of time and expiration of the temporary periods fixed in the several resolutions enumerated above. This brings us down to March 19, 1947, which is the first effective date of ch. 8, Laws 1947.

It is uncontroversial that the legislature intended to continue the temporary increases in force without interruption for the period February 28 to April 30, 1947. But, unfortunately, the action taken to assure such continuance was not completed within the time limitations involved. This is so by reason of the effect upon the situation of article IV, section 26 of the Wisconsin constitution. It reads in part:

"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; * * *."
I am of the opinion that any payment of the temporary salary increases for the period March 1, 1947 to March 18, 1947, inclusive, would, in legal effect, constitute extra compensation within the meaning of that term as used in said article and accordingly violate said constitutional provision against such payments. See XXXV Op. Atty. Gen. 328 at page 333.

You should, therefore, compute salaries for the period March 1, 1947 through March 18, 1947, without the temporary increases, and for the period March 19, 1947 through April 30, 1947 with the salary increases.

SGH

Motor Carriers—Contract Motor Carriers—Partnership organized for sole purpose of hauling milk for hire held contract motor carrier within meaning of terms defined in sec. 194.01, Stats., and is subject to the provisions of sec. 194.34, notwithstanding its contract of carriage is limited to members of the partnership.

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

March 28, 1947.

It appears from your request for opinion and supporting file that one Herman J. Bowe of Chippewa Falls is engaged in the business of transporting milk for farmers for hire under the terms of a so-called partnership agreement entered into by the said Herman J. Bowe and five farmers each of whom owns the milk hauled by Bowe in an individual capacity. You state that the operator of the truck and the several farmers who are partners claim to constitute a "cooperative."

It appears that Mr. Bowe applied to the public service commission of Wisconsin for authority as a contract carrier to transport milk and other farm products within 35 miles of Chippewa Falls from the towns of Eagle Point and Anson in Chippewa county, to the Chippewa County Dairy at Bloomer. It appears that this authority was denied by
an order of the public service commission for want of an adequate showing of necessity and that the public convenience would be served. The evidence disclosed that there were adequate facilities for transportation of milk and other farm products in the area sought to be served by Mr. Bowe. Mr. Bowe thereupon entered into the partnership agreement referred to with his former customers in the belief that a requirement of ch. 194, statutes, could be legally circumvented thereby.

The pertinent provisions of the partnership agreement read as follows:

"Whereas, the undersigned are all farmers living within three miles of each other on State Trunk Highway 53, in the Town of Eagle Point, Chippewa County, Wisconsin, and desire to enter into a partnership for the purpose of hauling milk and other farm products cooperatively, now, therefore, it is agreed:

"1. That the undersigned do hereby enter into a partnership for the purpose of hauling milk and other dairy products from the farms of the respective partners to market.

"2. That said partnership shall buy and operate a one and one-half ton truck for the purpose of conveying dairy products and farm produce to market.

"3. That said partnership shall employ as manager, H. J. Bowe, who shall be in active charge as manager of the partnership business.

"4. That the capital of said partnership shall be one thousand dollars and that each partner shall pay in the sum of one hundred dollars in cash, and the balance of four hundred dollars shall be borrowed by the partnership and repaid out of the profits of the partnership.

"5. That said partnership shall haul dairy products and farm products for the members of said partnership at a flat rate of twelve cents per hundredweight until said prices are changed by agreement of the partners and that said partnership shall not haul any dairy products for any persons who are not members of the partnership.

"6. That the manager of the partnership shall prepare an accounting on the 14th day of August in each year and shall account to the members of the partnership for all receipts and disbursements and after deducting all reasonable charges plus a reasonable amount for depreciation of the partnership property the balance shall be equally divided between the partners."
We are of the opinion that the partnership created by the foregoing agreement is a contract carrier within the meaning of ch. 194, Stats. Sec. 194.01 (11) provides:

"'Contract motor carrier' means any person engaged in the transportation by motor vehicle of property for hire * * *"  

Sec. 194.01 (4) provides:

"'Person' means and includes any individual, firm, co-partnership, corporation, company, association, * * *"  

Sec. 194.01 (15) provides:

"'For hire' means for compensation, and includes compensation obtained by a motor carrier indirectly, by subtraction from the purchase price or addition to the selling price of property transported, where the purchase or sale thereof is not a bona fide purchase or sale. Any person who shall pretend to purchase property to be transported by him; or who shall purchase such property immediately prior to and sell the same immediately after the transportation thereof shall be presumed to be transporting such property for hire and not a bona fide purchaser or seller thereof, which presumption may be rebutted. * * *"

The members of this partnership assume a dual capacity or role. For one purpose each farmer is a member of a partnership which has been set up to transport milk for hire. For another purpose each farmer is an individual. In his individual capacity each farmer apparently owns or rents his own farm, owns his own cattle, grows or purchases his own feed, performs or hires others to perform the labor incident to readying the milk for delivery to market, and otherwise owns the milk in his individual capacity. He sells the milk for profit. The only act performed in concert with the other partners is the hauling of the milk for which a consideration is paid, namely, "twelve cents per hundredweight." Each farmer having an equal partnership interest receives a division of such money as is left over after paying for the operating expenses incident to the operation of the partnership owned truck, including some form of compensation to the driver. From the foregoing the conclusion is inescapable that this partnership is engaged in the business of transporting milk for hire, and therefore is a con-
tract carrier within the meaning of ch. 194, and as such must procure the necessary operating authority from the public service commission as required by law, and otherwise comply with the requirements of said chapter.

SGH

March 28, 1947.

BANKING COMMISSION OF WISCONSIN.
Attention Mr. E. W. Tamm.

I acknowledge receipt of your letter of March 26, 1947 in which you advise that it is the desire of the banking commission at this time to withdraw your request for reconsideration of my opinion of August 26, 1946* relative to an interpretation of section 115.07, statutes.

In your letter of October 22, 1946 requesting that I reconsider my opinion you state "in all fairness to the industry, we have advised them that we would ask your office to reconsider."

You enclosed exhaustive briefs presenting the industry's point of view on the question. These briefs contain factual statements which were not before me when I rendered the opinion of August 26. Some of the significant facts which I learned for the first time when you forwarded these briefs were as follows:

In 1940 your commission sent out to all permit holders under sec. 115.07 your interpretation premised on the proposition that the charges, in addition to interest might be made in full with the limitation that the charge should be made but once. In that interpretation reference was made to rate schedules published by the lenders and the lenders were admonished to revise the schedules, if necessary, in accordance with that interpretation. The interpretation published by your commission contained the following example as to permitted charges:

"On a cash loan of $100 to be paid in 12 monthly installments, the maximum amount that may be charged the borrower is as follows:

“(1) cash advance $100.00
interest at 10% per annum 5.417
fee 7.00

Total amount of note $112.417”

It further appears that in November, 1938 the Wisconsin Association of Finance Companies published a study of loans under sections 115.07, 115.09 and chapter 214. A representative of your commission collaborated in the preparation of that study. The treatment of section 115.07 in that study appears to be premised on the proposition that the 7 per cent and 4 per cent charge in addition to interest are permitted to be made in full.

On April 8, 1944 a letter was sent to an officer of the Wisconsin Association of Finance Companies by the supervisor of your division of consumer credit, with reference to certain problems arising under section 115.07, the second paragraph of which read as follows:

“You, of course, are familiar with the requirements of sec. 115.07 which permits 10% simple interest for the period of time the loan is to run, plus a service charge of 7% and 4% which may be charged only once. It is my contention that on a 6% transaction such as outlined above, on $1,000 the lender is entitled to an interest charge of 5.41713, the balance of which should be considered as the service charge or fee referred to in subsection (3) (a) (sic) of sec. 115.07. If the lender does not take advantage of the full charge of 7% and 4% permitted under the subsection referred to above, then it is my contention that he is entitled to no further service charge when a transaction of this nature is refinanced at the end of the year.”

On May 22, 1944 your commission sent out a mimeographed pamphlet entitled: “Banking Commission’s Interpretation of Sec. 115.07.”

Under the heading “Interest or Charges Permitted” is listed the following:

“Statutory Charges Permitted
1. 7% on the first $100 loaned
2. 4% on the remainder.”

It further appears that your commission approved a bulletin sent out by the Wisconsin Association of Finance
Companies in 1944 in which the following statement was made:

"The rate of charge is limited to 10% simple interest on the outstanding balances, but in lieu of all fees, etc., the licensee may deduct a fee of 7% per annum on the first $100 and 4% per annum on the amount over $100, but such deduction may not be made for over one year. (a) No minimum charge may be made."

On October 30, 1946 your Mr. Doyle and Mr. Tamm verbally requested that reconsideration of this question be deferred pending further word. On December 1, 1946 I was again requested to reconsider the question.

It appears at this writing that in the aggregate several millions of dollars have been loaned over a long period of years with the knowledge of, and in accordance with the administrative interpretation of sec. 115.07 by, the banking commission.

In reviewing the file and briefs in connection with your request for reconsideration, two questions arose which I believe pertinent to state in view of what I have to say later:

1. Is there such ambiguity in the phraseology of sec. 115.07 as to necessitate application of rules of construction to ascertain the legislative intent?

If such ambiguity is present, would not the administrative interpretation made by your commission and followed by all concerned over a long period of years have a material bearing upon the construction now to be placed upon the statute?

2. It is suggested, as a diametrically opposite proposition, that your commission had no power to interpret sec. 115.07 (8) because it has no duty to do anything in connection with the statute other than the ministerial acts of issuing permits and revoking them upon certain contingencies. If such view were adopted, then any administrative construction made by your commission would be gratuitous and not binding upon the courts. Nor would you then have the right to request an opinion construing the statute in question.

I mention these questions, but do not answer them because of your withdrawal of request for consideration. But
I wish to state that I do not regard my August 26, 1946 opinion as binding precedent if the question of interpretation of this section should again arise, in view of the additional facts stated.

Inasmuch as no conclusions are reached with reference to the questions stated, this letter does not constitute a formal opinion, but it will nevertheless be published by reason of its bearing on my August 26, 1946 opinion.

SGH

Appropriations and Expenditures—Flood Disaster Committee—The appropriation made by ch. 467, Laws 1943 (sec. 87.20, Stats.), may be used to reimburse the village of Spring Valley for flood relief consisting of removal of flood debris, repairing and restoration of streets, roads and bridges and for restoration, reconstruction and repair of public utility facilities such as water system, fire-fighting equipment and buildings used for storing public utility equipment and otherwise conducting public utility business. Appropriation may not be used to reimburse village for loss of library or for restoring football field, baseball field or playground.

March 31, 1947.

ADOLPH KANNEBERG, Secretary,

Sprang Valley Flood Disaster Committee.

You have referred to our opinion of February 3, 1947* relating to ch. 467, Laws 1943. In this opinion we reached the conclusion that the act did not authorize the repair of damages to the village park, the improving of the school grounds, the laying of a new pavement on state trunk highway 29 or the building of new bridges within the village of Spring Valley.

We are now furnished with some suggested schedules covering other items. Schedule I covers the restoration, reconstruction and repair of streets and roads including repair and reconstruction of several bridges damaged or destroyed by the flood of September 17, 1942 and removal of flood debris from streets and highways. Without going into

* Page 47 of this volume.
detail it would appear that all of the foregoing including the Burkhardt Creek Bridge covered in a separate schedule could be considered as coming within the approval indicated in XXXII Op. Atty. Gen. 420. As we understand it no new construction at new sites is contemplated in this schedule.

The second schedule calls for more extended discussion. This schedule is entitled, "Restoration, Reconstruction and Repair of Public Utilities and Expenditures for Emergency Relief," and includes the following items:

(A) Repairs to Village Water System  
(B) Restoration and Repair of Fire-fighting Equipment and Fire Hall  
(C) Repairs to Village Hall  
(D) Loss of Village Warehouse  
(E) Loss of Public Library  
(F) Football and Baseball Field  
(G) Playground

It is the contention of the village that the repairs to the water system, fire-fighting equipment, fire hall, village hall, and warehouse come under the heading of "public utility facilities" within the meaning of sec. 87.20 (3). This would seem to be clearly so as to the water system, fire-fighting equipment and fire hall and it may be true also of the village hall and warehouse if these buildings are used, as has been indicated, for storage of utility equipment, utility records, etc. and in other ways for the conducting of the business of the village's public utility facilities. If the flood disaster committee should conclude from all of the facts and circumstances that such is the case we believe it would be acting within its proper discretion.

This, however, still leaves undecided the question of whether or not these items fall under the category of works of internal improvement in which the state may not engage or whether they fall under the heading of "emergency relief" which is a valid objective as held in State ex rel. New Richmond v. Davidson, 114 Wis. 563. Certainly it would seem that the repair of the village water system was intimately connected with public health and that it was necessary to take steps to prevent the spread of contagious diseases and pestilence by restoring the operation of the water
system at the earliest possible moment. Likewise there was a strong public interest to be served by repairing the fire-fighting facilities throughout the village so as to prevent possible loss of life and property by fire. Thus, while the erection of a water works system or the installation of a fire-fighting system in the first instance might be considered a work of internal improvement (See *Leavenworth Co. v. Miller*, 7 Kans. 479, 493) the emergency repair of such facilities in time of great disaster may be so intimately connected with general health and welfare of the public and the state as to justify the appropriation of state funds. See *State ex rel. New Richmond v. Davidson*, supra.

This leaves for discussion the loss of the public library and the restoration, reconstruction and repair of the football field, baseball field and playground. In the *New Richmond* case, supra, it was held that the taxing power of the state could be exercised only for public purposes and that the determination of the legislature upon the subject is not absolutely conclusive upon the courts. It was considered in that case that an appropriation to reimburse the city of New Richmond for expense it incurred after a cyclone in burying the dead, caring for the injured, clearing up the debris to prevent disease and pestilence, and to relieve and aid the homeless, destitute and impoverished was not for a purely local purpose but was for a public purpose subserv- ing the common interest and well-being of the people of the state at large. The court in its opinion stressed the extreme urgency of the situation, saying at page 579:

"* * * The local authorities were powerless in the presence of such great destruction, suffering, and death. The condition of things, so suddenly precipitated, the claims of humanity, and the good of the state called for immediate and extraordinary relief. * * *"

While the loss of the public library may have been detrimental to the cultural and educational life of the community and the loss of the football field, baseball field and playground may have interfered with the community's recreational and physical education program, there are many of us who can recall boyhood days spent in communities where none of these facilities existed and it never occurred to us that we were in the midst of a dire emergency calling for
the exercise of the state's police power. It is true, of course, that standards change with the passing of time and that the luxuries of one generation tend to become the necessities of succeeding generations, but at least until our attention has been directed to authorities going beyond the rather extreme emergency requirements indicated in the New Richmond case as being essential to sustain an act providing for local relief, it is our judgment that these last mentioned items cannot qualify under the heading of "emergency relief" so as to justify the use of the appropriation for such purposes, even assuming that the statute as worded is broad enough to cover the same. See State ex rel. Wisconsin Dev. Authority v. Dammann, 228 Wis. 147, to effect that an appropriation by the legislature must not merely be for a public purpose but for a state purpose, since a tax must be spent at the level at which it is raised.

Since these items do not qualify as "emergency relief" within the meaning of sec. 87.20 (2) there remains to be considered the possibility of whether or not they meet the qualifications of other provisions of the act. Subsection (3) provides that the committee may make expenditures from the appropriation in the interest of the public health and welfare for the restoration, reconstruction and repair of residential properties, business establishments, streets, roads and public utility facilities damaged or destroyed by the flood.

We are unable to conclude that a public library, football field, baseball field or playground falls within the scope of this subsection although there is some authority to the effect that a public park is a public utility. See 35 Words and Phrases 418. However, assuming that one or more of the foregoing items could be termed "public utility facilities" we are confronted with the rule as stated in XXXII Op. Atty. Gen. 420 that the state may not restore the same since to do so would violate art. VIII, sec. 10, Wisconsin constitution, which prohibits the state from engaging in works of internal improvement, there being nothing here of such an emergency character as would save the situation from the application of the general rule and bring it within the doctrine of the New Richmond case.

It is true, of course, that under art. XI, sec. 3a, Wis. Const., the state may acquire lands for parks and play-
grounds but we do not understand that any such acquisition by the state is intended or encompassed within the language of sec. 87.20.

WHR

Counties—Taxation—Tax Deed—Public Assistance—Old-age Assistance—For purposes of distribution under sec. 75.36, Stats., of the proceeds of the sale of county tax deeded lands, the amounts of the tax claims and of old-age assistance claim are computed as of the date of the tax deed.

March 31, 1947.

DEPARTMENT OF PUBLIC WELFARE.

In an opinion to the district attorney of Iowa county dated December 6, 1946* we stated that the taking of a tax deed by a county cuts off the old-age assistance lien under sec. 49.25, Stats., but that when the county sells the land, if the proceeds therefrom are more than enough to pay the tax claim, it must account for and apply the excess or surplus by way of payment on the old-age assistance claim. You ask whether for such purposes the amount of the tax claims are to be computed as of the date the tax deed is taken or as of the date the county sells the property. Because of the varied situations that may arise in respect to special assessments, each of which has to be dealt with in view of the particular facts, your question is here answered as applicable only to general taxes and this opinion does not necessarily apply to special assessments.

By virtue of the changes made by chs. 64, 567 and 586, Laws 1945, in sec. 75.36, Stats., it is of significance whether the tax deed is taken subsequent to April 24, 1945 or on or before that date. Sec. 75.36, Stats. 1945, as so amended, specifies in subsec. (11) that the provisions of the section as to the distribution of the proceeds realized by the county upon the sale of the tax deeded lands apply only where the deed was taken subsequent to April 24, 1945 and that the provisions of the statutes before such amendments apply to settlements in respect to deeds taken on or before April 24, 1945.

It is clear that under the provisions of sec. 75.36, Stats. 1945, the amounts of the tax claims for the purposes of distribution of the proceeds of the sale are computed as of the date upon which the tax deed was taken. Subsecs. (7) and (8) specifically deal with the disposition of such proceeds. Subsec. (7) sets out deductions to be taken by the county therefrom. Para. (c) thereof lists as one of such deductions "the redemption value as of the date of the tax deed" of county owned tax claims equal or subsequent in date to the tax certificate upon which the deed was taken. Subsec. (8) covers the matter of distribution of the net proceeds remaining after the deductions provided for in subsec. (7) and says the tax claims are computed at the "redemption value * * * on the date the tax deed was taken."

The statutes as they exist prior to such 1945 amendments and which are applicable in respect to tax deeds taken on or before April 24, 1945 are not as explicit, and require interpretation. In two opinions, XXVIII Op. Atty. Gen. 74 and XXX Op. Atty. Gen. 29, we said in substance that the effect of such statutes as properly interpreted is that the amount of the tax claims which the county becomes liable to pay out of the proceeds of the sale of tax deeded lands is determined as of the date it takes the tax deed.

In Spooner v. Washburn County (1905), 124 Wis. 24, 102 N. W. 325, it was held that under the statutes as they then stood, and particularly sec. 75.36, Stats., the county by taking a tax deed acquired a title in fee to the land in which all of the liens it then had were merged and it became immediately accountable to the local municipalities for the delinquent tax liens on the property at the redemption value thereof at the date of the taking of the tax deed. In the case of In re Dancey Drainage District (1929), 199 Wis. 85, 225 N. W. 873, the court after referring to that case said that the proposition that the taking of a tax deed by the county operates as an extinguishment of the tax represented by the certificates then held by the county and the liens thereof cannot be regarded as an open question. It there said that it is plain that the liens which the county then had were merged in the title the county acquired by the tax deed and by such merger were extinguished. The provisions of sec. 75.36 were amended in 1929 to read as they do in the 1943
statutes that the county should not be required to pay the local municipalities on its liability for tax claims in respect to lands upon which it took a tax deed until it sold the land and that if the amount realized on the sale were not sufficient to pay all of the tax claims then "the amount realized shall be applied thereto and there shall be no further liability upon the county for the same."

The effect of this change was discussed in XXVIII Op. Atty. Gen. 74 and XXX Op. Atty. Gen. 29. It was there stated that under Spooner v. Washburn County, supra, the amount of the county's liability was determined as of the date the tax deed was taken at the redemption value of the various tax liens at that time and the county was liable to account immediately for such amounts. It seems obvious that the amount of the liability was so computed and fixed because it was at that time that said tax claims and the liens thereof on the land became extinguished by merger in the county's title in fee, which it acquired by the tax deed. Thereafter said delinquent taxes or tax sales certificates ceased to exist as such or as liens against the land, but remained solely as items of intergovernmental accounting between the county and the local municipalities. Under the statutes as applied in the Spooner case the county had an immediate duty to account to local municipalities for said items. The amendment of sec. 75.36 in 1929 did not change or in any way deal with the computation of the amount at which said tax claim items were to enter into the accountability of the county to the local municipalities in respect thereto, but merely postponed the time when the county had to discharge its liability therefor until the county had sold the land. In other words, for the purposes of distribution of the proceeds realized by the county upon the sale of lands to which it has taken a tax deed, the amounts of the various tax claims or liens that enter into such distribution are determined as of the date the county takes the tax deed, because it is on that date that the tax claims and the liens thereof by merger in the county's title are extinguished, so that they thereafter no longer exist as such. In effect, said tax claims and the liens thereof are discharged by such merger, and were it not for the 1929 amendment to sec. 75.36, the county would become immediately accountable
for the amounts of the tax claims as they existed at the time of their extinguishment by such merger. The 1929 amendment merely changed the time at which the county became liable to account for them at such amounts by postponing it from the date of the tax deed to the date when the county sells the property.

Although the above is sufficient, in addition there is the lack of any provision in the statutes for interest after the taxes and tax certificates cease to exist. The taking of the tax deed automatically extinguishes them by the merging of them in the county's title so acquired. Thereafter there are no longer any delinquent taxes and outstanding tax certificates but there exist solely accounting items or claims that constitute the basis for the distribution of the sale proceeds which are merely matters of intergovernmental accounting and arose upon the merger as representing or in lieu of the amount of the extinguished taxes and tax certificates. The only statutory provisions for interest are upon delinquent taxes and tax certificates. There is thus no statutory basis for the accrual of interest when there are no delinquent taxes or outstanding tax certificates upon which to compute the interest provided for by these statutory provisions. Therefore there is no basis for computing the amount of the tax accounting items any differently at the time the land is sold than at the time of the taking of the tax deed. The amount at which these accounting items enter into the distribution of the sale proceeds is the amount thereof at the time they come into existence plus any interest thereon that is provided by the statutes. The time such items come into existence is when the delinquent taxes or tax certificates are extinguished. The amount thereof is that sum or figure which constituted the delinquent tax or tax certificate liens when they were extinguished. There being no provision for any accrual or running of interest thereafter these tax items are not subject to any interest and enter into the distribution of the sale proceeds at the amount of the redemption value of the delinquent taxes or tax sales certificates at the time of their extinguishment by the taking of the tax deed.

It is clear from Spooner v. Washburn County, supra, that interest does not accrue on these accounting items from the
date of the tax deed. The court there held that the county was not chargeable with interest from the date of the tax deed but was so chargeable from and after the demand by the town of Spooner for payment of the moneys then due to it from the county. It said the situation was comparable to that of an open account between persons and the liability of the county was that attaching in the case of demands and mutual accounts. The interest thus attaching upon failure to pay upon demand is allowed as a matter of damages to compensate for the loss of the use of the money due to its being wrongfully withheld.

The absence of any provision for interest upon these tax accounting items is readily explainable. The reason for providing interest on delinquent taxes and tax certificates is to induce payment thereof by the owner. The rates provided by the statutes are accordingly higher than commercial rates so as to make it uneconomical not to pay them. When the county has taken a tax deed the purpose in such interest no longer exists. Nor does the basis for ordinary damage interest exist. The whole matter of the county taking tax deeds is merely a part of the statutory machinery for collecting revenue to be used for the operation of the various subdivisions. The provisions of sec. 75.36, Stats., both before and after the changes in 1945, are founded upon the concept that the county should not be required to pay out money as the collection of revenue until it has actually made collection thereof. It thus is not required to distribute or pay to the local municipalities in respect to revenue impositions not collected until through the sale of the property it realizes the revenue to distribute. Until it has so realized on the revenue impositions there is no withholding of anything that should be paid and so no compensatory interest is justifiable. There is no adversity between the county and the local units until the county has made collection through the medium of sale of the land and upon demand has failed to pay the amount which is due and payable to the local unit.

It is our opinion that the amounts of the tax items for purposes of distribution of the proceeds of the sale by the county of tax deeded lands are computed as of the date of the taking of the tax deed. Under the previous provisions
of sec. 75.36, Stats., as interpreted in the opinion in XXVIII Op. Atty. Gen. 74, and provisions of sec. 75.36, Stats. 1945, if the amount realized on the sale is not equal to the amount of the tax claim items, there will be nothing for distribution to apply on the old-age assistance lien. It is only the amount in excess thereof that would be applicable thereto. But, by the same reasoning above in respect to computation of the amount of the tax claim items, the amount of the old-age assistance lien would likewise be computed as of the date of the taking of the tax deed for the purposes of distribution of the sale proceeds.

HHP

Legal Settlement—Soldiers, Sailors and Marines—Person who came to city primarily for the purpose of attending school but who made his home in such city and remained there for more than a year after the attainment of his majority and while completely self-supporting, established a legal settlement in such city which he did not lose by going therefrom into the United States army in which he served for about three years.

March 31, 1947.

ROBERT D. DANIEL,
District Attorney,
Janesville, Wisconsin.

From August 1936 through September 1940 one X resided in Deerfield, Illinois. He was then a minor under guardianship and resided in said city primarily for the purpose of going to school. After September of 1940 X considered any bond which previously existed between himself and his guardian ended. From October 1940 to May of 1941 X resided in Iowa City, Iowa, where he attended the university of that state. In May of 1941 he returned to Deerfield, Illinois, and spent the summer there. In September of 1941 he came to Beloit, Wisconsin, for the purpose of going to school; but X states that he considered Beloit his home because he had no other home. In October of 1941 he became 21 years of age. He remained in Beloit, Wisconsin,
from then through December of 1942, except that during the Christmas vacation of 1941 he went to Deerfield, Illinois. He attended the summer school at Beloit in the summer of 1942 and remained in that city during Christmas vacation of 1942. From October 1941 through December of 1942 he was completely self-supporting.

Near the end of 1942 X left Beloit College and on February 10, 1943 entered the army. He was discharged from the army in January of 1946, at which time he came back to the city of Beloit to go to college and to make his home there. X is married and he and his wife rent rooms from a college professor and in turn rent out a couple of rooms to other college students.

X is in need of care in a tuberculosis sanatorium. Although he is an honorably discharged officer of the United States army and is entitled to enter a veterans’ hospital, he prefers to receive treatment in the tuberculosis sanatorium of Rock county.

Before asking the county judge of Rock county to commit X to the Rock county tuberculosis sanatorium, you wish to be advised whether X has a legal settlement in the city of Beloit, whether he could qualify under the 5-year residence requirement provided for in sec. 50.03 (2a), Stats., or whether X’s care in said institution would be a charge upon the state. Apparently you entertain some doubt about whether X acquired a legal settlement in the city of Beloit because he came there primarily for the purpose of going to school.

Section 49.10 (4), (5) and (7) of the statutes provides:

“(4) Every person * * * who resides in any municipality one whole year gains a legal settlement therein; but the time spent by a person * * * while supported therein as a dependent person * * * shall not be included as part of the year necessary to acquire * * * a settlement. * * *

“(5) After September 16, 1940, the time spent by any person in the service of the United States Army * * * shall not be included as part of the year necessary to * * * lose a settlement in any municipality. * * *

“(7) Every settlement continues until it is lost by acquiring a new one in this state or by residing for one whole year elsewhere than the municipality in which such settlement exists * * *.”
From the foregoing statement of facts it appears that after X became 21 years of age he resided in the city of Beloit continuously for more than one year while completely self-supporting. The temporary absence from the city of Beloit during the Christmas vacation of 1941 would not interrupt the period of one year's residence necessary to acquire a legal settlement in the city of Beloit. XXII Op. Atty. Gen. 665 and XXIX Op. Atty. Gen. 395. Moreover, it appears that probably X resided in the city of Beloit continuously for more than a year after the end of the Christmas vacation of 1941 and while completely self-supporting.

The fact that X may have gone to the city of Beloit primarily for the purpose of attending school is not determinative of the question. As stated in XXVII Op. Atty. Gen. 326, "residence for school purposes and legal settlement as defined in sec. 49.02, Stats., are not at all alike." In the present case there is no question involved about the payment of tuition or the establishment by a minor child of a residence for school purposes different from the place of residence or the place of legal settlement of its parents. In XXIII Op. Atty. Gen. 825 it was held that a girl who had been residing in her uncle's home in one municipality in W county for a year or more after she attained her majority, although supported by her father who resided and had a legal settlement in a municipality in another county, gained a legal settlement in the municipality where her uncle lived.

X appears to have satisfied all of the legal requirements for the establishment of a legal settlement in the city of Beloit, and it is our opinion that he did acquire such a settlement there before he entered military service in February of 1943. Under sec. 49.10 (5) he did not lose this settlement because of his absence while in the United States army. Since his discharge from the army in January of 1946 his actions have been consistent with an intention to maintain a home in the city of Beloit and to preserve the legal settlement which he had acquired therein.

In view of the conclusion which we have reached, it appears to be unnecessary to discuss the other questions raised in your request.

JRW
Taxation—Tax Deed—Tax deed taken upon a notice of application therefor which omits the statement required by sec. 75.12, Stats. 1945, that the amount for which the land was sold bears interest as provided by law is invalid.

Lewis J. Charles,
District Attorney,
Medford, Wisconsin.

Your county took a tax deed in November 1946 upon a notice of application therefor, which although it otherwise met the requirements of sec. 75.12, Stats. 1945, as to content by setting forth the name and holder of the tax certificate, the date thereof, the description of the lands involved, the amount for which they were sold, and that after the expiration of 3 months from the service thereof a tax deed would be applied for, did not state that the amount for which the lands were sold "will bear interest as provided by law" or contain anything to that effect. This notice was served on the owner by registered mail and the return receipt signed by him is on file with the county treasurer. Our opinion is requested as to whether this omission in the notice renders the tax deed invalid.

Sec. 75.12, Stats. 1945, so far as here material, provides:

"(1) No tax deed shall be issued on any lot or tract of land which has been or shall hereafter be sold for the non-payment of taxes, unless a written notice of application for tax deed shall have been served upon the owner * * *

"(2) Such notice shall state the name of the owner and holder of the tax sale certificate, and the date thereof, the description of the lands involved, the amount for which the lands were sold and that such amount will bear interest as provided by law, and shall give notice that after the expiration of 3 months from the date of service of such notice a tax deed will be applied for. * * *"

In your consideration of the question you note the well established rule that all proceedings leading to the issuance of a tax deed must be in strict compliance with the statute, and cite Potts v. Cooley (1881), 51 Wis. 353, 8 N. W. 153. The supreme court recently reiterated this proposition in the case of Stoelker v. Cappon (1945), 247 Wis. 453, 19 N. 
W. (2d) 896 and cited as authority McHardy v. State (1943), 215 Minn. 132, 9 N. W. (2d) 427. You also call attention to the proposition that the purpose in requiring the giving of a notice of application for tax deed is to apprise the owner of the tax deed proceedings in order to give him an opportunity to redeem the lands from the tax upon which they are based, stated by our supreme court in Clouse v. Ruplinger (1940), 233 Wis. 626, 290 N. W. 133, and again more recently in the case of Stoelker v. Cappon, supra. The court has also expressed this somewhat differently in the statement that it is the policy of the courts to construe statutes relating to notice of application for tax deed liberally in favor of the owner of the property because the provisions thereof are for his benefit and protection. Klug v. Soldner (1938), 228 Wis. 348, 280 N. W. 350.

Reference is then made to Stoelker v. Cappon, supra, as holding that a tax deed was valid even though the proof of service of the notice was signed by a deputy sheriff other than the one who actually served it, and attention is directed to the statement in the opinion—that to do otherwise than there sustain the validity of the tax deed would be to give an overwhelming weight to the letter of the law as against the purpose to be accomplished. You suggest that this case justifies the conclusion that the defect in the notice in the instant matter is not of sufficient importance to invalidate the deed, inasmuch as the above stated purpose of the notice was accomplished because the filed return registered receipt shows he received it. With this we do not agree.

In the first place Stoelker v. Cappon did not hold that a defect in the content of a notice could be overlooked. It held that where it was a fact that the owner actually received the notice by personal service, as was established by the signing of an admission thereof, the purposes of the statutes in reference to requiring such notice were fully accomplished and just as much so as if the provision respecting filing of proof of service had been complied with in every respect. The owner contended that the tax deed was invalid for failure to technically comply with such filing provisions, notwithstanding that she had duly received the notice and that a more strict compliance with the filing provisions would not have benefited her in any way or apprised her
more fully as to the proceedings. It was to this contention that the court directed its statement previously mentioned.

What the court said was that all of the purposes of the statute had been as fully met as if the provisions for filing of proof of service had technically been complied with in every detail. It said the purpose in requiring notice was to inform the owner in respect to the proceeding in order to afford him an opportunity to redeem, and that the purpose in providing for filing of proof of service was to make sure the notice did reach him. It said that when it appeared as a fact that the notice was actually received as evidenced by the owner's solemn admission of personal service, the purposes and objectives of the statutes were fully satisfied.

Secondly, in your case the purposes of sec. 75.12, Stats., which are as above discussed, have not been met. This statute says that the notice given must contain certain statements which obviously is for the purpose of thereby informing the owner of the facts which it requires shall be so set out. In other words, the legislature has said that before one may take a tax deed he must bring certain stated information to the personal attention of the owner by serving a notice upon him containing the same. Service of a notice that does not contain all that this statute specifies clearly does not apprise the owner of everything that the statute says he shall be informed of by such a notice. It is unlike the situation in Stoelker v. Cappon, for a notice which did contain the omitted statement would do more by way of informing the owner than did the notice which was given. It is true that the statutes expressly provide that the face amount of the tax certificate bears interest from January 1 of the year following the tax levy, which must be paid along with the principal of the tax in order to redeem, and that every person as a matter of law is charged with the knowledge thereof. But the legislature has deemed that reliance thereon is not sufficient in the case of tax deed proceedings, and that the owner of land upon which a tax deed is to be taken must have it specifically called to his attention that in order to redeem his land from the proceeding he must pay not only the face amount of the tax certificate, being “the amount for which the lands were sold,” but interest thereon. If the notice merely set forth the face amount of the tax
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certificate, one desiring to redeem might be misled into thinking that all he needed to pay was such amount, and when confronted with the necessity of an additional payment for the accrued interest it might be too late for him to produce, or make arrangements to obtain and pay, the full amount. It was some such consideration that motivated the requirement that the notice contain the statement it specifies as to interest.

It is our opinion that Stoelker v. Cappon cannot be made the basis of holding this tax deed valid but that the rule of strict compliance as applied in Potts v. Cooley, supra, renders it invalid.

HHP

Taxation—Tax Receipts—Tax receipt distribution statement must under sec. 74.08 (1), Stats. 1945, give the proportion or ratio for each of the five kinds of taxes, namely, (1) state, (2) county, (3) local, (4) school and (5) other taxes, and do so separately, notwithstanding sec. 70.65 (2), Stats. 1945, specifies only "state, county and local taxes."

March 31, 1947.

Urban J. Zievers,
District Attorney,
Kenosha, Wisconsin.

You state that in one of the cities in your county the statement in the tax bill or receipt as to the breakdown or distribution of general taxes is as follows:

For every $100 you pay in 1947
The Schools get $49.40
The State and County get 27.70
The City gets 19.94
The Library gets 3.03

and ask our opinion as to whether the provisions of sec. 70.65 (2), Stats. 1945, would permit such distribution statement to be changed so that the division would be:

State $3.00
County 24.70
Local Municipality 72.30
As far as sec. 70.65 (2), Stats., is concerned, a distribution statement setting out percentages or ratios on the basis of the three categories of state, county and local taxes would satisfy its requirements. It provides in substance that the governing body of a city, town or village may direct that the aggregate amount of the "state, county and local taxes" may be set forth in a single column in the tax roll in lieu of setting each of them out in a separate column. It then says: "Each tax bill or receipt shall show the purpose for which such taxes are to be used, giving the percentage for state, county and local taxes."

However, sec. 70.65 (2), Stats., is not the only statutory provision relating to what the tax receipts shall show in respect to a breakdown of the taxes. Sec. 74.08 (1) Stats. 1945 specifically provides as to the form and content of the tax receipts. After providing that the county clerk or other designated official shall prepare and furnish to the town, city or village treasurer tax receipts which shall be "in a form containing separate and distinct columns labeled respectively to show column by column the following taxes: namely, state taxes, county taxes, town, city or village taxes, and all other taxes," and prohibiting the use of any other tax receipts, the subsection continues as follows:

"* * * Notwithstanding any other provisions of law, all city treasurers, and town and village treasurers, except where the information has already been placed in the receipt by the county, shall enter in each receipt given by him for the payment of taxes the name of the person, firm, company or corporation paying the same, the date thereof, the description of the property, the valuation and the aggregate amount of taxes paid and in separate and distinct columns labeled as herein provided the several amounts paid respectively for state taxes, county taxes, town, city or village taxes, and all other taxes, if any, appearing on the tax roll opposite the valuations to be charged therewith. In the alternative the governing body of any city, village or town may direct that the aggregate amount of state, county, local, school and other taxes shall be carried in a single column on the tax receipt, in which case there shall be printed or stamped on the tax receipt the separate proportion or rate of taxes levied for state, county, local, school and other purposes."
While in the first two instances of listing the various taxes in sec. 74.08 (1), Stats., the words "state taxes, county taxes, town, city or village taxes, and all other taxes" are used so as to set out four categories, in the last sentence of this subsection the comparable language is "state, county, local, school and other taxes." This last sentence is the provision which permits the tax receipt to set out the aggregate of the general taxes in a single amount but requires that when this is done there shall be printed or stamped on the receipt a distribution statement as to the separate proportion or rate of the taxes included therein. Its language as we see it prescribes that the percentage or other distribution statement must be in respect to the five categories there specified, and not just the four categories previously mentioned in the subsection or the three categories contained in the language of sec. 70.65 (2). Our conclusion that the school taxes are a separate category and not included with "other taxes" as composing one category is supported by the fact that in sec. 70.66, Stats., the language in subsec. (1) is "state, county, school and other taxes so certified, together with such town and other local taxes," and in subsec. (3) it is "state taxes, county taxes, school district taxes, town or village taxes and all other taxes."

The provisions in sec. 70.65 (2) were enacted by ch. 240, Laws 1927, whereas the provisions now in sec. 74.08 (1) to which reference has been made, came about by much more recent legislation. Ch. 1, sec. 4, Laws Special Session 1937, amended sec. 74.08 (1) to substantially its present form. It put in the provision that as an alternative to each of the taxes being set out in a separate column, the governing body of the town, city or village might direct the aggregation of them, "in which case there shall be printed or stamped on the tax receipt the separate amounts of taxes levied for state, county, local, school and other purposes," but restricted them to the year 1937. By ch. 377, Laws 1939, the words "proportion or rate" were substituted for the word "amount" and the limitation to the year 1937 was eliminated. Ch. 163, sec. 1, Laws 1941, made some further language changes in sec. 74.08 (1) but they are not of significance to the instant question. Accordingly the provisions
of sec. 74.08 (1), being the most recent enactment and furthermore specific provisions as respects the content of tax receipts, are controlling, and to the extent of any conflict with the provisions of sec. 70.65 (2) take precedence.

It is our opinion that the tax distribution statement in a tax receipt must give the proportion or ratio as to each of the five categories of taxes set out in sec. 74.08 (1), Stats., namely (1) state, (2) county, (3) local, (4) school, (5) other taxes, and do so separately.

HHP

Constitutional Law—Courts—Justice Court—Attorney and Client—Practice of Law—Legislature may not by statute so define the practice of law or provide who may practice the same as to deprive the courts of their inherent powers over these subjects.

April 2, 1947.

THE HONORABLE, THE SENATE.

We have received an attested copy of Resolution No. 22, S., requesting an opinion with reference to Bill No. 65, A., amending sec. 301.20 of the statutes to permit appearance by agent in justice court and Bill No. 154, A. with Substitute Amendment No. 1, A., amending sec. 256.30 (2), relating to the practice of law without a license and creating sec. 256.30 (5) relating to the practice of law.

The following questions are asked:

1. Can the legislature validly provide by act that persons other than attorneys may appear and practice in any court, including practice before a justice of the peace or in justice court as proposed in Bill No. 65, A., in view of the constitutional power of courts to control inferior courts?

2. Can the legislature validly provide by act that persons other than attorneys may practice law by drafting legal documents as proposed in Bill No. 154, A., or in Substitute Amendment No. 1, A., to that bill, in view of separation of powers under the constitution?

The first question is answered in the negative. Bill No. 65, A., so far as material here, reads:
"Any party, except a minor, 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 the 1945 statutes the corresponding provision reads:

"Any party, except a minor, may appear by an attorney or in person and conduct or defend any action."

The amendment proposed in Bill No. 65, A. restores sec. 301.20 to the form in which it appeared in the 1943 statutes. The change made in the 1945 statutes was effected by ch. 441, Laws 1945, published July 20, 1945, which was part of the general revision of chapters 300 to 307 (Title XXVIII) of the statutes relating to the courts of justices of the peace and proceedings therein in civil actions. The revision of the statutes relating to justice court practice was prepared and sponsored by the supreme court advisory committee on rules of pleading, practice and procedure, and involved long study and debate both by the sub-committee which prepared the initial draft and the committee as a whole in considering the draft. Nearly every section amended by the draft carries the committee's note as to reasons for the change in wording, and the note following the revision of sec. 301.20 reads:

"The amendment follows the general rule for appearance in courts of record. If the agent must be an attorney, the language should be changed. 'A lay person * * * may not appear in a representative capacity before a justice of the peace.' State ex rel. Junior Ass'n of Milwaukee Bar v. Rice, 236 W. 38."

Thus there was no intention on the part of the committee to change what was its understanding as to the right to appear by agent in justice court. Moreover the attorney general on June 14, 1945 prior to the enactment of the justice court revision bill rendered an opinion to the supervisor of the state banking department, XXXIV Op. Atty. Gen. 155, to the effect that a collection agency or officer thereof not licensed to practice law cannot try cases for creditors
in justice court despite the use of the word "agent" in sec. 301.20 as it then read, since the word "agent" as used in constitutional and statutory provisions relating to the practice of law has been generally construed to mean a qualified agent or, in other words, a licensed attorney. It was pointed out that under our constitution justice courts constitute a part of the judiciary, article VII, section 2, and that under the authorities it is contempt of the supreme court for an unlicensed person to intrude into the office or franchise of an attorney since an attorney is an officer of the supreme court. It is nevertheless contempt even though no misbehavior in the presence of the supreme court is involved. See *Bessemer Bar Association v. Fitzpatrick*, (1940) 239 Ala. 663, 196 So. 733, where the defendant, a collection agent, attempted to practice in justice court. See also *Bump v. Barnett* (1944) 235 Iowa 308, 16 N. W. (2d) 579; *State v. Merchants' Credit Service* (1937) 104 Mont. 76, 66 P. (2d) 337; *In re Morse* (1924) 98 Vt. 85, 126 A. 550, 36 A. L. R. 527; *State ex rel. Hunter v. Kirk* (1937) 133 Nebr. 625, 276 N. W. 380. In Wisconsin, by virtue of article VII, section 3 of the constitution, our supreme court, as in most states, has general superintending control over all inferior courts, and there is no reason to doubt the applicability in this state of the doctrine enunciated in the cases above cited.

Hence we consider that this office has already gone on record to the effect that unlicensed persons cannot practice in justice court whether or not sec. 301.20 contains the word "agent" and that no change in the law would be effected by reinserting the word "agent" which was dropped from this section by the 1945 legislature. We see no reason for now modifying the position we have heretofore taken.

It might be added at this point that the case of *In re Cannon* (1932) 206 Wis. 374, 240 N. W. 441, is ample authority for the proposition that the courts have inherent or implied power to determine who shall be admitted to the practice of law and that while the legislature may prescribe qualifications for attorneys and thus limit the class from which the court must make its selection, these qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administra-
tion of judicial functions. It was there held that the three great departments of the government being made separate and independent of one another, the idea that the legislature might embarrass the judiciary by prescribing inadequate qualifications for attorneys at law is inconsistent with the dominant purpose of making the judicial department independent of the legislature and that such an intent should not be inferred in the absence of express constitutional provisions. Also it was said in Integration of Bar Case (1948) 244 Wis. 8, 41, 11 N. W. (2d) 604, that judicial power is not reposed by the constitution in the legislature and that hence it cannot delegate it.

Therefore a legislative declaration to the effect that an unlicensed person may practice law as an agent in justice court would not be binding on the courts. This leads us to a consideration of the second question which is closely related to the first.

The second question is likewise answered in the negative. If the legislature does not have the power to prescribe the ultimate qualifications for the practice of law it cannot exercise that power indirectly by withdrawing from the courts the ultimate definition of what constitutes the practice of law and thus place such practice in the hands of unlicensed persons by indirection. As was said by the Nebraska Supreme Court in State ex rel. Johnson v. Childe (1946 Neb.) 23 N. W. (2d) 720, 723:

"The power to define what constitutes the practice of law is lodged with this court. The sole power to punish any person assuming to practice law within this state without having been licensed to do so also rests with this court. It is the character of the act and not the place where the act is performed that constitutes the controlling factor. An all inclusive definition of what constitutes the practice of law is too difficult for simple statement. We shall not attempt it here, but will follow the practice established by the previous decisions of this court and examine the facts and circumstances of each case and determine whether the defendant purported to exercise the legal training, experience and skill of an attorney at law without a license to do so."

It was held in this case that the defendant's conducting of a proceeding before the state railway commission in regard to an application of a motor carriers' association for
authority to establish commodity rates on building and fencing materials required the exercise of legal training, knowledge, and skill, so as to constitute the practice of law and hence the defendant could be punished for contempt upon showing that he was not licensed to engage in the practice of law. Again in *State v. Barlow* (1936) 131 Neb. 294, 268 N. W. 95 the court said at page 96:

"An all-embracing definition of the term, 'practice of law,' would involve great difficulty. For the purpose of this proceeding, it is sufficient to say that it includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing and advising as to the legal effect of petitions for the probate of wills, the drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required, and where counsel and advice are given with respect to the validity and legal effect of such instruments. Among the cases so holding, in substance, the following are mentioned: *In re Opinion of the Justices* (Mass.) 194 N. E. 313; *Paul v. Stanley*, 168 Wash. 371, 12 P. (2d) 401; *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796; *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N. E. 650."

The court added that of course this would not apply to one who merely acted as an amanuensis, or in other words, as a stenographer or copyist who wrote from dictation or copied what another had written.

The practice of law as defined by the courts is again well stated in the case of *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 at 317:

"Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counsellor at law' * * * bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as con-
cerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. * * * It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys."

While there is dictum in the Cannon case, supra, to the contrary, the foregoing definition of the practice of law may be regarded as the leading pronouncement on the subject in this country, and it has been widely cited. See 7 C. J. S. 704, footnote; Rhode Island Bar Ass'n, v. Automobile Service Ass'n. (1935) 55 R. I. 122, 179 A. 139, 144; 105 A. L. R. 1365n; 106 A. L. R. 548n; 111 A. L. R. 19n; 144 A. L. R. 150n.

In XXXIV Op. Atty. Gen. 155 at 158 we said:

"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."

Section 256.30 (2) now reads:

"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."
Bill No. 154, A. would add thereto the following language:

"But the preparation of contracts, wills, notes, bills of sale, deeds, mortgages, conveyances and similar legal instruments shall not be deemed the rendition of legal services within the meaning of this section."

Obviously this language would constitute a serious departure from the generally accepted definition of the practice of law as indicated above, but it could not take away from the judicial department its inherent or implied power to determine what constitutes the practice of law under any particular set of facts. The most that could be accomplished by the amendment would be to affect the application of the penalty provisions of sec. 256.30 (1) for the unlicensed practice of law. The power of the legislature to prescribe what shall constitute crimes and misdemeanors and provide penalties therefor is undoubtedly supreme within constitutional limitations. This would not, however, preclude the courts from exercising their inherent powers to punish for contempt or to issue injunctions to restrain what they hold to be the practice of law by unlicensed persons even though the acts in question would not constitute the practice of law under Bill No. 154, A.

Substitute Amendment No. 1, A. adds a second section to that bill creating sec. 256.30 (5) to read:

"SECTION 2. 256.30 (5) of the statutes is created to read:

"256.30 (5) No person shall engage in the preparation of contracts, wills, notes, bills of sale, deeds, mortgages, conveyances and similar legal instruments until he has filed with the clerk of circuit court for the county in which he resides a bond in the sum of $10,000 with one corporate surety authorized to transact business in this state or at least 2 individual sureties each owning real estate in this state. In the event individual sureties are given, a schedule of the real estate owned by each surety shall be attached and the bond shall be approved by the judge of a court of record of the county. Such bond shall be conditioned to indemnify any person engaging the principal to perform legal services against loss incurred by such person as the proximate result of any act or omission of the principal which occurred while he was performing such legal services, including the preparation of contracts, wills, notes, bills of
sale, deeds, mortgages, conveyances and similar legal instruments. Such bond shall not be cancellable until 10 days' after notice of cancellation has been given to the clerk of circuit court. Any person violating this subsection shall be subject to the penalty provided in subsection (1)."

This is a most novel provision and of course would apply to licensed attorneys as well as unauthorized practitioners of the law. It raises a number of questions both practical and legal which we cannot well attempt to fully cover within the limitations of any opinion of ordinary length.

The obtaining of such a bond might be out of the question even for qualified practitioners and it is not required of any other profession so far as we know. The practical difficulty in obtaining such a bond might be so great as to substantially disbar all but the wealthier members of the legal profession and thus deprive the judicial department of the government of the services of the bar without which the courts could not function. This might indeed constitute an unwarranted legislative interference with the judiciary so as to render the enactment invalid.

Moreover, the furnishing of such bonds by unlicensed practitioners, assuming they could obtain the same, could not legalize what would otherwise constitute the unauthorized practice of law in the eyes of the court so as to protect such practitioners from proceedings for contempt, injunction or quo warranto.

No particularly useful purpose would be served by prolonging this opinion, and while we have by no means exhausted the subject, we will close with a list of a few additional citations on the subject of the inherent power of the courts in matters relating to what constitutes the practice of law and who may undertake the same, for the benefit of those readers who may desire to study the problem further, although it is not intended to collect here all available authorities on the subject. *In re Day* (1899) 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (over bar admissions); *Howe v. State Bar of California* (1931) 212 Cal. 222, 298 P. 25 (over bar admissions); *The People ex rel. The Illinois State Bar Association v. People's Stock Yards State Bank* (1931) 344 Ill. 462, 176 N. E. 901 (inherent power as to practice of law and re contempt); *In re Opinion of the Justices* (1932)
279 Mass. 607, 180 N. E. 725, 81 A. L. R. 1059 (legislative power re bar examinations); Unger v. Landlords' Management Corporation (Court of Chancery of New Jersey 1933) 114 N. J. Eq. 68,168 A. 229 (inherent power as to unauthorized practice of law); State ex rel. Boynton v. Perkins (1934) 138 Kan. 899, 28 P. (2d) 765 (inherent power as to unauthorized practice of law); Fitchette et al. v. Taylor (1934) 191 Minn. 582, 254 N. W. 910, 94 A. L. R. 356 (inherent power as to unauthorized practice of law); Rhode Island Bar Association et al. v. Automobile Service Association et al. (1935) 55 R. I. 122, 179 A. 139, 100 A. L. R. 226 (inherent power as to unauthorized practice of law); Depew et al. v. Wichita Association of Credit Men, Inc.; State ex rel. Attorney General v. Wichita Association of Credit Men, Inc. (1935) 142 Kan. 403, 49 P. (2d) 1041. Cert. denied 2—17—36, 80 L. ed. 997 (inherent power as to unauthorized practice of law); In re Opinion of the Justices (1935) 289 Mass. 607, 194 N. E. 313 (inherent power as to unauthorized practice of law); Meunier v. Bernich (New Orleans, La., Court of Appeals, 1936) 170 So. 567 (inherent power as to unauthorized practice of law); State ex rel. Indianapolis Bar Ass'n. v. Fletcher Trust Company (1937) 211 Ind. 27, 5 N. E. (2d) 538 (re contempt); Clark v. Austin, Clark v. Coon, Clark v. Hull (Supreme Court, Missouri, 1937) 340 Mo. 467, 101 S. W. (2d) 977 (inherent power as to unauthorized practice of law); The People ex rel. The Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (re contempt and unauthorized practice of law).

You are therefore advised that it is not within the proper legislative sphere to enact a law which attempts either to provide an ultimate definition as to what constitutes the practice of law or which attempts to place beyond the control of the courts the designation of those who may practice in justice courts or other courts.

WHR
Counties—Public Assistance—Poor Relief—Homestead
—Homestead of decedent and proceeds from the sale thereof are not exempt from the claim of the county against the decedent's estate for direct relief furnished to her, but court may refuse to allow such claim where a parent or child of the decedent is dependent on such property for support.

April 3, 1947.

Herbert A. Bunde,
District Attorney,
Wisconsin Rapids, Wisconsin.

A woman who had been receiving direct relief from Wood county died leaving issue but no surviving husband. Her property consists of a homestead. Wood county filed a claim against her estate for the amount due by virtue of the direct relief furnished. The homestead was sold before the estate was closed, and the question arises whether Wood county can make a claim for reimbursement for the value of such direct relief against the proceeds from the sale of the homestead, or whether these proceeds are free and clear of this claim.

Sec. 49.08 of the Wisconsin statutes provides:

“If any person at the time of receiving relief under sections 49.01 to 49.17 * * * is the owner of property, the authorities charged with the care of the dependent, * * * may sue for the value of the relief from such person or his estate. * * * The court may refuse to render judgment or allow the claim in any case where a parent, wife or child is dependent on such property for support * * *.”

Sec. 272.20 (1), Stats., provides:

“A homestead selected by a resident owner * * * and its appurtenances and occupied by him shall be exempt from execution, from the lien of every judgment and from liability for the debts of such owner to the amount of five thousand dollars, except laborers’, mechanics’ and purchase money liens and mortgages and taxes and except as otherwise provided. * * *”

In the case of Johnson v. Door County, 158 Wis. 10, 147 N. W. 1011, it was held that under sec. 604q, Stats. (Supp. 1906) the entire property and estate of an insane ward was
made liable for his support and maintenance and chargeable with the payment thereof, and there was no exception in favor of the homestead. It was further held that the only provision for exemption of any part of the property was found in the same statute which permitted the judge, in his discretion, to refuse to enter judgment in any case where a parent, wife or child was dependent on the property or estate for future support. Sec. 604g, referred to in that case, read:

"The property and estate of any insane person * * * kept by any county at its charge shall be liable for his support and maintenance and chargeable for the payment thereof, and upon failure of the person having the charge or custody of such property or estate to pay therefrom for such support and maintenance, * * * the chairman of the board of the county furnishing such support may apply to the proper county judge to compel such payment; * * * if any order * * * made by such judge requiring * * * payment shall not be complied with, * * * such * * * chairman may recover in an action against the person having the charge or custody of such property or estate, * * * the amount directed to be paid by such order * * * and any judgment so recovered may be satisfied out of such property or estate * * *; provided, that the judge may, in his discretion, refuse to render judgment for the plaintiff in any case where a parent, wife or child is dependent on such property or estate for future support * * *.""

After referring to the above statutes the opinion held:

"* * * Sec. 2983, Stats., provides that 'a homestead * * * owned and occupied by any resident of this state, shall be exempt from seizure or sale on execution, from the lien of every judgment and from liability in any form for the debts of such owner, except laborers', mechanics' and purchase-money liens, and mortgages lawfully executed, and taxes lawfully assessed, and except as otherwise specially provided in these statutes.' Sec. 2271 provides that upon death of the owner his homestead 'shall descend, free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers’ and mechanics’ liens, in the manner following.' A homestead ceases to be the homestead of its owner upon his death. The widow or children to whom it descends do not hold it as her or their homestead because it was the homestead of the deceased husband or father. The homestead character of the
property simply determines to whom the legal title descends. And that it shall descend free from all but specified debts of the deceased owner. * * *” (p. 14)

“Sec. 604q provides specially that the property and estate of an insane ward shall be liable for his support and maintenance and chargeable for the payment thereof. This is one of the sections in the chapter providing for insane asylums and the support of the insane. Those having no property are supported by the state and counties. This provision was deemed necessary to protect the public against being charged with the support of patients having property and estates. It not only makes such estates liable for support and maintenance, but chargeable for the payment thereof. But it was not the policy of the state to provide that all the property and estate of a patient should be taken and leave his family, if he had one, destitute. And it is provided that when judgment is obtained which may be satisfied out of such property or estate, the judge may, in his discretion, refuse to render judgment for the plaintiff in any case when a parent, wife, or child is dependent on such property for future support. I think we must look to this provision for exemption of any of the property or estate.” (pp. 16–17)

In XX Op. Atty. Gen. 638 it was held that a homestead and the proceeds of the homestead of an insane person may be subjected to the claim of the county for the support and care of such person. It was stated in that opinion:

“* * * A careful reading of the opinion in Johnson v. Door Co., 158 Wis. 10, however, will show that the decision rested * * * upon the principle that the claim of the county for the support of an insane person is not a debt within the meaning of the homestead and exemption statutes, and that a proceeding by the county to collect is not a proceeding in debt, but in rem against the property. The decision rests not upon the theory that a homestead must be specifically authorized to be used for the ward's support, but that a homestead, being property and not being exempted from the particular charge involved, which is not a debt, can be proceeded against just as can other property of one who has been supported at public expense.

“* * *

“I think * * * that the language of sec. 49.10 'may sue for and collect * * * against such person and against his estate,' distinctly makes it a charge in rem, as well as a personal charge. To hold otherwise is to give no meaning whatever to the phrase 'and against his estate,' for this phrase was not necessary to make a debt of an insane person collectible from his estate.” (pp. 639–64.)
In *Estate of Wickesberg*, 209 Wis. 92, 244 N. W. 561, the old-age pension law was construed as subjecting a decedent's homestead to liability for advances thereunder to the decedent by a county, notwithstanding the fact that the act did not refer to section 237.02 providing for the descent of the homestead, or 272.20 providing for the exemption thereof from liability for the owner's debts, except certain liens and taxes. Reference was made to sec. 272.20 providing for the homestead exemption and particularly to the last part thereof which read, "except as otherwise provided in these statutes." The court then stated (pp. 94–96):

"Sec. 49.25 provides that—'On the death of a person who has been assisted under sections 49.21 to 49.39, * * * the total amount paid together with simple interest at three per cent. annually shall be allowed and deducted from the estate of such person * * * by the court having jurisdiction to settle the estate * * *.'"

"Although the old-age pension law does not refer to the particular sections which provide for the exemption of the homestead and the descent thereof to the heirs, and while it is complete in itself, still it carries with it a plain intent on the part of the legislature to subject a homestead, under circumstances such as here exist, to liability for such advances. There is no requirement that every act shall recite all other acts that its operation may affect by way of modification or extension. * * *

"To enable a municipality to furnish aid to one in need living in his own home the legislation under consideration was enacted. It and the legislation relating to homestead exemptions construed together result in a modification of the homestead exemptions to the extent outlined and leave a homestead under the circumstances set forth in the statement of facts liable for the advances made by the county. *State ex rel. Plowman v. Lear*, 176 Wis. 406, 186 N. W. 1014."

In the case of *Estate of Sletto*, 224 Wis. 178, 272 N. W. 42, it was said (p. 183):

"* * * The trend of legislative policy, as gathered from enactments, has been toward providing means to render assistance to the needy, but also to protect the public treasury against burdens which ought to be borne by the property owned by the one receiving aid or paid for by those on whom the law fixes a responsibility for support. * * *"

While the language of sec. 49.08 is not identical with that found in the statutes interpreted in the foregoing cases, it
is our opinion that when sec. 49.08 provides that the authorities "may sue for the value of the relief from such person or his estate" it was the legislative intent that the reasoning of the foregoing cases, which relate to claims for the support of the insane and old-age assistance, should be equally applicable to the recovery of sums furnished as direct relief. Accordingly, it is our opinion that the homestead of the decedent, or the proceeds from the sale thereof, are not exempt from the claim of the county for direct relief furnished to the deceased former owner of the homestead. However, this liability of the homestead and the proceeds from the sale thereof for the payment of this claim is subject to the qualification that the court may refuse to render judgment or allow the claim if a parent or child of the deceased woman is dependent on such property for support.

JRW

Minors—Legal Settlement—Under sec. 49.10 (2), Stats. 1945, legal settlement of a minor child of divorced parents is that of the parent having its legal custody, and if such parent has no settlement within this state, the child has none.

April 5, 1947.

JOHN D. KAISER,
Asst. District Attorney,
Eau Claire, Wisconsin.

We have your request for an opinion in regard to the legal settlement of a minor child whose parents are divorced. You state that the child's parents were divorced in 1943 and the custody of the child was awarded to the mother who immediately moved out of the state and has remained away ever since. At the time of the divorce the parents lived in Beloit and had legal settlement there. The mother of the child has been out of the state for over a year and has lost her settlement in Wisconsin. You state further that in 1945 the mother returned the child to the father in-
forming him that she did not wish to take care of the child any longer. No court order has been entered changing the legal custody as awarded in the divorce proceedings.


Sec. 49.10 (2), Stats. 1945, provides as follows:

“(2) Legitimate minor children have the settlement of their father if living, or of their mother if their father is deceased; but if the parents are divorced, the children have the settlement of the parent who has legal custody, and if such parent has no settlement, the children have none.”

It is clear that the rule of determining legal settlement has been changed and that now the child’s settlement is that of the parent having its legal custody, and if such parent has no settlement within this state, the child has none.

Your conclusion is therefore correct that the child in question has no legal settlement within any town, village or city in Wisconsin.

ES
Soldiers, Sailors and Marines—Department of Veterans Affairs—Medical Service—Public Officers—Delegation of Power—Opinion of January 4, 1947 to Leo B. Levenick, director, department of veterans affairs, reconsidered in light of certain additional facts submitted. The conclusion reached is that the situation in light of such additional facts does not differ essentially from that which was passed upon in former opinion and the former opinion still rules case.

Any arrangement by the board or department of veterans affairs to provide medical treatment or aid to qualified World War II veterans or their dependents as provided in sec. 45.35, Stats., must adequately protect the interests of the state and its taxpayers.

The duty to guard and protect the public interest is a continuing one which necessarily involves the exercise of judgment and discretion and for that reason cannot be delegated. A public officer or board has no authority to enter into any contract or arrangement which would impair its responsibilities in these respects.

April 7, 1947.

Leo B. Levenick, Director,
Department of Veteran Affairs.

You have asked us to reconsider in light of certain additional facts which you have submitted to us, our opinion of January 4, 1947* which holds that the department of veterans affairs has no authority to enter into a proposed contract with the Wisconsin Veterans Medical Service Agency which is a part of the State Medical Society of Wisconsin because said contract provided for the payment of a 10 per cent commission to said agency in addition to the medical fee. You state, inter alia:

"* * * the State Medical Society possesses that statutory authority to contract with public officials and others in the development of medical care plans on a non-profit basis. * * * the State Medical Society, by formal action of its controlling body * * * established a division or department of the Society known as the 'Veterans Medical Service Agency.'"

* Page 3 of this volume.
"It then executed a contract with the Veterans Administration for the rendition of certain medical care, and the two agreed to a schedule of fees applicable thereto. The veteran may apply to a physician of his own choice—the application is cleared through the Veterans Administration for eligibility, and, if authority is granted, the physician receives approval to proceed.

"Upon completion of the authorized care, the State Medical Society bills the Veterans Administration pursuant to the fee schedule attached. One check is issued for many such items billed, and the amounts payable by agreement of the State Medical Society to the participating physicians is remitted to them individually by the Society, less a charge for administration. The plan is non-profit.” [Emphasis ours]

The foregoing is supplemented by a letter we have received from counsel for the State Medical Society which states, _inter alia:_

"The Agency acting as agent for the physician to facilitate the program bills the Veterans Administration monthly with a master invoice and upon receiving payment sends each doctor a check for his services less eleven per cent for cost of administration as his agent. * * *"

We understand the proposed contract with your board or department would be substantially the same as that entered into between said agency and the veterans administration and the comments above as to the veterans administration apply here.

Following receipt of your letter and at our request, you have given us further information based on your past experience in furnishing medical aid or assistance to qualified World War II veterans or their dependents as follows:

1. The fees for medical services contained in the proposed fee schedule are greater than the charge your department has paid for like medical services in the past, there being no charges in said fee schedule which are the same or less than your department has paid in the past. You furnish us with a tabulation comparing fees called for in said proposed fee schedule with those actually paid by your department in the past, which tabulation shows that the fees actually paid by your department are less than those called for in said schedule. Such tabulation is attached to and made a part of this opinion.
2. Based on what your department has paid in the past, it would be possible for it to obtain suitable and adequate medical services for qualified World War II veterans or dependents throughout the state at prices less than that called for in the proposed fee schedule.

3. Fees for medical services are not uniform throughout the state for like type of service. You state "There is quite a variance" and that they "vary from place to place."

4. In general fees for medical services are lower in rural communities than they are in cities.

5. In general the amounts of fees called for in the proposed fee schedule are greater than the going rate for like services in all but the larger cities of the state.

6. The fee contained in the proposed fee schedule is increased over that which might otherwise be charged to take care of the 11 per cent the doctor would pay the Wisconsin Veterans Medical Service Agency under the proposed arrangement.

In view of the foregoing and especially that contained in number 6, we see no reason why our former opinion does not still rule the present case. That opinion held that your department had no authority to enter into a contract with the Wisconsin Veterans Medical Service Agency where it appeared that the bill submitted by the agency includes the charge made by the doctor plus 10 per cent which is added by the agency as a service charge. Now it is said that the doctor puts in his bill for his service as per the fee schedule and then receives that amount from the agency less 11 per cent which represents the agency's cost of administration. However, the facts you now give us indicate that the fee for medical service contained in the proposed schedule is increased over that which might otherwise be charged to take care of the 11 per cent which the doctor has deducted from his bill to take care of the agency's cost of administration. This is a subterfuge and we see no essential difference between what is now proposed and that which was passed upon in our former opinion.

We also think there is a serious question as to whether your board or department would have power to enter into a contract to pay for medical services on the basis of a uniform fee schedule which would apply throughout the entire
state when there is in fact no uniformity of charges for medical services and where because of such lack of uniformity the actual charges for medical services might differ from those contained in the uniform fee schedule. The importance of this is emphasized because you indicate that the going rate for medical services in many cases at least is actually less than that called for by the schedule and varies in different localities.

Any arrangement by the board or department to provide medical treatment or aid to qualified World War II veterans or their dependents must adequately protect the interests of the state and its taxpayers. In 43 Am. Jur. (Public Officers) §290, it is said in part:

"In view of his trust relation to the public whom he serves, a public officer must always guard and protect the public interests; he is not at liberty to make wasteful contracts, and it is his duty to require such guaranties in respect of proper performance as will adequately protect the government. * * *"

The duty to guard and protect the public interest is a continuing one which necessarily involves the exercise of judgment and discretion and for that reason cannot be delegated. A public officer or board has no authority to enter into any contract or arrangement which would impair its responsibilities in these respects.

In Shelby v. Miller, 114 Wis. 660, our supreme court made the following statement at page 663:

"* * * But that wise public policy which abhors bartering away official discretion seems to shut the judicial door to respondent's plea for redress.

"It has been decided by this and other courts that private contracts with officials, by which they surrender the performance of official duty to others, or allow the judgment of others to be substituted for their own in the performance of such duty, are void on grounds of public policy; that courts cannot be resorted to for the purpose of enforcing them. * * *"

In 43 Am. Jur. (Public Officers) §295, it is said in part:

"* * * Courts will hold invalid any agreement by governing bodies by which they abdicate any of their legislative powers, or circumscribe the limits of such powers * * * or diminish their efficiency. * * *"
If your board or department entered into a contract which would call for payment of medical fees according to a uniform fee schedule when in fact there is no uniformity as to fees, it would constitute an abdication of their powers because they would then be paying out state moneys according to a schedule which might be greater than the charge which is made for a particular type of medical service in a particular community without even investigating the facts concerning the particular case.

We also think there are other possible grounds on which the authority of the board to enter into said proposed contract might be questioned. However, in view of the conclusion we have already reached, it is unnecessary to discuss or attempt to answer any other possible questions which may be presented.

We still are of the opinion that the board of veterans affairs does not have authority to enter into said proposed contract with the State Medical Society or Wisconsin Veterans Medical Service Agency.

### Tabulation

<table>
<thead>
<tr>
<th>Item</th>
<th>Charge as Proposed Fee Schedule</th>
<th>Payments Made by Wisconsin Department of Veterans Affairs for Medical Service in Past</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tonsillectomy</td>
<td>No. 519 $55.00</td>
<td>$24; $34; $25; $50—including adenoids</td>
</tr>
<tr>
<td>Hernia</td>
<td>No. 19 (double) $165.00</td>
<td>$48.50; $100.</td>
</tr>
<tr>
<td></td>
<td>No. 20 (single) $110.00</td>
<td>$75; $100.</td>
</tr>
<tr>
<td>Appendectomy</td>
<td>No. 9 $110.00</td>
<td>$50; $100; $75; $50; $75; $75; $75.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$75.25; $100; $100; $75.</td>
</tr>
<tr>
<td>Delivery, Pre-natal &amp; Post-natal Care</td>
<td>No. 551 (Delivery only) $82.50</td>
<td>$60; $75; $60; $55; $50; $45; $75; $75; $60; $50; $50; $55; $75; $65; $51; $40; $40; 7 more at $50.</td>
</tr>
<tr>
<td>Ulcers</td>
<td>No. 35 $165.00</td>
<td>$75.</td>
</tr>
</tbody>
</table>
| Eye Examination and Prescription | No. 156 (No glasses) $11.00  | Includes glasses:
|                               |                                | $15.40; $15; $15; $15; $20; $22.60; $15; $15.40; $14.60; $15.40; $17; $20.25. |
| Hysterectomy                 | No. 21 $165.00                 | $45; $150.                                                                        |
| Fistula                      | No. 705 $110.00                | $50; $75.                                                                        |
| Visits                        | No. 801 (Home) $5.50           | $3; $3; $2; $1; $2; $2; $1.                                                     |
|                               | No. 808 (Office with treatment) $3.30 | $2; $1; $2; $1; $1; $2; $2; $2; $2.                                              |

WET
Barbers—Licenses and Permits—War—Duration—President’s proclamation on December 31, 1946 terminated state of actual hostilities but did not terminate state of war. Such proclamation does not constitute the end of the “duration of the present war” within the meaning of these words as used in sec. 158.12 (2) (a), Stats.

World War II will end only when formally terminated by ratification of a treaty of peace or by act of congress or by executive proclamation. There is a distinction between termination of the state of hostilities and termination of the state of war.

April 7, 1947.

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

You direct our attention to sec. 158.12 (2) (a), Stats., which provides in effect that a barber shop manager’s license shall be granted to one who meets certain requirements, including one that he shall have been “actively engaged in barbering” in this state not less than 40 hours per week for at least one-half of the 2-year period immediately preceding the date of application for license, and then further provides that said requirement “shall not apply for the duration of the present war and for 6 months thereafter.”

You ask whether the president’s proclamation on December 31, 1946 constituted the end of the “duration of the present war” within the meaning of these words as used in sec. 158.12 (2) (a), Stats.

The answer is “No.” The proclamation of the president terminated only the state of actual hostilities but did not attempt to terminate the state of war. Said proclamation No. 2714 (12 Fed. Reg. 1; 50 USCA App. §601) reads in part as follows:

“* * * Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

“NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o’clock noon, December 31, 1946.”

The 6-month period referred to in sec. 158.12 (2) (a) Stats., will commence to run only when the state of war is formally terminated in the manner stated in the foregoing paragraph.

**WET**

**Intoxicating Liquors—Restaurants—Words and Phrases—Principal Business**—In determining whether "principal business" of "Class B" licensee is restaurant or liquor business, within secs. 66.05 (10) (hm) 2, 176.06 (5) and 176.32, Stats., consideration is to be given to amount of capital, labor, time, attention and floor space devoted to respective businesses, gross and net income derived from each, and appearance, arrangement, advertising and name of premises. This is defensive matter as to which burden of producing evidence is on defendant.

*Andy Borg,*

*District Attorney,*

*Superior, Wisconsin.*

You inquire as to what test or tests or formula should be applied to determine what is the "principal business" of premises operated under both a liquor license and a restaurant permit, within the meaning of secs. 66.05 (10) (hm) 2, 176.06 (5) and 176.32, Stats. These statutes exempt hotels and restaurants whose "principal business" is that of fur-
nishing food or lodging to patrons from the closing hours of taverns and from the statute prohibiting presence of minors.

The term "principal business" is not defined in the statute and constitutes a question of fact in each case. While there are no court decisions establishing the tests to be applied it is generally considered that the question will be determined by an analysis of the amount of capital, labor, time, attention and floor space devoted to the respective businesses of serving food and serving liquor as well as the amounts of gross and net income derived from the two sources. A question which may properly be considered is, would the business continue to be conducted if the sale of liquor were effectually prohibited? Ordinarily, little or no difficulty is experienced in determining the predominant character of the premises. The appearance of the place, the interior arrangement, the advertising and often the very name of the establishment will generally point unmistakably in one direction or the other.

In this connection it should be pointed out that in case of a prosecution, the character of the place as being predominantly a restaurant rather than a liquor tavern is defensive matter as to which the burden of producing evidence is on the defendant, under well established rules. *Kreutzer v. Westfahl*, (1925) 187 Wis. 463, 477.

WAP
Building and Loan Associations—Dividends on Matured Stock—Local building and loan associations are not under existing statutes, authorized to pay dividends on installment shares which mature between dividend paying periods. The change in the law effected by the change in sec. 215.13 made by ch. 320, Laws 1941, applies to installment shares subscribed for or issued prior to the enactment of said ch. 320 when said shares mature after the effective date of said chapter.

April 9, 1947.

STATE BANKING COMMISSION.
Attention James B. Mulva, Chairman.

You ask our opinion on two questions which involve the question of payment of dividends by building and loan associations on stock retired or matured between dividend paying dates. Said questions are as follows:

1. Are local building and loan associations authorized to pay dividends on installment shares which mature between dividend paying periods?

2. Does the change in sec. 215.13 made by ch. 320, Laws 1941, apply to installment shares subscribed for or issued prior to the enactment of said ch. 320 when said shares mature after the effective date of said chapter?

At one time local building and loan associations were specifically authorized by statute to pay interest or dividends on unpledged matured shares between dividend paying dates. Thus sec. 215.13, Stats. 1939, read as follows:

"When, by making regular weekly or monthly payments as provided for in section 215.08, any stock shall have reached its matured value payment of dues thereon shall cease. Borrowers shall be entitled to have their securities released and returned to them. The holders of unpledged shares shall be paid out of the funds of the association the matured value thereof, with such rate of interest or dividends as shall be determined by the by-laws, from the time the directors shall declare such stock to have matured until paid. And when such maturity is reached between the dates of adjustment of profits the holders of stock maturing shall, in addition to the value thereof, be entitled to interest or dividends at such rate as may be fixed by the by-laws or determined upon by the directors, based upon the last appportionment, for all full months from the date of the preceding...
adjustment, or they may elect to continue payments of dues until the next date of adjustment of profits, at which time they shall be entitled to receive all dues paid and profits apportioned; provided, that at no time shall more than one-half of the monthly receipts of dues and interest of the association be applicable to the payment of matured or withdrawing shares without consent of the directors; but they may, at any time before maturity, retire unpledged shares by enforcing the withdrawal of the same as prescribed in the by-laws or articles of incorporation."

The foregoing section was amended by ch. 320, Laws 1941, and by ch. 516, Laws 1943, so that it now reads as follows:

"When, by making regular weekly or monthly payments as provided for in section 215.08, any shares shall have reached their matured value payment of dues thereon may at the option of the member cease. The holders of unpledged shares may continue to make payments upon such shares or may request the repurchase of such shares by the association subject to the provisions of section 215.11."

For our present purposes the important thing to note is that the provision contained in the statute as it appeared in 1939 which provided that when the shares matured between the dates fixed for adjustment of profits, the holders of such stock shall in addition to the value thereof "be entitled to interest or dividends at such rate as may be fixed by the by-laws or determined upon by the directors, based upon the last apportionment, for all full months from the date of the preceding adjustment," was taken out of the statute by ch. 320, Laws 1941. The only conclusion which can be drawn from this change in sec. 215.13 made by ch. 320, Laws 1941, is that the legislature intended to change the law as it then existed so that interest or dividends could no longer be paid on installment shares which mature between dividend paying dates. We therefore answer your first question "No."

As a general proposition the changes in the law effected by the amendment to sec. 215.13 made by ch. 320, Laws 1941, would apply to installment shares subscribed for or issued prior to the effective date of said chapter and which had not matured prior to that date and were then outstanding. The only reason why the law as changed by the enactment of ch. 320, Laws 1941, would not apply to such shares would be on the ground that such an application of the law
as so changed would be in violation of the clauses of the state and federal constitutions which prohibit the state from enacting any law which shall impair the obligation of contract. Art. 1, sec. 10, United States constitution; art. I, sec. 12, Wisconsin constitution.

The question as to the applicability of the contract clauses of the state and federal constitutions under the aforesaid circumstances involves a consideration of several factors.

There is no question but that there is a contractual relationship between a building and loan association and an installment shareholder. A statute such as sec. 215.13 is a part of that contract. Johnson v. Bradley Knitting Co., 228 Wis. 566; Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 at 435; Veix v. Sixth Ward B. & L. Assn., 310 U. S. 32 at 38.

Art. XI, sec. 1 of our constitution provides for the formation of corporations by general laws and states inter alia: "All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." This is the source of the so-called "reserve power" and under it the state may at any time repeal or alter the charter of a building and loan association without running afoul of the contract clause of either the state or federal constitutions. State ex rel. Cleary v. Hopkins Street B. & L. Assn., 217 Wis. 179, affirmed 296 U. S. 315, 56 S. Ct. 235; Veix v. Sixth Ward B. & L. Assn., supra, at page 40. Such reserve power also gives the state power to amend statutes which enter into the contract between the building and loan association and an installment shareholder without impairing the contract clause of either the state or federal constitutions. C. H. Venner Co. v. United States Steel Corp., (C. C. N. Y.) 116 Fed. 1012 cited with approval in Johnson v. Bradley Knitting Co., 228 Wis. 566. Veix v. Sixth Ward B. & L. Assn., supra, at page 40. For these reasons we are of the opinion that the change in sec. 215.13 made by ch. 320, Laws 1941, can constitutionally be applied to installment shares subscribed for or issued prior to the effective date of said ch. 320. We therefore answer your second question "Yes."

WET
Schools and School Districts—Vocational and Adult Education—Under secs. 41.18 and 40.70, Stats., unemployed persons under 16 years of age who have not completed an equivalent of eighth grade education are not entitled to vocational school privileges under sec. 41.18 (1). Persons between 16 and 18 years of age are entitled to such privileges even though they are not employed and have not completed the equivalent of a grade school education.

April 9, 1947.

C. L. GREIBER, State Director,
Vocational and Adult Education.

You have inquired whether a school of vocational and adult education is compelled by law to accept persons between the ages of 14 and 18 when such persons are not legally employed and have not completed the course of study for the common schools or the equivalent thereof and who reside in a city maintaining a school of vocational and adult education.

Sec. 41.18 (1), Stats., so far as residents as distinguished from nonresidents are concerned, provides:

"The schools of vocational and adult education shall be open to all residents of the cities, towns and villages in which such schools are located, who are fourteen years of age and who are not by law required to attend other schools ** **."

Consequently, reference must be had to sec. 40.70, the compulsory school attendance law, in order to determine "who are not by law required to attend other schools."

Sec. 40.70 (1) (a), among other things, provides in effect that a child between the ages of 14 and 16 not regularly, lawfully and usefully employed must attend some school regularly to the end of the school term, quarter, semester or other division of the school year in which he is 16 years of age. However, in sec. 40.70 (1) (b) it is provided that this subsection does not apply to any child who shall have completed the most advanced course of study offered in the public schools of the district (including a union free high school district) or city of his residence or the equivalent of such course in any other school. This paragraph also pro-
vides that any child who has completed the course of study for the common schools, or the first eight grades or equivalent thereof, who resides in a district which maintains a vocational and adult education school may at his option attend the school for vocational and adult education full time.

Thus it is apparent that persons between the ages of 14 and 16 who have not completed an eighth grade education or an equivalent are required by law to attend schools other than vocational schools if they are not regularly, lawfully and usefully employed.

The situation as to those between the ages of 16 and 18 is governed in part by sec. 40.70 (2) which so far as material here reads:

"Any person who is not indentured as an apprentice, who has not completed the equivalent of 4 years of high school work, who resides or is employed in a district which maintains a vocational and adult education school, who is not physically incapacitated, and who is not required by subsection (1) to attend school full time, must attend in the daytime, for at least 8 months in the year and for such additional months or parts thereof as the full-time public schools in the district are in session in excess of 8 months during the regular school year, some public, private, parochial or vocational and adult education school, half time from the end of the period of full time compulsory education to the end of the school term, quarter, semester or other division of the school year in which he is 16 years of age, and after that for at least 8 hours a week if regularly, lawfully and gainfully employed, half time if employed at home, and full time if unemployed, until he is 18 years of age; and the parents of such minors shall compel such school attendance.

It is to be noted that this section excludes from its operation those who are required by subsection (1) to attend school full time and, as previously pointed out, an unemployed person between 14 and 16 years of age would have to attend grade school until completing that course. However, if a person between 14 and 16 had completed grade school and were not indentured and had not completed the equivalent of high school he would be required to attend some public, private, parochial or vocational and adult education school half time until 16 and eight hours a week
thereafter until attaining the age of 18 if employed, half time if employed at home and full time if unemployed.

From the foregoing it is concluded that unemployed persons under 16 years of age who have not completed the equivalent of a common school or eighth grade education are not entitled to vocational school privileges under sec. 41.18 (1), but that persons between the ages of 16 and 18 are entitled to such privileges even though they are not employed and have not completed the equivalent of a grade school education.

WHR

Counties — Automobiles and Motor Vehicles — Traffic Ordinances—Under secs. 59.07 (11) and 85.84, Stats., county traffic ordinance may prohibit operating unregistered vehicles and driving without an operator's license.

April 9, 1947.

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

You inquire whether a county traffic ordinance may contain a provision imposing a penalty for failure to pay state license fees. The power of the county board to enact a traffic ordinance is derived from secs. 59.07 (11) and 85.84, Stats., which provide as follows:

"59.07. The county board of each county is empowered at any legal meeting to:
"* * *
"(11) Enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, in the county which is maintained at the expense of the county and state, or either thereof; declare and impose forfeitures, and enforce the same against any person for any violation of such ordinances or by-laws; provide fully the manner in which forfeitures shall be collected; and provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used."
"85.84. No local authority shall have power to enact, pass, enforce or maintain any ordinance, resolution, rule or regulation requiring local registration or other requirements inconsistent with the provisions of this chapter, or in any manner excluding or prohibiting any motor vehicle, trailer or semitrailer, whose owner has complied with the provisions of this chapter, from the free use of all highways except as provided by section 66.45; but the provisions of this section shall not apply to corporations organized pursuant to chapter 55 of the laws of 1899. Any local authority may pass any ordinance, resolution, rule or regulation in strict conformity with the provisions of this chapter and imposing the same penalty for a violation of any of its provisions except the suspension or revocation of motor vehicle operators’ licenses, and any such ordinance, resolution, rule or regulation so adopted must be in strict conformity with provisions of this chapter except as above provided."

While sec. 85.84 prohibits local authorities from requiring local registration or providing for revocation or suspension of drivers’ licenses, it does not prohibit them from legislating against the operation of unregistered vehicles or driving by unlicensed operators. Indeed, the provision guaranteeing "free use of all highways" is limited to vehicles whose owners have "complied with the provisions of this chapter," which includes the requirements of registration, operators’ licenses and financial responsibility. Secs. 85.01 to 85.09, Stats.

Section 59.07 (11), which is in pari materia with sec. 85.84, empowers county boards to enact ordinances or by-laws "regulating traffic." As used in such a statute the word "traffic" refers to the movement, stopping and parking of vehicles. Maner v. State (1935) 181 Ga. 254, 181 S. E. 856, 858; Withey v. Fowler Co. (1914) 164 Ia. 377, 145 N. W. 923, 927; People v. Rubin (1940) 284 N. Y. 392, 31 N. E. (2d) 501, 502; Dembicer v. Pawtucket Cabinet & Builders Finish Co. (R. I. 1937) 193 A. 622, 625. It has also been held that the power to regulate the use of streets includes the power to enact a city ordinance requiring registration and numbering of motor vehicles as an incident to the enforcement of the traffic laws, on the ground that without such identification motor vehicles and their drivers involved

You are therefore advised that the county's power to enact regulations of traffic granted by sec. 59.07 (11) includes the right to prohibit the driving of unlicensed vehicles and driving by unlicensed operators. The penalty imposed and the definition of the offenses must be in strict conformity with the provisions of chapter 85.

WAP

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**Detectives—Merchant Patrol Agency**—Merchant patrol agency contracting for a monthly fee to inspect premises between certain hours of the night, seeing that doors are locked, etc. is a "private guard" within the meaning of private detective license law, sec. 175.07, Stats.

April 10, 1947.

**ROBERT C. ZIMMERMAN,**  
*Assistant Secretary of State.*

You inquire whether the business of a "merchant patrol" is required to be licensed as a private detective agency under sec. 175.07, Stats., which applies to "a private detective, private police, or private guard." You refer to the opinion of this office in XX Op. Atty. Gen. 590 in support of your view that the statute is applicable to a "night watchman contracting for business."

In connection with your request you have submitted a printed form of contract used by a certain firm which describes itself in its corporate name as a "detective bureau and merchant patrol" and under which it agrees to furnish "protection service * * * between the hours of ________ and ________ and * * * see that all doors on said premises are properly and safely secured." The contract form then contains two blank lines which presumably would be filled up with a description of other services to be performed for the particular client. It provides for a monthly fee for
this service. If the “merchant patrol” business is not required to be licensed, the corporation intends to amend its name and drop its private detective services.

The attorney general's opinion to which you refer was written in 1931 at which time there were no decided cases on the subject of what constitutes a “private guard.” The opinion relies upon the definition in Webster's Dictionary of the word “watchman” as one set to guard property, and of “guard” as being “to watch over,” “to protect from danger,” etc. Other dictionaries agree with these definitions.

Since that time the supreme court of Illinois has held that an “independent patrol service” making rounds during the night over a regular route to check on residences, stores or garages, to see if doors were locked or anything unusual or of a suspicious nature was taking place was not within the private detective license law of that state. The law defined the private detective business as including among other things, “the business of furnishing for hire or reward guard or guards, or other persons to protect persons or property.” The dictionary definitions referred to in XX Op. Atty. Gen. 590 were not mentioned by the court. The court took the flat position that mere “watchman” service was not included in the statute and pointed out that the contrary construction would bring within the statute persons hired by farmers to shoot crows, “baby sitters,” railroad crossing watchmen, etc., which the court regarded as an absurd construction. People v. Jerry (1941) 377 Ill. 493, 36 N. E. (2d) 737, 739.

And the supreme court of Tennessee has held that a statute imposing a tax on “any person operating a detective agency or investigating agency or protective agency” was not applicable to an agency employed by several merchants and manufacturers to inspect their premises at night, lock doors, check lights, watch the heating plant, report fires to the fire department and report burglaries to the police department and the owner. Burns v. Johnson (1939) 174 Tenn. 615, 130 S. W. (2d) 89, 123 A. L. R. 1022. This case did not involve a construction of the word “guard,” however.

While the Illinois case above cited is in direct conflict with the opinion of this office above referred to, it is con-
sidered that the opinion was and is a correct interpretation of the statute for the reasons therein set forth. The exemption of night watchmen privately employed and watchmen employed by railroad companies clearly shows that the legislature intended to use the words "private guard" in their dictionary sense as including watchman service. "Baby sitting," which caused concern to the Illinois supreme court, is not generally engaged in as a business but rather as a casual employment and probably comes within the exemption of a "watchman privately employed."

It was seriously argued in the Illinois case that the present construction would make the law unconstitutional as an unwarranted interference with a lawful occupation. The court found it unnecessary to pass on that point since it held the law inapplicable to the situation before it. The argument is not impressive. A person entrusted with access to buildings of others in the nighttime and with the duty to watch the premises for suspicious situations, fires, etc. is a ripe subject for regulation and licensing under the state's police power. The requirements that persons engaging in such business post a surety bond and establish their good character, competency and integrity are eminently appropriate and reasonable. Cf. Pinkerton v. Buech, (1921) 173 Wis. 433.

WAP

Counties—Public Assistance—Sec. 49.15 (1), Stats., as amended in 1945 does not require person otherwise qualified to be committed to county home to be a pauper. Admission to county home under 49.15 (2) is governed by board of trustees, and commitment by a court is unnecessary.

April 10, 1947.

Edward J. Morse,
District Attorney,
Lancaster, Wisconsin.

You have requested an opinion with respect to two problems arising in connection with sec. 49.15, Wis. Stats. 1945. You ask, first of all, if it is necessary that a person be a pauper to be committed to a county home under sec. 49.15 (1).
We agree with your conclusion that the person need not be a pauper. Insofar as is here material, sec. 49.15 (1) provides:

“When it appears to the satisfaction of any judge of a court of record upon petition that a person is without a home or necessary care or is living in a state of filth and squalor likely to induce disease, such judge * * * may commit such person to the county home. * * * If the person sought to be committed has a legal settlement, the petition for commitment shall be signed by the relief officer of the municipality of settlement and the cost of care and maintenance shall be a charge against such municipality * * *”

The meaning of the statute is clear and unambiguous. So long as a person is “without a home or necessary care or is living in a state of filth and squalor likely to induce disease” he may be committed. To interpret these words to mean that a person must be a pauper would distort the plain and ordinary meaning of the words. We are therefore precluded from reading a further condition precedent into the statute or to engage in any sort of interpretation. The words speak for themselves, 50 Am. Jur. 204, §225; Weirich v. State, 140 Wis. 98, 121 N. W. 652; State v. Smith, 184 Wis. 309, 199 N. W. 954.

Moreover, the legislative history of the statute supports the view we have taken. Sec. 49.07, Stats. 1943, the predecessor to the present sec. 49.15, Stats. 1945, provided:

“Whenever it shall appear * * * that any person * * * is without sufficient means of support and necessary care and is by reason of sickness, infirmity, decrepitude, old age, drunkenness or pregnancy likely to become a public charge, either temporarily or permanently, or that such person lives in a state of indigence, squalor or filth likely to induce disease * * * or that such person is an inebriate or drug addict, such judge may commit such person to the county home * * *”

It is clear from the use of the word “and” (italicized above) that being without sufficient means of support (a pauper) was clearly a condition precedent necessary, in addition to sickness, squalor, disease, old age, etc., before a person could be committed under the old law. Since evidence of that in-
tention was clearly deleted from the present law, it must be assumed that the legislature did so purposely. 50 Am. Jur. 332, §340.

The second question you pose—must there be a commitment by a court before a person can enter the county home under sec. 49.15 (2)—we also answer in the negative.

Sec. 49.15 (2), insofar as is here material, provides:

"Any person upon application to the board of trustees may be admitted to the county home upon such terms as may be prescribed by the board." * * *

Again, the words of the statute are clear and unambiguous in meaning. They can only mean that the board of trustees of a county home may make such arrangements and contracts for the admission to the county home of any persons it sees fit. The necessity for a commitment is not mentioned, and the words themselves connote against any such intention. A legislative intention so clearly expressed will permit no interpretation.

To the extent that XXV Op. Atty. Gen. 433 conflicts with the foregoing it is regarded as made obsolete by virtue of the changes in the statute.

SGH
JMcC
A corporation which engages in the business of transporting for hire large sums of money for various business organizations and others and which is also engaged in the business of cashing checks for a flat fee through use of an armored motor vehicle equipped with bullet proof glass, which vehicle is driven to and parked at various places of employment on pay day, need not be licensed as a community currency exchange as provided in sec. 218.05 (2) if its business of cashing checks is an incident to its business of transporting money for hire. It must be licensed as provided in said subsection if the business of cashing checks is not an incident to its business of transporting money for hire.

The question whether the business of cashing checks is or is not incidental to the business of transporting money for hire as provided in sec. 218.05 (1) (b) is one of fact which cannot be determined by the attorney general.

Cashing of checks for a flat fee through use of an armored motor vehicle equipped with bullet proof glass which is driven to and parked at various places of employment on pay day, does not constitute banking as defined by sec. 224.02 or by MacLaren v. State, 141 Wis. 577.
business of a community currency exchange as provided in sec. 218.05, Stats. The definition of a community currency exchange contained in sec. 218.05 (1) (b) includes every person, firm, association, partnership, or corporation, with certain exceptions not here applicable which engages in the business of and provides facilities for cashing checks, drafts, money orders or other evidences of money for a fee or service charge or other consideration, as well as the business of selling money orders under certain circumstances, or both. There is an exception contained in this subsection which reads in part as follows:

"* * * Nothing in this section shall be held to apply to any person, firm, association, partnership or corporation engaged in the business of transporting for hire, bullion, currency, securities, negotiable or non-negotiable documents, jewels or other property of great monetary value, * * * who, in the course of such business * * * and, as an incident thereto, cashes checks, drafts, money orders or other evidences of money."

If the activity of Brinks, Inc. of Wisconsin in cashing checks is an incident to its business of transporting money for hire, it falls within the above exception and it need not be licensed as a community currency exchange, and it violates no law by engaging in the business of cashing checks. If such activity is not an incident to its business of transporting money for hire, the above exception does not apply and said corporation is required to be licensed as a community currency exchange, and if it cashes checks without a license, it will be operating in violation of law. The question whether the business of cashing checks is or is not incidental to its business of transporting money for hire is one of fact which cannot be determined by this department. XXXIV Op. Atty. Gen. 82. For this reason we are unable to answer your first question either "Yes" or "No."

In cashing checks in the manner stated in the facts you have given us, Brinks, Inc. of Wisconsin is not violating any provision of the banking law. A businessman does not enter the business of banking simply by cashing checks. If he did, many a drug or cigar store would be in the banking business. Banking is defined by sec. 224.02 and cashing of
checks does not fall within the definition therein contained. Neither does the cashing of checks fall within any definition of banking contained in *MacLaren v. State*, 141 Wis. 577.

WET

**Athletic Commission—Criminal Law—Boxing and Prize Fighting**—A contest described as “wrestling with gloves” can be considered a form of “boxing” or “prize fighting” depending on whether a prize is or is not offered based upon the outcome. Insofar as such a contest constitutes “boxing,” it cannot lawfully be held in the state except pursuant to authority granted by the state athletic commission as provided in ch. 169, Stats. In event such a contest is held and it further appears that the participants have agreed in advance that it be for the possession of any prize, belt or other evidence of championship, it would also be in violation of sec. 347.11, Stats.

April 11, 1947.

**STATE ATHLETIC COMMISSION,**
Milwaukee 3, Wisconsin.

You ask our opinion as to whether an exhibition which is described as “wrestling with gloves” is legal in the state of Wisconsin.

The particular exhibition to which you refer was advertised as “wrestling” but stated that it was “10 rounds with gloves” for a “$250 purse—winner take all.” In the course of the match the participants struck at each other while wearing boxing gloves and also spent some time wrestling with each other on the mat.

So far as we are advised, there is no law in Wisconsin which relates to wrestling. The result is that individuals can engage in wrestling or a wrestling match can be put on in this state without violating any law. The situation is otherwise with respect to boxing exhibitions or prize fights.
No boxing or sparring exhibition can be conducted in this state except pursuant to authority granted by the state athletic commission of Wisconsin and in accordance with the provisions of ch. 169, Wis. Stats., and the rules and regulations of the commission. Sec. 169.05. Any violation of this section of the statutes constitutes a misdemeanor. Sec. 169.21. Likewise, it is made a crime for any person to engage in a fight under certain circumstances for the possession of any prize, belt or other evidence of championship. Sec. 347.11 reads as follows:

"Any person who shall, by previous arrangement or appointment, engage in a fight with another person for the possession of any prize, belt or other evidence of championship, or for any other cause shall be punished by imprisonment in the state prison not more than five years nor less than one year, or by fine not exceeding one thousand dollars nor less than one hundred dollars."

Reference should also be made to sec. 347.12 which is tied in with sec. 347.11 and which reads as follows:

"Any person who shall be present at such fight as is mentioned in section 347.11 as aid, second or surgeon, or shall encourage, advise or promote such fight, shall be punished by imprisonment in the state prison not more than three years nor less than one year, or in the county jail not more than one year or by fine not exceeding one thousand dollars."

The contests covered by secs. 347.11 and 347.12 are what are ordinarily designated as "prize fights." This would seem to follow from the context of these sections but if there is any doubt it can be resolved by reference to the title to ch. 57, Laws 1869, from which said sections find their origin, which title states that said chapter is "an act to impose a penalty for prize fighting." The title of an act may be resorted to in cases of doubt to ascertain its purpose and scope. State ex rel. Pumplin v. Hohle, 203 Wis. 626.

There is a distinction between a boxing exhibition or match and a prize fight. The question whether a particular contest falls within one class or the other is one of fact for the jury. If the jury determines that it is a boxing exhibition or match, there is no violation of sec. 347.11. Parmentier v. McGinnis, 157 Wis. 596.
"Wrestling with gloves" cannot be considered as a true wrestling match because the contestants are permitted to strike each other while wearing boxing gloves. This does not fall within the usual concept of wrestling. See definition of "wrestling" contained in Webster's New International Dictionary, Second Edition, which is to the effect that wrestling is a sport consisting of the contest between two persons who seek to throw each other. As indicated in Webster, there are different types of wrestling with varied rules but nowhere is it indicated that in any recognized form of wrestling are the participants permitted to strike one another.

Wrestling with gloves can be considered a form of "boxing" or "prize fighting" depending on whether a prize is or is not offered based upon the outcome. In Webster's New International Dictionary, Second Edition, the word "boxing" is defined as: "The art or practice of attack and defense with the fists, esp. when covered with padded gloves."

In Teeters v. Frost (Okla.), 292 P. 356, 71 A. L. R. 179, the following is stated at page 183:

"In setting forth the essential elements of the term 'prize fight,' the authors of R. C. L. vol. 8, §§349, 350 gleaned from the authorities the law which has been applied elsewhere as well as here as follows: 'The term "prize fight" has no technical legal meaning; but as commonly understood it is a pugilistic encounter or boxing match for a prize or wager. The term is used in statutes against prize fighting in its ordinary signification, and includes all fights for a prize or reward in which the contestants intend to inflict some degree of bodily harm to each other. * * * So also it has been held that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished.'"

We therefore advise you that a contest of the nature you describe in your inquiry constitutes a form of boxing and cannot lawfully be held in this state except pursuant to authority granted by your commission as provided in ch. 169 of the statutes. In event such a contest is held and it further appears that the participants have agreed in advance that such contest be for the possession of any prize, belt or other evidence of championship, such contest would also be in violation of sec. 347.11, Stats.
These conclusions are, of course, based on the facts you have given us and you should understand that a different conclusion or conclusions might be reached should different facts be presented.

WET

Counties—Sheriffs—Traffic Patrolmen—Civil Service—
Traffic division of sheriff's department can be established only in connection with ordinance placing deputies under civil service. County highway committee has authority to appoint traffic patrolmen until they are placed under civil service.

April 15, 1947.

ARTHUR C. SNYDER,
District Attorney,
Hartford, Wisconsin.

You state that the county board of Washington county has adopted a resolution placing its traffic officers under the supervision and control of the sheriff's department. The ordinance reads as follows:

"WHEREAS, Under the present arrangement the Traffic Officers of Washington County are under the control of the highway department, and whereas, it would be deemed a step toward greater efficiency to have a Sheriff's Committee, and have said officers under the jurisdiction of the Sheriff.

"NOW, THEREFORE, BE IT RESOLVED by the Washington County Board of Supervisors that a Sheriff's Committee be appointed by the chairman and which committee is to consist of five members whose duty is to confer with and supervise the needs, powers, and duties of the Sheriff of Washington County and his deputies. It shall also have charge of all matters pertaining to the operation of the police radio system.

"The County Board of Supervisors hereby delegates to the Sheriff's Committee full power and authority to appoint one or more traffic policemen.

"BE IT FURTHER RESOLVED, that upon passing of the resolution. Washington County traffic officers shall be deputized as deputy sheriffs and shall be placed under the jurisdiction and supervision of the Sheriff's Department."
The contracts which are presently in existence are to be continued until their expiration and to be renewed by the Sheriff's Committee.

"BE IT FURTHER RESOLVED, that the highway police may be required by the Sheriff, to make investigation in criminal cases where a crime amounting to a felony has been committed. Said Officers may also serve criminal process when requested to do so for the Sheriff, but the fees earned therefor are to be paid to the County Treasurer.

"BE IT FURTHER RESOLVED, that any portion of another Resolution, in conflict herewith is hereby repealed.

"BE IT FURTHER RESOLVED, that the resolution shall take effect January 1st, 1947."

You ask: (1) Does the above resolution place the sheriff's deputies under civil service? (2) Can the county establish a traffic division of the sheriff's department under sec. 59.21 (8) (cm) without placing the deputies under civil service? (3) Can the county board divest the county highway committee of the authority granted by sec. 83.016, Stats., to appoint traffic patrolmen?

The answer to all three questions is "No."

There is nothing in the resolution presented which purports to establish a civil service system or which requires that deputy sheriffs shall be appointed on a merit basis, and the words "civil service" are not even mentioned in the resolution.

A county is a state agency, a quasi-municipal corporation, and has only such powers as are granted to it by statute. Under sec. 59.21, Stats., subsections (1) through (6), the power to appoint deputy sheriffs is vested in the sheriff. Under sec. 59.21 (8) (cm) a county board is given authority to establish a traffic division of the sheriff's department but only "in connection with the adoption of an ordinance providing for civil service selection and tenure of deputy sheriffs." Since the above quoted resolution does not place the deputies under civil service, the county has no statutory authority to create a traffic division of the sheriff's department.

Further, sec. 59.21 (8) (cm) provides:

"* * * The county board may also provide that traffic patrolmen who have been appointed by the highway committee pursuant to section 83.016 and who are employed by
the county at the time of the adoption of such ordinance pursuant to this subsection establishing a traffic division in the sheriff's department and providing civil service therefor shall be appointed to positions in such traffic division without examination."

Sec. 83.016 (1) provides in part:

"The county highway committee may appoint traffic patrolmen for the enforcement of laws relating to the highways or their use, or the maintenance of order upon or near the highways."

It is apparent from a reading of these two provisions that unless a traffic division of the sheriff's department is duly established in accordance with the foregoing, power to appoint traffic patrolmen is vested by state statute in a county highway committee and accordingly cannot be divested by the act of any inferior state agency.

RGT

Salaries and Wages—Lieutenant Governor—Under existing statutes the lieutenant governor, upon assuming the duties of acting governor, is entitled to retain the compensation theretofore paid in advance on account of compensation provided for lieutenant governor while serving as president of the senate.

Oscar E. Rennebohm,
Acting Governor.

You request my opinion as to what salary should now be paid to you upon your assumption of the duties of the office of governor. You state that prior to Governor Goodland's death you had been paid the sum of $2,500 pursuant to chapter 20, Stats., on account of your term compensation as president of the senate.

The two sections of the statutes which fix the compensation for the lieutenant governor when performing the duties of that office, and when performing the duties of acting governor, read as follows:

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

"** * **

"(2m) Lieutenant Governor. To the lieutenant governor, as follows:

"(a) For his services as president of the senate, $5,000 per term, payable one-half at the beginning of the regular session, one-fourth at the end of such session, and one-fourth on the first of January following."

"20.02 Executive. There is appropriated from the general fund to the governor:

"(1) * * * Of this there is allotted:

"** * **

"(c) To the lieutenant governor when acting as governor because of the temporary absence or temporary disability of the governor, additional compensation at the rate of $5 per day; when acting as governor because of a vacancy in the office of governor created by the happening of any contingency specified in section 17.03, an annual salary of $6,000 together with all the other rights, privileges and emoluments of the office of governor. The annual salary of $6,000 paid in such instance shall be in lieu of all other compensation provided for the lieutenant governor."

I am of the opinion that you may retain all moneys paid to you pursuant to law as compensation for your duties as president of the senate prior to the devolution upon you of the duties of the office of governor resulting from Governor Goodland's death. I am of the further opinion that your right to further compensation from the time of Governor Goodland's death for the residue of the term during which you will serve as acting governor is controlled by sec. 20.02 (1) (c) quoted above, namely, an annual salary of $6,000. This salary should be paid for the remainder of the calendar year upon a pro rata basis, effective the day following Governor Goodland's death.

I premise the foregoing conclusions upon the following reasons:

The provision made by sec. 20.01 (2m) for payment of one-half of the term salary of the lieutenant governor in advance for his services as president of the senate must be regarded as in pari materia with sec. 20.02 (1) (c), Stats., which provides for a different measure of compensation for the same person when performing the duties of acting gov-
That the legislature had section 20.01 (2m) in mind when it enacted 20.02 (1) (c) is patent from the words of the last sentence which read “shall be in lieu of all other compensation.” Such “other compensation” is provided for by section 20.01 (2m) quoted above, and consists of the remaining installments payable “one-fourth at the end of such [legislative] session, and one-fourth on the first of January following.”

The fact that you are prevented from further acting as president of the senate for the remainder of the current regular legislative session, or during any special session which might be called in the future, does not affect your right to retain the $2,500 paid prior to your assumption of your present duties. The compensation granted by the legislature has no relationship to the length of time it may take to perform the duties of the office. When the legislature enacted sections 20.01 (2m) and 20.02 (1) (c) it is clearly evident that it had in mind all of the contingencies which existed with reference to the situation with which it was dealing. For example, if the 1947 general session of the legislature had adjourned sine die at the end of one month and did not reconvene in special session for the balance of the term, your compensation would be proportionately greater, measured by the period of actual service, than it would were the session to last 10 months and you were called back at a subsequent date for a long special session. It is also within the realm of possibility that immediately after receiving his compensation in advance, a lieutenant governor might die or become physically disabled to perform the duties of his office. In such an instance the title to and ownership of the money so paid would be vested in him without any duty or obligation in law to pay back such money.

The basic question involved here was considered in VI Op. Atty. Gen. 75, where a member of the legislature resigned because of ill health three weeks after qualifying. Referring to the statutes which provided for payment of his compensation at the beginning of the session, the attorney general said in part:

“These statutes appear to be explicit and mandatory. They appear to be in conformity with the constitutional
provision. At least, in the absence of any suggested or apparent constitutional question, the validity of the statutes referred to will be assumed. Under these statutes it is clear, beyond any occasion for doubt, that the member's right to his salary and mileage accrues and is perfected when he is sworn in and receives his certificate of membership and of mileage; that then, and immediately, his salary and mileage is payable to him. There is nothing in the statutes from which a court could infer that his right thereto could be defeated or in any manner affected by his subsequent resignation, nor is there anything which suggests that if he had received his salary and mileage and subsequently resigned, the state might have a right of action to recover it back from him in whole or in part; nor is there anything in the statute which provides for or authorizes you to pay a member's salary in part. It is either payable in full or not at all.” (Emphasis ours)

The distinction between compensation to office holders and salary to employees under contract in private industry or business is discussed in volume 43 American Jurisprudence at page 150, from which I quote:

“§362. [Compensation: Measure and Amount] Generally.—In so far as concerns compensation for services, there is a very imperfect analogy between services rendered by a public officer and those rendered by one individual to another in a private capacity. The law implies in the latter case a promise to pay as much money as the services are reasonably worth, whereas the compensation for services of a public officer is in most cases fixed by positive law. If the fixed compensation is more than the service is worth, the public or party must pay it; if less, the officer must be content with it. Neither can resort to any rule other than the written law. In other words, the measure and amount of compensation to which a public officer is entitled is generally not fixed upon a quantum meruit basis, but rests in the judgment and consideration of the legislature or other public body to which the matter is intrusted. So, the compensation allowed may be a just medium for the services which the officer is called upon to perform, or it may be extravagant for such services, or wholly inadequate. * * *”

The circumstances attendant upon the succession of then Acting Governor Goodland to the duties of the office of governor upon the commencement of the term for which Orland S. Loomis had been elected, posed some similar problems, and in XXXII Op. Atty. Gen. 7, I advised Acting Gov-
Governor Goodland that he was entitled to full compensation of the office of governor. My opinion there was based on State v. LaGrave (Nev.) 45 P. 243. That opinion is pertinent here only for its relationship to, and sequence in, the events which followed, and which we may safely assume the legislature had freshly in mind when it enacted chapters 53 and 547, Laws 1943. The supreme court had just decided the case of State ex rel. Martin, Attorney General v. Julius P. Heil and Walter S. Goodland, 242 Wis. 41 in which Lieutenant Governor Walter S. Goodland was held to succeed to the duties of the office of governor, then declared vacant. That decision was handed down in the last week of December 1942. My opinion on the salary question was furnished to Acting Governor Goodland on January 18, 1943. Chapter 53 amended section 20.02 (1) (c), statutes, by increasing the lieutenant governor’s salary to $6,000 annually when acting as governor. This act was approved April 15, 1943 and published April 17, 1943. It became effective by operation of law in the succeeding term which commenced on the first Monday of January, 1945. Chapter 547, Laws 1943, amended section 20.01 (2m) (a) of the statutes by increasing the lieutenant governor’s compensation as president of the senate to $5,000 per term. It fixed the amounts and dates of payment as set forth in the above quoted statute. Section 20.02 (1) (a) was further amended by increasing the governor’s salary to $10,000. This was approved July 22, 1943 and by its terms became effective the first Monday of January, 1945 and is still in effect.

This legislative history in the light of the events preceding the enactments referred to, demonstrates the legislature’s cognizance of the effect of the acts in question, because if the special provision for a different amount and mode of compensation for the lieutenant governor’s services when acting as governor had not been made, you would now be receiving the salary ordinarily paid to the governor, that is, at the rate of $10,000 per annum for the remainder of Governor Goodland’s term.

In summary I state that the matter is resolved by statute. The controlling statutes clearly support my conclusion without the necessity of application of rules of construction.

SGH
Public Deposits—Out of State Depository—The board of deposits has no power to approve a claim or pay a loss under sec. 34.08 (1), Stats., for Wisconsin "public funds" deposited in an Illinois state bank irrespective of whether premiums due under ch. 34 of the statutes are paid by the "public depositor" to the board or not.

The board of deposits has no power under sec. 34.09, Stats., to approve an out of state bank as a depository for Wisconsin "public funds" even though the out of state bank and the Wisconsin public depositor involved are willing to comply with the provisions of ch. 34 of the statutes.

A Wisconsin "public depositor" cannot without violating the provisions of ch. 34 of the statutes deposit "public funds" up to $5,000 in an out of state bank even though deposits in said bank up to that amount may be insured by the Federal Deposit Insurance Corporation and for that reason are by order of the board of deposits exempt from payment of premium into the state deposit fund, since secs. 34.05 (1) and 34.01 (5) establish that every "public depositor" deposit all "public moneys" coming into the hands of the treasurer in a Wisconsin "public depository."

April 17, 1947.

BOARD OF DEPOSITS OF WISCONSIN.

Attention Bernice E. Coe, Executive Secretary.

You advise that a small group of public depositors located in the southwestern part of the state have been depositing their public funds in Illinois state banks located in East Dubuque, Illinois. The towns in which these public depositors are situated have no banking facilities located therein and the deposits are made in the East Dubuque banks for sake of convenience. Such deposits are not being made to avoid payment of any premium with the state deposit fund. The premium due has been paid on request.

You also advise that since January 1, 1939, by order of the board of deposits, the first $5,000 of each public depositor's account, or that portion insured by the Federal Deposit Insurance Corporation, has been exempted from payment of premium into the state deposit fund.
You ask our opinion on the following questions:

1. Could the board of deposits approve a claim for Wisconsin public funds deposited outside the state if the premiums due had been paid by the public depositor in question?

2. Under chapter 34, Wisconsin statutes, does the board of deposits have power to approve an out of state depository for Wisconsin public funds if said out of state depository and the public depositor are willing to comply with the provisions of chapter 34?

3. Since the first $5,000 of each public depositor's account is insured by the Federal Deposit Insurance Corporation rather than the board of deposits of Wisconsin, can a public depositor desiring to use an out of state depository deposit up to $5,000 in an out of state depository which is a member of the Federal Deposit Insurance Corporation without violating Wisconsin law?

The answer to question No. 1 is "No." The general purpose of ch. 34 of the statutes is to create a guarantee fund known as a "state deposit fund" out of which "public depositors" who are required to deposit in "public depositories" all "public funds" which come into their treasurers' hands, are reimbursed for any loss which may result in case of failure of a public depository. The "state deposit fund" is made up by contributions made by "public depositors" who contribute at a rate fixed by the board of deposits of Wisconsin. There is also a specific statutory provision which relieves the state treasurer or the treasurer of any governmental unit depositing public money in any public depository in compliance with the requirements of sec. 34.05, from liability for any loss of public moneys which may result from any failure of a public depository. Sec. 34.06, Stats.

To qualify as a "public depository" a bank or other financial institution mentioned in ch. 34, Stats., must be organized and doing business under the laws of Wisconsin or be a national bank. All must be located in Wisconsin. Secs. 34.05 (1); 34.09; 34.01 (2). An Illinois state bank cannot become a "public depository" within the meaning of that term as used in ch. 34, Stats.
Authority of the board of deposits to pay a loss is found in sec. 34.08 where it is said, inter alia in subsection (1) as follows:

"* * * Such fund shall be used solely for the payment to public depositors of losses as defined by subsection (6) of section 34.01 and the repayment of any sums borrowed by the board of deposits for the purpose of paying losses required to be paid out of such fund. * * *"

The word "loss" is defined in sec. 34.01 (6) as follows:

"'Loss' shall mean any loss of public moneys, which have been deposited in a designated public depository in accordance with this chapter and upon which the required payment has been made into the state deposit fund, resulting from the failure of any public depository to repay to any public depositor the full amount of its deposit because the commissioner of banking or the comptroller of currency has taken possession of such public depository or because such public depository has, with the consent and approval of the commissioner of banking and the state board of deposits, adopted a stabilization and readjustment plan or has sold a part or all of its assets to another bank which has agreed to pay a part or all of the deposit liability on a deferred payment basis or because such depository is prevented from paying out old deposits because of rules and regulations of the commissioner of banking or the comptroller of the currency."

Inasmuch as an Illinois state bank cannot become a public depository as that term is used in ch. 34, Stats., it follows from the foregoing that the board of deposits would have no authority to approve or pay any claim for Wisconsin "public funds" deposited in such a bank irrespective of whether the "public depositor" pays premiums to the board or not. The fact a Wisconsin "public depositor" who deposits Wisconsin "public moneys" in an Illinois state bank has paid the required premium to the board of deposits would not establish any equities for the payment of any claim in event the Illinois bank failed, since by failing to deposit its "public money" in a "public depository" the Wisconsin "public depositor" is in any event required to pay such premium plus a penalty of 25 per cent of the required payment. Sec. 34.05 (4).
It is also important to note that the immunity granted treasurers by sec. 34.06 exists only where public moneys have been deposited in a public depository in compliance with sec. 34.05. It would not exist if public moneys are deposited in an Illinois state bank because such a bank could not be a public depository.

The answer to question No. 2 is also "No." The banks and other financial institutions which may be designated as "public depositories" by the board of deposits under ch. 34, Stats., appear in sec. 34.09. They include "every state bank, savings and trust company and mutual savings bank and every national bank located in this state" and which also meet certain other requirements. This of itself would seem to exclude banks or other financial institutions located out of this state. In any event this is made certain by what is said in sec. 34.05 (1) and by the definition of "public depository" contained in sec. 34.01 (2). The board of deposits has no authority to designate a bank as a public depository when to do so would be contrary to the provisions of ch. 34 of the statutes.

The answer to question No. 3 is also "No." The statutes contemplate that every "public depositor" deposit all "public moneys" coming into the hands of the treasurer in a "public depository." Secs. 34.05 (1); 34.01 (5). No exception is made for any amounts which might be insured by the Federal Deposit Insurance Corporation and no such exception can be read into the statute without usurping the functions of the legislature.

WET
Platting Lands—State Board of Health—Subdivision adjoins lake within meaning of sec. 236.06 (1) (g) when lots and intervening parcel running to water's edge are commonly sold as a unit.

Sale in one year of more than four parcels of land each less than one and one-half acres in extent in an unplatted subdivision violates sec. 236.16, Stats.

April 24, 1947.

WARD WINTON,
District Attorney,
Shell Lake, Wisconsin.

You state that the village of Shell Lake has laid out a subdivision known as Crescent Park Plat so that the eastern edge of the plat lies about 100 feet from the water's edge of Shell Lake; that the village owns the strip of land 100 feet wide between the waters of Shell Lake and the plat, and that as each lot is sold, it is the practice of the village to convey to the purchaser the land lying between his lot and the lake shore. You state further that the plat itself does not provide access to the lake.

You inquire (1) whether the plat must be approved by the board of health; and (2) if such approval is not required, whether the acts above described may result in a violation of sec. 236.16, Stats.

The answer to your first question is "Yes."

The applicable statute provides:

"236.06 (1) No plat shall be valid or entitled to be recorded until it has been submitted to and approved by the governing bodies as this section provides:

"* * *

"(g) For lands lying in any subdivision adjoining any lake or stream or where access is provided to any such lake or stream, the state board of health."

The application of this statute depends upon the interpretation of the words "adjoining" or "where access is provided to any such lake or stream." It is a primary rule of statutory construction that the intent of the legislature must control. Wait v. Pierce, 191 Wis. 202; State ex rel.
Thieme v. Gregory, 202 Wis. 326; Standard Oil Co. v. Industrial Comm., 234 Wis. 498.

To ascertain the legislative intent the court must look to the purpose the legislature intended to accomplish and the subject matter to which the statute is intended to apply. Danischefsky v. Klein–Watson Co., 209 Wis. 210. Further, statutes are to be construed according to their intent, although such construction is contrary to the letter of law. State ex rel. Jackson v. Leicht, 231 Wis. 178, 59 C. J. 964.

The requirements of ch. 236 that plats be approved by municipal governing bodies, by the state board of health, and by the state director of regional planning, are dictated by the purpose and desire to provide for an orderly and planned development of all the communities of the state. XXXV Op. Atty. Gen. 437.

In our opinion, in view of the manifest purpose of ch. 236, and the rules of construction cited above, the transaction described, viewed as a whole, constitutes a sale of lots adjoining a lake and also a provision of access to the lake and the requirement of approval by the board of health cannot be avoided by failing to include the entire parcel sold in the plat. As was said in Marcus v. Heralds of Liberty, 241 Pa. 429, 88 A. 678: “The law looks to the substance rather than the form, and is not to be cheated by any gloss of words.”

In answer to your second question you are correct in your assumption that if the parcels of land between the lots and the lake shore are each less than one and one-half acres in extent, the village is prohibited from selling more than four of such parcels in any one year. This rule is clearly and unequivocally stated in sec. 236.16, Stats.

RGT
Public Assistance—Dependent Children—Homestead—
Aid for dependent children need not be denied because of the applicant's possession of proceeds from the sale of a homestead (within the limitations of sec. 49.19 (4) (e), Stats.) when such proceeds are being held for the purchase of a home.

An agreement providing security for reimbursement of aid granted for dependent children under sec. 49.19, Stats., is unenforceable.

April 25, 1947.

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

You ask two questions with respect to a proposed grant of aid for dependent children under section 49.19, Stats. 1945, and with respect to a related escrow agreement. The agreement provides that certain funds in the possession of the person having custody of the children, which funds were derived from the sale of a homestead, shall be placed in escrow and, if not used for the purchase of another home within five years, shall be subject to lien for all aid paid under section 49.19.

You ask:

1. Are you, as the supervising state agency, obligated to challenge eligibility to receive aid on the basis of lack of need because of available cash resources, and to refuse reimbursement from state and federal funds?

2. Would the provision relating to a lien for recovery of aid granted be enforceable?

Question 1

If the local agency is attempting at the present time to determine the question of eligibility or need for aid for the entire five-year period covered by the agreement, its action is in excess of its authority because sec. 49.19 (5) provides that "no aid shall continue longer than one year without reinvestigation."

We do not, however, believe that you are obligated to challenge a present grant to be operative for no more than a year, merely because of the applicant's possession of the proceeds of the sale of a homestead.
Assuming the applicant is otherwise eligible, the possession of $4,300 in cash as proceeds of the sale of her homestead in September of 1946 should not bar the granting of aid. The question of eligibility for aid to dependent children as related to ownership of property and other assets is discussed in XXVIII Op. Atty. Gen. 185. After review of pertinent statutory provisions it is said at page 136:

"Thus it will be observed that the statutes do not attempt to lay down any definite yardstick as to property or absence of property conditioning the granting or denying of aid, with the exception of the homestead provision in sec. 48.33 (5) (f), above quoted."

Section 49.19 (4) (e), Stats. 1945 (formerly sec. 48.33 (5) (f)), provides as follows:

"The ownership of a homestead by a person having the care and custody of any dependent child shall not prevent the granting of aid if the cost of maintenance of said homestead does not exceed the rental which the family would be obliged to pay for living quarters."

Section 272.20 (1), Stats. 1945, in defining homestead exemption provides in part:

"* * * Such exemption shall not be impaired by temporary removal with the intention to reoccupy the premises as a homestead nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding five thousand dollars, while held, with the intention to procure another homestead therewith, for two years. * * *"

While the latter section relates to exemptions from execution rather than to standards of eligibility for aid to dependent children, it seems probable that the legislature intended that proceeds from a homestead should be impressed with characteristics and immunities no less favorable to the consideration of problems relating to the latter than to the former.

Under those statutory provisions, we do not believe that aid should be denied solely because of the possession of proceeds from sale of the homestead if the amount does not exceed the limitations of section 49.19 (4) (e).
The other question relates to the validity of the escrow agreement.

We believe that the provision relating to a lien on the funds for recovery of aid granted would be unenforceable. We adhere to the views expressed in XXVIII Op. Atty. Gen. 135 where it was pointed out at page 137 that even where the statutes provide for a recovery of aid furnished, as for direct relief, the county agency could not condition the granting of relief upon the applicant's contracting or pledging present or future property. It was further pointed out at page 137 that since there is no statutory provision for recovery of aid to dependent children, "it would seem clear that the county pension agency may not require an applicant for such aid to contract or pledge present or future property as a condition precedent to obtaining aid."

The opinion was also there given that the local agency may require that funds in the possession of an applicant be sequestered for the purpose of protecting future needs. An agreement for such purpose must, under present statutory requirements, be subject to the annual reinvestigation and redetermination provided in section 49.19 (5). No agreement of the local administrators could obligate the continuance of aid beyond the one year period; and obviously if aid should be discontinued during the period of the agreement the local agency would lose whatever authority it has respecting control over an applicant's funds.

Since statutory provisions relating to relief are subject to change, we will not attempt to anticipate whether the possession of funds two years hence might preclude the granting of aid at that time. If local authorities desire at that time to continue a grant of aid and the funds have not been used for purchase of another homestead, the question may be reconsidered in the light of then existing statutes.

BL

JVS
Legal Settlement — Illegitimate Children — Illegitimate child born before September 15, 1945, and who has gained a legal settlement under sec. 49.02 (3), Stats. 1943, may now under the provisions of sec. 49.10 (3), Stats. 1945, lose such settlement if its mother loses hers.

April 25, 1947.

John D. Kaiser,
Assistant District Attorney,
Eau Claire, Wisconsin.

We have your request for an opinion relative to the legal settlement of an illegitimate child. You state that it is your opinion that under sec. 49.02 (3), Stats. 1943, an illegitimate child gained the settlement of its mother if she had one in this state and retained such a settlement even though the mother lost hers. In other words, the rule was that the illegitimate child retained the settlement it had at the time of its birth. This department has frequently upheld that ruling in the following opinions: XII Op. Atty. Gen. 109; XIV Op. Atty. Gen. 348; XXVII Op. Atty. Gen. 469.

The 1945 legislature repealed and recreated ch. 49, Stats. The settlement of illegitimate children is now determined by the rule laid down in sec. 49.10 (3) which reads as follows:

“(3) Illegitimate minor children have the settlement of their mother unless her parental rights are terminated; and if her settlement is lost, theirs is lost.”

This clearly changes the previous rule in that if the mother of an illegitimate child loses her settlement within any town, village or city in this state, her illegitimate child likewise loses its settlement. Ch. 585, Laws 1945, became effective September 15, 1945. Therefore any relief granted to an illegitimate child before that date would be chargeable to that unit of government which was found to be responsible under the old rule. Any relief granted after that date would be chargeable to the governmental unit as determined under the new rule. The legal settlement of a child born before the effective date of the change in the statute is now governed by the new statute. Such child will lose its settlement.
if the mother loses hers. The determining factor in charging the cost of assistance to a governmental unit is this: When was the public aid granted?

We conclude, therefore, that an illegitimate child born before September 15, 1945 (the effective date of ch. 585, Laws 1945) and who had gained a legal settlement under sec. 49.02 (3), Stats. 1945, may now lose such settlement if its mother loses hers.

Edward A. Krenzke,
District Attorney,
Racine, Wisconsin.

April 30, 1947.
property, particularly where power of disposition is necessary to enable the entity to carry out the purposes for which it was created. You have also called our attention to sec. 66.40 (9) (k) of the statutes which authorizes a housing authority in connection with any loan to agree to limitations upon its “right to dispose of any housing project or part thereof,” which seems to assume a power of disposal in the housing authority since otherwise there would be no necessity for agreeing to limitations thereon. A similar provision is contained in sec. 66.40 (15) (e); and in sec. 66.40 (15) (e) an authority is expressly authorized to reserve “the right to dispose of” property. As you have also pointed out, an authority is empowered to mortgage property which involves the possibility of the title being alienated through foreclosure, as is recognized in the language of sec. 66.40 (20).

On the other hand, there are indications in the section that the legislature did not intend an authority to have unrestricted power of disposal. The power to mortgage is limited under sec. 66.40 (15) (x); power to convey property to a government is expressly contained in sec. 66.40 (11), which would perhaps be unnecessary if unrestricted power of disposition were contemplated; and it is expressly provided in sec. 66.40 (9) (p) that no provision of law with respect to acquisition or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

The legislature likewise appears to have evinced an intent that the general functions of an authority shall be to provide property for rental rather than for sale, in order that there may be a continuing governmental restriction on the amount of rental and a continuing availability of property at rentals appropriate to low income groups. Sec. 66.40 (4) (b), for instance, provides that an authority may be established by a city council where it is found that there is a shortage of dwellings “available to persons of low income at rentals they can afford.” The legislature has likewise made careful provision in sec. 66.40 (27) for the method of rental of houses provided by the authority, at such amounts and to such persons as would carry out the objective of
making the units available for rental to low income groups. Obviously, if houses provided by the authority were sold instead of rented there would be no continuing governmental supervision to insure that the units were serving the purpose for which the authority was created. Where the powers of an authority are defined in sec. 66.40, they include only such terms as to “prepare, carry out, acquire, lease and operate” projects (see sec. 66.40 (9) (a) for instance) without any reference to sale or disposition. In view of the purpose of the authority to provide housing units at low rentals, this omission seems significant.

The legislature has specified in sec. 66.40 (9) that an authority shall constitute “a public body and a body corporate and politic” exercising public powers and having all the powers necessary or convenient to carry out and effectuate the purposes of the section. As a public body, an authority would be comparable with a municipal corporation, the powers of which in the disposition of property are summarized in 43 C. J. 1340–1341, §2098:

“Municipal corporations, it has been said, hold all property in a fiduciary capacity; and they have not the power of disposition which belongs to the private proprietor. All their powers are held in trust for public use, and the validity of their exercise generally depends upon the purpose thereof. * * *”

As a body corporate, the powers of an authority would probably be comparable to those of a corporation which are described in 19 C. J. S. 648, 653, §1095 as follows:

“Except insofar as it is restrained by statute, by its charter, or public policy, a corporation has, as an incident to the ownership of property, the same powers as a natural person to dispose of or alienate the same, provided it does so for a legitimate corporate purpose. * * *” (p. 648)

“* * *”

“The power of a corporation to dispose of its property is frequently limited or restricted by express charter or statutory provisions which are binding on it and may not be dispensed with. * * *”

“To the general rule authorizing free alienation of its property by a corporation, there are many exceptions, arising from the nature of particular corporations, the purposes
for which they are created, and the duties and liabilities imposed on them by their charters. A corporation cannot convey, lease, or otherwise dispose of its property if the terms of its charter or the duties imposed on it are such as impliedly to prohibit such transfer. * * *” (p. 653)

Under the foregoing rules, it seems that the legislature intended a housing authority to have power to convey property if necessary to carry out its proper functions of providing housing for rental to low income groups but not otherwise. If, for instance, an authority had acquired property which it found to be unsuitable for a housing project, certainly the legislature intended that it might dispose of such property in order to acquire something more suitable; or if it had acquired more property than was needed for a project, it might dispose of the surplus in order to utilize the proceeds for carrying out its functions. On the other hand, it appears that the legislature contemplated that the primary purpose of an authority was to provide rental property and to ensure the continuance of the availability of such property at modest rentals for the income group for which such housing facilities are most needed.

We do not believe, therefore, that the legislature intended under sec. 66.40 that a housing authority should provide housing facilities for sale. It may be that a different interpretation would be given to the statutes by the courts, and perhaps a declaratory judgment might be obtained. As a practical measure, it might be possible to lease the particular properties in question with an option to purchase in the event that the authority’s power to sell is established by the courts or in the event that the legislature amends the law so as to grant such authorization.

BL
Opinions of the Attorney General 196

Guardian and Ward—Joint and Separate Guardians—
Under sec. 319.34, Stats., county court may appoint more
than one guardian of any person subject to guardianship,
and under sec. 319.01 (2) such court may appoint separate
guardians of the person and of the property of a ward.

May 5, 1947.

F. R. King, Superintendent,
State Public School for Dependent
and Neglected Children.

You state that a 16-year old girl was committed to the
state public school as a dependent child on a temporary
commitment. Both of the parents are now dead and
the girl is living with her grandmother who is about 80
years of age. The girl is rather unmanageable and the
grandmother has not been able to give her the guidance and
counsel that is needed. A small inheritance of about $600
was left the minor by her mother and a general guardian
has been appointed by the county court.

The school authorities have been having difficulty with
the girl and the question has been raised whether another
guardian living in the neighborhood could be appointed
who would assume some responsibility for her behavior or
whether this possibility is precluded by the fact that she al-
ready has a guardian and has been committed to the state
public school.

While offhand it would appear that there may possibly
be already too many persons and agencies attempting to
regulate the life and fortune of this young lady, we can see
no legal objection to appointing another guardian or a
dozen more guardians if it is deemed necessary.

Sec. 319.34 provides:

"More than one guardian. The county court, in its dis-
cretion, whenever the same shall appear necessary, may
appoint more than one guardian of any person subject to
guardianship, who shall give bond and be governed and
liable in all respects as is provided respecting a sole guard-
ian. An account rendered by two or more joint guardians
may be allowed by the county court upon the oath of either."
However, by the time additional bond premiums, guardians' fees and attorney fees are paid there isn't going to be much of the $600 left for the benefit of the minor.

It is true, of course, that under sec. 319.01 (2) the court may in every case appoint separate guardians of the person and property of a ward, but it is doubtful that a guardian of the person as distinguished from a guardian of the property can be excused from furnishing a bond. Sec. 319.05 (b), among other things, provides that before letters shall be issued to a guardian he shall give a bond to the judge of the county court conditioned, "when guardian of the person, to report in relation to the care, custody and education of the ward." Perhaps such bond could be in a nominal amount so that the premium would not be large; also it might be possible to obtain the services of a person willing to act as such a guardian for little or no compensation, but we feel that these matters should be called to your attention in order that all of the attendant possibilities as to expense may receive consideration before additional expenses are actually incurred.

WHR

Courts—Legislature—Continuance of Actions or Proceedings—Sec. 256.13, Stats., relating to adjournment of actions or proceedings in any court or commission wherein a party or an attorney for a party is a member of the legislature while it is in session is a special statute and is controlling over other and inconsistent general provisions as to adjournment found in other statutes.

May 5, 1947.

The Honorable, The Senate.

You have asked by Resolution No. 29, S. for our interpretation of sec. 256.13, Stats., relating to continuances of actions or proceedings when a party or an attorney for a party is a member of the legislature in session, and particularly as to conflicts which arise in the application of this section in cases where the court's power to grant ad-
Adjournments is otherwise limited by statute, as in the case of unlawful detainer actions where the authority of the justice to grant adjournments is limited by sec. 291.08 to six days after the return of the summons except in certain instances where an undertaking is finished and the maximum adjournment period is 90 days from the return date of the summons.

Sec. 256.13 provides:

"Continuances; legislative privilege. When a party or an attorney for any party to any action or proceeding in any court or any commission, is a member of the Wisconsin legislature or is president of the senate, in session, such fact shall be sufficient cause for the adjournment or continuance of such action or proceeding, and such adjournment or continuance shall be granted without the imposition of terms."

This language is very sweeping and implies no exceptions.

On the other hand there are many statutes such as 291.08, mentioned above, and other justice court practice statutes which limit the authority of the court to grant adjournments. See secs. 301.38, 301.39, 301.40, 301.41, etc. There are also similar limitations as to adjournments in various types of special proceedings and administrative hearings before special tribunals, administrative agencies, boards or commissions. For instance, in condemnation proceedings under chapter 32 it is provided in sec. 32.10 (3) that a majority of the commissioners may adjourn from time to time but not more than twice or for more than 60 days. The real estate brokers board under sec. 136.08 (3) is required to hold its hearing on a complaint for revocation of a broker's license within 30 days after the date of filing the complaint. The state board of dental examiners in license revocation proceedings is governed by a similar statute, sec. 152.06 (4). Doubtless many other statutory illustrations could be furnished, but the foregoing are sufficient to bring the problem of possible conflicts with sec. 256.13 into sharp focus.

It therefore becomes necessary to resolve these conflicts if it is at all possible to do so in the light of the rules relating to statutory construction.
By way of preliminary approach to the problem it may be appropriate to ascertain, if it can be done, the intention of the legislature in enacting sec. 256.13,— in other words, to determine what evils or mischiefs the statute was designed to prevent. While our supreme court does not appear to have passed upon the precise problem here presented, it and other courts have had occasion to pass upon the related problem or purpose of constitutional immunity from civil process granted members of the legislature while in session. Article IV, section 15, Wis. constitution.

The reason for this type of provision is fairly obvious. As was pointed out in Anderson v. Rountree, 1 Finn. 115, the privilege is an ancient one and is a privilege of the people as well as of the representative. The theory is that the people elect the representatives to the legislature to protect their rights and advance their interests. In order that this may be done properly it is equally necessary that the rights and interests of the representative should be protected while he is absent in the public service. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session of the legislature, for the purposes of defending his private suits in court, as it is to be exempt from imprisonment on execution. The claims of the people upon his personal attendance are paramount to those of the individuals involved in the litigation and they must submit. See Doty v. Strong, 1 Finn. 84, 87-8.

Obviously if a member of the legislature is required to absent himself from that body while it is in session in order to appear in litigation where he is either a party or an attorney and he is unable to procure an adjournment in those types of cases and in those tribunals where the time of adjournment is restricted by statute, the purposes sought to be accomplished by the enactment of sec. 256.13 would be largely defeated.

In State v. Snyder, 172 Wis. 415, it was held that though a provision of the workmen's compensation act contravened other general provisions found elsewhere in the statutes, by familiar rules of statutory construction this special provision, dealing with a particular subject, prevails over such
other general provisions. Sec. 256.13 is a special statute relating only to actions or proceedings wherein a member of the legislature, while in session, is a party or an attorney for a party. By its language the scope of the statute is extended to "any action or proceeding in any court or any commission." Under the well-established rule of statutory construction that special provisions govern over general provisions to the extent that they are in conflict, we conclude that sec. 256.13 is controlling on the matter of adjournments or continuances of actions or special proceedings notwithstanding general statutory provisions as to adjournments to the contrary.

WHR

Appropriations and Expenditures—Schools and School Districts—Vocational and Adult Education—Under sec. 20.33 (8) (a), Stats., equipment purchased by state board of vocational and adult education with federal aid for purpose of food production war training program may be transferred to local schools in view of federal legislation requiring that possession of such equipment shall remain in local schools and the federal authorities having specifically assented to such transfer.

May 8, 1947.

C. L. GREIBER, Director,
Wisconsin State Board of Vocational and Adult Education.

You have called attention to the fact that certain federal funds were received pursuant to sec. 20.33 (8) (a), Stats., for the purpose of purchasing equipment for the food production war training program. Under the state plan title to all equipment purchased out of food production war training funds remained in the state and the equipment was subject to transfer from place to place in the state upon order of the director of your board. Local school systems have possession of the equipment and the 79th congress by Public Law 124 has provided that no school
or school system shall be required to surrender possession or use of any property or equipment which it is using in its educational or training program. In view of this federal legislation your board desires to relinquish its jurisdiction over this equipment.

The federal security agency of the United States office of education has given its approval of the transfer of the equipment to the local schools and you have inquired whether the proposed transfer will be in compliance with state law.

Sec. 20.33 (8) (a), Stats., provides in part:

"Any moneys received by the state from the United States as federal aid for vocational or adult education shall be paid, within one week after receipt, into the general fund, and are appropriated therefrom to the state board of vocational and adult education, to be expended in such manner as said state board shall deem proper. Such funds, however, shall be expended only in conformity with the purposes and requirements of the several acts of congress under which such federal aid is paid to this state. * * *"

It is to be noted that the authority of the state board of vocational and adult education is very broad under this section. The moneys received as federal aid may be expended in such manner as the board shall deem proper subject only to the proviso that the funds shall be expended only in conformity with federal law. Since the federal authorities have approved of your proposed relinquishment of jurisdiction over the equipment in question in favor of the local schools with whom possession of the property must remain under federal law so long as it is used for educational and training purposes, we deem the transfer to be in conformity with sec. 20.33 (8) (a) quoted above.

WHR
Opinions of the Attorney General 201

Counties—Boats—Counties are not authorized to enact ordinances prohibiting operation of certain types of motor boats.

May 10, 1947.

J. K. Anderson,
District Attorney,
Waupaca, Wisconsin.

You have asked whether a county board may enact an ordinance prohibiting the operation of motor boats or power craft, generating more than 5½ horse power, upon any inland lakes in the county.

We are of the opinion that a county may not enact such an ordinance. It is the well settled law of this state that:

"* * * the county has only such authority as is conferred upon it by statute. Counties are purely auxiliaries of the state and can exercise only such powers as are conferred upon them by statute, or such as are necessarily implied therefrom."

Spaulding v. Wood County, 218 Wis. 224, 260 N. W. 473. See also Dodge County v. Kaiser, 243 Wis. 551, 11 N. W. (2d) 348.

As you have pointed out the legislature has not included within the enumerated powers of a county board an authorization to regulate the operation of boats. On the contrary, the legislature has expressly delegated such authority to cities, towns and villages. See sec. 30.06 (7) which provides:

"All cities, towns and villages of this state are hereby empowered to make reasonable safety regulations relating to such vessels [boats propelled other than by hand power] and the equipment thereof and to provide and enforce proper and reasonable penalties for the violation or neglect of any such provisions or regulations or ordinances."

In addition sec. 60.29 (35) provides, as you have pointed out, that towns may "regulate or prohibit by ordinance the use, traffic and noise of motor boats on any inland lake or river, during such hours when noises are disturbing to the public or inimical to public safety, morals and health."

BL
Airports—Counties—Board Member—Public Officers—
Malfeasance—County board member and corporation of which he is stockholder are not disabled by sec. 348.28, Stats., from contracting with city–county union airport commission created under sec. 114.14 (2).

May 12, 1947.

Donald C. O'Melia,
District Attorney,
Rhinelander, Wisconsin.

You have requested an opinion based on the following facts:

The city of Rhinelander and Oneida county have created a municipal–county union airport under a commission as provided in sec. 114.14 (2), Stats. A member of the county board of Oneida county is a stockholder and officer in a corporation doing general construction work. You inquire whether the corporation of which he is a stockholder and officer may lawfully contract with the commission for construction work. The construction work is to be paid for in part by federal aids, possibly some state aids and the remainder by the city of Rhinelander and Oneida county in equal proportions.

Section 114.14 (2) provides for the creation of airport commissions and authorizes joint commissions such as is involved here. The county board has nothing to do with the appointment of the commissioners; those representing the county "shall be appointed by the county judge." The statute provides further, in part:

"... Such commission shall have complete and exclusive control and management over the airport for which it has been appointed. All moneys appropriated for the construction, improvement, equipment, maintenance or operation of an airport, managed as provided by this subsection, or earned by such airport or made available for its construction, improvement, equipment, maintenance or operation in any manner whatsoever, shall be deposited with the treasurer of the city, village, town or county where it shall be kept in a special fund and paid out only on order of the airport commission, drawn and signed by the secretary and countersigned by the chairman. ** The moneys available for union airports shall be kept in the manner pro-
It appears that the airport commission has complete jurisdiction "for the construction, improvement, equipment, maintenance or operation" of the airport and that the monies appropriated to it or otherwise made available for construction are deposited in a special fund and paid out only on order of the airport commission by its secretary and chairman. The county board has nothing to do with the expenditure of the monies or the making of contracts, nor does it audit the accounts of the commission. Its functions are exhausted when it has appropriated money to the commission. Although the commission is required to keep an accurate record of its proceedings and transactions and report the same to the county board and the city council, this is for information only and not for any official action by those bodies.

Section 348.28 (1), Stats., as amended by ch. 59, Laws 1947, among other things and with certain exceptions, prohibits any officer, agent or clerk of any county (or other unit of government) from having, reserving or acquiring any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any contract in relation to any public service "made by, to or with him in his official capacity or employment, or in any public or official service." Under subsec. (3) any contract entered into in violation of the provisions of this section is absolutely null and void and the county incurs no liability thereon. Violation is also punishable by fine or imprisonment.

In State v. Bennett, (1934) 213 Wis. 456, it was held that the malfeasance statute, sec. 348.28, does not prohibit all pecuniary transactions by public officers, agents and clerks with the community by which they are employed or of which they are officers. To make the statute applicable to any such transaction it must appear that the officer, agent or clerk had a legal duty as such to act for the governmental unit in an official capacity with reference to such contract or transaction.
Since the county board and its members have no official function to perform in connection with a contract with the airport commission, it is our opinion that the board members are not disabled from entering into contracts with the commission by which they have, reserve or acquire any pecuniary interest. See also: XXIV Op. Atty. Gen. 180; XXIV Op. Atty. Gen. 243; XXIV Op. Atty. Gen. 666; XXIX Op. Atty. Gen. 415. It follows that corporations of which they are officers or stockholders are likewise not disqualified from making such contracts.

Other questions submitted by you in this connection become immaterial by reason of our answer to the first question and will therefore not be discussed.

WAP

Appropriations and Expenditures—Motor Vehicle Department—Radio System—Authority of motor vehicle department to operate and maintain radio communications is not impaired by the creation of the state department of budget and accounts, and the department of state audit, pursuant to ch. 9, Laws 1947.

May 13, 1947.

THE HONORABLE, THE SENATE.

I have received Senate Resolution No. 30, requesting an opinion on the effect of ch. 9, Laws 1947, upon the authority of the motor vehicle department to expend state funds for the installation, operation, and maintenance of a radio system. By your resolution, you direct our attention to the pending bill No. 291, S. which would prohibit such expenditure unless a specific appropriation has been made for that purpose.

In our opinion the passage of ch. 9, Laws 1947, has no effect whatsoever upon the existing authority of the motor vehicle department to use its proper appropriation for the installation, operation and maintenance of a radio system. Chapter 9 was passed for the purpose of carrying out the provisions of the recent constitutional amendment creating
art. IV, sec. 33, which removed the auditing functions from the secretary of state and authorized the legislature to create such officers to audit state accounts as it deemed necessary. The purpose of ch. 9, as expressed in its title, is to transfer accounting and pre-auditing functions from the secretary of state to the department of budget and accounts, to create a department of state audit and provide a system of state accounting and state audit. The previously existing accounting and auditing functions which were carried on by the director of the budget pursuant to the provisions of sections 15.01 through 15.14, and the auditing functions previously carried on by the secretary of state pursuant to art. VI, sec. 2, Wisconsin constitution, have now been transferred to the state department of budget and accounts and the department of state audit, as shown by subchapters 1 and 2 of ch. 15, Stats., as amended by ch. 9, Laws 1947. A careful reading of all the provisions of ch. 9 discloses no provision which would transfer to either of the new departments any greater discretion or control over the expenditures of state funds than that possessed by their predecessors, the department of budget and the secretary of state.

Accordingly, the discretion of state departments, boards and commissions as to the purposes for which they may use existing appropriations is in no wise impaired by the passage of ch. 9, Laws 1947. See XXIX Op. Atty. Gen. 381.

It is pursuant to such existing authority that the motor vehicle department is operating and maintaining its existing ground and mobile units, all of which have been licensed by the federal communications commission. In the event of the passage of Bill No. 291, S., which adds the following to section 20.052(5) of the statutes:

“No expenditure shall be made from any appropriation in this section for the installation, operation or maintenance of a radio system to be used in connection with the execution of the functions of the motor vehicle department unless a specific appropriation has been made for that purpose.”

the department would have no funds for the operation or maintenance of its existing equipment and accordingly would have to discontinue such operations.

RGT
Constitutional Law—Pensions—Conservation Wardens—
Bill No. 148, A. probably is unconstitutional.

THE HONORABLE THE ASSEMBLY.

By Resolution No. 15, A., adopted February 26, 1947, you have requested our opinion as to “whether Bill No. 148, A. in its present form is constitutional and particularly whether sec. 23.14 (7a) of the statutes can lawfully be applied retroactively as provided in the proposed amendment to said subsection.”

Bill 148, A., with the proposed amendment italicized, reads as follows:

“23.14 (7a) 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. This subsection shall apply retroactively to all such retirements and deaths since July 15, 1935.”

A consideration of the question requires some understanding of the fundamental structure of the conservation warden pension fund which was created by ch. 227, Laws 1935, as sec. 23.14 of the statutes. Sec. 23.14 (1) provides that a fund shall be set aside “for the pension of disabled and superannuated conservation wardens and the widows or orphans of deceased conservation wardens.”

The moneys which constitute the fund are derived from the following sources:

(a) Three per cent of the monthly salary of each conservation warden.
(b) Fines imposed on conservation wardens for violations of rules of the department.
(c) Witness or other fees received by wardens.
(d) Fifty per cent of the proceeds received from the sales of certain confiscations by the conservation commission.
(e) Fees or emoluments that may be paid or given for or on account of any service of conservation wardens, except when allowed to be retained by them by resolution of the board of trustees of the fund.

(f) Gifts.

The moneys are placed in the state treasury and the state treasurer is ex-officio treasurer of the fund which is administered by a board of trustees provided for by statute.

A warden who has served for 20 years may retire and receive monthly a sum equal to one-half of his monthly salary at the date of retirement. A warden who is disabled while on duty and compelled to retire because of such disability likewise may receive each month a sum equivalent to one-half of his monthly salary at the date of such compulsory retirement. The law also provides for a monthly benefit to the widow and each child under age 16 of a warden who dies while on duty, who dies from an injury received in the line of duty, who dies from any cause while in service and after 15 years of service, or who dies after retirement, provided that such benefit shall not be available to any widow after she remarries or to a widow who married the warden after he had retired. The duty disability benefit and the death benefit payable as a result of death while on duty or death from injury received in the line of duty, do not in any way depend upon length of the service or the amount of the contribution made by the warden.

Section 23.14 does not contain any provision which purports to grant a contractual right or a vested interest to any warden, and subsec. (8) provides in part:

"* * * If any time there shall not be sufficient money in such pension fund to pay each person entitled to the benefit thereof, the full amount per month as hereinbefore provided, then, in that event a pro rata reduction of such monthly payments shall be made to each pensioner or beneficiary thereof until the said fund shall be replenished to warrant the payment in full to each of such pensioners or beneficiaries."

Until 1945, if a warden resigned or was discharged before he became eligible for a monthly benefit, the contributions which he had made to the fund could not be returned to him; if he died while in service under circumstances which did not make his widow or children eligible for a
monthly death benefit, the amount which he had contributed to the fund remained in the fund.

Chapter 551, Laws 1945, created subsec. (7a) of sec. 23.14 as quoted above, except, of course, that it did not contain the italicized language.

Under said chapter it would appear that if a conservation warden died under circumstances which would make his widow, or child, or both, entitled to a monthly benefit, the amount which he had contributed to the fund would be paid to his heirs also, since the limitation upon this payment to the heirs applies only to cases where the conservation warden dies before he became eligible for retirement.

It is assumed that the words “such retirements” as used in the proposed amendment to sec. 23.14 (7a) by Bill 148, A., actually were intended to refer to resignations or discharges prior to eligibility for retirement rather than to actual retirements as that term ordinarily is used.

Sec. 23.14 (2) provides in part: “There shall be paid into such fund three per cent of the monthly salary of each conservation warden.” The law does not provide the method by which this payment is to be made. It appears to have been the practice, however, for the conservation department to deduct three per cent of the salary of the conservation warden from his check and to remit such deducted sum to the board of trustees of the conservation warden pension fund which is the administrative body for said fund.

The practical construction given to a statute by those entrusted with its administration is of great weight and is oftentimes decisive in determining its meaning. 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; State v. Johnson, 186 Wis. 59, 202 N. W. 319; State ex rel. Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78.

“In some instances pension funds are maintained in part by compulsory contributions of the beneficiaries thereof. ** in such a case the statute creating the fund ordinarily authorizes the proper official to retain weekly or monthly a certain per cent of the prospective pensioners’ pay. By the great weight of authority the fact that a pensioner has made such compulsory contribution does not give him a vested right in the pension.” (54 A. L. R. 945)
To this proposition many authorities are cited, among them being *Pennie v. Reis*, 132 U. S. 464 and *State ex rel. Risch v. Board of Trustees of the Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954. These authorities were supplemented by additional citations in 98 A. L. R. 506, 112 A. L. R. 1010 and 137 A. L. R. 252.

In *State ex rel. Risch v. Board of Trustees*, supra, it was stated (p. 49):

"* * * While the law of 1899 and similar laws, in form, require the officers to pay a certain sum per month out of their salaries into the pension fund, they in fact are not required to do so. The contribution to the fund is made by the public out of public money. It is not first segregated from the public funds so as to become private property and then turned over to the control of the pension board, but is set aside from one public fund and turned over to another, regardless of the mere words of the law. The effect thereof is to scale down the salaries of the officers in form by so much as measures the contribution by each to the pension fund, but to really fix such salaries at the amount actually paid and to require the payment by the city into the pension fund of the amounts, per month, mentioned as being taken from the salaries. Such amounts are no less public money after such payment than before. That would seem plain as an original proposition, but has received sanction by the highest authority, as suggested by the respondent's counsel, in *Pennie v. Reis*, 80 Cal. 266, 22 Pac. 176, carried to the supreme court of the United States, and the decision there reported in 132 U. S. 464, 10 Sup. Ct. 149. * * *"

The United States supreme court said in the case of *Pennie v. Reis*, supra:

"Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property."

See also: *Griffith v. Rudolph*, 298 Fed. 672; *Schuh v. Waukesha*, 220 Wis. 600, 265 N. W. 699; and *Maxwell v. Madison*, 235 Wis. 114, 292 N. W. 301.

"The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but a gratuitous allowance." 54 A. L. R. 943. That citation lists
a great many authorities in support of that statement. See also *State ex rel. McCarty v. Gantter*, 240 Wis. 548, 4 N. W. (2d) 153; and *State ex rel. Bartelt v. Thompson*, 246 Wis. 11, 16 N. W. (2d) 420.

Although the position taken in the case of *State ex rel. Risch v. Trustees*, supra, has not been adopted unanimously by the courts, it necessitates the conclusion that the moneys constituting the conservation warden pension fund, including the sums contributed by the wardens themselves, would be held to be public moneys by our supreme court.

"In cases where an attack has been made on the validity of pension statutes or ordinances so far as they attempt to award benefits to public officers retired from the public service at the time of their passage, the constitutional provisions relied upon as requiring a determination of their invalidity are those which forbid donations for private purposes, prohibit the grant of extra compensation to public officers, or provide that no appropriation shall be made for benevolent purposes to any person not under the absolute control of the state." (142 A. L. R. 938–939)

While the state of Wisconsin does not have any constitutional provision similar to the third one referred to, art IV, sec. 26 of the Wisconsin constitution provides:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into * * *,"

and on many occasions our supreme court has expressed the opinion that public funds can only be expended for public purposes. *State ex rel. W. D. A. v. Dammann*, 228 Wis. 147, 277 N. W. 278, and numerous cases collected and cited in that opinion.

In *State ex rel. Haberlan v. Love*, 89 Nebr. 149, 131 N. W. 196, it was held that a provision of the Nebraska constitution similar to art. IV, sec. 26 of the Wisconsin constitution quoted above would operate to prevent an increase of a pension benefit to one already receiving a benefit.

In *Porter v. Loehr*, 332 Ill. 353, 163 N. E. 689, it was held that a statute amending existing legislation providing for pensions to retired policemen and increasing certain of the pensions currently being paid was invalid as a mere
gift or gratuity to individuals and hence an attempted exercise of the taxing power for private purposes. See also People ex rel. Waddy v. Partridge, 172 N. Y. 305, 65 N. E. 164.

In Lamb v. Board of County Peace Officers Retirement Commission, 29 Cal. App. (2d) 348, 84 P. (2d) 183, it was held that an act making a pension statute retroactive was ineffectual to extend benefits to a public officer retired before the statute was enacted because it violated the principle that the legislature has no power to make a gift of public money to an individual nor the power to grant any extra compensation to any public officer after services have been rendered by him.

In XXVI Op. Atty. Gen. 251 this office stated (p. 254):

"In considering the constitutionality of the state teachers' retirement act, ch. 459, Laws 1921, our court in the case of State ex rel. Dudgeon v. Levitan, 181 Wis. 326, held that such act did not constitute a grant of extra compensation for services already rendered by the teachers contrary to sec. 26, art. IV, Wisconsin constitution, but was intended to induce experienced teachers to remain in the service, and therefore is compensation for the services to be rendered in the future, even though, in cases of teachers longest in service, such additional compensation would be disproportionate to the services thereafter rendered. Hence, it would appear that except for the reason that the teachers' retirement act was intended to induce experienced teachers to continue teaching the court would have held it unconstitutional under sec. 26, art. IV * * * ."

In XX Op. Atty. Gen. 434 it was held that Bill No. 524, A. (1931), appropriating a sum from the contingent fund of the state retirement system to the widow of a teacher who died in 1917 when the teachers' retirement law provided no death benefit, was unconstitutional because in violation of art. IV, sec. 26 of the Wisconsin constitution. Notwithstanding that opinion the bill was passed by the legislature and the act tested in the courts. In the case of State ex rel. Stafford v. State Annuity and Investment Board, 219 Wis. 31, our supreme court declared the law unconstitutional as an attempted impairment of the obligation of the contract existing between the state and the teachers. The court did
not discuss the applicability of art. IV, sec. 26 of the Wisconsin constitution.

"There are a number of states in which constitutional provisions expressly prohibit the legislature from granting any extra compensation to any public officer, agent, or servant, after the service has been rendered. The purpose of such a provision is apparently to prohibit any attempt to favor individual officers by retrospective laws in order to make up for what might be regarded as a meager official salary." (23 A. L. R. 613)

In State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N. W. 224, in sustaining the constitutionality of the soldiers' educational bonus law of 1919, our court said (p. 256):

"Nor is the gift here made an extra compensation for services rendered, though it must be admitted that a pure gratuity is sometimes called extra compensation. But such compensation, strictly speaking, is given to reimburse the recipient financially for service rendered, so that the total money consideration will equal the money value of such service. Its whole sanction lies in the fact that inadequate financial compensation was given in the first instance, and that in order to make it adequate additional compensation must be made. It is granted purely on a money basis, without regard to its effect upon the donor, the recipient, or the general public. A gift like this rests upon no such foundation. Its purpose is not to make the soldier financially whole * * *.*"

The very strong implication is that if the purpose had been to make the soldier "financially whole," the law would have violated the constitutional provision against granting extra compensation.

In the present instance the proposed bill does attempt to make certain former conservation wardens "financially whole" by providing that they shall be paid those sums which were withheld from their salaries and for which they received no tangible cash benefit in the form of an annuity.

Statutes are not invalid merely because they operate retrospectively. In re West, 207 Wis. 557, 242 N. W. 165; Appeal of Van Dyke, 217 Wis. 528, 259 N. W. 700; Welch v. Henry, 223 Wis. 319, 271 N. W. 68.

From the foregoing cases, however, it will be seen that statutes relating to pensions or benefits are generally held
to be invalid when they attempt to operate retrospectively and grant benefits to persons who are no longer in the public service and who may, or may not, have retired under any pension system. The foregoing decisions indicate that Bill No. 148, A. would probably be held to be unconstitutional.

From time to time, however, the legislature is requested to appropriate sums to discharge what is alleged to be a moral obligation. In People of the State of New York v. Westchester Nat. Bank of Peekskill, New York, 231 N. Y. 465, 132 N. E. 241, it was stated:

"** * * We have held that a payment to an individual is not a gift if it be made in recognition of a claim, moral or equitable, which he may have against the state. 'The legislature, however, is not prevented from recognizing claims founded on equity and justice, though they are not such as could have been enforced in a court of law if the state had not been immune from suit.' Munro v. State, 223 N. Y. 208, 215, 119 N. E. 445." (15 A. L. R. 1350)

"We are not forgetful of the fact that, if there is any reasonable ground for the legislative decision that a moral obligation exists, the courts may not intervene. If there is such a ground, the legislature must determine whether the claim shall be recognized. But the prohibitions of the Constitution may not be evaded by the assertion that such an obligation exists, when in fact it does not. Arbitrary action may not convert a wrong into a right." (15 A. L. R. 1353–54)

In State ex rel. Sullivan v. Dammann, 227 Wis. 72, 277 N. W. 687, our court stated (p. 81):

"In State v. Langlade County Creamery Co. 193 Wis. 113, 116, 213 N. W. 664, it was said:

"The rule is familiar that this court must presume that the legislature did not intend to pass any act that would be in conflict with any constitutional limitation upon the power of that body, and that it is the duty of the court to give the acts of the legislature a construction that will bring them into harmony with the provisions of the constitution and not into conflict with the fundamental law.'

In 11 Am. Jur. p. 820, § 142, it is said:

"On frequent occasions the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it
when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding.

"As a general rule it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is usually regarded as conclusive unless an abuse of discretion can be shown, and that the courts do not generally have jurisdiction or power to reopen the question or make new findings of fact."

But in Lewis v. State, 189 N. Y. Supp. 560, the court said: "The legislature cannot direct or authorize the payment of a claim where there is no legal or moral obligation against the state. It cannot, by declaring that there is a moral obligation, where there is none, create a liability." (22 A. L. R. 1448). See also: Petters & Co. v. Nelson County, 68 N. D. 471, 281 N. W. 61, and State ex rel. Consolidated Stone Company v. Houser, 125 Wis. 256, 104 N. W. 77.

In sustaining the soldiers' cash bonus (State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589) and the soldiers' educational bonus (State ex rel. Atwood v. Johnson, supra), our supreme court determined that although "the money is levied for the purpose of making a gift—a pure gratuity," the money was being expended for a public purpose. It would appear that although the court did not specifically so state, the bonus laws were upheld, at least partially, upon the theory that the state owed a moral obligation to those whom it regarded as having served the state of Wisconsin as well as the United States.

However, it is our opinion that Bill 148, A. could not be sustained upon the theory that the state owed a moral obligation to refund sums withheld from the salary of a conservation warden who never actually realized any cash benefit from such withheld sum, or that any public purpose would be served by such a refund. As previously indicated, a conservation warden who had contributed three per cent of his salary and had become subject to the provisions of the conservation warden pension fund, might have become
eligible to receive benefits far in excess of the contribution which he had made, regardless of the length of his service.

A pension fund which does not provide for the refund of contributions in the event of a resignation or discharge prior to eligibility for a retirement benefit, is neither unique nor unusual. This principle still obtains under the policemen's and firemen's pension systems created under sec. 62.13 (9) and (10), Wisconsin statutes.

If the legislature deems it advisable to support Bill 148, A., notwithstanding our opinion as to its constitutionality, it is suggested that consideration be given to the two questions previously raised: First, whether it is the legislative intent that where a warden dies prior to his eligibility for retirement, the amounts which he has contributed shall be paid to his heirs even though he dies under circumstances which would entitle his widow and children to benefits, and second, whether the amendment to sec. 23.14 (7a), proposed by Bill 148, A., should not refer to "resignations" and "discharges" rather than to "retirements."

JRW

Appropriations and Expenditures—Counties—Airports—Neither sec. 114.11 nor sec. 59.07 (20), Stats., authorizes county board to donate money to a city to purchase an airport, although under sec. 59.07 (20) county board in its discretion may appropriate to a city each year an amount of money equal to the town, city, village and school tax upon the lands of a municipally owned airport without buildings.

May 17, 1947.

Winslow R. Davis,
District Attorney,
Hayward, Wisconsin.

You have inquired whether under secs. 114.11 and 59.07 (20), Stats., a county board may donate the sum of $5,000 to a city in the county for the purpose of purchasing an airport. The county will not own any interest in the airport or have any control over its operation.
Sec. 114.11 (1) authorizes the governing board of any county, city, village or town to acquire, establish, construct, own, control, lease, equip, improve, maintain and operate airports. Secs. 114.12 and 114.13 make provision for acquisition by condemnation or purchase but none of these sections authorizes the donation of county money to a city for airport acquisition.

Sec. 59.07 (20) among other things, authorizes the county board in its discretion to appropriate each year to any town, city or village in which a municipally owned airport is located and which would be subject to tax if privately owned, an amount of money equal to the amount which would have been paid in town, city or village and school tax upon the land without buildings, if such land were privately owned.

As we see it this statute marks the limits to which the county may go in providing financial assistance in the case of a municipally owned airport in view of the well known rule that counties have only such powers as are expressly granted or necessarily implied from the statutes and if there is a reasonable doubt as to any implied power, it is fatal to its being. *Dodge County v. Kaiser*, 243 Wis. 551, 557.

WHR
Marriage—Venereal Diseases—All male applicants for marriage licenses are required to present certificate pursuant to sec. 245.10 (1), Stats., including those applicants who must also present certificate under sec. 245.11 (4). Certificate issued under sec. 245.11 (4) is valid for 15 days.

Clinical and laboratory tests must be used in application for certificate under sec. 245.10 (1) when in the discretion of the examining physician they are necessary.

May 19, 1947.

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

You seek our opinion with respect to three problems you raise in connection with antenuptial examinations as provided for in section 245.10 and section 245.11, Wis. Stats. 1945. You ask:

1. Is a male applicant for a license to marry, who presents a certificate by the state health officer under sec. 245.11 (4) also required to present a physician's certificate under sec. 245.10 (1)?

2. How long does the certificate issued according to sec. 245.11 (4) remain valid?

3. Is it the intent of sec. 245.10 (1) that a physician's certificate may be issued on the basis of physical examination alone?

In answer to your first question, it is obvious from a reading of sec. 245.11 (4) in connection with the other provisions of sections 245.10 and 245.11 that the machinery for the granting of a certificate under sec. 245.11 (4) is for the sole purpose of reviewing the findings and clinical evidence of a positive blood test for syphilis given to an applicant in accordance with sec. 245.10 (5). This is clearly indicated by the plain meaning of the words of sec. 245.11 (4) for it refers directly to the laboratory test for syphilis provided for specifically as a mandatory requirement of sec. 245.10 (5). In addition, it is significant that sec. 245.10 (5) specifically refers to the certificate issued in accordance with sec. 245.11 (4) as an exception to the provisions of sec.
245.10 (5). But the most important reason for our view is that sec. 245.11 (4) limits the state health officer to issuing a certificate that the applicant "is not in the infective or communicable stage of syphilis," and does not authorize the state health officer to issue a certificate that the individual is free from all venereal diseases as is required by sec. 245.10 (1). The conclusion is inescapable then that since a certificate issued under sec. 245.11 (4) goes only to satisfy the provisions of sec. 245.10 (5), and since sec. 245.10 (5) specifically provides that it "is in addition to" the requirements of sec. 245.10 (1), it was clearly not the intent of the legislature that a certificate issued under sec. 245.11 (4) meet the requirements of sec. 245.10 (1).

In answer to your second question, sec. 245.11 (4) itself is silent on the matter. However, as was previously pointed out, sec. 245.11 (4) and sec. 245.10 (5) are related statutes, the former being specifically to provide for a review of a blood test given in accordance with the latter section. Since sec. 245.10 (5) provides that the examination shall be given no more than 15 days prior to application for a license, we must advise you that the 15-day time limit applies also to a certificate issued under sec. 245.11 (4). As a general rule, words or phrases may not be inserted into a statute by construction. However, there is a well recognized exception to that rule in cases where it is necessary to give effect to the intention of the legislature as manifested in the act. The rule is especially applicable where such application is necessary to prevent the law from being evaded, emasculated, or nullified. 50 Am. Jur. 221, § 234 and cases cited. 50 Am. Jur. 358 et. seq., §§ 357 and 358 and cases cited. Since the legislature established 15 days as the maximum time that a blood test for syphilis would be recognized under sec. 245.10 (5), we would be reticent to say that that time limit did not also apply to a certificate issued as an exception to that section, for it would clearly be contrary to the established legislative policy.

Answering your third question, again the plain meaning of the words of the statute control. Sec. 245.10 (1) provides that the certificate shall set forth that such person is free from all venereal diseases "so nearly as can be determined by a thorough examination and by the applica-
tion of the recognized clinical and laboratory tests of scientific search, when in the discretion of the examining physician such clinical and laboratory tests are necessary." It is clear that the examining physician must certify that he believes the male applicant to be free from all venereal diseases, and it rests in his discretion whether or not he will so certify by a physical examination alone or whether he will use the "microscopical examination for gonococci" or other "recognized clinical and laboratory tests of scientific search" specifically referred to in the statute. The physician is not obliged to resort to other than the physical examination if he believes it alone is sufficient to certify that the applicant is free from all venereal diseases, but the statute makes it clear that clinical and laboratory tests should also be used when, in the discretion of the physician, they are necessary. We can add nothing further to the words of the statute.

RGT

Highways and Bridges—Highway Commission—Counties—Acquisition of Lands—In state highway acquisition cases, counties may be reimbursed by state for expenses of highway committee members at customary rate established by county board.

Expenses of county highway committee are governed by sec. 83.015 (1), Stats.

When committee members are on salary basis, county may be reimbursed by state at per diem rate of $8.

JAMES R. LAW, Chairman,
State Highway Commission.

May 20, 1947.

You have asked for our interpretation of the term "customary expenses of the county highway committee" as used in ch. 76, Laws 1947, which amends the present sec. 84.09 (4), Stats., to read as follows:

"The cost of the lands and interests acquired and damages allowed pursuant to this section, expenses incidental thereto and the customary per diem (or if on an annual
salary, a per diem not to exceed the lawful rate permitted for members of county boards) and expenses of the county highway committee incurred in performing duties pursuant to this section shall be paid out of the available improvement or maintenance funds."

In our opinion the construction of this term is controlled by the provisions of sec. 83.015 (1), Stats., which establishes the authority of the county to control the compensation and expenses of the highway committee. The applicable portion of such subsection reads:

"** The members of such committee shall be reimbursed for their necessary expenses incurred in the performance of their duties, and shall be paid the same per diem for time necessarily spent in the performance of their duties as is paid to members of other county board committees, not, however, exceeding $500 for both per diem and expenses to any member in any year. A different amount may be fixed as a maximum by the county board."

Prior to the amendment of the statute by sec. 89 of ch. 334, Laws 1943, it used the phraseology "actual and necessary expenses." We do not consider that the deletion of the word actual has made any substantial change in the interpretation to be applied to the section.

In our opinion the expenses allowable under this section would include necessary travel expenses, including either reimbursement for train or bus fares or a proper allowance for the use of a personal automobile, expenses for meals, hotel bills, or other necessary incidental expenses arising out of the performance of the duties of the committee. Such expenses in the sum in which they are allowed to members of the highway committee in cases where the county would bear the burden of the expenses, are the customary expenses for which the county may obtain reimbursement under sec. 84.09 (4).

Referring now to the specific section numbers of the statutes as to which you have raised a question, we hold as follows:

Subsection 14.71 (6) (f) does not apply to county board members for the reason that a prior specific reference to county board members in the subsection as created by ch. 373, Laws 1931, was stricken by ch. 133, Laws 1945.
Section 59.03 (2) (f) applies only to services as a member of the county board and not as a member of any committee. This is indicated by the statement in the first sentence that the per diem is paid “for each day he attends a meeting of the board” and by the reference in the same subsection to the fact that services as a member of a committee are controlled by sec. 59.06.


Section 59.15 states by its terms that it applies to persons other than “county board members and circuit judges.” This exception is contained both in subsections (1) and (2), and subsection (2) states the power thereby conferred shall control over subsection (3).

Answering now your specific inquiries, we see no reason why expenses of a highway committee member who has used an automobile in county service should not be reimbursed to the county by the state at the rate customarily allowed by the county when the county bears the expense, whether or not the member owns the car or has borrowed or rented it from some fellow employe. Since none of the above cited statutes controls, this rate may be established by the county board. This allowance for the use of the car may properly be construed to be the necessary expense of operation which, as a matter of common knowledge, is greater than the actual outlay for gasoline and oil. Further, if the county, in lieu of paying its committee members allowances for the use of their personally owned automobiles, furnishes an automobile to be used by them and pays the expenses of operation thereof, it is entitled to reimbursement at the same rate under sec. 84.09 (4) as amended. Such charge is covered by the proviso for expenses incidental to acquisition. In this connection, it is pointed out in accordance with the opinion in XXVII Op. Atty. Gen. 851, that committee members are not entitled to a “mileage” allowance. Mileage has been defined as special compensation for the trouble and expense of traveling. If several committee members travel in one car, only the owner thereof is entitled to reimbursement at the customary rate set by the county for the highway committee.
The maximum lawful rate per diem permitted for members of county boards is $8. Accordingly, this per diem should be allowed in the case of those county boards that are on an annual salary basis, pursuant to sec. 59.03 (2) (f). In the absence of other statutory direction, of which we are able to find none, the same maximum permitted rate of $8 would apply in counties with a population in excess of 250,000.

Sec. 83.015 (1) (a) provides the highway committee shall receive the same per diem as is paid to other county board committees and states that it applies unless otherwise provided in (b). Paragraph (b) provides for number of members, manner of appointment, and term of membership in counties having a population over 200,000 but says nothing as to salary or per diem. Hence, the salary provision of subsection (a) must control by reference. However, in a county in the range 200,000 to 250,000, which has been put on a salary basis by board action, and in all counties over 250,000 which are on a salary basis by virtue of sec. 59.03 (1), no committee members are entitled to a per diem. For this reason, the parenthetical expression in sec. 84.09 (4), viz. (if on an annual salary, a per diem not to exceed the lawful rate permitted for members of county boards) determines the amount for which the county may be reimbursed, and the permitted rate as above stated is $8.

RGT

Court s—Bastardy—Modification of Judgment—Judgment in illegitimacy action providing for monthly payments entered prior to passage of ch. 259, Laws 1941, cannot be modified.

May 20, 1947.

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

You state that on September 28, 1937, pursuant to agreement admitting paternity, the father of an illegitimate child was ordered to pay $5 per month for the support of the
child. Thereafter in the summer of 1946 the father, being substantially in arrears, entered into a stipulation and agreement that the monthly support be increased to $20 per month, and on September 19, 1946 an order was entered providing that the original judgment filed September 28, 1937 "be and the same is hereby amended to read that the defendant pay the sum of $20 each and every month as and for the support and maintenance of the illegitimate child of the parties * * * said payments to commence as of the date of this order and in all other respects the said original judgment remain the same."

You ask: (1) Did the court have jurisdiction to enter the order of September 19, 1946 which amended the original judgment of September 28, 1937? (2) May the father be punished for contempt for failure to comply with the order of September 19, 1946?

In our opinion the court did not have jurisdiction in 1946 to amend the judgment entered in 1937, and the father may not now be punished for contempt otherwise than for failure to comply with the original judgment. Illegitimacy proceedings of this type are governed by the provisions of ch. 166, Stats. At the time the original judgment was entered in 1937 the applicable statutes provided in part:

"166.11 (1) If the accused shall be found guilty, or shall admit the truth of the allegation, or shall have entered into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity shall have been denied in such settlement agreement, and shall be ordered to pay to the mother or town or county all expenses incurred by them for lying-in and attendance of the mother during the last six months of pregnancy, and also for the care and support of the child, including funeral expenses if child be dead at time of trial, from the time of its birth until the date of the entry of judgment, and to pay to the county the costs of the action, and to stand chargeable for the future support of the child until it shall attain the age of sixteen years. Payments for such future support shall be directed to be made in either of the two following methods: (a) Payment of a specified monthly sum until the child is sixteen years of age; (b) payment of a specified lump sum within sixty days after entry of judgment or in specified monthly instalments subject to the condition that upon default in any instalment the entire amount shall become due and payable. All payments for the future support of the
child shall be paid to a trustee and shall be held by him for the benefit of the child and by him shall be paid to the person having legal custody of the child in such manner and amounts as the court may direct."

"166.12 Whenever the judgment for the future support of the child has not been satisfied by the payment of the lump sum directed to be made, the court shall have continuing jurisdiction over proceedings brought to compel support and to increase or decrease the amount thereof until the judgment of the court has been completely satisfied. Nothing in this section shall in any way be considered a derogation of section 351.30."

Under these statutes it has been held that the court has continuing jurisdiction over the action only when the original judgment provided for a lump sum settlement and that lump sum has not been paid (State ex rel Lang v. Civil Court, 228 Wis. 411; State ex rel. Wall v. Sovinski, 234 Wis. 336, 341) and a judgment or order which attempts to modify a prior judgment providing for monthly payments is void.

By ch. 259, Laws 1941, the controlling statute was amended to read as follows:

"166.12 (1) Whenever settlement has been made pursuant to section 166.11 and the defendant fails to comply with the terms of such settlement, or whenever the judgment or agreement providing for the monthly support of an illegitimate child has been docketed or filed, the court shall have continuing jurisdiction and may, on the petition of the district attorney, the trustee, the mother, the named or adjudicated father, or any other person, agency or institution having legal custody of the child or upon stipulation signed by the defendant and the person, agency or institution having legal custody of the child and approved by the district attorney, revise and alter such judgment or agreement respecting the amount of support and the payment thereof and in its discretion may provide for or increase or decrease the amount of future support, and may make such further judgment or order as the circumstances of the parties require."

Under this statute the court now has continuing jurisdiction and control over judgments and the right to modify at any time. However, these statutes bear no indication on their face that they are to operate retrospectively, that is, to authorize modification of judgments previously ex-
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isting, and in the absence of such declaration of legislative intent none can be presumed.

Further, it is questionable whether the statute could constitutionally be given such retrospective effect. A statute which annuls or sets aside a final judgment of a court of competent jurisdiction and defeats rights thereby vested is void. Mills v. Charleton, 29 Wis. 400. While the constitutional issue was not raised in this case, as the defendant consented to the entry of the modifying order, it is clear that parties cannot by stipulation confer jurisdiction on the court when the court has no jurisdiction of the subject matter of the action. 60 C. J. 58; 21 C. J. S. 128.

Since illegitimacy actions are purely statutory and the courts have only such jurisdiction in such actions as is conferred by statute, State ex rel. Wall v. Sovinski, 234 Wis. at 341, it seems clear that this jurisdiction cannot be extended by any stipulation of the parties.

You do not raise the question whether the stipulation between the parties might be enforceable as a contract. Illinois Steel Company v. Warras, 141 Wis. 119. However, on the facts you have stated there does not seem to be any change in the position of the parties in reliance on the stipulation so that the status quo cannot be re-established; and the stipulation does not come within the rule in the Illinois Steel Company case.

RGT

Municipalities—Airports—Wisconsin cities, villages, towns and counties have authority under sec. 114.11, Stats., to construct, maintain and operate airports acquired subsequent to January 1, 1940.

Said units have authority to issue bonds for airport development.

May 22, 1947.

State Aeronautics Commission.

You have asked whether sec. 114.14 (1) of the Wisconsin statutes prevents the owners of public airports (we assume you mean Wisconsin cities, villages, towns or coun-
ties) from constructing, maintaining and operating airports acquired subsequent to January 1, 1940.

Sec. 114.14 (1) reads:

"The governing body of a city, village, town or county which has established an airport or landing field, or landing and take-off strip, and acquired, leased or set apart real property for such purpose, prior to January 1, 1940, may construct, improve, equip, maintain and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance and operation thereof in any suitable officer, board or body of such city, village, town or county. The expenses of such construction, improvement, equipment, maintenance and operation shall be a city, village, town or county charge as the case may be. The governing body of a city, village, town or county may adopt regulations, and establish fees or charges for the use of such airport or landing field, or may authorize an officer, board or body of such village, city, town or county having jurisdiction to adopt such regulations and establish such fees or charges, subject however to the approval of such governing body before they shall take effect."

The phrase "prior to January 1, 1940" was added to the above subsection by ch. 269, Laws 1943, when subsec. (2) was added to the same section to provide for operation and management of airports by airport commissions. Your concern is whether alteration of subsec. (1) of sec. 114.14 by the 1943 legislature so as to apply in terms only to airports, landing fields and landing and take-off strips established prior to January 1, 1940 has removed from cities, villages, towns and counties the authority to manage and operate airports acquired thereafter.

The general authorization for counties, cities, villages and towns "to acquire, establish, construct, own, control, lease, equip, improve, maintain and operate" airports or landing fields or landing and take-off strips is contained in sec. 114.11 of the statutes. Both secs. 114.11 and 114.14 were originally enacted by ch. 348, Laws 1929. As then enacted sec. 114.11 contained a general grant of power, whereas sec. 114.14 was concerned primarily with the prescription of the method of management and operation of facilities established under the first section. While sec. 114.14 has been more extensively amended than sec. 114.11, we believe the purposes of the two sections have not been altered; and
that sec. 114.14 is not intended to define the powers of counties, cities, towns and villages nor to derogate from the power granted in sec. 114.11, but that even as amended it is concerned primarily with the method of management and operation by those units.

The apparent discrepancy in sec. 114.14 since the enactment of ch. 269, Laws 1943, is probably due to the history of the enactment in which the original plan proposed to the legislature was twice altered before it was adopted. The law was enacted from Bill 123, S. As originally introduced that bill proposed to make it mandatory for all cities, villages, towns or counties with a population of less than 500,000 to manage and operate their airport facilities by means of an airport commission. A substitute amendment was adopted (1, S.) to make such method of management and operation mandatory only as to facilities acquired after January 1, 1940 and to leave it optional with the county, city, village or town whether facilities acquired prior to that date should be operated by the governing body, some other officer or board, or an airport commission. Substitute amendment 1, S. contained a proposed subsec. (4) to sec. 114.14 reading:

“All airports, landing fields and landing and take-off strips established and operated by a city, village, town, county or a union of them, after January 1, 1940 shall be managed in the manner specified in subsecs. (2) and (3).”

The above quoted subsection was stricken from the bill by amendment 1, S. to substitute amendment 1, S., which also struck from one of the preceding subsections a reference to the date, January 1, 1940, but neglected to strike the reference from subsection (1). The terms of sec. 114.14 as amended, therefore, authorize the governing bodies of cities, villages, towns or counties to manage and operate facilities acquired prior to January 1, 1940, either directly or through any suitable officer or board and authorize them to vest the operation of airports in airport commissions, but make no express provision for the operation of landing fields and landing and take-off strips acquired after January 1, 1940 nor for operation of airports acquired after that date except through airport commissions. It
seems clear, however, from the history of the enactment that the failure to remove the phrase “prior to January 1, 1940” from the first subsection was an oversight and that the intent of the legislature was to prescribe the details of management and operation through an airport commission but to leave to the governing bodies of the units owning the facilities the option to decide whether that method should be utilized or some other.

It is our opinion that sec. 114.11 contains an unequivocal grant of authority for counties, cities, villages and towns to establish and operate airports, landing fields and landing and take-off strips, and that sec. 114.14 was not intended to deprive them of such power nor to restrict it, but that the latter section is concerned solely with the method of management and operation.

You have also asked whether the existing Wisconsin statutes authorize cities, villages, towns and counties to issue bonds for airport development. All of the above named units are authorized to borrow money and issue bonds “to acquire sites for airports or landing fields and to construct hangars, buildings, runways and other equipment and appurtenances necessary for the operation and maintenance of same.” Such authority is contained with respect to counties in sec. 67.04 (1) (k); with respect to cities in sec. 67.04 (2) (s); with respect to villages in sec. 67.04 (4) (a); and with respect to towns in sec. 67.04 (5) (n).
Counties—Contracts—Public Works—Bids—Sec. 59.07 (4) (c) requires that all contracts for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of supplies or material of any kind whatsoever by a county, be let by competitive bidding as provided by sec. 66.29, where the estimated cost exceeds $1,000, excluding the highway contracts mentioned in said sec. 59.07 (4) (c).

The fact that the contracts are to be entered into by the board of trustees of a county institution appointed under sec. 46.18 would not justify disregarding the requirements of sec. 59.07 (4) (c).

May 22, 1947.

FRED G. DICKE,
District Attorney,
Manitowoc, Wisconsin.

You advise that your county proposes to repair certain county buildings not under jurisdiction of the county highway committee, the cost of labor and materials for which will exceed $1,000 by a substantial amount, and ask the following questions:

1. Does sec. 59.07 (4) (c) require the county to call for competitive bids and let the contract for the necessary materials and labor as provided by sec. 66.29?

2. If question 1 is answered “yes,” would the fact that the contracts are to be entered into by the board of trustees of a county institution appointed under sec. 46.18 result in a different answer?

Your first question requires an interpretation of sec. 59.07 (4) (c) which reads as follows:

“All public work, of the kinds mentioned in section 66.29 (1) (c), where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bidder, such contract shall be let, made and entered into pursuant to and in accordance with section 66.29. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make.”
Section 66.29 (1) (c) which is referred to in the foregoing subsection reads as follows:

"The term 'public contract' shall mean and include any contract for the construction, execution, repair, remodeling, improvement of any public work, building, furnishing of supplies, material of any kind whatsoever, proposals for which are required to be advertised for by law."

As indicated in the opinion of this department dated March 29, 1946 which appears in XXXV Op. Atty. Gen. 88, doubt as to the exact meaning of sec. 59.07 (4) (c) arises when the foregoing subsections are considered together. In that opinion it is stated:

"There are at least three possible constructions of sec. 59.07 (4) (c). The first is that all contracts for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of supplies or material of any kind whatsoever must, where the cost will exceed $1,000, be let by competitive bidding as provided by sec. 66.29 (1) (c), except in case of highway contracts mentioned in the last sentence. The second is that the statute in no event requires competitive bidding unless the contract involves what falls within the designation 'public work.' The third is that the statute requires competitive bidding only in cases involving public works of the kinds mentioned in sec. 66.29 (1) (c), proposals for which are required to be advertised for by some other provision of law."

In the opinion cited it was not necessary to determine which of the three possible constructions of sec. 59.07 (4) (c) was the proper one. Your first question makes it necessary to now answer that question.

After considering the legislative history of sec. 59.07 (4) (c) which was created by ch. 456, Laws 1945, as well as its context, we are of the opinion that the proper construction of that subsection is to the effect that all contracts for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of supplies or material of any kind whatsoever by a county, must be let by competitive bidding as provided by sec. 66.29 where the estimated cost will exceed $1,000. Highway contracts which the county highway committee is authorized by law to let or make are, of course, exempt.
Ch. 456, Laws 1945, had its origin as Bill 74, S. The original bill read as follows:

"All contracts and purchases for or on behalf of the county for construction, repairing, remodeling or improving of county buildings, grounds and other public works, and for fuel, supplies, furnishings, furniture, machinery, material and equipment whatsoever, in any estimated amount of $1,000 or more shall be let, made and entered into pursuant to and in accordance with the provisions of section 66.29. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

On March 14, 1945, substitute amendment 1, S. was offered, reading as follows:

"All public work, the estimated cost of which will exceed $1,000 shall be let by contract to the lowest responsible bidder, such contract shall be let, made and entered into pursuant to and in accordance with section 66.29, provided however, that no bids shall be rejected except by a vote of at least two-thirds of the members elect of the county board. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

On May 3, 1945, amendment 1, S. to substitute amendment 1, S., was offered and adopted in the senate. The senate then adopted substitute amendment 1, S. as amended and sent the bill to the assembly. After adoption of amendment 1, S. to substitute amendment 1, S. the bill as sent to the assembly read as follows:

"All public work, the estimated cost of which will exceed $1,000 shall be let by contract to the lowest responsible bidder, such contract shall be let, made and entered into pursuant to and in accordance with section 66.29. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

Up to this time it is not difficult to follow the changes made in the bill and determine the exact effect of each change. However, on June 1, 1945 the assembly adopted amendment 1, A., the effect of which was to insert after the words "public work" in the first sentence of the bill as received from the senate, the words "of the kinds mentioned
in section 66.29 (1) (c)" and the bill as thus amended was later concurred in by the assembly. This amendment was subsequently concurred in by the senate and thereafter became law in the form in which it now appears.

The difficulty in determining the proper meaning of sec. 59.07 (4) (c) arises out of the adoption of the assembly amendment. Obviously the legislature had some purpose in adopting such amendment, and in construing sec. 59.07 (4) (c) such purpose must be discovered, if possible, and be given effect.

It is very obvious that by adopting said amendment the legislature very definitely indicated that it did not intend that this subsection provide that competitive bidding would be required only in cases involving "public work," for the reason that the bill as received from the senate clearly so provided but in such form was not acceptable to the assembly and the assembly amendment referred to was thereafter adopted. It therefore becomes necessary to eliminate the possibility that said subsection should now be construed to require competitive bidding only where "public work" is involved, which is the second possible construction referred to in the opinion in XXXV Op. Atty. Gen. 88.

It also cannot be said that the legislature intended that this subsection be construed to mean that competitive bidding is required in cases involving public work of the kind mentioned in sec. 66.29 (1) (c), proposals for which are required to be advertised for by some other provision of law, for the reason that if such a construction were to be adopted the legislature would in enacting said subsection have accomplished exactly nothing. This subsection was adopted following the case of Cullen v. Rock County, 244 Wis. 237, which held that under the law as it then existed, there was no statute which required competitive bidding in a case where a county proposed to erect certain buildings. In that case specific reference was made to secs. 59.07 (4) and 66.29 (1) (b) and (c). It is reasonable to suppose that sec. 59.07 (4) (c) was enacted to fill, in part at least, the omission in the statutes made apparent by the Cullen case. If sec. 59.07 (4) (c) were to be construed in this manner suggested earlier in this paragraph the same result would have to be reached as was reached in the Cullen case and
the effect would be to write this subsection off the statute book as a nullity, since there is no other statute which would require competitive bidding. This of course cannot be done, as the legislature obviously intended to accomplish something by the enactment of this subsection by ch. 456, Laws 1945.

The only remaining alternative is to construe this subsection as meaning that all contracts for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of supplies or material of any kind whatsoever by a county, must be let by competitive bidding as provided by sec. 66.29 where the estimated cost exceeds $1,000, excluding the highway contracts therein mentioned. This is the only way effect can be given to the assembly amendment to which reference has been made. It treats the reference to sec. 66.29 (1) (c) as one intended to describe the nature of the public work referred to, which is in line with the language employed in sec. 59.07 (4) (c). It is there provided at the outset “all public work, of the kinds mentioned in section 66.29 (1) (c).” In other words, sec. 66.29 (1) (c) should be referred to to determine the various types or kinds of activity which are to be considered as falling within the words “public work” as used in sec. 59.07 (4) (c), and by referring to said sec. 66.29 (1) (c) it will be noted that it includes “any contract for the construction, execution, repair, remodeling, improvement of any public work, building, furnishing of supplies or material of any kind whatsoever.”

The fact that the contracts to which you refer are to be entered into by the board of trustees of a county institution, appointed under sec. 46.18, would not justify disregarding the requirements of sec. 59.07 (4) (c). Any repair on a county building, whether managed by a board of trustees appointed under sec. 46.18 or not, would fall within the designation “all public work, of the kinds mentioned in section 66.29 (1) (c)” as construed herein, and where the estimated cost exceeds $1,000 must be let by contract after calling for competitive bids as provided by secs. 59.07 (4) (c) and 66.29 (1) (c).
Bureau of Purchases—Lease of Office Space—The term “contractual services” as defined by sec. 15.54 (4), Stats., which was sec. 15.26 (4) until renumbered by ch. 9, Laws 1947, does not include a lease of office space for state departments.

In leasing office space for state departments pursuant to power granted by sec. 15.64 (1), which was sec. 15.37 (1) until renumbered by ch. 9, Laws 1947, the director of purchases is not required to call for competitive bids irrespective of the amount of rental called for by the lease. Sec. 15.60 (1), which was sec. 15.33 (1) until renumbered by ch. 9, Laws 1947, has no application in case of such a lease.

Francis X. Ritger,
Director of Purchases.

You ask two questions regarding the matter of leasing office space for state departments as follows:

1. Do such leases fall within the term “contractual services” as defined by sec. 15.54 (4), Stats., which was sec. 15.26 (4), until renumbered by ch. 9, Laws 1947?

2. Where the total rental called for in a lease exceeds $3,000, is the director of purchases required to call for competitive bids in negotiating for and in entering into such a lease for office space?

A lease of office space for state departments does not fall within the term “contractual services” as defined by sec. 15.54 (4), Stats., which was sec. 15.26 (4), until renumbered by ch. 9, Laws 1947. We arrive at such conclusion by following the same line of reasoning as was applied in an opinion to you dated February 25, 1947 appearing in XXXVI Op. Atty. Gen. 75.

The director of purchases is not required to call for competitive bids in negotiating for and entering into leases for office space for state departments irrespective of the amount of rent called for in the lease. The authority of the director of purchases to lease office space for state departments is specifically granted by sec. 15.64 (1) which
was sec. 15.37 (1) until renumbered by ch. 9, Laws 1947. The subsection referred to reads as follows:

"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."

The general rule is that competitive bidding is not required in absence of an applicable constitutional provision, statute, ordinance or other legislative requirement. 43 Am. Jur. (Public Works and Contracts) § 24; Cullen v. Rock County, 244 Wis. 237. There is nothing in sec. 15.64 (1) quoted above which requires the director of purchases to call for competitive bids in leasing office space for state departments. The only other statute which we can find which has a possible bearing on the question is sec. 15.60 (1) which was sec. 15.33 (1) until renumbered by ch. 9, Laws 1947, and which reads in part as follows:

"(1) All materials, supplies, equipment and contractual services except as otherwise provided herein, when the estimated cost thereof shall exceed $3,000, shall be purchased from the lowest responsible bidder, after due notice inviting proposals, except that stationery and printing shall be let to the lowest bidder in all cases. * * *"

A lease for office space would not fall within the designation "materials." Neither could it be classified as "supplies" or "equipment." The term "contractual services" is defined by sec. 15.54 (4) which was 15.26 (4) until renumbered by ch. 9, Laws 1947, and as already stated does not include such a lease. We therefore advise you that sec. 15.60 (1) has no application in the case of a lease for office space for state offices and there being no constitutional provision or other statute which requires competitive bidding in case the director of purchases proposes to lease such space, the director is not required to call for competitive bids in negotiating for and entering into such leases irrespective of the amount of rental called for by the lease.
WET
Counties—Public Assistance—Old-Age Assistance Lien—
Under sec. 49.26 (8), Stats., county pension director may release old-age assistance lien so as to permit use of proceeds from sale of realty for maintenance of recipient in county asylum to which he has been committed.

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

You have inquired whether a county pension director has the authority under sec. 49.26 (8), Stats., to release an old-age assistance lien to provide for the recipient's maintenance in a public institution. A specific instance is called to our attention wherein a recipient of old-age assistance has been committed to a county asylum, his real estate has been sold, and the county pension director has been requested to release the lien and allow the guardian to apply the proceeds of the sale to the ward's care in the asylum. As we understand it from your letter the universal practice in such instances has been to release the lien.

Sec. 49.26 (8) reads:

"When the county agency of the lienor county is satisfied that collection of the amount paid as old-age assistance will not thereby be jeopardized or that the release of the lien in whole or in part is necessary to provide for the maintenance of the beneficiary, his spouse, or minor children, or incapacitated adult child, it may release the lien as to all or any part of the real property of the beneficiary, which release shall be filed in the office of the register of deeds of the county in which the certificate is filed. The beneficiary, his heirs, personal representatives or assigns may discharge such lien at any time by paying the amount thereof to the treasurer of the proper county who, with the approval of the county agency, shall execute a satisfaction which shall be filed with the register of deeds."

Where it has been judicially determined that maintenance of an old-age assistance recipient in a county asylum is necessary we can see no good reason why the underscored language of the statute quoted above is not directly applicable, and you are so advised.

WHR
Civil Service—Historical Society—Special research assistants appointed by state historical society are not included in the unclassified service under sec. 16.08 of the civil service act but such positions may be filled under sec. 16.20 (3) relating to the filling of vacancies without examination where exceptional qualifications of a scientific, professional or educational character are required.

May 24, 1947.

CLIFFORD LORD, Director,
State Historical Society.

You inquire whether it is necessary for the state historical society to proceed through the bureau of personnel in filling its special research grants. These grants are for one-year periods and are made only to specially qualified academic personnel. No state funds are involved, payment being made out of the income from private endowments given the society for research purposes. These grants are exactly analogous to and competitive with research fellowships granted by the university of Wisconsin, which fellowships are filled without recourse to the bureau of personnel. The incumbents receive no tenure as the appointments are for one year only and no retirement benefits are involved.

In recent years these appointments have been filled under the exemption provided in sec. 16.20 (3), Stats., upon the recommendation of the society. While no difficulties have arisen as a result of this procedure and the personnel board has always accepted the society's recommendations, it is deemed desirable to ascertain whether or not the present procedure is necessary.

In approaching the answer to this question we wish to acknowledge our indebtedness to you for your research in tracing the history of the employment of the society's staff. It appears that the staff has been largely paid by the state from the outset. The first employees,—corresponding secretary, 1854–1909; librarian, 1865–1909; and assistant librarian, 1881–1909, were paid entirely by the state. At the present time, with the exception of part time student help and research assistants as above noted, every employe is
paid by the state, although at times all or part of the sal-
aries of several individual staff members have had to be
paid from private funds as in 1931 when the state appro-
priation was cut. From a casual examination of the rec-
ords it appears that janitorial and secretarial positions
were under civil service from the beginning of the civil
service law but that the library staff in any library main-
tained wholly or in part at state expense was in the un-
classified service (Laws 1905, ch. 363, sec. 8) as was “the
professional staff, including apprentices and research work-
ers in any library maintained wholly or in part at state
expense” (Laws 1921, ch. 243, sec. 1) and “the professional
staff, including the superintendent, librarians, apprentice
librarians and research assistants in any library or mu-
seum maintained wholly or in part at state expense” (Laws
1929, ch. 465, sec. 2). In 1931 the unclassified service was
largely abolished, although a bill, No. 142, S., has been in-
troduced in the 1947 legislature to reinstate the director,
head librarian and museum head in the unclassified service.

The state historical society of Wisconsin is a private cor-
poration for a public purpose. See State ex rel. Wisconsin
Dev. Authority v. Dammann, 228 Wis. 147, 172. It was
chartered by the legislature on March 4, 1853 (Laws 1853,
ch. 17) to “have perpetual succession with all the faculties
and liabilities of a corporation.” Its constitution states that
“its financial and personnel activities are conducted in ac-
cordance with state law” (Art. I). It is a trustee of the
state and holds all of its property for the state (sec. 44.01,
Stats.). It is governed by a board of curators, of which the
governor, secretary of state, and state treasurer are ex
officio members (sec. 44.01).

The fact that from time to time there has been special
legislation, as above noted, excepting from the classified
service certain members of the professional staff and that
at the present time there is a bill pending in the legislature
to place the director, chief librarian, chief curator and re-
search specialists of the society in the unclassified service
would seem to indicate a legislative intent that employes
of the society are deemed to be in the classified service of
the state except as specifically exempt therefrom.
Sec. 16.08 relating to civil service classifications provides:

"(1) CLASSES. The civil service is divided into the unclassified service and the classified service.

"(2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by:
  "(a) All officers elected by the people.
  "(b) All officers and employes appointed by the governor whether subject to confirmation or not, unless otherwise provided.
  "(d) All presidents, deans, principals, professors, instructors, research assistants, librarians and other teachers, as defined in section 42.20, in the university, state teachers colleges, Stout institute and the Wisconsin institute of technology.
  "(f) All legislative officers.

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

It will be noted that the only research assistants in the unclassified service are those employed in the university, state teachers colleges, Stout institute and the Wisconsin institute of technology (sec. 16.08 (2) (d)). If the legislature had intended research assistants of the state historical society to be placed in the unclassified service it could easily have so provided in sec. 16.08 (2) (d) and its failure to do so gives occasion to apply the rule of statutory construction that the expression of the one results in the implied exclusion of the other—expressio unius est exclusio alterius.

Sec. 16.20 (3) provides:

"In case of vacancy in a position in the competitive division where peculiar and exceptional qualifications of a scientific, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable, and that the position can best be filled by the selection of some designated person of high and recognized attainments in such qualities, the board upon recommendation of the director may suspend the provisions of the statute requiring competition in such case, but no suspension shall be general in its application to such place, and all such cases of suspension shall be reported in the biennial report of the bureau with the reasons for the same."
In the absence of an exemption from the classified service under sec. 16.08 (2) (d) or otherwise, it would appear that you should continue to make the research grants under sec. 16.20 (3) in cooperation with the bureau of personnel.

WHR

Appropriations and Expenditures—Motor Vehicle Department—Radio System—If Bill 291, S. is enacted into law the authority of the motor vehicle department to continue to operate and maintain a system of radio communication or to construct additions to existing facilities will depend upon a specific appropriation of monies for that purpose by the legislature.

June 2, 1947.

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

You request my opinion whether it will be necessary for the legislature to provide a specific appropriation under sec. 20.052, statutes, for the construction, maintenance and operation of a radio communications system by the motor vehicle department, if Bill No. 291, S. is enacted into law.

Bill 291, S. reads as follows:

"Payments from the appropriations made by this section shall be made only on the order of the motor vehicle department. No expenditure shall be made from any appropriation in this section for the installation, operation or maintenance of a radio system to be used in connection with the execution of the functions of the motor vehicle department unless a specific appropriation has been made for that purpose."

Heretofore you have constructed, operated and maintained a system of radio communication in the execution of the functions of your department under chapters 85, 110 and 194 of the statutes out of your general appropriation. The general appropriation under which you are now operating provides, so far as is material here:
"20.052 * * * There is appropriated from the state highway fund to the motor vehicle department:
"(1) On July 1, 1945, $966,450, and annually, beginning July 1, 1946, $841,300 for the execution of its functions under chapters 85, 110 and 194.
"* * *
"(5) Payments from the appropriations made by this section shall be made only on the order of the motor vehicle department."

I rendered an opinion to the senate on May 13, 1947 (XXXVI Op. Atty. Gen. 204) upon a related question, in which it was incidentally stated:

"* * * In the event of the passage of Bill 291, S. * * * the [motor vehicle] department would have no funds for the operation or maintenance of its existing equipment and accordingly would have to discontinue such operations."

I reaffirm that conclusion in answer to your specific question. Your authority under the statutes as now written to allocate such portion of your general appropriation as in your sound judgment and discretion may be necessary for the construction, operation and maintenance of a system of radio communication would be terminated by the proposed statute unless an appropriation were made which specifically provided that the amount thereof be allotted to your department for that purpose. The language of Bill No. 291, S. is so clear that the application of rules or principles of statutory construction is unnecessary.

SGH
Coroner—Jurors’ Fees—Mileage—Coroner’s jurors are not entitled to any compensation for their services since the amendment of sec. 366.14 by ch. 198, sec. 10, Laws 1945.

Coroner on a fee basis is entitled to mileage provided by sec. 366.14 notwithstanding the fact that the county furnishes free transportation in a county owned automobile.

June 2, 1947.

FRANK G. LOEFFLER,
District Attorney,
Wausau, Wisconsin.

You have submitted two questions with reference to coroner’s inquests.

The first question is “whether the compensation to be paid coroner’s jurors is payable at the rate of $2 per day or $4 per day.” Until the enactment of ch. 198, Laws 1945, sec. 366.14, Stats. 1943, provided in part as follows:

“The compensation of jurors and of constables and witnesses at such inquest shall be the same as is allowed for like services in justice court.”

Under that statute the jurors would be paid at the rate of $2 per day, since that is the compensation of jurors in justice court. However, the quoted sentence was deleted from sec. 366.14 by Laws 1945, ch. 198, sec. 10, and a careful search of the statutes fails to disclose any other provision for payment of compensation to coroner’s jurors. It is of course the general rule that one claiming compensation out of a public treasury must show clear statutory authority for its payment. At common law neither coroners, their jurors nor witnesses were entitled to any compensation or mileage for their services. 18 C. J. S. 304—Coroners § 28. Accordingly, coroner’s jurors are entitled only to such compensation as is authorized by statute. 18 C. J. S. 307—Coroners § 28.

The statutes providing for payment to jurors in justice courts and in courts of record make no reference whatever to coroner’s jurors and hence have no application thereto. It is therefore clear that coroner’s jurors are not entitled to any fees or mileage for their services.
Your second question is whether, when the county provides transportation to the coroner in a county owned car, he is nevertheless entitled to his mileage as prescribed in sec. 366.14 which provides as follows:

"The sole compensation of the coroner and deputy coroners for taking inquest or making an investigation to determine the necessity to take inquest shall be $8 for each day and $4 for each half day actually and necessarily required for the purpose, and 10 cents for each mile actually and necessarily traveled in performing such duty; provided, that any coroner or deputy coroner may be paid an annual salary and allowance for traveling expenses to be established by the county board pursuant to section 59.15 which shall be in lieu of any and all fees, per diem, compensation for services rendered."

I assume from your question that the coroner of your county is on a fee basis as provided in the first clause of the above statute.

The question asked is one of considerable difficulty. If the 10 cents per mile is compensation to the coroner, he is obviously entitled to it. If it is a reimbursement for the cost of transportation, then it may well be argued that since the county furnishes the transportation free it is under no obligation to reimburse the coroner for costs which he did not incur. It is my opinion that the mileage allowance is not intended solely to reimburse the coroner for the cost of transportation for the following reasons.

The courts have had considerable difficulty with this question. Some have held that a mileage allowance is intended as a reimbursement for the expenses of traveling and that although an officer may by traveling in a lower style save something out of the flat allowance, nevertheless that is not intended and therefore the saving cannot be regarded as a fee, charge or emolument of his office. U. S. v. Smith, (1895) 158 U. S. 346. But it also appears that if the mileage is deemed to be a reimbursement for travel expense, it covers not only the actual cost of transportation but also meals and lodging procured along the way. State v. Clausen, (1927) 142 Wash. 450, 253 Pac. 805, 807. See also Power v. Choteau County Comm'r's., (1887) 7 Mont. 82, 14 Pac. 658.
On the other hand, it has been held that it is not unusual to make large mileage allowances “to eke out the compensation of officers.” Marioneaux v. Cutler, (1907) 32 Utah 475, 91 Pac. 355, 359. And in that sense so much of the mileage allowance as may be saved by the officer constitutes compensation. Reed v. Gallet, (1931) 50 Ida. 638, 299 Pac. 337, 338.

In Indiana it has been held that a sheriff’s mileage is not a reimbursement of expense at all, but is a fee which he must turn in to the county treasury when he is compensated on a salary basis. Smith v. State, (1907) 169 Ind. 260, 82 N. E. 450, 452; Roberts v. Board of Comm’rs. (Ind. App. 1912) 99 N. E. 1015, 1018.

At any rate, the mileage includes the cost of travel and an officer who is allowed mileage at a flat rate cannot be reimbursed for his actual expenses incurred. Richardson v. State, (1902) 66 Oh. St. 108, 63 N. E. 593, 594. In that case the supreme court of Ohio said that the term “mileage” “is defined in the Century Dictionary as ‘payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over.’ The same definition substantially is found in Bouvier’s and other law dictionaries.”

Whether the mileage allowance is intended solely to reimburse expenses of travel or includes also some element of compensation to the officer must be determined in the light of the conditions existing when the law was enacted. State v. Clausen, (1927) 142 Wash. 450, 253 Pac. 805, 807.

Clearly an allowance of 25 cents a mile could not be justified on the basis solely of reimbursement for expenses and would have to be deemed intended in part as compensation. Under conditions existing today, even 10 cents per mile is clearly excessive if regarded as reimbursement for the cost of transportation alone, and probably was so in 1885 when it was first allowed to justices of the peace for conducting inquests.

By ch. 240, Laws 1885, it was provided that justices of the peace should receive $4 per day and 10 cents a mile for conducting inquests, “which shall be in lieu of all other
compensation." Coroners were inserted into the statute by sec. 4877a, Stats. 1898 (now sec. 366.14). The statute was amended by Laws 1905, ch. 314, sec. 4 to read:

"The sole compensation of justices of the peace and coroner for taking inquest shall be four dollars for each day and two dollars for each half day actually and necessarily required for the purpose and ten cents for each mile actually and necessarily traveled in performing such duty. * * *" (Omitting the clause "which shall be in lieu of all other compensation.") (New matter in italics.)

The history of the statute therefore indicates that the 10 cents per mile allowance was considered by the legislature to constitute "compensation." Undoubtedly it was intended to include also the cost of transportation and other necessary expenses of travel.

For the foregoing reasons it is clear that by furnishing free transportation the county does not give to the coroner an adequate quid pro quo for his 10 cent mileage. To deny him the mileage merely because he accepted free transportation from the county would deprive him of so much of the mileage allowance as would otherwise be available for meals and lodging necessarily incurred by him in the course of his duties, as well as that part of the 10 cents which he could save to "eke out his compensation." You are therefore advised that the coroner is entitled to mileage notwithstanding the fact that transportation is furnished him by the county.

WAP
Taxation—Income Tax Apportionment—Statutes—Construction—Provision in sec. 71.18 (4), Stats., for deduction of claim for overpayment of income tax distribution in the apportionment next following the allowance thereof is directory only and deduction may be made in subsequent apportionment.

June 2, 1947.

WISCONSIN DEPARTMENT OF TAXATION.

You have requested an opinion as to whether in sec. 71.18 (4), Stats. 1945, relating to the return of overpayment of income tax distributions to counties, cities, towns and villages, the language that if a claim therefor is not paid collection thereof shall be effected by your department deducting it from "the June 1 apportionment of income taxes nearest following the allowance of the adjustment," limits your authority to the next apportionment or is directory only.

The inquiry is occasioned by the fact that on October 1, 1945 you approved a claim by town A against city B. The town has been unsuccessful in getting city B to pay the claim so in February of this year requested you to effect collection by making deduction under sec. 71.18 (4), Stats. If this language limits your authority, then you were restricted to making the adjustment from the June 1, 1946 apportionment and cannot do so in this year's apportionment.

As suggested by you a claim might be allowed late in May of a year and there would not intervene thereafter sufficient time to determine that the debtor county, city, town or village would not voluntarily pay it before the June 1 apportionment of that same year. Also there is always the possibility of omission of the deduction in an apportionment through error. The language of the statute in providing for such deduction "in the event that such overpayment has not been settled or paid voluntarily" would seem to indicate that such voluntary payment is expected and this method of collection by deduction is provided only to take care of the situation where the matter is not taken
care of by voluntary payment between the parties, thereby assuring correct distribution. This method of collection was intended as a benefit to the claimant unit and not as a restriction on it. That the purpose thereof was the providing of an effective means of assuring collection of overpayments is shown by the next to the last sentence in the subsection which provides that if the initial deduction or withholding is not sufficient so there is still a balance due, then you shall continue to "withhold all or a part of the apportionment due on each succeeding June 1 until the balance of the overpayment has been adjusted."

There is no universal test by which it can be determined whether a statutory provision is mandatory or directory. However, in State v. Industrial Comm., (1940) 233 Wis. 461, 289 N. W. 769, our court said:

"* * * as a rule a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.* * *" (p. 466)

and then quoted with approval from Appleton v. Outagamie County, (1928) 197 Wis. 4, 220 N. W. 393, as follows:

"* * * when there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be so done it may work an injury or wrong; nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all,—the courts will deem the statute directory merely."

In 50 Am. Jur. 57 it is said:

"* * * On the other hand, where a construction which would impose an absolute duty would clearly militate against the interest of those in whose interest the law was enacted, the courts will construe the law as permissive merely. Moreover, the rule favoring the construction of a statute as mandatory, where the power or duty to which it relates is for the security and protection of private rights of third persons, has been regarded as having no applica-
tion to a case involving a person having no legal right to be protected and enforced by such construction. To call for an interpretation of the statute as mandatory, the protection must be substantial, and must be intended as a guard of rights or property."

It is well said in Sutherland on Statutory Construction, at page 575:

"* * * Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute."

An interpretation of the language in question as a limitation instead of as directory in nature would be contrary to the purpose of the subsection, which was to provide a sure means of return of overpayments, and would make this statute operate against the interest of the county, city, town or village properly entitled to the amount involved and in whose interest this provision is designed. It is therefore our opinion that the language in question is directory only and that you may make proper deduction in a succeeding apportionment.

HHP
Prisons and Prisoners—Prison Labor—Good Time Credit

Prisoner committed to county jail at hard labor who performs services around the jail and court house such as cutting the lawn, shoveling snow, etc., is entitled to good time credit of one-fourth of his sentence under sec. 56.08 (4), Stats. This statute applies whether or not the prisoner has dependents.

June 2, 1947.

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

You request an opinion on the following question:

“A question frequently arises as to whether or not prisoners committed to the county jail and who perform certain services around the jail and court house, such as cutting lawn, shoveling snow, etc., are entitled to be credited with one-fourth of the time of their sentence, as set out in section 56.08 (4) of the Wisconsin statutes.”

You state that it is clear that if such prisoner has dependents and is under contract of employment he is entitled to this credit, but you express a doubt as to whether the same applies where the prisoner has no dependents or his dependents are not in need and the services are such as are described in your above quoted question.

The statute involved, sec. 56.08, is known as the Huber law. Subsection (1) provides in part as follows: “Any person convicted of any offense and sentenced to imprisonment in the county jail or in a workhouse or house of correction in counties where such institutions may exist, shall be committed to hard labor,” but the court may order all or part of the imprisonment to be in actual and ordinary confinement. “Every such prisoner, for such period of time as he may have been sentenced to hard labor, shall be required to do and perform any suitable labor provided for by the sheriff anywhere within said county.”

It follows that the law applies to anyone sentenced to the county jail, unless the court expressly orders otherwise at the time of sentencing. XXVIII Op. Atty. Gen. 71.
Subsection (6) as amended by Laws 1945, ch. 185, sec. 5, provides in part: "A single prisoner without dependents shall be entitled to his earnings less a charge for such housing and meals, if any, as may be furnished him." This shows that the statute applies to persons without dependents as well as to those with dependents, in accordance with an earlier opinion rendered by this office. XXIV Op. Atty. Gen. 380.

Under subsec. (5) the sheriff has a duty to make written contracts, subject to the approval of the court, for the employment of all such prisoners "if not employed in doing work for the county." Subsection (6) provides in part that "if the prisoner worked for the county the sheriff shall issue and deliver * * * an order on said county, for an amount equal to one dollar per day for the number of days of such labor." Subsection (4) provides in part as follows: "Every prisoner employed under the provisions of this section who shall perform faithfully all the duties assigned to him shall, for willingness, industry, and good behavior in such performance, be credited with one-fourth of the time of his sentence."

The prisoner referred to in your letter was, I assume, committed to hard labor. The sheriff had a duty to furnish him with such labor and pursuant to that duty employed him in working around the jail and court house, which would be work for the county for which he would be entitled to payment at the rate of $1 per day. The prisoner was therefore "employed under the provisions of this section" and performed faithfully all the duties assigned to him. He is therefore clearly entitled to the diminution of his sentence for good behavior as provided in the statute. WAP
Landlord and Tenant—Public Welfare Department—
Sec. 45.25, Stats., does not authorize perpetually renewable lease of Wisconsin memorial hospital to federal government.

June 2, 1947.

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

You have called to our attention a certain lease entered into by the state board of control and the United States of America in 1936 whereby the board leased to the federal government the Wisconsin memorial hospital apparently pursuant to sec. 45.25 (4), Stats., which then read substantially as it does now. This lease was originally for the term beginning January 1, 1937 and ending June 30, 1937 and it contained a paragraph reading as follows:

"5. This lease may, at the option of the Government, be renewed at an annual rental of ONE DOLLAR ($1.00)—and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least one month before this lease would expire; Provided that no renewal thereof shall extend the period of occupancy of the premises beyond the day of (Renewable indefinitely)."

The state department of public welfare has notified the veterans administration that it is interested in the re-acquisition and use of the property and may want to discontinue the lease as of July 1, 1947. The veterans administration has elected to stand on the provisions of paragraph 5 of the lease quoted above and has indicated that it desires to continue occupancy of the hospital for a period of at least a year from July 1, 1947.

We are asked whether the state must consent to the renewal of the lease indefinitely if the veterans administration so desires.

On January 10, 1936 this office rendered an opinion to the state board of control to the effect that under sec. 45.25, Stats., the state board of control could enter into a leasing arrangement with the federal government for the use of the Wisconsin memorial hospital in caring for veterans
eligible for treatment there. XXV Op. Atty. Gen. 12. However, we were careful to state at page 14:

"We, of course, do not want to be understood as placing our approval upon any particular lease in advance of an opportunity to examine the same."

So far as we know this lease was never submitted to us for examination and approval and it is unlikely that we would have approved any lease of state property for $1 a year with a provision for indefinite renewal.

Aside from the fact that it is highly questionable that the legislature ever intended to authorize any such type of lease in enacting sec. 45.25, there is the cardinal principle that in the creation of terms for years the term must be certain, that is, there must be certainty as to the commencement and duration of the term. 32 Am. Jur. 77. In Norman et al. v. Morehouse et al. (1922, Tex. Civ. App.), 243 S. W. 1104, the agreement was that the defendants should have a lease on the premises in question so long as either of the defendants engaged in the business of making and repairing harnesses, shoes, etc. It was held that where a lease for years is to be made good by reference, the reference ought to be to a thing that has expressed certainty at the in time the lease is made and not to a possible or casual certainty and that since the reference was to an event that had no certainty at the time of the contract the defendants' tenancy would be terminable at the will of the lessor. See also 1 Tiffany, Landlord & Tenant, 57 and following, to the effect that the duration of the term must appear with certainty from the lease creating it and that otherwise it is insufficient to create a term of years and the person entering thereunder will be either a tenant at will or a periodic tenant.

In view of the fact that the lease contemplates annual terms at a rental of $1 each it would appear that this lease may be considered as creating a periodic tenancy on a year to year basis and that at the election of the state the same might be terminated at the end of any annual period. If, on the other hand, it were regarded as creating merely a tenancy at will such tenancy might be terminated in the
manner provided by sec. 234.03 by giving at least 30 days’ notice in writing to the tenant requiring removal from the premises.

In any event you are advised that in the absence of language in the lease evidencing intention to convey a freehold estate to the federal government the lease is not to be construed as a perpetually renewable one because to do so would result in violence to the principle that the lease must have certainty as to duration either by its terms or by reference to some collateral fact or event having in itself certainty as regards duration or time of happening.

WHR

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Banks and Banking—Banking Commission—Retirement of Debentures—Under existing statutes the banking commission has no power to compel a state bank to retire debentures issued by it.

June 3, 1947.

BANKING COMMISSION OF WISCONSIN.

Attention James B. Mulva, Chairman.

You advise us as follows: The banking crisis of 1933 gave rise to the enactment of the federal deposit insurance law. 48 Stat. at Large 168, 969. This was but a temporary measure and it set up a temporary federal deposit insurance fund. The Federal Deposit Insurance Corporation was set up and a permanent fund established by enactment of the banking act of 1935 (49 Stat. at Large 684) effective August 23, 1935.

In 1933 and 1934 many state banks were required to obtain additional capital. Such capital was obtained from the Reconstruction Finance Corporation and others who purchased from the bank certain obligations of the bank denominated debentures. The debentures purchased by the Reconstruction Finance Corporation were in some cases called “A” debentures and those purchased by others were commonly referred to as “B” debentures. The “B” deben-
tures were by their terms subordinate in all respects to the "A" debentures. See *In re Farmers Bank of Lone Rock*, 248 Wis. 269.

You have also furnished us with a copy of a form of a "B" debenture. Among other things it is provided that such "B" debenture is payable only out of earnings. Provision is also made for the creation of a sinking fund for the retirement of the "B" debentures out of net profits and for their retirement as therein provided when the sinking fund reaches a certain size.

The banking act of 1935 inserted a provision into the federal deposit insurance law not contained in the previous law (12 USCA, § 264(v) (4)) which provides *inter alia* as follows:

"Unless, in addition to compliance with other provisions of law, it shall have the prior written consent of the Corporation, * * * no insured State nonmember bank (except a District bank) without such consent shall reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures."

The term "District bank" is defined as any state bank operating under the code of law for the District of Columbia so the foregoing exception would not apply here. 12 USCA, § 264 (c) (3).

You further advise that at the present time there are a number of state banks which are now members of the Federal Deposit Insurance Corporation and which still have debentures outstanding which they wish to retire, but that the Federal Deposit Insurance Corporation will not consent to the retirement of any debentures issued prior to 1935. You also state: "From our viewpoint, these debentures are not necessary and should be retired because they are causing an additional financial burden which is unnecessary, most of them bearing interest at the rate of 3 per cent."

You ask our opinion on the following question: Can the Federal Deposit Insurance Corporation keep a bank from retiring debentures taken prior to the enactment of 12 USCA, § 264 (v) (4) when the Wisconsin banking com-
mission is of the view that the assets of said bank are sound and its management is of the best?

The foregoing presents a number of legal questions. The only questions that we can see which involve the banking commission and which are therefore the only questions on which we can properly give an opinion are: (1) What right has the banking commission to compel a state bank, such as referred to in your inquiry, to retire the debentures therein mentioned; and (2) if the banking commission has such power, what would be the result in event the commission ordered the bank to retire its debentures when the Federal Deposit Insurance Corporation, acting pursuant to the provisions of 12 USCA, § 264 (v) (4), refuses to grant its consent to such retirement.

The banking commission is, of course, an administrative body. As such it has only such power as is expressly granted to it by statute or as may necessarily be implied from express powers granted. American Brass Co. v. State Board of Health, 245 Wis. 440 at 448. We have been unable to find any statute which gives the commission power to compel a state bank to retire debentures issued by it. The only statute which you have referred to is sec. 220.075 and it is plain that this section does not confer such power. This section fixes a minimum ratio which the capital of a bank must bear to deposits, and in event the ratio falls below that fixed by this section for a certain period it requires that capital or surplus be increased so as to bring the ratio between capital and deposits over the minimum within one year after receiving notice from the banking commission. There is nothing in this section that provides for a reduction of capital in event the ratio exceeds the minimum fixed therein, whether by order of the commission or otherwise. We therefore advise you that under the statutes of this state as they now exist the banking commission has no power to compel a state bank to retire debentures issued by it. This makes it unnecessary to answer the second question referred to.

In event a bank desires to retire debentures issued by it and cannot obtain consent from the Federal Deposit Insurance Corporation, any resulting controversy would be one
between the bank and the corporation and hence is one on which we cannot furnish an opinion. XXXV Op. Atty. Gen. 175. Should such a situation arise and the bank involved desire to be advised as to its legal rights, if any, it should consult its own attorney and be guided by his advice.

WET

Automobiles and Motor Vehicles—Licenses and Permits

Motor Vehicle Dealer—Under facts stated the purchase of motor vehicles is held to constitute the purchaser a "motor vehicle dealer" as defined by sec. 218.01, Stats., and accordingly subject to the licensing provisions of that section.

June 4, 1947.

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

You ask my opinion on the following two questions:

1. Is an individual who purchases automobiles in the state of Wisconsin as a representative (agent) of an out of state dealer in motor vehicles subject to the provisions of sec. 218.01, Stats.?

2. Is an individual who purchases motor vehicles in Wisconsin for resale outside the state on his own account and not for others, as a business, subject to the provisions of sec. 218.01, Stats.?

Section 218.01 (2) (a) provides in part as follows:

"No motor vehicle dealer * * * shall engage in business as such in this state without a license therefor as provided in this section. * * *"

Section 218.01 (1) (a) defines a "motor vehicle dealer" to be

"(a) * * * any person, firm or corporation, not excluded by paragraph (b) of this subsection who:

"1. For commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,
“2. Who is engaged wholly or in part in the business of selling motor vehicles whether or not such motor vehicles are owned by such person, firm or corporation.

“(b) The term ‘motor vehicle dealer’ does not include:

1. Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or

2. Public officers while performing their official duties; or

3. Employees of persons, corporations or associations enumerated in subdivisions 1 and 2 of this paragraph, when engaged in the specific performance of their duties as such employees.

4. Sales finance companies or other loan agencies who sell or offer for sale motor vehicles repossessed or foreclosed by them under terms of an instalment contract, or motor vehicles taken in trade on such repossessions.”

The only facts furnished to me are contained in the stated questions. The form of these questions implies, and I so assume for the purpose of this opinion, that excepting the fact that the motor vehicles are disposed of outside the state, all the elements are present which would otherwise subject the individual involved to the licensing requirements of ch. 218, Stats. For example, it is assumed that the purchase transactions are “for commission, money or other thing of value.” It is further assumed that the individual in question purchases the motor vehicles from private owners, as distinguished from buying from duly licensed motor vehicle dealers. It is further assumed that the individual in question is not in any of the classes of persons excluded by paragraph (b) of subsec. (1) quoted above.

I am of the opinion that the individual described in both questions is a “motor vehicle dealer” as defined in sec. 218.01 (1) (a), as quoted above, and is subject to the requirements of sec. 218.01 (2) (a) also quoted. By the plain language of the definition, any one of the acts enumerated is sufficient to render the individual in question a dealer. The acts are enumerated disjunctively. The acquisition of motor vehicles by purchase is sufficient to make the purchaser a dealer, in the statutory sense, without showing how the same were disposed of. Nor does the statute except from its terms any person acting in a representative or agent capacity for an out of state principal. This is a reg-
ulatory statute within the police power of the state to enact. The conduct of the person dealing with the Wisconsin public is the subject of the regulation. It is the possible injury to the public in such transactions that is sought to be prevented by regulatory measures under the licensing law in question. The out of state principal is beyond the regulatory control of the state of Wisconsin. The agent is within its borders and amenable to its laws in the transaction of this kind of business.

Since it is the act of buying motor vehicles which constitutes the individual in question a dealer, it is unnecessary to consider the difference between the methods of disposition of the vehicles outside the state. They are immaterial to my conclusion.

SGH

Schools and School Districts—Counties—Insurance—County Normal Schools—Joint county rural normal school board under sec. 41.42, Stats. 1945, is without authority to determine that the school property be insured in the state insurance fund under sec. 210.04, Stats. 1945. Such property is owned by the respective counties and the interest of each is only insurable in said fund the same as other property of such county.

June 5, 1947.

MORVIN DUEL,
Commissioner of Insurance.

The board of the Racine-Kenosha rural normal school at Union Grove has indicated its desire to insure the school properties in the state insurance fund under sec. 210.04, Stats., and you request our opinion as to whether the passage of a resolution to that effect by such board is sufficient to authorize such insurance.

This joint county normal school exists and is operated under the provisions of sec. 41.42, Stats. 1945. The site was purchased and the buildings erected with monies appro-
appropriated by the two interested counties and are now owned by them in common. Each county has an undivided interest therein. There is no rural normal school or joint county normal school district which, as in the case of other school districts, exists as a separate or independent governmental unit. Title to the property thus is clearly in the respective counties as the owners thereof.

As respects the interest of each of the counties in the property the situation is the same as where an asylum, sanatorium, poor farm, etc. is operated by a committee, board of trustees, etc. of the county. There is no separate corporate entity independent of the county. Each board, committee, etc. is but an agency of the county, and as pointed out in XXX Op. Atty. Gen. 405, such governing board, committee or officer in charge, under whose supervision the institution or activity is operated or carried on, is not authorized under sec. 210.04, Stats. to make the determination that the properties shall be insured in the state insurance fund.

Accordingly, in order for the interest of Racine county in this joint county normal school property to be insurable in the state insurance fund it would be necessary that the county board of Racine county take proper action. However, the county board could not take action to have only the interest in the school property so insured but would have to take action to insure the county property generally in such fund. It is our opinion that no such general action having been taken by the county board of Racine county the interest of that county in the property is not presently insurable in the state fund.

You advise that Kenosha county has, however, taken appropriate action to insure its property in the state fund. That being true, then the interest of Kenosha county in the school property is insurable only in the state fund and may not be insured by the county in private insurance companies.

HHP
Constitutional Law — Legislature — Municipalities — Impairment of Contracts — Bill No. 391, A. would probably be held invalid if enacted into law.

June 5, 1947.

The Honorable The Assembly.

Your Resolution No. 28, A. requests an opinion upon the constitutionality of Bill No. 391, A. should it be enacted into law.

That bill provides in brief that any contractual restriction on the use of subdivided lands may be continued beyond the contract expiration date by resolution of the governing body of any town, city or village where the lands are located, upon a petition signed by a majority of the owners of the land affected; and that upon the enactment of such resolution and its filing in the office of the register of deeds the restriction shall continue for the same length of time as was provided in the original contract by which it was created. The bill apparently contemplates that such a resolution will give the restriction only the force of a contract rather than of a law, since no penalty is provided for a violation. It would appear that a restriction continued by resolution could be enforced only in the same manner as it was enforceable prior to the enactment of the resolution.

The practical effect to be accomplished by such a law would be to give a restriction the same force and effect when adopted by the governing body of the town, city or village as it would have if agreed upon voluntarily between all of the parties affected. It would impose upon the minority property owners not signing the petition the obligation of a contract to which they did not agree.

One of the principal objections to Bill No. 391, A. as applied to existing subdivisions is that it violates the provision of art. I, sec. 10 of the United States constitution which provides: "No state shall * * * pass any * * * law impairing the obligation of contracts."

The restrictions which are incorporated in deeds for the protection of property owners in any given plat are generally covenants running with the land and a part of
the contractual rights of the owner derived from his vendor and enforceable mutually by all the property owners.

Such contract by its terms is generally drawn to run for a specified period. Any attempt by governmental action to allow certain of these owners to extend the term of the contract even though such extension be sanctioned by the governing municipality is an impairment of the contractual rights of the persons not consenting. The right to have the initial restrictions terminated at a given date is a valuable right which cannot be so impaired. Warranties of clear title may be construed to cover not only the continuance of restrictions but the free use of property upon expiration of a restriction. (Banking moratorium laws where 90 per cent of depositors could agree on plan of liquidation were emergency legislation.)

In Stierle v. Rohmeyer, (1935) 218 Wis. 149, 260 N. W. 647 our supreme court held invalid a statute which provided procedure to subject property covered by a chattel mortgage to the mortgage debt without the consent of the mortgagor, and which provided that the mortgage debt should be deemed fully satisfied upon the failure of the mortgagee to comply with certain statutory provisions. The court there said, loc. cit. 218 Wis. 155:

""* * * There is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights."

It was again said, loc. cit. 218 Wis. 156:

""It is under this concept of due process that state courts have held that property rights cannot be taken from one person and transferred to another by legislative action, in whatever form those rights may be. * * *"

The considerations as to impairment of contract obligations would not apply to any plats established or deeds issued after the date of enactment of the law. In such cases it might be considered that the statute is imported into the contract and the owners are bound thereby. Even with re-
spect to subdivisions established after its enactment, however, we believe Bill No. 391, A. would be invalid if passed in its present form.

There can be little question that the legislature could authorize the governing boards of cities, villages and towns to enact building or use restrictions upon property within their limits, in the form of zoning ordinances or otherwise, when such restrictions are adopted in the exercise of the police power for the "health, safety, morals or general welfare of the community" as in the specific authorization contained in sec. 62.23 (7) for cities to enact zoning ordinances. Legislation, however, which has no public purpose is not only beyond the powers of towns, villages and cities but of the legislature as well.

In State v. Withrow, (1938) 228 Wis. 404, 406, 280 N. W. 364, 116 A. L. R. 1310 the court said:

"The defendant * * * concedes that things may be prohibited by statute that offend against public morals, public health, public safety, or public welfare. This being true, the converse is also true, that things that do not offend in some one or more of these respects cannot be prohibited.

* * *"

Similarly it was said in Wisconsin Telephone Co. v. Milwaukee, (1936) 223 Wis. 251, 261, 270 N. W. 336:

"* * * Thus, the ordinance, if valid, would operate to take money from one of the public for the sole benefit of a private property owner who would have the balance due on his assessment paid for him by the utility. The city would be an instrument which, under the guise of a police regulation, would compel one of the public to pay the debt of another. Neither the state nor a municipality can authorize such an exaction or taking of money or property belonging to one person or corporation for any mere private purpose, or the private use or benefit of another. * * *"

See, also, State v. Redmon, (1907) 184 Wis. 89, 111, 114 N. W. 137, 14 L. R. A. (n.s.) 229 in which the following excerpts appear:

"* * * As said in Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501:

"'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second,
that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'

"** **

"Controlling significance should be attached to the words above quoted, 'the interests of the public generally,' etc., 'require such interference.' Not that some individuals now and then, or even generally, demand it, or require it, but that the interests of the people generally require it. In other words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature."

Bill No. 391, A. does not limit the governing boards of towns, cities and villages to the adoption of restrictions affecting the public interest, or the health, safety, morals or general welfare of the community as a whole. We do not believe the legislature could constitutionally authorize the adoption of restrictions except upon such considerations.

Another possible objection to the validity of the law which occurs to us is that it proposes to make the restrictions binding for a specific term. It is a principle recognized in this state that no legislative body can bind itself by contract to exercise or not to exercise its police power for any length of time. As pointed out in Milwaukee v. Railroad Commission, (1916) 162 Wis. 127, 129-130, 155 N. W. 948:

"** ** The state could not contract away its power to make such regulations, nor incapacitate itself from making such changes in them from time to time as the public necessities require. ** **"

If the law were not subject to the foregoing objections, we do not believe it would necessarily be invalidated by the fact that the regulations are to be initiated by petition of private individuals, provided the determination as to whether the restrictions should be adopted is left entirely within the discretion of the legislative group. See Des Moines v. Manhattan Oil Co., (1921) 193 Ia. 1096, 184 N. W. 823, 23 A. L. R. 1322.

It is our opinion, therefore, that Bill No. 391, A. if enacted into law would probably be held invalid as a violation of the clauses of the constitution relating to impairment of the obligation of contracts and due process of law.

BL

RGT
State—Parks—Conservation Commission—Dams—The state may purchase and develop parks, dams, and artificial impoundments under art. XI, sec. 3a, Wisconsin constitution, without violating art. VIII, sec. 10 governing works of internal improvement.

Conservation commission as administrative agency of the state has not been delegated the full power of the state to develop parks and improve them with dams and artificial lakes. The commission's power extends at the most to incidental dam construction.

The conservation commission has statutory power to take over maintenance and operation of existing dams on wholly owned state lands.

E. J. Vanderwall, Director,
Conservation Department.

You request an analysis of the authority of the conservation commission to engage in dam construction (1) on lands or public parks owned by the state, (2) where the state owns a portion of the lands involved, (3) when the state is requested to purchase certain lands for the purpose of creating an artificial lake and park. You inquire further, (4) as to the authority of the commission to take over existing dams and to maintain the impoundment for conservation purposes.

The conservation commission, as an agency of the state, can have no greater powers in the premises than the state has itself. Accordingly, it is subject to the restriction in art. VIII, sec. 10, of the Wisconsin constitution, that “the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works” except as modified by art. XI, sec. 3a, which provides express authority to establish public parks. This latter section reads:

“The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same;
and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works."

A preliminary consideration of the activities prohibited by art. VIII, sec. 10 will be helpful in determining the extent of the modification achieved by the subsequent enactment of art. XI, sec. 3a.

In the leading case of State ex rel. Jones v. Froelich, 115 Wis. 32, 38, the term "works of internal improvement" was construed to include "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government." The court recognizes that the dominant characteristic of one class may be present in illustrations of the other and states that in such cases the dominant purpose of the activity under consideration would determine its legality or illegality.

Quoting with approval from Rippe v. Becker, 56 Minn. 117, 57 N. W. 335, the court enumerates as facilities which are used by the state as a sovereign in the performance of its governmental functions and are therefore lawful "a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like." The court further enumerates as activities which are works of internal improvement and prohibited unless specifically authorized in the constitution, (1) deepening, dredging or straightening a river, (2) street railways, (3) telephone or telegraph lines, (4) irrigation reservoirs, (5) roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, or gas works.

Upon such considerations the court held that, prima facie, levees and dikes to restrain the waters of a navigable river are works of internal improvement, whether the main purpose be improvement of navigability, creation of water
power, or reclamation of adjoining lands, stating: "In any of these there is enough of pecuniary benefit to warrant belief in the possibility, at least, that they may be undertaken by private enterprise or local associations."

In *State ex rel. Owen v. Donald*, 160 Wis. 21, the court ruled that the acquisition, preservation, and development of forests were prohibited works of internal improvement. The constitution has since been amended to authorize the development of forests.

In our opinion, the foregoing cases conclusively establish that the erection of any dam by the state, under circumstances wherein there is such a possibility of pecuniary profit that the work might be undertaken by private promoters, is a work of internal improvement and prohibited except insofar as it might be justified under art. XI, sec. 3a.

Art. XI, sec. 3a was construed by the supreme court in *State ex rel. Hammann v. Levitan*, 200 Wis. 271 to constitute express authority to the legislature to adopt the statute creating the Horicon marsh. The court ruled that the Horicon marsh could properly be considered a park in the broad sense of the term, and that the power to establish the park included the power to construct and maintain a dam for the improvement of the park.

We consider the foregoing principles of primary importance as establishing that the state has no general power to construct dams and the only exception to the prohibition against engaging in a work of internal improvement is found in the case of dams which are used to improve public parks.

Passing now to the powers of the conservation commission as distinguished from the powers of the state itself, we are met with two somewhat conflicting propositions. The first is that an administrative agency, which includes the commission, is a creature of statute and has only such powers as are expressly granted to it or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the commission proceeds. *American Brass Co. v. Board of Health*, 245 Wis. 440. This rule would appear to prohibit the conservation commission from engaging in any extensive program of dam construction unless it received express stat-
utory authority as it did in the case of the Horicon marsh. The second proposition is the statement of Mr. Justice Wickhem in *New Lisbon v. Harebo*, 224 Wis. 66, at p. 75, that a delegation to a board of park commissioners of power "to govern, manage, control, improve, and care for all public parks, parkways" is broad enough to empower the city to do such acts as are reasonably incident to the construction and maintenance of a park, and that the erection of a dam and the maintenance of an artificial lake are well within such purposes.

In our opinion there is a clear conflict between the cases. While brooks, small waterfalls, or artificial lagoons might appear to be common and proper adjuncts of a *park*, when the artificial lake has become so expanded in size that it is the principal object and the park is merely a fringe on the shore of the lake, we seriously question whether the legislature ever intended or contemplated that the authority which it delegated to create parks included authority to create extensive artificial impoundments of the proportions of natural lakes.

Upon examining the statutes to find what powers in regard to parks have been delegated to the conservation commission, we find the following:

"23.09 (7) ** The Commission shall also have authority:

**

"(d) To acquire by purchase *** lands or waters suitable for the purpose hereinafter enumerated ***"

**

"2. For state parks for the purpose of preserving scenic or historical values or natural wonders.

"3. For public shooting, trapping or fishing grounds or waters for the purpose of providing areas in which any citizen may hunt, trap or fish."

"23.11 (1) In addition to the powers and duties heretofore conferred and imposed upon said commission by this chapter it is empowered and required to have and take the general care, protection and supervision of all state parks *** and said commission is granted such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law, ***"
"27.01 (2) (a). To lay out and ornament any state park, to govern and manage the same, to lay out and construct all proper roads, trails and bridges therein, to permit people to picnic and camp in and use such park under restrictions and rules made by it, and to make such rules and regulations as may be necessary to manage and control the same."

"29.04 (1) The state conservation commission may remove or cause to be removed, in such manner as they may deem fit, old and abandoned dams in streams in the state of Wisconsin, upon giving sixty days' notice in writing to the owner thereof, if he can be found. * * *

"(2) Whenever the conservation commission shall determine that the conservation of any species or variety of wild animals will be promoted thereby, the commission is authorized to maintain and repair any dam located wholly upon lands the title to which is in the state either as proprietor or in trust for the people; subject, however, to the powers of the public service commission to fix the level and regulate the flow of the public waters."

These may be summarized:

(1) Power to purchase for parks lands of historical or scenic value and natural wonders.

(2) Power to purchase lands suitable for hunting or fishing grounds.

(3) Power to care for, protect, and supervise state parks together with such further powers as may be necessary and convenient to the exercise of powers otherwise specifically delegated.

(4) Power to lay out and ornament any state parks and to construct roads, trails, and bridges therein.

(5) Power to remove abandoned dams, or to take over maintenance and repair of any dam located upon lands wholly owned by the state.

Powers (1) and (2) cover merely purchase and maintenance and are insufficient to cover any radical alteration of the terrain.

Power (3), all other powers necessary and convenient, must be construed in the light of the powers to which it is adjunct, and is not an independent grant of power.

Power (4) taken by itself grants power to engage in specified construction in parks, and by the application of
the well known rule *expressio unius est exclusio alterius* excludes all other types of construction including dams.

Power (5), by the same rule, in allowing maintenance and repair of existing dams would exclude construction of new dams.

The foregoing considerations would indicate rather clearly that the commission has no general power of dam construction were it not for the case of *New Lisbon v. Harebo*, supra. It is impossible to tell from the opinion in that case what, if any, consideration was given to the proposition that powers of an administrative agency must be clearly specified, or whether a city, as a municipal corporation operating under the home rule amendment, is not subject to so strict a construction of its powers as an administrative agency.

Under the circumstances, we are of the opinion that the conservation commission cannot engage safely in anything other than the most incidental construction of dams or improvements of waterways or water courses. While each case would have to be decided on its own facts, a rough but fairly accurate test can be made by comparing the cost of dam construction with the cost of the park being improved. If such construction cost is minor compared with the total, it may safely be undertaken as an incident of the entire project. If the principal expenditure is the cost of constructing the dam and artificial lake, it is no longer properly an incident of any granted power and cannot be undertaken.

Applying these principles to your specific questions: (1) Incidental dam construction may be undertaken on wholly owned state parks. (2) Creation of an artificial lake when private parties own a portion of the shore line, of the type of work often undertaken by subdividers for their financial profit, cannot be undertaken. (3) The commission may, when appropriate under the statutes quoted above, acquire lands for park purposes with the expressed purpose of making incidental improvements by dams or otherwise to the waters and water courses. (4) The commission has the right under sec. 29.04 to take over maintenance and operation of existing dams in lands wholly owned by the state.

RGT
Fish and Game—Navigable Waters—State—Interstate Commerce—The state has no power to regulate interstate transportation of legitimate articles of commerce.

State has power to prohibit the deposit of bark or other refuse in any of its outlying territorial waters.

June 10, 1947.

THE HONORABLE THE SENATE.

I have received senate Resolution No. 21 requesting an opinion on the right and jurisdiction of the state of Wisconsin to regulate rafting of unpeeled pulpwood and logs in the outlying waters of the state, as provided by substitute amendment 1, S., Bill 269, S.

The proposed bill as amended provides:

"29.29 (4) of the statutes is created to read:
"29.29 (4) RAFTING PULPWOOD AND LOGS. (a) No person shall place or cause to be placed in the outlying waters of the state any unpeeled pulpwood or logs or cause such unpeeled pulpwood or logs to be placed in rafts and propelled through such waters causing the bark of such pulpwood to become detached and deposited in such waters.
"(b) Paragraph (a) shall not apply to ponds or waters in the immediate vicinity of paper mills, pulp mills or saw mills when used as storage or hot ponds, or ponds where pulpwood or logs are placed before loading the same for shipment.
"(c) It shall be unlawful for any person to purchase, order or receive any pulpwood or logs which are transported in violation of the provisions of this subsection.
"(d) Any person who shall violate any provision of this subsection shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than 30 days nor more than one year, or both for each violation. Each day of continued violation shall be deemed a separate offense."

Insofar as the bill as drawn might be construed to regulate or prohibit the transportation in interstate or international commerce of legitimate articles of commerce, it is beyond the power of the state in that it conflicts with the power of congress to regulate commerce among the several states. Gibbons v. Ogden, 9 Wheat. 1; Railroad Company v.

In the latter case, the court indicated that certain regulations which only incidentally affect interstate commerce are within the power of the state until congress acts and assumes control, but that direct regulation of interstate commerce is the exclusive province of congress. Discussing the various types of regulation, the court stated at p. 204:

"* * * While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. * * *

While it might be argued that unpeeled pulpwood logs are not legitimate articles of commerce in that it is impossible to move them by rafting without dislodging their bark and causing damage to the waters and fisheries through which they travel, the possibility of establishing such a contentment appears doubtful and would depend in any event upon the examination of a mass of factual evidence of the character of unpeeled logs and their tendency to lose bark during rafting. In our opinion such controversy can be avoided by restricting the bill to a prohibition of the deposit of bark or other refuse in the territorial waters of the state of Wisconsin. The state has ample power to enact such a prohibition. The state is the owner of the navigable waters within its limits, of the land underlying its lakes, and of the fisheries therein with full power to regulate and control. McCready v. Virginia, 94 U. S. 391; Manchester v. Massachusetts, 139 U. S. 240; Port of Seattle v. Oregon & W. R. R. Co., 255 U. S. 56.
In the latter case the court stated (p. 63):

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same."

In view of this statement, the fact that congress has adopted a statute prohibiting dumping of refuse in the navigable waters of the United States (33 USCA, § 407) can in no way be deemed exclusive and intended to occupy the entire field of regulation. Under familiar principles, the authority of the state to protect its interests by additional or supplementary legislation is not impaired. Skiriotes v. Florida, 313 U. S. 69. Its regulations designed to protect its fisheries, in the absence of conflicting federal legislation, are within the police power of the state. Manchester v. Massachusetts, supra.

Accordingly, in our opinion, if the statute is limited to a prohibition of the deposit of bark in the navigable waters of the state it could not be successfully challenged. The present section 29.29 (3) which is limited to tanbark, could be amended to include all bark, or the bill revised to read as follows:

"29.29 (4) BARK FROM PULPWOOD AND LOGS. (a) No person rafting unpeeled pulpwood or logs in the outlying waters within the boundaries of this state, shall cause or suffer the bark of such logs to become detached therefrom and deposited in such outlying waters.

"(b) Paragraph (a) shall not apply to ponds or waters in the immediate vicinity of paper mills, pulp mills or saw mills when used as storage or hot ponds, or ponds where pulpwood or logs are placed before loading the same for shipment.

"(c) Any person who shall violate any provision of this subsection shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than 30 days nor more than one year, or both for each violation. Any person violating this section shall also be liable for treble damages in a civil action brought by any fisherman or other person whose nets are fouled by such bark or who is otherwise damaged."

RGT
**District Attorney—Inquest**—Although under sec. 366.01, Stats., district attorney is not required to appear in an inquest unless it has been ordered by him, it is deemed better practice for him to appear whether the inquest was ordered by him or not.

June 12, 1947.

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

We have your request for an interpretation of sec. 366.01, Wisconsin statutes. Specifically, your question is this: Is it the duty of the district attorney to appear in an inquest called or ordered by the coroner?

Sec. 366.01 Stats., provides in part 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."

You have concluded that the sentence underlined above does not make it necessary for the district attorney to appear unless he has ordered the inquest.

The statute makes it the duty of the district attorney to order an inquest where there is good reason to believe that one of the crimes enumerated in the statutes has been committed. The statute does not make it mandatory for the district attorney to be present where the inquest has been called by the coroner. There is, of course, no provision prohibiting his appearance should he deem it advisable.

As a matter of practice, it is probably preferable for him to be present in any event to protect the interests of the state. For example, a coroner might call an inquest during the temporary absence of the district attorney. If the cir-
cumstances surrounding the death of the person give rise to the belief that homicide has been committed, the district attorney clearly ought to be present even though he did not order the inquest. Although technically it may be correct to conclude that the district attorney must appear at an inquest only when he himself has ordered it, it is our view that it is better practice for the district attorney to appear in the inquest whether ordered by him or not.

ES

Constitutional Law—Appropriations and Expenditures—Legislature—Appropriation made by sec. 1, ch. 105, Laws 1947, to certain members of interim committee appointed pursuant to Joint Resolution No. 79, Session 1945, to reimburse them for expenses incurred by them, makes money available to pay amounts to which such members became entitled under sec. 20.01 (1) (c), Stats. Said section is valid and does not conflict with art. IV, sec. 26, Wisconsin constitution.

Fred R. Zimmerman,
Secretary of State.

You ask our opinion as to the validity of the various appropriations made by ch. 105, Laws 1947.

Section 1 of said act appropriates to certain members of the interim committee created by Joint Resolution No. 79 of the 1945 session, certain sums for expenses advanced including hotel bills, meals and mileage.

Section 2 appropriates the sum of $492.26 to the individual appointed secretary of all interim committees as provided by ch. 414, Laws 1945, for services rendered and for expenses incurred by such person in the course of her duties for hotel and meals. It is specifically said in said section that the appropriation made by ch. 414, Laws 1945, was insufficient to pay all the expenditures incurred in performing the duties prescribed by said chapter.

Section 3 appropriates $31.10 to the bureau of purchases for supplies furnished the general secretary of all interim
committees, it being stated therein that the appropriation made by ch. 414, Laws 1945, is insufficient to pay all expenditures incurred in performing the duties prescribed by said chapter.

Your inquiry as to the validity of the appropriation made by section 1 of ch. 105, Laws 1947, is no doubt prompted by the fact that all members of the interim committee therein mentioned were and are members of the legislature at both the sixty-seventh (1945) and sixty-eighth (1947) sessions.

The matter of payment of compensation and expenses to members of the legislature for serving on an interim committee as well as other boards, in addition to the $100 per month payable to legislators as provided by sec. 20.01 (1) (a) as well as other allowances granted, is covered by sec. 20.01 (1) (c). Said subsection was created by ch. 33, Laws 1931, and reads as follows:

"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."

In view of the foregoing, we have no reason to doubt the validity of the appropriation made by section 1 of ch. 105, Laws 1947, of certain sums to the members of the interim committee therein mentioned. What is done is to appropriate money to pay amounts to which the members of the committee clearly become entitled under sec. 20.01 (1) (c), which subsection was adopted before they commenced to perform their duties as members of such committee. It may be reasonably inferred from the text of section 1 that the sums appropriated are in fact to reimburse them for expenses actually and necessarily incurred by the individuals therein named as members of such committee. The amounts appropriated are within reasonable limits and authorize the conclusion that they could readily be substantiated by the various individuals to whom the appropriation is made.
See *Peay v. Nolan*, 157 Tenn. 227, 7 S. W. (2d) 815, 60 A. L. R. 408. For that reason we have no reason to question the recital in section 1 to the effect that the appropriation is made to reimburse the members of the committee for expenses incurred by them in the performance of their duties.

Our state constitution is not a grant of power. It is a limitation of power and the legislature possesses all power not specifically denied by our constitution or by the federal constitution or delegated to congress. *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94; *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326; *State ex rel. Carnation Milk Products Co. v. Emery*, 178 Wis. 147. We are unable to find any provision of our state constitution which would deprive the legislature of power to make the appropriation in question. Art. IV, sec. 26, which provides that 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, has no application because the amounts appropriated by ch. 105, Laws 1947, do not constitute compensation, but are to reimburse the members of the committee for out of pocket expense incurred by them in the performance of their duties. 43 Am. Jur. (Public Officers) § 371; *Milwaukee County v. Halsey*, 149 Wis. 82; XXXIV Op. Atty. Gen. 59. Furthermore, the appropriation made by ch. 105, Laws 1947, was made to pay the members of the committee amounts they were clearly entitled to under sec. 20.01 (1) (c) which was enacted in 1931 long before the committee was created, which would, even if the allowances mentioned were considered as a form of compensation, which they are not, preclude any claim that they were a grant of extra compensation made after the services were rendered.

Prior to April 1929 the compensation of the legislature was fixed by art. V, sec. 21, and any act of the legislature such as sec. 20.01 (1) (c) or section 1 of ch. 105, Laws 1947, might have been in violation of that section of the constitution. However, said constitutional provision was repealed in April 1929 and, of course, need not now be con-
sidered. It is interesting to note that sec. 20.01 (1) (c) was enacted in 1931 which followed the repeal of art. V, sec. 21. The matter of fixing amounts payable to members of our legislature for compensation and expenses is now governed entirely by statute, subject of course to the provisions of art. IV, sec. 26, of our constitution, which as previously said does not apply under the circumstances here.

We now turn to the question of the validity of section 2 of ch. 105, Laws 1947. Chapter 414, Laws 1945, established a general office of secretary of all interim committees. It was provided that such office be in charge of a general secretary who was to perform certain duties for which said secretary "shall receive the salary established by the bureau of personnel for the classification of stenographic reporter II and shall be entitled to the bonus provided in section 14.71 (1n)." Chapter 414 also appropriated the sum of $3,500 from the general fund as a nonlapsible appropriation for the payment of salaries and office supplies and materials for the office of general secretary, no part of which could be used for travel expense which was to be paid out of the appropriation to the interim committee for which such expense was incurred.

From the text of section 2 of ch. 105, Laws 1947, it is very evident that the $3,500 appropriation made by ch. 414, Laws 1945, was used up and that thereafter the general secretary continued to perform her duties. It would further appear that in the performance of her duties she also incurred travel expense for which she was not reimbursed. The effect of section 2 of ch. 105, Laws 1947, is to make money available to pay the salary which had become due by reason of duties performed after the appropriation made by ch. 414, Laws 1945, had run out and to reimburse for travel expense which the general secretary had incurred and for which she had not been reimbursed.

We see no constitutional objection to section 2 of ch. 105, Laws 1947. State ex rel. Sullivan v. Dammann, 227 Wis. 72. The only constitutional provision which said section 2 or the appropriation made by it might possibly be in conflict with, is art. IV, sec. 26. As previously noted, that section contains a prohibition against a grant of extra compensation after the services have been performed. The portion
of the appropriation made by said section 2 to reimburse for expenses incurred by the general secretary in the performance of her duties would not under the authorities previously cited be considered "compensation" or "extra compensation" within the meaning of art. IV, sec. 26, and hence would not be subject to the prohibition contained in said constitutional provision. The portion of said appropriation which was to make money available to pay the portion of the salary earned after the appropriation made by ch. 414, Laws 1945, had been used up does not conflict with art. IV, sec. 26, because it does not constitute a grant of "extra compensation." State ex rel. Sullivan v. Dammann, 227 Wis. 72 at 79. In arriving at such conclusion, we assume the amount appropriated for salary is based on the rate of compensation fixed by ch. 414, Laws 1945 or on a rate otherwise fixed before the services were performed, and there is no attempt to grant the general secretary an amount by way of salary over the rate fixed before ch. 105, Laws 1947, was enacted. If the amount were in fact increased over the rate fixed before the services were performed there would be a grant of extra compensation after the services were rendered and said section 2 of ch. 105, Laws 1947, would be in conflict with art. IV, sec. 26, at least insofar as it attempts to appropriate money for payment of back salary to the general secretary.

We are unable to see any question as to the validity of section 3, ch. 105, laws 1947 or the appropriation made by it. In making this statement we assume the amount appropriated is to pay for supplies furnished at price agreed upon at the time of sale. If the amount appropriated is in excess of that amount there would be a violation of art. IV, sec. 26.

The fact that there may be the sum of $66.64, which at the present time may appear to be unexpended from the appropriation made by ch. 414, Laws 1945, which might be used to pay the $33.10 mentioned in section 3 of ch. 105, Laws 1947, will not prevent the legislature from making another appropriation to pay said sum or affect the validity of section 3, ch. 105, Laws 1947, or the appropriation made thereby.

WET
Assignments—Co-operative Associations—Partial assignment made to a co-operative association by a member for membership dues out of moneys due or to become due the member for produce delivered to such association is not invalid under sec. 241.28 (4), Stats.

June 13, 1947.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 33, A., adopted June 10, 1947, you have requested our opinion of the validity under sec. 241.28 (4), Stats., of a partial assignment made to a co-operative association by a member for membership dues out of moneys due or to become due the member for produce delivered to such association.

Sec. 241.28, Stats., relates to the assignment of accounts receivable and in substance declares the validity of such assignments made in writing for a valuable consideration, notwithstanding that the obligor be not notified of or does not assent to the assignment, although the obligor is protected where he, acting in good faith, makes payment to the assignor or to a second purchaser or transferee of the account.

Sec. 241.28 (4) reads:

"This section shall not be construed to alter or affect any existing law with respect to the negotiation of or the rights of the holders of negotiable instruments, or with respect to the assignment of wages or to require an obligor to recognize a partial assignment."

It is to be noted that this subsection establishes three exceptions to the application of the statute. These relate to: (1) Rights of holders of negotiable instruments under existing laws, (2) assignment of wages, and (3) rights of obligors to ignore partial assignments.

The first two exceptions can be disregarded in answering your question inasmuch as we are not here concerned with the rights of holders of negotiable instruments or with wage assignments.

The third exception providing that an obligor is not required to recognize a partial assignment does not mean that such a partial assignment is wholly void. It merely gives
the obligor the right to ignore such partial assignment if he so elects.

Moreover, in the case you put, the "obligor," which under sec. 241.28 (1) (b) means "a person who owes or will owe the account," is the same party as the assignee. The "obligor" is the co-operative association which owes or will owe the money in question to the member who makes the assignment and who is known under the statute as the "assignor." According to sec. 241.28 (1) (d) the term "assignor" means "the person who, being the owner of an account, makes an assignment thereof, and the term 'assignee' means the person to whom such assignment is made."

The membership dues are owned by the member or "assignor" to the co-operative association which is both the "obligor" and the "assignee." The assignment of the dues is for its benefit, hence it would be most unlikely to ignore the partial assignment under the circumstances even though it has the privilege of doing so under sec. 241.28 (4).

This being true it is difficult to see where any question of invalidity of the assignment is presented under the statute. Under the circumstances the partial assignment amounts to no more than a unilateral contract of a type that is perfectly legal. The most that can be said is that the party for whose primary benefit the contract is made may disavow it if he wishes. To translate the transaction into a simple illustration,—let us say A owes B $5. B has or will have $25 belonging to A and A in effect says, "You may deduct the $5 from the $25 when it becomes due and remit to me the balance of $20." B, so far as sec. 241.28 (4) is concerned may elect to follow A's instruction or he may say to A that the transactions must be handled separately and remit the $25 to A, leaving A indebted to B in the sum of $5.

However, and quite independently of any purported assignment, if A were to sue B for the $25 when it became due and payable, B would have the common law right to set off or deduct the $5 from the $25 owing A. Thus the partial assignment, if it be called that, does no more than to give written expression to what would otherwise and in the absence of the agreement constitute the common law rights of the parties.

WHR
Counties—Taxation—Tax Sales—Special Assessments—

When county in 1947 sells land upon which it took tax deed in 1944 on 1939 general tax certificates, the tax certificates issued to the county in 1939 to 1944 upon special assessment returned in trust are existing enforceable liens by virtue of the 15-year life given them under the amendment of sec. 75.20, Stats., by ch. 132, Laws 1945, which the county must pay to free the land therefrom.

June 17, 1947.

Edward Krenzke,
District Attorney,
Racine, Wisconsin.

The taxes on a parcel of land were returned delinquent in the years 1931 to 1944 and included special assessments levied under secs. 62.20 and 62.21, Stats., which were returned in trust. The 1931 to 1937 returns were excess rolls. At the annual tax sales the property was struck off to the county and all the certificates were issued to it. On October 24, 1944 the county took a tax deed to the land on the 1939 certificate issued upon the sale for the 1938 general tax.

When the tax deed was taken the redemption value of all the special assessment certificates then not over 6 years old was $250 and the redemption value of the general tax certificates amounted to $150, making a total of $400 as the redemption value of all the tax certificates held by the county. Recently the county sold the property for $450. The redemption value of said special assessment certificates not over 6 years old at the time the county sold the property was only $190.

The question has now arisen as to the liability of the county to account for the proceeds realized upon the sale of said property. The county contends that the limitation period of 6 years contained in sec. 75.20, Stats., prior to the 1945 amendment thereof, is applicable and continues to run on the special assessment certificates subsequent to the taking of the tax deed by the county so that its liability to the local municipality is limited to the $190 redemption value of the special assessment certificates that were then not
over 6 years old. The municipality claims that this 6-year limitation period of the statute did not run during the time the county held the title and therefore the county is liable to it in respect to all the special assessment certificates which were not over 6 years old at the time the county took the tax deed. We are not informed whether the municipality claims that the amount of the county’s liability is the redemption value of said certificates as of the date of the taking of the tax deed or as of the date the county sold the property. Our opinion is requested as to what is the county’s liability to the municipality under the above circumstances.

The case of Agnew v. Milwaukee County (1944), 245 Wis. 385, 14 N. W. (2d) 144 holds that the county is not the owner of tax sale certificates issued to it upon the sale of land for special assessments returned in trust and therefore the 6-year limitation period in sec. 75.20, Stats. 1943, would be applicable to such certificates. The court based its decision upon Gross v. Sommers (1937), 225 Wis. 266, 271 N. W. 11, where it was held that because sec. 62.20 (3) (c), Stats., then provided as it does now that if not paid, assessments shall be returned delinquent,

"* * ** and thereafter the same proceedings shall be had as in the case of other taxes, except that all moneys collected by the city treasurer on account of such taxes, and all the tax certificates issued to the county on the sale of the property for such tax, if the same is returned delinquent, shall be delivered to the owner of the same on demand, * * **"

a private individual who is the beneficial owner of special assessments returned in trust and not the county is the owner of the tax sale certificates issued thereon to the county and is entitled to receive the same on demand.

If the beneficial owner of assessments covered by sec. 62.20 is a municipality instead of a private individual then by the same reasoning it is the owner of the tax certificates issued to the county thereunder. On the other hand if the assessments are not covered by sec. 62.20 but rather by sec. 62.21, Stats., the municipality is the owner of tax certificates issued to the county upon special assessments returned in trust thereunder. In sec. 62.21 (1) (h) 1a it is expressly provided that upon demand of the municipality
the county treasurer shall assign to it the tax certificates issued to the county upon special assessments returned in trust.

It is therefore our opinion that tax certificates issued to the county upon special assessments returned in trust are not owned by the county but by the local municipality or the private individual bondholders for whom the municipality acts as trustee, as the case may be. Accordingly the 6-year period of limitation of sec. 75.20, Stats. 1943, is applicable to such certificates, even though the municipality itself is the owner of the special assessments.

Under the rule of Pereles v. Milwaukee (1933), 213 Wis. 232, 251 N. W. 255 the taking of the tax deed by the county on the 1939 certificate cut off the liens of all prior tax certificates not owned by the county. See also XXVIII Op. Atty. Gen. 74. Thus, the special assessment tax certificate issued to the county at the sale in 1938 would not thereafter be an enforceable lien against the property. It was cut off by the taking of such tax deed upon a subsequently dated general tax certificate. In addition if it was dated prior to October 24, 1938 it was over 6 years old at the time of the taking of the tax deed. The question here is thus narrowed down to a consideration of what is the county's liability only as respects the special assessment certificates issued to it at the 1939 to 1944 tax sales.

These special assessment tax certificates did not merge in the fee title the county acquired by taking the tax deed in 1944 because they were not liens owned by the county. The only merger thereby effected would be in respect to liens which the county owned. These special assessment tax certificates issued in the name of the county and held by it in trust thereafter continued to exist as liens against the property until their effectiveness expired by operation of the applicable period of limitation. Either they are liens owned by the county, in which event they merge in or are swallowed up in the county's larger interest by way of title in fee simple acquired by taking the tax deed, or else they are not county owned and therefore do not merge in its tax title. In our opinion they do not so merge because not county owned and therefore continue to have existence as liens which the municipality could have assigned to it upon demand. In this respect they stand the same as out-
standing tax certificates held and owned by private individuals. Therefore, none of the special assessment certificates held by the county, whether dated prior to, the same as, or subsequent to 1939 general tax certificate, merged in the county’s tax title taken in 1944.

This being the situation, the 6-year period of limitation in sec. 75.20, Stats. 1943, would continue applicable to the special assessment certificates issued to the county upon the sales in 1939 through 1944. The result would be that, as the 1939 and 1940 certificates were over 6 years old when the property was sold in the fore part of the current year 1947, they would no longer be effective liens against the property which the county would have to pay off in order to convey good title to the purchaser. The remaining 1941 to 1944 certificates would not as yet have reached that age and so the county would have to redeem them in order to give good title.

However, sec. 75.20, Stats., was amended by ch. 132, Laws 1945, which took effect May 15, 1945, to provide a 15-year life for tax certificates issued in the name of the county but held by it “in trust for the benefit of an owner other than the county, dated in 1939 through 1945.” As this amendment took effect before the special assessment certificates issued to the county upon the 1939 and 1940 tax sales had reached an age of 6 years it operated to extend the life of such certificates to 15 years. It changes the rule of the Agnew case as respects certificates dated in 1939 through 1945 so that special assessment certificates of that dating which are held in trust by the county have a life of enforceability of 15 years from the date of issuance.

We see no constitutional objection to sec. 75.20, Stats., as amended or enacted in 1945. The county is not in this instance acting in any proprietary capacity but is acting merely as a subdivision of the state government in the enforcement, collection, and distribution of taxes and revenue. Its rights in respect thereto are wholly derivative and it has no vested rights therein so that the legislature may not change them at will. Richland County v. Richland Center (1884), 59 Wis. 591, 18 N. W. 497; Kaukauna v. Dept. of Taxation (1947), 250 Wis. 196.
Sec. 75.36, Stats., relates to the taking of tax deeds by the county and its accountability for the proceeds realized on the sale of tax deed lands. It was likewise amended in 1945 but with the express provision in subsec. (11) that as so amended it should apply only to settlements in respect to the sale of land where the tax deed was taken subsequent to April 24, 1945. Such amendments to sec. 75.36 therefore are not applicable to the situation under consideration.

It is therefore our opinion that special assessment tax certificates issued to the county in 1939 through 1944 were still enforceable liens at the time the county sold the property this year, and in order to free the title therefrom the county would have to pay the municipality the redemption value thereof at the time it sold the property, unless the sale was made subject thereto. The fact that the county took the tax deed prior to the effective date of the 1945 amendment to sec. 75.20 is not in our opinion of any significance and does not change the result.

HHP

Appropriations and Expenditures—Historical Society—
Under sec. 20.16 (1) (g), Stats., as amended by ch. 131, Laws 1947, state historical society is required to deposit with state treasurer all funds received by grant, bequest or otherwise.

While said society may not sell its personal property generally and other than as permitted by sec. 44.01, Stats., it may sell waste paper, worn out equipment and the like in the interests of sound administration and deposit the proceeds with the state treasurer pursuant to sec. 20.16 (1) (g), Stats.

June 17, 1947.

E. C. GIESSEL, Director,
State Budget Bureau.

You have inquired whether the state historical society is required to deposit with the state treasurer all funds received by grant, bequest or devise and whether it has the power to sell personal property other than duplicates of historical articles, books or periodicals.
To answer these questions requires a rather close study of the statutes relating to the society and their legislative history. Mr. Clifford Lord, director of the society, has done considerable research on this matter and has graciously furnished us with the material he has collected.

The state historical society of Wisconsin was chartered by the legislature by ch. 17, Laws 1853, published March 4, 1853. This corporation was the successor to the Wisconsin historical society established without charter in October 1846 and which was reorganized without charter as the historical society of Wisconsin on January 30, 1849. Chapter 17, Laws 1853, provided that certain individuals therein named, "and their present and future associates, and their successors, be and they are hereby constituted and created a body politic and corporate, by the name of 'The State Historical Society of Wisconsin,' and by that name shall have perpetual succession with all the faculties and liabilities of a corporation." The act then goes on to provide for the objects and powers of the society. Its object in brief is to collect historical material and it was given the usual corporate powers. Sec. 4 provided:

"Said society may receive, hold, purchase and enjoy books, papers and other articles forming its library and collections to any extent, and may acquire and hold, and at pleasure alienate, any other personal and real estate, and may acquire the same by devise, or bequest, or otherwise, not exceeding ten thousand dollars in value, but all its funds shall ever be faithfully appropriated to promote the objects of this formation."

Article I of the society's constitution provides that its financial activities are conducted in accordance with state law. In addition to the funds appropriated to the society by the legislature it receives money from membership dues, sale of publications and from bequests. The bequests are set aside in endowment funds and the income is used in accordance with the terms of the donors. Principal and accumulated income on the endowment funds totaled $642,632.11 at the close of the last fiscal year. Membership dues have been charged since 1846 and were expended for the operations of the society without restriction until 1920 when they were first deposited with the state treasury.
The constitution of the society provides that the board of curators shall in accordance with state law manage, administer and control the finances, property and affairs of the society. Article IV, sec. 3. This board consists of the governor, secretary of state, and state treasurer ex-officio and thirty-six elected curators. The constitution of the society also provides that the private funds of the society shall be invested in mortgages or securities as authorized by the laws of the state or by the terms of the gift, and the treasurer shall make investments only with the approval of at least three members of the executive committee. Article VII, sec. 3. The executive committee consists of the president, treasurer and director, ex-officio, and four other curators appointed by the president. It has the powers of the board of curators when the latter is not in session, although its acts are subject to review by the entire board.

Until 1920 the funds from private sources were handled entirely by the board of curators and the society's treasurer. In 1920 an agreement was reached between the society, the secretary of state and the state treasurer whereby the treasurer of the society was to retain the principal of the funds from private sources and invest the same without their being passed through the state treasurer's office. But all funds considered to be income were to be deposited in the office of the state treasurer and were to be checked out over the signature of the superintendent and treasurer of the society, with bill attached, which account and bill were to be first audited by the secretary of state's office.

To illustrate the mechanics of this procedure let us assume that a cash bequest is accepted by the society. The principal amount is deposited in a checking account against which withdrawals are made for investment by the treasurer upon approval of at least three other members of the executive committee. Securities purchased are placed in a safe deposit vault in The First National Bank of Madison. Income from investments and income from dues, sales of publications, etc. is accumulated in a separate checking account for income and is regularly turned over
to the state treasurer pursuant to sec. 20.78 and is reappropriated to the society by sec. 20.785.

We are somewhat at a loss to understand the statutory basis for the arrangement made in 1920 which is discussed above. Sec. 20.78 provided then as it does now that among other things all appropriations from state revenues for any society or association receiving state aid are made on the express condition that such society or association pays all moneys received by it into the state treasury within one week of receipt. This provision is as much applicable to the principal sum of any grant, bequest or devise as it is to the income thereof.

Also sec. 14.68 (1) provided then as it does now that unless otherwise provided by law, all moneys collected or received by any society or association for or in behalf of the state shall be deposited in or transmitted to the state treasury at least once a week to be accompanied by a statement in such form as the treasurer may prescribe showing the amount of such collection, and from whom and for what purpose or on what account the same was received. Moneys received by the association are obviously received on behalf of the state since sec. 44.01 provided in 1920 as it does today that the society shall be the trustee of the state and shall hold all its present and future collections and property for the state. This section was amended by ch. 55, Laws 1947, but the amendment does not affect in any way the provision just mentioned.

Moreover, sec. 20.16 (1) (g) was just amended by ch. 131, Laws 1947, to read:

“All fines, fees or other money collected by said society shall be paid within one * * * month after receipt into the general fund and are appropriated therefrom to the state historical society as an additional appropriation to carry out its powers, duties and functions.”

You are therefore advised that under sec. 20.16 (1) (g) as amended all moneys collected by the society, whether by grant, bequest, devise or otherwise, and whether the same be principal or income, are to be deposited with the state treasurer within one month after receipt. This pro-
cedure would in no way interfere with the society's author-
ity to invest items of principal in securities authorized by
law nor would it interfere with the society's custody of
the securities when purchased since there is no statutory
provision requiring that the securities be deposited with
the state treasurer for safekeeping as is true for instance
under sec. 36.03 in the case of university trust fund se-
curities.

You have also inquired as to the power of the state his-
torical society to sell personal property other than dupli-
cates of historical articles, books or periodicals.

Sec. 44.01, as amended by ch. 55, Laws 1947, provides in
part that the society:

"* * * shall not sell, mortgage, transfer or dispose of
in any manner, or remove, except for temporary purposes,
from * * * its building or buildings any article therein
without authority of law; * * * except that the society
* * * may sell * * * or * * * exchange its publications, * * *
and may sell, exchange or otherwise * * * dispose of dupli-
cate books * * *, periodicals or museum objects, or books,
periodicals or museum objects outside of its field of collec-
tion to other public libraries, schools, museums or other
educational or charitable institutions * * * or their agents.
There shall continue to be a board of curators of said
society, constituted with substantially the same powers as
at present, of which the governor, secretary of state and
state treasurer shall be ex officio members and take care
that the interests of the state are protected. The society
may acquire property, real or personal, by gift, bequest or
otherwise, in any amount and may sell for such price and
upon such conditions as its finance committee may deem
best for its interests, and convey real estate acquired by
it by gift or bequest or through the foreclosure of any
mortgage."

It is readily apparent that there is nothing in the fore-
going language or in the preceding language in sec. 44.01,
to the effect that the society is a trustee for the state and
shall hold all its property for the state, which can be con-
strued as a specific grant of power to sell personal prop-
erty of the society with the exception of the items actually
enumerated.
We understand, however, that in the past it has been customary to sell waste paper which otherwise would have to be burned or thrown out as trash and that on occasion items such as old light fixtures, an elevator motor, and coils on air-conditioning equipment have been sold for their salvage value. Perhaps additional illustrations could be furnished, and we would be most reluctant to rule that waste paper and junked equipment could be discarded but that the same could not be sold for such salvage value as it might have. Certainly no prudent trustee would follow such a ridiculous and wasteful policy unless clearly required to do so. It is true that administrative agencies of the state have only such powers as are expressly granted to them or are necessarily implied, and any power sought to be exercised by such an agency must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440. However, the state historical society is a private corporation for a public purpose. See *State ex rel. W. D. A. v. Dammann*, 228 Wis. 147, 172. The act incorporating the society, ch. 17, Laws 1853, sec. 1, among other things provided that the society “for the purposes of its institution, may do all such acts as are performed by natural persons.” At any rate and whether the society be regarded as a state administrative agency or as a private corporation for a public purpose it must be deemed to have the implied powers necessary to the carrying out of its functions to the extent not otherwise specifically provided or prohibited by statute.

Implied powers are those that flow from a grant of expressed powers and are those powers necessary or incidental to the exercise of the express powers. *Skelly Oil Co. v. Pruitt & McCrory*, 94 Okl. 232, 221 Pac. 709. Also the implied powers of a corporation are not limited to those merely necessary, but include such as are appropriate, convenient, and suitable in carrying out the express purposes of the corporation. *Malone v. Republic Nat. Bank & Trust Co.*, Tex. Civ. App., 70 S. W. (2) 809. Likewise the implied powers of a trustee are inherent in the purposes and intent of the trust created and the objects to be attained thereby. *Barrett v. Hennebry*, 322 Ill. App. 703, 54 N. E. (2) 608.
Here the purposes and intent of the legislature in making provision for the creation and perpetuation of the state historical society are obvious. So far as personal property is concerned it is its duty to serve as trustee of the state in the preservation and care of records and all articles and other materials of historical interest and significance placed in its custody. See sec. 44.02 (1) as repealed and recreated by ch. 56, Laws 1947. No useful historical purpose would be served by keeping waste paper, worn out equipment, machinery and the like, and it would be most imprudent and contrary to the duties of a faithful trustee to throw away such material when the same could be sold even for small sums which could be deposited in the state treasury under sec. 20.16 (1) (g) for the purpose of reappropriation to the society as additional funds to carry out its powers, duties and functions.

You are therefore advised that while the state historical society is not presently authorized to sell its personal property generally or otherwise than as provided in sec. 44.01, it is not precluded from selling its waste paper, discarded equipment and the like where it is sound administrative practice and prudent trusteeship to do so. The proceeds from such sales are to be deposited with the state treasurer pursuant to sec. 20.16 (1) (g).

WHR
State Board of Health—Hospital Survey and Construction Plan—Any regulation made by the state board of health under sec. 140.18 may be enforced by action brought in a state court of competent jurisdiction.

Sec. 140.05 (3) applies in case of regulations made by the state board of health under sec. 140.18 and gives the board power to enforce such regulations in event of a violation either by an action brought in a state court of competent jurisdiction or by imposition of a fine as therein provided.

June 25, 1947.

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

You direct our attention to the Hospital Survey and Construction Act (42 USCA § 291, et seq.) which among other things appropriates a certain sum to be used to assist the various states to make a survey of existing hospital facilities and the need for new public or nonprofit hospitals, and which also appropriates a certain sum to be allotted to the various states as therein provided which have submitted a state plan to construct necessary public and other nonprofit hospitals. To participate in the allotment for the purpose last mentioned, each state must meet certain requirements, including those stated in sec. 623 (d) of said act which reads as follows:

"If any State, prior to July 1, 1948, has not enacted legislation providing that compliance with minimum standards of maintenance and operation shall be required in the case of hospitals which shall have received Federal aid under this title, such State shall not be entitled to any further allotments under section 624."

To enable Wisconsin to meet the requirements of said Hospital Survey and Construction Act, ch. 255, Laws 1947, was recently enacted into law which among other things creates secs. 140.10 to 140.22, known as the Wisconsin
Hospital Survey and Construction Act. Said act establishes in the state board of health a division of hospital survey and construction to be administered by a director under supervision of the state health officer.

It is provided in sec. 140.18 that:

"The board shall by regulation prescribe minimum standards for the maintenance and operation of hospitals which receive federal aid for construction under the state plan."

The United States public health service which you state administers the federal Hospital Survey and Construction Act, raises a question whether sec. 140.18, Wis. Stats., meets the requirements of 623 (d) of the federal act because there is no provision for the enforcement of any standard set up by our state board of health pursuant to authority granted by said sec. 140.18. In a letter dated June 10, 1947 addressed to you signed by A. S. Rumreich, Director, Hospital Survey and Construction, it is said inter alia:

"Section 140.18 quoted above is applicable to all hospitals and health centers receiving Federal aid and provides for the establishment of standards of maintenance and operation for them. However, nothing in S. B. 105 makes any provision for enforcement of these standards. In the absence of some provision for enforcement, the requirement of section 623 (d) that the State enact 'legislation providing that compliance with minimum standards of maintenance and operation shall be required in the case of hospitals which shall have received Federal aid under this title' will not have been met.

"The means to be adopted by which such enforcement may be achieved are largely a matter of State discretion. It may be done through a licensure law which is the pattern being followed in most states. It may be done by imposition of some penalty to be imposed on institutions which do not comply with the standards laid down. It would not be necessary, however, to make specific provision for any penalty if some other means of enforcement were available to the agency promulgating the standards. For example, it would be sufficient if the State agency had the power to compel observance of its standards by injunction or other court order."
The questions on which you ask our opinion are:

1. Has the Wisconsin state board of health power to enforce any regulation made by it under sec. 140.18?

2. Does sec. 140.05 (3) give the board power to enforce any regulation made by it under sec. 140.18?

In 42 Am. Jur. (Public Administrative Law) § 53, it is said among other things: "Power to enforce a rule may be implied in the grant of power to establish it."

In Kasik v. Janssen, 158 Wis. 606, our supreme court said at pages 609-610:

"In addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers. * * *

"Administrative officers have a limited power to make and enforce rules and regulations consistent with and supplementary to the statutes under which they act. This power varies according to the nature and necessities of the office * * *."

[Emphasis ours]

In addition the board here is granted specific power by sec. 140.13 which reads inter alia as follows:

"In carrying out the purposes of the act, the board is authorized and directed:

"* * *

"(2) To provide such methods of administration, appoint a director and other personnel of the division and take such other action as may be necessary to comply with the requirements of the federal act and the regulations thereunder;

"* * *"

The above would justify action by the board to enforce any regulation made by it in event such enforcement is necessary to meet any requirement of the federal act. It is possible that there may be several means of enforcement. There is authority which would support the view that even in absence of statute any regulation of the board could be enforced by action brought in our state courts. See note in 26 Nebraska Law Review 116 at 118; In re Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; United States v. American Bond & Mortgage Co. (DC III.), 31 F (2d) 448 at 450. An example in our own state where an ad-
administrative order was enforced by action brought in court is the case of State ex rel. Martin v. Juneau, (1941) 238 Wis. 564, where the attorney general brought action in the name of the state for a mandatory injunction to compel compliance with an order of the state board of health and water pollution committee requiring the city of Juneau to take steps to install a sewerage system. There was no express statute authorizing such action. But wholly aside from the foregoing, an action to enforce a regulation of the board under sec. 140.18 prescribing minimum standards would, in our judgment, be authorized by the provisions of sec. 140.13 (2) above referred to and also by the provisions of sec. 140.05 (1) which states inter alia:

"The state board of health shall have general supervision throughout the state of the health and life of citizens, and shall study especially the vital statistics of the state and endeavor to put the same to profitable use. * * * The board may establish bureaus and shall possess all powers necessary to fulfill the duties prescribed in the statutes and to bring action in the courts for the enforcement of health laws and health rules. * * *

In making a regulation of the kind mentioned in sec. 140.18, the board would clearly be exercising or fulfilling "duties prescribed in the statutes" with respect to a subject matter which falls within the designation of "health laws and health rules." Regulations issued by the board prescribing minimum standards for the maintenance and operation of hospitals as provided in sec. 140.18 relate to health of the people of this state and such construction of the term "health laws and health rules" follows from its context. It also is justified from the broad powers given the board by sec. 140.05 (1), namely "general supervision throughout the state of the health and life of citizens" and "all powers necessary to fulfill the duties prescribed in the statutes." This indicates pretty well that the term "health laws and health rules" should be construed to cover any rules or regulations made by the board within the scope of its powers which relates to the health and life of its citizens including regulations covering the subject matter involved here, namely maintenance and operation of hospitals.
Power to enforce any regulation made by the board under sec. 140.18 may also be found in sec. 140.05 (3) which reads *inter alia* as follows:

"The board shall have power to make and enforce such rules, regulations and orders governing the duties of all health officers and health boards, *and as to any subject matter under its supervision, as shall be necessary to efficient administration and to protect health*, and violation shall be punished by fine of not less than ten nor more than one hundred dollars for each offense, unless penalty be specially provided. * * *”

The context requires that the word “and” following the word “boards” should be construed to mean “or.” Otherwise the power granted would be limited to rules governing health officers and health boards which would be contrary to the evident intent of the legislature as therein stated. *State ex rel. Wisconsin D. M. Co. v. Circuit Court, 176 Wis. 198 at 204.* Any regulation made by the board under sec. 140.18 would obviously relate to “any subject matter within its supervision, as shall be necessary to efficient administration and to protect health” and would meet the requirements of that portion of sec. 140.05 (3) above quoted.

Attention is also directed to the fact that sec. 140.05 (3) also provides for a punishment by way of a fine for violation of any rule, regulation or order therein mentioned unless another penalty is specifically provided. Inasmuch as any regulation made by the board under sec. 140.18 is included in the rules, regulations or orders mentioned in sec. 140.05 (3), failure to comply with any such regulation could be penalized by the imposition of a fine as therein stated.

We therefore advise you (1) that any regulation made by the state board of health under sec. 140.18 may be enforced by action brought in a state court of competent jurisdiction; (2) that sec. 140.05 (3) is applicable and gives the broad power to enforce any regulation made by it under sec. 140.18 by such an action and further provides for the imposition of a fine in case of violation of any such regulation."
Before concluding this opinion, we wish to direct your attention to an opinion of this office appearing in XXXV Op. Atty. Gen. 29 which holds that the state board of health might prescribe minimum standards to guide those in charge of tuberculosis sanatoria but was without power to enforce them. The opinion in that case turns on a statute which specifically limited the board's power of enforcement to recommending such changes and additions as it deemed proper which, of course, distinguishes the situation there from that here.

**Counties—Taxation—Tax Deed—Public Assistance—Old-age Assistance**—Where tax delinquent lands, subject also to old-age assistance lien, are deeded to the county, the county's lien for such taxes and old-age assistance is merged in the county's title and interest on the delinquent taxes ceases to run.

June 28, 1947.

**Herbert A. Bunde,**
**District Attorney,**
Wisconsin Rapids, Wisconsin.

You state that an old-age pensioner against whose lands an old-age assistance lien had been filed was committed to the county home for the aged and gave a deed of his property to the county. Thereafter the county welfare director sold the property to a third party and accounted to the state welfare department upon the basis of the sale price of the land. There were delinquent taxes, interest and penalties against the land when the county took title, and you inquire whether interest continued to run after the county acquired title.

This problem has received consideration either directly or indirectly in the following opinions where tax deeds to the county were involved,—XXVIII Op. Atty. Gen. 74, XXX Op. Atty. Gen. 29, XXXV Op. Atty. Gen. 429 and XXXVI Op. Atty. Gen. 120. In the last of these opinions it was
pointed out that there is no provision in the statutes for interest after the taxes and tax certificates cease to exist, since the taking of the tax deed automatically extinguishes them by merging them in the county's title.

On the basis of these opinions your question narrows itself down to the problem of whether or not the result should be any different where the lands are conveyed to the county voluntarily rather than by tax deed.

We are unable to perceive that there is any statutory distinction so far as the running of interest or so far as accounting for the proceeds from the sale of the lands are concerned. If there is a merger in the one case there should likewise be a merger in the other and you are therefore advised that the opinions hereinbefore referred to are controlling so far as your problem is concerned.

WHR

State Treasurer—Taxation—Income Tax—Income tax collections may be invested in appropriate securities the same as other state funds. The provisions of sec. 71.10 (4m) (a), Stats., do not preclude such handling of said funds.

June 28, 1947.

John M. Smith,
State Treasurer.

You call our attention to the following provision of sec. 71.10 (4m) (a), Stats. 1945:

"In collecting income taxes as provided in this chapter, the department of taxation shall be deemed to act as agents of the state, counties and towns, cities or villages entitled to receive the taxes collected."

and ask whether in view thereof of the income tax collections transmitted to you by the department of taxation may be invested, such as in United States government bonds or securities, pending the next apportionment and distribution thereof on March 1, June 1, September 1, or December 1, as the case may be.
By the express language of sec. 71.10 (3), Stats. 1945, all income taxes are payable to the department of taxation. Sec. 71.10 (4m) (b), Stats., requires it to transmit all income tax collections to the state treasurer within 15 days after it receives them and also provides that on March 1, June 1, September 1 and December 1 of each year the state treasurer "shall apportion and pay income taxes collected and transmitted to him to the county and local treasurers" as provided in sec. 71.19, Stats.

All that sec. 71.19 contains is the basis upon which such revenue derived from income taxes collected is to be divided and distributed on the prescribed dates. Except as it directs how the appropriations made by sec. 20.09 (4) to the department of taxation to cover the cost of administering the income tax law shall be deducted from such income tax collections, there is nothing in it that in any way relates to what the state treasurer shall or shall not do with the proceeds of such collections or grants any rights to the counties or local units, during the interim between the time of receipt thereof and the next respective apportionment date. We find no other statutory provision respecting what the state treasurer shall do with such proceeds during such interim or conferring any rights on the counties or local units during that time.

The provision which you quote from sec. 71.10 (4m) (a), Stats., came into the statutes by ch. 367, Laws 1933, which, so far as the income tax law is concerned, was designed to improve the collection of income taxes. The main change made in this respect was to take the collection of the income taxes away from the county treasurers and put it in the hands of the tax commission, now the department of taxation. Prior thereto all income taxes were payable to and the collection of income taxes was made by the county treasurers. It is because of this change that the quoted provision from sec. 71.10 (4m) (a) was put in the statutes. Its significance is to make clear that the income tax law after amendment in 1933 is designed to and does produce revenue for the state and all of the named local subdivisions thereof. There is nothing in the quoted language of sec. 71.10 (4m) (a) that has any significance in respect to the question which you have presented.
When the proceeds of income tax collections are transmitted to the state treasurer by the department of taxation they come into the hands of the state treasurer the same as any other state funds. He is not required to segregate them and keep them in a separate account. Factually that has never been done and such funds have been commingled with other state funds and deposited in the state general bank accounts. The state treasurer has the duty to preserve them in the same fashion that he does other funds. As respects these particular funds his only other duty is to see that at the respective revenue distribution dates there are sufficient state funds available in a form capable of distribution according to the prescribed basis set forth in sec. 71.19, Stats. The tax department certifies to the state treasurer how they shall be apportioned and if any overdistribution is made the tax department handles the effecting of any correction thereof. Sec. 71.18 (4), Stats.

We find nothing in the statutes that precludes the handling of funds representing the proceeds of income tax collections the same as other state funds generally, except of course, as indicated above, the inherent requirement that on the respective revenue distribution dates funds shall be available in sufficient liquid form to make the distributions. On the other hand, secs. 14.445 and 14.67, Stats., do provide for the investment of state funds in the treasury in United States government bonds. If these or other provisions authorize the investment of state general funds they apply equally to the funds derived as income tax revenue.

It is our opinion that, subject to such limitations as may be applicable to state funds generally, the income tax collections may be placed in proper investments such as United States government bonds or securities, either maturing or capable of conversion at such time as they may be needed.

HHP
Taxation—Motor Fuel Tax—Words and Phrases—Time
—Change to 6 months in the time prescribed by sec. 78.14 (2), Stats., for filing claims for refund of motor fuel taxes, made by ch. 321, Laws 1947, applies only to claims upon purchases made on and after June 28, 1947. Such period does not include the same day of the sixth month as the purchase date, but expires on the day before. Where sixth month has fewer days than that upon which the final filing date would fall, the period expires on the last day of such month. If final filing date falls on Sunday or a holiday, claim may not be filed the next secular or business day.

July 1, 1947.

Wisconsin Department of Taxation.

You request an opinion on four questions as to the application of the amendment made by ch. 321, Laws 1947, in the provisions of sec. 78.14 (2), Stats., changing the time within which claims for refund of motor fuel taxes must be filed from “90 days” to “6 months” after the purchase. Said ch. 321 was published June 27 and therefore took effect June 28. See sec. 370.05, Stats.

1. Does the time limitation of 6 months for filing claims apply only to purchases made on or after the effective date of the act, or does it also apply to purchases made within the 6 months prior to the effective date of the act even though in some cases tax refund may have been previously disallowed for late filing when the claim was presented under the 90-day time limitation?

Under the provisions of sec. 370.06, Stats., as interpreted and applied in Estate of Tinker (1938) 227 Wis. 519, 279 N.W. 83; Pierce v. Westby State Bank (1935) 218 Wis. 648, 261 N.W. 752; Augustine v. Congregation of the Holy Rosary (1934) 213 Wis. 517, 252 N.W. 271, and Thom. v. Sensenbrenner (1933) 211 Wis. 208, 247 N.W. 870, any change in the limitation or period of time prescribed by the statute for the doing of an act applies only to rights and remedies which accrue after the effectiveness of such amendment, and the old limitation or period of time continues to apply to all matters upon which it had commenced to run prior to such change, unless the amending act provides the new
limitation or period of time shall apply to matters upon which the limitation or period of time had commenced to run when it took effect. Chapter 321, Laws 1947, is wholly devoid of anything indicating that there was any intention that the 6-month limitation should apply to claims which had already accrued when it took effect. Accordingly sec. 370.06, Stats., is applicable and the 6-month period applies only to claims for refunds on purchases made on and after June 28, 1947. It does not apply to claims for refund in respect to purchases made prior to June 28, 1947, but the 90-day limitation continues to apply to them.

2. Does the language “within 6 months after the purchase” mean that the final filing date is the same day of the month 6 months hence, or the day before or the day after?

Sec. 370.01 (10), Stats. 1945, specifies that as used in the statutes:

“The word ‘month’ shall be construed to mean a calendar month unless otherwise expressed * * *.”

This same section by subsection (24) provides:

“The time within which an act is to be done as provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Sunday or a legal holiday the act may be done on the next secular day; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.”

However, there is nothing in the statutes respecting how time shall be computed where expressed in months. Accordingly, as was the case in XXV Op. Atty. Gen. 600, resort must be made to the general rule of construction, which is as stated by the supreme court in Siebert v. Jacob Dudenhoefer Co. (1922) 178 Wis. 191, 194, 188 N.W. 610:

“* * * The rule is well settled on an issue of limitation where the time is to be computed from a certain date, that in the computation the day of the date is to be excluded, and where the computation is from a certain event the date of that event must be included. * * *”

The above quotation was cited and followed in the more recent case of Brown v. Oneida Knitting Mills (1938) 226 Wis. 662, 277 N.W. 653.
The provision in sec. 78.14 (2), Stats., as amended, is that the claim for refund must be filed "within 6 months after the purchase of the motor fuel." It does not say from the date of the purchase. Therefore, as the time is computed from an event, e.g., the purchase of the motor fuel, the above general rule is applicable and the 6-month period is computed by including the day of the purchase as the first day of such period. The 6 months thus does not extend to include the same day of the month 6 months hence but expires on the day before. To illustrate, if motor fuel is purchased on July 15, the period within which a claim for refund may be filed expires on the next January 14.

3. What is the final filing date in respect to a purchase made on the 31st day of a month where the sixth month thereafter has less than 31 days?

The applicable rule is stated in 62. C.J. 970 as follows:

"Where 'month,' as employed in a statute, judicial proceeding, or contract, means calendar month, a period of a month or months is to be computed not by counting days, but by looking at the calendar, and it runs from a given day in one month to a day of the corresponding number in the next or specified succeeding month, except where the last month has not so many days, in which event it expires on the last day of that month. It means the period of time intervening between a given date and the corresponding date of the next succeeding month by name, and as the number of days in a calendar month varies, the number of days in such period is necessarily limited by the number of days in the month during which the computation begins, and also in which it ends."

It is therefore our opinion the answer to this question is that the period expires on the last day of the sixth month. Taking the example you present, the final filing date would be February 27 for purchases on August 28, and February 28 for purchases on August 29, 30 and 31, except if it were leap year, when February 29 would be the final date in respect to purchases on August 30 and 31.

4. If the final filing date falls on Sunday or a holiday does the next secular or business day become the final filing date?

Upon this question the only authority in this state is Williams v. Lane (1894) 87 Wis. 152, 58 N.W. 77, where it was held that in the absence of express statutory language
to the contrary, where the time set out in a statute for commencement of an action is expressed in years and the last day falls on Sunday, the action cannot be commenced on the next day. It specifically referred to the statute which is now sec. 370.01 (24), Stats., providing that when the time for doing an act is expressed in days, then if the last day falls on Sunday or a holiday it may be done the next secular day, and said the case did not come within it because that statute applies only to cases where the time in the statute "is expressed in days." We perceive no reason why the same rule should not obtain where the time is expressed in months. Clearly such a case likewise is not within the provisions of sec. 370.01 (24), Stats. Your question is, therefore, answered in the negative.

HHP

Constitutional Law—Marketing and Trade Practices—Bill 326, A. as amended, Session 1947, requiring every person who under franchise or other contract sells, exchanges or otherwise deals at retail in merchandise in a territory which includes an area of this state to have a bona fide place of business in such area in this state, if enacted into law would be unconstitutional because of conflict with sec. 1, art. I, of the state constitution and sec. 1 of the 14th amendment of the federal constitution.

July 2, 1947.

The Honorable, The Assembly.

By resolution you ask our opinion of the constitutionality of bill 326, A. with amendments 1, A. and 2, A. if enacted into law. The bill as amended provides:

"100.195 RETAIL PLACE OF BUSINESS REQUIRED. (1) Every person holding a franchise or contract by any other name to engage in selling, exchanging or otherwise dealing in any product at retail in a territory including an area of this state shall have a bona fide place of business in such area of this state; and no person shall grant or issue to another person a franchise or contract by any other name to sell, exchange or otherwise deal in any product at retail in a territory including an area of this state unless such
other person shall have a bona fide place of business in such area of this state. 'Bona fide place of business' as used in this subsection shall be deemed to include a place of residence in or from which operations under such franchise or contract are carried on.

"(2) The provisions of this section shall not apply to the employes of any employer having a place of business in such area nor to sales agents representing a principal having a place of business in such area.

"(3) Any person violating this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100 nor more than $500. Each violation of this section, after the first, continuing for a period of 30 days shall be deemed a separate and distinct offense."

Said bill would if enacted into law discriminate between the person who under a franchise or other contract, sells, exchanges or otherwise deals at retail in any product in a territory which includes an area of the state, and the person who might sell, exchange or otherwise deal in a like or similar product at retail in this state but not under a franchise or contract, such as a manufacturer (who might or might not be a resident of this state) who sells his or its products direct to the public. The person who does business under the franchise or contract would become subject to bill 326, A. if it is enacted into law and must have a bona fide place of business in this state in the territory covered by his franchise or contract. The person who does business without a franchise or contract would not become subject to bill 326, A. if enacted into law and need not have such a place of business. We see no rational basis for such a classification and for that reason are of the opinion that bill 326, A. would if enacted into law be unconstitutional because such improper classification would make it discriminatory and would violate sec. 1, art. 1 of our state constitution and sec. 1 of the 14th amendment of the federal constitution. *Whipple v. South Milwaukee*, 218 Wis. 395; *Edgerton v. Slatter*, 219 Wis. 381.

We understand that the above bill is designed to require nonresidents of this state who are authorized by a manufacturer or others to engage in the sale of merchandise in a certain territory which includes a portion of this state, to
have a place of business in this state. Normally any contract entered into between the nonresident retailer and the manufacturer or anyone else authorizing said retailer to engage in the sale of merchandise in a certain territory which might include a portion of the state would be entered into in some state other than Wisconsin, and there is a question whether Wisconsin has any power to enact legislation which would affect contracts of this kind made outside its borders. There is also a question whether Wisconsin could prevent its citizens from going into another state and making purchases from such nonresident retail dealer and also whether Wisconsin could impose any requirement upon the nonresident retailer in event such retailer, either in person or through agents, comes into this state for the purpose of negotiating or making a sale of merchandise. However, the conclusion already reached makes it unnecessary to now determine such questions or other possible questions such as whether the bill is aimed at remedying something legitimately within the scope of the police power or whether the bill if enacted into law would discriminate between residents and nonresidents of this state as well as whether it may be discriminatory in other respects, or whether it would impose an undue or discriminatory burden on inter-state commerce, which latter question might arise if such bill were applied to the numerous different factual situations which could be presented.

WET
Intoxicating Liquors—Gambling Devices—Governor—District Attorney—Under sec. 176.90 (9), Stats., district attorney has no duty to report to the governor the negative circumstance that he has not received reports of the presence of specified gambling devices within his county during the preceding quarter year.

In the absence of such report, governor must presume the district attorney has done his duty, unless proof is received by governor of presence of such gambling devices in said county, and of district attorney's knowledge thereof. In the latter circumstance the governor may remove district attorney on his own complaint.

July 3, 1947.

OSCAR RENNEBOHM,

Acting Governor.

You request my opinion as to (1) whether, under section 176.90 (9), Stats., it is the duty of a district attorney to report in writing to you if no information has come to such district attorney of the presence of gambling devices in places where liquor is sold for the preceding quarter year; and (2) whether the governor has any duty in the premises if no report is received.

A consideration of the following excerpts from section 176.90, Stats., (commonly known as the "Thomson Law") is necessary to the answers to your questions:

"176.90 (1) A license or permit issued under the provisions of this chapter or section 66.05 (10) to any person who shall thereafter knowingly suffer or permit any slot machine, roulette wheel, other similar mechanical gambling device, or number jar or other device designed for like form of gambling, to be set up, kept, managed or used upon the licensed premises or in connection therewith upon premises controlled directly or indirectly by such person, shall be revoked by the circuit courts by a special proceeding as hereinafter provided." ***

"(2) Any sheriff, undersheriff, deputy sheriff, constable or other municipal police officer or any person authorized to enforce the gambling laws under the provisions of section 14.426 shall within 10 days after acquiring such information report to the district attorney of the county the name and address of any licensee or permittee under chapter 176 or section 66.05 (10) who to his knowledge has knowingly
suffered or permitted any device to which reference is made in subsection (1) to be set up, kept, managed or used upon the licensed premises or in connection therewith upon premises controlled directly or indirectly by such licensee or permittee. Such officer or person shall also report to the district attorney his knowledge of the circumstances and the name of the municipality or officer by whom the license or permit has been issued. Any other person may in writing and signed by that person report any such name, address and other information to the district attorney. Within 10 days after any report to him the district attorney shall institute a proceeding as hereinafter provided before the circuit court of his county or shall within such time report to the attorney-general the reasons why such a proceeding has not been instituted. * * *

"(9) A written record shall be kept by every officer and district attorney of reports made by or to him under subsection (2). On the first day of the third calendar month after the passage of this section the district attorney of each county shall report in writing to the governor the name, address and office, if any, of each person who has reported to him knowledge of gambling devices under the provisions of subsection (2). He shall also set out the disposition of such reports and the status of all cases instituted thereon. Thereafter such a report shall be filed quarterly on the first days of January, April, July and October in each year, and each report shall also set forth the status of cases not shown by any prior report to be finally determined."

You suggest that if this section requires the district attorney to make quarterly reports at all events, whether or not informers communicated with the district attorney, the governor would be warranted in believing the district attorney who does not file a report is derelict; and that it would be the governor's duty to demand a report, even though the report should show that the official had received no information as to gambling devices in his county. You further suggest that if there is no duty on the part of the district attorney to report to the governor following those quarter years in which no information comes to the district attorney, the governor is not justified in assuming that the district attorney is derelict and there would be no duty upon the governor to call for the report.
You state the further proposition as your conclusion that in the latter event, the governor would not seem to have any duty in the absence of a report, even though in the particular county the law may have been violated and the violation ignored.

Subsection (9) is clear in affirmatively prescribing the contents of the report required to be made. No requirement is expressed, nor, in my opinion, can be implied, which defines or imposes upon the district attorney a duty to report to the governor the negative circumstance that no violations have occurred within the periods preceding the due dates of such reports. The plain language of the statute supports the foregoing conclusion without the necessity of applying any rules of construction.

It follows that if the governor does not receive a report from a district attorney on the due date designated by the statute, he may properly assume that no violations of section 176.90, Stats., have occurred within the preceding quarter year in the county in question. The maxim omnia praesumuntur rite et solemniter esse acta (all things are presumed to have been rightly and regularly done) which is frequently applied to the acts of almost every class of officers, is applicable here.

"* * * in the absence of evidence to the contrary, sworn public officials are presumed to have performed their duties properly." See 1 Jones on Evidence, 4th ed., paragraph 45, pp. 78–80. Citing State v. Kempf, 69 Wis. 470, 84 N.W. 226, 2 Am. St. Rep. 753.

In that part of your conclusions in which you state that "the governor would not seem to have any duty in the absence of a report; even though in the particular county the law may have been violated and the violation ignored," you are correct, provided proof of a violation has not reached your official attention from other sources. In the latter instance, if proof of such violation should be submitted to you from a source other than the district attorney, a further question arises by virtue of section 176.90 (8), which reads as follows:

"Any officer or employe referred to in subsection (2) or any district attorney who shall without proper excuse neglect or refuse to perform the duties required of him herein
within such times as may be specified shall be subject to remo-
val. The governor may remove any such sheriff or dis-
trict attorney under the provisions of section 17.16 by filing
a complaint on his own motion.

Section 17.16 Stats., referred to above, prescribes gener-
ally the procedure for removal of public officers. The only
subsection material to the present question reads as follows:

"(3) Removals from office for cause under this chapter,
except as provided in section 17.14, shall be made as pro-
vided in this section, and may be made only upon written
verified charges preferred by a taxpayer and resident of
the governmental unit of which the person against whom
the charges are filed is an officer, * * *"

In view of this strengthening of the removal process by
conferring upon the governor the power to file a complaint
on his own motion, it is clear that the legislature intended
to impose a larger responsibility upon him than is contem-
plated by the general removal statute (17.16 (3) ) which
requires a taxpayer's petition.

The office of governor is a constitutional office under the
American system, and does not exist by virtue of the com-
mon law. 24 Am. Jur. 824. No powers or duties attach to the
office except such as are expressly conferred. State ex rel.
Resley v. Farwell, 3 Pinney 393, 432.

While the statute in question (sec. 176.90) is not a
criminal statute, in that it does not create a criminal off-
fense and the remedial provisions employed in the section
do not constitute a punishment for crime (State v. Coubal,
248 Wis. 247, 262), there is a strong similarity between the
character of a district attorney's duty to act under this
statute when appropriate circumstances exist which would
arouse that duty, and the character of his duty to prosecute
in a criminal case.

In the absence of the power vested in the governor to file
a complaint on his own motion under section 176.90 (8),
the residual situation which would exist upon the failure or
neglect of a district attorney to act in an appropriate case
under section 176.90 and that which would exist upon his
failure or neglect to act in a criminal case, would be much
the same insofar as the duty of the governor to act is con-
cerned.
It has been held in a former opinion of this department, III Op. Atty. Gen. 804, that the governor has no special duties in the matter of enforcing the criminal laws. In reaching that conclusion my predecessor considered that part of section 4 of article V of the Wisconsin constitution which provides:

"* * * He [the governor] shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed."

with reference to the construction of which he quoted from a leading case involving a similar provision in the constitution of the state of West Virginia: Preston v. Bennett, 8 W. Va. 89, wherein the court said:

"The provision which requires that the governor shall take care that the laws be faithfully executed does not generally, if ever, make it the duty of the governor himself to execute the laws. But, as the language imports, it makes it his duty carefully to observe the manner in which the different officers of the government exercise their proper functions and execute the laws committed to their charge, or their failure to perform such duties; and when they fail to act, or act improperly, if he has the power to remove them from office, to do so; or if he has not, to bring the subject to the cognizance of that department of the government which has the power to remove or punish them." (Emphasis ours)

My predecessor further elucidated upon the subject of the governor's duty in the following manner:

"Under our scheme of government the county is made the unit for the enforcement of state laws. A person must be prosecuted in the county in which the crime with which he is charged was committed. The expense of the trial is borne by the county. The district attorney and the sheriff are the law officers of the county and to them is committed the duty and responsibility of enforcing the laws throughout their respective counties. Nowhere in the constitution or in the statutes is the governor charged with anything in the nature of specific duties concerning the enforcement of laws, but by the provisions of sec. 968 [17.08] he is given the power to remove from office, among others, any sheriff or district attorney for their neglect of duty or malfeasance or misfeasance in office. By virtue of this power he may ex-
exercise a very decided influence in spurring these officers to a proper discharge of their duties and by this power he is enabled to see that the laws are faithfully executed.” III Op. Atty. Gen. 804, at 807.

I concur in that opinion and advise that it furnishes the answer to your question respecting your duty in the premises.

SGH

Municipal Court—Judge—Salaries and Wages—Art. IV, sec. 26, Wisconsin constitution, does not apply to increase in fees of municipal judges.


HENRY C. Oakey,
District Attorney,
Balsam Lake, Wisconsin.

You inquire whether the increased fee for the municipal judge of Polk county provided by ch. 38, Laws 1947, shall be collected on all cases docketed during the balance of the term of the present incumbent. The answer to this question is “Yes.” The only conceivable objection to the collection of such increase would be the provision of art. IV, sec. 26, of the Wisconsin constitution, which provides in part, “nor shall the compensation of any public officer be increased or diminished during his term of office.” It is now well established that this provision applies only to public officers whose salaries are paid out of the state treasury. Sieb v. Racine, 176 Wis. 617, at 625. XXXII Op. Atty. Gen. 51. XXIX Op. Atty. Gen. 464.

Since this increase in fee is provided by state statute it would supersede the terms of any other inconsistent section of the statutes previously adopted.

RGT
Villages—Bond Issues—Airports—Since the amendment of sec. 67.05 (5), Stats., by ch. 330, Laws 1947, villages have authority to issue bonds for airport purposes without a vote of the electors.

August 2, 1947.

T. K. Jordan,
Executive Secretary,
State Aeronautics Commission.

You have asked whether it would be lawful for a village to issue bonds for airport purposes without a referendum of the voters of the village.

We believe that since the enactment of ch. 330, Laws 1947, no referendum is required in such a case.

Prior to the enactment of ch. 330, sec. 67.05 (5) (a) provided that whenever an initial resolution should be adopted by the governing body of a town or village the clerk of the municipality should immediately call a special election for the purpose of submitting the resolution to the electors for approval. Ch. 330 amended that provision by removing the words "or village" and making the requirement applicable only to towns.

The same law included villages within the scope of sec. 67.05 (5) (b) which had theretofore applied only to cities. It now provides that cities and villages may not issue bonds without submitting the question to the electors except for certain specified purposes. Ch. 330 also added airports to the excepted purposes. We think it clear that by such change the legislature intended to make it possible for villages, as well as cities, to issue bonds without referendum for the purposes specified in sec. 67.05 (5) (b), including airports.
Optometry—Contact Lenses—Licenses and Permits—
Fitting of contact lenses involves the practice of optometry under sec. 153.01, Stats., and under 153.02, Stats., may be done only by a licensed optometrist or licensed physician or surgeon.

August 6, 1947.

DR. A. N. ABBOTT, President,
Wisconsin Board of Examiners in Optometry.

You have inquired whether the fitting of contact lenses constitutes any part of the practice of optometry and have furnished us with the following information relating to the methods employed in fitting these lenses:

There are two methods in general use known as the "molded" and the "trial case." Both were devised by optometrists and the various refinements in technique have been worked out by optometrists. Most of the unlicensed persons now in the field use the "molded" method. Optical companies in many instances give a stenographer a short course in the work and she dons a white dress and proceeds to work on patients. The mold is made by placing a low melting wax over the eye ball and allowing it to take the contour of the eye. The mold can be made after instilling a few drops of anesthetic on the eye but equally good results can be obtained without an anesthetic. This latter method is gaining in popularity because the patient can report his sensations as the work progresses, thus insuring more accurate work, although where an optometrist does use an anesthetic he works in conjunction with a physician. After the mold has been forced into proper shape it is cooled and removed from the eye. From this is made a mold of the eye over which is fitted a plastic shell or lens.

After the final shell has been made up a drop of fluorescein (which is a dye, not a drug) is put in the eye. Then the lens is inserted in the eye and checked with a fluorescent light for leaks and general fit. The patient is then given a conventional optometric refraction with this shell in his eye. The resultant findings are then ground into the shell and the job is finished.

The "trial case" method varies only in that no mold is made. From an assortment of twenty-five or more lenses
of various sizes and shapes the one making the best fit of the eye is selected. An optometric refraction is then given and the final lenses are ordered from the laboratory by number. Any slight alteration that is needed to make a good contact is made by bending the shell margin with a warm forceps.

Some optical companies are soliciting patients directly and others are sent to them by physicians and optometrists. In some instances a patient is sent to a physician to secure a prescription for the anesthetic but in most cases the company secures this for the patients. Unlicensed persons are making the molds and doing the refractions. While some of the optical companies contend that the work is done under medical supervision, the physician in most instances is not even in the building and has never seen the patient.

Sec. 153.01, Stats., reads:

"The practice of optometry is defined as follows: The employment of any means other than drugs to determine the visual efficiency of human eyes or the measurement of the powers or defects of vision; the furnishing, using or employment of any means or device designed or calculated to aid in the selection or fitting of spectacles or eyeglasses; and the adaptation of lenses, prisms and mechanical therapy to aid the vision of any person."

Sec. 153.02 reads:

"(1) No person shall practice optometry within the meaning of this chapter without a license so to do and a valid certificate of registration issued by the Wisconsin board of examiners in optometry.

"(2) This section shall not apply to physicians and surgeons duly licensed as such in Wisconsin nor shall this section apply to the sale of spectacles containing simple lenses of a plus power only at an established place of business incidental to other business conducted therein, without advertising other than price marking on the spectacles, if no attempt is made to test the eyes. The term 'simple lens' shall not include bifocals."

As we see it the fitting of contact lenses for the purpose of correcting visual defects is no different in principle than the fitting of ordinary spectacles. In the one instance the eye is fitted with a thin shell or cap of plastic or other transparent material which is held in place by the eyelids. In the
other instance glass is used and is held in place by framework attached to the nose (pince-nez) or to the nose and ears as in ordinary eyeglasses.

According to sec. 153.01 there are three steps in the practice of optometry: (1) Determining visual efficiency or measuring powers or defects of vision, (2) use of any means or device designed to aid in the selecting or fitting of eyeglasses or spectacles (i.e. refraction) and (3) adaptation of lenses, prisms and mechanical therapy to aid vision.

The determination in the first instance that corrective lenses are needed at all requires the services of a licensed man in testing “the visual efficiency of human eyes” and in “the measurement of the powers or defects of vision.” Secondly, as we understand it the refraction or use of any means or device designed to aid in the selecting or fitting of spectacles or eyeglasses is the same whether conventional eyeglasses be selected or whether contact lenses be employed as ultimate corrective agencies.

Lastly, the statute is all-inclusive as to the type of lenses that are employed to aid the vision of any person. They need not be restricted to glass nor is there any limitation as to the manner in which they are to be attached to the person. The statute says “and the adaptation of lenses, prisms and mechanical therapy to aid the vision of any person”.

While there may be some steps in the fitting of contact lenses which do not involve the practice of optometry, such as the grinding of the prescription into the lens, it is apparent that the determination of the need for visual correction, the fitting of the lens to the eye, the optometric refraction, and the writing of the prescription are all a part of the practice of optometry and may be done only by licensed optometrists or licensed physicians and surgeons.

WHR
Civil Service—Bureau of Personnel—Reclassification and Promotion—The personnel director may reallocate a position from one classification to another upon compliance with the rules of the personnel board but if the position is reclassified upward, incumbent may not occupy the higher position without compliance with the statutes and rules relating to promotion.

Neither reallocation nor promotion can be effected retroactively.

August 6, 1947.

A. J. Opstedal,
Director of Personnel.

You have asked a number of questions respecting classification procedure followed by your department as applied to a specific case. The facts as reported by you include the following: At the request of a certain appointing officer you reallocated a position in his department on May 8, 1947 (to be effective from May 1, 1947) on the grounds that the duties of the position were of a higher grade than provided by the classification to which the position had theretofore been allocated. At the same time you notified the appointing officer that the incumbent of the position had taken an examination which qualified him for the higher ranking position, and that the incumbent would therefore be promoted to the position as reallocated, also effective as of May 1. Written notice of your action was given to both the employe and the appointing officer. On or about the 2nd day of June following, the appointing officer recommended a further change in the classification to be based on a reassignment of duties in his department. Such recommendation, if adopted, would result in the abolishment of the position to which promotion had previously been effected as above described. The appointing officer requested that his recommendation be made retroactive to May 1. No action has been taken by the bureau of personnel with respect to the second recommendation of the appointing officer. You have asked three questions in connection with the case.

Your first question is: "Is the procedure which the bureau has followed with relation to reclassification matters
adequate to consummate the intent and purpose of the transaction as recommended by the appointing authority?"

It appears to us that your first question involves two subdivisions. One is with respect to the reclassification of the position and the other is with respect to the promotion of the incumbent to the status necessary to permit him to fill the position as reclassified. As pointed out in Odau v. Personnel Board, 250 Wis. 600, 27 N.W. 2nd 726, reclassification or reallocation of a position does not of itself affect the status of the incumbent. If his rating is to be altered, that must be done as required by statute through appointment, promotion, demotion, transfer, reinstatement or the like, depending on what may be appropriate to the particular case. If a position is reallocated to a higher grade, the person who occupied the position before reallocation could occupy it thereafter only by compliance with the statutes respecting promotion or original appointment. We will therefore consider your first question as if it were two separate ones; the first relating to reallocation of the position, the second relating to promotion of the person.

Sec. 16.105 provides that the director, with advice and approval of the personnel board, shall establish grades and classes for all positions. The board has adopted a rule for carrying out this provision which was quoted and impliedly approved in Odau v. Personnel Board, supra. The portion of the rule respecting changes in classification reads:

"After the adoption of the classification plan, and after consultation with appointing authorities, the director shall allocate each position in the classified service to the appropriate class therein on the basis of its duties, authority, and responsibilities. He shall likewise reallocate positions from class to class on the same basis whenever such action may be found to be warranted. Any employee or appointing authority affected by any such allocation or reallocation shall be given written notice thereof, and upon written request, shall be entitled to an appeal from such action to the personnel board. Any such appeal shall be made within 15 days from the date of notification of such action." (Rule V, par. 2, p. 284, Red Book) (Emphasis supplied)

Under the foregoing rule, the director may reallocate a position after consultation with appointing officers. Upon reallocation he must notify in writing both the employe and
the appointing authority affected, and either the employe or the appointing authority is entitled to appeal within 15 days of the notice. It appears from the facts reported by you that the reallocation of May 8 was made in accordance with this rule, since it was made following consultation with the appointing authority and since both the appointing authority and the employe were notified in writing of the action. As we understand the facts, no appeal was taken and the reallocation must therefore be regarded as valid to the extent that it is within the jurisdiction of the personnel director. We find, however, nothing in the statutes which authorizes the personnel director to take action retroactively. It is a principle of law that any officer or employe holding his position by force of statutory enactment must find all of his authority within the four corners of the statute, either in express words or by necessary implication. We see nothing in the statute that would give the director either express or implied authority to make a reallocation of a position retroactive. We believe, therefore, that the reallocation of the position is valid but that it did not become effective prior to May 8 when it was made.

As we understand it, the reclassified position was not filled pursuant to the procedure for a new appointment as prescribed in sec. 16.18. If valid it must, therefore, conform to the procedure for promotions as prescribed in secs. 16.10 (1) and 16.19 (1) and the rules of the board of personnel adopted to carry out those provisions. The first provision above referred to reads:

“16.10 (1) Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which, except as otherwise provided by law shall be ascertained so far as practicable by examinations which so far as practicable, shall be competitive.”

The second provision reads:

“16.19 (1) Vacancies in positions in the competitive division shall be filled, so far as practicable, by promotion from among persons holding positions in the lower grade in the department, office or institution in which the vacancy exists, under rules and regulations made and enforced by the bureau. Promotions shall be based upon merit and fitness to be ascertained by examinations, to be provided by
the director, and upon the superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority and experience."

Rule X of the personnel board reads:

"1. Vacancies in positions in the classified service shall be filled so far as practicable by promotion of permanent employees rather than by appointment from original employment registers. Promotions shall be made on the basis of merit to be ascertained so far as practicable by examinations, service ratings, and seniority.

"2. Promotions shall normally be made from registers prepared from competitive promotional examinations which, at the discretion of the director, may be limited to the department or institution in which the vacancy occurs or opened service-wide. Where it is in the interest of the service, the board may authorize the giving of a non-competitive promotional examination upon which the recommendation of the appointing authority and the director, where such action is justified, with due regard to the competitive principle."

The first statutory provision quoted indicates that promotions as well as appointments are to be based on merit and fitness to be ascertained "so far as practicable" by examinations which "so far as practicable" shall be competitive. The second provision which relates solely to promotions as distinguished from original appointments, makes no reference to "competitive examinations" but indicates only that the promotions are to be based upon merit and fitness to be ascertained by "examinations" to be provided by the director, "and upon the superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority and experience." (Emphasis supplied) We believe that when the two foregoing sections are read together they indicate a legislative intent to leave a considerable amount of discretion to the bureau of personnel as to when it is practicable to make a promotion by means of competitive examination and when it is preferable for the welfare of the service to give a non-competitive examination after taking into consideration "the superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority and experience." The personnel board has in its rule above quoted
attempted to set up a general guide in this respect giving preference normally to competitive procedure by specifying that "where it is in interest of service, the board may authorize the giving of a non-competitive promotional examination upon the recommendation of the appointing authority and the director, where such action is justified, with due regard to the competitive principle." Your statement of facts does not refer specifically to action of the board authorizing a non-competitive examination in this case but for the purposes of this opinion, we will assume that it did. Your facts indicate that the appointing authority did recommend the promotion of the incumbent rather than that a competitive examination be given. Under such circumstances it is our opinion that the promotion was made in conformity with the above quoted statutes and rules.

With respect to that promotion we must also indicate, as in connection with the reallocation of the position, that we do not believe it could be made retroactive.

Your second question is: "Is the appointing officer within his right as the responsible head of that department to change his recommendation, as was done in this case, making the change retroactive in character?"

Once a reallocation and promotion has been made as required by statute and the rules of the board, it remains in effect until it is changed according to the same procedure. The recommendation of the appointing authority for a further reallocation is ineffective until it is acted upon in the manner described by the statutes. In any event, we believe it is true of action by the appointing authority as of action by the bureau of personnel that the statutes do not authorize a change in an employee's status to be made retroactively.

Your third question reads: "Is the bureau correct in holding that the employee, unless he voluntarily waives his rights, is entitled to compensation as examiner for the month of May and also for the month of June, even though his duties have been changed materially during the latter month as compared to May, in view of the fact that the bureau has not concurred in a downward classification and the commissioner has not advised the employee in writing that he is being demoted and reduced in pay or position as required in section 16.24?"
The employe, when duly promoted to a position of higher grade, is entitled to the salary for that position until further action is taken to effect his reduction in some manner prescribed by statute.

BL

**Detectives—Licenses and Permits**—Persons engaged in posing as patrons for the purpose of checking honesty, efficiency and neatness of employes and the condition of the premises of hotels, restaurants and theaters and rendering reports thereon to the employer are required to be licensed as “private detectives” under sec. 175.07, Stats.

Robert C. Zimmerman,
Assistant Secretary of State.

You have inquired whether an individual, firm or corporation rendering a service of checking the honesty, efficiency and neatness of employes and the condition of the premises of hotels, restaurants and theaters and subsequently rendering reports thereon to the employer is required to be licensed under the private detective law, sec. 175.07. The ultimate question is whether such service constitutes “private detective” work in the meaning of the statute.

Section 175.07 (2) provides as follows:

“The term ‘private detective’ shall include among others those persons known as inside shop operatives, that is, persons who do not undertake direct employment whether in shops or otherwise with the owner of a place of employment, but who are engaged by some independent agency to operate or work in such place of employment, and to render reports of activities in such place of employment, to such independent agency, or to the owners of the place of employment under the direction of such independent agency.”

The term has been defined elsewhere as “a person unofficially engaged in obtaining secret information for the use and benefit of those who choose to employ him and to pay his compensation.” 26 C.J.S. 1251, n. 2.

You have enclosed with your request certain blank forms used by the operatives who do this type of work from which
it is to be inferred that the operatives by posing as patrons keep their identity secret from the employes of the place being investigated, so that in that sense the information obtained is "secret"—that is, the fact that the information is being obtained is unknown to the personnel of the establishment.

While the operatives do not come within the statutory definition above quoted, since they do not take employment in the hotels, restaurants and theaters, still their investigative work is of the same general nature as that of "inside shop operatives"—and the statutory definition does not purport to be exclusive. There is no reason to suppose that the legislature intended the law to apply to persons posing as employes in the place to be investigated but not to those who pose as patrons.

A well-known detective agency which performs identical services in connection with "shopping" department stores and the like has been licensed for many years.

It appears that services such as are involved in your question are within the spirit and intent of the statute and that persons performing them are required to be licensed.

WAP

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Towns—Villages—Supervisors—Under secs. 60.20 and 61.21, Stats., supervisors elected from villages and towns take office as soon as they have qualified after their election and their defeated predecessors cannot act in any official capacity on the county board subsequent thereto.

August 7, 1947.

Jerold E. Murphy,
District Attorney,
Fond du Lac, Wisconsin.

We have received your inquiry relative to the terms of county board supervisors for villages and towns. Your question is whether a supervisor from a village or town, after his defeat and his successor has qualified, can act on the county board committee and receive compensation therefor. You have concluded that after the newly elected supervisor
has qualified, the defeated supervisor cannot act as such on the county board or any committee thereof. We concur in your conclusion.

The terms of supervisors for both villages and towns expire as soon as their successors have been elected and qualified. Sec. 60.20, Stats., provides that the town clerk shall transmit notice of election to the person elected within 5 days after the election and thereupon the successful candidate shall take and file the official oath. Failure to file such oath within 5 days after his election is deemed a refusal to serve in office.

Sec. 60.22, Stats. provides that every town officer elected at an annual meeting shall hold his office for 2 years and until his successor is elected and qualified. Therefore, as soon as the successor has taken his oath, the term of office of his predecessor automatically expires. Since this must be done within 5 days after the election, the defeated supervisor cannot subsequently serve on the county board or any of its committees.

The same rule is applicable to supervisors from villages. Sec. 61.21 provides that within 5 days after the election the village clerk shall notify the person elected and such person shall within the same 5-day period take and file his official oath. Sec. 61.23 provides that the terms of village officers shall be 2 years and until their successors are elected and qualified.

This problem was considered in XVII Op. Atty. Gen. 333. It was there said:

"* * * supervisors in villages and town chairmen take office as soon as they have duly qualified."

This rule was not altered by the amendment of secs. 60.20 and 61.21 by ch. 23, Laws 1945. The same conclusion was reached in XXI Op. Atty. Gen. 378. See especially page 379 of that opinion.

It is our conclusion, therefore, that supervisors elected from villages and towns take office as soon as they have qualified after their election and that their predecessors cannot act in any official capacity on the county board subsequent thereto.

ES
Board of Accountancy—Examinations—Public Officers—
Delegation of Power—Wisconsin state board of accountancy may not delegate to American Institute of Accountants responsibility of preparing and grading examinations which would be used by the board in determining qualifications of candidates for a certificate as a certified public accountant.

August 8, 1947.

WISCONSIN STATE BOARD OF ACCOUNTANCY.
Attention Clarence H. Lichtfeldt, President.

Since the enactment of statutes regulating the practice of accountancy in this state your board has been authorized and directed to administer those statutes, and by its membership annually has supervised the preparation of the examination questions and the correction of the examination papers used to determine the qualifications of individuals desiring to be licensed as certified public accountants.

As a matter of practice in the United States only four states, including Wisconsin, still continue to give qualifying examinations directly by their respective boards of accountancy. All others use an examination prepared by the American Institute of Accountants which also grades the papers and submits such grades back to the respective state boards of the states in which the candidates are residents. Your board has contemplated using the facilities of the American Institute in the preparation and grading of the examinations.

You inquire whether your board may delegate to an outside agency the responsibility of preparing and grading an examination by which candidates for a certificate as a certified public accountant are qualified, provided your board actually continues to conduct and supervise the sittings for the examinations.

It is our opinion that this question must be answered in the negative.

Sections 135.03 (1), 135.04 (2) and (3) provide:

"135.03 (1) No person may lawfully practice in this state as a certified public accountant either in his own name, or as an employe, or under an assumed name, or as an officer, member or employe of a firm, or as an officer or employe of a corporation, unless such person has been granted by the
board a certificate as a certified public accountant, and unless such person, firm or corporation, jointly and severally, has complied with all of the provisions of this chapter, including annual registration as herein provided.”

“135.04 (2) No certificate as a certified public accountant shall be granted to any person other than a citizen of the United States, or person who has in good faith declared his intention of becoming such citizen, who is over the age of twenty-three years and of good moral character and (except as provided in section 135.05) who shall have successfully passed an examination in commercial accounting, governmental accounting, auditing, commercial law as affecting accountancy, and in such other subject as the board may deem necessary.

“(3) Examinations shall be held by the board at least once in each year at such times and places as may be determined by it. * * *”

In XXIII Op. Atty. Gen. 303 it was held that under chapter 147 of the statutes relating to treatment of the sick, the Wisconsin state board of examiners in the basic sciences could not substitute for its examination the result of an examination made by the national board of medical examiners of Philadelphia.

In XXV Op. Atty. Gen. 459 it was held that under the same chapter the state board of medical examiners could not delegate its powers to the national board of medical examiners in respect to setting standards and giving examinations to applicants under secs. 147.15 to 147.18. In that opinion it was said at pages 460-461:

“The statutes have made it the duty of your board to determine whether an applicant is qualified to receive a license. It is the duty of your board to exercise its judgment, following the dictates of the statutes above referred to, and this determination must be in accordance with the terms of the statute.

“This duty of the board cannot be delegated to any other person or body. The board may not accept the judgment of others.

“The board may use the examination questions of the national board of medical examiners in whole or in part as part of its examination provided the board determines that they are in accordance with the standards set by the board. The duty of passing upon the qualifications of each applicant is by statute placed upon the board. It is the judgment of the board and not the judgment of any other person or body that the statute requires must be exercised. The appli-
cann has the right to the judgment of the board and not of others as to whether he is qualified.”

Again, in XXVII Op. Atty. Gen. 412, it was held that sec. 147.16 of the statutes contemplates that applicants for licenses to practice medicine and surgery or osteopathy and surgery in Wisconsin are to be examined by the Wisconsin state board of medical examiners rather than by some out-of-state board or agency. That opinion further held that the Wisconsin board was not prohibited from availing itself of examinations conducted by the national board of medical examiners provided the practice was such that it could still be said to be an examination of said board. In the latter opinion it was stated at page 413:

“We are unable to escape the conclusion that it was the intention of the legislature that applicants for licenses to practice medicine and surgery or osteopathy and surgery in this state are to be examined by the Wisconsin state board of medical examiners in the various branches mentioned in sec. 147.16 and that if some other board or agency outside the state were to conduct the examination for the board in whole or in part it would fall short of the statutory requirements.

“However, there is nothing in the statute that would prohibit the board from availing itself of examinations conducted by the national board of medical examiners provided the board procures authentic examination papers and applies its own system of grading to the examination papers thus examined * * *.”

While the statutes providing for licensing and examining under chapter 135 are not identical with those found in chapter 147, nevertheless in our opinion the similarity is such that the reasoning and conclusions reached in these opinions would be applicable. Hence, it is our opinion that while your board might be authorized to obtain and use some of the examination questions prepared by the American Institute of Accountants it would not be authorized to delegate to this agency the responsibility of preparing and grading the examination upon the results of which you would determine whether to issue a certificate as a certified public accountant, even though your board actually conducted and supervised the sittings for the examination.

JRW
Counties—Sheriffs—County Veterans’ Service Officer—
Salaries and Wages—Salary of sheriff, his assistants and county veterans’ service officer may include a mileage allowance.

Sec. 59.15 (1), Stats., prohibits the county board from passing a resolution giving present sheriff a new mileage allowance, because it would result in increasing his compensation.

County board may pass resolution providing for reimbursement to present sheriff for any out-of-pocket expense incurred by him in the discharge of his duties.

When county board resolution fixing salary of the sheriff in lieu of fees does not reserve any fees to him, he is not entitled to the fees or special compensation provided for by secs. 51.06 (2), 53.04 (1), 59.28 (27) or 59.29, Stats., for performing various duties enumerated in said sections.

County board may pass resolution giving increased mileage allowance to present sheriff’s assistants and present county veterans’ service officer as part of their respective salaries.

ANDY BORG,
District Attorney,
Superior, Wisconsin.

At the annual meeting of the county board the compensation of the sheriff and his assistants was fixed. In addition to other compensation, the sheriff, undersheriff and two deputies were granted the sum of $40 per month car allowance together with their gas and oil.

At the annual meeting the county board also fixed the compensation of the county veterans’ service officer which included a car allowance of $150 per month in addition to his gas and oil.

The sheriff has cited the increased cost of car maintenance on the part of his regular deputies, and difficulty in obtaining persons to act as special deputies unless they are paid a per diem.

A proposed resolution would allow the sheriff and his regular salaried assistants 7 cents per mile and other necessary expenses for transportation of prisoners to the state
prison and reformatory. The proposed resolution would also provide a $5 per diem in addition to train fare and expenses for special deputies appointed to accompany persons to state institutions.

Another proposed resolution would provide 7 cents per mile to the veterans' service officer for trips in ambulance on county business outside of Douglas county, on some of which trips he acts as a special deputy sheriff.

You have inquired concerning the validity of the proposed resolutions.

Sec. 59.15 provides:

"(1) (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) ). The annual compensation may be established on a basis of straight salary, fees, or part salary and part fees, and if the compensation established by the county board is a salary, or part salary and part fees, such compensation shall be in lieu of all fees except those specifically reserved to the officer by enumeration regardless of the language contained in the particular statute providing for the charging of the fee. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the county board by timely action.

"* * *

"(2) (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, em-
ploye or deputies to elective officers without regard to the
tenure of the incumbent (except as provided in paragraph
(d) ) and also establish the number of employees in any de-
partment or office including deputies to elective officers, and
may establish rules and regulations of employment for any
or all persons paid from the county treasury, but no action
of the county board shall be contrary to or in derogation of
the rules and regulations of the state department of public
welfare pursuant to section 49.50 (2) to (5) relating to
employees administering old-age assistance, aid to dependent
children, and blind pensions or the provisions of sections
16.81 to 16.44.

“(3) The county board may at any regular or special
meeting provide for reimbursement to any elective officer,
deputy officer, appointive officer or employe of any expense
out-of-pocket incurred in the discharge of that person's
duty as such officer or employe in addition to the salary or
compensation for such person, including without limitation
because of enumeration, traveling expenses within or with-
out 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 neces-
sity for any and all such reimbursements, and also establish
in advance 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.”

In XXI Op. Atty. Gen. 190 it was held that the county
board may include an allowance for certain expenses of the
sheriff as a part of his salary, in XX Op. Atty. Gen. 1141
that an allowance of 6 cents per mile for the use of his auto-
mobile would be construed to be part of the salary of the
sheriff, and in XX Op. Atty. Gen. 35 that an allowance to
the sheriff of $80 a month for the upkeep of his car used in
the performance of his official duties was a part of his
salary.

XXIII Op. Atty. Gen. 811 held that a sheriff may be com-
ensated for car expense in one of several ways. Three ways
were mentioned therein, but it was not held that such ways
were exclusive.

Since sec. 59.15 (1) (a) provides that “the compensation
established shall not be increased * * * during the officer’s
term,” it is our opinion that the county board may not now pass a resolution allowing the present sheriff an additional 7 cents per mile because this would be an attempt to increase his compensation during his term. XX Op. Atty. Gen. 35, XXIII Op. Atty. Gen. 811, XXX Op. Atty. Gen. 484.

You have not itemized “other necessary expenses for transportation of prisoners to the state prison and reformatory.” Presumably, however, these necessary expenses would be “expense out-of-pocket incurred in the discharge” of the sheriff’s duty, and hence would be expense, the reimbursement for which the county board might have provided under sec. 59.15 (3). Since sec. 59.15 (3) does not require that provision for reimbursement to the sheriff for expenses must be made prior to the earliest time for filing nomination papers or prior to the time when he assumes office or prior to any other time, it is our opinion that the county board could legally pass a resolution authorizing reimbursement to the present sheriff hereafter of other necessary out-of-pocket expenses which he might incur for transportation of prisoners to the state prison or reformatory.

Your letter states:

“It would seem that the sheriff would be entitled to per diem while traveling out of the state on the governor’s requisition of extradition. See 20 OAG 717. The issue is confused slightly by 20 OAG 248 which seems to indicate that the county board may make one type of agreement on compensation for travel and use of a vehicle with their sheriff, and later during his same term of office change the agreement as to the mode of compensation.”

Your letter also states:

“It may also be questioned whether a flat mileage rate may be allowed where the statutes provide different methods of payment depending on the nature of work and destination. Sec. 53.04 (1) provides actual and necessary expenses and a fair compensation for time for transportation of prisoners to the state prison. Sec. 51.06 (2) provides for allowance to the sheriff of $5 per day railroad fare and other actual expenses and $3 per day for assistance, together with actual expenses for the transportation of insane and senile persons. Sec. 59.28 (27) provides a fee of ten cents per mile and actual and necessary disbursements
for the transportation of prisoners other than to Waupun. However, the implication of 20 OAG 1141 seems to be that a flat mileage basis of ten cents per mile without regard to destination or type of person transported is permissible."

In XX Op. Atty. Gen. 248 it appeared that an attempt was made to increase the compensation of the sheriff during his term of office. Without attempting to pass upon the validity of this agreement, it appeared that it was a purely personal agreement between the county board and the then incumbent and was not an attempt upon the part of the county board to fix the salary for that office for the future. Since the county board did not attempt to make the additional compensation a part of the salary of the office for the future, the opinion in XX Op. Atty. Gen. 248 held that such additional compensation could be taken away.

In connection with your reference to XX Op. Atty. Gen. 717 and the other sections of the statutes providing specific compensation to the sheriff for certain work, it appears advisable to point out that when the legislature repealed and recreated sec. 59.15 of the statutes by ch. 559, Laws 1945, it intended to make, and did make, important changes in that statute. As indicated above, sec. 59.15 (1) (a) now provides, in part:

"* * * if the compensation established by the county board is a salary, * * * such compensation shall be in lieu of all fees except those specifically reserved to the officer by enumeration regardless of the language contained in the particular statute providing for the charging of the fee. * * *"

Sec. 59.15 (4) also makes it clear that the provisions in sec. 59.15 shall prevail over other statutes which may be inconsistent therewith.

It does not appear from your request that the resolution fixing the salary of the sheriff reserved any fees to him. In such a case it is our opinion that he would not be entitled to the special compensation provided by sec. 59.29 for the return to this state of fugitives apprehended in other states, or the special compensation provided for various duties under secs. 51.06 (2), 53.04 (1) and 59.28 (27).

Since mileage allowance has been held to be a part of the salary of the sheriff, we do not see any reason why it should
not also be held to be a part of the salary of the sheriff's assistants. Such being the case, the county board under the authority of sec. 59.15 (2) (a) and (c), could pass a resolution providing a mileage allowance of 7 cents per mile to the sheriff's assistants which could take effect at any time. It is our opinion that the case of Prielipp v. Sauk County, 215 Wis. 16, 254 N.W. 369, referred to in your letter and which held at page 20 that a statutory charge "was payable to the sheriff as performed by him through his deputy" has no application. In XXIV Op. Atty. Gen. 545, at 546, it was held: "Inasmuch as the salary fixed by the county board in lieu of all fees, per diem, etc., sec. 59.15 (1), includes the deputies, the deputies have no claim against the county," and in XXVIII Op. Atty. Gen. 673, at 674, it was stated:

"Moreover, it is our conclusion that neither the sheriff nor his deputies may collect mileage from the county where the office is not on a fee basis. Where the sheriff is on a salary basis, such salary is in lieu of all fees, per diem and compensation. * * * This statute applies as well to a deputy sheriff on a salary basis as it does to a sheriff on a salary basis."

Section 45.43 (1), (2), (3) and (5) provides:

"(1) The county board shall elect a county veterans' service officer who shall be an honorably discharged veteran who served the United States in time of war.

"(2) Upon his first election the county veterans' service officer shall serve until the first Monday in January of the second year subsequent to the year of his election, and, if reelected, it shall be for a term of two years.

"(3) The salary of the county veterans' service officer shall be fixed by the county board prior to or at the time of his election and annually thereafter.

"* * *

"(5) The county veterans' service officer shall advise with veterans of all wars residing in the county who were engaged in the service of the United States, relative to any complaint or problem arising out of war service and shall render to them and their dependents all possible assistance.

* * *

While the county veterans' service officer is "elected" by the county board for a term of two years, it is our opinion that he is not an elected official within the meaning of sec.
59.15 (1) (a) since nomination papers would never be filed in connection with filling such office. Hence, 59.15 (1) does not require that his compensation be fixed at any particular time, nor does it prohibit an increase in his compensation during his term. In fact, sec. 45.43 (3) clearly provides that the salary does not have to be fixed prior to the election of the county service officer and that the salary may be fixed annually thereafter notwithstanding the fact that the term is for two years. Consequently, it is our opinion that under the provisions of sec. 59.15 (2), (a) and (c) and 45.43 (3), the county board may this year fix a salary for the county veterans' service officer which would include an allowance of 7 cents per mile in addition to his other compensation.

JRW

Constitutional Law—Appropriations and Expenditures—Normal School Regents—Emergency Board—Appropriation made by sec. 20.38 (2) (c) created by sec. 56, ch. 332, Laws 1947, held valid.

August 12, 1947.

EDGAR G. DOUDNA, Secretary,
Board of Regents of Normal Schools.

You have requested an opinion as to the validity of sec. 56 of ch. 332, Laws 1947, which reads as follows:

"20.38 (2) (c) and (d) of the statutes are created to read:

"20.38 (2) (c) On July 1, 1947, $200,000, and on July 1, 1948, $200,000 for employing additional teachers, subject to approval by the emergency board, in such amounts and at such times as student enrollment increases to such an extent over the 1946-1947 enrollment that additional instructional staff is necessary to provide adequate instruction. Any amounts approved by the emergency board shall be transferred to the appropriation made by section 20.38 (2) (a). If the provision relating to allocation, with the approval of the emergency board, is invalid, the appropriation in this subsection shall not be invalidated but shall be considered to be made without any condition as to time or manner of allocation, release or transfer.

"(d) On July 1, 1947, $25,000 for summer session instructional salaries and supplies."
Sec. 20.38 (2) (a) is the statute making the general appropriation for teachers' salaries at the several state teachers colleges.

The constitutionality of appropriations made which delegate to the state emergency board, created by sec. 14.72, discretionary powers in authorizing the use of the funds has been established. See State ex rel. Zimmerman v. Dammann, (1938) 229 Wis. 570. In this case a somewhat similar statute was held to be an unlawful delegation of authority by the legislature to the emergency board because the law failed to set a "standard or guide" by which the board was to act. In the previous case of State ex rel. Board of Regents of Normal Schools v. Zimmerman, (1924) 183 Wis. 132 similar discretionary powers over an appropriation delegated to the governor, secretary of state and state treasurer were held constitutional. In this case the appropriation was for the purpose of meeting "operating expenses of any state institution, department, board, commission or other body for which sufficient money has not been appropriated to properly carry on the ordinary regular work." It further provided that "no moneys shall be paid out under this appropriation except upon the certification of the governor, secretary of state and state treasurer that such moneys are needed to carry on the ordinary regular work of the institution, department, board, commission or other body for which the moneys are to be used and that no other appropriation is available for that purpose." The court held that the powers conferred were administrative in nature and not legislative. It further held that the legislature may enact a statute to become operative on the happening of a certain contingency or future event and that legitimate expenditures may be made by the legislature in their discretion and the courts have little power or inclination to control them as long as there is no violation of constitutional requirements.

The deciding factor in this case appears to be whether or not a sufficient "standard or guide" was set so that the action of the emergency board would be an administrative one rather than an unlawful use of legislative powers which the legislature cannot lawfully delegate. The Board of Regents of Normal Schools case, supra, is very similar to the instant
one and in our opinion the "standard or guide" set is even more explicit here than was the one upheld in that case. There is a definite ratio between the present number of students and teachers. While circumstances might make it wise to alter this ratio somewhat, should the future enrollment increase, it certainly provides an excellent basis upon which to employ additional teachers who might be necessary if the enrollment in the normal schools increases. This leads us to the only possible conclusion, which is that the section in question constitutes a valid appropriation and vests power in the emergency board to release the funds in question on the contingency therein set forth in such amounts reasonably necessary to procure sufficient teachers to instruct any additional students, taking into consideration such special circumstances as might be present.

REB

Governor — Sheriffs — Public Officers — Removal — A charge in a petition for removal under sec. 17.16, Stats., that a sheriff made purchases and obtained delivery of automobiles "by reason of his official position as sheriff of Milwaukee County," and that he engaged in business as an automobile dealer without a license as required by sec. 218.01, Stats., held not to state a legal cause for removal.

August 12, 1947.

Oscar Rennebohm,
Acting Governor.

You have submitted to me a copy of a petition addressed to you in which a number of persons joined requesting you to initiate an investigation and hold a public hearing to determine whether or not cause exists for the removal of George M. Hanley as sheriff of Milwaukee county, and to remove him from his office, or clear him, as the facts developed may warrant.

You request my official opinion as to whether the petition qualifies in form and content so as either to require or empower the governor to hold a removal hearing.
Upon examining the petition in the light of the supreme court decisions of Wisconsin and of a number of other jurisdictions which have passed upon kindred questions, it was tentatively determined that the petition was defective in two respects: (1) It failed to identify which of the 19 signers were taxpayers and residents of Milwaukee county, as required by the statute which fixes eligibility for petitioners in such matters; and (2) it failed to charge the officer in question with such official misconduct as to meet the requirements of the definition of "cause" for removal contained in sec. 17.16 (2), Stats.

Anticipating that an opinion so holding would not dispose of the entire question if there was a possibility of an amended petition being filed, consultation was had with you and your executive counsel relative to my tentative conclusions.

You approved the idea of a conference with petitioners or their representatives for the purpose of permitting them to amend their petition if the facts within their knowledge warranted allegations in as definite and certain terms as the reported decisions indicated they had to be. A conference was had with two of the petitioners, one of whom, as an attorney, had drafted the document in question.

A full discussion of the facts as alleged was had, and the substance of the following propositions with citations of authority was communicated to them:

The basic power of the governor to remove a sheriff is conferred by art. VI, sec. 4, of the Wisconsin constitution, which, after enumerating various county offices, including that of sheriff, provides:

"* * * The governor may remove any officer in this section mentioned, giving to such a copy of the charges against him and an opportunity of being heard in his defense. * * *"

Beyond the requirement of notice of the charges and an opportunity to defend, no particular form or procedure for removal proceedings is prescribed by the constitution itself. Sec. 17.09, Stats., provides that the governor may remove a sheriff for cause. Sec. 17.16, Stats., defines cause to mean "inefficiency, neglect of duty, official misconduct or malfeasance in office." The same section provides the procedure for removals from office. State v. Ballentine, 152
S.C. 365, 150 S. E. 46, holds that where the constitution is silent as to the method of removal, the legislature can provide the method. Holliday v. Fields, 210 Ky. 179, 275 S.W. 642, holds that the legislature may designate offenses as grounds for removal within the meaning of the constitution. State ex rel. Rodd v. Verage, 177 Wis. 295, 301 holds:

"Now the legislature did not assume to restrict or limit the constitutional power of removal conferred upon the governor. The words 'for cause' were inserted no doubt for the purpose of clarity and indicated the legislative understanding of the constitutional power in such respect. * * *

"Thus we have the legislative interpretation of the extent of the constitutional power of removal, acquiesced in by two governors of the state. This we think not only reflects the popular conception of the character of the power conferred upon the governor, but is in harmony with the genius of our institutions and the spirit of the fundamental principles of our government."

"The remedy by the removal of a public officer has been said to be a drastic one, and the statutory provision defining the grounds for removal is given a strict construction." 43 Am. Jur. § 194, p. 39, "Public Officers."


Under a New Hampshire statute, an irregular proceeding for the removal of a public officer was set aside although the cause for removal may have been just and legal. Atty. Gen. ex rel. Hagerty v. Shedd, 75 N.H. 393.

Ekern v. McGovern, 154 Wis. 157, holds that a removal may be set aside on review by the courts when the cause alleged is legally insufficient. The court can reach the governor and review his action only if he exceeds the scope of his executive authority. This implies that a writ of prohibition would lie where a legally insufficient cause is alleged in a
petition. The limit of judicial interference in such cases is to protect public officers, removable for cause only, in their right to a hearing upon specific charges. See *State v. Hay*, 45 Nebr. 321.

The essence of the petition before you consists of two allegations. The first is that Sheriff Hanley purchased and obtained delivery of a number of automobiles "by reason of his official position as sheriff of Milwaukee county." The second, in substance, is that he engaged in business as an automobile dealer without first procuring a license therefor as required by sec. 218.01, Stats.

I am of the opinion that the words "purchased and obtained delivery of such new automobiles by reason of his official position as sheriff of Milwaukee county" do not charge "inefficiency, neglect of duty, official misconduct or malfeasance in office." I hold it is necessary to connect the act complained of with the official duties of the sheriff in such a way that there can be no doubt as to what is meant by the charge.

"* * * It is only necessary that the charge should inform the officer of what he is accused, and that the facts charged should show a proper cause for removal; a reference to the statute is not required. But it must specify the cause with sufficient particularity to enable the person to make his defense; a general charge of incompetency is not sufficient." Throop, Public Officers, §882, p. 377. (Emphasis ours)

An example of the degree of definiteness and certainty required would be where a public official made a threat to illegally exercise the powers of his office against a person unless a favor or benefit were conferred upon him by said person. Such conduct would constitute extortion. It would clearly be misconduct in office within the meaning of the above cited statute. So, if a public official knew that a citizen who was in a position to confer a favor or grant a benefit was guilty of a crime, and offered to withhold prosecution in consideration of such favor or benefit, the official would be guilty of soliciting a bribe. And if he neglected to perform a sworn duty for such consideration, such misconduct would constitute legally sufficient cause for removal. An allegation of such facts would be sufficient in a petition. The decided cases support the proposition that extortion,
consisting in any public officer's unlawfully taking, by color of his office, from any person any money or thing of value that is not due to him, or more than his due, constitutes official misbehavior, and a ground for removal. *Lancaster v. Hill*, *supra*. If he represented to the automobile dealers enumerated in paragraph 4 of the petition that he needed automobiles for the official use of his office as a means of inducing said dealers to deliver cars to him in preference to other persons and that such representation was deceptive in that he diverted said automobiles to his own use and pecuniary profit after they had been delivered to him, that would constitute official misconduct. It would relate directly to the performance of his duties and the improper procurement of something of value by color of title of his office. But an allegation that a person "purchased and obtained delivery" of scarce goods "by reason of his official position as sheriff" does not impute criminal conduct nor any offense involving moral turpitude.

The difficulty with the proposition before us is the failure of petitioners to distinguish between the sheriff's conduct as an individual and his conduct as a public official. Petitioners stress the loss of confidence by the public in Sheriff Hanley's ability to administer the affairs of his office in compliance with his sworn duty. It is submitted that that loss of confidence may be the result of his individual conduct as distinguished from his official conduct.

Section 12, art. XIII of the Wisconsin constitution provides a remedy for the citizens of Milwaukee county to eliminate any public official in whom they may have lost confidence but against whom they are unable or unwilling, whichever the case may be, to prefer charges which will constitute grounds for removal. That remedy is the recall. No grounds are needed. The popularity of the official and the public confidence in him may be fully and adequately tested and determined in such a proceeding.

The distinction between individual misconduct wholly apart from the discharge of official duty, and official misbehavior which the statute specifies as a ground for removal from office, is discussed and set out in *Lancaster v. Hill*, *supra*, citing *Hawkins v. State*, 54 Ga. 653. It is stated there:
"Lack of civility in official acts very probably will cause the electorate to decline to re-elect an incumbent who is wanting in the temperamental qualities which the ethical standard of the community may prescribe, but is not sufficient, when disassociated from illegal conduct, for the officer's removal from office * * *." (Emphasis ours)

Thus we see that the alleged failure of a public officer to meet the ethical standards prescribed for him by his constituency will not meet the test of sufficiency in a removal petition.

As to the allegation that the sheriff engaged in the business of automobile dealer without a license, I am of the opinion that such conduct relates to his actions as an individual and not to his official conduct as sheriff. The requirement of sec. 218.01, Stats., that persons dealing in the purchase or sale of automobiles first procure a license therefore is a regulatory statute, the violation of which does not involve moral turpitude nor criminal intent.

There are innumerable village, town, city and county ordinances, state statutes and rules and regulations of various administrative bodies having the force and effect of law, as well as federal laws, rules and regulations, which all fall in the category of offenses described as malum prohibitum as distinguished from that body of offenses, the commission of which constitutes crime malum in se.

I find no authority which holds that the commission of a misdemeanor malum prohibitum unrelated to the duties of the office, that is, which at once does not constitute a breach of official duty, is official misconduct or constitutes grounds for removal.

I offered counsel for the petitioners such time as he deemed necessary to conduct an independent research of the authorities and to furnish me with citations supporting his position that either of the grounds alleged in the petition constituted "cause" within the meaning of the statute. Counsel communicated the decision of petitioners that they would make no change in the petition, except to identify the taxpayers and residents, which they did. No citations of authority contrary to those furnished and discussed at our conference have been submitted, and I assume that counsel's search for such authorities was without success.
The suggestion was offered by petitioners at the conference that you proceed on the basis of the petition as drafted and that your investigation, coupled with the voluntary action of the citizenry, would produce evidence of the quality necessary to sustain a judgment of removal. My function here is to apply the principles of law to the facts before me. All I can do is communicate my opinion to you as to the sufficiency of the petition in its present form. The adoption of such a suggestion would be a matter of executive prerogative. I must assume in rendering this opinion, that the respondent public official would avail himself of the remedy of a writ of prohibition, thereby effectively preventing the matter from reaching the stage of a hearing if cause for removal were not adequately alleged at the outset in the petition itself. In such an eventuality, it would be my official duty to defend your action in the courts. Even if it were within my province, I could not, therefore, approve of an arbitrary course of action which would offend against the conclusions I have arrived at after studying the leading cases on the subject.

SGH

**Counties—County Board—Public Assistance—Sec. 49.03**

(1), Stats., requiring affirmative vote of a majority of all members of county boards must be strictly followed and resolution passed by mere majority is ineffectual. Subsequent passage of a budget containing appropriation for purposes which were objects of invalid resolution though by majority of all members of the board does not serve to confirm such resolution.

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

You have advised us that the Winnebago county board recently adopted the provisions of sec. 49.03 as the method by which they desire to operate relative to the payment of medical expenses incurred for dependent persons. You state that when this resolution (No. 22) was passed by the board
in November, 1946, the vote was 22 in favor of the resolu-
tion and 20 against. You further state that the total mem-
bership of the Winnebago county board is 46, and that a
majority of the membership is therefore 24 members. You
have asked for an opinion concerning the following three
questions:

1. Was the action of the county board on Resolution No.
22 a valid adoption of the same, since a majority of the
members present voted affirmatively on the resolution, or
under the statute is it required that to make the action ef-
fective a majority of all the members of the board vote af-
firmatively, and that a majority, to-wit, 24 members of the
Winnebago county board must have voted aye in order to
make the county's action effective?

2. Assuming that the action of the county board on Reso-
lution No. 22 was ineffective because less than a majority of
all members voted affirmatively, did the action of the board,
in adopting the budget which provided among other things
for $10,000 for pension medical aids, and which budget was
adopted by a vote of 40 ayes and 1 nay, have the effect of an
endorsement of Resolution No. 22 to such an extent that the
county may now regard itself as under the plan provided by
section 49.03 (1) (c) ? (According to the information you
have given us, the budget above referred to was adopted by
the county board on December 4, 1946, subsequent to the
passage of Resolution No. 22.)

3. In the event that there has been no effective adoption
of Resolution No. 22 under the vote thereon or under the
vote on the approval of the budget, what consequences
would Winnebago county officials incur if they made pay-
ments pursuant to said Resolution No. 22?

We are pleased to answer the above questions as follows:

1. It should be first noted that the general provisions re-
lating to the voting quorum of county boards are as follows:

"59.04 (3) A majority of the supervisors entitled to
a seat in the county board shall constitute a quorum for the
transaction of business. All questions shall be determined by
a majority of the supervisors present unless otherwise pro-
vided."

"59.02 (2) Ordinances and resolutions may be adopted
by any county board by a majority vote when a quorum is
present, or by such larger vote as may be required by law
in special cases."
Sec. 49.03 (1) which prescribes the method by which a county may adopt the system of payment for medical assistance to dependents, in question in this matter, reads in part as follows: "The county board may, by a resolution adopted by an affirmative vote of a majority of all its members **.**" The law in this case appears to be well settled and is set forth in the decision in the case of St. Aemilianus Orphan Asylum v. Milwaukee County, 107 Wis. 80. In that case it was held that a quorum of the membership of the county board is the board. The court stated that the common law rule as to county boards was embodied in sec. 665, Stats. 1898, in the following language:

"A majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business **.** All questions shall be determined by a majority of the supervisors present unless otherwise provided." (Emphasis supplied.)

The court went on further to state:

"It will be observed that in cases where the common-law rule has been changed by statute, language uniformly occurs which is so plain as to leave very little, if any, room for judicial construction,—such as 'a majority of all the members entitled to seats in the county board' (subd. 1, sec. 670, Stats. 1898); or 'a majority vote of all the members thereof' (sec. 697a); or 'a vote of three fourths of all of the members' (ch. 270, Laws of 1885); or 'a majority of the whole board' (Cumberland Co. Sup'rs v. Webster, 53 Ill. 141); or a 'majority of the whole number of the members of the board' (State ex rel. Cadmus v. Farr, 47 N.J. Law, 208-216); or 'two-thirds of the members elect.' While such expressions as 'a majority vote of the house;' 'two thirds of the house or branch' (Green v. Weller, 32 Miss. 650); 'two thirds of each house' (Southworth v. P. & J. R. Co. 2 Mich. 287); 'a majority of the corporation' (Morawetz, Priv. Corp. §476); 'adopted by a majority of the electors affected thereby,'—have been held to refer to a majority of a quorum or of such number of persons present as were empowered to act."

It is a well settled general rule that: "Ordinary acts of legislatures are taken as meaning what they say when what they say is definite and certain. Construction of a statute is resorted to only when its language is ambiguous, indefi-
nite, and uncertain." See Holland v. Cedar Grove, 230 Wis. 177.

In view of the above it is our opinion that the resolution adopting sec. 49.03 was not legally passed "by an affirmative vote of a majority of all its members" and is therefore invalid.

2. In Dodge County v. Kaiser, 243 Wis. 551, the court said:

"The county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given." (p. 557)

This case also restated the rule set forth in Spaulding v. Wood County, 218 Wis. 224, which is as follows:

"It has been held that if there be a fair and reasonable doubt as to an implied power [of a county board] it is fatal to its being".

The act of the county board in adopting the budget in December, 1946, which appropriated money for medical aids, merely assumed that its prior resolution to operate under the provisions of sec. 49.03 was valid and would not constitute a valid passage of the resolution since the matter was apparently not directly in issue, and it could only be passed by a resolution adopted by an affirmative vote of a majority of all its members as prescribed by sec. 49.03 (1).

3. The elements of intent, good faith and the act or omission to act, are some of the factors which must be considered. Because of this, I cannot answer this question without knowing more definite and specific circumstances.

REB
*Public Lands—Swamp Lands—Swamp Land Act of 1850, ch. 84, 31st Congress, 9 Stat. 519, granting to the several states the swamp and overflowed lands therein operated in praesenti but does not pass legal title until such lands have been surveyed, selected by the state, approved by the secretary of the interior and a patent issued, whereupon fee simple title vests in the state and its inchoate or equitable title becomes perfect as of the date of the act. Even though patent has not been issued to state it may protect its equitable interest in such lands against trespasser cutting timber thereon by appropriate legal proceedings upon proof that the lands in question were of swamp and overflowed character as of the date of the act so as to be subject thereto.*

August 13, 1947.

COMMISSIONERS OF THE PUBLIC LANDS.

You call our attention to the fact that in the Wisconsin river and in sections 4 and 5, township 8 north, range 1 east, there is located an island known as "Mile Island," which contains approximately 160 acres of land. This island was not surveyed by the United States at the time of the original survey in 1833 or subsequently thereto, although its existence at the time of the survey is indicated by the original government plat on file in your office.

In view of the fact that the island is subject to overflow twice each year, making it unfit for cultivation, you have raised the question as to whether the state has any title or interest in the island under the Swamp Land Act of 1850. Your office made application about a year ago to the United States department of the interior for a survey of all the unsurveyed islands in the Wisconsin river and the application is being considered. However, in the meantime timber is being removed from the island and it will be necessary to act promptly if the state's rights are to be adequately protected inasmuch as the chief value is in the timber rather than in the land constituting the island.

In *State ex rel. Parsons v. Commissioners*, 9 Wis. 236*, it was held that the state of Wisconsin does not have title to the swamp and overflowed lands within its limits under
the Swamp Land Act, chapter 84, 31st Congress, 9 Stat. 519, until the patent for the lands is issued to the state. The court said at page 238*:

"Upon an examination of the relations, they fail to show that these lands have ever been patented to the state, or, in other words, it does not appear that the state has acquired the legal title to them; and consequently it is difficult to understand what right the state has to dispose of them before it has acquired such a title. For manifestly the state could convey to the purchaser no greater title than itself possessed. Now whatever claim in equity the state may have to the swamp and overflowed lands within its limits by virtue of the provisions of chap. 84, §1, of the acts of 31 Congress (see 9 vol. U. S., Stat. at Large, p. 519); yet we think it quite obvious that by the terms of that act, the fee simple to the lands does not vest in the state until the patent issues. It is true the language of the first section of the act would favor the idea that it was the intention of Congress to make a grant which should operate, in praesenti, and vest the title absolutely in the states which were the objects of the grant, by the act itself; but still, if the second section is examined, it will be seen that provision is made for the issuing of patents for the swamp and overflowed lands, on the request of the governor of the state (in which such lands are situated), and it is expressly declared that 'on that patent the fee simple to said lands, shall vest in said states,' &c., subject to the disposal of the legislature thereof.' This language shows, in the clearest manner, that the title to these lands remains in the general government until the patent issues. Such being the case, and if no patent has issued to the state for the lands mentioned in the relations in the above cases, we cannot see what right the state has to sell them."

Again, in *State ex rel. Owen v. Donald*, 162 Wis. 609, the court said at page 623:

"In *State ex rel. Parsons v. Comm’rs*, 9 Wis. 236, the act of 1850 was construed, and it was held that the title to the lands remained in the United States until patents were issued, and until patent issued the state had no right to sell them. The same construction was adopted by the United States supreme court in *Michigan L. & L. Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208."

In *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589, referred to above, it was held that the act of 1850 granting swamp lands to the several states was a grant in praesenti
passing title to all lands which at that time were swamp lands but leaving to the secretary of the interior to determine and identify what lands were and what lands were not swamp lands, and that whenever the granting act specifically provides for the issuing of a patent the legal patent remains in the government until its issue with power to inquire into the extent and validity of rights claimed against the government, and whereas a survey had been made of lands in controversy indicating that they are swamp lands, it is within the power of the land office at any time prior to the issue of a patent to order a resurvey and to correct mistakes made in a prior survey.

In *Rogers Locomotive Works v. American Emigrant Co.*, 164 U.S. 559 it was ruled that whether lands were swamp and overflowed lands within the meaning of the act of 1850 is to be determined in the first instance by the secretary of the interior and that when he has identified lands as embraced by that act, and not before, the state is entitled to a patent and on such patent the fee simple title vests in the state and what was before an inchoate title then becomes perfect as of the date of the act.

The conclusion that the swamp land grant to the state does not attach to any particular lands until they have been identified as swamp lands by the secretary of the interior or other competent authority of the United States and that the Swamp Land Act, while a grant *in praesenti*, did not pass the legal title to the lands transferred thereby to the states until the lands had been selected as such and the patents delivered, has been reached in literally dozens of cases, state and federal. We will not take the space here to cite them but they are collected in footnotes to 43 USCA §983.

Also, it has been held that swamp lands cannot be selected by the state and approved by the secretary of the interior until a survey has been made. *State v. Warner Valley Stock Co.*, 56 Ore. 283, 106 P. 780, rehearing denied, 108 P. 861. Until the state's selection of swamp lands as of the character passing to it under the act is approved by the federal land department, such department retains the authority to order a resurvey or correct errors, and until the selection is approved and a patent issued conflicting claims are to be settled by the land department and not by the courts. *Wil-
loughby v. Caston, 111 Miss. 688, 72 So. 129. The patent is evidence that the title to the land vested absolutely in the state as of the date of the act. Hamilton v. Shoaff, 99 Ind. 63, Matthews v. Goodrich, 102 Ind. 557, 1 N.E. 175.

However, it has been held that the plaintiff in an ejectment action may introduce a patent from the state and evidence that the lands are swamp lands though they have not been patented or listed to the state. Irwin v. San Francisco Savings Union, 136 U.S. 578. In this case the plaintiffs claimed title to the swamp and overflowed lands in question under the state of California and introduced in evidence a patent from the state to their grantor. This evidence was objected to by the defendant on the ground that a patent issued by the state to any individual for swamp or overflowed lands does not convey title to the lands therein described unless it be shown that the same lands had been patented by the United States to the state or listed to the state by the land department of the United States. This objection was overruled and the plaintiffs then introduced other evidence for the purpose of showing that the lands sued for answered to the description of swamp and overflowed lands and the defendant's motion to strike such evidence, including the patent, was denied. The judgment was affirmed upon the grounds that the case was governed by Wright v. Roseberry, 121 U.S. 488. In the Wright case the supreme court ruled that a grant of swamp and overflowed lands to the several states by the act of 1850 was one in praesenti passing title to the lands and requiring only identification to render the title perfect and that on neglect or failure of the secretary of the interior to make such designation it is competent for the grantees of the state to identify the lands in any other appropriate mode to prevent their rights from being defeated and that such rights cannot be defeated because the lands have not been certified or patented to the state. It was further held that in an action for possession of the lands evidence is admissible to determine whether or not the lands were in fact swamp and overflowed at the time of the swamp land grant and if proved to have been such the rights of subsequent claimants under other laws are subordinate thereto.
It has been held in Wisconsin that an equitable title is sufficient for the maintenance of an ejectment action even though a patent from the United States has not been issued, although the rule is otherwise in the federal courts and in many other jurisdictions. *The Wisconsin Central R. Co. v. The Wisconsin River Land Co.*, 71 Wis. 94.

Sec. 275.02 (1), Wis. Stats., provides:

“No person can recover in ejectment unless he has an interest in the premises claimed and a right to the possession thereof or of some share, interest or portion thereof.”

Sec. 275.05 reads:

“The complaint in ejectment actions shall set forth the plaintiff's estate or interest in the premises claimed, describing them and that he is entitled to possession and that the defendant unlawfully withholds possession from him, to his damage such sum as he claims, and may include a claim for damages for injuries to the freehold. The plaintiff may recover any individual share or interest in the premises claimed or any separate parcel thereof which he may establish.”

It would seem that if the patentee of a state as in the Irwin case, supra, could maintain an ejectment action upon a showing that the lands in question answer to the description of swamp and overflowed lands within the scope of the Swamp Land Act even though such lands had not been patented or listed to the state, there would be no sound reason why the state itself could not proceed similarly. It must be remembered, of course, that in an ejectment action the plaintiff must prevail if at all on the strength of his own title and not upon the weakness of his adversary's title. *Chris Schroeder and Sons Co. v. Lincoln County*, 244 Wis. 178.

You are therefore advised that if the state is prepared to prove that the island in question was in fact swamp and overflowed at the time of the swamp land grant, it is in a position to protect its equitable interest in the property by appropriate legal proceedings even though the island has not yet been surveyed, selected or patented.

It should perhaps be pointed out in closing that no determination made in any ejectment or similar action in court would be a binding determination on the United
States as to whether or not the lands come under the Swamp Land Act, since, as was held in *Willoughby v. Caston*, supra, until the selection is approved and patent issued, the United States land department has full power and authority to make its initial designation of the land. In *Brown v. Hitchcock*, 173 U.S. 473, it was stated that no mere matter of administration in the various executive departments of the government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. Assuming, however, that the lands are of the character encompassed by the act so that the government holds the legal title in trust for the state it would appear as hereinbefore pointed out that the state cannot be deprived of its equitable rights without due process of law.

WHR

*Securities Law*—Contracts and accompanying documents submitted in connection with the proposed operations of the Michigan Chinchilla Ranch which contemplate sale, identification and delivery of chinchillas and offspring, temporary ranching of chinchillas by seller but no profit-sharing between seller and purchaser do not constitute an interest, share or participation in any profits, earnings or profit-sharing agreement or an investment contract under sec. 189.02 (1), Stats.

August 15, 1947.

**Edward J. Samp, Director,**

**Department of Securities.**

You have submitted a brief from interested parties and documents relative to the operations of the Michigan Chinchilla Ranch and inquire whether such operations as indicated by the documents constitute the sale of a security within those portions of sec. 189.02 (1) of the Wisconsin statutes which define a security as "* any interest, share
or participation in any profits, earnings, profit-sharing agreement * * *, any * * * investment contract * * *.

The documents submitted which are used by the Michigan Chinchilla Ranch include: (1) An agreement (a) wherein the seller (Michigan Chinchilla Ranch) agrees to supply the buyer with a pair of royal chinchillas at an agreed price per pair, payable as definitely agreed therein between the seller and purchaser, (b) wherein the seller agrees to supply a guarantee and certificate of ownership within 10 days after the purchaser makes full payment for the chinchillas purchased by him, (c) wherein the seller agrees to ranch the original pair of chinchillas purchased and any offspring of the original pair at the rate of $2.50 per month per animal, and (d) which recites that "the purchaser understands that he is purchasing chinchillas with the intention of ranching them himself as soon as circumstances permit"; (2) A bill of sale which provides that for a recited consideration the seller sells, assigns, transfers and sets over to the purchaser all of the seller's right, title and interest in the pair of chinchillas particularly described and designated by the number of each animal which is set forth in the bill of sale, together with the natural increase of the said pair of chinchillas so sold; (3) A certificate of title which certifies under the signature of the seller that the purchaser is the registered owner of a pair of genuine royal chinchillas bearing specified serial numbers; (4) A guarantee which forms a part of the certificate of title whereby the seller guarantees (a) that the chinchillas referred to are of breeding age, of good standard royal quality and in good physical condition, (b) that should said chinchillas be ranched at any of the seller's ranches, seller agrees that if they fail to produce a litter within a specified time from date of purchase they will be replaced with others of equal quality which have produced a litter and that they and their litter will be transferred to the owner, and should one or both of the original animals die from any cause before producing a litter they will be replaced by others of equal quality, (c) that should a litter be born of one sex suitable mates will be found with owners who are in a like position and animals paired, (d) should a litter be born of opposite sex, seller agrees to exchange one of the young for the
animal of another family that is not related, and (e) seller agrees to assist the owner in the proper care of the animals and to give all the help that seller deems necessary while owner is establishing a ranch.

From correspondence submitted it appears that the offspring of the original pair of chinchillas identified by the bill of sale and certificate of title are tattooed with an identifying number shortly after birth, that the owner of the original pair of chinchillas is notified of such identifying numbers and the chinchilla offspring themselves are segregated in a pen set apart for the owner as soon as the young ones can be separated from their mother safely.

In XVII Op. Atty. Gen. 343 it was held that a contract between the owner of a fur farm and muskrat purchasers by which purchasers acquire title to units of muskrats and the purchasers are entitled to receive their prorata share of progeny of units, such progeny not being identified with any particular unit, is a security. In the statement of facts given in that opinion it was said:

"The bill of sale of the H.______ fur company provides in forms for the transfer of title to one or more units of muskrats. The ranching contract between the purchaser and the company provides that the company shall care for the animals and that the company shall be entitled to one-half of the natural increase of each unit. It is provided that 'the holders in gross shall be entitled' to 50% of the natural increase of the animals. It is expressly provided that the increase of the animals may be sold or pelted by the company, at its option, and that the proceeds shall be divided as heretofore stated."

See also XVIII Op. Atty. Gen. 488 where the same conclusion was reached in reference to a similar contract involving sheep whereby the seller was to share in the increase of the original sheep sold, and XIX Op Atty. Gen. 173 where a similar conclusion was reached concerning an agreement whereby the seller was to benefit by the increase in original muskrats sold.

In the present case the documents submitted indicate that the pair of chinchillas sold to the purchaser and their offspring are specifically identified and segregated and covered by a bill of sale and that the purchaser shall take possession of the original pair of chinchillas and their offspring
as soon as he has paid for them and is so situated that he can ranch them properly. Said documents further show that the seller shall be paid a definite amount for service which he furnishes to the purchaser by way of ranching the animals which he has sold until possession of them is taken by the purchaser. The papers do not indicate that the seller is to share in any profit which may accrue to the purchaser as a result of the latter's purchase of the original pair of chinchillas. Hence it is our conclusion that the purchase contract and other documents referred to above do not constitute an interest, share or participation in any profits, earnings or profit-sharing agreement within the meaning of sec. 189.02 (1), Stats.

To constitute an "investment contract" money or capital or property must be entrusted to another with the expectation of deriving profit or income therefrom through the efforts of such other person. In the case of Creasy Corporation v. Enz Bros. Co., 177 Wis. 49, 187 N.W. 666 our supreme court held that the purpose of the securities law was to protect the residents of the state from the purchase of worthless obligations for the payment of money in whatever form such obligations took and that a contract for the furnishing of service would not be classified as a security or as a sharing in either the capital or profits. Thus the agreement to furnish the ranching service for the fixed fee of $2.50 per month per animal is not sufficient in itself to make the contract a security.

In Securities & Exchange Commission v. Bailey, 41 Fed. Supp. 647 at 650, it is said:

"The Securities Act is remedial in nature, to be liberally construed. It affects, not ordinary land sale contracts, but 'investment contracts' which evidence primarily a right to participate in the proceeds of an income-producing venture, membership in which is secured through entrusting an investor's capital to the management of others. In appraising contracts for the purpose of determining the applicability of the statute, courts readily look through the form to discover the real nature of the transaction. Labels affixed by the parties are of little moment. Securities & Exchange Comm. v. Universal Service Ass'n., 7 Cir., 106 F. 2d 232; Securities and Exchange Comm. v. Crude Oil Co., 7 Cir., 93 F. 2d 844; Securities and Exchange Comm. v. Wickham, D.C., 12 F. Supp. 245."
"As contemplated by the Securities Act, 'securities' are evidences of obligations to pay money, or of a right to participate in the earnings or distribution of property. Oklahoma-Texas Trust v. Securities and Exchange Comm., 10 Cir., 100 F. 2d 888.

"An 'investment contract,' as contemplated by the Act, is one which contemplates the entrusting of money or other capital to another, with the expectation of deriving a profit or income therefrom, to be created through the efforts of other persons. Otherwise stated, it is a contract providing for the investment or laying out of capital in a way intended to secure income or profit from its employment, which will arise through the activities and management of others than the owner. Securities and Exchange Comm. v. Universal Service Ass'n., 7 Cir., 106 F. 2d 232, 237; State of Minnesota v. Evans, 154 Minn. 95, 191 N.W. 425, 27 A.L.R. 1165."

In Domestic & Foreign Petroleum Co. v. Long, 51 Pac. (2d) 73, at page 76, the court cites a long array of cases from other courts and makes the clear-cut distinction that in the cases cited where the transaction under attack was held to be either a profit-sharing agreement, or an "investment contract," the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share. In the foregoing case the court said:

"Such interests are generally declared to be investment contracts, which are included in the definition of 'security' in the Blue Sky Law of this and other states, and may also be 'certificates of interest or participation,' or 'certificates of interest in a profit sharing agreement, within the act."

In Securities and Exchange Commission v. C. M. Joiner Leasing Corporation, 320 U.S. 344, the court points out that an 'investment contract' contemplates the anticipation of a profit or income to be derived by or through the seller's efforts. See also People v. Davenport (Calif.) 91 Pac. (2d) 892 and Union Land Associates v. Ussher (Oregon) 149 Pac. (2d) 568.

It is our opinion that the contracts in the instant case may be distinguished from the contracts reviewed in the attorney general's opinions cited above, and that in view of the foregoing decisions the proposed operations of the
Michigan Chinchilla Ranch, the contracts and accompanying documents of the latter would not constitute securities within the meaning of those portions of sec. 189.02 (1), Wis. Stats., quoted above.

JRW

Vocational and Adult Education—State Board—Copyrights—Where state board not having power to sue or be sued desires to procure copyright of works of board’s (state) employes, it is recommended that the copyright be issued in the name of the state in its sovereign capacity. Other procedure prescribed respecting avoidance of infringement.

August 15, 1947.

STATE BOARD OF VOCATIONAL AND ADULT EDUCATION,
Attention Mr. C. L. Greiber, State Director.

Your department has produced writings denominated “Study Guides” for use in the field of vocational and adult education. You propose to publish same and are desirous of having the material copyrighted. You request our advice as to whether the copyright may be granted to your board. Since the protection afforded by copyright may be effectuated in the event of an infringement only through court action, it is important to ascertain the powers of your board in that respect. Section 41.13, Wis. Stats., which defines your board’s powers and duties does not authorize you to sue or be sued. Assuming, without deciding, that your board could procure a copyright in its name, you would be powerless to enforce it without the power to sue. On the other hand, the board is an agency of the state of Wisconsin and the board’s employes are the employes of the state. Under §62 of the copyright act, title 17, USCA at page 193, the term “author” is defined as follows:

“§62. Terms defined. In the interpretation and construction of this title *** the word ‘author’ shall include an employer in the case of works made for hire.”
Under this section, it has been held in *Tobani v. Carl Fischer, Inc.*, 98 F. (2d) 57, (cert. denied 59 Sup. Ct. 243, 305 U.S. 650, 83 L. ed. 420,) that an employer may be deemed the "author" of a work as respects right to original copyright.

We are aware of the case of *Bank v. Manchester*, (Ohio 1888) 9 Sup. Ct. 36, at p. 39, 128 U.S. 244, 32 L. ed. 425, which held that a copyright could not be granted to a state under the Revised Statutes, paragraphs 4952 and 4954 which provided for the issue of copyrights to "citizens" of the United States. The decision was based on the proposition that a state cannot be properly called a "citizen" under that statute.

Although the decision stands unreversed, the statute has been amended so as to no longer require the applicant for issuance of a copyright to be a "citizen."

In response to an inquiry addressed to the register of copyrights we have a reply in the nature of an administrative ruling or interpretation of the present statute (quoted above) to the effect that a state may acquire a copyright on the works of its employees.

It is therefore recommended that the writings to which you refer be copyrighted in the name of the state of Wisconsin in its sovereign or proprietary capacity.

We submit herewith proper forms of application for registration of a claim to copyright in a book published in the United States of America. Full instructions are given in the form. We shall be pleased to assist you in completing same if you feel the need for such help.

In your request you indicated that your so-called "Local Directors Association" produced similar study guides a year ago and that a contract was let by this association to the American Technical Society for publication and that a copyright was procured by the American Technical Society. You indicate that there is a similarity in some features of your present publication to those which were copyrighted by the American Technical Society and you ask our opinion as to whether there is an encroachment upon that society's copyright.

Without proceeding in the work beyond the page which constitutes instructions "To the Student," it appears that
the language of that page is identical with the instructions contained in the publication of the American Technical Society, and in our opinion these instructions may not be reproduced without permission from said society. There appear to be other minor similarities with respect to form as distinguished from content. Inasmuch as the distribution of your work might be enjoined because of the probable violation of said society's copyright as to the one page, it is recommended that you confer with said society's representatives with a view toward obtaining their permission to use as much of the same form as can be agreed upon. You indicated in a conference the probability of success in obtaining such permission. This will obviate the necessity of a detailed study and comparison of the society's publication and your proposed publication if such consent should be procured.

SGH

Appropriations and Expenditures—Highway Commission—Grand Army Home—Highways—Grand Army Home for Veterans at King, Wisconsin is a state charitable institution and entitled to benefits made for purposes by sec. 20.49 (5a), Stats.

JAMES R. LAW, Chairman,
State Highway Commission.

August 15, 1947.

You have requested an opinion from this office as to whether or not the Grand Army Home for Veterans at King, Wisconsin, is eligible for road improvement and maintenance under the provisions of sec. 20.49 (5a). This section reads as follows:

“INSTITUTION ROADS. Not to exceed $25,000 for improving highways forming the most convenient connection between the university, state teachers' colleges, state charitable or penal institutions, and the state trunk highway system, or to construct roadways under or over state trunk highways that pass through the grounds of the university, state teachers' colleges, or any charitable or penal institution, or to construct and maintain all drives and roadways
on the grounds of the university, state teachers' colleges, or any state charitable or penal institution. Within the limitations and for the purposes of this subsection, funds may be allotted by and work performed by or under the supervision or authority of the state highway commission, upon the request for such work filed by the board of regents of the university, the board of normal school regents, or the state boards, commissions, departments, or officers, respectively, as to such work in connection with the institution controlled by them.”

In order to determine whether or not the Grand Army Home for Veterans is a state charitable institution within the meaning of the statute above quoted, it is necessary to examine the history and present status of the home.

The home was originally founded by the Grand Army of the Republic, Department of Wisconsin, in 1887. The articles of incorporation, filed in the office of the secretary of state, incorporated the “Board of Trustees of the Wisconsin Veterans Home” as a non-stock charitable corporation, “for the purpose of establishing and carrying on a charitable institution for the maintenance of destitute Union soldiers, sailors and marines, of the late Civil War, their wives and widows.”

The original organization was apparently unable to carry the financial expense of the home, since in 1889 the legislature passed a bill which appropriated $50,000 to the institution to pay off old debts, operate the home, and improve the premises, and further provided that the “acceptance * * * of the amount hereby appropriated shall vest the title to the real estate of said home in the state of Wisconsin subject to the right of said home to have the use, enjoyment and possession of said real estate for a home for soldiers, sailors and marines and their wives and widows as long as said home shall use said real estate for such purposes, and said Wisconsin Veterans’ Home shall convey said real estate to the state of Wisconsin by a good and sufficient warranty deed in accordance with the spirit and intent of this act.” See ch. 264 Laws 1889.

Apparently, pursuant to the above act, title to the real estate was conveyed to the state of Wisconsin by warranty deed, dated May 28, 1890. This deed is recorded in the office of the secretary of state in Vol. 1 of Deeds, p. 156 and contains the following limitations on the conveyance:
“Subject, however to the condition that said premises and land should be used for, and devoted to the maintenance of a home for dependent Union soldiers and sailors, their wives and widows, and to the maintenance of such other persons as said grantee shall, by law, be authorized to maintain on said premises * * *”

In 1891 the legislature by ch. 393, appropriated further funds for the home and stating that the real estate had been conveyed to the state provided that the state board of control inspect the premises and operation of the home at least twice a year and report its findings to the governor and legislature. Responsibility for the actual operation of the home was allowed to remain with the Grand Army of the Republic, Department of Wisconsin.

The state continued to support this institution over the succeeding years. In 1917 the control and management was vested in a “board of managers” consisting of the department commander of the Grand Army of the Republic and six persons appointed by the governor. Several changes were made in the management organization and at the present time it is vested in the director of the department of veterans affairs and a board of managers by sec. 45.37. In 1938 the name was changed to the Grand Army Home for Veterans. See XXXVI Op. Atty. Gen. 16.

Throughout almost its entire history this institution has been supported chiefly by the bounty of the state of Wisconsin. Contributions are made by the federal government for the domiciliary care given to veterans who would be entitled to receive similar federal care at a national veterans facility under the law. Inmates having incomes make contributions for their support. Employees of the home are state employees and regulated by the civil service law. The requirements as to eligibility for entry to the home have been changed by statute from time to time to allow veterans, their wives and widows of more recent wars to enter.

It should be pointed out that sec. 46.03 which prescribes the functions of the state board of control (since transferred to the state department of public welfare) delegates to the state board of control the power to maintain and govern a number of state charitable and penal institutions specifically named and then states, “and all other charitable
curative, reformatory and penal institutions that may be established or maintained by the state except the Wisconsin state sanatorium, the northern state sanatorium and the state tuberculosis camp." The Grand Army Home for Veterans is not mentioned in this section. This section is for the purpose of specifying certain functions of the board of control and in no way attempts to classify state penal and charitable institutions as such. Since statutes elsewhere prescribe for the management and control of the Grand Army Home for Veterans, its omission in sec. 46.03 can only be regarded as an oversight.

From the above there can be no doubt of the eleemosynary nature of this institution or of the fact that it is owned and controlled by the state of Wisconsin.

In our opinion the Grand Army Home for Veterans is properly classified as a state charitable institution and entitled to the benefits under sec. 20.49 (5a).

REB

Barbers—Licenses and Permits—Individual whose master barber's license expired in 1929 is not entitled to a renewal thereof without complying with the provisions of sec. 158.10 (2), Stats.

August 16, 1947.

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

A master barber whose license expired in 1929 has made application for the re-instatement of his license and insists that he is entitled to a master barber's license without having to meet the requirements of the present law. He contends that secs. 158.13 (3) and 158.10 (2) of the statutes were enacted into law in 1935 and that they did not terminate his right to the restoration of a master barber's license merely upon payment of the fee.

Secs. 158.07, 158.13 (3), 158.10 (2) and 158.11 (3) provide:
“158.07 Any person who at the time of the taking effect of this chapter shall be actually engaged in the practice of barbering and shall be licensed as a master barber under the provisions of chapter 158, statutes of nineteen hundred thirty-three, may have such license renewed without examination, provided he makes application and pays the renewal fee prior to June 1, 1936. All unexpired licenses are extended to June 2, 1936.

“158.13 (3) Every master barber who continues in active practice or service shall, annually, on or before the first day of June, make application for a renewal of his license and pay the required fee. A master barber whose license has expired may have his license restored upon the payment of the required fee. Any expired master barber’s license which is not restored within a period of three years from the date of expiration, shall be annulled. After annulment of his master barber’s license, such person may at any time make application for and be granted a journeyman’s license, subject to all the conditions of subsection (2) of section 158.10.

“158.10 (2) Each application for a journeyman’s license shall be accompanied by a fee of five dollars. Upon approval of the application the board shall issue a journeyman’s license entitling the applicant to practice barbering under a master barber for a period of one year from the date of the license. After expiration of this license it must be renewed and such journeyman must take the first examination for a master barber’s license given in his respective locality, provided he has served one year as a journeyman.”

“158.11 (3) All master barber’s licenses shall expire on June 1 next succeeding issuance and be renewed on application on or before the expiration date at a renewal fee of $3. For the restoration of an expired master barber’s license the renewal fee shall be $5.”

On behalf of the applicant it is contended:

(a) That under the law of 1929, when his master barber’s license expired, he was entitled to a renewal of such license at any time thereafter upon payment of a fee of $3.

(b) That by ch. 467, Laws 1935, ch. 158 of the statutes was repealed and recreated to include secs. 158.07, 158.13 (3), 158.10 (2) and 158.11 (3), as quoted above (except that by ch. 97, Laws 1947, the $3 fee was substituted for the $2 fee in the latter statute).

(c) That he was not actually engaged in the practice of barbering when ch. 467, Laws 1935, became effective and
hence could not apply under the provisions of sec. 158.07 for a renewal of his license without examination.

(d) That after ch. 467, Laws 1935, became effective he could not apply for the restoration of his license under the provisions of sec. 158.13 (3) because the 3-year period within which he was permitted to apply had already run.

(e) That prior to the enactment of ch. 467, Laws 1935, applicant was fully qualified to hold a master barber's license and at that time had the legal right to have his master barber's license renewed on payment of a fee of $3.

(f) That up to the effective date of ch. 467, Laws 1935, applicant had a common-law right to engage in business as a master barber subject to rules adopted for the regulation of barbers, and the right to apply for a renewal of his license without examination and without again serving as a journeyman and hence, under the case of Relyea v. Tomahawk Paper & Pulp Co., 102 Wis. 301, 78 N.W. 412, the act of 1935 which attempted to extinguish such rights without giving him a chance to comply with the new regulations, is inoperative and void in its application to his particular case.

From the time that applicant permitted his master barber's license to expire in 1929 to the effective date of ch. 467, Laws 1935, sec. 158.08 (1) of the statutes provided as follows:

"Master's license shall be issued only to one having journeyman's license, the requisite skill to properly perform all the duties thereof including ability in the preparation of the tools, shaving, beard-trimming, haircutting, and all the duties and services incident thereto, and sufficient knowledge concerning the common diseases of the face and skin to avoid aggravation and spreading thereof in the practice. When the applicant passes examination he shall pay two dollars and the board shall issue a master's license. Masters' licenses shall expire on June twentieth, next succeeding issuance and be renewed upon application on or before June twentieth and payment of two dollars. If application for renewal is not made by June twentieth, annually, the fee is three dollars. Renewal may be refused if application be not made at that time."

Attention is directed to the fact that after applicant had permitted his master barber's license to expire he did not have an absolute right to have such license renewed upon
payment of a fee of $3, even under the statutes of 1929 to 1933, since sec. 158.08 (1) provided: "Renewal may be refused if application be not made at that time." Applicant permitted his license to expire at a time when the statutes contained this provision.

The following quotation from the case of Relyea vs. Tomahawk Paper & Pulp Co., supra, is cited on behalf of applicant:

"** * * A law changing the time for, or conditions of, the enforcement of a common-law right, is in the nature of a statute of limitations which, if of such a character as to materially affect the right itself, is within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or comply with the new condition, is within the inhibition mentioned and is void as to such existing rights, otherwise valid.** * *" (pages 306-307).


Ch. 467, Laws 1935, was published September 17, 1935 but sec. 4 of the act provided that those parts thereof which are quoted above should not take effect until October 1, 1935. If applicant had known about the act, he would have had an opportunity to make application for the renewal of his master barber's license during the period between the passage of ch. 467, Laws 1935, and the effective date thereof, although it must be conceded that such period would have been very short.

However, it is our opinion that ch. 467, Laws 1935, did not deprive applicant of any common-law right which he had. Disregarding the last sentence of sec. 158.08 (1) of the statutes of 1929 to 1933, which gave your board the right to refuse to renew a master barber's license which had expired, the most that applicant had under the statutes of 1929 to 1933 was a right to have his master barber's license renewed. Since the master barber's license referred to in those statutes was unknown under the common law, the
right to such license was a purely statutory one. The common-law right which applicant had to practice as a barber, as distinguished from a statutory right to have a master barber's license renewed, was not taken from applicant by ch. 467, Laws 1935. On behalf of applicant it is apparently conceded that the common-law right to practice as a barber is subject to reasonable rules and regulations. After the effective date of ch. 467, Laws 1935, applicant could practice as a journeyman barber upon compliance with the provisions of sec. 158.10 (2) which in our opinion are reasonable regulations of the barber trade under the police power of the state.

If it be contended that that portion of sec. 158.13 (3) which requires the annulment of a master barber's license which is not renewed within a period of 3 years from the date of expiration, could apply only to licenses which expired thereafter, it would mean that an individual such as the applicant, who had not practiced barbering for a period of at least 18 years would immediately be entitled to the renewal of his license as a master barber, but an individual whose license had expired 4 years ago and hence become annulled, would have to practice as a journeyman for a period of at least one year and take the first examination for a master barber's license which would be given thereafter in his locality. This would be an unreasonable construction which would not promote the general welfare and one which in our opinion was not intended by the legislature.

Hence, it is our conclusion that applicant is not entitled to a renewal of his master barber's license which expired in 1929 without complying with the provisions of sec. 158.10 (2).

In view of our conclusion, it is not deemed necessary to discuss the question of laches and the tardiness of applicant in requesting the renewal of his license more than 11 years after the statutory change to which he now objects.

JRW
Public Officers—Malfeasance—Towns—Board Member—Under sec. 348.28 (2), Stats. 1947, town board member may work for the town to obtain credit on his taxes not in excess of $300 in any one year.

August 20, 1947.

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

You inquire whether it is a violation of sec. 348.28, Stats. (malfeasance) for members of town boards to do road work or other work for the town and get credit for it on their taxes. Section 348.28 has been amended by ch. 59, Laws 1947, by which the former statute has been split up into subsections. Subsection (2) as amended contains the exceptions and now reads in part:

"The provisions of this section shall not apply * * * to any contract, not exceeding $300 in any one year * * * ."

Thus the words, "for the sale of printed matter or any other commodity" after the word "contract" in the former statute have been deleted, the word, "any" has been inserted before "contract," and the exempt amount has been increased from $100 to $300.

It follows that under the amended law the town board members may work for the town to obtain credit on their taxes provided that the amount of credit so earned does not exceed $300 in any one year.

WAP

Public Assistance—Dependent Children—Juvenile Court—Term "county agency" as used in sec. 49.19 (1), Stats. 1947, includes juvenile court as well as county administrative agencies, but excludes state and private agencies.

August 20, 1947.

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

You have requested an opinion with reference to the interpretation of sec. 49.19, Stats., as amended by ch. 526, Laws 1947. The purpose of the amendment is to extend
eligibility for aid to dependent children to children “living in a foster home having a permit under section 48.38 and placed in such home by a county agency pursuant to chapter 48.” This act was created by Bill 186, S., which originally did not include the part of the quoted portion set out in italics. That was added by Amendment No. 1, S., which also struck out a portion of the original bill increasing the appropriation for state aid to dependent children by $350,000 annually. The requirement that the children be placed by a county agency would seem therefore to have been intended to reduce the number of such children eligible for state aid below the number covered by the bill as originally drawn and thus reduce the necessary funds to be appropriated.

Your inquiry is as to the meaning of the term “county agency” in the statute as amended. Without going into detail, foster home placements are now made under various sections of chapter 48 by licensed private child welfare agencies, the state public school, the state department of public welfare, county homes for dependent children, county children’s boards, county public welfare departments and by the juvenile courts.

It is clear that in using the term “county agency” the legislature meant a governmental agency, which excludes licensed private child welfare agencies and further that it meant governmental agencies of the county, which excludes state agencies.

County administrative agencies are clearly included, but the question arises as to the juvenile court, which functions judicially rather than administratively. There is no apparent reason why the legislature should have intended to extend state aid where the children were placed in the foster homes by county welfare agencies or other administrative agencies but not where they are so placed by the juvenile court. Clearly the term “agency” when used in this sense is broad enough to include judicial agencies as well as administrative agencies.

In conclusion, therefore, you are advised that children placed in foster homes by state or private agencies are excluded from eligibility for aid, but children so placed by the juvenile court or any administrative agency of the county are eligible.

WAP
Highway Commission—Highways and Bridges—Silent Cross Memorial Highway—Ch. 193, Laws 1947, creating sec. 84.103, Stats., relating to the Silent Cross Memorial Highway is construed as follows:

Existing plans and relocation orders affecting reconstruction of portions of highways to be included in such program need not be discarded when the same are not in conformity with the act but this may be done where it is deemed expedient to do so in complying with the 50-year limitation for completion of said highway.

Regulations and restrictions as to use of land adjoining such highway ordered by state highway commission pursuant to the act will supersede local zoning ordinances where in conflict therewith.

Such restrictions cannot be imposed without compensation to the owners of lands affected thereby.

State highway commission is authorized by act to restrict access to the highway in accordance with the latest and most advanced standards of highway development.

Landowner is entitled to damages whether he is deprived of access which he previously had to an existing highway or whether he is denied access to a newly created highway traversing a portion of his lands.

In acquiring conveyances of right of way for such highway the necessary restrictions as to use of adjoining lands by landowner should be obtained also whenever possible.

In subdividing or platting lands having restrictions as to access to such highway provision should be made for public streets or highways which will provide access to such highway through some street or highway at a point where access is permissible.

August 21, 1947.

STATE HIGHWAY COMMISSION.

You have asked for our opinion on some nine questions relating to the interpretation and administration of ch. 193, Laws 1947, which makes provision for the so-called Silent Cross Memorial Highway.

FIRST. You point out that portions of this highway are in general established by terms of the act so as to include state trunk highway 30 and the major portion of U. S. high-
way 51. In this connection you inquire whether it is re-
quired that all major construction or reconstruction on parts
of these routes shall conform to the act. Some sections of
these highways are scheduled for current improvement and
it is important to know whether these improvements should
conform to the provisions of the act relating to laying out
of right of way, zoning, regulating of access, etc.

In answering this question consideration must be given to
the terms of the act, the material parts of which we will
take the liberty to quote.

Sec. 84.103 (2) reads:

"The alignment and grade of the highway shall be con-
structed to the most modern standards with structures of
appropriate strength and designed with due regard to aes-
thetics. It shall, where practical to meet present and rea-
sonably anticipated need for complete traffic and driver
service, consist of a 4-lane, double divided concrete high-
way, suitably landscaped, seeded and planted, and shall in-
clude appropriate wayside development for emergency
stops and for rest and observation. The economy, efficiency,
safety and permanence and memorial quality of the high-
way shall be complemented and enhanced by complete bor-
der control and restrictions to access according to the latest
and advanced standards of highway development."

Sec. 84.103 (4) provides:

"The Silent Cross Memorial Highway shall be developed
over a period of 50 years and finally completed by July 1,
1997. The state highway commission shall proceed with
such development, so far as practical, in the manner and
order following.

"(a) It shall establish definitely the final location of the
highway;

(b) It shall lay out for acquisition as needed a right of
way of sufficient width for ultimate development;

(c) It shall by orders regulate and restrict the location,
shape, height, size and set back building lines of buildings
and other structures along such location, right of way or
highway and along any natural watercourse, body of water,
stream, creek or place of vantage in near proximity thereto;
and it may by orders regulate and restrict the use of land
along such location right of way or highway and the opera-
tion of vehicles thereover. No such order shall prohibit the
continued use or location of any building, structure or
premises existing at the time such order takes effect, but the
alteration of or addition to any building or structure so ex-
isting and not conforming to such order may be prohibited. No commercial enterprise or activity shall be authorized or conducted by the commission upon any part of the property designated as a part of such highway or acquired for such purpose. But the commission shall, in order to permit establishment of adequate fuel and other services for users of the highway by private owners or their lessees, provide for access roads within said right of way at points which in its opinion will best serve the public interest. All orders made pursuant to this paragraph shall be reasonable and designed to promote the public health, safety and public welfare. Any person violating this paragraph or any such order shall be punished by a fine of not exceeding $500 or by imprisonment for a period not exceeding 6 months or by both such fine and imprisonment. Compliance with this paragraph and such orders may be also enforced by injunctive order at the suit of the state highway commission or any owner of real estate affected thereby.

"(d) When plans are made for any construction on the highway such plans shall provide for the ultimate development even though only a part thereof is to be carried out at the time; all construction shall conform with the plans of development, both as regards elevation and alignment. Landscaping of the highway shall be considered and included in the plans prior to or at the time of construction and shall closely follow construction of the highway."

It is to be noted that the highway is to be developed and finally completed in 50 years. Sec. 84.103 (4).

The first step in the process is to establish definitely the final location of the highway. Sec. 84.103 (4) (a).

The second step is to lay out for acquisition the needed right of way. Sec. 84.103 (4) (b). This, however, does not mean that such right of way is to be acquired immediately.

In this connection you have called attention to the fact that a relocation order has been issued with reference to U. S. highway 51 near Madison; that the plans do not necessarily conform to all of the standards of design and control contemplated by ch. 193 and that appraisals have been made for acquisition of the new right of way although it has not yet been acquired.

We do not believe that it is necessary under ch. 193 to discard plans that have already been made or to change existing relocation orders so as to include additional lands which will be needed ultimately in conforming to the standards of ch. 193. Sec. 84.103 (4) (d) provides that when
plans are made for any construction on the highway such plans shall provide for the ultimate development even though only a part thereof is to be carried out at the time. This statutory provision, like most statutes, is prospective in its operation rather than restrospective or retroactive. Except as to some mere remedial statute, laws are presumed to have only a prospective effect unless the contrary clearly appears. *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.*, 151 Wis. 555. We hasten to add, however, that we do not mean to intimate that the highway commission lacks authority to scrap existing plans and relocation orders if as a matter of sound highway engineering and economics the change should be made now in order to conform to the 50-year limitation in which to comply with the terms of the act. If, for instance, the highway reconstruction now contemplated will have an estimated expectancy of usability of only 25 years and it will then be necessary to rebuild there will still be plenty of time to comply with the mandate of ch. 193. On the other hand, if such period of expectancy will exceed 50 years it might be better to discard the existing plans and relocation orders and start over in compliance with the standards set up by ch. 193. This involves a matter of highway engineering judgment upon which we do not feel competent to advise beyond stating the general consideration which should control.

Perhaps it should be pointed out that experience has demonstrated to the satisfaction at least of the United States public roads administration that because the cost of subsequent widening of existing streets and highways is so great it is often more economical in the long run to acquire at the outset the lands which will ultimately be needed. Frequently it costs no more to acquire a whole parcel than to take just part of it and pay heavy consequential damage on the remainder. Some striking examples are cited at page 35 of “Public Control of Highway Access and Roadside Development,” a pamphlet published in 1947 by the public roads administration. It was pointed out that in 1929 the estimated cost of widening the Boston Post Road from 66 feet to 166 feet would have been over $1,000,000 per mile for the land alone. In Detroit 3 miles of Woodward Avenue were replaced at the cost of $11,000,000, of which more
than $9,800,000 was for acquisition of land, including property damage, and the widening of Ashland and Western Avenues and LaSalle Street in Chicago cost more than one-third of a million dollars per mile on the average for each additional 10 feet.

SECOND. You inquire whether the plans for improvement on the route with respect to design of the road, extent of right of way to be acquired, "border control and restrictions to access according to the latest and advanced standards," regulation and control of the location, height, size and shape of buildings and land use along the highway must be altered to conform to the standards of the act. All of these factors necessarily have a direct bearing on the extent of and the cost of the initial right of way acquisition as well as the cost of the work.

This question closely parallels the first question and calls for the same answer.

THIRD. You call attention to the fact that the act authorizes and directs what might be considered the zoning of property abutting the Memorial Highway and you inquire whether the powers thus conferred on the commission supersede the zoning regulations of local units of government and other provisions of law.

Subject to the general proposition that where statutes are apparently conflicting they should, if possible, be so construed as to give operation to both without doing violence to either (Attorney General ex rel. Taylor v. Brown, 1 Wis. 513*), the rule is that where statutes conflict in terms, ordinarily the later prevails over the earlier. Jones v. Broadway Roller Rink Co., 136 Wis. 595. Implied repeals, however, are not favored, and both statutes will be permitted to stand if it can be done upon any reasonable construction. State ex rel. Hayden v. Arnold, 151 Wis. 19.

It would, of course, be a little difficult to try to resolve any of such conflicts or apparent conflicts as a hypothetical proposition in the absence of any actual factual situation and we will be glad to give you more detailed assistance whenever the question actually arises.

FOURTH. You inquire whether the authority conferred upon the commission to restrict the use or to in effect zone
property adjoining the highway may be exercised without compensation to the landowner.

One of the principal tests to be applied in this connection is whether the regulation amounts to an exercise of the power of eminent domain or whether it comes properly within the exercise of the police power so as not to constitute a taking of property which would require compensation. This distinction is well set forth in Metzenbaum, "The Law of Zoning" at page 47, as follows:

"The right of 'Eminent Domain' when exercised, admittedly 'takes' the property or an interest therein, from the owner, for the benefit of some specific public improvement. "Since eminent domain does 'deprive' the owner, it becomes necessary that he be paid.

"On the other hand, it is to be noted that although there may be a regulation of, or a limitation upon, the use of property, for the common good of all, such a restriction or regulation does not fall within 'eminent domain,' but does come within the 'police power' if the regulation or restriction is not meant for some specific project nor for some particular public improvement, but if it is meant for the protection and promotion of the public health, safety or welfare. Under such circumstances, such regulatory restrictions upon the use of property, fall within the police power and compensation is not required to be made." (Emphasis ours.)

This distinction, express or implied, is contained in a number of Wisconsin cases.

One of the leading cases is that of Piper v. Ekern, 180 Wis. 586, wherein the court held that a statute limiting the height of buildings on property surrounding the state capitol building for the purpose of preventing damage to that building and the property therein from fire, constituted an unreasonable exercise of the police power and was an attempt to acquire rights that could only be acquired by exercising the power of eminent domain and violated sec. 13, art. I, Wisconsin constitution, prohibiting the taking of property for public use without just compensation and also the due process clause of the 14th amendment to the federal constitution. It was pointed out there (page 596) that such restriction practically amounted to the granting of an easement over and above the 90-foot height provided for in the
act for the benefit of the state and its capitol and that such easement did not differ materially from the easement required for the tunnel to insure the connection of the heating plant with the capitol.

However, the situation is materially different where the zoning restriction is not designed for the benefit of some specific project or particular public improvement. See: Building Height Cases, 181 Wis. 519, which upheld a general state-wide law limiting the height of buildings in populous centers to promote the public health and safety and perhaps the convenience and general welfare of the people.

The distinction between the above two cases is emphasized by the court in its opinion in State ex rel. Carter v. Harper, 182 Wis. 148, where the court said at page 154:

"Except in cases of nuisance there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor. This principle was pointed out in Piper v. Ekern, 180 Wis. 586, 194 N.W. 159, and furnishes the distinction between the fate of sec. 4444g, Stats. 1921, there condemned, and sec. 4444f, Stats. 1923, which was held a constitutional enactment in the Building Height Cases, 181 Wis. 519, 195 N.W. 544, decided October 16, 1923. In the former case it was held that the statute was enacted purely for the protection of the state capitol, and that, as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for the protection of the capitol. The latter statute, however, was general in its operation throughout the state and was not limited to the special and selfish purpose which characterized the former. All those whose property is affected by the latter statute are compensated by the restrictions placed upon their neighbors."

It would seem here that the regulations that might be imposed by the commission in "complete border control," "restrictions to access," and in the regulation and restricting of "the location, shape, height, size and set back building lines of buildings and other structures along such location, right of way or highway and along any natural watercourse, body of water, stream, creek or place of vantage in near proximity thereto," and in regulating and restricting
"the use of land along such location right of way or highway and the operation of vehicles thereover" might well be considered as having been made for the benefit of a specific project or particular public improvement, to wit, the Silent Cross Memorial Highway. Such restrictions would practically result in the acquisition of a very substantial easement over the lands affected and might indeed in some instances at least approach the point where the landowner would virtually be deprived of any beneficial or profitable use of his property. The restrictions in question would not apply to highways generally throughout the state and would be designed solely to enhance the utility of one particular strip of property owned by the state so as to come within the condemnation of the doctrine laid down in *Piper v. Ekern, supra*.

In a constitutional sense compensation is required not only when there is an injury that would be actionable at common law, but also in all cases in which it appears that there has been some physical disturbance of a right, either public or private, which the owner of a parcel of land enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. 18 Am. Jur. 765.

You are therefore advised that before zoning or restricting the use of property adjoining the highway it will be necessary to either acquire title thereto or to contract for the rights in question through purchase or gift from the landowners affected.

**FIFTH.** We are asked next whether, under the act, the commission has the right to designate and limit the points at which an abutting owner may have access to the property, even to the point of denying all direct access where the tract in question is accessible from other highways.

As hereinbefore indicated sec. 84.103 (2) provides, among other things:

"* * * The economy, efficiency, safety and permanence and memorial quality of the highway shall be complemented and enhanced by complete border control and restrictions to access according to the latest and advanced standards of highway development."

"
Thus the authority to restrict access is conferred on the commission by the act but again the element of compensation cannot be ignored.

"* * * Clearly, an owner of land abutting on a street cannot constitutionally be deprived of all access to his premises without compensation, either by the vacation of the street or its physical obstruction in front of his premises, or its obstruction at another place so that the portion of the street in front of his premises cannot be reached. Total deprivation of access is equivalent to a taking, especially when the easement of access to the street is recognized by the substantive law of the state." 18 Am. Jur. 814

The problem of compensation to the landowner for loss of access to a highway has recently been given careful study by the Minnesota supreme court. In Petition of Burnquist (Minn. 1945) 19 N.W. (2d) 394, it was pointed out that super highways or so-called “free-way” highways must of necessity be broad with divided roadways separating traffic, with underpasses and cloverleaf intersections and with crossway traffic thereon limited to certain definite points, and that while it is true that the creation of a public highway at the same time subordinates the land on which it is established to the easement of access insofar as abutting landowners are concerned, there is nothing which prevents the sovereign state from later extinguishing such easements in subsequent condemnation proceedings. In this case it was undisputed that the taking of access to such a highway would require the abutting owner to build a road to the rear 900 feet of the property if it were subdivided, for which such part was valuable, and the estimates of cost of road ranged from $300 to $1,200. The verdict of the jury awarding no damages to the abutting owner was set aside and the cause remanded for new trial on the issue of damages. The reasoning of the court in this case which we cannot take the space to discuss in detail appears to us to be sound and very likely would be followed in Wisconsin were a similar case to arise here.

SIXTH. You next inquire whether the owner of the abutting tract must be compensated for the limitation or restriction in access to a new highway established on a new location.
While the *Burnquist* case, *supra*, relates to the extinguishment of an existing easement of access the problem would not be materially different where in the initial taking of part of landowner's land he were to be denied access to the newly created highway. Only the problem of damages would be approached somewhat differently. In condemnation proceedings the landowner is entitled to recover the value of the land taken, and the amount which the taking diminishes the value of the remainder. *New Dells L. Co. v. Chicago, St. P., M. & O. R. Co.*, 222 Wis. 264.

Obviously the damage to the remaining land of the owner is going to be much greater where it can be shown that such parcel will have no access to the highway. Thus the landowner is entitled to damages whether he is deprived of access which he previously had to an existing highway or whether he is to be denied access to a newly created highway traversing a portion of his lands.

The *Burnquist* case, however, should be read in connection with the later case of *Alexander Co. v. City of Owatonna* (Minn. 1946) 24 N.W. (2d) 244. Here the plaintiff wanted to cut a curb on the city street and construct a driveway across the sidewalk in connection with its automobile supply store. The court held that an abutting owner does not have such a right of property in the public street of a municipality as to authorize him to appropriate a portion of the street for his private business but that such an appropriation, being a privilege which under proper circumstances may be conferred, is subject to such restrictions as the city council finds to be necessary for the safety of the traveling public. The court cited cases to the effect that a driveway used to serve a business is part of such business and as such subject to restrictive regulations that are applicable to such business. Reference was made to the case of *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560, where the owner of a lot sought to obtain an injunction to restrain the city from tearing up a driveway leading onto his lot on the ground that he had a right to access to the lot from both streets and that such right was absolute and inherent. It was ruled that he was not entitled to the relief sought and that while conceding that an abutting property owner has an easement in the public road which amounts
to a property right the exercise of this right is subordinate to the right of the municipality to so control the use of the street as to promote the safety, comfort, health and general welfare of the public. The convenience or necessity of the owner constitutes but one side of the question and must be weighed against the danger to the traveling public. For instance, as was pointed out in Town of Tilton v. Sharpe, 85 N.H. 138, 155 A. 44, it would be difficult to conceive of a situation where an owner should be deprived of access to his lot by persons on foot at any point on abutting street however extensive his frontage, but that on the other hand if an owner should propose to propel freight or vehicles with great force or speed across a congested sidewalk such use would be clearly unreasonable even though it was the only accessible entrance to his lot.

We do not believe that the authorities on the subject of access hereinbefore discussed are in conflict but it is clear that there are limitations on the property owner’s right of access to a public street or highway which may be imposed as an exercise of the police power in the interest of public safety and welfare and without compensation to the landowner.

SEVENTH. You inquire whether the owner’s right of access must be acquired in the same manner as lands and other rights are acquired under conditions where the highway is laid over an existing highway to which the abutting property had access.

This was the situation as we understand it in the Burnquist case. There the original highway had been laid out in 1937 and an easement of access was thereby created for the lands in question. Thereafter the state commenced a condemnation proceeding solely for the purpose of acquiring the property owner’s right of access to the existing highway. No additional land area was sought to be acquired in the proceeding. The court quoted from 18 Am. Jur. 716 as follows:

“It may be stated as a general rule that, except where restricted by statute, a right or interest already owned in property may be increased, or a burden in respect thereof may be relieved, upon good cause shown, by the exercise of eminent domain; in other words, the mere fact that one al-
ready owns some right or interest in property is not a bar to his acquisition, by the exercise of eminent domain, of the fee title to the property, or of some other increased interest therein."

It was then pointed out that devoting a highway to uses destructive of easements to which it is servient, such as access, light and air constitutes a taking for which compensation must be made.

Sec. 84.09 (1) provides, among other things, that the state highway commission may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways, streets and roadside parks which it is empowered to improve or maintain, or interests in lands in and about and along and leading to any or all of the same. Thus the statute confers authority on the state highway commission to acquire any interest in lands such as an easement of access. The same is also true where the commission proceeds through a county highway committee under sec. 84.09 (3) (a), ch. 373, Laws 1947, which amended sec. 84.09 (3), or through a city board, commission or department as provided in sec. 84.09 (3m) created by ch. 254, Laws 1947.

EIGHTH. In negotiating with owners for right of way on a new location you inquire whether the conveyance should stipulate for restriction of access or whether the commission may rely on its authority to impose such regulation by order issued under sec. 84.103 (4) (c).

The answer to this question has already been indicated in the answers to preceding questions. By all means the conveyance should contain the necessary restrictions because otherwise the commission will have to pay later on for the acquisition of the property owner’s right of access as held in the Burnquist case.

NINTH. “Assuming that the tract is subsequently subdivided, would the plans for subdivision need to arrange for a local service road giving the individual lots access to the point of access to the highway, or would the service drives connecting the individual lots or tracts to the point of access to the highway need to be provided at public expense on the highway right of way?”
The owner of property which has been legally deprived of its access to the proposed highway must of course do his platting or subdividing with full knowledge of the problem of limited access.

Sec. 236.06 provides in effect that no plat shall be valid or entitled to be recorded until it has been submitted to and approved by the proper municipal governing body and no municipality is likely to approve a plat in which any parcel lacks access to a public highway and even if it would approve the plat it would be virtually impossible for the owner to sell a lot therein not having such access. The natural thing to do would be to dedicate streets or highways in the plat to public use and so arrange the same as to provide access to the Memorial Highway through some street or highway at a point where access is permissible. Assuming the plat is approved the streets or highways therein become public and are subject to being constructed and maintained as such.

WHR

Public Health — Cosmetic Art — Apprentices — Section 159.12 (2), Stats., requires that circuit teacher teaching cosmetology apprentices in theoretical and scientific subjects must hold Wisconsin manager’s license.

August 23, 1947.

Dr. Carl N. Neupert,
State Health Officer.

You have requested an opinion with reference to sec. 159.12 (2) relating to apprentices in cosmetology, which provides in part:

“Apprentices must practice for at least two years under the personal supervision and direction of a licensed manager before they shall be eligible to make application to take the examination for operator. Applicants shall be given instruction by a manager in all branches of practical work and in the subjects required to be taught in schools of cosmet art as set forth in section 159.02. * * *”

Your question is as to whether the circuit teachers now giving part time instruction to cosmetology apprentices
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should be required to hold a Wisconsin manager's license in cosmetology. The answer is that they should hold such license.

Section 159.02 (3) requires schools of cosmetic art to teach courses in both theory and practice of cosmetology. The apprentice law (above quoted) requires that all these subjects be taught to the apprentices "by a manager." The circuit teachers supply the theory courses while the shop manager instructs in the practical branches. If the circuit teacher is not a manager, the apprentice is not getting instruction in theory from the source contemplated by the statute. It is therefore perfectly clear that if instruction by a circuit teacher is intended to comply with sec. 159.12 (2), the teacher must hold a Wisconsin manager's license.

WAP

Public Health—Plumbing—City ordinance which provides that no plumbing or drain laying may be done for remuneration except by a licensed plumber does not conflict with sec. 145.06 (1), Stats., which provides generally that no person shall engage in or work at the business of a master or journeyman plumber unless licensed to do so by the state board of health. The work must, however, be done under the supervision of a licensed master plumber by virtue of sec. 145.06 (2) subject to the exceptions to sec. 145.06 provided by sec. 145.13.

August 23, 1947.

Dr. Carl N. Neupert, Executive Secretary,
State Board of Health.

You have called our attention to sec. 14.07 (1) of the city of Racine plumbing ordinance which provides:

"No person, firm or corporation shall do any plumbing or drainlaying until after a permit therefor has been taken out with the Plumbing Inspector; and no person, firm or corporation, contractor or subcontractor shall do any plumbing or drainlaying for remuneration pursuant to written or oral contract with another person unless licensed to do so."
We are asked whether this provision is in conflict with chapter 145 of the state law relating to plumbing.

The question presented is not so much one of conflict between the city ordinance and the state law as it is a question of whether under the state law a plumber must be licensed irrespective of the remuneration he receives for his work, conceding that he need not be licensed so far as the Racine ordinance is concerned unless he is remunerated.

We do not find that the precise question here presented has heretofore been considered by this office. In VI Op. Atty. Gen. 481 it was ruled that a person not licensed as a plumber may install plumbing in his own home provided the quality of material and work of installation comply with the law. See also sec. 145.13 (1) (a). In IV Op. Atty. Gen. 701 it was ruled that under sec. 959-53 (2) all persons are prohibited from engaging in or working at the business of a master plumber or journeyman plumber unless duly licensed. However, no attempt was made in this opinion to determine what constitutes the business of plumbing.

In XXVI Op. Atty. Gen. 187 we were asked to determine the proper line of demarcation between plumbing and steamfittings. It was pointed out that connections with pipes containing the pure water supply would have to be made by a licensed plumber. This ruling must of course be viewed in light of the question presented and the exceptions provided in sec. 145.13 to the general provisions of the statutes relating to plumbing. We were merely trying to point out where the work of one engaged in the business of steamfitting ends and the one engaged in the business of plumbing begins. Thus the opinion is not to be taken as a construction or interpretation of sec. 145.06 (1) which tells when licenses are required. This section reads:

“No person shall engage in or work at the business of a master plumber or journeyman plumber in any city or village having a system of waterworks and sewerage or in any metropolitan sewerage district unless licensed so to do by the board. A master plumber may also work as a journeyman. No person shall act as a plumber’s apprentice in any such city or village or building unless registered with the board.”

The question you have raised makes it necessary for us to determine what is meant by working “at the business of
a master plumber or journeyman plumber” and specifically whether this language is broad enough to cover all plumbing regardless of the element of compensation. Ordinarily words and phrases used in the statutes are to be construed and understood according to the common and approved usage of the language, sec. 370.01 (1). Webster has defined the word “business,” among other things, as “any particular occupation or employment habitually engaged in, especially for livelihood or gain.” The courts generally have accepted this definition in construing statutes containing the word “business.” In Vandervort v. Industrial Comm., 203 Wis. 362, it was held that the term “business” of an employer as used in sec. 102.07 (4) means habitual occupation or employment for livelihood or gain and does not include casual isolated and desultory activities, especially in view of the penalty provisions of sec. 102.28 requiring employers to carry compensation insurance. Numerous cases to the same effect are to be found in 5 Words and Phrases, Perm. Ed. 979 and following. Some of these relate to plumbing, Wilby v. State, 93 Miss. 767, 47 So. 465, 23 L.R.A. (N.S.) 677; Warburton-Beacham Supply Co. v. City of Jackson, 151 Miss. 503, 118 So. 606. In Employers' Liability Assurance Corporation v. Accident and Casualty Insurance Co., 134 Fed. (2d) 566, it was held that one's business is the activity on which he spends the major portion of his time and out of which he makes his living. In State v. Cooper, 205 Minn. 333, 285 N.W. 903, 122 A.L.R. 727 it was considered that an enterprise not conducted as a means of livelihood or profit was not a “business.” In Hazen v. National Rifle Association of America, 101 Fed. (2d) 432 it was again stated that “business” is any particular occupation or employment habitually engaged in, especially for livelihood or gain and that a single or occasional disconnected act does not constitute engaging in “business.” Also, in Board of Supervisors of Amherst County v. Boaz, Virginia, 10 S.E. (2d) 498, it was considered that the word “business” implies some constant and connected employment as distinguished from an isolated act or two.

In view of the foregoing we are constrained to rule that under sec. 145.06 (1) the phrase “engage in or work at the business of a master plumber or journeyman plumber” ex-
tends only to habitual occupation or employment for livelihood or gain and does not include isolated instances where no remuneration is involved. As so viewed there is no conflict between sec. 145.06 (1) and 14.07 (1) of the Racine plumbing ordinance.

In reaching this conclusion we are not unmindful of the fact that the over-all purpose of chapter 145 is to insure to the people of this state a safe water supply insofar as the proper regulation of plumbing can attain that end, as we pointed out in XXVI Op. Atty. Gen. 187, nor do we overlook the fact that an isolated act of plumbing without remuneration by an experienced handyman or jack-of-all-trades may endanger the health and possibly the lives of a great many people where an improper cross connection is made between a pipe which carries pure water for drinking and a pipe carrying waste or contaminated water into the sewerage system with the dangers of resultant back siphonage or drainage by gravity of the polluted water into the safe water supply.

The answer to this danger is to be found in the fact that the legislature has very wisely provided by sec. 145.06 (2) that no person, firm or corporation shall install plumbing unless at all times a licensed master plumber is in charge who shall be responsible for proper installation. This applies in any city or village having a system of waterworks and sewerage and in any metropolitan sewerage district. Consequently, while a single or isolated piece of plumbing may be done by an unlicensed person without remuneration under both the state law and the Racine ordinance, a licensed master plumber responsible for proper installation must nevertheless be in charge at all times subject, of course, to the exceptions provided in sec. 145.13. This should insure both proper layout of plans and specifications for the job plus assurance that the job has been completed in accordance with the plans and in such a way as not to endanger the safe water supply of the community, even though the actual labor involved in installing the plumbing is performed by an unlicensed person.

WHR
Schools and School Districts—Counties—School Committee—The members of a “county school committee” provided for by sec. 40.303 (1) who must be residents of incorporated cities or villages of the county may come from incorporated cities having a city superintendent of schools. Sec. 39.01 (5) is not applicable.

Under sec. 40.303 (2) education committee of county board must nominate candidates for the county school committee equal in number to members to be elected to the latter committee. Said education committee has no authority to nominate a greater or lesser number of candidates. After the education committee submits its nominations, members of the county board which elects the county school committee, have the power to nominate additional candidates from the floor.

In cases where sec. 40.303 becomes effective within 30 days prior to the next meeting of the county board, education committee of county board may nominate candidates for membership on county education committee at any time up to said next meeting.


Henry Van De Water,
District Attorney,
Sheboygan, Wisconsin.

In your letter of August 12 you ask our opinion regarding certain problems which arise out of proposed sec. 40.303 of the statutes as created by Substitute Amendment 3, S. to Bill 255, A. This bill which passed both houses of the legislature, was signed by the governor on August 21, 1947 but has not yet been published.

We agree with your conclusion that members of a “county school committee” as provided by sec. 40.303 (1) may be residents of cities having a city superintendent of schools. There is nothing in this subsection which disqualifies residents of such cities from being members of such committee and the fact is that said subsection specifically requires that three members of the committee shall be residents of incorporated cities or villages of the county and three shall be residents of towns of the county. The requirement is three members “shall be residents of incorporated cities or
villages of the county" and there is nothing that limits these residents to incorporated cities not having a city superintendent of schools. To restrict membership to residents of incorporated cities not having a city superintendent of schools or villages of the county would be to add a requirement not placed there by the legislature, which cannot be done.

We do not think sec. 39.01 (5) has any application. It provides as follows:

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, shall bear no part of the expense connected with the office of county superintendent of schools; and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."

The theory behind the foregoing subsection is obvious. Cities having a city superintendent of schools are placed outside the county superintendent's district and hence it is only fair and proper that such cities or any elector or supervisor therefrom have no voice as to the matters connected with or arising out of the office of county superintendent. Such consideration would apply only as to questions or matters which are directly connected with or arise out of the office of the county superintendent of schools. Sec. 40.303 (1) is not directly connected with or related to the office of the county superintendent of schools. It relates to another subject matter, namely, the county school committee. The law makes the county superintendent secretary of the committee but it specifically provides he is not entitled to vote. His position as secretary is clerical and his connection with the committee does not make the functions of the committee a question or matter connected with or arising out of the office of county superintendent within the meaning of sec. 39.01 (5).

We are of the opinion that the education committee of the county board cannot nominate as candidates for the office of member of the county school committee, more candidates than the number of members to be elected. We base this on the language of sec. 40.303 (2) which states that:
"The education committee of the county board, * * * shall nominate candidates for the county school committee equal in number to the number of committee members to be elected. * * *

At the present time six members will be elected so the education committee can nominate six candidates and no more. As time goes on and the terms of the members expire on different dates, the county board education committee can of course nominate only such number of candidates for the office of member of the county school committee as will equal the number of members to be elected. In view of the fact that the county board education committee must nominate candidates equal to the number of members to be elected, it cannot nominate a lesser number.

We feel that members of the county board of supervisors have power to nominate additional candidates from the floor. The law provides that the county board elect the committee. If members of the county board cannot nominate candidates from the floor, they would have to take the candidates nominated by the education committee without any choice since the number of candidates nominated by that committee equals the number of members to be elected. Under such circumstances the county board's power to elect would be an empty one; the board would simply act as a rubber stamp and the real power of selection would be in the committee. Under these circumstances we feel the members of the county board must of necessity have power to nominate additional candidates from the floor. The fact that a committee is given power by statute to present nominations does not negative the right of members of the board also to make nominations especially where the board has the power of election. Furthermore, as you state, under rules of parliamentary procedure, members have the right to make nominations in addition to those made by a nominating committee. For example, in Robert's Rules of Order (1943), it is said at page 263 in referring to nominations made by a committee:

"* * * When the committee makes its report, which consists of a ticket, the chair asks if there are any other nominations. They may then be made from the floor. The committee's nominations are treated just as if made by mem-
bers from the floor, no vote being taken on accepting them. When the nominations are completed, the assembly proceeds to the election * * *.”

You also ask whether any serious objection would arise if the county board defers taking action on the matter of the election of the county school committee until the annual November meeting. From what you say in the next to last paragraph of your letter, we gather that the reason for thinking such delay may be necessary is due to the fact the next meeting of the county board would be on September 8, 1947 and for that reason the nominating committee cannot now make its nominations at least 30 days prior thereto. However, sec. 40.303 (2) reads in part as follows:

“* * * Such nominations shall be made at least 30 days before the meeting of the board at which the election is held, except that the 30-day provision shall not apply to the initial election if the first meeting of the county board following the effective date of this section is held less than 30 days after such effective date. * * *”

Up to the present time Bill 255, A. has not yet become a law. It will be published soon so that sec. 40.303 will become effective within 30 days of the next meeting of the county board and the 30-day requirement for nominations will not apply. For that reason nominations can be made at any time up to the next meeting of the board which will be held on September 8, 1947. It is now August 25, 1947 and it would seem to us that in the time from now to September 8, 1947 the county board education committee could make its nominations and that there is no need to delay action to a later date.

For this reason we do not at this time attempt to determine whether the provisions in sec. 40.303 fixing the time when the nominations are to be made and when the members of the county school committee are to be elected are directory or mandatory. As a general proposition, we strongly feel that it is best to act within the time fixed by the statutes when it is at all possible to do so if for no other reason than that our system of government is predicated upon the proposition that the law as enacted by the legislature will be complied with. Furthermore, compliance with the statute here will avoid any legal question in the future
and, so far as that is concerned, we think there is a real possibility that a court might hold in view of the language used in sec. 40.303 (2) and (3) and the care with which the legislature set the time for doing the acts therein mentioned, that the portion of the statute here involved is mandatory and not directory. We certainly would not want to advise you that the provisions of the statute are directory and not mandatory in absence of decision of our court on the subject.

WET

_Schools and School Districts—Counties—Supervising Teacher—_Supervising teachers mentioned in sec. 39.14, Stats., are county and not state employes._


MARSHALL NORSENG,
_District Attorney_,
Chippewa Falls, Wisconsin.

You ask our opinion on the following question: Are supervising teachers mentioned in sec. 39.14 to be considered state or county employes?

Such teachers are county employes and are not state employes. We arrive at this conclusion because (1) they are employed by the county superintendent of schools, (2) the county board fixes the salary (which shall not be less than the amount fixed by the state superintendent) and is required by statute to make provision for the monthly payment of the salary and expenses of such teacher, (3) they are required to perform certain statutory duties “under the direction of the county superintendent,” and (4) they may be discharged for cause by the county superintendent after opportunity is given to be heard. Sec. 39.14 (1) (a), (2), (4) and (5). Note also that sec. 39.14 (1) was amended by ch. 158, Laws 1947, and the title to said chapter reads that it is an act “To amend 39.14 (1) of the statutes, relating to employment of supervising teachers by counties.” Such title may be resorted to should there be any doubt on this matter. _State ex rel. Pumplin v. Hohle_, 203 Wis. 626.
Generally one may become a state employe only by complying with the provisions of the civil service law. *State v. Industrial Comm.*, 250 Wis. 140. The only exception would be in case there is a specific statute which provides that the right to employ or appoint is not subject to the provisions of ch. 16, of which secs. 15.15 (2), 45.35 (5) and 73.02 (4), Stats., are typical examples. Supervising teachers under sec. 39.14 are not employed under state civil service. There is no statute which provides that such teachers shall be appointed without reference to ch. 16. Such teachers therefore obviously cannot be considered state employes. It may also be asked, if it is contended that supervising teachers are state employes, what state officer or agency hired them? The answer would have to be that there is none.

The fact that the state may reimburse the county in all or in part for the amount expended by the county for salary and the actual and necessary expenses incurred by supervising teachers as provided in sec. 39.14 (7) does not operate to make such teachers state employes. It is not at all uncommon for the state to appropriate money to reimburse local governmental units for salaries paid employes of such local units who are engaged in certain governmental activities which the state desires to encourage. The same is often done by the federal government. It has never been thought that this resulted in making such employes state or federal employes as the case may be. Furthermore, in the present case the amendment to sec. 39.14 (1) made by ch. 158, Laws 1947, now permits the county superintendent to employ more supervisors than provided for by sec. 39.14 (1) (a) when he is so authorized by the county board, with the qualification that the county will not be reimbursed as provided in sec. 39.14 (7) for the salary or expenses of any supervising teachers employed in excess of the number fixed by sec. 39.14 (1) (a). Hence, if the fact that the state may reimburse the county in all or in part for the salary and the actual and necessary expenses paid its supervising teachers makes them state employes, we would then have the rather unusual situation in a case where the number of such teachers employed exceeds the number provided in sec. 39.14 (1) (a) of having the teachers for whom the county is reimbursed considered state employes while those
for which it received no reimbursement would be considered county employees. This result demonstrates the error which would result if it be considered that the fact that the state reimburses the county makes county supervising teachers state employees.

WET

Automobiles and Motor Vehicles—Motor Cycles—Licenses and Permits—Driver’s License—Three-wheel motor propelled vehicle intended for sidewalk use held a motor cycle as defined by sec. 85.10 (4), Stats., requiring a licensed operator under sec. 85.08, Stats.


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

We have your request as to whether a three-wheel motor propelled vehicle constructed for operation by children between the ages of 8 to 10 years and intended for operation upon sidewalks is subject to registration and whether the operators thereof must be licensed as operators of a motor vehicle under ch. 85, Stats.

Section 85.10 (1) as amended by ch. 13, Laws 1947, and (2) read as follows:

“(1) Vehicle. Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting, unless specifically included, vehicles used exclusively upon stationary rails or tracks or any vehicle propelled by the use of electricity obtained from overhead trolley structures.

“(2) Motor vehicle. Every vehicle as herein defined which is self propelled.”

Section 85.10 (4) defines motor cycle as follows:

“Every motor vehicle designed to travel on not more than three wheels in contact with the ground except any such motor vehicle as may be included within the term tractor as herein defined.”

Your description of the vehicle in question clearly places it within the definition of a motor cycle. Section 85.01 (1)
prohibits the operation of a motor cycle upon any highway unless the same shall have been registered in the office of the motor vehicle department and the registration fee paid.

Section 85.23 provides as follows:

"The operator of a vehicle shall not operate his vehicle upon any sidewalk area except at a permanently or temporarily established driveway, unless permitted to do so by the local authorities."

Section 85.08 prohibits the operation of any motor vehicle upon a highway in this state unless the operator has a valid license issued under the provisions of this section. No person under 16 years of age may be licensed to operate a motor vehicle except under special circumstances which are not applicable here.

Section 85.10 (24) defines a sidewalk as that portion of a highway between the curb lines and the adjacent property lines, unless local authorities designate otherwise.

I am of the opinion that the vehicle which you describe in your request for opinion cannot be operated upon a sidewalk unless local authorities permit such operation; nor may such motor vehicle be operated by anyone who does not legally hold an operator's license.

SGH

Taxation—Airports—Sections 114.11 (3), Wis. Stats., and 360.201, 360.202 and 360.203, Minn. Stats.; and secs. 70.11 (2), Wis. Stats., and 272.02, Minn. Stats.: Compared and held to satisfy conditions precedent to granting reciprocal tax exemption to city of Red Wing, a municipal corporation of the state of Minnesota, upon land owned by said municipal corporation in the state of Wisconsin acquired for municipal airport purposes.

August 26, 1947.

State Aeronautics Commission.

You ask whether my former opinion reported in XXXIII Op. Atty. Gen. 101 applies to public airport owners of other states developing airports in Wisconsin in accordance with
the provisions of sec. 114.11 (3), Stats. You advise that the city of Red Wing, Minnesota, a municipal corporation, has acquired a site for a public airport in the town of Isabelle, Pierce county, Wisconsin, and is preparing to develop a commercial airport on the site. You wish to know whether the site in question is exempt from real estate taxes which the town and county in which the airport is intended to be located are empowered to levy.

The opinion you cite holds that the exemption from taxation provided for in sec. 70.11 (2), Stats., rests upon the public character of the municipality or body corporate which owns it, and not upon the purpose or use to which such real estate may be devoted. Obviously, this does not deal with the operation of reciprocal tax exemption statutes, and does not completely answer your question.

Section 114.11 (3), Stats., provides as follows:

"The governing body of any municipality or other political subdivision of an adjoining state whose laws permit, is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain and operate airports, or landing fields, or landing and take-off strips or other aeronautical facilities in this state, subject to all laws, rules and regulations of this state applicable to its municipalities or other political subdivisions in such aeronautical project, but subject to the laws of its own state in all matters relating to financing such project. Such municipality or other political subdivision of an adjoining state shall have all privileges, rights and duties of like municipalities or other political subdivisions of this state, including the right to exercise the right of eminent domain. This subsection shall not apply unless the laws of such adjoining state shall permit municipalities or other political subdivisions of this state to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and otherwise control such airport, landing field or landing and take-off strips or other aeronautical facilities therein with all privileges, rights and duties applicable to the municipalities or other political subdivisions of such adjoining state in such aeronautical projects."

Section 70.11 (2), Stats., provides as follows:

"Lands owned or occupied free of rental exclusively by any county, city, village, town, school district, free public library, sewerage district or commission, sanitary or water
district or commission, or any public board or commission of this state and lands in this state belonging to cities of any other state used for public parks."

The latter statute, as stated in XXXIII Op. Atty. Gen. 101, affords the basis for exemption from real estate taxation of a municipally owned airport.

It becomes necessary to examine the statutes of the state of Minnesota to ascertain whether reciprocal provisions are contained therein in conformity with the conditions stated in the last sentence of sec. 114.11 (3), Stats., quoted above. An examination of the Minnesota statutes annotated discloses the existence of what is denominated the "Reciprocity Act" consisting of the following sections:

"RECIROCITY ACT"

"360.201. Municipalities in adjoining states may acquire air navigation facilities in state.

"The governing body of any county, city, village, town, or other municipality or political subdivision of an adjoining state, whose laws permit, is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, and operate airports, or restricted landing areas, or other air navigation facilities in this state, subject to all laws, rules, and regulations of this state applicable to its municipalities and other political subdivisions in such aeronautical projects, but subject to the laws of its own state in all matters relating to financing such projects. Laws 1945, c. 175, §1, subd. 1.

"360.202. To have same rights as local municipalities.

"Such municipality or other political subdivision of an adjoining state shall have all the rights, privileges, and duties of like municipalities and political subdivisions of this state, including the right to exercise the right of eminent domain. Laws 1945, c. 175, §1, subd. 2.

"360.203. Reciprocal provisions.

"Sections 360.201 to 360.203 shall not apply unless the laws of such adjoining state shall permit municipalities and other political subdivisions of this state to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and otherwise control such airports, restricted landing areas, or other air navigation facilities therein, with all privileges, rights, and duties applicable to the municipalities and other political subdivisions of such adjoining state in such aeronautical projects. Laws 1945, c. 175, §1, subd. 3."
The similarity in phraseology and substance between the Minnesota and Wisconsin statutes indicates they were patterned after the same model.

We next proceed to the Minnesota statute which affords exemption from real estate taxes to "all public property exclusively used for any public purpose."

Section 272.02, M.S.A., provides in part:

"Property exempt from taxation
"All property described in this section to the extent herein limited shall be exempt from taxation:
"(7) All public property exclusively used for any public purpose;"


I am accordingly of the opinion that the conditions precedent to the granting of a tax exemption reciprocally to a municipality of an adjoining state as prescribed by secs. 114.11 (3) and 70.11 (2), Wis. Stats., are satisfied by the Minnesota statutes quoted above; and that the land located in the town of Isabelle, Pierce county, Wisconsin, acquired by the city of Red Wing, Minnesota, a municipal corporation, for the purpose of a municipal airport, is entitled to the exemption afforded by sec. 70.11 (2), Wis. Stats.

SGH
Appropriations and Expenditures—Post-war Construction and Improvement Fund—Under sec. 20.125, Stats. (ch. 373, Laws 1945) allotment for preparation of plans and specifications for a project is 4 per cent of the estimated cost of the project and such allotment is not necessarily limited to 4 per cent of the sum allocated from the post-war construction and improvement fund for the particular project.

Total cost of preparation of plans and specifications for all projects encompassed by sec. 20.125 is not limited to 4 per cent of the total amount of the post-war construction and improvement fund.

Ch. 577, Laws 1943, ch. 373, Laws 1945, and ch. 481, Laws 1947, are construed as being prospective in operation rather than retroactive or retrospective.

August 26, 1947.

E. C. Giessel, Director,

Department of Budget and Accounts.

You have asked for our opinion interpreting sec. 20.125, Stats., relating to the allowances for plans and specifications from the post-war construction and improvement fund created by sec. 25.35, Stats.

Sec. 20.125 reads:

"Of the appropriations made from the post-war construction and improvement fund, there is allotted from the respective appropriations an amount not exceeding 4 per cent of the estimated cost of each construction or improvement project for the preparation of plans and specifications for each such project. Expenditures from these allotments shall be subject to the approval of the bureau of engineering."

Sec. 20.125 should be read in connection with sec. 20.83 (2) which provides for executive control over construction work and which reads as follows:

"No plan or plans shall be finally adopted, and no contract or contracts entered into, for the construction of any building until such plans and contracts, with complete estimates of the total cost thereof, shall have been submitted to and in writing approved by the governor, who shall withhold such approval until he shall have satisfied himself, by a personal examination or by such other means as he may in
his discretion adopt, that such building is required for the purpose proposed, and that it can and will be erected and fully completed according to such plan or contracts for the sum proposed for the same out of the appropriation made for such purpose."

Several questions have arisen in applying these provisions to different situations.

FIRST. In September, 1946, the board of regents of the university of Wisconsin passed a resolution authorizing President E. B. Fred and Director of Business and Finance A. W. Peterson to make application for educational facilities provided pursuant to Public Law 697, 79th congress (section 504 of the Lanham Act as amended). Such facilities were required for persons engaged in the pursuit of courses of training or education under Title II of the Servicemen's Readjustment Act of 1944 as amended, through the bureau of community facilities of the federal works agency.

Agreements to provide such educational facilities were entered into between the university and the federal works agency. The federal works agency entered into contracts with private contractors to perform the work agreed upon. Disbursements direct to the contractor were made by the federal works agency, no federal funds channeling through the state treasury.

Total costs on the federal emergency projects at the university are estimated as follows:

$1,000,000 Federal works agency disbursements to contractors
361,141 Allotment from post-war construction fund (ch. 125, Laws 1947)
71,000 Disbursements from university general fund appropriations

$1,432,141 Total estimated cost

In this connection you inquire whether the 4 per cent allowance for plans and specifications as provided in sec. 20.125 is computed on the total estimated cost of $1,432,141 or whether the 4 per cent is figured on that portion of the total construction allotted from the post-war construction fund, or $361,141.
The standard form of printed agreement between owner and architect drafted by the American Institute of Architects, and which is used almost universally, contains the following wording: “The Owner agrees to pay the Architect for such services a fee of _ _ per cent of the cost of the work, etc.” Presumably the legislature was cognizant of the fact that such plans and specifications are almost without exception computed on the basis of some percentage of the total cost of construction such as 4 per cent and that it would therefore be impossible to secure the preparation of plans and specifications on a $1,432,141 project for 4 per cent of $361,141.

Thus if we construe the allowance for preparation of plans and specifications as being so limited the work cannot and will not be done at all unless some funds other than those provided by sec. 20.125 are available for such purpose or unless the scope of the project is cut down to a $361,141 figure allotted from the post-war construction fund.

It has been the uniform policy of the legislature to make provision for the acceptance of federal funds made available to the states for various purposes. This policy is clearly expressed in sec. 101.34 (1), among other statutes, and which provides:

“The governor is authorized to accept for the state the provisions of any act of congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens, so far as the governor may deem such provisions to be in the public interest; and to this end the governor may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties.”

Assuming that the language of sec. 20.125 is so ambiguous or unclear as to be susceptible of a double meaning (which we do not believe to be the case) it would seem that the over-all policy of the legislature in arranging for the acceptance of federal funds would be defeated by any narrow and strained construction of sec. 20.125. Laws should be given a reasonable, sensible construction to the end that the legislative intent shall not fail and technical assaults
will not be favored. *Calumet Service Co. v. Chilton*, 148 Wis. 334. Where the intent of a statute is plain and there is opportunity to choose between a restrictive and liberal construction, and the latter accords with the intent, such liberal construction should be accepted and extended so far as the rules of language will permit and is necessary to effectuate such intent. *State ex rel. Owen v. Donald*, 160 Wis. 21.

We are mindful of the fact, of course, that if the language of the statute is clear and unambiguous there is no room for construction. *McGarvey v. Independent O. & G. Co.*, 156 Wis. 580. In other words the language of the statute is to be reviewed without any bias for or against any particular meaning and without any pre-conceived purpose to bring about a particular result. If viewed in this way and applied to the subject in hand, there is no double or ambiguous aspect of the words employed in the writing or their ordinary equivalents. *State ex rel. Wisconsin Trust Co. v. Leuch*, 156 Wis. 121.

The words “of the appropriations made from the post-war construction and improvement fund” merely identify the source of the money which is to be used in preparing plans and specifications and have nothing to do with the amount to be devoted to preparing any particular plans or all plans prepared under this section except, of course, that in no event could the cost of such plans exceed the amount of the appropriation. The amount to be devoted for the plans is to be found in the words, “an amount not exceeding 4 per cent of the estimated cost of each construction or improvement project,” since under familiar rules of syntax the phrase, “for the preparation of plans and specifications for each such project” is to be referred to the next preceding antecedent.

“By what is known as the doctrine of the ‘last antecedent,’ relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire act.” *Zwietusch v. East Milwaukee*, 161 Wis. 519, 522, quoting from 36 Cyc. 1123, j.
The meaning of sec. 20.125 appears to be reasonably clear as it is worded, but if the word order is transposed somewhat it can be made clearer as follows:

"An amount not exceeding 4 per cent of the estimated cost of each construction or improvement project is allotted from the respective appropriations of the post-war construction and improvement fund for the preparation of plans and specifications for each such project."

Except for word order this transposition by no means does violence to the phraseology of the statute but perhaps adds clarity by placing the amount first and the source of the money second instead of the reverse thereof as in the present wording of sec. 20.125.

You are therefore advised that where a proposed project such as the university project above mentioned includes funds from the federal government and other state funds in addition to moneys from the post-war construction fund the cost for preparing plans and specifications may be based on 4 per cent of the total cost of the project and is not limited to 4 per cent of the moneys contributed to the project from the post-war construction fund.

SECOND. You call attention to the fact that sec. 20.39 appropriates $3,150,000 from the post-war construction and improvement fund for construction, equipment, remodeling and making needed improvements at and in the state teachers colleges. Among these items is the sum of $434,250 for additional college building, dormitory and union at Eau Claire. Assuming that under present higher building costs the contemplated construction at Eau Claire will cost $1,200,000 instead of $434,250, you inquire if plans and specifications may be authorized on the basis of 4 per cent of the current estimated cost or on 4 per cent of the $434,250.

In answering this question it is assumed that there are no other moneys available either by way of federal aid or other state appropriations.

This question raises the issue of whether it would be expedient to prepare plans and specifications for $1,200,000 worth of construction when only $434,250 is available.
Recently while diligently reading the Gospel according to St. Luke, our attention was arrested by the following language which is appropriate here:

“For which of you, intending to build a tower, sitteth not down first, and counteth the cost, whether he have sufficient to finish it?

“Lest haply, after he hath laid the foundation, and is not able to finish it, all that behold it begin to mock him,

“Saying, this man began to build, and was not able to finish.” 14 Ch., Verses 28–30

Under sec. 20.83 (2) quoted above the governor would be obliged to withhold his approval of final adoption of plans and contracts for construction unless satisfied that the construction could be completed out of the appropriation made.

However, we do not read sec. 20.83 (2) as prohibiting the preparation of plans for building, the cost of which may exceed funds presently available, nor do we believe as here-inbefore indicated that the total cost of plans and specifications under sec. 20.125 may not exceed 4 per cent of the total post-war construction and improvement fund.

It is to be noted that in addition to the required approval of the governor under sec. 20.83 (2) for final adoption of plans and contracts of each project, it is also necessary under sec. 20.125 to have the approval of the bureau of engineering for any expenditure under that section. Apparently the legislature very wisely concluded that statutes of this sort cannot be made self-executing and to insure that there would be no ill-considered expenditure of moneys from the post-war construction and improvement fund a double check was provided. In other words, no money whatsoever can be expended for any plans without the approval of the bureau of engineering and secondly, no plan can be finally adopted and contract entered into without the approval of the governor who must be satisfied that the building is needed and can and will be built according to the plans and contract for the sum proposed out of the appropriation available.

If an attempt were made to impose additional checks not provided for by the statute the imposition of such checks would not only be unauthorized but might indeed result in
complete defeat of the legislative purpose in providing the post-war building fund. It is a matter of common knowledge that no construction can be completed today on the basis of the figures allotted by sec. 20.39 such as the $434,250 sum to be used for a college building, dormitory and union at the Eau Claire state teachers college.

This being true those charged with the administration of the appropriation in question are faced with the dilemma of determining on the one hand that because the building cannot be built for the sums contemplated by the legislature no plans whatsoever should be prepared, or of deciding on the other hand that the legislature did expect them to take some steps toward meeting the critical building shortage by at least having the plans prepared for the buildings authorized by the legislature even though additional appropriations will be required before the actual building thereof can be undertaken.

It is not the function of this department to make the choice. All we can do is to point out that the authority to make such decision exists and the responsibility for deciding wisely rests with those who must make the decision. You are therefore advised that if the decision is made to prepare plans and specifications for a building program at Eau Claire which will cost $1,200,000 instead of $434,250 the 4 per cent for plans and specifications as hereinbefore indicated is to be computed on the estimated cost of the construction, or $1,200,000.

THIRD. Because of current high building costs, certain projects had to be abandoned at the university to make the "pattern fit the cloth." The governor had released money on several of these projects for plans and specifications pursuant to section 20.125, Wisconsin statutes. Because of the abandonment of such projects, expenditures for preliminary plans and specifications were lost with the project.

Under such circumstances you inquire whether more than 4 per cent of the total appropriations from the post-war construction fund can be used for plans and specifications under sec. 20.125.

The answer to this question has already been indicated above. The 4 per cent is not computed on the total appropriations from the post-war construction fund but on the
estimated cost of each project. The result may well be that considerably more than 4 per cent of the total appropriations from the post-war construction fund will be used for preparation of plans and specifications, since the total cost of construction will exceed the total of the post-war construction fund by reason of the fact that additional money, state and federal, is going to be used on some of these projects, and it is the cost of the construction upon which the 4 per cent is based as we have already stated.

FOURTH. The first appropriations made from the post-war construction and improvement fund (ch. 577, Laws 1943) contained no limitation as to expenditures for plans and specifications.

The succeeding legislature of 1945 created additional revenues and appropriations in the post-war construction fund and also created section 20.125 establishing 4 per cent as the maximum expenditure allowance for plans and specifications, effective June 28, 1945.

The 1947 legislature in Bill 529, S. enacted into law on August 9, 1947 (ch. 481), amended section 20.125 to the extent that expenditure allowances from the post-war construction fund for plans and specifications were increased to 5 per cent for construction and improvement projects and 6 per cent for remodeling projects.

In connection with the foregoing you inquire whether sec. 20.125 (ch. 373, Laws 1945) effective June 28, 1945, and sec. 20.125 as amended by ch. 481, Laws 1947, effective August 9, 1947, are retroactive in application to unreleased appropriations from the post-war construction fund, partially released appropriations from the post-war construction fund, and completely released appropriations from the post-war construction fund.

Except as to mere remedial statutes laws are presumed to have only a prospective effect unless the contrary clearly appears. Lanz-Owen & Co. v. Garage Equipment Mfg. Co., 151 Wis. 555. Sutherland on Statutory Construction states the rule as follows at §463:

"Retroactive statutes are those which operate on such acts and transactions and change their legal character or effect. Congress, as well as the states, are expressly forbidden by the federal constitution to pass any ex post facto
law, and the states are forbidden to pass any law impairing the obligation of contracts. As retrospective laws are generally unjust and in many cases oppressive, they are not looked upon with favor. Statutes not remedial will therefore not be construed to operate retrospectively, even when they are not obnoxious to any constitutional objection, unless the intent that they shall do so is plainly expressed or made to appear. Where the intention as to being retrospective is doubtful the statute will be construed as prospective only; but where the language clearly indicates that it was intended to have a retrospective effect, it will be so applied."

There being nothing in any of the provisions referred to in your question which indicates that the legislature intended them to operate retrospectively they are construed as being prospective only. Each speaks as of its effective date. Ch. 577, Laws 1943, was controlling until superseded by ch. 373, Laws 1945, and ch. 373, Laws 1945 was controlling until superseded by ch. 481, Laws 1947. None of these provisions were or are retroactive in their application to any circumstances.

WHR

Public Officers — Malfeasance — Counties — Trustees of County Institutions—A member of board of trustees of county institutions may sell insurance on county buildings to the county when approval of such contract is vested in the county board, without violating sec. 348.28, Stats.

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

You inquire whether a member of the board of trustees of Dodge county institutions could sell insurance to Dodge county which would cover all buildings of Dodge county, including the county institutions under control of his board.

The answer is "Yes." Sec. 348.28, Stats., which provides that officers or agents of a county or of any county charitable institution who have any pecuniary interest in any
contract "made by, to or with him in his official capacity or employment" are guilty of an offense, has been construed in the leading case of State v. Bennett, 213 Wis. 456 to apply only to transactions in which the officer as a governmental agent has the power to approve or participate in the transaction which benefits him as an individual. Under the provisions of sec. 59.07 (4) the county board is charged with a responsibility of insuring all county buildings. Accordingly, in our opinion, insurance is excluded from those claims incurred on behalf of the county institutions which are audited by the board of trustees under the provisions of sec. 46.18 (6). Accordingly, since the member of the board of trustees has no power to approve or disapprove the insurance contract or to audit the claim for premiums and certify it for payment (since these functions are vested in the county board), he is not dealing with himself within the meaning of the Bennett case, and he may lawfully sell insurance to the county.

RGT
Constitutional Law—Municipalities—Zoning—Zoning laws based upon purely aesthetic considerations are a deprivation of property without compensation in violation of the Wisconsin and United States constitutions and are invalid.

September 3, 1947.

THE HONORABLE, THE SENATE.

You have requested our opinion on the constitutionality of Bill 328, A. which amends sec. 62.23 (7) (a) to read as follows:

“For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes provided that there shall be no discrimination against temporary structures, and may by ordinance require that a building or structure be of such design, material and size, so as not to cause any depreciation to the property in the immediate or surrounding neighborhood. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.”

The italicized words are added by the bill in question.

The validity of zoning laws and ordinances which prescribe zoning districts and limit the height and character of buildings therein, both as against existing buildings, trades or businesses, or those to be established in the future, is now so well established that it cannot be called into question. Hadacheck v. Sebastian, 239 U. S. 394; Village of Euclid v. Ambler Realty Co., 272 U. S. 365; State ex rel. Carter v. Harper, 182 Wis. 148.

Such laws and ordinances are an exercise of the police power which has been defined as the power to do all things necessary to promote the health, safety, morals or general welfare of the community. It has been recognized that promotion of general prosperity is included within the term “general welfare.”
It is equally well established that aesthetic considerations alone are an insufficient basis for the exercise of the police power under the guise of a zoning law.

"* * * However, so far as it appears from the decided cases, apart from general expressions on the subject, restrictions on the use of property contained in zoning regulations solely for purely aesthetic purposes are regarded as invasions of private property rights." McQuillan, Municipal Corporations, Revised, Vol. 3, page 508; see also page 89.

"* * * Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." Passaic v. Passaic Bill Post. Ado. & S. P. Co., 72 N. J. L. 285, 287.

"* * * It has been decided quite generally, if not universally, by courts in which the question has been raised, that aesthetic considerations alone or as the main end do not afford sufficient foundation for imposing limitations upon the use of property under the police power." Opinion of the Justices, 234 Mass. 597, 604, 127 N. E. 525.

There are contrary statements in a few cases but the above quoted decisions represent the great weight of authority in this country.

Further, it is well established that regulations of the materials of which buildings are constructed for the purpose of fire prevention are valid and major repairs to existing wooden buildings may be prohibited. 26 A. L. R. 1223. Similar restrictions on material for the purpose of insuring structural safety are now common and their validity cannot be called into question.

Applying the foregoing considerations to the amendment proposed by Bill 328, A. we find the following: Insofar as the expressed purpose of the regulations thereby authorized is to prevent depreciation in adjoining properties in the immediate neighborhood, it is only an exercise of the power to promote general prosperity which has been recognized to be a portion of the general welfare. Insofar as it authorizes regulation of the size of buildings, it is only a duplication of the presently existing statute which states, "for the purpose of promoting * * * the general welfare * * * the council may * * * restrict the * * * size of buildings." Insofar as it purports to authorize the regulation of the design and materials of buildings for the sole purpose
of protecting the value of surrounding property, it is our opinion that the regulation is based upon purely aesthetic considerations and for that reason cannot be sustained.

As we had indicated, materials of which buildings are constructed can be regulated both for the purpose of fire protection and for the purpose of insuring structural safety. Such regulations are becoming more and more common, especially in the larger cities. Power to regulate buildings for the purpose of fire protection is presently contained in sec. 62.23 (9) (b). However, when an attempt is made to regulate material of which buildings are constructed, for purposes other than structural safety or fire prevention, it is impossible to escape the conclusion that such restrictions are based upon aesthetic considerations and are intended to make new structures conform in material as well as design to existing structures and to substitute the judgment of some zoning board for the judgment of the owner as to the architectural design and construction of any particular building.

Restrictions on design, materials and value are often incorporated in plats of well planned subdivisions, especially for residential areas. Restrictions created in such manner are contracts or covenants running with the land and are voluntarily accepted by the purchaser of the premises who may be favorably influenced in his decision to purchase by the fact that such restrictions are available for his protection. Such restrictions have a permanency which they would not have under a zoning ordinance which is subject to alteration or repeal at any time and to diverse interpretations by successive zoning boards. Extensive as the police power may be, in our opinion it does not extend to the restriction on aesthetic grounds of the expression of individuality by the owner in the development either of his home or his place of business.

Summarizing the foregoing, such portions of the suggested amendment as are constitutionally valid are already contained in the existing statute; such portions as authorize the regulation of design or materials for the sole purpose of preventing depreciation of adjoining properties are invalid.

RGT
Public Welfare Department—Public Assistance—Blind
—Section 49.53, Stats., prohibits state department of public welfare from furnishing a list of blind persons to a private agency.

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

You have asked this department if it is legal and proper for the state department of public welfare to furnish or make available to a private agency a list of blind persons residing in this state. It is our conclusion that it would constitute a violation of sec. 49.53 for your department to furnish such information. That section provides, in part, as follows:

"The use or disclosure of information concerning applicants and recipients for any purpose not connected with the administration of aid to dependent children, blind aid and old-age assistance is prohibited. **""

Since the purpose for which the list was requested by the private agency is not connected with the administration of aid to the blind, the disclosure of such information would constitute a violation of sec. 49.53.

ES

Counties—Towns—Highways and Bridges—Town is not authorized to contribute to cost of construction of bridge on county trunk highway system other than as provided by sec. 83.03 (2), Stats.

Rudolph P. Regez,
District Attorney,
Monroe, Wisconsin.

You state that a controversy has arisen between the town of Sylvester and Green county concerning payment for construction of a bridge on a county trunk highway located in the town of Sylvester.
In May, 1940, the county board passed a resolution providing, among other things, that bridges on county trunk highways should be built and maintained on a fifty-fifty basis with local municipalities. The highway in question was made part of the county trunk system in May of 1941 and the bridge which is the subject of the controversy was built in the spring of 1944. The total cost was $5,880.32, of which the town paid half without raising any question as to the validity of the charge.

At the November, 1946, session of the county board a resolution was introduced and later withdrawn providing that the cost of construction of bridge building during the past two or three years should also be borne by the county and that the county should appropriate sufficient funds to reimburse the towns that had done bridge construction on county trunk highways in proportion to the amounts they had paid during the past two or three years and that the resolution of May, 1940, should be rescinded. At the adjourned November, 1946, session held in February, 1947, a petition was presented to the county board to the effect that $1,940.16 be refunded to the town of Sylvester on the theory that under the statutes not more than 40 per cent of the cost of the improvement, but not more than $1,000 in any year, should be assessed against the town.

You inquire whether the payment of one-half the cost of the construction of the bridge by the town was illegally made.

In answering this question our references to applicable sections of the statutes will be to the 1943 statutes which were in effect when the bridge was constructed.

Sec. 83.025 (2) provides in part: "The county trunk system shall be marked and maintained by the county."

Sec. 83.03 provides:

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

"(2) If any county board determines to improve any portion of a county trunk highway with county funds, it may assess not more than 40 per cent of the cost of the improvement but not over $1,000 in any year against the town, village or city in which the improvement is located as a special tax but no such assessment shall be made
against any town in which the combined appropriation of the town and county for the improvement of county trunk highways in such year exceeds 2 mills per dollar on the assessed valuation of the town. The county clerk shall certify the tax to the town, village or city clerk who shall put the same in the next tax roll, and it shall be collected and paid into the county treasury as other county taxes are levied, collected and paid. A portion or all of such special assessment may be paid by donation.

"(3) The county board may accept donations to the county of money or lands for highway or bridge purposes, and apply the donations in accordance with the wishes of the donor as nearly as is practicable."

It is clear from the foregoing statute that the responsibility for maintenance of county trunk highways is on the county and that it may not assess more than 40 per cent of the cost of any particular improvement and not over $1,000 in any one year against a town. Even this amount may not be assessed where the combined appropriation of the town and county for the improvement of county trunk highways in such year exceeds 2 mills per dollar on the assessed valuation of the town.

This, however, does not completely answer your question and we must further consider whether, despite the foregoing statutory provisions, the town might nevertheless legally and voluntarily contribute half the cost of construction of a bridge on a county trunk road so as to now be precluded from recovering the amount thereof in excess of the figure provided by sec. 83.03 (2).

Sec. 60.18 (1) provides that the qualified electors of each town shall have power at any annual town meeting by vote to raise money for the repair and building of roads or bridges, or either. For reasons which we will try to make clear we conclude that this section and other sections hereinafter mentioned are not broad enough to authorize the raising of money by the town for the building of bridges which it has no obligation to construct or maintain.

Sec. 67.04 (5) (c) authorizes municipal borrowing by a town to provide a sum, not exceeding $5,000, sufficient to defray the cost of any bridge in the town costing more than $2,000.

Sec. 81.38 (1) provides:
When any town has voted to construct or repair any bridge on a highway maintainable by the town, and has provided for such portion of the cost of such construction or repair as is required by this section, the town board shall file a petition with the county board setting forth said facts and the location of the bridge; and the county board, except as herein provided, shall thereupon appropriate such sum as will, with the money provided by the town, be sufficient to defray the expense of constructing or repairing such bridge, and shall levy a tax therefor, which tax when collected shall be disbursed on the order of the chairman of the county board and the county clerk, when the town board and county highway committee shall file a written notice with the clerk that the work has been completed and accepted. The county board of any county which has never granted aid under this section may in its discretion refuse to make any appropriation."

Sec. 81.39 provides:

"The town board may levy a tax for the purpose of rebuilding or repairing bridges and culverts which the town is required to maintain and which do not come within the provisions of section 81.38. But no such tax shall exceed $300 for any bridge or culvert, and not more than one such tax shall be levied in any year."

Sec. 84.14 (3) provides:

"Whenever any municipality has participated in the cost of the construction, reconstruction, or purchase of a bridge under section 84.11 or 84.12, the property in such municipality shall thereafter be subject to taxation by the county for the construction and repair of bridges within the county under section 81.38."

This section, however, has no application to the present situation since sec. 84.11 relates to intrastate bridges which are either 475 feet or more in length or which are located on a state trunk highway or on a street in a fourth class city selected by the state highway commission as a direct connection between portions of such system, and sec. 84.12 relates to interstate bridges.

Sec. 83.14 (1) provides, among other things, that any town meeting may vote a tax of not less than $500 to improve a designated portion of a county aid highway and under subsection (2) the town board may petition the
county board at its next annual meeting to appropriate an equal amount. This statute likewise has no application since it applies to *county aid* roads rather than *county trunk* roads and it covers the situation where the town rather than the county institutes the project and county aid is invoked instead of the reverse of that situation where the county seeks town aid on a county project.

It is apparent from reading the various sections of the statutes hereinbefore discussed that sec. 83.03 is the only one relating to construction of a bridge on a county trunk highway with the assistance of the town. The other sections either contemplate exclusive construction by the town of bridges on highways maintainable by the town or with county assistance in some cases.

In *Schaettle v. State Highway Comm.*, 223 Wis. 528, it was held that where a bridge was eligible for construction under one section of the statutes relating specifically to the particular type of situation involved it might not be constructed under other general statutory provisions. There a bridge was eligible for construction as a bridge project located on the state trunk highway system under sec. 87.02 (1) (b), 1935 Statutes (now sec. 84.11 (1) (b) ). Despite the fact that sec. 83.03 provided that the county board could construct or maintain or aid in constructing or improving any road or bridge in the county it was held that the county could be restrained from paying any of the cost of such bridge.

It perhaps should be pointed out that the *Schaettle* decision turns in a large measure at least upon the fact that sec. 87.02 (5) (b) then provided that if a bridge such as the one involved there is located on a United States highway no portion of the cost shall be paid by any county, but independently of the absence of any such prohibition relating to town aid in the building of a bridge on a county trunk system we are faced with the principle that a municipal corporation may expend money only pursuant to statute or where the power is necessarily or reasonably implied from powers expressly granted. 44 C. J. 1107.

Moreover, sec. 83.03 which expressly provides a method for town participation in the construction of a bridge on
the county trunk highway system impliedly excludes other participation by the town in such projects under the familiar rule of statutory construction,—expressio unius est exclusio alterius. That is, the expression of one thing is the exclusion of another.

It is therefore our opinion that the payments made by the town of Sylvester to Green county in the construction of the bridge in question were illegal to the extent that such payments exceeded the amounts provided by sec. 83.03 (2), Stats.

Consequently the county may reimburse the town for such illegal payments or the same may be recovered by suit, if necessary, since it is the duty of the town board to institute proceedings for recovery of money paid out illegally. XXIII Op. Atty. Gen. 350. Furthermore, the principle that money paid for a consideration which fails may be recovered back is applicable as against counties without any special statute to that effect. Norton vs. The Supervisors of Rock County, 13 Wis. 611*.

WHR

Intoxicating Liquors—Licenses and Permits—Where liquor license covers entire building as the premises and the licensee dispenses liquor in several places on the premises the license need be posted as provided in sec. 176.05 (12), Stats., only in the room where the principal part of the business is carried on.

Donald C. O'Melia,
District Attorney,
Rhinelander, Wisconsin.

You have asked for an interpretation of sec. 176.05 (12) of the Wisconsin statutes, which provides as follows:

"Every license for the sale of intoxicating liquor or fermented malt beverages shall be inclosed in a suitable *** frame *** and shall be posted up and at all times dis-
played in a conspicuous place in the room where such business is carried on, so that all persons visiting such place may readily see the same."

The facts confronting you are as follows: A municipality in your county granted a "Class B" liquor license describing the premises according to lot and block upon which the building is located. The building consists of a barroom, dining room, kitchen and bowling alley, all connected with the barroom by doorways and halls. The proprietor desires to maintain a separate bar in the bowling alley and a small service bar in the dining room. The question is where the license shall be posted since the statutes refer to the room where the business is carried on.

It is our opinion that the statute above quoted will be complied with if the license is posted in the barroom where the principal business of selling the intoxicating liquor is carried on. Since the entire premises are covered by the license, it is necessary to post the license in only one place. The proprietor would not be required to obtain separate licenses for the service bar and the bar in the bowling alley. Enforcement officers will readily be able to observe the license, which will adequately describe the premises licensed.

ES
Courts—Minors—Under secs. 48.01 (5) (am) and 48.15, Stats., criminal courts have jurisdiction of offenders 16 years of age concurrent with juvenile courts and may commit them to state prison or reformatory or county jail notwithstanding sec. 48.12 (1) as amended by ch. 410, Laws 1947.

Child under 18 who violates municipal ordinance must be prosecuted in juvenile court, which has exclusive jurisdiction under sec. 48.01 (5) (a).

Under sec. 301.22, Stats., justice court must appoint guardian ad litem for minor charged with violation of municipal ordinance, but failure to do so does not affect jurisdiction of court to render judgment.

ANDY BORG,
District Attorney,
Superior, Wisconsin.

Attention Douglas S. Moodie, Assistant.

You have requested an opinion with reference to the jurisdiction of the municipal court of the city of Superior (a court of justice court jurisdiction) in the case of traffic violations by minors 16 years of age. Your question is based on sec. 48.12, Stats., prohibiting incarceration of children in prisons, jails and lockups under certain circumstances. Before quoting that statute certain other sections should be mentioned.

Section 48.01 (1) (c) defines “delinquent child” to mean, in part, “any child under the age of eighteen years who has violated any law of the state or any county, city, town or village ordinance.”

Section 48.01 (5) (a) provides in part as follows:

“Except as otherwise provided in this paragraph and paragraph (am) the juvenile court shall have exclusive jurisdiction of proceedings under this chapter involving:

1. Delinquency, neglect or dependency of children residing within the county;

2. * * *”

Section 48.01 (5) (am) provides in part as follows:

“* * * In all cases of delinquent children over 16 years of age, the criminal courts shall have concurrent jurisdiction with the juvenile court * * *.”
On the basis of the foregoing statutes, this office has frequently expressed the opinion that where the defendant in a criminal case is 16 years of age but under 18, the criminal and juvenile courts have concurrent jurisdiction and that if the criminal court assumes jurisdiction it may, notwithstanding sec. 48.12, impose the same penalty as it would in case of an adult, including commitment to the state prison or reformatory or to the county jail. XX Op. Atty. Gen. 833; XX Op. Atty. Gen. 978; XXIX Op. Atty. Gen. 299; XXXIII Op. Atty. Gen. 250.

The 1947 legislature, by ch. 410, Laws 1947, has amended sec. 48.12 (1), reducing the minimum age at which certain children may be placed in segregated quarters in the county jail from 16 to 14 and otherwise amending it to read as follows:

“No child under 18 years of age shall be placed in or committed by the juvenile court to or held in custody pursuant to law by any sheriff or police officer in, 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 *** 14 years of age or older, whose habits or conduct are such as to constitute a menace to other children, may, by written order of the juvenile court, reciting the reasons therefor, 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, but no such order shall be made until the state department of public welfare shall have filed with the clerk of the juvenile court its approval of such place of detention.” (Italics indicate new matter.)

The question arises, of course, as to whether the added words, “or held in custody pursuant to law by any sheriff or police officer,” were intended to prevent the criminal courts from committing children under 18 to county jails, on the theory that the sheriff could not lawfully accept their custody. It is our conclusion that this was not the legislative intent and that the quoted language means only that the sheriff or police officer may not hold children in custody in the jail pursuant to an arrest but without a commitment from a criminal court or magistrate. Had the legislature intended to prevent commitment to the county
jail by criminal courts it may be assumed that much more specific language would have been used. For one thing, it would undoubtedly have stricken out the word "juvenile" so as to make the statute prohibit any court from committing children to the county jail rather than limiting the prohibition to the juvenile court. In the second place, the legislature would certainly have repealed or amended the above quoted language from sec. 48.01 (5) (am) granting concurrent jurisdiction of children over 16 to the criminal courts. The legislature would also undoubtedly have amended or repealed sec. 48.15 which provides as follows:

"Any child, under the age of 18, convicted of a criminal offense may, in the discretion of the judge or magistrate before whom the case is tried, be committed to one of the industrial schools of this state instead of to the state prison, state reformatory, home for women, house of correction, county jail or police station, as the case may be. All commitments of such children and of delinquent children to such school shall be to the age of 21 years or until paroled in accordance with section 48.16 (2) (b)."

Repeals and amendments by implication are not favored. Section 48.12 (1) must if possible be reconciled with secs. 48.01 (5) (am) and 48.15, and this requires the construction of sec. 48.12 (1) above stated.

It follows that a child who has reached his sixteenth birthday may be prosecuted criminally for violating the state traffic laws and may be committed to the county jail in such action. But since the statutes make no such exception from the exclusive jurisdiction of the juvenile courts in the case of civil prosecutions for violation of municipal ordinances, no such prosecution can be maintained, and if the charge arises out of such an ordinance the child must be brought into juvenile court if he is under 18.

You also inquire whether, if a minor is prosecuted under an ordinance, the court is required to appoint a guardian ad litem to represent him. It is well established that actions to enforce penalties imposed by municipal ordinances are civil actions. Waukesha v. Schessler (1941), 239 Wis. 82; State ex rel. Keefe v. Schmiege (1947), 251 Wis. 79. Section 301.22, relating to practice in justice courts provides as follows:
"After the service and return of civil process against any minor the action shall not be further prosecuted until a guardian for him has been appointed. Upon the request of a defendant the justice shall appoint some person, consenting thereto in writing, to be guardian of the defendant in the action; and if the defendant does not appear on the return day of the process or if he neglects or refuses to nominate such guardian the justice may, at the request of the plaintiff, appoint any suitable person as guardian. The guardian shall not be liable for costs."

I find nothing in the statutes to indicate that this section does not apply to forfeiture actions brought to enforce municipal ordinances. It is therefore erroneous to proceed in such an action against a minor until a guardian ad litem has been appointed, but the error does not affect the jurisdiction of the court so as to subject its judgment to collateral attack. Will of Jaeger (1935), 218 Wis. 1, 11; 43 C. J. S. 279—Infants, §108 b.

In conclusion, you are therefore advised that the court has no jurisdiction to entertain an action for a forfeiture under a municipal ordinance against a child under 18 years of age, but if the defendant is a minor over 18 the court has jurisdiction to proceed but must appoint a guardian ad litem to represent the minor.

WAP

Appropriations and Expenditures—Highway Commission—Highways and Bridges—Lands comprising a state military reservation [Camp Williams, Juneau county] are not eligible for benefits of appropriations made under sec. 20.49 (6), Stats., except such "swamp lands" as were attempted to be made a part of said reservation by unconstitutional acts of the legislature.

September 8, 1947.

JAMES R. LAW, Chairman,
State Highway Commission.

You have requested an opinion as to whether or not the state highway commission may use funds appropriated by sec. 20.49 (6), Stats., to improve an existing traveled fire lane through the grounds of Camp Williams in Juneau county. The section in question reads as follows:
"20.49 (6) State Park Roads. Not to exceed $500,000 for the construction and maintenance of roads, including fire roads, in the state parks and state forests and other public lands as defined in chapter 24, and for highways or fire roads leading from the most convenient state trunk highways to such lands. Within the limitations and for the purposes of this subsection, funds may be allotted by and work performed by or under the supervision or authority or with the approval of the state highway commission, upon the request for such work filed by the state conservation commission as to state park or forest lands, or the land commission as to other classes of public lands. Outside the limits of the said park, state forest and public land areas, direct connections to the most convenient state trunk highway may be built or maintained under the provisions of this subsection. The expenditure of funds under this subsection shall not affect the eligibility of any highway for aids or the expenditure of other funds thereon."

The public lands referred to in this section are defined by sec. 24.01 Stats., as follows:

"Definitions and classification. Terms used in chapters 23, 24, 25, 26, 27, 28, and 29 of the statutes are defined as follows:

"(1) 'Public lands' embraces all lands and all interests in lands owned by the state either as proprietor or as trustee which constitute any part of the lands defined or specified in either of the following paragraphs of this section.

"(2) 'School lands' embraces all lands made a part of the school fund' by section 2 of article X of the constitution.

"(3) 'University lands' embraces all lands the proceeds of which are denominated 'the university fund' by section 6 of article X of the constitution.

"(4) 'Swamp lands' embraces all lands which have been or may be transferred to the state pursuant to an act of congress entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, or pursuant to an act of congress entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March 2, 1855.

"(5) 'Normal school lands' embraces all parcels of said 'swamp lands' which the legislature has declared or otherwise decided, or may hereafter declare or otherwise decide, were not or are not needed for the drainage or reclamation of the same or other lands.
"(6) 'Agricultural college lands' embraces all lands granted to the state by an act of Congress entitled 'An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' approved July 2, 1862.

"(7) 'State Park lands' embraces all lands constituting the state parks specified in section 27.01.

"(8) 'State forest lands' embraces all lands specified in section 28.01.

"(9) 'Marathon County lands' embraces all lands acquired by the state pursuant to chapter 22 of the general laws of 1867.

"(10) 'Lands purchased for forest reserve' embraces all the lands acquired by the state in pursuance of chapter 450, laws of 1903, or chapter 264, laws of 1905, or chapter 638 or chapter 639, laws of 1911, or in pursuance of sections 1494-41 to 1494-62, both inclusive, Wisconsin Statutes of 1915, and all lands acquired by the state through tax sales and tax deeds.

Camp Williams was originally known as the Wisconsin Military Reservation. Its present name was given to it by the legislature in 1927. According to records and plats in the office of the adjutant general of Wisconsin, it comprises some 2,003 acres, 1,563 of which are state owned and 440 of which are owned by the federal government. Of the state owned land the records in the office of the state land commissioners show that 80 acres were set aside for the camp from the "swamp lands" acquired from the federal government in 1850, which are mentioned in sec. 24.01 (4) and (5), Stats., set forth above. The remainder of the state lands was acquired through purchase from individuals.

In the case of State ex rel. Owen v. Donald, (1914-15) 160 Wis. 21, it was held that the "swamp lands" which were acquired by the state under federal grant were held by the state for school purposes under sec. 2, art. X of the Wisconsin constitution, which states that lands acquired by "grant to the state where the purposes of such grant are not specified" create an obligatory trust upon the property and the legislature has no power to make other disposition of the same. In the report of the special referee appointed by the court in State ex rel. Owen v. Donald, (1916) 162 Wis. 609, 621, in which an accounting was made
of the dealings with the trust fund lands, two 40-acre tracts comprising a part of the present Camp Williams are mentioned as follows:

“There are two tracts of said swamp lands which require special mention because of legislative action relative to them.

“Ch. 49, Laws 1897, provides that ‘The commissioners of the public lands are hereby authorized and directed to withdraw from sale the southwest quarter of the southeast quarter of section twenty-two (22), township seventeen (17) north, of range two (2) east, and to set aside said land for the perpetual use of the Wisconsin military reservation. The land described was partitioned to the normal school fund in 1865. As the act is unconstitutional and void, the land still remains part of the normal school fund.

“Ch. 293, Laws 1899, provides that ‘The commissioners of the public lands are hereby authorized and directed to withdraw from sale the northwest quarter of the northeast quarter of section twenty-one (21), township seventeen (17) north, of range two (2), east, and to set aside said land for the perpetual use of the Wisconsin Military Reservation.’ This land was never partitioned to either the normal school fund or drainage fund, but belonged, prior to the act of 1899, one half undivided to each fund. While the act was void and ineffectual as an attempt to dispose of the land for an unauthorized purpose, it evidenced the decision of the legislature that it was not necessary for drainage, and the character of the half belonging to the drainage fund was changed from drainage to school fund lands, and it now belongs to the normal school fund.”

In view of the above, it must follow that as far as these two parcels are concerned they must be considered lands eligible for the construction and maintenance of roads, including fire roads, under sec. 20.49 (6) Stats.

Lands acquired by the state for Camp Williams from private sources are not within the classes of lands defined in ch. 24. It should also be pointed out that the appropriation statute, sec. 20.49 (6), states that the funds are to be allotted and the work done “upon the request for such work filed by the state conservation commission as to state park or forest lands, or the land commission as to other classes of public lands.” This makes it appear clear that the lands owned by the state for the benefit of other divisions of the
state government were not meant to be included in this section.

Sec. 20.49 (5a), Stats., appropriated money for construction and maintenance of roads, etc., needed for the university, state teachers colleges, state charitable and penal institutions. Between this statute and the one in question, it would seem that appropriations have been made for the benefit of roads, etc., necessary for almost all state property with the exception of military reservations, and that this omission is possibly a legislative oversight. However, in view of the wording of the statutes which so specifically enumerate the classes of state lands to benefit from the highway appropriations and which clearly do not include state military lands, it is our opinion that they may not benefit from the present highway appropriations. It must also necessarily follow that federally owned lands, which are considered to comprise a portion of Camp Williams, likewise may not be benefited by the appropriation in question.

REB

Criminal Law—Abandonment—Public Welfare Department—Probation—Persons convicted of abandonment under sec. 851.80, Stats., are not subject to the probation provisions of ch. 57, Stats. 1947, and hence cannot be placed on probation to the department of public welfare. Section 351.30 contains its own probation provisions, which make no requirement of supervision by a probation officer or by the department.

September 8, 1947.

A. W. Bayley, Director,

State Department of Public Welfare.

You have requested an opinion as to whether or not persons convicted of abandonment and nonsupport in violation of sec. 351.30, Stats., may be placed on probation to the department of public welfare under the provisions of ch. 57, Stats., as revised by ch. 477, Laws 1947. Prior to the said revision, persons convicted of abandonment were subject to the same provisions as to probation as misdemean-
ants, under sec. 57.04, Stats. 1945. Abandonment and non-support under sec. 351.30 carries a maximum penalty of two years in the state prison and is therefore a felony as defined in sec. 353.31, Stats. If it had not been for the fact that violation of sec. 351.30 was expressly excluded from sec. 57.01, Stats. 1945, (relating to probation of adult felons) and from sec. 57.05, Stats. 1945, relating to probation of minors convicted of misdemeanors or felonies, the violation of sec. 351.30 would clearly have been included in both those sections. Moreover if violation of sec. 351.30 had not been expressly included in sec. 57.04, Stats. 1945, it would not have been covered by that section, which relates otherwise only to misdemeanors. In other words, the statutory scheme prior to the passage of ch. 477, Laws 1947, was to treat persons convicted of abandonment and non-support as misdemeanants for purposes of probation, although their offense was actually a felony.

Chapter 477, Laws 1947, originated as a revision bill introduced by the joint interim committee on public welfare. The committee's deliberations resulted in the conclusion that abandonment and non-support under sec. 351.30 should be excluded entirely from ch. 57. Section 351.30 provides for probation of persons convicted and also for probation of persons who have not been convicted but merely stand charged with the offense. The purpose of probation in those cases is to insure that the person accused or convicted makes support payments to his wife and children in the amounts ordered by the court. There is no necessity for supervision since the only condition of probation in those cases is the continued making of support payments. Accordingly the committee determined to recommend the exclusion of such persons from the general probation law, leaving them to the probation provisions included in sec. 351.30. Section 351.30 makes no provision for the appointment of probation officers to supervise such cases nor for their supervision by the department of public welfare.

Section 57.01, Stats. 1947 (as created by ch. 477, Laws 1947), applies to persons "convicted of a felony (convictions under sec. 351.30 excepted)." Section 57.04, Stats. 1947, applies only to persons "convicted of a misdemeanor." It is perfectly plain that violations of sec. 351.30 have been
expressly excepted from the provisions relating to persons convicted of felonies, and because sec. 351.30 creates a felony and not a misdemeanor, it does not fall within the provision relating to persons convicted of misdemeanors. This is so clear as not to admit of any doubt.

Chapter 477, Laws 1947, was originally Bill No. 256, S. which contained so-called "committee comments" which were in the nature of revisor's notes. The "committee comment" to sec. 57.01 as created by that bill reads in part as follows:

"57.01 (1) is made general. The exception to its application are deleted, except 351.30 (desertion of wife or child). The remedy under that section is very special and quite complete. It is a different kind of probation. It scrambles criminal and civil practice. It clashes with ch. 57. If 351.30 is not excepted from ch. 57, confusion will result."

The "committee comment" to sec. 57.04 reads in part as follows:

"The provision relating to 351.30 is omitted. That section contains a complete scheme for punishing husbands and fathers and creates a felony. See comment under 57.01."

The intent of the legislature is so manifest in this connection that it is difficult to see how any misunderstanding can have arisen.

WAP

Taxation—Motor Fuel Tax—Filing a fraudulent claim for refund of motor fuel taxes is a violation of sec. 78.27 (d), Stats., although the fraud is discovered and no money is paid on such claim.

A. E. Wegner,
Commissioner of Taxation.

You have requested an opinion with reference to the interpretation of sec. 78.27 (d), Stats., relating to the motor fuel tax law, which provides as follows:
“No person shall commit any of the following acts:

"** **

“(d) Use a false or fictitious name or give a false or fictitious address in any application or form required under the provisions of this chapter, or otherwise commit a fraud in any application, record, or report or claim for refund;”

You state that from time to time claims for refunds are received which are supported by invoices on which the claimants have altered the dates in an effort to come within the 90-day filing period provided by sec. 78.14 (2), Stats. 1945 (increased to 6 months by sec. 78.14 (2) (b), Stats. 1947, as amended by ch. 321, Laws 1947).

Your method of examining such applications is such as to reveal practically every case where invoices have been altered, with the result that such claims are seldom if ever paid. One district attorney has raised the question whether such a state of facts constitutes a basis for a prosecution under sec. 78.27 (d), on the ground that unless the deception is successful no fraud has been committed. That position is untenable and you are advised that a prosecution will lie under the statute even though the attempted deception was unsuccessful and the perpetrator obtained nothing.

In connection with sec. 78.27 the following statutes must also be considered:

“78.31. Penalties. ** **

“(5) Violation of section 78.27. Except as otherwise provided in this chapter, any person violating any provision of section 78.27 shall be deemed guilty of a misdemeanor, unless such violation is by any other provision of law declared to be a felony, and upon conviction shall be punished by a fine of not less than $100 nor more than $500 and by imprisonment in the county jail for not to exceed 6 months. Such fine shall be in addition to any other penalty imposed by any other provisions of this chapter.”

Section 78.14 (2) (c), Stats. 1947 (relating to claims for refund of motor fuel tax) provides in part:

“** ** The penalty provided in this chapter for presenting a false or fraudulent statement shall be printed in full on the form of statement.”
It is true, as the district attorney points out, that as a general proposition the term "fraud" means in law a successful deception whereby the victim has been damaged, but that is because unless a person has been damaged by a wrong committed against him he cannot successfully maintain an action against the wrongdoer. It does not mean that the word "fraud" never includes attempted deceptions which fail in their object.

In Bigelow, Fraud (1888), page 3, the author states that the word "fraud" is difficult but not impossible to define, and on pages 4 to 5 he makes the following statement:

"* * * In defining fraud the question of its success may be disregarded; for though as a rule the courts refuse to take cognizance of fraud which comes to nothing, still it is plain that everything that goes to constitute it is present as much in fraud which is abortive as in fraud which is successful."

Finally, the author defines the word as follows:

"* * * Fraud consists in endeavor to alter rights, by deception touching motives, or by circumvention not touching motives." (Italics supplied.)

Funk & Wagnalls New Standard Dictionary (1946) gives the following as the first definition of "fraud": "An act of deliberate deception practiced with the object of securing something to the prejudice of another; a trick or stratagem intended to obtain an unfair advantage; craft, circumvention; trickery." (Italics supplied.)

Webster's New International Dictionary gives the following definition among others: "1. Quality of being deceitful; deceit; trickery."

One definition given by the Oxford Dictionary, Vol. IV, is: "4. A method or means of defrauding or deceiving; a fraudulent contrivance; in mod. colloq. use, a spurious or deceptive thing."

It is clear therefore that one may "commit a fraud" without having succeeded in obtaining the advantage sought. And it is likewise clear that it was in that sense that the legislature used the word in sec. 78.27 (d) above quoted. As pointed out, sec. 78.14 requires that the penalty
“for presenting a false or fraudulent statement” be printed on the form to be provided for applying for refunds. If secs. 78.27 (d) and 78.31 (5) do not provide a penalty for “presenting a false or fraudulent statement,” then no such penalty is provided anywhere in ch. 78. The legislature must have intended and understood that sec. 78.27 (d) made it unlawful to “present a false or fraudulent statement” and did not require that money be paid out on the faith thereof in order to consummate the offense.

Moreover, the term, “commit a fraud,” is used in connection with the phrase, “use a false or fictitious name or give a false or fictitious address in any application or form.” It is clear that the presenting of an application in a false name or giving a false address is an offense per se, regardless of whether anyone is deceived. Applying the rule noscitur a sociis, by which words are to be construed in the same sense as other words used in connection with them, the expression, “commit a fraud in any application” etc., is likewise to be understood as meaning only that the fraudulent claim is presented, not that the deception has succeeded.

Finally it should be pointed out that if the legislature had meant that the fraud must succeed in order that the offense be consummated, it would have been unnecessary to make any such provision in ch. 78 at all, since the person presenting the fraudulent claim would then be guilty of obtaining property by false pretenses in violation of sec. 343.25, Stats., which offense is a felony. It follows that the legislature must have intended to create a separate and different offense of filing a fraudulent claim, which offense is a misdemeanor carrying a considerably less penalty than would be the case if the fraud had succeeded.

WAP
Fish and Game—Deer—A person residing in this state who has lawfully killed a deer and attached the deer tag thereto may store such deer in his locker in a public locker plant throughout the year.

September 9, 1947.

Charles P. Curran,
District Attorney,
Mauston, Wisconsin.

You inquire whether a person residing in this state who has lawfully killed a deer may store the meat thereof in his locker in a public locker plant during the period from July 1 to the opening of the deer season if the deer tag is attached thereto.

Sec. 29.39, Stats., as amended by ch. 232, Laws 1947, now reads as follows:

“POSSESSION DURING CLOSE SEASON OR IN EXCESS OF BAG LIMIT. Except as otherwise expressly provided it shall be unlawful for any person to have in his possession or under his control, or have in storage or retention for any person, any game or other wild animal or the carcass or part thereof, during the period beginning July 1 and extending to the last day of the close season therefor in each year, or any game fish at any time other than during the open season therefor and 10 days thereafter, or in excess of the bag or possession limit or below the minimum size for any game, game fish or other wild animal at any time. The open and close seasons and the bag, possession and size limits of the state or province in which taken shall apply to game, game fish and other wild animals lawfully killed outside of this state.”

This language is substantially the equivalent of the old conservation commission order No. G-660.

Sec. 29.40 (2) provides as follows:

“HOME CONSUMPTION. 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.”

In XXVIII Op. Atty. Gen. 198, we held that deer meat in a customer’s locker in a public locker plant was in the possession of the customer. The language of sec. 29.39, as
amended, clearly indicates that the restrictions therein do not apply if there is any other express statute dealing with the subject. Sec. 29.40 (2) is such an express statute and authorizes the person who has lawfully killed a deer to have the meat thereof in his possession at all times including the period between July 1 and the opening of the deer season. On the basis of our previous ruling, we are of the opinion that such person may store such deer meat at all times in his own locker in a public locker plant provided the deer tag is attached thereto, and that such storage is not a violation of sec. 29.39.

RGT

_Cities—City Plan Commission_—In cities operating under the general charter law city plan commission must be composed of only seven members.

September 9, 1947.

MARTIN W. TORKELSON, Secretary,
Wisconsin State Planning Board.

You inquire whether a municipality in setting up a city planning commission under the provisions of sec. 62.23, Stats., can enlarge such commission by adding several additional citizen members.

Insofar as any municipality is operating under the provisions of the general charter law as set forth in ch. 62, it is bound by the terms thereof. "The city is simply an agency of the state, and has only such powers as are conferred upon it expressly or by implication." _Milwaukee v. Rauf, 164 Wis. 172, Van Gilder v. Madison, 222 Wis. 58, 105 A. L. R. 244_. Sec. 62.23 (1) as written specifically provides that the board organized thereunder shall at all times have seven members. This provision is exclusive for cities operating under the general charter law.

Your attention is directed to the fact that a city by complying with the provisions of sec. 66.01 may adopt a charter ordinance by which it could vary the number of members on the city plan commission. In our opinion the number
of members of such commission is not such a matter of statewide concern that it is excluded from action by the city by the provisions of sec. 66.01 (4). Further, in cities which adopt the commission form of government under ch. 63, membership of any boards or commissions except the board of police and fire commissioners may be altered as provided in sec. 63.12 (2). In cities which adopt the city manager plan under ch. 64, a similar alteration in the city plan commission may be accomplished under the provisions of sec. 64.10 (2).

RGT

Constitutional Law—Pensions—Conservation Wardens—Chapter 589, Laws 1947, amending sec. 23.14 (7a), Stats., is probably unconstitutional. Disbursing agent advised against paying out money under amendment except pursuant to a judgment of a court of competent jurisdiction.

September 10, 1947.

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

You request my opinion as to the constitutionality of ch. 589, Laws 1947, amending sec. 23.14 (7a), Stats.

This act originated in the assembly as Bill No. 148, A. In compliance with a resolution adopted by the assembly, I gave it as my opinion on May 15, 1947 that Bill No. 148, A., if enacted into law, would probably be held unconstitutional. The bill has since been enacted into law in the identical form then considered by me.

I am still of the opinion that this law will probably be held unconstitutional if subjected to a court test. I shall not discuss the reasons therefor in this opinion as they are set forth at length in the May 15, 1947 opinion which appears at page 206 of the present volume.

You state you have been called upon by a former conservation warden to pay him the amount he paid into the conservation warden fund prior to his leaving the service. You are advised, that in view of the grave doubt as to the
constitutionality of this law, no payment should be made on account of the claim referred to, or any similar claim arising by virtue of the amendment, except pursuant to a judgment of a court of competent jurisdiction.

SGH

Highways and Bridges—Dust-Free Surfacing—Weights and Measures—Distance—Highways must be made dust-free as provided in sec. 86.08 (1) at all points within 400 feet of any part of a licensed dairy plant. To do this it may be necessary that the 400 feet be measured from one or more parts of each particular plant depending upon the location of the highway or highways with reference thereto.

September 10, 1947.

DAVID H. SEBORA,
District Attorney,
Chilton, Wisconsin.

You call our attention to sec. 86.08, Stats., which was renumbered as sec. 86.08 (1) and amended by ch. 429, Laws 1947, to provide inter alia that the duly constituted authority charged with the maintenance of any highway not having a dust-free surface “shall cause the main traveled portion thereof within 400 feet of any licensed dairy plant to be rendered dust-free,” and ask our opinion as to the point from which the 400 feet shall be measured.

The statute in question is in reality a measure to promote the public health. It is designed to eliminate dust in the vicinity of licensed dairy plants. The statute does not distinguish between parts of a licensed dairy plant which are and which are not to be protected from dust and the only practical approach is to consider that the entire plant is to be considered as a unit. Having in mind all this we are of the opinion that a highway must be made dust-free at all points within 400 feet of any part of a licensed dairy plant. Compare Commonwealth v. Jones, 142 Mass. 573, 10 N. E. 603; In re the Liquor Locations, 13 R. I. 733. To do
this it is obvious that it may be necessary to measure the
400 feet from one or more parts of each particular plant,
depending upon the location of the highway or highways
with reference thereto.

WET

Landlord and Tenant—State—University—Rent Control
—Sec. 234.26, Stats., as created by ch. 442, Laws 1947, is
not applicable to properties of the university of Wisconsin.

September 12, 1947.

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

You have requested our opinion as to the applicability
of the new state rent control law, sec. 234.26, Stats., as cre
ated by ch. 442, Laws 1947, to properties owned by the uni
versity of Wisconsin.

At the outset it is well settled that general statutes are
not to be construed to include, to its harm, the state. Sulli
van v. School District (1923), 179 Wis. 502, 507, 191 N. W.
1020; Milwaukee v. McGregor (1909), 140 Wis. 35, 38, 121
N. W. 642; Sandberg v. State (1902), 113 Wis. 578, 589, 89
N. W. 504. It is said in the Milwaukee v. McGregor case
that the most general words that can be devised, such as
"any person or persons, bodies politic or corporate," do not
make the statute applicable to the state in the least if it
tends to restrain or diminish any of its rights or interests.

Accordingly, it is held that costs are not recoverable
against the state in the absence of some provision in the
costs statute expressly providing therefor. Sandberg v.
State, supra. Upon the same basis interest is not collectible
from the state under general statutes allowing interest, but
only if there is express provision for payment of interest
by the state. 49 Am. Jur. p. 287. General statutes of limi
tation are likewise held not to apply to the state unless
specifically so provided. Estate of Frederick (1945), 247
Wis. 268, 19 N. W. (2d) 248. See also 34 Am. Jur. p. 306.
Applying this rule to the construction of sec. 234.26, Stats., it is not applicable to the state unless there is something therein that so indicates. We find nothing in the language of the section that constitutes a clear intention that it should. The language coming closest, and in fact the only possible pertinent language in the section is in the definition of "housing accommodation" in sec. 234.26 (2) (a). But clearly this language of the most general character is the very kind that in Milwaukee v. McGregor is said not to be sufficient to make a statute applicable to the state. The use of the words "public institution" in the exclusion part of the definition is of no significance, for it is not necessary that the ownership be by the state in order to constitute a "public institution." On the other hand if it were, then by the use of these words the property of the university of Wisconsin would not be included in the definition and therefore not subject to the provisions of sec. 234.26 Stats.

Furthermore, it would appear that properties owned by the university are not now subject to federal rent control. By sec. 209 (b) of the Housing and Rent Act of 1947 (Public Law 129, 80th cong., ch. 163, 1st session) it is provided:

"Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered. * * *"

By sec. 36.03, Wis. Stats., the university regents are a body corporate possessing "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law," which certainly is broad enough to constitute authorization to bring proceedings to evict persons from property owned by the university.

It is therefore our opinion that the provisions in sec. 234.26, Wis. Stats., the new rent control law, created by ch. 442, Laws 1947, are not applicable to properties of the university of Wisconsin.

HHP
Licenses and Permits—Showmen—Under sec. 129.14, Stats., a showman's license is not required for a penny arcade but a showman's license is required for wild life exhibit where no regular admission fee is charged but collection is taken at the exit of the exhibit. A showman's license may not be transferred from one kind of amusement ride to another even though both are owned by the same person. Chapter 259, Laws 1947, has no application to the licenses granted under this section.

September 14, 1947.

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

We have your request for an opinion in regard to sec. 129.14, Wisconsin statutes. That section provides in part as follows:

"** every owner or manager of a so-called side show, traveling vaudeville, Ferris wheel, merry-go-round, ocean wave, whip, seaplane, caterpillar, butterfly or similar device, or so-called 'rides' operated for amusement, or transient shooting gallery, and ** every person exhibiting for money any trained animal, wild animal or any object of curiosity shall procure a state license as a public showman and pay therefor twenty dollars "**."

Subsec. (1) further provides that if such exhibits are at fairs or carnivals held on the grounds of a society or association receiving state aid smaller license fees are required.

In your request you ask four specific questions:

1. Penny Arcade. Is a showman's license required under sec. 129.14, when no fee is required to enter the tent but coin must be deposited in machine in order to view pictures or play games?

We believe this question must be answered in the negative. In the portion of the statute quoted above no mention is made of penny arcades. It certainly does not fall within the classification of vaudeville or any of the amusement rides enumerated. Furthermore we do not believe it falls within the classification of side show because the statute
separately enumerates transient shooting galleries. A transient shooting gallery is somewhat the same form of amusement as a penny arcade. The legislature undoubtedly considered that a transient shooting gallery could not be included in the classification of side show and it is quite clear that the penny arcade also does not fall within that classification. Therefore since the penny arcade is not separately enumerated and does not fall within any of the general classifications, such as side show, it is not an exhibit which requires a license.

2. Wild Life. Where wild animals are exhibited in cages in the tent and no fee is charged to enter the tent but a box is placed at the exit in which to drop coins, is the exhibitor required to obtain a showman's license?

In this case wild animals are exhibited in a tent where no regular admission is charged. However, a box is placed at the exit and people leaving the exhibit drop coins. Although they are not compelled to make a contribution, the observation of enforcement officers in your department has been that practically everyone does so. It is our opinion that this type of exhibit does require a showman's license even though no regular admission fee is charged. Clearly, the owner or manager exhibits the wild animals for money. We believe that the collection of contributions at the exit constitutes an exhibiting for money. It is perfectly obvious that even though no set fee is charged the operator wouldn't carry on the exhibit unless he received some profit in return. In our opinion the words "exhibiting for money any ** wild animal" are sufficiently broad to cover the situation described.

3. Rides. Under sec. 129.14, may a showman's license be transferred from one kind of "ride" to another under the same owner?

It has long been the practice to collect a license fee for each ride exhibited. Hence, if an owner has ten rides at a carnival he is required to obtain one license for each, or ten licenses altogether. If he subsequently adds another ride, he is required to buy an additional license. It is our opinion that even though he attempts to make a substitution by introducing a new ride and discontinuing an old
one, he must obtain a new license for the new ride. The license applies to each ride and if a new one is added a new license must be obtained even though one of the old rides is discontinued.

4. Does Bill 76, S., now ch. 259, Laws 1947, apply to the licenses granted under sec. 129.14?

Ch. 259, Laws 1947, does not in any way change sec. 129.14. The chapter referred to is limited to secs. 129.01 (3) and 129.05 (2). These two sections apply to truckers and transient merchants and make certain exceptions when they are operating at state or county fairs. It has no application to sec. 129.14.

It is our conclusion therefore that a showman's license is not required for a penny arcade, but that a showman's license is required for a wild life exhibit even though no regular admission fee is charged but a collection is taken at the exit from those viewing the exhibit. A showman's license may not be transferred from one kind of amusement ride to another even though both are owned by the same person. Bill 76, S., now ch. 259, Laws 1947, has no application to the licenses granted under sec. 129.14.
Opinions of the Attorney General

Counties—Public Assistance—County Judge—Resolution of county board under sec. 49.03 (1) (b), Stats., abolishing distinction between county and municipal dependents as to sick care requiring services of a physician or surgeon or hospitalization and directing the county welfare department to administer such assistance cannot operate to deprive county judge of his exclusive right to designate the hospital under secs. 142.01 to 142.04, where the indigent has legal settlement in the county. Welfare department must apply to county judge under sec. 142.02. This does not apply to social security aids under sec. 49.40.

Office of county judge cannot be abolished nor its functions transferred to other agency under sec. 59.15 (2), Stats.

September 15, 1947.

Ray J. Haggerty,
District Attorney,
Phillips, Wisconsin.

You state that August 5, 1947 the county board passed a resolution abolishing all distinction between county dependents and town, city and village dependents as to sick care requiring the services of a physician or surgeon, or hospitalization from and after December 1, 1947 as provided in sec. 49.03 (1) (b). The resolution provided further: “That the public welfare department of Price county administer the details necessary to carry out this resolution.”

Your question is whether this resolution deprives the county judge of his jurisdiction to determine hospitalization pursuant to secs. 142.01 to 142.04 and vests those functions in the county public welfare department. This office has frequently ruled that the county judge may not be deprived of his statutory power to designate the hospital under ch. 142, Stats., and that any attempt of a county board to limit the powers of a county judge under that statute would be invalid. XXIV Op. Atty. Gen. 155; XXVI Op. Atty. Gen. 239, 240 and opinions cited.

The question arises whether those opinions are made obsolete by sec. 59.15 (2) (b) which provides as follows:
“The county board at any regular or special meeting may abolish, create or reestablish any such office, board, commission, committee, position or employment, and in furtherance of this authority may transfer the functions, duties, responsibilities and privileges to any other existing or newly created agency including a committee of the county board except as to boards of trustees of county institutions.”

The term “such office” etc. refers back to paragraph (a) of the subsection which excludes elective offices under sec. 59.15 (1). The office of county judge, being an elective office mentioned in subsec. (1), is not included among the offices which the county board is authorized to abolish and as to which the board may transfer its functions to another agency.

You are therefore advised that the powers of the county judge under ch. 142 are exclusive and cannot be transferred by the county board to any other agency. It follows that the resolution in question must be construed as vesting in the welfare department only such powers with reference to the sick care of county dependents having legal settlement within the county as do not involve the designation of the hospital, and that if the welfare department learns of cases requiring hospitalization it must apply to the county judge pursuant to sec. 142.02. Reissmann v. Jelinski, (1941) 288 Wis. 462, 467.

This opinion does not apply to cases where the county judge is without authority under ch. 142 because the indigent has no legal settlement in the county, nor to recipients of social security aids furnished supplementary medical aids under sec. 49.40, Stats., created by ch. 121, sec. 18, Laws 1947.

WAP
Counties—Contracts—Public Works—Bids—County garage buildings may be constructed only by letting contracts as prescribed in sec. 66.29, Stats.

W. A. Cowell,
District Attorney,
Kewaunee, Wisconsin.

You have asked three questions relating to the construction of a garage building for housing and maintenance of machinery for county highway work. Your first question is: Can a county board legally authorize its highway department to construct a garage building for the housing of its road machinery without complying with the bid statute section 66.29?

We are of the opinion that the answer to this question is in the negative because of the provisions of sec. 59.07 (4) (c) of the statutes, which was created by ch. 456, Laws 1945. In view of the fact that the above statutory provision was enacted at the next legislative session after the decision of the supreme court in Cullen v. Rock County, (1943) 244 Wis. 237, 12 N. W. (2d) 38 it seems probable that the primary purpose of the enactment was to change the rule announced in that case. That case held that county contracts for public work need not be let under competitive bidding, but based its decision upon the fact that there was no statutory requirement for competitive bidding at that time. To the same effect is XXX Op. Atty. Gen. 320. Thereafter the legislature provided in sec. 59.07 (4) (c) that "all public work * * * shall be let by contract to the lowest responsible bidder * * *." In view of the above provision the Cullen case and the attorney general's opinion above cited no longer have any bearing upon the question.

In asking for this opinion you are concerned not with whether a contract might be let without receiving bids, but in determining whether the county might decide to do the work directly without letting a contract.

There are many cases in which it has been determined that statutes which provide merely that all contracts for public work shall be let to the lowest responsible bidder do
not prevent the governmental agency from deciding not to do the work by contract at all, but to do it directly by means of its own employees. An example of such a case is *Contracting Plumbers' Ass'n. v. Board of Education*, (1946) 238 Mo. App. 1096, 194 S. W. (2d) 731 in which many earlier cases were discussed. The court there pointed out the significance of the difference between two types of statutory wording. It was there said:

"It appears to be the generally accepted rule that in the absence of a requirement to that effect, a municipality need not let public work to contractors, but may do it through its own officers, and that a charter provision requiring all contracts for public improvements to be let to the lowest responsible bidder does not prohibit the municipality from constructing the improvements under the direction of its own engineers and officers." (p. 735)

The court further pointed out that where the statute does not simply require that *all contracts* for public improvements be let to the lowest responsible bidder but requires that *all public work* shall be let by contract, the result is different. With respect to such statutes the court said, quoting from *Perry v. City of Los Angeles*, 157 Cal. 146, 106 P. 410:

"*** Of course, where a statute or charter declares that any work must be let to the lowest bidder, there is no possible basis for any other construction than one making bids and contracts imperative. The omission from the Los Angeles charter of any such provision as either of those discussed is most significant. If it had been intended to require that whenever a proposed improvement would cost more than $500, the work must be done "by contract" let to the lowest responsible bidder, it would have been the simplest matter in the world to say so in plain terms, as has been said over and over again in other acts and charters. The failure to do so indicates that the framers of these charter provisions were guarding solely against the method of letting contracts for public work otherwise than to the lowest responsible bidder, after public notice of the work to be done thereunder; the object being to prevent favoritism in the matter of letting contracts and the payment of a greater price than the work was reasonably worth. ***" (p. 735)

Since our statute is not like that in the Contracting Plumbers' case, supra, which provides only that all contracts shall be let to the lowest responsible bidder, but provides that all public work of a certain nature shall be let by contract, we believe it manifests a legislative intent not only that the work should be let to the lowest bidder if done by contract but that the work must be done by contract.

This conclusion is fortified by comparison of sec. 59.07 (4) (c) with sec. 62.15 (1) of the statutes. In the latter the legislature, after directing that all public work done by cities should be let by contract to the lowest responsible bidder, added the proviso that “the council may also by a vote of three-fourths of all the members-elect provide by ordinance that any class of public work or any part thereof may be done directly by the city without submitting the same for bids.”

Since the legislature deemed it necessary to make an express provision authorizing cities to do public work directly rather than by contract in certain cases, and neglected to include such an express proviso in the provision relating to counties, the omission must be deemed significant particularly in view of the similarity of the language in the first sentences.

Your second question is: Can a county board legally authorize its highway department to use its crew of men and machinery in constructing a garage building, calling for competitive bids only for materials, plumbing and heating, electrical equipment and the like?

While sec. 59.07 (4) (c) would probably not be construed to prohibit the construction of a public building by the letting of several contracts rather than a single one,
particularly where the lowest and best bids could be secured only by separating the work into distinct parts, we believe the letting of the contracts would in either case be subject to the provisions of secs. 59.07 (4) (c) and 66.29 of the statutes. In Vol. 3, McQuillan, Municipal Corporations, (2d ed.) §1290, it is said:

"* * * Where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding."

An illustration of this situation is discussed in State v. Halladay, (1934) (S. D.) 252 N. W. 733, 737. In that case it was decided that, under a statute somewhat similar to ours, a state agency might construct a public building by letting separate contracts for various phases of the construction instead of letting a single contract, but that each separate contract in such case was subject to the competitive bidding statute even though the separate amounts might fall below the amount specified in the statute.

We do not believe that the requirements of sec. 59.07 (4) (c) and sec. 66.29 could be evaded with respect to any part of the construction of a county garage. That is, we believe that every part of the construction, including both labor and materials, must be performed under contracts let to the lowest responsible bidders.

Your third question is: Has the county highway committee power under section 83.015 to erect a garage building for its highway machinery and equipment and repair when authorized by the county board and proceed without complying with the bid statute?

We do not believe that under sec. 83.015 the county highway committee has power to construct a garage building without conformity with the requirements of sec. 59.07 (4) (c) and sec. 66.29.

We believe the proposition to be so elementary as to require no citation that no statutory officer has any power except such as is expressly conferred upon him by statute or as must be implied to enable him to carry out powers ex-
pressly granted. We find nothing in sec. 83.015 or in sec. 83.01 (7) (c) which either expressly or by necessary implication authorizes the county highway committee to engage in construction of public buildings such as garages without conformity to the statutes relating to bids. The very fact that the legislature has in sec. 59.07 (4) (c) excepted contracts for highway work from the statute relating to competitive bidding, and has failed to make any such exception with respect to contracts for garage buildings, is significant of the legislature's intention that the construction of buildings should be subject to the competitive bidding statute.

BL

Public Assistance—Counties—County Judge—Juvenile Court—Salaries and Wages—Existing salary of county judge cannot be apportioned between judicial functions and administration of public assistance as a basis for reimbursement to county under sec. 49.51 (3), Stats.

County paying county judge sum in addition to his present salary as judge for services rendered in administering public assistance may be reimbursed for such sum under sec. 49.51 (3).

Juvenile judge may not be assigned to administration of old-age assistance or blind aid, and is not entitled to added compensation under ch. 584, Laws 1947.

September 23, 1947.

ALLEN W. BAYLEY, Director,
Department of Public Welfare.

You state that ch. 584, Laws 1947, amended sec. 49.51 (1) to read as follows:

"The county administration of all laws relating to old-age assistance, aid to dependent children and blind aid shall be vested in the officers and agencies designated in the statutes. The county board may provide assistants for such officers and agencies and prescribe their qualifications and fix their compensation in conformity with the rules and regulations of the department as provided in section 49.50
The emphasized sentence was added by the amendment.

You inquire (1) whether under this amendment the state must reimburse the counties in accordance with sec. 49.51 (3) (a) and sec. 20.18 (6) (a) for sums paid the county judges for administering such assistance, and, (2) whether the amendment includes juvenile judges by virtue of sec. 49.51 (5).

The statutes controlling the first question read as follows:

"49.51 (3) (a) Federal Aid. The state shall reimburse the counties for expenditures incurred in the administration of old-age assistance, aid to dependent children, and blind aid, to be prorated in accordance with the amount expended by each county for such administration and be paid from the appropriation made by section 20.18 (6) (a)."

"20.18 (6) AID FOR ADMINISTRATION. (a) For aid to the counties in the administration of old-age assistance, aid to dependent children, and aid to the blind, annually, beginning January 1, 1939, 80 per cent of all moneys received from the federal government for the administration of these forms of public assistance, to be allotted as provided by section 49.51 (3) (a)."

"59.15 (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) ). The annual compensation may be established on a basis of straight salary, fees, or part salary and part fees, and if the compensation established by the county board is a salary, or part salary and part fees, such compensation shall be in lieu of all fees except those specifically reserved to the officer by enumeration regardless of the language contained in the particular statute providing for the charging of the fee. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the county board by timely action."
Your first question may be subdivided into two parts:
(a) May a county designate a portion of the existing salary of a county judge as compensation for administering assistance and receive reimbursement to such extent from the state?
(b) May a county pay to its county judge for administering such assistance a sum in addition to his existing salary and receive reimbursement to the extent of such additional pay from the state?

In answer to (a), under sec. 59.15 the salary of a county judge cannot be decreased during his term of office. We have already held in XXXIV Op. Atty. Gen. 428 that a county judge who is also administering local aids under sec. 49.20 receives his entire compensation by virtue of his incumbency in the office of judge, and that this compensation is not severable. This conclusion leaves for present consideration only the question whether ch. 584, Laws 1947, has worked an implied repeal of sec. 59.15 (1). In our opinion it has not. Implied repeals are not favored in law. There is nothing in the language of sec. 49.51 (1) as amended to indicate that the legislature intended to authorize a county to reduce the existing salary of a county judge. Such a reduction would be clearly accomplished if the present salary should be apportioned between judicial duties and administrative duties and then the administrative duties were taken from the office.

In answer to (b), the clear intention of the amendment made by ch. 584 is to authorize additional duties and additional pay for such duties to the county judge. There is no constitutional inhibition to the imposition of such duties and the provision of such payment. Further, since 49.51 (3) (a) contains a blanket direction that the state shall reimburse the county for expenses of administration of the assistance program, this direction would cover reimbursement for expenses to any person even though that person may also be the county judge.

The answer to question (2) poses a more difficult problem. The controlling statute 49.51 (5) reads as follows:

"ALTERNATIVE OFFICIAL DESIGNATIONS. The use of the words ‘county court,’ ‘county judge,’ or ‘juvenile judge’ in any statute relating to old-age assistance, aid to
dependent children, and blind aid, unless the context indicates otherwise, means the county court, county judge, juvenile judge, county department of public welfare, or county pension department, whichever has been designated by the county board under this section to administer assistance and aid in the county.”

Applying this statute literally the term “county judge” as used in ch. 584, Laws 1947, would clearly include the juvenile judge designated by the county board to administer the assistance program. The question then arises whether the context of ch. 584 indicates that a different meaning is intended. This question can only be answered by a consideration of a history of the assistance programs involved. Under the laws of 1943, the administration of old-age assistance was primarily vested in the county judge. Sec. 49.20. The administration of aids to dependent children was primarily vested in the judge of the juvenile court. Sec. 48.33. The county court was also given authority in such cases. Blind pensions were under the jurisdiction of the county judge. Sec. 47.08 (5). Further, under sec. 49.51 which declared that these three forms of assistance were under the administration of the officers designated by statute, it was provided that in counties over 500,000 any of the three forms of assistance could be transferred from the statutorily designated officer to a department of public welfare and in counties under 500,000 to a county pension department. Thus, while the county judge could administer all three forms of assistance, the juvenile judge never had previous statutory authority to administer anything other than aids to dependent children, nor was there any statute under which such other duties could be transferred to him. By the statutes of 1945 the county judge continued as primary administrator of old-age assistance under sec. 49.20. The judge of the juvenile court or the county court continued in charge of aids to dependent children under new sec. 49.19 (1) (b) and blind aids were transferred to the jurisdiction of the “county agency” under new sec. 49.18 (5). This last change left the blind aid in the anomalous situation that if there was no county pension department there was no agency to administer blind aid.
In light of the foregoing, the amendment made by ch. 584, Laws 1947, has two effects. In addition to allowing the county board to name the county judge as administrator for old-age assistance and aids to dependent children, it constitutes the express and only statutory authority to direct the county judge to administer blind aids. Now, if it were claimed that the term "county judge" in ch. 584 could also mean juvenile judge by virtue of sec. 49.51 (5), it would have to mean juvenile judge for all purposes. This would mean that the county board would now have authority to direct the juvenile judge to administer the program of old-age assistance, which he had never done before, and to administer the system of blind aid, which he also had never previously done. Viewing the statutes as a whole, we are of the opinion that the legislature never intended to make such a drastic change in the system of administering old-age assistance and blind aid and hence the term "county judge" in ch. 584, Laws 1947, cannot include juvenile judge.

RGT

Landlord and Tenant—Rent Control—Words and Phrases—Owner—One who acquires a warranty deed to residence property by payment of the full purchase price, using his own monies in an amount less than 20 per cent thereof and the balance out of the proceeds of a bona fide first mortgage loan on the premises to a disinterested third party, is an owner within the provisions of sec. 234.26 (2) (e), Wis. Stats.

September 29, 1947.

DEPARTMENT OF VETERANS AFFAIRS.

Attention Leo B. Levenick, Director.

In rendering assistance to veterans in respect to the purchase of property a question has arisen as to the application of the recently enacted rent control law, sec. 234.26 Wis. Stats., created by ch. 442, Laws 1947. In August, 1947 a veteran purchased residence premises in the city of Milwaukee and received a deed thereto. He applied
$1,000 of his own money to the purchase price of $9,000 and paid the balance with the proceeds of a first mortgage loan of $8,000 on the premises which he obtained from a savings and loan association. The question is whether he is an "owner" within the provisions of sec. 234.26 (2) (e) so as to be entitled to obtain possession of the premises for his own personal occupancy under subsec. (6) (d).

Sec. 234.26 (2) (e) defines an owner for the purposes of the section as follows:

"(e) 'Owner.' A person who has acquired title (legal or equitable) to the property and has made a bona fide payment of not less than 20 per cent of the purchase price thereof. Any credit extended by or guarantee of credit granted by the federal administration of veterans' affairs under Title III of the Servicemen's Readjustment Act of 1944, as amended, or by the state board of veterans' affairs shall be deemed a bona fide payment under this paragraph."

This veteran, in our opinion, qualifies as an owner of the premises for the purposes of sec. 234.26 Stats. He comes within the express language of subsec. (2) requiring that he be the holder of the title and make bona fide payment of not less than 20 per cent of the purchase price. The warranty deed conveyed to him and he thus has legal title to the premises. He has himself paid over to the former owner monies which total the full amount of the purchase price. The payment is bona fide so far as the former owner is concerned because the amount which he received, made up of the $1,000 savings of the veteran and the $8,000 he borrowed on the mortgage, totals the amount of the purchase price. It is bona fide on the part of the veteran purchaser because when he received the $8,000 he borrowed by the mortgage loan on the premises it then became his own money. The delivery of this $8,000 to the former owner along with the $1,000 savings was payment by the veteran of his own money in the amount of the full purchase price. The bona fide character of the mortgage loan transaction cannot be questioned for it was with a third person who was and is wholly disinterested, and unrelated to the parties and the transaction of sale.

In addition the transaction clearly satisfies the purposes behind this requirement of payment of at least 20 per cent
of the purchase price. It is to assure that there is a bona fide sale and to preclude sham or colorable transactions which have the appearance of an actual change of ownership. Without such a requirement it would be possible for the owner and a prospective tenant to completely circumvent the object of the section. They could enter into a purported land contract for the purchase of the premises providing for little or no down payment and calling for monthly payments that are in fact rent. This would put the purported purchaser in a position to evict the tenant in occupancy of the premises and furnish a means for substituting or changing tenants where the landlord owner could not do so himself under this section. This would be especially true if the land contract were in form that merely provided for transfer of legal title after payments were ultimately made which aggregated the purchase price and interest but contained no obligation on the part of the purported purchaser to pay the full purchase price. Awareness of the possibility of such transactions was based upon experience during the early part of federal rent control. This requirement was designed to preclude such circumvention of the intent of the section and also to preclude such method being used by tenants and landlords collusively to arrange what in effect amounted to payment of rent at higher than the maximums permitted under the section. On the other hand it was not deemed that all land contract arrangements were to be precluded. The 20 per cent requirement was fixed as being the amount sufficiently large to assure that the purchase transaction is bona fide upon the theory that no person would pay that amount on the purchase price under a sham or collusive purchase arrangement. In the situation at hand, there being a bona fide sale, full payment of the purchase price to the former owner, and the mortgage transaction by which the purchaser obtained funds to pay the purchase price in full being bona fide because with a third party who had no connection with the transaction and who made the loan purely as an ordinary business transaction, it is obvious that the purpose of this requirement is completely satisfied.

It is, therefore, our opinion that one who buys residence property and obtains a warranty deed to the premises upon
payment of his own monies in an amount less than 20 per cent of the purchase price and payment of the balance of the purchase price out of the proceeds of a first mortgage loan on the premises with a disinterested third party, is an owner of the premises within the provisions of sec. 234.26 (2) (e), Wis. Stats.

HHP

Highway Commission—Highways and Bridges—Dust-Free Surfacing—Attorney General—Section 86.08 (2), created by ch. 429, Laws 1947, relating to dust-free highway surfacing at dairy plants became operative on its passage and it is the duty of a county to cause such work to be done where the local unit of government failed to do so by June 1, 1947.

Ch. 429, Laws 1947, places no duty on the state highway commission or other state officers to compel the county highway commissioner to perform the dust-free surfacing required under the statute.

Attorney general cannot advise how private litigant should proceed against county or its officers.

October 3, 1947.

STATE DEPARTMENT OF AGRICULTURE.

Attention Anthony E. Madler, Counsel.

You have called our attention to ch. 429, Laws 1947, which amends sec. 86.08 of the statutes relating to dust-free surfacing of highways at cheese factories, creameries, and condensaries. This section formerly read:

"The duly constituted authority charged with the maintenance of any highway not having a dust-free surface shall cause the main travelled portion thereof within 400 feet of a cheese factory, creamery or condensary to be rendered dust-free by palliative treatment or an improved surface approved by the state highway commission. The cost of such treatment or surface shall be paid from the funds for maintenance or improvement of highways which shall be made available by the division of government responsible for the highway."
By ch. 429, Laws 1947, it was amended to read:

"86.08 (1) DUST-FREE SURFACING AT * * * LICENSED DAIRY PLANTS. The duly constituted authority charged with the maintenance of any highway not having a dust-free surface, shall cause the main travelled portion thereof within 400 feet of * * * any licensed dairy plant to be rendered dust-free by palliative treatment or an improved surface approved by the state highway commission. The cost of such treatment or surface shall be paid from the funds for maintenance or improvement of highways which shall be made available by the division of government responsible for the highway.

"(2) If such treatment or surface is not applied by the division of government responsible on or before June 1 of any year, the county shall cause the work to be done. It shall keep an accurate account of the cost of such work and the county clerk shall, on or before November 1 of each year, certify to the state highway commission the cost of such work. The amount so certified shall be credited to the county in its allotment and deducted from the allotment to the division of government responsible."

The principal change made by the enactment of ch. 429 is the creation of subsec. (2) which places the duty of furnishing the treatment of the highway upon the county when the local unit of government responsible for such treatment neglects to supply the same by June 1 of any year. Subsection (2) also provides the machinery whereby the county is to be reimbursed from the allotment of state highway funds which would otherwise be payable to the division of local government responsible for supplying the dust-free treatment.

Apparently the enactment of ch. 429 resulted from the failure of local units of government to discharge their responsibilities under the former sec. 86.08, and you have requested our advice on the following questions arising under ch. 429:

1. Is the county required to so surface such portions of the highway during the year 1947 if such work was not done by the responsible division of government prior to the effective date of ch. 429, Laws 1947?

2. Is it the duty of the state highway commission or any other state officer to compel the county highway commissioner to perform such work?
3. If each dairy plant is required to institute steps necessary to compel the doing of such work, can it proceed by mandamus against the highway commission or commissioner?

1. While ch. 429 became effective July 27, 1947, we do not consider that any problem of retroactive or retrospective application of the statute is involved since the duty of providing dust-free highway treatment by the local unit of government existed under sec. 86.08 prior to its amendment by ch. 429. All that subsec. (2) does is to provide in effect that if the local unit of government has not discharged this duty by June 1 in any year, the county shall cause the work to be done and may be reimbursed from the allotment of state highway aid payable to the local unit of government which was responsible for the surfacing. The statute is prospective in its operation even though the duty to act, so far as the county is concerned, arises out of circumstances existing as of a date prior to the passage of ch. 429. A statute is not made retroactive merely because it draws upon antecedent facts for its operation. Cox v. Hart, 260 U. S. 427, 67 L. ed. 332, 337.

The local unit of government is in no position to complain about a situation which has arisen through its failure to comply with the pre-existing law and in any event it has no vested rights which may be invoked against state legislation affecting it, since municipal corporations are arms of the state created for the purpose of exercising within their boundaries those powers conferred on them by the legislature and discharging such duties as the state may prescribe, and the authority of the legislature over a municipal corporation is supreme, subject only to such limitations as may be prescribed by the state constitution. State ex rel. Martin v. City of Juneau, 238 Wis. 564.

2. In answer to your second question, there is nothing in sec. 86.08 which makes it the duty of the state highway commission or any other state officer to compel the county highway commissioner to perform the work in question. The statute provides that "the county shall cause the work to be done," and the duty is therefore imposed upon the proper county officers rather than upon any state officials.
3. Your last question involves the giving of legal advice as to questions of procedure in private litigation, and we regret to state that it is impossible for us to furnish assistance in such cases. Mandamus is a civil action and if any dairy plant operator decides to bring such a proceeding, it will be necessary for him to retain his own counsel who can advise him as to the propriety of bringing such action and what parties should be joined as defendants. Moreover, it might become the duty of the local district attorney to represent the county official or officials proceeded against and it would be our duty to consult and advise with the district attorney pursuant to sec. 14.53 (3), Stats., should he request us to do so. Consequently we do not care to be placed in the embarrassing position of advising how a private litigant should proceed against the county or its officers and then be faced later with the necessity of advising the district attorney how he can best defend such an action.

WHR

Counties—Taxation—Tax Sales—Appraisal—Persons to make the appraisal to be published under ch. 490, Laws 1947, should be appointed by the county board. Unless the appraisal is made the duty of a committee as provided in sec. 59.06, Stats., the county board may not appoint any of its members as appraisers.

October 7, 1947.

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

You have asked our opinion what requirements must be met in connection with the publication of an appraised value of tax delinquent real estate under sec. 75.69 of the statutes, created by ch. 490, Laws 1947. Specifically, you desire to know (a) whether the appraised value to be published may be determined by a committee of the county board or (b) whether the county board should appoint appraisers solely for the purpose of compliance with this stat-
Opinions of the Attorney General

ute and (c) if so, whether the appraisers so appointed can be members of a county board committee.

Sec. 75.69 contains no directions as to how the appraised value is to be fixed. It does not specify by whom the appraisal is to be made, the method by which it is to be made, the qualifications of appraisers nor even by whom they are to be appointed. So far as we have been able to ascertain all other provisions of the Wisconsin statutes involving appraisals designate the appraisers or provide for the method of their appointment and their qualifications. For instance, under sec. 170.08 the value of strays is to be appraised by a justice of the peace or a town chairman; under sec. 170.08 the value of lost goods is to be appraised by a justice of the peace or a town chairman; under sec. 172.04 the value of animals running at large is to be appraised by a justice of the peace; under sec. 173.01 the extent of damage done by animals is to be appraised by three disinterested freeholders to be appointed by a justice of the peace; under sec. 203.04 appraisal of damage by fire for insurance purposes is more in the nature of an arbitration with one appraiser to be appointed by each party; under sec. 266.10 the value of attached property is to be determined by two disinterested persons appointed by the sheriff; under sec. 272.19 the value of property claimed to be exempt from execution is to be appraised by two disinterested freeholders appointed by the officer making the execution; under sec. 312.01 the value of the estates of deceased persons is to be appraised by disinterested persons appointed by the court; under sec. 316.40 the value of lands to be sold in probate or administration proceedings may be appraised by three disinterested freeholders when authorized by the court; and under sec. 319.28 the estates of wards are to be appraised by two or more disinterested freeholders appointed by the court.

In view of the fact that the legislature customarily goes into considerable detail as to the requirements surrounding an appraisal, the circumstance that in this instance it has provided no details but has specified merely that "an" appraised value should be published would indicate that the legislature intended to leave the procedure as free from
restriction as the definition of "an appraised value" will permit.

In 6 C. J. S. 92 "appraise" is defined to mean "to count; to estimate value; to value property at what it is worth." Definitions in ordinary dictionaries are similar. In Funk & Wagnalls New Standard Dictionary of the English Language, for instance, "appraise" is defined: "1. To estimate the money value of; set a price of value on, especially by authority of law or agreement of interested parties; as to appraise a stock of goods; 2. To estimate the amount, quality or worth of; judge." Under these definitions the legislative words are equivalent to a requirement that there be published an estimated value of the real estate.

The use of the term "appraise" in a statute probably carries the implication that the method of determining value should be fair. See, for instance, the definition of the term "appraiser" in 6 C. J. S. 92 to the effect that the term implies disinterestedness. Aside from the requirements that may be reasonably read into the term itself, however, the legislature has not affixed any limitations. Whatever limitations may be implied with respect to fairness and disinterestedness of appraisers must be determined, we believe, in the light of the legislative purpose of enacting the law. In view of the provision of sec. 75.69 that any bid of less than the appraised value shall be rejected, it appears that the purpose of the statute is to insure that the county or municipality shall receive a reasonably adequate return for the property, and that the appraisal is intended more for the benefit of the public as recipients of the purchase money than for the benefit of purchasers. In the light of that purpose, we do not believe that officials elected or appointed to represent the county or municipality would be disqualified on the ground of interest. The appraisal is apparently to be made primarily in the interest of the public which they represent.

We believe that a county might comply with the provisions of sec. 75.69 in either of two ways which you have suggested: (a) By making the appraisal of lands to be sold under sec. 75.69 a duty of one of the committees to be appointed under sec. 59.06 of the statutes or (b) by appointing third persons as appraisers. If the latter course were
followed, we do not believe that county board members could be appointed because of the proscription contained in sec. 66.11 (2) of the statutes, at least if it were contemplated that the appraisers were to be compensated. That section provides that except as expressly authorized by statute "no member of a * * * county board * * * shall, during the term for which he is elected, be eligible for any office or position * * * the selection to which is vested in, such board." The above provision has been construed in many opinions of this office. See for instance XXVII Op. Atty. Gen. 9 in which the opinion is given that a county board may not hire one of its members to work on collection of delinquent taxes. Many other situations governed by the statute are cited in the same opinion.

In the absence of any other provision, we believe the duty of designating appraisers would fall to the county board under the general provisions of section 59.07 (6) of the statutes.

BL

Corporations—Articles—The statement of the minimum amount of capital with which a corporation will commence business which shall not be less than $500, which sec. 180.02 (1) (dm) provides must be included in the articles of incorporation, must be stated in dollars. A statement in the articles that a corporation will commence business with 500 shares of no par stock fully subscribed and paid in without stating in dollars the actual amount of capital which will thereby be paid into the corporation, does not meet the requirements of this subsection.

October 8, 1947.

Fred R. Zimmerman,
Secretary of State.

You advise that you have had presented to you certain articles of incorporation which provide that the capital stock of the corporation shall consist of 500 shares of stock of no par value and that the corporation will commence
business with 500 shares of said stock fully subscribed and paid in without stating in dollars the actual amount of capital which will thereby be paid into the corporation.

You ask whether this is sufficient to comply with the requirements of sec. 180.02 (1) (dm) as created by ch. 575, Laws 1947, which provides that the persons desiring to form a corporation shall sign and acknowledge articles containing:

“A statement of the minimum amount of capital with which the corporation will commence business which shall not be less than $500.”

The answer to your question is “No.” Prior to the enactment of ch. 575, Laws 1947, a stock corporation could not commence to transact business with others until a certain proportion of its capital stock had been subscribed and actually paid in. Sec. 180.06 (4), Stats. 1945. Likewise, certain other events connected with the organization and subsequent functioning of a stock corporation could not take place until a certain portion of the capital stock had been subscribed or actually paid in or both. See secs. 180.06 (3) and (5), 180.10, 182.19 (1), Stats. 1945. Chapter 575, Laws 1947, completely changed the law as it formerly stood by amending sec. 180.06 (4) so as to provide that a stock corporation can now commence to transact business with others when the minimum amount of capital with which the corporation will commence business has been actually paid in, and by further amending secs. 180.06 (3) and (5) and 182.19 (1) so as to provide that the various events therein mentioned could or could not take place until the minimum amount of capital with which the corporation will commence business has been fully paid in. Section 180.10 was repealed.

Section 180.02 (1) (dm) was obviously created to provide the mechanics whereby the changes in secs. 180.06 (3), (4) and (5) and 182.19 (1) made by ch. 575, Laws 1947, can be carried into effect (a) by fixing the minimum amount of capital with which a corporation can commence business; and (b) by providing a place where the minimum amount of capital with which each particular corporation will commence business is definitely stated and where it is
readily available for all those who may find it necessary to ascertain this amount. To accomplish the foregoing purposes, the minimum amount of capital with which the corporation will commence to do business should be stated in dollars. A statement in the articles that the corporation will commence business with 500 shares of no par value stock fully subscribed and paid in will not furnish the information necessary to comply with the purpose of sec. 180.02 (1) (dm) because it does not tell how much by way of money, services or property has actually been paid in on these shares. See sec. 182.14, Stats. It might be that a considerable amount of real value has been paid in for these shares by way of cash, services or property but it is equally true that the money, services or property paid in might amount to very little and could conceivably even be less than $500.

WET

Marketing and Trade Practices—Unfair Sales Act—A gift of an item of merchandise by a wholesaler or retailer as defined in sec. 100.30, Stats. 1947, when such gift is made contingent upon the purchase of any other item of merchandise, is prohibited.

October 8, 1947.

JOSEPH E. TIERNEY,
First Deputy District Attorney,
Milwaukee, Wisconsin.

We have your request for an interpretation of sec. 100.30 (2), (3), Wisconsin statutes, as amended by ch. 323, Laws 1947.

Sec. 100.30 (2) (j), Stats. 1945, provided as follows:

"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."
Sec. 100.30 (3), Stats. 1945, provided as follows:

"Any advertising, offer to sell, or sale of any merchandise either by retailers or wholesalers, at less than cost as defined in this section, with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this section."

Sec. 2, ch. 323, Laws 1947, is worded as follows:

"100.30 (2) (j) When one or more items are advertised, offered for sale, * * * sold * * * or * * * offered as a gift, or given tied in or combined with the sale of one or more other items, * * * the price of each item * * * shall be * * * subject to the requirements of subsection (2) (a) or (b) hereof."

"(3) Any advertising, offer to sell, or sale of any item of merchandise either by retailers or wholesalers, at less than cost as defined in this section * * * and any advertising, offer to give, or gift of any item of merchandise contingent upon the sale of any other item of merchandise, with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair-competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this section."

Your question is whether the amendments set forth above now make it a violation for a merchant to give away merchandise in combination with other merchandise which is sold to the purchaser. In other words, we assume that the gift is contingent upon the sale.

On April 8, 1947, the supreme court in State ex rel. Heath v. Tankar Gas, Inc., 250 Wis. 218, 26 N. W. 2d 647 considered sec. 100.30 as it stood before the amendment referred to above. The court concluded that sec. 100.30 (2) (j) did not require that each item of merchandise offered for sale had to be offered at a price which would conform to the formula set forth in subsec. (2) (a). The court held that the total price for which merchandise was sold at the combined price, or the sale of merchandise with a gift added, must measure up to the aggregate cost of the goods as determined by the statutory formula.
The court stressed the fact that in sec. 100.30 (3) the term "item" was not used and the reference in the 1945 statutes was to the sale of any merchandise. 250 Wis. 218, 222.

Ch. 323, Laws 1947 amends sec. 100.30 (3) by adding the words "item of" in the first line and then adds the following language: "And any advertising, offer to give, or gift of any item of merchandise contingent upon the sale of any other item of merchandise." It is apparent that the words "item of" were deliberately inserted before the word "merchandise." It is also quite apparent that subsec. (3) now specifically refers to gifts of any item of merchandise contingent upon the sale of another item of merchandise. Sec. 100.30 (2) (j) as amended by ch. 323, Laws 1947, now provides that each item "given tied in or combined with the sale" of one or more other items shall be subject to the price requirements of subsec. (2) (a) or (b).

On the face of it, it is apparent that the legislature was aiming at the result reached in the Tankar case. We have traced the legislative history of the revision and we will outline it herewith:

1. On March 25, 1947, Bill No. 407, S. was introduced. This amended secs. 100.21 and 100.30 (4). The first section referred to has nothing to do with our problem and the amendment to subsec. (4) of sec. 100.30 was only for the purpose of increasing the penalties for violation.

2. On April 8, 1947, the supreme court handed down the opinion in the Tankar case.

3. On April 16, 1947, a request was received by the legislative reference library for an amendment of Bill 407, S. The draftsman's notes contain the following comment: "To take care of State v. Tankar Gas Company (April 8, 1947)."

His notes also contain the following comment: "Provide: (1) Violation to offer as gift contingent upon purchase; (2) Each item in combination when priced separately must sell 6% over cost."

4. On April 17, a proposed draft of amendment 1, S. was delivered and on the same day offered by Senator Busby. The amendment made no changes whatever in the original Bill No. 407, S. but rather added amendments of subsecs. (2) (j) and (3) of sec. 100.30.
5. On April 23, 1947, substitute amendment No. 1, S. to Bill 407, S. was offered by the committee on labor and management. This substitute amendment made some changes in the revision of subsec. (4) of sec. 100.30, but only to the extent of reducing the amount of the fines to be levied for violations. The substitute amendment was identical with the first amendment insofar as subsec. (2) (j) is concerned. However, the substitute amendment added language to subsec. (3) which was not contained in amendment 1, S. This briefly is the history of the amendment of the statute.

There is no question what the legislature intended to do. The only question is whether they used apt language to accomplish the purpose. Considering the amendment of subsec. (2) (j) of 100.30 alone, one might conclude that the changes made were not sufficient to escape the interpretation made by the court in the Tankar case. However, when we consider the amendment to subsec. (3) of sec. 100.30 there can be little doubt that the legislature was aiming squarely at gifts of any items of merchandise contingent upon the sale of some other item of merchandise. Such contingent gifts are now defined as unfair competition and contrary to the policy of this statute.

The legislature certainly intended to do something or it would not have gone to the lengths it did in amending this statute. If the language actually used will permit of an interpretation that will effectuate the clearly apparent legislative intent, we are justified in adopting such construction. As we have pointed out above, the language of subsec. (2) (j) is not such as unmistakably prohibits gifts. We must consider, however, that the legislature perhaps did not intend to prohibit an outright gift of merchandise, but sought only to prohibit gifts that were tied in, combined with, or contingent upon sales of other merchandise. For example, the statute clearly does not prohibit a merchant from giving away a can of corn or a bar of soap if he desires to do so. We believe it does prohibit, however, the offer of a gift of a bar of soap contingent upon the customer purchasing three bars of the same kind or a different kind of soap.

The interpretation set forth above applies to wholesalers and retailers as defined in subsec. (2) of sec. 100.30. It is
our conclusion, therefore, that a gift of merchandise contingent upon a purchase of other merchandise, is now prohibited.

ES

Criminal Law—Lotteries—Awarding of prizes to certain lodge members in attendance at meetings selected by lot constitutes a lottery in violation of sec. 348.01, Stats.

October 14, 1947.

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

You have requested an opinion as to whether or not the carrying out of the following plan would constitute a violation of the state gambling laws:

"A Fraternal organization of this city advises that in an effort to stimulate attendance at lodge meetings, they are going to have a drawing, at each regular meeting of the lodge, for a $5 cash prize. Three names will be drawn, and if any name drawn is that of a person in attendance at the meeting, he will receive the $5. If the persons whose names are drawn are not present, the amount of the drawing for the following week will be increased by the $5.

"The officers of the lodge advise that the $5 fund which is drawn for each week comes from a fund carried on the club books as a recreation fund, and is a very large fund of several thousand dollars, and is created through profits of the operation of the dance hall, bars, bowling alleys, and elsewhere.

"The persons eligible to participate in the drawing each meeting night actually pay nothing for eligibility to have their name drawn, or for the prize, nor is any part of the prize money made up from any solicitation of the members for refreshments, nor is it taken out of their dues, but, rather, is an appropriation from the social fund, as above described, of $5 each time the lodge meets."

Lotteries are expressly forbidden by sec. 348.01, Stats., and art. IV, sec. 24 of the Wisconsin constitution forbids the legislature from authorizing the same.
In the case of *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153, the supreme court held that a lottery involved three elements—a prize, chance and a consideration. In our opinion all three are present in the scheme you have presented. The prize and chance elements are obvious at first glance. The consideration is the dues that are paid which permit a person to be a member and so eligible to attend meetings and receive a prize, regardless of the fact that he pays nothing at the meeting itself and that the prize is taken from "social funds" and not directly from the dues. The "social fund" exists because of the organization which is comprised of individual members, all of whom have given consideration for their membership previously. According to the case of *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, the consideration element in a lottery may consist in a disadvantage to one party or an advantage to the other. It is certainly beneficial to an organization to have a large number of its members in attendance at meetings. This alone is sufficient consideration under the law. We are hardly in a position to say whether or not the attendance at the meetings is disadvantageous to the members, although, if it is necessary to offer a prize to increase the attendance it is obvious that a number of the members so feel.

The plan presented could be developed into a lottery of dangerous proportions by opening the membership of the club, lowering the dues and increasing the prize until the organization would become no more than a lottery.

The size of the prize and the entire nature of the plan do not seem to show any intent to flaunt the law, but since all the three required elements of a lottery are present it must be classed as such regardless of the sums involved.

This opinion is in accordance with the cases cited as well as that of *Stern v. Miner*, (1941) 239 Wis. 41, and a number of somewhat similar opinions previously rendered by this office.

REB
Public Welfare Department—Juvenile Court—Commitments—Chapter 546, Laws 1947, the youth correction act, became effective August 23, 1947 which was the day after publication, despite section 5 of the act which provided that it was to take effect July 1, 1947. However, sec. 58.62 of the act specifically provides that secs. 58.68 to 58.98 are to apply only to violations of law committed after January 1, 1948.

October 15, 1947.

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

You have asked whether on August 22, 1947, commitments under sec. 48.07 (1) (b) as amended by ch. 546, Laws 1947, could be made to the department of public welfare or whether the amendment is applicable only to violations of law committed subsequent to January 1, 1948.

Under sec. 48.07 (1) (b) prior to its amendment by ch. 546, Laws 1947, if the court found that a child was delinquent, neglected or dependent it was authorized to:

"Commit the child to a suitable public institution or to a suitable child welfare agency licensed by the state department of public welfare and authorized to care for children or to place them in suitable family homes. The terms and duration of such commitments, other than to the Wisconsin school for boys or to the Wisconsin school for girls, shall in each case be fixed by the court, subject to modification by the court on its own motion or otherwise; provided that the court upon application before commitment may consider the wishes of the parent, guardian or custodian in the selection of a suitable institution or agency; or"

By ch. 546, Laws 1947, sec. 48.07 (1) (b) was amended to read:

"Commit the child to ** * the department of public welfare, or to a suitable child welfare agency licensed by the state department of public welfare and authorized to care for children or to place them in suitable family homes. The terms and duration of such commitments, other than to the ** * department of public welfare, shall in each case be fixed by the court, subject to modification by the court on its own motion or otherwise; provided that the court upon
application before commitment may consider the wishes of
the parent, guardian or custodian in the selection of a suit-
able institution or agency; or;"

Chapter 546, Laws 1947, known as the youth correction
act, not only amended sec. 48.07 (1) (b) but it also
amended sec. 48.14 and created a number of new sections
of the statutes. Among the newly created sections are sec-
tions 58.61 to 58.98. Sec. 58.62 reads:

"The provisions of sections 58.68 to 58.98 apply only
to violations of law committed subsequently to January
1, 1948."

Thus the amendment to sec. 48.07 (1) (b) is not sub-
ject to the January 1, 1948 date mentioned above but is gov-
erned ostensibly by section 5 of the act which provides that:
"This act will take effect July 1, 1947."

However, the act was not published until August 22,
1947. Section 370.05 provides that every law or act which
does not expressly prescribe the time when it takes effect
shall take effect on the day after it is published. While sec-
tion 5 of the act expressly provided that it should take ef-
flect July 1, 1947, such provision must fail in this case be-
cause it could not in any event become effective prior to
publication in view of art. VII, sec. 21, Wisconsin constitu-
tion, which provides among other things that no general
law shall be in force until published. The legislative process
is not complete unless and until an enactment has been pub-
lished as required by the above constitutional provision as
well as by sec. 14.29 (10) and sec. 35.64, Stats. Goodland v.
Zimmerman, 243 Wis. 459.

It must be concluded therefore that the amendment of
sec. 48.07 (1) (b) by ch. 546, Laws 1947, did not become
effective until the day after publication, August 23, 1947,
and that consequently a juvenile court lacked authority on
August 22, 1947 to make a commitment to the department
of public welfare pursuant to the statute as amended. Such
commitment was subject to the provisions of sec. 48.07 (1)
(b), 1945 Stats.

WHR
Schools and School Districts—High School—The amendment to sec. 40.64 (1), Stats., made by ch. 62, Laws 1947, requiring a plat of the territory to be included in a proposed union free high school district to be submitted to and approved by the state superintendent of public instruction before such a district might be created or an election held for that purpose, applies in cases where proceedings for the establishment of a union free high school district were commenced but not completed prior to the effective date of said act as well as to those commenced on or after said effective date.

October 17, 1947.

JOHN CALLAHAN,
State Superintendent of Public Instruction.

You ask whether the amendment to sec. 40.64 (1), Stats., made by ch. 62, Laws 1947, published April 25, 1947, applies in a case where proceedings for the establishment of a union free high school district as provided in said section were commenced but were not completed prior to the effective date of said act.

You give us the following facts: Petitions under sec. 40.64, Stats. 1945, were filed in the office of the village clerk for the village of Rewey, Iowa county, on April 25, 1947 at about 10:30 a.m. Notice of meeting of the municipal clerks to be held on April 29, 1947 at 2:00 p.m. was delivered to the clerk of the town of Lima, Grant county, on April 26, 1947 and sent by registered mail to the clerks of the towns of Mifflin and Linden, Iowa county, and Belmont, Lafayette county, on April 26, 1947, and were received by the clerks of the towns of Mifflin and Linden on April 26, 1947 and by the clerk of the town of Belmont on April 28, 1947. The municipal clerks met on April 29, 1947 at 2:00 p.m. pursuant to said notice and set November 4, 1947 as the date for holding the election mentioned in sec. 40.64.

Chapter 62, Laws 1947, amended sec. 40.64 (1) so as to require a plat of the territory to be included in a proposed union free high school district to be submitted to and approved by the state superintendent of public instruction before such a district might be created or an election be held.
for that purpose. Said subsection now reads (the changes made by said amendment appearing in italics) as follows:

“A high school district may be established in any contiguous compact territory with an assessed valuation of $1,250,000 or more, and the plat of the territory to be included in the proposed district approved by the state superintendent of public instruction. A high school district or a consolidated free high school district may also be established in any township comprising only island territory. The clerks of each governmental subdivision affected by the establishment of such district shall submit jointly a plat of the territory proposed to be included therein. No election shall be held in such territory unless the state superintendent of public instruction has approved such plat.”

You are advised (1) that sec. 40.64 (1) as amended by ch. 62, Laws 1947, applies to proceedings commenced under sec. 40.64, Stats., and not completed before the effective date of said ch. 62, Laws 1947, as well as to those commenced on or after that date; (2) that the requirements imposed by that subsection as amended must be complied with in all said proceedings commenced but not completed before the effective date of said ch. 62, Laws 1947, before a union free high school district can be created or an election held under the provisions of sec. 40.64. As applied to the facts in the instant case, this means that the requirements imposed by sec. 40.64 (1) as amended must be complied with before the election scheduled for November 4, 1947 can be held or before a union free high school district can be established as is there proposed.

As already noted, ch. 62, Laws 1947, which amends sec. 40.64 (1), Stats. 1945 was published on April 25, 1947 and became effective the next day. Sec. 370.05. The language of the subsection as amended, by its terms applies to proceedings already begun as well as those which may be begun in the future. The application of said subsection as amended to all proceedings commenced under sec. 40.64, Stats. 1945, and not completed before April 26, 1947, does not give it a retrospective or retroactive operation since it simply operates on the facts or situation as it exists from and after the effective date of said subsection as amended. State ex rel. Sweet v. Cunningham, 88 Wis. 81 at 87; Cox v. Hart,
In the case last cited it is said: "A statute is not made retroactive merely because it draws upon antecedent facts for its operation."

The proceedings for the establishment of school districts are purely statutory. State ex rel. Hermanson v. Callahan, 179 Wis. 549 at 554. The legislature may by curative act remedy an omission or irregularity that may have occurred in the formation of such districts. State ex rel. Johnson v. Union Free H. S. D., 179 Wis. 631 at 632-3. State ex rel Vandehouten v. Vanhuse, 120 Wis. 15. By the same token there is nothing to prevent the legislature from imposing additional requirements which must be met in establishing a school district and making them apply to proceedings already commenced and not completed. State v. Gettle, 196 Wis. 1.

**District Attorney—Counties—Public Assistance—Old-age Assistance**—Under sec. 49.26 (3) as amended by sec. 14, ch. 121, Laws 1947, a part-time district attorney is entitled to retain fee allowed to him by the county court as attorney for the administrator in probating an old-age pensioner's estate but no district attorney is entitled to retain any fee for filing and prosecuting a claim on behalf of a county against such an estate. The only collection fee in such case is 10 per cent but not in excess of $50 which may be allowed by the court for the district attorney's services and which must be paid into the county treasury.

October 17, 1947.

A. W. Bayley, Director,

State Department of Public Welfare.

You call our attention to the fact that a question has been raised as to the proper interpretation of sec. 49.26 (3), Stats., as amended by sec. 14 of ch. 121, Laws 1947. The amendment reads:

"DISTRICT ATTORNEY, DUTIES AND FEES. The district attorney shall take the necessary proceedings and represent the county in respect to any matters under this
section. Out of the amount collected on any claim for old-age assistance, the county court in which the estate is probated may authorize the payment of a collection fee of 10 per cent but not in excess of $50 for the services of the district attorney which fee shall be paid into the county treasury but any part-time district attorney acting as the attorney for the administrator shall be entitled to retain any fee allowed to him by the court as attorney for the administrator. No fee shall be ** allowed to any county employee for services as estate administrator. The county agency and the district attorney shall report to the county board at its November meeting concerning collections made and estates pending. The county board may authorize the district attorney to act for the county generally to collect old-age assistance liens and claims, and claims for hospitalization, institutional care and general poor relief. It may authorize him to compromise the payment of any such claim, with the approval of such judge, officer or agency or of such committee of the county board as the board designates, but such compromise shall be made only when the collection of the full amount would produce undue hardship upon the debtor, or the debt is uncollectible. Any compromise made before July 15, 1943 which would be valid if made pursuant to these provisions for compromise of claim is hereby validated.”

One of the county old-age assistance administrators who is a county judge states:

“It has been our practice for the department to file a claim in an estate. When the estate is settled, the administrator pays the claim to the pension department. The way this section is drawn, it might be construed that it is the duty of the district attorney to file this claim and to collect his commission out of same, regardless of whether or not it is contested. It seems more reasonable to me that we should follow our present policy and file the claim, and if it is uncontested, the administrator pays the pension department. If, on the other hand, the claim is contested, then the district attorney should be called in, and he would be entitled to his commission, but I think this paragraph could be construed either way.”

It is apparent from the present wording of sec. 49.26 (3) that two types of fees are covered. The 10 per cent collection fee but not in excess of $50, as was pointed out in XXXII Op. Atty. Gen. 431, is for the collection or recovery of amounts payable to the county by virtue of the claim
which it asserts on behalf of itself and the state and federal
governments and has no relation to the fee that might oth-
erwise be allowed to the administrator's or executor's at-
torney in the probate of an estate. We do not see that this
provision of the statute is materially different as amended
from what it was at the time the above opinion was writ-
ten and no distinction is made between a contested and an
uncontested claim. It is of course discretionary with the
county court as to whether any collection fee is to be al-
lowed and in fixing the collection fee it may take into con-
sideration the amount of work required in enforcing col-
lection although in no case may the allowance exceed the
maximum limitation fixed by the statute.

However, the provision to the effect that any part-time
district attorney acting as an attorney for the administra-
tor shall be entitled to retain any fee allowed him by the
court as attorney for the administrator is new and was in-
serted in the statute for the purpose of correcting the situa-
tion as it existed previously and as was discussed in the
following opinions of this office: XXX Op. Atty. Gen. 275,
XXXIV Op. Atty. Gen. 172, in addition to the opinion in

In filing and prosecuting a claim on behalf of the county
against an estate of an old-age pensioner the district at-
torney, whether on a full-time or a part-time basis, is act-
ing as attorney for the county and is entitled to no compen-
sation or commission over and above his salary. XXX Op.

It is only where the part-time district attorney is acting
as the attorney for the administrator in probating the es-
teate that he is entitled to retain a fee allowed for such
services under the amendment to sec. 49.26 (3). The full-
time district attorney is not included in this amendment
and as pointed out in XXXI Op. Atty. Gen. 57 any extra
fees that he might obtain would have to be turned over to
the county.

Thus the only collection fee contemplated by sec. 49.26
(3) is the 10 per cent fee but not to exceed $50 which may
be allowed by the court and which must be paid into the
county treasury in any event. This has nothing to do with
the fee which may be allowed by the county court to the part-time district attorney for his services as attorney for the administrator. The district attorney, whether full-time or part-time, when acting as attorney for the county in collecting a claim against an estate is in the same position as he is in when performing any other service on behalf of the county. He takes his office "cum onere" and is entitled to only such salary as has been fixed according to law. Also it is clear that as between the county pension department and the district attorney it is the duty of the district attorney to file and prosecute the claim, since the statute provides that: "The district attorney shall take the necessary proceedings and represent the county in respect to any matters under this section."

It may well be that conflicts of interest will arise in many instances where the part-time district attorney is acting as attorney for the administrator and is at the same time representing the county in prosecuting a claim against the estate, to say nothing of the conflict which arises where the allowance for the attorney's fee for representing the administrator will result in reduction of the money available for paying the county's claim. These are matters, however, which fall outside the scope of this opinion and it is not our purpose here to indicate in any detail how these conflicts are to be resolved.

The legislature in any event has authorized the part-time district attorney to receive a fee allowed him by the county court for his services in representing the administrator despite his duty to prosecute the county's claim and it must be presumed that both the district attorney and the county judge will properly perform their respective duties in good faith and that a district attorney will have the good grace not to take any part in the fixing of his fee as attorney for the administrator where the allowance of such fee will be at the expense of the county's claim and that he will also have the good grace to withdraw as attorney for the administrator when it is apparent that as such attorney it will be his duty to actively contest the claim which he has filed for the county.

WHR
Soldiers, Sailors and Marines—Grand Army Home—Maintenance Payments—Ch. 347, sec. 3, Laws 1931, does not exempt members of Grand Army Home for Veterans at King, Wisconsin, admitted prior to 1931, from payment of appropriate portion of their income for maintenance as provided by sec. 45.37 (2) (g).

October 17, 1947.

Leo B. Levenick, Director,
Wisconsin Department of Veterans Affairs.

You have made inquiry as to whether a resident of the Grand Army Home at King, Wisconsin admitted prior to June 1, 1931 is required by sec. 45.37 (2) (g) to pay to the home in addition to 20 per cent of his income any amount over $500 per year. You state that this member claims exemption under the provisions of ch. 347, sec. 3, Laws 1931, since this section exempts members of the home admitted prior to 1931 from certain requirements for admission.

In order to write an answer to your question, it is necessary to examine the requirements for admission as they existed immediately prior to 1931 and the changes that have been made to the present time.

The Grand Army Home at King, Wisconsin was originally founded by the Grand Army of the Republic, Department of Wisconsin, as a private charitable institution a few years after the Civil War. The institution was in debt and apparently the Grand Army was unable to furnish sufficient financial assistance to it. The state took over the home and paid its debts in 1887, and has been supporting it by state bounty up to the present time. The state exercised only a nominal control over the affairs of the home until relatively recent years, allowing the Grand Army of the Republic, Department of Wisconsin, to be the actual governing body. See XXXVI Op. Atty. Gen. 16.

The law as it existed in 1929 provided that indigent veterans, their mothers, wives and widows were entitled to the benefits of the maintenance appropriation for members of the home. However, it did not limit members of the home to indigents. The class of persons eligible were veterans of the various wars, their mothers, wives and widows, but no
You inform us that prior to the passage of ch. 347, Laws 1931, which is set forth below, the regulations of the home required applicants for admission to agree to the following:

"Applicants for admission must voluntarily agree to pay over to the home such money as the rules of the home require, which are as follows: On an income of $72 per month $15 per month shall be paid. Other members 20% of income. Such assessments shall become due and payable as soon as the income is received."

The supreme court held prior to this time that the governing body of the veterans home had "the right to prescribe reasonable rules governing the admission of inmates and also have the right to prescribe like rules pertaining to their discharge." See Smith v. Board of Trustees (1909) 138 Wis. 628, 634. There can be no question that this regulation was a proper one, in the absence of statutory direction, by the rule above stated, and also because of the fact that there was no money provided for the support and maintenance of non-indigent members.

Chapter 347, Laws 1931, was more definite and certain than the previous law had been regarding the exact definitions of the various classes. For example, it required that the veterans must have served at least 70 days and be over 50 years of age unless service was terminated by physical disability incurred in line of duty; veterans under 50 years of age could be admitted if unable to secure adequate care from the federal government; and wives of veterans must have lived continuously with their husbands not less than 10 years before making application. There were a number of other changes of like nature which are not material to the instant case except that they were similar changes in the conditions for admission of classes of persons to the home.

Section 2 and Section 3, ch. 347, Laws 1931, read as follows:

Section 2. * * *

(g) "No person of any of the classes specified in paragraphs (a) to (f) shall be admitted to the Grand Army Home for Veterans unless he shall have presented satis-
factory proof of ten years' continuous residence in this state immediately preceding the application for admission, nor unless he shall pay twenty per cent of his income from any source or at the option of the commandant all of his income in excess of four hundred dollars into the general fund for the maintenance and operation of the home; provided, that a wife of a veteran may, in addition, retain for personal use, annually, one hundred dollars independent income; provided further, that the advisory board may in its discretion remit such sums as they deem necessary for the care of the minor dependents of a member.

"** **

Section 3. "The changes in the conditions for admission to the Grand Army Home for Veterans made in this act shall not affect the rights of any member who was admitted to the home prior to June 1, 1931."

The next change in statutes applicable to the instant case took place in the passage of ch. 72, Laws 1943. This law amended sec. 45.37 (2) (g) to require that no person would be admitted "unless he shall pay 20 per cent of his gross income and all of his income from any source in excess of $500 per year into the general fund for the maintenance and operation of the home." This law was amended in minor respects and now requires that an applicant shall not be admitted "unless he shall pay 20 per cent of his income and all of his income from any source in excess of $500 per year into the general fund for the maintenance and operation of the home."

In none of the amendments subsequent to ch. 347, Laws 1931, was there any exemption of members as set forth therein in sec. 3, quoted above. This exemption excludes members admitted prior to June 1, 1931 from the "changes in the conditions for admission to the Grand Army Home for Veterans made in this act." In using the words "in this act" the legislature confined itself to ch. 347, Laws 1931. Furthermore, it could not by its own action prevent itself at a later time from changing its own law. There is no legal consideration running from the members of the home to the state. While the state has assumed what it feels to be its moral duty toward its veterans in establishing and maintaining the home, there is nothing to prevent it from drastically changing the requirements for admission of resi-
dents or even discontinuing the home altogether. For that reason the terms of admission at the time a member is accepted do not constitute a continuing contract with the state unless the law specifically exempts a member from conditions later imposed. There was no such exemption granted in the 1943 change which required payment of all income over $500.

It should also be pointed out that this member had no rights actually affected by the 1931 law since you inform us that the veteran at no time paid more than 20 per cent of his income, due to the fact that he either had no income in excess of $400 at that time or because the commandant of the home did not exercise the option granted him in the 1931 law.

The word “admission” in the laws governing the home has been loosely used, since in the requirements of monetary payments it obviously means that the applicant must agree to make the payments and also must continue to agree and to make the payments throughout his membership in the home. This differs from a requirement for admission in the sense of “eligibility” which deals purely with the fact as to whether or not the applicant belongs to a certain class of persons, as defined in the act.

It can easily be understood that in exempting the members of the home prior to June 1, 1931 from the more strict entrance requirements of the 1931 law, the legislature meant to protect the aged and feeble members of the home from being expelled and having the difficulty of seeking other refuge as well as of going to the trouble of seeking to establish the proofs necessary as to their membership in an eligible class of persons. We cannot, however, conceive of any reason why the legislature should intend to exempt any member from paying his or her amount for care and support that any other member is required to pay, merely because one had gained entrance to the home at a prior date. If this were true, it would be possible to require a veteran of the Civil War, who belongs to the most preferred class of persons eligible for entrance, to pay more for his own maintenance than a member of a class having the lowest priority. In the absence of specific language of
the legislature so stating, this position is not believed to be tenable.

For the reasons stated above it is our opinion that a member of the home admitted prior to 1931 is not exempted from paying any amounts of his income required by statutes subsequent to that time.

REB

Soldiers, Sailors and Marines—Grand Army Home—Pensions—State Employes—Pensions of state employes received by members of the Grand Army Home for Veterans must be calculated as income in determining the support payment required by sec. 45.37 (2) (g), Stats. Section 42.70 affords no exemption.

October 17, 1947.

W. H. ZUEHLKE, President,
Board of Managers,
Grand Army Home for Veterans,
King, Wisconsin.

You have requested an opinion as to whether the pension of a member of the Grand Army Home for Veterans at King, Wisconsin received from the state of Wisconsin is subject to the personal maintenance payments required by sec. 45.37 (2) (g). This statute provides as follows:

“No person of any of the classes specified in paragraphs (a) to (f) shall be admitted to the Grand Army Home for Veterans until he shall have presented satisfactory proof of 10 years’ continuous residence in this state immediately preceding the application for admission, nor unless he shall pay 20 per cent of his income and all of his income from any source in excess of $500 per year into the general fund for the maintenance and operation of the home; except that the net income of such person after applying such 20 per cent deduction shall not be less than $20. Complete medical care and personal maintenance will be furnished all members under the policy of the Wisconsin department of veterans affairs. ‘Income’ as used in this section shall not include wages, salary or payment to a member as an
employe of the home. The department shall allow a wife of a member to retain for personal use annually a sum not to exceed $100 independent income, and may remit such monthly sums as it deems necessary for the care of the minor dependents of a member. Veterans whose services are not credited to Wisconsin and who are otherwise qualified may be admitted upon producing satisfactory proof of at least 15 years’ continuous residence in this state immediately preceding date of application."

You point out that some doubt has arisen due to the protection afforded pensions of state employees under sec. 42.70, which reads as follows:

"Exemption of funds and benefits from taxation, execution and assignment. All moneys and assets of the state employees' retirement system and all benefits and allowances, and every portion thereof, both before and after payment to any beneficiary or estate granted under the state employees' retirement system shall be exempt from any state, county or municipal tax, and from attachment or garnishment process, and shall not be seized, taken, detained or levied upon by virtue of any execution, or any process or proceeding or judgment whatsoever issued out of or by any court of this state for the payment in whole or in part of any debt, claim, damage, demand or judgment against any member, annuitant or beneficiary of the state employees' retirement system, and no such member, annuitant or beneficiary shall have any right to assign his benefit or allowance, or any part thereof, provided that;

** * **"

This question does not appear to have been passed upon in this state but has come up in other jurisdictions. Several cases in point on the subject concern instances where the governing board of the home had made regulations for payments from pensions mentioning them specifically. See Loser v. Board of Managers, (1892) 92 Mich. 633, Ball v. Evans (1896) 98 Iowa 708, Howell v. Sheldon, (1908) 82 Nebraska 72. These cases held that the managing authority of the state veterans homes had the right to make reasonable regulations and that a rule requiring payments from pensions was a reasonable one. The pensions in question had similar exemptions to those set forth above in sec. 42.70. The reasoning in these cases is well expressed by the
court in the case of *Ball v. Evans*, supra, p. 714-715, in the following language:

"** * * The legislature, not standing upon its legal obligations, but prompted by feelings both patriotic and humane, has voluntarily undertaken to provide for the care and support of this class of citizens. The support offered by the state, and given at the home, is a gratuity, and not based upon any legal duty or contractual relations between the state, on the one hand, and the inmates of this home, on the other; hence it follows that the power which confers the benefaction may, by itself or its agents, determine what the benefaction shall be, and the circumstances which must exist in order to entitle one to share the state's bounty. It has said that if you enter the home, and if you have an income, from pension or otherwise, which will in part support you, you shall agree to and shall contribute from it towards your support. This deprives the soldier of no rights. When he makes his application for admission to the home, he knows what the rules require. He then understands the conditions under which he may be a sharer in the bounty of the state. The support in the home being a gift upon the part of the state, it or its agents may make the enjoyment of the benefaction dependent upon any reasonable conditions. No one is compelled to accept the conditions and become an inmate of the home. One may decline, and remain outside. If, however, he sees fit, after knowing of the conditions and agreeing to them, to become an inmate of the home, he is in duty bound to obey the rules; and, if he fails or refuses so to do, he is in no situation to complain if he be honorably discharged from the home. When we have in mind the purpose of the legislature, and the fact that deserving, diseased and disabled soldiers are constantly seeking admission to the home, and must be refused for want of room,—men who are unable to support themselves,—it would seem that the rules complained of are just and humane, and in accordance with the spirit of the act creating the institution. In view of what we have said, there is no force in the claim that, since all soldiers do not receive the same amount of pension, more is taken from one for his support than from another. Every inmate surrenders just what he voluntarily agreed to when he entered the home."

The question here posed is slightly different in that a statute prescribed for the maintenance payments and it makes no specific mention of pensions. However, this office has previously construed "income" as used in this law
as meaning "means of support derived from any source" including pensions, in a letter to you dated April 10, 1939. See XXVIII Op. Atty. Gen. 232. Had the legislature meant to exempt pensions from the operation of sec. 45.37 (2) (g) it would certainly seem that specific mention of them would have been made by this time, especially in view of the fact that one of the few sources of income of individual members of the home is payments from the federal government, either pensions or payments for service connected disability, which are subject to exemptions similar to those stated in sec. 42.70. We understand that since the founding of the home members have made partial payments from their federal pensions or disability allowances. These were required by a regulation of the home at first, and, since 1931, by statute.

This fact, we believe, is an important factor in determining the answer to your question since it is a rule of statutory construction in this state that the practical long-continued construction given to a statute by those entrusted with its administration is of great weight and is often times decisive in determining its meaning. See State v. Johnson (1925) 186 Wis. 59, Green v. Clark, (1940) 235 Wis. 628.

It is our conclusion, therefore, that while it is true that under the law a state pension is afforded the protection as indicated in sec. 42.70 above and that the Grand Army Home for Veterans would stand in no better position than any other creditor, nevertheless, the amount of state pension a member receives must be used to determine the amount he is required to pay as a condition to his residence in the home.

REB
Counties—Salaries and Wages—Statutes—Repealing Act
—County boards may change the salary of a county official under sec. 59.15 (1) (c), Stats., at any meeting held prior to the effective date of its repeal by ch. 483, Laws 1947.

Such action by a county board may continue in effect after the repeal of the enabling act.

October 17, 1947.

WALTER T. NORLIN,
District Attorney,
Washburn, Wisconsin.

You have asked whether, under sec. 59.15 (1) (c) of the statutes which is repealed as of December 31, 1947 by ch. 483, Laws 1947, the county board may increase the salary of a county official in November, 1947, to be effective for the remainder of his term of office which continues after December 31, 1947.

Sec. 59.15 (1) (c) reads:

“For the duration of the present war and for 6 months after the termination thereof as proclaimed by Congress or the President, the county board may, during the term of office of any county officer, change the basic salary or compensation for such county officer in such amount as the county board may determine will adjust the basic salary to fit any changes in the cost of living during the emergency, notwithstanding any other provision of law to the contrary.”

You have raised two questions in connection with the above statute and the act by which it is repealed. The first is whether sec. 59.15 (1) (c) is not repealed by the operation of its own terms as of June 30, 1947, because of the president's proclamation terminating hostilities on December 31, 1946. The second question is whether the repeal of the statutory section above quoted has the effect of terminating acts of the county board authorized thereby, or whether the effect of those acts may continue beyond the expiration date of the enabling statute.

We do not believe that sec. 59.15 (1) (c) became ineffective on June 30, 1947 by reason of the presidential proclamation of December 31, 1946. (See Proclamation 2714,
12 Fed. Reg. 1) The words of the statute do not make it terminable 6 months after the end of the war, so as to leave it open for a court to determine when the war ceased. It made the duration of the provision dependent upon the termination of the war "as proclaimed by Congress or the President." So far as we know, neither congress nor the president has yet proclaimed the termination of the war. The presidential proclamation No. 2714, 12 Fed. Reg. 1, which was filed December 31, 1946, specifically recognized that "a state of war still exists" but declared that the president found it to be in the public interest to declare "that hostilities have terminated." That the president intended the proclamation to operate as something different from a declaration of a termination of the war is evidenced by the fact that he expressly recited in the same document that a state of war still exists. This was apparently the opinion of the legislature of this state, because if the law had expired of its own terms it would seem to have been unnecessary to repeal it expressly by ch. 483, Laws 1947. It is our opinion, therefore, that sec. 59.15 (1) (c) continues in full effect until the termination date set by our legislature in ch. 483, Laws 1947, i.e., December 31, 1947.

We are also of the opinion that the repeal of the law as of December 31, 1947 will not operate to terminate the effect of any otherwise valid action taken in pursuance of it. The general rule is stated in 59 C. J. 1186, §722, to be:

"* * * the repeal of a statute will not operate to impair rights vested under it, or to revive rights lost or taken away under the repealed statute, or to affect acts performed or suits commenced, prosecuted, and concluded under the former law. * * *"

It is again said at 59 C. J. 1190, §727:

"* * * Acts done and suits concluded by final judgment before the repeal are not affected by the repeal of statutes relating to them; nor does a suit pending to enforce a vested right abate upon a repeal of the statute under which the right accrued * * *.*

The rule was illustrated in In re Opinion of the Justices, (1938) (N. H.) 198 Atl. 249, 250, where it was said:
"The repeal of a statute renders it thenceforth inoperative, but it does not undo or set aside the consequences of its operation while in force, unless such a result is directed by express language or necessary implication. *

See, also, Foster v. Rowe, (1906) 128 Wis. 326, 107 N. W. 635 in which it was held that where a board of commissioners of equalization had fully performed certain acts before the repeal of the statute under which the functions were performed, its action was effective despite the repeal.

It is our opinion that any action validly taken by a county board under sec. 59.15 (1) (c) of the statutes prior to December 31, 1947 will continue in effect until otherwise terminated by operation of law.


October 18, 1947.

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

You have made inquiry as to whether the clerk of the municipal court for the city of Oshkosh and county of Winnebago is eligible to be a deputy sheriff of Winnebago county.

While there appears to be no direct statutory prohibition against one person holding two of these offices, it is, however, a well established rule of common law that the same person may not hold two offices which are incompatible. Incompatible means not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where contrariety and
antagonism would result in the attempt by one person to discharge faithfully the duties of both. See McQuillan on Municipal Corporations, §469, Vol. 2, pp. 142-143, 37 Am. Jur. 866-867.

This rule has been adopted and is the law of this state. See State ex rel. Knox v. Hadley, (1858) 7 Wis. 700, State v. Jones, (1907) 130 Wis. 572, also XXIX Op. Atty. Gen. 247.

The municipal court of the city of Oshkosh and county of Winnebago exists under the provisions of ch. 43, Laws 1935. Sec. 20 provides for the appointment of a clerk by the judge of the court and sets forth his duties which include the issuing of all processes except summons in civil actions, the taxation of costs, the taking of bail from persons arrested when the court is not in session, and the examination under oath of all persons applying for warrants. See sec. 20 (2). The general powers of deputy sheriffs are set forth in sec. 59.24. Ch. 48, sec. 23, Laws 1935, provides that the “sheriffs of Winnebago county * * * shall be officers of said court and may serve its processes and carry into effect its lawful orders and judgments.”

It can readily be seen from the above that if the clerk of the court were also a deputy sheriff he might well be dealing with himself in his subordinate capacity as an officer of the court as provided by sec. 23 above. For example, it is conceivable that he as clerk could direct himself to serve processes as a deputy sheriff, or to set the bail for a person whom he has arrested.

It is our opinion therefore, that the two offices are incompatible and cannot be held by the same person.

REB
Appropriations and Expenditures—Grain and Warehouse Commission—Expenses for convention of National Association of State Warehouse Departments at Superior, Wisconsin, held not authorized by sec. 126.44.

October 18, 1947.

E. W. Richardson,
Grain and Warehouse Commission,
Superior, Wisconsin.

You have made inquiry as to whether the grain and warehouse commission may make expenditures for the rental of a convention hall, luncheon for delegates, a boat trip around the harbor at Superior to view the elevators and shipping facilities, and for the hire of automobiles incident to the transportation of delegates at the National Association of State Warehouse Departments convention at Superior.

The laws of this state allow the state warehouse commission to make certain expenditures. This authority is embodied in sec. 126.44 which reads as follows:

"Monthly expense report; audit thereof. The commission shall file with the secretary of state on the first of each month a correct, detailed statement of all expenses incurred by it during the preceding month. The commission may pay additional compensation to employees who are required to work in excess of the regular hours of employment. The commission may expend, above its legal obligations, not to exceed $4,000 annually, to promote the grain trade or market in any city which has a public warehouse. Such statement shall contain the names and post-office addresses of all claimants, together with the amount due each; and the secretary of state shall audit said accounts."

The legislature has made appropriations from time to time for certain specific conventions and if these are for public purpose which is state wide, they have been held to be valid. See State ex rel. American Legion 1941 Conv. Corp. v. Smith, (1940) 235 Wis. 443. A somewhat different problem is presented in your case. Here we are only dealing with the question as to whether the expenditures contemplated "promote the grain trade or market," since the appropriation is so restricted.
A convention of the National Association of State Warehouse Departments, while it would no doubt result in the exchange of valuable information, is only of direct benefit to the warehouse commission itself and not to the grain trade and market. It is, of course, conceivable that there might be some advantage indirectly derived at some future time which would benefit the "grain trade or market," but since this, at best, lies in the realm of remote possibility, we do not believe that the statute can be so construed.

The validity of an appropriation of this sort depends upon its being for a public and state wide purpose. Such benefits may not lie in the field of "conjecture and speculation." See State ex rel. American Legion 1941 Conv. Corp. v. Smith, supra, p. 463. Therefore, the statute itself would be illegal if it allowed expenditures of funds for remote benefits.

It is our opinion therefore that the proposed expenditure may not be made.

Motor Carriers—Municipalities—Municipality renting motor truck without driver held to be a private motor carrier under definitions provided by sec. 194.01 (5), (11) and (14). Persons furnishing truck and driver for municipality held to be contract motor carriers. Sec. 194.05 (1) does not provide exceptions in above cases.

October 18, 1947.

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

You have requested an opinion as to whether vehicles employed on a time basis in the manner listed below, where public authorities have complete control and direction of the operation, are exempt from ch. 194, the motor vehicle transportation act:

1. If a municipality rents a truck by the hour with gas, oil, maintenance, etc. furnished by the owner but with no driver furnished.
2. If a municipality rents a truck by the hour with gas, oil, maintenance, etc. furnished by the owner and with driver also furnished by the owner.

3. If a municipality hires a driver with a truck, when the driver owns the vehicle and is paid on a time basis, usually at an hourly rate. Compensation includes wages and rental of the truck.

4. Same conditions as question 3, except that wages and truck rental are paid as separate items.

Sec. 194.05 (1) of the statutes formerly read as follows: "This chapter shall not apply to motor vehicles owned or operated by the United States, any state, or any political subdivision thereof." The words "or operated" were deleted in 1939. As this section now stands the words are clear and unequivocal. The vehicle must be owned by the United States, any state, or any political subdivision thereof to come under the specific exemption of sec. 194.05 (1).

The question remains, however, as to whether a municipality under any other condition you have named is a private motor carrier, in which case the owner of the truck would be a lessor, or whether the owner of the truck is a contract motor carrier and the municipality not a carrier at all. The several classes of carriers are defined in sec. 194.01 as follows:

"(5) 'Common motor carrier' means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle between fixed termini or over a regular route upon the public highways, passengers or property other than live stock, fluid milk or other farm products or farm supplies transported to or from farms. The transportation of passengers in taxicab service shall not be construed as being that of a common motor carrier.

"(11) 'Contract motor carrier' means any person engaged in the transportation by motor vehicle of property for hire and not included in the term 'common motor carrier of property.'

"(14) 'Private motor carrier' means any person except a common or contract motor carrier engaged in the transportation of property by motor vehicle other than an automobile or two-wheeled trailer used therewith, upon the public highways."
It should be noted here that the statutes contemplate the fact that a truck owner may lease his vehicle *without driver* to another who operates it as a private motor carrier. See sec. 194.44 (2). This section allows either the owner, or lessee to secure a private motor carrier permit for operation.

In the first question you have asked, it seems clear that where the truck is furnished by the owner, together with gas, oil and maintenance, the municipality is a private motor carrier and the owner is a lessor, as contemplated by sec. 194.44 (2). The furnishing of the gas, oil and maintenance is a mere incidental and of no effect so far as the legal status of the parties in relation to each other is concerned.

The last three questions involve almost the same factual situations. The driver is furnished with the vehicle. Whether he is the actual owner or not is not material. It is also of no consequence in what manner the compensation is paid, whether in a lump sum for truck and driver or broken down into separate items. These are mere matters of bookkeeping and do not go into the essence of the legal relationship between the parties.

In each case the owner of the truck is a "contract motor carrier." He is engaged in the transportation of property for hire. The owner either personally or by his employe is engaged in actually driving the vehicle and in so doing transports the property. This is distinguished from the case of a lessee of a vehicle who transports the property in a leased vehicle of another. In the case of *Standard Oil Co. v. Public Service Comm.* (1935) 217 Wis. 563 the court held that an agent of a company on contract to operate a bulk oil station and furnishing a truck chassis exclusively for the company's business in the operation of the bulk oil station was an agent of the company and not a carrier of any sort. The company was held to be a private carrier.

This case can be distinguished on the facts involved. An examination of the briefs filed in this case discloses that the company stressed the fact that under the terms of its contract with the owner of the vehicle, the relationship of principal and agent was fully established. He conducted the business of the company as their representative. Con-
tracts with these terms appear to have been a standard practice among oil companies, the purpose of such arrangement being that ownership of the truck by the employee would insure its maintenance and upkeep. The agents receive sufficient compensation to allow them to purchase the truck chassis. It should also be pointed out that in the decision in this case, p. 568, the court pointed out that the owner of the truck was engaged, among other things, in selling and delivering the principal's goods. In other words transportation was not the only thing involved. It should be pointed out also, that under the contract it was impossible for the employee to use the vehicle to transport for either himself personally or for others, so he was neither a private motor carrier nor was he competing in the contract carrier class.

Unfortunately, the law does not distinguish between contract motor carriers who engage in the business in an incidental manner and perhaps for only a few jobs per year and those who make the business a full-time occupation. Consequently, we cannot make an exception in the cases you have set forth, as all elements of a contract for the transportation of property for hire are present.

REB

Pensions—Policemen—Firemen—Wisconsin Retirement Fund—Interpretation of chapters 206 and 556, Laws 1947, as they apply to policemen and firemen outside of cities of the first class.

Frederick N. MacMillin,
Executive Director,
Wisconsin Retirement Fund.

As a result of the enactment of ch. 206, Laws 1947, it will be necessary for you to make preparations for the implementation of the provisions of the act as modified by ch. 556, Laws 1947. You request our opinion as to whether the following statements comprise a correct interpretation of the effect of these enactments insofar as policemen and firemen are concerned:
(1) In cities of the second and third class, and in villages to which sec. 61.65 is applicable, which elected to become participating municipalities under the provisions of sec. 66.90, policemen first employed on or after January 1, 1948 will become participating employes under said latter section upon completion of the qualifying period if they meet the requirements of 66.90 (3) (d).

(2) In any city of the second or third class, or any village affected by sec. 61.65, which has not elected to become a participating municipality on or before January 1, 1948, all policemen first employed on or after January 1, 1948 will be included under 66.90 at the end of the qualifying period without action by the city council or village board, and with respect to these policemen the governing body will be required to act in all respects as though the city or village had voluntarily elected to become a participating municipality under 66.90.

Both of these interpretations are correct. Section 62.13 (9) provides that each city of the second or third class shall have a police pension fund of the type therein specified. Paragraph (e) of that subsection (as created by sec. 15 of ch. 206, Laws 1947) provides:

"No person who, prior to January 1, 1948, had not contributed to a police pension fund established pursuant to this subsection shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the police department in a city of the second or third class, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a police pension fund pursuant to this subsection, and who can otherwise qualify, shall be, or become, a participating employe under section 66.90. If any such participating employe shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

Section 61.65 provides that every village having a population of 5,000 or more according to the last federal census
shall have a police department and police pension fund of the type specified in sec. 62.13. Section 61.65 (6) (as created by sec. 12 of ch. 206, Laws 1947) provides:

"No person who, prior to January 1, 1948, had not contributed to a police pension fund established pursuant to this section shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the police department in a village having a population of 5000 or more according to the last federal census, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a police pension fund established pursuant to this section, and who can otherwise qualify, shall be, or become, a participating employe under section 66.90. If any such participating employe shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

Sec. 66.90 (4) (a) as amended by ch. 556, Laws 1947, provides in part:

"** A municipality which has not elected to participate but some of whose employes will be included within and be subject to this fund on or after January 1, 1948 shall be included within and be subject to this fund effective January 1, 1948 as though such municipality had elected to participate herein, except that, until such municipality does actually so elect and such election becomes effective, its employes included within and subject to this fund shall be only those specified by sections 61.65 (6), 61.65 (7), 62.18 (9) (e), 62.13 (9a), 62.13 (10) (f) and 62.13 (10) (g)."

(3 In every city of the fourth class, all policemen first employed on or after January 1, 1948 will become participating employes under 66.90 if otherwise eligible in conformity with (1) and (2) above. All other policemen in cities of the fourth class not now participating municipalities will likewise become participating employes as of January 1, 1948 if otherwise eligible unless they are properly contributing to a police pension fund established in con-
formity with 62.13 (9a). The clerk or other representative of each city of the fourth class should indicate the situation which probably will exist in that city on December 31, 1947 by filing with the Wisconsin retirement fund a statement that apparently there will or will not be a police pension system established pursuant to 62.13 (9a) in effect in that city on December 31, 1947.

The interpretations made by this paragraph are correct. Section 62.13 (9a) (as renumbered by section 14 and as amended by section 16 of ch. 206, Laws 1947) reads:

"In cities of the fourth class the council may annually and from time to time provide by ordinance for the pensioning, out of the general fund or otherwise, of members of the police department who have served for a term of 20 years or more, and shall have reached the age of 55 years, or who shall be disabled or superannuated, and for the widows and orphans of deceased members. Such pension shall not exceed one-half the salary of such officer at the time of his pensioning or death. No person who, prior to January 1, 1948 had not contributed to a police pension fund established pursuant to this subsection shall be permitted to contribute to such fund or become a member thereof on or after said date; nor shall he or his widow or child be, or become, entitled to receive any benefit from such fund or under any such ordinance which may have been passed after December 31, 1947 pursuant to this subsection. Any person who, after December 31, 1947, becomes a member of the police department in a city of the fourth class, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a police pension fund established pursuant to this subsection, and who can otherwise qualify, shall be, or become, a participating employe under section 66.90. If any such participating employe shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

Sec. 66.90 (17) (a) provides that the board of trustees of the Wisconsin retirement fund "is authorized and directed to: * * * 6. Request such information from any * * * participating municipality as shall be necessary for the proper operation of the fund."
Technically it might be argued that until January 1, 1948 many of the cities of the fourth class actually will not be participating municipalities. However, it was the intention that the board of trustees should have the right to obtain from the municipalities which will participate in the fund all information necessary to enable the board to administer the fund. Among the duties of such board under sec. 66.90 (17) (a) 5 is the duty of certifying the municipality contribution rate. This contribution rate can be determined with any degree of accuracy only after the board has received information about the number and service record of the employees of the municipality which will become a participating municipality as of the succeeding January 1. Since under 62.09 (11) the city clerk has "the care and custody of * * * all papers and records of the city," he would know of existing ordinances creating a pension fund in such city under 62.13 (9a). If such a pension fund is in existence in any city, the clerk could furnish a statement to that effect. If no such pension fund is in effect in that city, the city clerk could, after consulting the city council about the matter, furnish a statement to the effect that there probably will or will not be such a pension fund in effect in that city on December 31, 1947.

(4) In each city of the fourth class which had not elected to become a participating municipality and which does not on December 31, 1947 have a police pension fund, all policemen otherwise eligible as participating employees under 66.90 will become such on that date without action of any kind by the city. The city council will be required to act in all respects relative to such policemen as though the city had voluntarily acted to become a participating municipality. Prior service credits will be computed for such persons on the basis of 2 times the rate of the 7 per cent municipality credit for current service unless that city acts to become a participating municipality to be effective not later than January 1, 1948 and elects to provide prior service credits on other than the 2 basis.

These statements of interpretation are correct. In connection with the first and second statements made in this paragraph, reference is hereby made to 62.13 (9a) and 66.90 (4) (a) quoted above.
In connection with the last statement made in said paragraph, reference is made to said statutes and 66.90 (7) (a) which provides in part:

"For the purpose of determining the amount of any annuity or benefit to which an employe or beneficiary shall be entitled, each participating employe shall be credited with the following amounts, as of the dates specified:

"1. For prior service, each participating employe who is an employe of a participating municipality on the effective date, shall be credited, as of such date, with a prior service credit of an amount equal to the accumulated value, as of such date, of the contributions which would have been made during the entire period of prior service of such employe ***

"2. For current service, each participating employe shall be credited with the following amounts as of the dates specified: *** (b) Normal credits of amounts equal to each payment of normal contributions received from such employe * * *.

Section 66.90 (6) (a) 1 (as amended by section 31 of ch. 206 and section 24 of ch. 556, Laws 1947) provides: "*** the normal contribution rate on *** earnings for *** employes who are *** policemen *** and firemen *** shall be 7 per cent ***.

A policeman is required to make a current service contribution at the 7 per cent rate and the municipality is required to make a similar contribution for current service, and 62.13 (9a) provides that he shall be given prior service credits at the "2" rate unless the municipality has elected some other rate. Section 66.90 (7) (a) 1 requires that he be given a prior service credit of an amount equal to the accumulated value as of the effective date of the contributions which would have been made during the entire period of prior service of the employe. Inasmuch as both the employe and the municipality would have contributed at the 7 per cent rate for current service if the law had been in effect during the prior service of the policeman, he must be given prior service credit on the basis of 2 times the rate of the 7 per cent municipality credit for current service unless the city acts to become a participating municipality not later than January 1, 1948 and elects to provide prior service credits on other than the 2 basis.
(5) In cities of the second and third class and in villages to which sec. 61.65 is applicable, firemen first employed on or after January 1, 1948 who qualify will become participating employees under 66.90 in the same manner as policemen under (1) and (2) above.

This interpretation is correct.

Sec. 61.65 (7) (as created by sec. 13, ch. 206, Laws 1947) and 62.13 (10) (f) (as created by sec. 18 of ch. 206, Laws 1947) provide as follows:

"61.65 (7) No person who, prior to January 1, 1948, had not contributed to a firemen's pension fund established pursuant to this section, shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the fire department in a village having a population of 5500 or more according to the last federal census, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a fireman's pension fund established pursuant to this section, and who can otherwise qualify, shall be, or become, a participating employee under section 66.90. If any such participating employee shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

"62.13 (10) (f). No person who, prior to January 1, 1948, had not contributed to a firemen's pension fund established pursuant to this subsection shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the fire department in a city of the second or third class, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a firemen's pension fund established pursuant to this subsection, and who can otherwise qualify, shall be, or become, a participating employee under section 66.90. If any such participating employee shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by
which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

(6) In cities of the fourth class where a pension system adopted in conformity with 62.13 (10) [under the option granted by 62.13 (10) (g)] is in effect on December 31, 1947, all full-time firemen first employed on or after January 1, 1948 who qualify will become participating employees under 66.90 in the same manner as under (5) above. In cities of the fourth class which elected to become participating municipalities under 66.90, every fireman first employed on or after January 1, 1948 who is otherwise eligible will become a participating employee under 66.90 regardless of whether he is a full-time fireman or not.

Both of these interpretations are correct.

In connection with the first statement in this paragraph, reference is made to 62.13 (10) (g) (as renumbered by sec. 17 and amended by sec. 19 of ch. 206, Laws 1947) which provides:

"Each city of the fourth class shall install a pension system for full-time firemen pursuant to this subsection, unless the common council shall adopt a pension plan for such firemen in the same manner as provided for policemen by section 62.13 (9a), or unless the city shall act or shall have acted to become a participating municipality pursuant to section 66.90, in which event members of the fire department shall be included under the provisions of section 66.90 if they can otherwise qualify thereunder provided there is not existing in such city a system created pursuant to this section. No person who, prior to January 1, 1948 had not contributed to a firemen's pension system established pursuant to this paragraph or section 62.13 (9a) shall be permitted to contribute to such a system or become a member thereof on or after such date; nor shall he or his widow or child be, or become, entitled to receive any benefit from either such system or under any ordinance which may have been passed on December 31, 1947, pursuant to this paragraph or section 62.13 (9a). Any person who, after December 31, 1947 becomes a full-time fireman in a city of the fourth class or who was such a full-time fireman on said date, but who, in each such case had not, on or before such date, properly contributed to a firemen's pension system established pursuant to this paragraph, or section 62.13 (9a), and who can otherwise qualify, shall be, or become, a par-
participating employe under section 66.90. If any such participating employe shall be entitled to a prior service credit, he shall be given such credit at the 2 rate unless the municipality by which he is employed shall have elected to become a participating municipality under said section, in which case the rate elected by such municipality shall be used."

The conclusion stated in the second sentence of paragraph (6) above is not based upon any change resulting from the enactment of ch. 206 or 556, Laws 1947. Prior to the passage of those acts firemen in cities of the fourth class which elected to become participating municipalities were included as participating employees if they otherwise qualified as employees under 66.90 (3) (d) which defines an employe as being:

"Any person who:
1. Receives earnings out of the general funds of any municipality or out of any special fund or funds controlled by any municipality as payment for personal services.
2. Whose name appears on a regular pay roll of such municipality.
3. Is employed in a position normally requiring actual performance of duty during not less than 600 hours a year in such municipality, and
4. Has completed at least 6 months continuous service or 12 months total service for the municipality by which such person is employed when such person otherwise first becomes eligible for participation in the fund;"

Such firemen will continue to become participating employees on or after January 1, 1948 if and when they qualify the same as before the passage of chapters 206 and 556, Laws 1947.

(7) In every city of the fourth class where a pension plan for firemen conforming to sec. 62.13 (9a) [adopted pursuant to 62.13 (10) (g) ] is in effect on December 31, 1947, full-time firemen first employed on or after January 1, 1948 will become participating employees under 66.90 upon completion of the qualifying period therein provided for if otherwise eligible. Every other full-time fireman in such cities must likewise become a participating employe on January 1, 1948 if otherwise eligible unless on December 31, 1947 he was properly contributing to a firemen's
pension system established under 62.13 (9a). In these cities which have elected to become participating municipalities every fireman in both the above categories will become a participating employe if otherwise eligible regardless of whether full-time or not. The clerk of each city of the fourth class should indicate the situation which will exist in that city on December 31, 1947 by filing with the Wisconsin retirement fund a statement that (a) there probably will or will not be a firemen's pension system established pursuant to 62.13 (9a) or 62.13 (10) (g) in effect in such city on December 31, 1947 and (b) that there probably will be either no full-time firemen or a specified number of such firemen in the service of that city on December 31, 1947.

These interpretations are correct. In connection with the first two statements made in this paragraph, reference is made to 62.13 (10) (g) quoted in answer to paragraph (6) above.

In connection with the third statement in this paragraph, reference is made to the answer given to the last statement in paragraph (6) above because this interpretation likewise depends upon the provisions of 66.90 of the statutes prior to its amendment by chapters 206 and 556, Laws 1947.

In connection with the last statement, reference is made to the answer given to the last statement made in paragraph (3) above. The reasoning there given is applicable to such last statement.

(8) In cities of the fourth class not now participating municipalities under 66.90 where no fireman's pension plan will be in effect on December 31, 1947, all full-time firemen who otherwise qualify will become participating employes under 66.90 on January 1, 1948 in the same manner as policemen under (4) above. Other full-time firemen otherwise eligible who complete the qualifying period after January 1, 1948 will become participating employes under 66.90. In such cities which have elected to become participating municipalities under 66.90, every fireman otherwise eligible will become a participating employe under said section even if not on a full-time basis.

These interpretations are correct. In connection with the first two statements, reference is made to sec. 62.13 (10) (g) and 66.90 (4) (a), both quoted above.
In connection with the last statement in this paragraph, reference is made to the answer to the last statement made in paragraph (6) quoted above. The interpretation made there is applicable here.

(9) A person with a record of 10 years of general municipal employment prior to the date when 66.90 became effective in the municipality would under said section receive no prior service credit for such years if he resumes municipal employment in that municipality after such date except that his qualifying period would have been completed, but he would become a participating employee as of the date of re-employment. Should any different treatment be accorded to a person with a similar record of 10 years previous service as a policeman or fireman if the position of policeman or fireman is resumed after the effective date? Any previous membership of such a person in a pension system pursuant to 62.13 (9) or (10) would have been terminated when the previous employment was ended.

Section 62.13 (9) (a) provides in respect to policemen in cities of the second or third class that there shall be paid into the police pension fund "three and one-half per cent of the salary of each member of the department." Section 62.13 (10) (a) contains a similar provision with reference to firemen in cities of the second and third class. Under 62.13 (9) (e) and 62.13 (10) (f) quoted above, it is only persons "who, prior to January 1, 1948, had not contributed to" the police and fire pension systems established respectively by 62.13 (9) (a) and 62.13 (10) (a) who are excluded from those systems, and it is only persons "who, ** had not, on or before such date [December 31, 1947] properly contributed to" these respective systems who must be or become participating employees under sec. 66.90. Since the persons to whom you refer presumably will have properly contributed to a policemen's or firemen's pension system established under 62.13 (9) or (10) prior to January 1, 1948, although such contributions may have been made several years prior thereto, these persons will not be excluded from these old systems or forced to come under 66.90 upon their return to municipal service in their former capacity of policeman or fireman. Upon such return, they will be compelled to contribute 3½ per cent of their salary un-
der 62.13 (9) (a) or 62.13 (10) (a). Section 66.90 (3) (e) 2 (as amended by sec. 22 of ch. 206, Laws 1947) excepts from the definition of employee as used in 66.90 persons “who are contributing to any policemen’s or firemen’s pension fund by virtue of sec. 61.65 or sec. 62.13 (9) or (10)” except that any such person may voluntarily elect to relinquish rights under the pension funds therein referred to and come under the Wisconsin retirement fund. Consequently it is our opinion that persons referred to in paragraph (9) will return to membership in a policemen’s or firemen’s pension fund established pursuant to sec. 62.13 (9) or (10) rather than become participating employees under 66.90 unless they make the election to do the latter as provided by 66.90 (3) (e) 2.

(10) Policemen and firemen included as participating employees under 66.90 on June 7, 1947 should make a normal contribution of 7 per cent on participating earnings received for and after that date. Policemen and firemen who become participating employees under 66.90 after June 7, 1947 shall make a normal contribution of 7 per cent on participating earnings received after they become participating employees.

These interpretations are correct. Section 66.90 (6) (a) 1 quoted above provides that the normal contribution rate for policemen and firemen shall be 7 per cent. This provision was enacted by sec. 31 of ch. 206, Laws 1947. This act did not contain any section which provided when the act should become effective. The act was published June 6, 1947.

370.05 of the statutes provides:

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

Thus ch. 206, Laws 1947, became effective on June 7, 1947, and policemen and firemen who were participating employees on that date should have contributed 7 per cent of participating earnings received for and after that date. Policemen and firemen who became participating employees after that date should have contributed 7 per cent of participating earnings received after they became participating employees.
(11) If a person is to be included as a participating employee effective January 1, 1948 and is entitled to prior service credits because of 15 years of service subsequent to the completion of the qualifying period, of which the first 5 years were in the water department, for example, and the last 10 years were as a policeman, presumably such prior service credits would be computed for the first 5 years on the 5 per cent basis, and for the last 10 years on the 7 per cent basis.

This interpretation is correct. Under 66.90 (7) (a) 1 quoted above, the employe is entitled to prior service credit "of an amount equal to the accumulated value, * * * of the contributions which would have been made during the entire period of prior service of such employe."

Section 66.90 (6) (a) provides:

"Each participating employe shall make contributions to the fund as follows:
"1. Normal contributions of 5 per cent of each payment of earnings * * * ."

Since under 66.90 (6) (a) 1 this person would have contributed 5 per cent for the 5 years during which he was an employe of the water department and would have contributed 7 per cent for the 10 years during which he was a policeman, his prior service credits should be computed upon those respective bases.

(12) In some police and fire departments there are employees (such as, for example, stenographers, janitors and so forth) whose duties are not substantially different from those of similar employees in other municipal departments. There are also employes whose duties might be considered to be of a borderline nature, such as police matrons, chauffeurs for police chiefs and fire chiefs, clerical employes in police identification bureaus, etc. Will the 5 per cent or the 7 per cent normal contribution rate be applicable to such types of employes?

Under 66.90 (6) (a) 1, the 7 per cent rate applies only to conservation wardens, policemen and firemen. The persons to whom you refer obviously are not conservation wardens. Although they are employed in the police department or the fire department, they are neither policemen nor fire-
men, and hence the 5 per cent rather than the 7 per cent rate is applicable to their participating earnings.

In *State ex rel. Koch vs. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Milwaukee*, 244 Wis. 580, 13 N. W. 2d 56, our court held that a senior clerk stenographer in the police department of a first class city was not entitled to pension benefits as a "policeman." The court referred to the fact that the act which created the pension system provided benefits not only for the policemen themselves but also for their widows and children and said (p. 584):

"** By thus expressly including also the widows and orphans of deceased members of the police department as participants in the pension benefits there is evidenced the intent to provide for the care of those subjected to the consequences of the greater hazards incurred as police officers by members of police departments in the line of their duties. **"

Chapter 206, Laws 1947, which amended the provisions of sec. 66.90 to compel the inclusion therein of certain policemen and firemen and fixed a contribution rate of 7 per cent for all policemen and firemen, also created sec. 102.455 of the statutes which provides a special disability and death benefit for those policemen, firemen and conservation wardens who are participating employes under sec. 66.90 and for the widows and children of such participating employes. These special benefits were provided for the policemen and firemen because of the greater hazards which they incur. Presumably, none of the persons whom you have mentioned in paragraph 12 will be incurring the greater hazards referred to by our court in the *Koch* case, and hence would not be considered as policemen or firemen within the meaning of sec. 66.90 or 102.455.

(13) In some smaller cities and villages the governing body has combined various duties to be performed by a single individual. For example, one person may act as village marshall, water superintendent, village hall janitor, street superintendent, etc. Where there is such a combination of duties should the 5 per cent or the 7 per cent normal contribution rate be applicable? One realistic solution would be to have the 7 per cent normal contribution rate apply in those instances where an individual devotes 51 per
cent or more of full time to the duties of a policeman or fireman or both.

Sec. 66.90 does not provide that different contribution rates may be applied to different portions of the earnings of a participating employe. Hence it will be necessary that some administrative policy be adopted to take care of the cases where one person performs some duties which would make him subject to the 5 per cent contribution rate and other duties which would make him subject to the 7 per cent contribution rate. It is our opinion that the solution suggested by you does not conflict with sec. 66.90 and is both workable and reasonable and hence may be adopted.

(14) A policeman or fireman receiving a pension from the same or any other municipality because of police or fire service will still be eligible for inclusion as a participating employe if otherwise eligible.

This interpretation is correct. Section 66.90 (3) (e) (as amended by sec. 22 of ch. 206, Laws 1947) excludes from the definition of employe under 66.90 persons:

"2. Who are contributing to any policemen’s or firemen’s pension fund by virtue of section 61.65 or section 62.13 (9) or (10) * * *

Since the policemen or firemen receiving a pension under 62.13 or 61.65 would not be contributing to any one of the pension funds referred to in 66.90 (3) (e) 2, they would still be entitled to be included as participating employees under 66.90 if otherwise eligible thereunder.

No portion of sec. 66.90 excepts from the definition of "employe" thereunder a policeman or fireman who may be receiving a pension under any annuity and benefit fund established for policemen in cities of the first class pursuant to ch. 589, Laws 1921, or under any annuity and benefit fund established for firemen in cities of the first class pursuant to ch. 423, Laws 1923. Thus such former policemen or firemen may become participating employes if otherwise eligible.

In writing this opinion, ch. 362, Laws 1947, which extensively renumbered 66.90 has been disregarded since, by the provisions of said act, such renumbering does not become effective until the 1947 session laws are printed.

JRW
Annuity and Investment Board—State Treasurer—Safekeeping Receipts—Safekeeping receipts for United States treasury securities purchased by the state annuity and investment board but left on deposit with federal reserve bank, which receipts are delivered to the state treasurer under secs. 14.42 (17) and 42.24, Stats., should run to the state annuity and investment board and bear upon their face the name of the fund to which the securities described in the receipt belong.

October 21, 1947.

ALBERT TRATHEN,

Director of Investments,

State Annuity and Investment Board.

From your request for an opinion it appears that there are several millions of dollars' worth of U. S. treasury securities held for safekeeping in the Federal Reserve Bank at Chicago. These securities are owned by various funds whose investment is under the control of the state annuity and investment board according to sec. 25.17 (1) (as amended by chapters 469 and 614, Laws 1947), which provides:

"The state annuity and investment board shall have power and authority and it shall be its duty:

"To have exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from any of the following funds: The several funds of the state retirement system, the life fund, the state insurance fund, the soldiers' rehabilitation fund, the funds created by sections 25.31, 102.49 and 102.59, the state employees' retirement fund, the post-war rehabilitation trust fund, the post-war construction and improvement fund and other similar post-war and trust funds, funds established or referred to by sections 25.20, 25.29, 25.30, 20.573, 34.08, 20.491, 102.65 (10) and 220.20 and all other funds of the state or of any state department or institution, except funds which by the constitution are required to be controlled and invested by the commissioners of public lands, funds which are required by specific provision of law to be controlled and invested by any other authority, and moneys in the university trust funds."
Secs. 14.42 (17) and 42.24 provide:

"14.42 (17) Whenever any federal securities are purchased under authority of any law and the state treasurer is custodian thereof he may accept and hold safekeeping receipts of a federal reserve bank for such securities. Each such receipt shall be identified on its face with the name of the fund to which the securities described in the receipt belong."

"42.24 The state treasurer shall be ex officio treasurer of the state annuity and investment board and of the state retirement system, and shall give an additional bond in such amount and with such corporate sureties as shall be required and approved by the state annuity and investment board, the cost of which shall be borne by said board. Any of the securities purchased by the state annuity and investment board for any of the funds whose investment is under the control of said board may be deposited by the state annuity and investment board or the state treasurer in vaults or other safe depositories outside of the office of the state treasurer, and either in or outside of the state of Wisconsin, but a safe-keeping receipt shall be delivered to the state treasurer for all securities so deposited. Every such safe-keeping receipt shall describe the securities covered thereby and be payable on demand without conditions to the state annuity and investment board or to any designated fund under the control of said board or to the state treasurer."

Heretofore the safekeeping receipts delivered to the state treasurer under sec. 42.24 have been made out to the state treasurer with a notation thereon designating the fund whose moneys were used to purchase the securities. These safekeeping receipts have been kept in the state treasurer's vault.

Chapter 469, Laws 1947, increased the duties of the state annuity and investment board by providing that said board should invest the moneys of several other funds which previously had been invested by other state departments or agencies.

A question has arisen with respect to the correct wording of the safekeeping receipts covering U. S. treasury securities held in the Federal Reserve Bank, which receipts are delivered to, and kept by, the state treasurer. You ask whether these safekeeping receipts should run to "state
treasurer of Wisconsin (______ fund), 'state of Wisconsin (______ fund), 'state of Wisconsin annuity and investment board (______ fund), — or how should they be written?"

You are of the opinion that the receipts should have the same wording as the bonds which are registered as to principal in the name of the "state annuity and investment board." Thus, when transfer or delivery of the securities is required, your board would give the state treasurer a receipt for the safekeeping receipt and would deal directly with the Federal Reserve Bank showing your authority by the customary certificates and affidavits.

In Attorney General ex rel. Blied v. Levitan, 195 Wis. 561, 219 N. W. 97, our court stated (page 563):

"Sec. 42.24, Stats., provides that 'The state treasurer shall be ex officio treasurer of the Annuity Board and of the State Retirement System, and shall give an additional bond in such amount and with such corporate sureties as shall be required and approved by the Annuity Board, the cost of which shall be borne by the state.' This is all we find in the State Retirement Law relating to the duties of the state treasurer with reference to funds belonging to the State Retirement System. This provision of law does no more than make the state treasurer the mere custodian of the funds and securities belonging to the State Retirement System. He is merely the treasurer of the Annuity Board. He is charged with no responsibility concerning the investment or management of the funds and securities belonging to the State Retirement System. Being merely the custodian of these funds and securities, the management of which is vested exclusively and comprehensively in the Annuity Board, he can incur no liability in making such disposition of the funds and securities deposited with him as may be directed by the Annuity Board. His duty is to safely keep such securities while in his custody, and there his duty ends."

In XXII Op. Atty. Gen. 365 it was held that the state treasurer is merely the custodian of funds and securities of the annuity board and state retirement system and must make such disposition of such funds and securities deposited with him as may be directed by the said board. That opinion related particularly to securities belonging to the state insurance fund which had been deposited in the state treasury vault.
In XVIII Op. Atty. Gen. 543 it was held that notes and mortgages executed in connection with loans made by your board should run to "the state of Wisconsin (state _____ fund)" and that the blank should be completed by the insertion therein of the name of the fund from which the moneys actually were loaned. However, this opinion was based largely upon sec. 25.17 (3) which provides that it is the duty of your board "To make all loans from any funds within its jurisdiction in the name of the state * * *." The same conclusion would not necessarily follow with respect to other securities.

Since the state treasurer is ex officio treasurer of the state annuity and investment board as well as of the state retirement system, he would be the custodian of all of the securities purchased by the state annuity and investment board under sec. 25.17 (1) and deposited with him by said board whether such securities belong to the state retirement system or some other fund.

Under sec. 42.24 your board is authorized to leave securities on deposit in the Federal Reserve Bank of Chicago provided a safekeeping receipt therefor is delivered to the state treasurer for all securities so deposited. Under 14.42 (17) the state treasurer is authorized to accept and hold these safekeeping receipts. The latter statute also requires that such receipt should indicate on its face the name of the fund to which the securities described in the receipt belong. Under 42.24 the safekeeping receipt, in addition to describing the securities, must also be payable on demand without conditions either to the state annuity and investment board, to any designated fund under the control of said board or to the state treasurer.

(The state treasurer is merely the custodian of the safekeeping receipts as he would be the custodian of the securities covered by them if such securities were delivered to him.) As indicated in Attorney General ex rel. Blied v. Levitan, supra, he has no duty beyond that of safely keeping the securities or the receipts for them. Since your board has "exclusive control of the investment and collection of the principal and interest of all moneys * * * invested" from the funds, the safekeeping receipts should be made out in a manner which, in addition to complying with the
Opinions of the Attorney General

It is our opinion, therefore, that these safekeeping receipts should run to the "state annuity and investment board" and should bear upon their face the name of the fund to which the securities described in the receipt belong.

JRW

Towns—Chairman—Public Officers—Appointment—

Town chairman appointed pursuant to sec. 17.25, Stats., but being member of appointing body, holds office de facto until contrary adjudication.

Henry J. Olk, Jr.,
District Attorney,
Antigo, Wisconsin.

You have informed us that a town chairman of Langlade county has resigned and that, pursuant to sec. 17.25, Stats., the remaining supervisors and the town clerk met and appointed as the new chairman one of the supervisors. The new appointee then resigned his former position in order to take the chairmanship, and an additional supervisor was appointed to take his place. You desire to know whether the town chairman is acting under a valid appointment.

The supreme court of this state has apparently never passed on the question as to whether, in a situation such as you have presented here, an appointing body can name one of its members to fill a vacancy. You have pointed out that the weight of authority appears to be that they may not, for reasons of public policy, and have cited 46 C. J. 940, to this effect—even where the person appointed does not vote for himself.
We agree with you that this appears to be a correct statement of the usual rule. See McQuillan on Municipal Corp., §477, Vol. 2, p. 459.

However, in this particular case the appointee is already a member of the town board; he has merely been appointed chairman thereof. He is not gaining any remuneration for this appointment, and due to the fact that he is familiar with the town's business, he is probably in a better position to act as chairman than one who must first acquaint himself with the present affairs of the town. The law allows a county board to select its chairman from its members and we doubt that there would be anything intrinsically wrong with the instant appointment, with the possible exception of its being against public policy. We agree that if the court of this state followed the weight of the law it would probably find that the appointment was invalid, but we cannot see that an opposite finding would not be possible under the facts presented.

Assuming that the appointment was invalid and that the appointee is not the de jure town chairman, we believe that he holds the office de facto. Our supreme court held in the case of State ex rel. Jones v. Oates, (1893) 86 Wis. 634 that a de facto officer is one who is in possession of an office and discharging its duties under color of authority. It further stated that "color of authority" means authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. The definition given in this case was again set forth as the rule in this state in the case of Schoonover v. Viroqua, (1944) 245 Wis. 239.

As an officer de facto his acts are valid and effectual where they concern the public or third persons until the title to his office is adjudged insufficient. See Dean v. Gleason, (1862) 16 Wis. 1, State ex rel. Blumer v. Canavan, (1914) 155 Wis. 398, XXVII Op. Atty. Gen. 311.

REB
Motor Carriers—Leased Vehicles—Provisions of sec. 194.44 (2), Stats., do not apply to "private motor carrier" as defined by sec. 194.01 (14).

Section 194.44, Stats., construed.

B. L. Marcus, Commissioner,

Motor Vehicle Department.

You have requested an opinion concerning the following two questions:

1. Does section 194.01 (14) exempt 2-wheel trailers from the provisions of section 194.44 (2) when such trailers are leased to private motor carriers to be towed by automobiles?

2. Is section 194.44 (2) a mandatory law, or can a person engaged in the business of leasing motor vehicles without drivers, or trailers to be propelled by motor vehicles, procure a permit under said section if he so desires?

Sec. 194.44, Stats., reads as follows:

“Private motor carriers, permit. (1) No private motor carrier shall operate a motor vehicle upon the public highways without first having obtained from the motor vehicle department a private motor carrier permit therefor.

(2) If any person engaged in the business of leasing motor vehicles without drivers, or leasing trailers to be hauled or propelled by a motor vehicle, desire to lease such motor vehicles without drivers, or to lease such trailers to private motor carriers, such lessor shall be entitled to procure a private motor carrier permit in his name for the motor vehicles or trailers to be leased to private motor carriers. In such event, a lessor’s private motor carrier’s permit on a motor vehicle or trailer being used by a private motor carrier shall constitute compliance with this chapter on the part of such motor carrier with respect to the requirements for a permit on such motor vehicle or trailer. Provided, that in the event of a leased motor vehicle or trailer being used by a private motor carrier under permit issued to the lessor of such motor vehicle or trailer, the person in whose name the permit shall have been issued shall be responsible to the state of Wisconsin for the payment of all taxes, fees and other payments due under chapters 85 and 194 because of the operation of the motor vehicle or trailer under such permit, and for the making of all reports in connection with the operation of such motor vehicle or trailer. Provided, that the owner of each such leased motor vehicle or trailer shall before leasing the same comply with the insurance requirements of section 194.41. The annual permit fee for...
each such leased motor vehicle shall be $10 and for each such leased trailer $7.50. It shall be the duty of the department to supervise and regulate the operations of such leased motor vehicles and trailers to effectually accomplish the intent of section 194.02.

(3) The provisions of subsection (2) of this section shall not apply to any motor vehicle leased to or used by any private carrier who obtains a permit as required in subsection (1) of this section."

In answer to the first question, it is pointed out that sec. 194.01 (14) defines “private motor carrier” as a “person except a common or contract motor carrier engaged in the transportation of property by motor vehicle other than an automobile or two-wheeled trailer used therewith, upon the public highways.” This clearly means that a person using a two-wheeled trailer with a private automobile is not classed as a “private motor carrier,” and therefore the provisions of sec. 194.44 which allow either the lessee, or lessee in the business of leasing trucks and trailers to “private motor carriers” to procure a private motor carrier’s permit, are not applicable.

If the person to whom the two-wheeled trailer is leased is a “private motor carrier,” within the definition above given, he is required to have the proper permit as such, or if the use of the rented vehicle, such as a two-wheeled trailer, places the operator in the private motor carrier class, he could operate under a permit secured by the lessor in accordance with the provisions of sec. 194.44 (2).

In answer to your second question, we point out that subsection (2), quoted above, states that the lessor of vehicles “shall be entitled” to obtain a permit, and subsection (3), quoted above, provides that the procedure set forth in subsection (2), by which the lessor may obtain a permit, shall not apply when the lessee has obtained a private carrier permit as provided by subsection (1). This indicates beyond any question that it is optional as to whether the lessor or the lessee obtains the permit. The statute merely assists persons in the business of leasing vehicles in leasing the same, since they obviously can obtain more customers when they are in a position to lease the vehicle complete with permit.

REB
Municipalities—Counties—Budget—A county budget formulated under sec. 65.90, Stats., may appropriate a lump sum for a given department without subdividing the amount as to purpose.

October 24, 1947.

David H. Sebora,
District Attorney,
Chilton, Wisconsin.

You have asked whether a lump sum appropriation to a county highway department covering all of its expenditures including grading, surfacing, oiling, general maintenance, snow drift and ice prevention, administration, insurance, maintenance of garages, marking and signing, and moving fund, would be valid under sec. 65.90 of the statutes.

Sec. 65.90 provides that each county, with certain exceptions, must formulate an annual budget which shall "list all proposed expenditures for each department or activity during the said ensuing year." The statute then describes the procedure which must be taken for adoption of a budget; and in subsec. (5) provides that "the amounts of the various appropriations and the purposes for such appropriations stated in such budget * * * shall not be changed thereafter unless authorized by a vote of two-thirds of the entire membership of the governing body of such municipality."

The opinion has been given by this office that when a budget has been adopted allocating specified portions of the highway department appropriation for specified purposes, the county board may not grant authority to the county highway committee to transfer monies from one fund to another because of the restrictions contained in sec. 65.90 (5). This opinion, however, is not necessarily applicable to the question you have presented.

Subsecs. (2) and (5) of sec. 65.90 utilize different terminology and deal with different phases of budget procedure. The purpose of subsec. (5) in restricting alterations of the budget appears to be to insure special consideration as to changes made in the budget after its adoption. The restrictions of subsec. (5) apply only to changes in purposes as "stated in such budget."
Budgets may be adopted with varying degrees of particularization. The extent of the detail to be stated in the budget, and the extent of restriction of expenditures for particular purposes, may be one of the subjects of controversy in the public hearings held before the budget is adopted. If it is deemed advisable in the adoption of the budget to include a considerable amount of particularization and restriction, then the taxpayers are entitled to the protection accorded by subsec. (5) before any of those restrictions are removed. On the other hand, if a more general budget is adopted, it may be assumed that it is because it is desired to leave a greater amount of discretion in the administrative officers.

Subsec. (2) of sec. 65.90 of the statutes defines the minimum rather than the maximum amount of particularization which must be contained in an annual budget. It does not prevent the budget from going into great detail. If a detailed budget is adopted the county board and the administrative officers are restricted by its provisions.

The amount of detail required in a budget as a minimum is described in the phrase that it shall “list all proposed expenditures for each department or activity.”

Under ch. 83 of the statutes the legislature has set up separate administrative groups to handle all county functions relating to highways. In so doing, we believe the legislature has recognized the highway administrative personnel as a definable “department” within the meaning of sec. 65.90.

Cases dealing with budgetary requirements as to specification of purposes of expenditures are not controlling, at least unless they are decided under identical statutes. The reasoning utilized in such cases is sometimes helpful, however, in throwing light upon the considerations which moved the legislature. In People ex rel. Rocke v. Eastern Illinois & M. R. Co., 167 N. E. 24, 25, 335 Ill. 245 it was held that under a tax levy ordinance requiring specification of the purposes for which appropriations are made, it is unnecessary to specify every item, but a “single appropriate general purpose is sufficient to include every expenditure required for that purpose, though there may be many items.” In that case the stated purpose of the levy was “to
pay the cost of constructing, reconstructing and repairing streets, roads and alleys, including the village's portion of said work or improvement done by special assessments."

The ordinance was held not subject to the objection that it levied a tax for two separate purposes without designating the amount for each purpose separately.

In the case of Becker v. Board of Com'rs of City of Newark, (N. J.) 168 Atl. 746, 747, it was held that a budget provision appropriating a total sum for the operation of a specified department did not need to be subdivided and itemized. The court said:

"* * * The language of the budget act is that in regard to appropriations the budget is to 'state the several purposes and the amount to be appropriated for each purpose for which the anticipated revenues are to be expended for local purposes other than schools.' * * * 'Under the heading of "Appropriations" in the budget, as provided in section six of this act, there shall be set forth the appropriations, itemized according to the respective objects, departments or sub-departments for which they are to be expended, with the amount to be devoted to said object, department or sub-department. The several items of appropriations shall be set forth accurately according to the particular object, department or subdepartment for which the respective amounts are to be expended.'

"I agree with counsel for the city that this statutory requirement is fairly met by a specification in the budget that such and such an amount is assigned, for example, to the office of the director of public affairs, as the expenses of that office. This would properly include the salary of the director, of his deputy, his secretary, and any other clerical help and incidental expenses. I do not think that it should be held necessary to go into further detail. * * *

"It is important, of course, that the taxpayers should be apprised in reasonably specific terms of the amounts proposed to be spent for the conduct of municipal affairs; but it is not necessary, and indeed it would be impossible, practically to state all the subordinate items in such meticulous detail as to deprive the several departments of all elasticity in current management."

It appears to us that sec. 65.90 contemplates that there can and probably will be included in the budget a certain amount of breakdown for expenditures within departments, particularly in view of the provision in subsec. (3) that a
"summary" of the budget shall be published together with a notice of the place where the budget "in detail" is available for inspection.

The amount of detail essential to constitute compliance with minimum requirements, however, we believe would be satisfied by a lump sum appropriation to a department. When the statute says that the budget must list "all proposed expenditures" it apparently refers to the total expenditures of the county or municipality as a whole, and the modifying phrase "for each department or activity" sets the minimum standard for the divisions within which such expenditures must be listed.

BL

Counties—Lease—Words and Phrases—Public Institution—A county board is given power by sec. 59.07 (2), Stats., to lease a county home to a private individual.

Where county leases county home to private individual, the home loses its character as a "public institution" under facts submitted, as that term is used in sec. 49.23, Stats., or in the portion of the social security act appearing in 42 USCA §303 (a).

Donald C. O'Melia,
District Attorney,
Rhinelander, Wisconsin.

You advise us that Oneida county proposes to lease property described as the Oneida county home to a private individual and ask our opinion on the following questions:
1. Has the county power to enter into such a lease?
2. If the answer to question 1 is "Yes," does such home retain its character as a public institution?

The answer to your first question is "Yes." The county owns the property involved. It can discontinue operation of the home at will. The power to lease such property thereafter is given by sec. 59.07 (2) which provides that the county board of each county is empowered at any legal
meeting to: "Make such leases, contracts or other conveyances in relation to lands acquired for public purposes as in their discretion are in the interest of the public welfare."

In sec. 49.14 (3) it is provided that no county in which a county home is established shall contract to conduct the same or to support and maintain the inmates thereof and that all agreements in violation thereof shall be void. It is possible that there might be a violation of this subsection if a county leases its home to a third person under an agreement whereby such person undertakes to continue to operate the home and binds himself to take such persons into the home as may be referred to it by the appropriate county representatives at rates agreed upon which will be paid by the county. The question whether any such an arrangement or anything like it does or does not exist in the present case is one of fact. In your letter of September 25, 1947 you advise us that no such agreement or understanding now exists and for that reason there would not at the present time seem to be any basis for believing that the proposed lease here would be in violation of sec. 49.14 (3).

The answer to your second question is "No." The question arises because of limitations imposed upon the right to receive old-age assistance by sec. 49.23, Wis. Stats., which provides inter alia that old-age assistance shall not be granted or paid to a person "while or during the time he is an inmate of and receives the necessities of life from any public institution maintained by the state or any of its political subdivisions" and also because of a provision in the social security act which contains language which limits the contribution of the federal government to the state having an approved plan of old-age assistance to a certain proportion of the total amount expended as old-age assistance under the state plan with respect to each needy individual age sixty-five or older who "is not an inmate of a public institution." 42 USCA §303 (a).

The term "public institution" is not a technical legal term which has acquired a specific or particular meaning in the law. In the final analysis its meaning must depend upon the meaning that the legislative body enacting the statute intended to give it. Mesar v. Southern Surety Co., 197 Wis. 578 at 580; Sec. 370.01 (1), Stats. There is no doubt as
to what our legislature meant by "public institution" as used in sec. 49.23 (1) because in enacting that subsection the legislature used the words "public institution maintained by the state or any of its political subdivisions" which of course means just what it says. No doubt the legislature also intended that such institutions be available on an equal basis to all members of the public who are indigent or are otherwise entitled to enter such institution at public expense. We also believe that the words "public institution" in the section of the social security act above referred to (42 USCA §303 (a) ) are used in substantially the same sense as they are in sec. 49.23 (1), namely, an institution maintained by the state or any of its political subdivisions for the care of all members of the public who are indigent or are otherwise entitled to enter said institution where they are kept at public expense.

We have examined the proposed lease involved in the instant case. It is in the usual form and would lease the Oneida county home for a period of five years. When the lease is executed the lessee will be entitled to possession of the property and the county will have parted with all control over it for that period. It is fundamental that a lease gives the right of possession of the premises against the whole world, including the owner. 36 C. J. 50.

In an opinion appearing in XXXV Op. Atty. Gen. 110 it was held that a county home would not lose its character as a "public institution" where in the lease from the county to a private individual it appeared that the lessee agreed to take into the home persons who would have been eligible for admission to the home had the county continued to operate it. Such ruling was of course absolutely correct because, as pointed out, under such arrangement the county was in substance still maintaining the institution.

You advise us in your letter of September 5, 1947 that Oneida county shall have no authority to determine who shall enter the premises, to determine operating policies, or to fix fees or otherwise interfere with the peaceful and reasonable use of said premises. As previously mentioned, you subsequently advised us that there is in this case at the present time no agreement or understanding whereby the lessee binds himself to take into the home such persons as
may be referred to it by the county. We understand from what you say that persons who would have been eligible to enter the home had the county continued to run it may also enter the home when it is operated by the lessee, not because of any agreement or understanding between the lessee or the county, but rather on the basis of agreements which may be entered into between the lessee and said persons. We cannot say that this shows that the county is still in substance running the institution so as to bring it within the scope of our ruling which appears in XXXV Op. Atty. Gen. 110.

We also have before us a statement of certain factors which the social security board has set up as a guide to assist it in determining whether a leased public institution retains or loses its character as a "public institution." The various points which the board indicates should be considered in determining the question indicate that what the board is really interested in is to determine whether the lease is bona fide or whether it is merely a device whereby the governmental subdivision goes through the form of leasing the property but in truth and in fact retains control over the institution. In the final analysis the question whether a lease of a public institution is or is not bona fide, is one of fact and no set test can be used which will automatically give the answer in each case.

On the basis of the facts we have before us, we cannot say that the lease here involved is not bona fide, and we cannot say that the county in fact retains control over the premises. As a result we conclude the county home involved in the instant case loses its character as a public institution since after execution of the lease in question Oneida county no longer has any legal right to the possession of the home and it will no longer be operated or maintained either directly or indirectly by Oneida county.
Cities—Zoning—A zoning restriction adopted under sec. 62.23 (7) (d), Stats., is not a charter ordinance. It may be enacted by a majority vote unless a city council has adopted a rule to the contrary, or unless a petition is filed by property owners as described in the said statute.

October 25, 1947.

HERBERT A. BUNDE,
District Attorney,
Wisconsin Rapids, Wisconsin.

You have asked whether a zoning restriction adopted under sec. 62.23 (7) (d) may be enacted by a majority vote of a city council, or whether it requires a two-thirds vote as a charter ordinance under the provisions of sec. 66.01 (2) (a) of the statutes.

We do not believe that a zoning restriction adopted pursuant to sec. 62.23 (7) of the statutes is a charter ordinance within the meaning of sec. 66.01 (2) (a), so as to require a two-thirds vote. A charter ordinance is defined under sec. 66.01 (2) (a) as one which enacts, amends or repeals the whole or any part of a city charter, or which elects that the whole or any part of the state laws relating to city government shall not apply to a particular city. The general charter law for cities is contained in ch. 62 of the statutes. Under sec. 62.02 special charters for cities of the second, third and fourth classes are repealed and such cities are incorporated under the general charter law. Generally speaking then, a charter ordinance as defined under sec. 66.01 (2) would be one which amends or repeals a part of ch. 62 or some other statutory provision of general application. We do not believe that an ordinance, the enactment of which is expressly authorized and regulated by ch. 62, could be classified as an ordinance amending or repealing a charter provision.

Our statutory provisions relating to what constitutes a charter or a charter ordinance, as above discussed, accord with the general law prevalent in other jurisdictions. A city charter is generally defined as the organic law of the city, or as the act creating such city together with the laws defining its powers and regulating the mode of their exer-
cise. See, 6 Words and Phrases 674, 30 Words and Phrases 281.

The vote required for the enactment of a zoning restriction may be affected by the rules adopted by a particular city council for its own government pursuant to sec. 62.11 (3) (e), or in some cases by the filing of a petition by property owners as described in sec. 62.23 (7) (d). Otherwise the vote required would be governed by the general rules of parliamentary procedure which are stated in 46 C. J. §14, pp. 1380-1381, to be:

"Where a legal quorum is present, the general rule is, in the absence of provision to the contrary, that a proposition is carried by a majority of the legal votes cast * * *"

See, also, 2 McQuillan, Municipal Corporations (2d ed.) 554-559, §§ 623, 624.

A zoning ordinance is, of course, subject to the other procedural restrictions specified in sec. 62.11 (7) (d).

BL

Holidays—Counties—County Board—Since the enactment of ch. 541, Laws 1947, the annual meeting of a county board may not be held on Armistice Day.

October 25, 1947.

JAMES D. HYER,
County Clerk,
Jefferson, Wisconsin.

You have asked whether the county board may meet on November 11 of this year and legally transact business.

We are issuing this opinion because we assume from the nature of your question that you desire an early answer, but we wish to call your attention to the fact that since the district attorney is the legal advisor of the county board, such inquiries in the future should be directed to him.

A legal holiday which exists by force of a statute does not have the attributes of a Sunday. It has only such at-
tributes as are given it by the legislature. Any official business may be performed on such a holiday except such as the statute forbids. See 40 C. J. S. 416, §6, in which it is said:

"In the absence of statutory prohibition, either express or reasonably implied, official acts or business, such as the meeting or transaction of business by a public board, commission, municipality, or legal subdivision of the state, may validly take place on a holiday. * * *"


Ch. 541, Laws 1947, has amended sec. 59.04 (1) (a) of the statutes to provide that when the day fixed for the annual meeting of the county board "falls on a legal holiday the annual meeting shall be held on the next succeeding day."

In enacting ch. 541, Laws 1947, directing that if the date of the annual meeting of a county board falls on a holiday the meeting "shall" be held the next day, the legislature has used a term the primary significance of which is mandatory. It is true that the term "shall" is sometimes used in a directory sense as equivalent to the term "may," but that is the case only when there is something in the context indicating that such is the legislative intent. It appears to us that the legislature, in enacting ch. 541, intended to extend the observance of days designated by it as legal holidays, and at least impliedly to forbid county boards from holding their annual meetings on such days. Perhaps it should be noted that the restriction added by ch. 541, Laws 1947, is limited by its terms to the "annual meeting."
Constitutional Law—Normal Schools—Sectarian Instruction—Under sec. 37.02 (1), Stats., state teachers college property may be used for educational purposes solely and none other. Such property is not available to private organizations for religious instruction.

October 30, 1947.

J. Martin Klotsche, President,
State Teachers College,
Milwaukee, Wisconsin.

You state that a religious organization located near the campus of the Milwaukee state teachers college has requested the use of one of the college buildings for religious instruction inasmuch as the organization’s own facilities are so limited that additional space is needed for the giving of religious instruction to boys and girls between the ages of eleven and sixteen.

Accordingly you have inquired whether it is permissible to permit the use of state buildings for religious instruction by a private group.

In XVI Op. Atty. Gen. 308 this office concluded that it was improper to permit a university of Wisconsin building to be used for student Christian Science religious services because of the prohibitions contained in art. I, sec. 18, art. X, secs. 3 and 6, Wis. Const., and secs. 36.06 (1) and 40.67, Stats.

Much of what was said in that opinion is applicable here although art. X, sec. 6, Wis. Const., and sec. 36.06 (1), Stats., apply only to the university and provide that no sectarian instruction shall be allowed in the university.

However, entirely aside from any constitutional or statutory provision, express or implied, relating to sectarian instruction in school property belonging to the public, the principle is well recognized that school property cannot lawfully be devoted to private uses. In School District No. 8, etc., v. Arnold and another (1867) 21 Wis. *657, a temperance society had obtained permission from a majority of the electors of the district to use the school house for temperance meetings but it was held that such electors had no authority to thus divert its use. This decision was quoted
from with approval in *State ex rel. Weiss and others v. District Board, etc.* (1890) 76 Wis. 177 at 214.

Likewise, in *Tyre v. Krug* (1914) 159 Wis. 39 it was held that a school board had no authority to permit school principals to use the school buildings for the purpose of conducting private school book and supply businesses for their personal profit and that such use of the building could be restrained in a taxpayer's action. The court said at page 44:

"** We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those uses expressly enumerated in the statutes. **"

It was pointed out in the later case of *Cook v. Chamberlain* (1929) 199 Wis. 42 that it was proper to permit the use of school buildings for the sale of books and supplies at cost as an aid to the efficient conduct of the school especially where the law had expressly given the school board power to adopt such measures as would promote the good order and public usefulness of the schools and to purchase text books and fix the terms and conditions upon which they should be furnished to pupils. This case should not be taken though as modifying the doctrine previously laid down to the effect that public school property is not to be made available for private purposes.

While none of the authorities hereinbefore discussed specifically mention normal school or state teachers college buildings or the power of the board of regents of normal schools with respect thereto, it is apparent from examining the powers of the board as set up in sec. 37.02 (1) that the result would be the same. That section reads in part:

"The board of regents and their successors in office are constituted a body corporate by the name aforesaid; and 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 teachers colleges authorized by law and none other **."

Thus the legislature has made it very clear that the property of the state teachers colleges is to be used "for educa-
tional purposes solely” and “none other.” Accordingly, you are advised that such buildings are not available to private organizations for religious instructions.

WHR

Soldiers, Sailors and Marines—Grand Army Home—By virtue of sec. 45.37 (2) (d) created by ch. 604, Laws 1947, eligibility of mother of World War veteran for admission to Grand Army Home for Veterans is dependent upon eligibility of veteran and is further conditioned on her being a widow.

October 30, 1947.

SAMUEL H BLUTHE,
District Attorney,
Wautoma, Wisconsin.

You request my opinion as to the construction of sec. 45.37, Wis. Stats., pointing out that subsec. (2) (a) imposed a requirement of military service of at least 70 days before a serviceman would be eligible for admission to the Grand Army Home for Veterans. Paragraph (c) of the same subsection provided that all mothers of World War veterans were eligible for admission. You inquire whether a mother of a veteran of World War I who did not serve 70 days in the military service would be eligible for admission to the home. You state that in your opinion the mother is eligible regardless of the length of service of her son because he is a veteran, and the term “veteran” in paragraph (c) is silent as to any requirement of length of service.

During the pendency of your request the legislature clarified the matter by the enactment of ch. 604, Laws 1947, amending sec. 45.37 (2) (d), Stats. Said paragraph now reads:

“(d) The widowed mothers of those veterans eligible to membership under the provisions of paragraph (a).”

Paragraph (a) sets forth the conditions of eligibility of veterans which includes 90 days of service for veterans
of World War I or World War II. It is clear that now only widowed mothers of veterans are eligible, and that they derive their eligibility for membership in the home from their veteran sons. If the son is not eligible, neither is his mother.

ES:SGH

Appropriations and Expenditures—Highway Commission—Flood Disaster—Last annual allotments of highway aids referred to in sec. 86.24, Stats., ch. 474, Laws 1947, mean the full allotments for the entire fiscal year including supplemental appropriation made by ch. 518, Laws 1947.

October 31, 1947.

JAMES R. LAW, Chairman,
State Highway Commission of Wisconsin.

You have inquired whether in administering the provisions of sec. 86.24, Stats., relating to allotments to counties, towns, cities and villages for flood damage, recognition must be given to the amendments of secs. 20.49 (3) and 20.49 (8) by ch. 518, Laws 1947, in making the deductions of one-fourth of the last annual allotments to local municipalities under these sections.

Sec. 86.24, Stats., was repealed and recreated by ch. 474, Laws 1947, published August 4, 1947. This section, among other things, sets forth the procedure to be followed by the state highway commission in allotting aid to local municipalities for flood damage. After prescribing the method to be followed in determining the damage and amount of aid to be paid there is to be deducted "one-fourth of the last annual allotment (preceding the date of the commission's finding) to the county under section 20.49 (3), in the case of county trunk highways, or less one-fourth of the last annual allotment to the town, village or city under section 20.49 (8), in the case of highways under their jurisdiction."

Chapter 518, Laws 1947, was published on August 9, 1947. Among other things the introductory paragraph of sec. 20.49 was amended to as to appropriate to the state highway commission the surplus of the motor vehicle regis-
tration fees, operator’s license fees, motor vehicle fuel taxes and motor carrier fees and taxes after certain deductions.

Sec. 20.49 (11) of the statutes was also created by ch. 518. This section reads:

"On June 30, the amount remaining after the allotments provided by subsections (1) to (9) have been set aside, which shall be apportioned and allotted as follows:

"(a) Forty per cent shall be added to the allotment provided by subsection (9).

"(b) Sixty per cent shall be apportioned and allotted to the several counties, towns, villages, and cities as follows:

1. To supplement the appropriation to counties made by sections 20.49 (3) and 83.10 a sum equal to 30 per cent of such revenues.

2. To all towns to supplement the appropriation made by subsection (8) a sum equal to 30 per cent of such revenues, to be allocated to each town in proportion to the allotment under subsection (8).

3. To all villages to supplement the appropriation made by subsection (8) a sum equal to 10 per cent of such revenues, to be allocated to each village in proportion to the allotment under subsection (8).

4. To all cities to supplement the appropriation made by subsection (8) a sum equal to 30 per cent of such revenues, to be allocated to each city in proportion to the allotment under subsection (8).

"(c) The appropriations made by subsection (11) (b) shall be paid in the same manner as each appropriation so supplemented. The first allocation shall be for the fiscal year ending June 30, 1947 and shall be made on July 15, 1947 or as soon thereafter as subsection (11) (b) becomes effective."

The appropriations made by sec. 20.49 (11) are "to supplement the appropriation" made by secs. 20.49 (3) and 20.49 (8) among others, and paragraph (c) provides that such appropriations are to be paid in the same manner as each appropriation so supplemented.

So far as sec. 20.49 (3) is concerned the date of the supplemental appropriation is the same as the date for the appropriation as it existed prior to the enactment of ch. 518, viz. June 30. However, the date for the appropriation under sec. 20.49 (8) (renumbered sec. 20.49 (8) (a) by ch. 431, Laws 1947) is annually on March 10.
Sec. 6 of ch. 518 provides that secs. 1 to 4, inclusive, shall take effect at the close of business on June 30, 1947 and shall apply to the distribution of the revenues of the fiscal year ending on that date. We understand, however, that the figure as to the amount of supplemental aid that is to be granted under ch. 518 will never be available on June 30 of any year since it takes some time after the closing of the fiscal year to collect the necessary data. That means that the date of March 10 in sec. 20.49 (8) (a) and the date of June 30 in the case of sec. 20.49 (3) cannot be taken as controlling the entire annual allotment due the municipality or due the county. In any event there will have to be at least two payments in each case or withholding of the entire payment until some time after June 30 each year because of the necessity of waiting for the figures that will control the supplemental appropriation under ch. 518.

Consequently it is necessary to construe the words, "last annual allotment" as used in ch. 474 to mean the entire annual allotment for the whole fiscal year regardless of when paid.

While it is true that in enacting ch. 474 the legislature did not have before it the provisions of ch. 518 relating to supplemental appropriations it did have before it the provisions of ch. 474 when it enacted ch. 518, and no good reason suggests itself for considering "the last annual allotment" as used in ch. 474 to cover anything less than the full allotment for the entire fiscal year as supplemented by ch. 518.

Accordingly, we conclude that in making the deduction of one-fourth of the last annual allotment there should be deducted one-fourth of the entire or full allotment for the year and not just one-fourth of the allotment as it existed prior to the supplemental appropriation made by ch. 518.

WHR
Constitutional Law—Appropriations and Expenditures—Soldiers, Sailors and Marines—Veterans Housing Authority—Expenditure of public funds for veterans’ housing is for a public purpose and is valid under the Wisconsin constitution.

Art. VIII, sec. 10, Wisconsin constitution, does not prohibit Wisconsin veterans housing authority from expending state funds to encourage the development of housing by others.

E. G. Giessel, Director,
Department of Budget and Accounts.

You have requested our opinion of the validity of ch. 412, Laws 1947, as amended by ch. 614, Laws 1947, which creates the Wisconsin veterans housing authority. It appears that the question of immediate concern is the validity of sec. 20.209, which appropriated the sum of $100,000 annually commencing July 1, 1947, from the general fund to the Wisconsin veterans housing authority for the execution of its functions under sec. 45.355, and accordingly this opinion will be limited to the consideration of the general validity of such appropriation.

To determine the validity of the appropriation it will be necessary for us to determine (1) whether the purposes for which the funds may be spent under sec. 45.355 are public purposes and (2) whether the activities and purposes of the Wisconsin veterans housing authority involve the state in works of internal improvement. We direct particular attention to the fact that the Wisconsin veterans housing authority created by sec. 45.355 (1) is a public body appointed by the governor with the advice and consent of the senate and hence the appropriation is not subject to the charge that it is being made to a private corporation or other private agency.

At this time it is well established that appropriations of public funds must be for public purposes and we do not deem it necessary to recite the authorities declaring this view. The activities of the Wisconsin veterans housing authority which must be paid for out of sec. 20.209 are as outlined in sec. 45.355 (3) as follows:
"The Wisconsin veterans housing authority shall have the following powers, duties, and functions:

"(a) To assist in the co-ordination of the state, county, municipal and private activities relating to veterans’ housing.

"(b) To co-operate with any and all federal departments, agencies and independent establishments relating to veterans’ housing, materials, priorities and finances.

"(c) To assist any housing authority, municipality or other private enterprise engaged in supplying additional veterans’ housing in the acquisition of materials, finances, legal aid and compliance with federal rules and regulations.

"(d) To recommend to any housing authority authorized by statute to engage in the furnishing of veterans’ housing, such action as will improve and increase housing facilities for veterans and otherwise to advise as to any and all problems relating to the establishment and operation of such housing authorities.

"(e) To utilize the services and facilities of existing state departments and boards.

"(f) To undertake and carry out studies and analyses of the veterans’ housing needs and of meeting such needs and make the results of such studies available to the public and the building, housing and supply industries; and may also engage in research and disseminate information on the subject of veterans’ housing.

"(g) To employ such assistants as it may deem necessary to carry out its functions without regard to the provisions of chapter 16.

"(h) To perform such other duties as specifically set forth in other sections of the statutes."

Stripped of all legal verbiage and detail the general purpose of the above provisions is to create a controlling state agency to assist the municipalities of the state in providing housing for veterans. In the leading cases, State ex rel. Atwood v. Johnson, 170 Wis. 218 [soldiers’ cash bonus], and 170 Wis. 251 [soldiers’ educational bonus] the supreme court ruled that the considerations of gratitude due soldiers and the tendency to stimulate patriotism and to insure the defense of the republic were ample public purposes to support, first, a cash bonus to veterans and, second, an educational bonus to veterans. It logically follows that if these purposes may be fulfilled by the provision of housing for veterans, then expenditure of funds for such housing
must be held to be a public purpose. This is especially true in view of the masses of other legislation, both state and federal, which tended to freeze the persons who stayed at home in existing accommodations and render it difficult for the veterans as a group to obtain proper housing. Accordingly, in our opinion the general purpose for which funds may be spent under sec. 20.209 is public and valid and the appropriation cannot be attacked from that angle.

Once the public purpose has been established, it is then only necessary to consider whether the activities in which the Wisconsin veterans housing authority may engage involve the state in a work of internal improvement in violation of art. VIII, sec. 10 of the Wisconsin constitution. Determination of this question involves a consideration of whether sec. 45.355 (3) makes the state a party to a work of internal improvement or whether the functions there outlined may properly be described as the co-ordination and encouragement of works of internal improvement by others. It is clearly established that the encouragement by the state of works of internal improvement by other persons or corporations is not a violation of art. VIII, sec. 10, Wisconsin constitution. State ex rel. W. D. A. v. Dammann, 228 Wis. 147, 193, Jensen v. Board of Supervisors of Polk County, 47 Wis. 298, 2 N. W. 543; State ex rel. New Richmond v. Davidson, 114 Wis. 563, and Appeal of Van Dyke, 217 Wis. 528, 259 N. W. 700.

Analyzing the separate provisions of sec. 45.355 (3) in detail, we conclude as follows:

(a) The co-ordination of the state, municipal and private activities relating to veterans' housing is a proper means of encouraging such housing by others and is proper.

(b) Co-operation with federal departments and agencies again is a proper means of encouragement of others.

(c) While general educational activity to inform local housing authorities of market and financial conditions, of legal problems involved, and of state and federal regulations may be considered valid, any attempts to render specific aid and counsel to a specific local agency run counter to the proposition that state funds must be spent for state-wide purposes and not for matters of private and local concern, and such activities cannot be carried on. State ex rel.

(d) Recommendations and advice to local housing authorities again may be considered a proper means of encouragement of others.

(e) Utilization of existing services, facilities of other state departments for the proper purposes of the Wisconsin veterans housing authority is only an express recognition of that inter-office co-operation required by sec. 14.65, Stats.

(f) Studies, analyses, and research on veterans housing are a necessary part of a general educational program and the results of such activities may properly be disseminated to any interested person.

(g) Employment of assistants to carry out its functions is, of necessity, valid.

(h) "Such other duties as specifically set forth in other sections of the statutes" can only be passed upon and considered by a detailed analysis of such other duties as the question may arise. We do not pass upon (h) at this time.

In view of the foregoing, it appears that most, if not all, of the activities which would be paid for out of the appropriation provided by sec. 20.209 are lawful under the Wisconsin constitution.

If you have any question as to any particular item of expenditure submitted to you for audit, we will advise you further upon receipt of the details of the transaction.

RGT
Appropriations and Expenditures—Highway Commission—Statutes—Construction—Sec. 3, ch. 518, Laws 1947, directs the state highway commission to make certain additions to the state trunk highway system and this should be done with reasonable promptness. While ch. 518 was not published until August 9, 1947, it is nevertheless applicable to the distribution of revenues for the fiscal year ending June 30, 1947.

October 31, 1947.

JAMES R. LAW, Chairman,
State Highway Commission of Wisconsin.

You have called our attention to sec. 3 of ch. 518, Laws 1947, which reads in part:

"The state highway commission is directed to add to the state trunk highway system the following highways or portions thereof situated in the county or counties designated, with descriptions and approximate mileage as follows: * * *

[Detailed descriptions of some 866 miles of highway or proposed highways in various counties of the state are then set forth.]

Sec. 6 of ch. 518 provides that secs. 1 to 4, inclusive, shall take effect at the close of business on June 30, 1947, and shall apply to the distribution of the revenues of the fiscal year ending on that date.

However, ch. 518 was not published until August 9, 1947. Sec. 370.05 provides that every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after it is published. But in no event can an act take effect prior to publication. Art. VII, sec. 21, Wis. Const. See also sec. 14.29 (10), sec. 35.64, Stats., and Goodland v. Zimmerman, 243 Wis. 459. Nevertheless a statute may draw upon antecedent facts for its operation. Cox v. Hart, 260 U. S. 427, 67 L. ed. 332, 337. Consequently, there is no insurmountable difficulty in providing for the distribution of revenues for the fiscal year ending on June 30, 1947 even though the provisions therefor are enacted subsequent to that date. If the distribution has already been made any
surplus accruing under the new act can be paid by supplemental voucher. Likewise, although we do not understand the problem to be present here, the local municipalities could be required to refund or account for excess moneys if the new act resulted in a smaller distribution than that provided for by the prior law, since municipalities have no vested rights as against the state other than as prescribed by the state constitution itself. *State ex rel. Martin v. Juneau*, 238 Wis. 564.

But the primary question raised by your request relates to the date when the roads in question actually become a part of the state trunk highway system. It is your position that the statute is not self-executing and that affirmative action on the part of the commission is required since otherwise the legislature would not have directed the commission to add the roads in question to the state trunk highway system but would have used some language such as this: "The following highways are hereby added to the state trunk highway system."

We believe your position to be well taken. However, the word "direct" as used in a statute is usually held to impose a mandatory duty. *Upshur v. Baltimore*, 94 Md. 743, 51 Atl. 953. Assuming the statute to be mandatory it would nevertheless be true that the commission would have a reasonable time within which to carry out the mandate. For instance, you state that in some cases no public highway presently exists on the designated route so that it will be necessary to plan and finance the acquisition of right of way, building of bridges, etc. To designate lands still privately owned as state trunk highways involves a misuse of the term "highway," which means a public way over land. See 39 C. J. S. 909.

What is and what is not a reasonable time within which to add any portion of the routes named in ch. 518 to the state trunk highway system must depend upon all of the surrounding facts and circumstances and it would be impossible for us to furnish much guidance on this question without knowing all of such facts and circumstances relating to each portion.

The legislature has told the commission what it must do but hasn't specified exactly when or how it is to be done.
Consequently these are administrative details resting within the sound discretion and good judgment of the commission. The legislature should not be accused of expecting the impossible but its command should be carried out as rapidly as conditions permit.

WHR
State—Public Printing—Sec. 35.69, Stats., held to prescribe compensation to papers other than state official paper, for purposes of state notices, to be the same as that prescribed for state official paper. Words "advertising space" mean advertising space used for like nature.

F. X. Ritger, Director,
Bureau of Purchases.

You have requested an opinion as to what rate of compensation is to be paid for state legal notices published in papers other than the official state paper. You point out that sec. 35.69, Stats., formerly prescribed these rates by stating that they were to be the same as those prescribed by sec. 6.82, Stats., which prescribes the rate for election notices, but that ch. 260, Laws 1947, amended sec. 35.69 by inserting the words "and other papers" after the words "official state paper." Therefore, as the statute now exists one part is in direct conflict with another in that in one place it prescribes the same rate as the official state paper and in another it prescribes the rate set forth in sec. 6.82.

Sec. 35.69 as it now exists reads as follows:

"The compensation to the official state paper and other papers for the original printing of the laws, for reprinting any law or for printing all election and other notices, all accounts, fiscal statements, advertisements, proclamations or other matter required to be published at the expense of the state shall equal the amount regularly received by such newspaper for the same amount of advertising space, not exceeding, however, $1 per folio for the first insertion and 70 cents per folio for each subsequent insertion. The rates in the case of other papers shall be the same as those provided from time to time for election notices in section 6.82 of the statutes. The price in full for the publication in any paper of advertisements of the sale of school, university or other public lands shall not exceed 70 cents each description whenever the advertisement contains 15 descriptions or more. All expenditures for transportation, communication, and delivery incidental to any such printing shall be borne by the paper doing the same."

The insertion of the words underlined above and the raising of the rates scheduled are the only changes made by ch. 260, Laws 1947.
The question posed then is: Did the legislature, by inserting the words "and other papers" as shown above, intend that "other papers" were to be paid on the same rate as the state paper, or did it intend that the old system was to continue and that "other papers" were to be paid on the rates prescribed by sec. 6.82? The insertion of the words "and other papers" is a clear and unmistakable expression of the intent of the legislature even though they neglected to strike out the words which prescribed the then existing methods of publication rates.

It has long been the rule in this state that where a conflict in statutory law exists the most recent expression of the legislature is deemed to be controlling, unless a reasonable construction can be placed upon the earlier law which will leave the later law in force. See The Attorney General ex rel. Taylor v. Brown, (1853) 1 Wis. 442. State ex rel. Hayden v. Arnold, (1912) 151 Wis. 19. Ollmann v. Kowalewski, (1941) 238 Wis. 574.

In this instance the conflict can in no way be reconciled so that the last expression of the legislature must prevail and the rate to apply to advertising in "other papers" is that of the official state paper.

It should be noted that subsequent to the passing of ch. 260, Laws 1947, the legislature amended sec. 6.82 by ch. 458, Laws 1947, by striking out the rate table and making the rates for election notices the same as those of ordinary legal notices provided in sec. 331.25. Although this change is not very material in deciding the point in question, it does however further strengthen the position we have taken above, in that, had the legislature intended to have the rate for "other papers" prescribed by sec. 331.25, they would probably have amended sec. 35.69 to refer directly to sec. 331.25 instead of allowing a double reference to exist. There is a possibility of further confusion in sec. 35.69. It will be noted that this law states that "compensation * * * shall equal the amount regularly received by such newspaper for the same amount of advertising space, not exceeding, however, $1 per folio for the first insertion and 70 cents per folio for each subsequent insertion."

There is a considerable difference in the amounts charged by newspapers of various circulations. Also, the charges
made for ordinary commercial open display advertisements is less than the same newspaper would charge for legal advertising because the latter requires a greater time and more meticulous care to prepare. We believe that since this section refers to legal advertising the words "the amount regularly received by such newspaper for the same amount of advertising space" mean the amount regularly received by such newspaper for advertising space used for such purpose.

Thus, where such amount is greater than the amount allowed by sec. 35.69 payments made may not exceed $1 per folio for the first insertion and 70 cents per folio for each subsequent insertion and where the regular rate received for legal advertising is less than the folio limit here prescribed only the lesser amount can be paid.

REB

Intoxicating Liquors—Sale to Forbidden Persons—Knowledge of the identity of the purchaser is a necessary element of the offense of sale of liquor to a person "posted" under sec. 176.26 (1), Stats.

LEARY E. PETERSON,
District Attorney,
Prairie du Chien, Wisconsin.

November 6, 1947.

You state that a common drunkard, after having been "posted" pursuant to sec. 176.26 (1), Stats., purchased one-half pint of liquor at a liquor store from an employe of the owner. You state further that neither the owner of the liquor store, who had received notice, nor his employe, were acquainted with the "posted" person at the time of the purchase and that at the time of purchase such person was not asked his name.

You inquire whether the above transaction constitutes an offense under the provisions of sec. 176.28, Stats. Such statute provides as follows:
“Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been *forbidden in the manner provided by law*, every person who shall sell or give to, or for, or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250 and the costs of prosecution; and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs.”

The statute which provides for serving the notice of prohibition of sale, which is sometimes referred to as “posting,” sec. 176.26 (1), provides for service of a notice in writing which shall “forbid all persons *knowingly* to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same.” Your question resolves itself into a determination whether knowledge of the identity of the purchaser upon the part of the vendor is a necessary element of the offense. In our opinion, it is.

Under sec. 176.35, which deals with an action for civil damages for unlawful sale, the word “knowingly” has been construed to refer to knowledge of the identity of the purchaser and not merely to knowledge that the liquor was intoxicating or that the sale was being made. *Crist v. Kiltz*, 232 Wis. 567. While sec. 176.28, Stats., taken by itself does not contain the word “knowingly” and so might be considered analogous to sec. 176.30 governing sale to minors, under which it has been held that knowledge of the minority of the purchaser need not be proved to establish the offense, sec. 176.28 states that it applies to sales which shall have been forbidden in the “manner provided by law.” The only “manner provided by law” is the provision in sec. 176.26 (1) that a notice may be served forbidding any person *knowingly* to sell or give away to a “posted” person any
intoxicating liquors or fermented malt beverages. Since there is no provision under sec. 176.26 (1) to forbid anything other than a knowing sale, a sale without knowledge of the identity of the purchaser is not contrary to the notice provided in that section and is, therefore, not a violation of sec. 176.28 (1).

RGT

Counties—Salaries and Wages—County board may fix salaries of superintendent, visiting physician and subordinate employes of county home and county asylum under sec. 59.15, Stats.

County board may not delegate authority to fix such salaries to trustees and superintendent of the respective institution.

Notwithstanding the provisions of secs. 46.19 and 51.25, Stats., county board may decline to fix such salaries, in which case they may be fixed by board of trustees of the institution under sec. 59.15 (2) (d).

November 8, 1947.

Jerold E. Murphy,
District Attorney,
Fond du Lac, Wisconsin.

In the past, and in accordance with sec. 46.19 of prior statutes, the salary of the superintendents of the county institutions has been set by the board of trustees, and the superintendent in turn, with the approval of the board of trustees, has designated the compensation of subordinate employes. However, certain changes in the statutes relative to county institutions were made during the 1947 session of the legislature. Because of these changes you inquire whether it is mandatory that the county board fix the salaries of the superintendent, the visiting physician and all necessary additional officers and employes of your county home and county asylum, or whether the county board may delegate this right to the board of trustees and the superintendent of the institution.
540 OPINIONS OF THE ATTORNEY GENERAL

Ch. 268, Laws 1947, revised ch. 46 of the statutes. Secs. 46.18 and 46.19 now provide in part:

"46.18 Every county home, hospital, tuberculosis hospital or sanatorium, or similar institution, house of correction or workhouse, established by any county whose population is less than 500,000, shall (subject to regulations approved by the county board) be managed by 3 trustees.

46.19 (1) The trustees shall appoint a superintendent of each institution and may remove him at pleasure.

"(4) The salaries of the superintendent, visiting physician and all necessary additional officers and employees shall be fixed by the county board."

Ch. 485, Laws 1947, revised and consolidated chapters 51 and 52 of the statutes relating to mentally ill, mentally infirm and mentally deficient persons. Sec. 51.25 (1) now provides:

"Any county may establish a hospital or facilities for the detention and care of chronic mentally ill persons, mentally infirm persons. In other counties [less than 500,000] it shall be governed pursuant to sections 46.18, 46.19 and 46.20. The trustees shall appoint the superintendent. With the approval of the trustees, he shall appoint a visiting physician. The salaries of the superintendent and visiting physician shall be fixed by the county board."

Sec. 59.15 provides:

"(2) (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 employe 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 *** fix *** the salary or compensation of any such office, board, commission, committee, position, employee *** without regard to the tenure of the incumbent ***.

“(d) The county board at any regular or special meeting or any board, commission, committee, or any agency to which the county board or statutes has delegated the authority to manage and control any institution or department of the county government may enter into contracts for the services of employees setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.

“(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 contended on the one hand that the provisions of secs. 46.19 and 51.25 are mandatory and that the salaries referred to in said respective statutes can be fixed only by the county board, and on the other hand that sec. 59.15 (2) (d) would authorize the county board to delegate to the board of trustees and superintendent of the institution the power to fix the salaries of the superintendent, visiting physician and subordinate employees. Neither ch. 268 nor ch. 485 contains any language which would limit the plenary power to fix salaries which the county board has under sec. 59.15. Hence the provisions of secs. 46.19 and 51.25 do not add anything to the power which the county board previously had to fix the salaries referred to in said sections 46.19 and 51.25.

It may well be contended that sec. 59.15 (2) (d) does not authorize, and was not intended to authorize, any delegation of authority by a county board but was meant to cover, among other things, certain cases where the county board had exercised the power of delegation given to it by other statutes. Assuming, without deciding, however, that this statute was intended to authorize delegation of power by a county board, it would not authorize the county board to delegate to the board of trustees and superintendent of a county institution the power to fix the salaries of the superintendent, visiting physician and subordinate employees since sec. 46.18 of the statutes already has delegated to the trustees the authority to manage the county institutions;
and from this latter statutory delegation flows a limited right to fix said salaries.

Upon the failure of the county board to exercise the power granted to it under secs. 46.19, 51.25 and 59.15 to fix the salaries of the superintendent, visiting physician and subordinate employees of the county institutions, the board of trustees of the institution which, under 59.15 (2) (d), is an "agency to which the * * * statutes has delegated the authority to manage * * * any institution" may "enter into contracts for the services of employees setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years." This would include the right to fix the salary of the superintendent.

The fact that secs. 46.19 and 51.25 appear to be in mandatory form requiring the county board to fix certain salaries would not operate to deprive the board of trustees of the institution of the authority granted to them under sec. 59.15 (2) (d), since sec. 59.15 (4) makes it clear that sec. 59.15 (2) (d) would prevail over secs. 46.19 and 51.25.

However, under sec. 59.15 (2), (a) and (c), the county board still has the right to fix the salaries of the superintendent, visiting physician and subordinate employees of the institutions if it sees fit to do so, rather than permit these salaries to be fixed by the trustees under sec 59.15 (2) (d) through its own failure to act.

JRW

State Treasurer—Reports—State treasurer has no duty to issue a printed monthly report showing the condition of the state treasury at the end of each month, there being no statute which requires or authorizes him to issue such report.

November 12, 1947.

John L. Sonderegger,
State Treasurer.

You inform us that it has been the policy of the state treasurer for a long time to issue a printed monthly report as to the condition of the state treasury at the end of each month of which about 4,000 copies are distributed. You ad-
vise that you can find nothing in the statutes which requires the state treasurer to issue such a report and ask whether its preparation, publication and distribution can be discontinued. You state that by discontinuing this report your department will be relieved of considerable expense and that in place of it a statement containing the same information can be prepared and mimeographed each month and sent to daily newspapers of the state.

We have been unable to find any statute which authorizes or requires the state treasurer to prepare and distribute a report such as you mention. There are statutes such as secs. 14.42 (8) and (9) and 35.67 which require the state treasurer to prepare certain reports or statements but none of them mentions any report such as is here involved. We therefore advise you that you are under no obligation to continue with the preparation, publication and distribution of said report and that you can discontinue its preparation, publication and distribution at any time.

WET

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Public Health—Cosmetic Art—All schools teaching cosmetic art are subject to the provisions of sec. 159.02 as to minimum requirements and any school meeting such requirements may offer advanced courses subject to supervision and regulation by the state board of health under sec. 159.08, Stats. However, advanced lectures and demonstrations may be offered to licensed operators without board supervision or regulation provided that no representation is made to the effect that the same constitutes a school of cosmetic art under ch. 159.

November 13, 1947.

CARL N. NEUPERT,
State Health Officer.

You have inquired whether the state board of health has authority under ch. 159 to set up rules and regulations establishing certain requirements for the administration of advanced courses in cosmetology and whether an advanced school for licensed cosmetologists can be operated without
meeting the preliminary requirements for a registered beauty school as provided by sec. 159.02.

Sec. 159.03 relating to supervision of beauty schools by the state board of health provides in part:

"(1) The board shall enforce the provisions of this chapter and shall prescribe and enforce rules and regulations governing beauty parlors, and schools teaching cosmetic art and for the examining and licensing of managers, operators and manicurists and the registration of apprentices and students, and shall make and enforce rules governing sanitary and hygienic conditions surrounding the practice of cosmetic art and the conduct and operation of beauty parlors and schools of cosmetic art.

"(3) If a beauty parlor or school teaching cosmetic art be found insanitary or if any person working therein be charged with imparting a communicable disease the board may immediately order the local health officer to close such beauty parlor or school and the person so charged shall not practice or teach cosmetology until authorized to do so by the board."

The above statute makes no distinction between schools teaching a basic course in cosmetology and those offering advanced or post graduate courses. Consequently it must be considered that all cosmetology schools are subject to supervision by the board. The purpose of such supervision is indicated in part by subsection (3) quoted above and it is obvious that from the standpoint of public health there is just as much need of supervision as to sanitation and communicable diseases in the case of a school offering an advanced course as there is in a school offering only the basic course.

It may well be that some of the present rules and regulations of the board will be found inapplicable to advanced courses and the board may find it advisable to set up certain rules and regulations governing advanced courses solely, but there is no basis for concluding that schools offering advanced courses are exempt from board supervision.

Likewise it is apparent from reading sec. 159.02 that it contains no exemptions in favor of a school covering an advanced course only.

Subsection (1) provides that no person shall operate a school for the purpose of teaching cosmetic art for compen-
sation unless a proper annual certificate of registration has been obtained from the board.

Subsection (2) provides that no school for teaching cosmetic art shall be granted a certificate unless it meets certain requirements as to having a staff physician, a sufficient number of instructors, a minimum number of students, etc.

Subsection (3) provides that no school teaching cosmetic art shall be granted a certificate unless it requires certain educational attainments for admission. Also it must offer a course of not less than 1,500 hours within a period of not less than 8 months with instructions between the hours of 8 and 6 on week days, and certain subjects are required.

Various other requirements are set forth in subsections (4), (5) and (6). No useful point would be served by discussing them in detail. These subsections contain various language such as "No school * * * shall," "A school shall," "Any school * * * shall," etc., all indicating that no exemptions are intended and that all schools must meet the requirements stated in the statute. Also subsection (7) provides an annual registration fee for a certificate of registration "for a school to teach cosmetic art." Again there is no exception. Sec. 159.01 (9) defines a school of cosmetic art as a school established under sec. 159.02. This excludes all others.

From all of the foregoing it is apparent that the Wisconsin statutes do not contemplate or permit the operation of a cosmetic school teaching advanced courses only and that there are no exemptions from the requirements that have been set up for schools offering basic or undergraduate courses in teaching cosmetic art. There would appear to be no reason, however, why such a school should not offer advanced courses since there is nothing in the statute to prohibit a school from providing more than the minimum statutory requirements, although, as above indicated, such advanced work would be subject to such supervision and such reasonable rules and regulations as the board might designate under sec. 159.03.

This does not mean, however, that no instruction in cosmetic art may be offered in Wisconsin except through the medium of a school registered under sec. 159.02. For instance, sec. 159.12 (2) relating to apprentices who qualify
for operators’ licenses without attending schools of cosmetology, provides that applicants shall be given instruction by a manager in all branches of practical work and in subjects required to be taught in schools of cosmetic art as set forth in sec. 159.02. Obviously the shop manager offering such instruction to apprentices would not have to register the shop as a school of cosmetic art under sec. 159.02 or meet the other requirements therein set forth except as to the content of the instruction offered. Also it has been previously indicated unofficially by this office that a course in the use of the electric needle may be offered outside of a registered school.

It is apparent that the purpose of secs. 159.02 and 159.12 is to insure the adequate training of operators who can qualify for licenses to serve the public. Once this objective has been achieved it is not particularly important that the state supervise the instruction that may be offered by way of advanced or graduate courses for persons who are already licensed. They have already demonstrated their fitness to meet the minimum requirements of the law.

It is our understanding that from time to time prominent hair stylists and others give lectures and demonstrations in this state to licensed cosmetologists. We do not believe that ch. 159 contemplates the supervision and regulation of this type of activity so long as such activities are not held out to the public as constituting a school of cosmetic art as that term is used in sec. 159.01 (9).

To state it another way sec. 159.02 (1) providing that no person, firm or corporation shall operate a school for the purpose of teaching cosmetic art for compensation without a certificate from the state board of health was probably intended to mean a school teaching cosmetic art in all or substantially all of its branches to unlicensed persons desiring to qualify for licenses. Hence, while the statute is by no means clear and doubtless should be clarified, we conclude that it was not intended to apply to advanced lectures and demonstrations or special subjects offered primarily to licensed operators and not for credit on the 1,500 hour course required of applicants for licenses. But as above indicated, because of the statutory limitations relating to schools teaching cosmetic art, no such special courses can
be designated as constituting a school of cosmetic art unless the person offering the same is willing to comply with all of the statutory requirements applicable to such schools. It should perhaps be added in closing that if members of the public are to be used as subjects and are charged for services rendered them in the course of giving the lectures or demonstrations to the licensed operators the provisions of the beauty parlor law must be observed.

WHR

Counties—Parks—Highways and Bridges—Sec. 27.015 (7) (f), Stats., as created by ch. 281, Laws 1947, relating to rural planning does not impliedly amend statutes relating to distribution of highway allotments to counties but merely places all roads in county parks under county board police regulation.

November 13, 1947.

JAMES R. LAW, Chairman,
State Highway Commission of Wisconsin.

You have called attention to ch. 281, Laws 1947, relating to rural planning. Among other things this chapter creates sec. 27.015 (7) (f), the last sentence of which reads:

"The [county] board shall also establish rules, regulations and penalties for infractions thereof, for all roads in county parks and all such roads shall be part of the county highway system."

In this connection you state:

"Section 83.02 of the statutes designates and describes the 'county aid highway system'; Section 83.025 designates and describes the 'county trunk highway system'; and Section 27.04 provides for a 'county system of streets and parkways.' We do not find any provision for a 'county highway system' and we therefore ask your opinion as to the meaning of that term as used in Section 27.015 (7) (f).

"It is probable that some 'roads in county parks' are state trunk highways, county trunk highways, connecting streets, other public streets in cities and villages, public highways
under the jurisdiction of towns, or drives which may not have been laid out as public highways by statutory procedures.

"The mileage of all highways, exclusive of highways and streets in cities and villages, is a factor used in the computation of allotments under Section 84.03 (3); such rural mileage and also specifically the mileage of county trunk highways are factors used in the computation of aid under Section 83.10; the mileage of connecting streets in cities and villages is the basis for the computation of aid under Section 84.10 (1); and the mileage of public roads and streets which are open and used for travel, and which are not state or county trunk highways or connecting streets, is the basis for the computation of aids under Section 20.49 (8). We therefore ask your opinion as to whether and in what respect the status of any of such public streets or highways which may be in county parks, and the computation of aids or allotments based on the mileage of such public streets or highways, are affected by Section 27.015 (7) (f).

"If it were determined that 'county highway system' as used in Section 27.015 (7) (f) means 'county trunk highway system,' it seems to us that serious conflicts as to jurisdiction would result in the case of any state trunk highway or connecting streets that might be in a county park, unless the statutes relating thereto take precedence over the more general provisions of Section 27.015 (7) (f). It also would be somewhat inconsistent with the intent of Section 83.025 relating to the county trunk highway system, which is explained in Volume 29 of Attorney General's Opinions on page 24 as follows:

"The underlying idea of a county trunk highway system * * * is a system of highways maintained by the county of a continuous and interconnecting nature which provide routes of travel between various points within the county and also points in adjoining counties, similar in nature to and supplementing the state highway system. It is not just a system of highways maintained by the county but is a system of trunk highways maintained by the county. It is inherent in a trunk system that the highways thereof shall serve as continuous and through routes of travel between different points, termini or localities of an appreciable and substantial distance apart.'

"It also does not seem logical that the term 'county aid highway system' were intended, since that would only make such roads eligible for county aid on local unit initiative under Section 83.14 and for improvement with county bonds issued under Sections 67.13 and 67.14.
"It does seem logical that roads in county parks should be subject to the general control of the county board such as a road in a ‘county system of streets and parkways,’ subject, where conflicts arise, to the specific provisions relating to systems or classes of streets and highways which are more definitely defined."

It is apparent from reading chapter 281 in its entirety, and particularly sec. 27.015 (7) (f), that the objective is to regulate rural planning. Paragraph (f) is devoted largely to police regulations of county parks and it is inconceivable that the legislature intended by the last clause of the last sentence of paragraph (f) to revamp the entire statutory procedure for allotment of highway aids. If such had been the legislature’s intent it would undoubtedly have amended the allotment statutes directly.

In other words the controlling purpose of paragraph (f) is to confer upon the county board the authority to make regulations for policing all roads in county parks regardless of whether such roads be designated as state trunk highways, county trunk highways, county aid highways, town roads, village or city streets, etc. and irrespective of the distribution of highway aids.

Chapter 281 has nothing to do with distribution of highway allotments and when the legislature in sec. 27.015 (7) (f) provides that all roads in county parks shall be part of the county highway system such language must be read in the light of the language preceding in the same sentence, i.e., “The board shall also establish rules, regulations and penalties for infractions thereof, for all roads in county parks.” Under familiar rules of syntax the words, “and all such roads shall be part of the county highway system” are modified or qualified by the next preceding antecedent quoted above and which relates entirely to the authority of the county board to establish rules, regulations and penalties for infractions thereof as to all roads in county parks.

Assuming there is any doubt as to the meaning of the last part of the last sentence in paragraph (f) such meaning is to be ascertained by referring to the associated words under the old maxim, “noscitur a sociis” which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which
they are associated. You are therefore advised that the wording in question is not to be taken as an implied amendment of the various statutes governing the distribution of highway allotments in view of the construction above given and in view of the further rule that amendments by implication are not favored since the legislature will not be held to have changed a law it did not have under consideration while enacting a later law unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together. Vol. 1, Sutherland on Statutory Construction, 3d Edition, § 1913.

WHR
Savings and Loan Associations—No fee or other charge can be imposed when member of savings and loan association withdraws funds either by redemption as provided by sec. 215.10 or repurchase as provided in sec. 215.11, other than that mentioned in the definition of participation value contained in sec. 215.08 (1) notwithstanding any provision to the contrary contained in the articles or by-laws as provided in sec. 215.26 (1), which provisions are superseded by the statutory provisions referred to. This is true as to shares which were subscribed for or issued before effective date of ch. 820, Laws 1941, as well as those subscribed for or issued thereafter, and no right of the shareholder or association under contract cause of federal or state constitution is violated thereby.

An employe of savings and loan association department who is an officer, employe or stockholder of a savings and loan association located in certain county is not for that reason prohibited from examining other savings and loan associations located in the same county. Section 220.06 (1) is not applicable.

The commissioner of savings and loan associations may retain his connection with and accept salary as an officer from an association which is subject to his supervision, with the qualification that he must refrain from passing on, considering or taking any action in his official capacity with respect to any matter involving the association with which he is affiliated. He must devote full time to the duties of his office and any service he may render to the association must be done at such time and under such circumstances as would not interfere with this requirement.

An administrative officer by retaining his connection with and accepting a salary from a person, firm or corporation under his supervision does not by that fact standing alone violate sec. 348.28, Stats.

Immunity granted by sec. 220.065 does not inure to the benefit of the commissioner of savings and loan associations.

Where commissioner of savings and loan associations performs duties which are quasi judicial in nature, he will not be liable in damages to others for his mistakes or errors if he exercises his honest judgment in performing acts within his jurisdiction, with exception of a case where such officer
unjustifiably invades private property rights so person injured will be without remedy unless such officer is made to respond in damages. Where such commissioner acts in a ministerial capacity, the protection afforded when he acts in a quasi judicial capacity no longer exists.

November 13, 1947.

ROBERT C. SCHISSLER,
Commissioner of Savings and Loan Associations.

In your letter of October 7, 1947 you submit for our opinion several questions on different subjects which we will take up in their order.

I

You first inquire as to whether a fee can be deducted from the book value of a certificate of a member of savings and loan association when said member withdraws his funds from the association.

The member can withdraw his funds from a savings and loan association by two methods: (a) By the association redeeming his shares as provided in sec. 215.10; and (b) by the association repurchasing his shares as provided in sec. 215.11.

In sec. 215.10 it is provided in part:

"At any time funds are on hand for the purpose, the association shall have the right to redeem by lot, or otherwise as the board of directors may determine, all or any part of any of its share accounts on a dividend date, by giving 30 days' notice by registered mail addressed to the holders at their last address recorded on the books of the association. The association shall not redeem any of its share accounts when there is an impairment of share capital or when it has applications for repurchase which have been on file more than 30 days and not reached for payment. The redemption price of share accounts redeemed shall be the full value of the share account redeemed, as determined by the board of directors, but in no event shall the redemption price be less than the repurchase value. * * *"

In sec. 215.11 it is provided in part:

"The association shall have the right to repurchase its share accounts at any time upon application therefor and
to pay to the holders thereof the repurchase value thereof. Holders of share accounts shall have the right to file with the association their written application to repurchase their share accounts, in part or in full, at any time."*

The participation value is defined in sec. 215.08 (1) as follows:

"** The participation value in the share capital of each share account held by a member shall be the aggregate of payments upon such share account and dividends credited thereto less withdrawals, redemption and repurchase payments and depreciation charges."

It is evident that no fee or other charges can be imposed when a member withdraws his funds from an association either by the redemption or repurchase method other than that mentioned in the definition of participation value in sec. 215.08 (1). Where the shares are redeemed, the redemption price "shall be the full value of the share account redeemed, as determined by the board of directors, but in no event ** less than the repurchase value." Where the shares are repurchased, the price the member is entitled to receive is "the repurchase value thereof." Repurchase value is the participation value, which is defined in sec. 215.08 (1) as the aggregate of payments upon each share account and dividends credited thereto, less withdrawals, redemption and repurchase payments and depreciation charges. No provision is made for the deduction of any other fee or charge and for that reason no such other fee or charge can be imposed when a member withdraws his funds from an association.

The provisions of secs. 215.10, 215.11 and 215.08 (1) above referred to by their terms apply to shares subscribed for or issued before as well as those issued after these sections were repealed and recreated by ch. 320, Laws 1941, which was published June 30, 1941 and by its terms became effective upon passage and publication. The application of these sections to shares issued before the effective date of ch. 320, Laws 1941, violates no right of a shareholder or association under the contract clause of either the state or federal constitution. XXXVI Op. Atty. Gen. 157 at 158–9.

In your inquiry you refer to the provisions of sec. 215.26 (1) which reads in part as follows:
"The articles of association or by-laws of each local association must specify: * * * how shares may be withdrawn, the fees to be charged therefor and the proportion of the profits payable on such withdrawal; the regulations as to retiring shares and the amount to be paid holders thereof; * * *"

In event the articles of association or by-laws of a local association contain a provision providing that a fee be charged when a member withdraws his shares or funds, such provision will conflict with the provisions of secs. 215.10 and 215.11 as repealed and recreated by ch. 320, Laws 1941. Any provision contained in articles of association or by-laws which conflicts with a statute has no effect. A statute governs over a conflicting provision in articles of association or a by-law. No constitutional right of the shareholder or of the association under the contract clause of either the state or federal constitution is thereby impaired. XXXVI Op. Atty. Gen. 157 at 158–9.

II

Your second question is whether an employe of the savings and loan association department who is an officer, employe or stockholder of a savings and loan association located in a certain county, is for that reason prohibited from examining other savings and loan associations located in the same county.

A prohibition against employes of your department such as that mentioned in your inquiry would exist only if there is a statute so providing, as we have been unable to find anything in the common law which imposes such a restriction. The only statute we have been able to find on the subject is sec. 220.06 (1).

Prior to the enactment of ch. 411, Laws 1947, which among other things created a savings and loan association department headed by a commissioner of savings and loan associations, which department and commissioner are given supervisory power over savings and loan associations, sec. 220.06 (1) read as follows:

"No commissioner of banking, deputy, assistant deputy or examiner shall examine a bank in which he is interested as a stockholder, officer, employe or otherwise. No commis-
Opinions of the Attorney General

A savings and loan association is not a bank (State ex rel. Cleary v. Hopkins Street B. & L. Ass'n., 217 Wis. 179 at 185) and for that reason the above quoted provisions of sec. 220.06 (1) had no application in case of examinations of savings and loan associations even before the enactment of ch. 411, Laws 1947, when the supervision of savings and loan associations was under supervision of the banking commission as provided in sec. 215.31, Stats. 1945.

The foregoing conclusion also finds support in the fact that sec. 220.06 (1) found its origin as sec. 6, ch. I of ch. 234, Laws 1903, which was the act providing for the creation of banks and for the regulation and supervision of the banking business. Then as now the restriction was against the commissioner of banking or subordinates mentioned examining "a bank" under the circumstances stated, and the word "bank" was defined in ch. IV of ch. 234, Laws 1903, as "any incorporated banking institution which shall have been incorporated under the laws of this state as they existed prior to the passage of this act, and to such banking institutions as shall hereafter become incorporated under the provisions of this act," which definition now appears in sec. 224.01. This indicates that the word "bank" as it appears in sec. 220.06 (1) did not and does not include a savings and loan association.

Furthermore, in enacting ch. 411, Laws 1947, which abolished the banking commission and substituted in its place a commissioner of banks and also shifted supervision of savings and loan associations to the savings and loan association department and commissioner, which department and office were also created thereby, the legislature also indicated that the words "commissioner of banking" as they appeared in sec. 220.06 (1) before the enactment of said ch. 411, Laws 1947, should thereafter refer to the commissioner of banks. See sec. 215.30 (5) and 220.02 (5) as created by ch. 411, Laws 1947. The words "deputy, assistant deputy or examiner" as they appeared in sec. 220.06 (1) before the enactment of ch. 411, Laws 1947, referred to a
deputy, assistant deputy or examiner of the banking commission and after enactment of said ch. 411, Laws 1947, refer to a deputy, assistant deputy or examiner of the commissioner of banks. Hence, even if sec. 220.06 (1) was applicable in case of examination of savings and loan associations prior to the enactment of ch. 411, Laws 1947, it is not in any event applicable thereafter.

III

You also ask whether the commissioner of savings and loan associations may accept a salary as an officer from an association which is subject to his supervision.

We find no constitutional provision or statute which prohibits an appointive state official from accepting a salary from a person, firm or corporation with which he may be affiliated, when said person, firm or corporation is subject to his supervision. See XXXII Op. Atty. Gen. 65. The statute which provides for the appointment of a commissioner of savings and loan association and states the term of office and qualification states: "He shall devote full time to the duties of his office." Sec. 215.30 (2), Stats. This does not necessarily negative the right to accept a salary from an outside person, firm or corporation since it is possible for the commissioner to devote full time to the duties of his office and spend evenings and other free time working for the outside person, firm or corporation. See XXXII Op. Atty. Gen. 65 at 68 as to discussion of term "full time."

There seems to be nothing in the common law which prohibits a public officer from being affiliated with and drawing a salary from a person, firm or corporation engaged in a private business enterprise even though said person, firm or corporation is subject to his supervision. This is recognized by sec. 220.06 (1) which prohibits a commissioner of banks and others from examining a bank in which he is interested as a stockholder, officer, employee or otherwise and also prohibits the commissioner of banks and others from examining a bank located in the same village, city or county with a bank in which he is interested as a stockholder, officer, employee or otherwise. If it were not considered that the commissioner of banks could be interested
in a bank as stockholder, officer, employe or otherwise, there would be no need for a statute such as sec. 220.06 (1).

In an opinion of this department dated March 11, 1943 appearing in XXXII Op. Atty. Gen. 65, it was held among other things that members of the banking commission might at the same time be officers or directors of banks or building and loan associations or other corporations subject to supervision by the banking commission. Among other things it was pointed out that for a substantial number of years before and after enactment of ch. 374, Laws 1933, providing for a three-man banking commission, members of said commission or commissioners have at the same time been officers and directors of institutions subject to their supervision, which was characterized as a "well known and uniform practical construction of the statutes" over a substantial period of years which would be entitled to great weight and "would probably be controlling" if there were any reasonable doubt as to the proper construction of the statutes involved which, the opinion states, "we believe there is not."

The point has also been made that appointive officials should be permitted to retain their outside business interests because otherwise it would be difficult to secure fit persons who would accept an appointment to such office. See Holmes v. Osborn (Ariz.), 115 P. (2d) 775 at 784, and also XXXII Op Atty. Gen. 65 at 67.

No doubt a public officer occupying a position such as indicated above would be prohibited from passing on, considering, or taking any action in his official capacity with respect to any matters involving the person, firm or corporation with which he is affiliated under the general rule that officers are not permitted to put themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. 46 C. J. 1037. In the authority cited it is also said at page 1038 that in the discharge of his duties the officer must be disinterested and impartial, and he cannot at the same time act in his official capacity and as the agent of one of the public whose interests are adverse to those of another.

We therefore advise that in our opinion it would not be unlawful for the commissioner of savings and loan associa-
tions to retain his connection with and accept salary as an officer from an association which is subject to his supervision, with the qualification that he must refrain from passing on, considering, or taking any action in his official capacity with respect to any matter involving the association with which he is affiliated. It should also be understood that the commissioner must devote full time to the duties of his office and any services he may render to the association must be done at such time and under such circumstances as would not interfere with this requirement.

An administrative officer by retaining his connection with and accepting a salary from a person, firm or corporation under his supervision does not by that fact standing alone violate sec. 348.28, Stats.

IV

You also ask whether the commissioner of savings and loan associations now has the benefit of the immunity granted by sec. 220.065, and if not, under what circumstances he can become liable in damages to others for his acts.

The immunity granted by sec. 220.065 does not inure to the benefit of the commissioner of savings and loan associations for the reason that after the enactment of ch. 411, Laws 1947, the words "banking commission" as used in sec. 220.065, Stats. 1945, mean commissioner of banks. See sec. 220.02 (3), (4), (5), Stats., as recreated by ch. 411, Laws 1947.

It is difficult to give a general answer to your question asking under what circumstances liability might exist, because everything depends upon the facts in each particular case, of which there can be endless variations. As a general proposition whenever the commissioner of savings and loan associations performs duties which are quasi judicial in nature he would not be liable in damages to others for his mistakes or errors if he exercises his honest judgment in performing acts within his jurisdiction. State ex rel. Lathers v. Smith, 242 Wis. 512. Compare Wasserman v. Kenosha, 217 Wis. 223. As an exception to this rule it is said that an officer acting in a quasi judicial capacity is liable to a third person where such officer unjustifiably in-
vades private property rights so the person injured will be without remedy unless such officer is made to respond in damages. *Wasserman v. Kenosha*, *supra*; *State ex rel Bautz v. Harper*, 166 Wis. 303 at 314.

Where the administrative officer acts in a ministerial capacity, the situation is different. Then the protection afforded when action is taken in a *quasi* judicial capacity does not exist. *State ex rel. Lathers v. Smith*, 242 Wis. 512; 42 Am. Jur. (Public Administrative Law), § 257 at p. 707.

As to when a duty is to be regarded as *quasi* judicial or ministerial, see 21 Minnesota Law Review 263 at 297.

The Law Review article above cited contains an extensive discussion on the subject of liability of an administrative officer in tort and can profitably be read in event further information is desired on the subject. See also 42 Am. Jur. (Public Administrative Law), § 256 and following.

WET

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*Taxation—Schools and School Districts—High School Tuition Tax*—Under ch. 573, Laws 1947, a town is not entitled to credit against amounts due for high school tuition tax if it neither lies within a high school district established as such pursuant to statute nor operates a high school established as such in a manner recognized by statute.

November 17, 1947.

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

You have asked whether the town of Allouez is entitled to any exemption or deduction from high school tuition tax, assessed pursuant to sec. 40.47 (5) and (6) of the statutes as amended by ch. 573, Laws 1947, because of the fact that it lies within a school district which operates a ninth grade.

The question is strictly one of statutory interpretation. As pointed out by the supreme court in *Holland v. Cedar Grove*, 230 Wis. 177, 189, 282 N. W. 111, political subdivisions of the state have no rights except such as are con-
ferred by the legislature and are liable to have their statutory rights and duties modified or abolished by it.

In _Wauwatosa v. Union Free H. S. District_, 214 Wis. 35, 252 N. W. 351 it was held that a legislative enactment was not objectionable on constitutional grounds because it subjected a portion of a municipality which was already subject to taxation for the maintenance of a high school to an additional tuition tax as a part of a school district which failed to maintain a high school.

In XXIV Op. Atty. Gen. 516 the opinion was given by this office under sec. 40.47 (6) as it existed prior to its amendment by ch. 573, Laws 1947, that a municipality within a school district offering two years of high school was entitled to one-half exemption under this statutory provision reading:

"If a portion of such municipality forms a part of a high school district, the taxable property in that portion shall be exempt from such tuition tax."

That opinion, however, is not applicable to the situation involved in your question both for the reason that new provisions have been added to the statute altering the basis of assessment for tuition tax, and for the reason that the opinion above cited apparently dealt with a high school rather than a common school district. The opinion above cited was based in part upon the fact that the law as it then existed dealt with the tuition charge as a debt due to one municipality from another, since liability was therein based upon the residence of the student for whom the tuition was charged. Sec. 40.47 (6) as created by ch. 573, Laws 1947, on the other hand, does not make the municipality of residence of a pupil directly liable to the municipality furnishing the school facilities to such pupil. It provides that the tuition due to municipalities furnishing the school facilities shall be collected through the county by division among the tax collection districts on the basis of equalized valuation rather than on the basis of residence of the pupils.

There can be no exemptions from the tax except such as are expressly stated or necessarily implied in the statute. The statute subjects to the tuition tax all portions of each municipality in the county that lie "outside of districts
which operate high schools” and further provides, as the
statute formerly did, that if a portion of such municipality
forms a part of a high school district, “the taxable property
in that portion shall be exempt from such tuition tax.” An
evaluation of exactly what exemption is intended under the
foregoing provisions is somewhat complicated by the fact
that in one portion of the statute reference is made to “dis-
tricts which operate high schools” and in another part to
“high school districts.” As recognized in State ex rel. Her-
manson v. Callahan, 179 Wis. 549, 191 N. W. 974 these are
not necessarily the same thing, since an ordinary school
district may operate a high school. See sec. 40.62 Stats.

It is clear, however, that no municipality or portion
thereof is entitled to exemption from the tuition tax under
the provisions of sec. 40.47 (6) as amended by ch. 573,
Laws 1947, unless it either operates a high school or is a
high school district. The municipality involved in your ques-
tion is not located within a high school district organized
or existing under any of the statutory provisions by which
such a district may function. The other question, then, is
whether it may be considered to be within a district which
operates a “high school” as that term is used in the exemp-
tion provision.

Sec. 40.02 provides that the 9th, 10th, 11th and 12th
school grades are high school grades. It does not follow,
however, that even schools providing all four of such grades
classify as high schools within the statute, because it is
recognized in various provisions of the statutes (notably
secs. 40.535 and 40.47 (7)) that grades above the 8th may
be maintained in schools which are recognized as distinct
and different from high schools. See also State ex rel. Her-
manson v. Callahan, 179 Wis. 549, 553, 191 N. W. 974 in
which it was recognized that even a state graded school of
the first class offering a twelve-year course of study “may
be a school just a little less than one equivalent to a free
high school.” It is apparent, therefore, that even if the term
“districts which operate high schools” as used in sec. 40.47
(6) was intended to include anything other than a “high
school district” established or existing in accordance with
statutory provisions relating to such districts (upon which
question we do not at this time give an opinion) it could not
apply to any school except one established as a high school in a manner authorized by statute.

As we understand it, the 9th grade provided by the district involved in your question is provided as a part of a graded school system and not as a high school. It follows that there can be no exemption under the terms of sec. 40.47 (6) as amended by ch. 573, Laws 1947; and it is unnecessary to determine whether a partial exemption such as was involved in XXIV Op. Atty. Gen. 516 would ever be possible under the terms of the statute as it now exists.

BL

Elections—Ballots—Sec. 5.12 as created by ch. 559, Laws 1947, does not prevent statement of principles of independent candidates on ballots at November elections nor statement of principles of candidates for delegate at April elections.

November 17, 1947.

FRED R. ZIMMERMAN,
Secretary of State.

You have asked what restrictions the recently enacted sec. 5.12 of the statutes (ch. 559, Laws 1947) impose upon the preparation of ballots pursuant to secs. 5.24 and 6.23 of the statutes with respect to candidates for delegates to national conventions and with respect to independent candidates for state and county offices at the November elections.

It is our opinion that sec. 5.12, as created by ch. 559, Laws 1947, was not intended to repeal or modify the provisions of sec. 5.23 to the effect that “the nomination papers and ballot for any delegate may contain a statement of the principles or candidates favored by such candidate for delegate, which statement shall follow his name and be expressed in not more than five words”; nor the provisions of sec. 6.23 (4) to the effect that “if the person be an independent candidate, his name shall be placed in its proper place in the column or columns designated independent, together with his party designation as given in his nomination papers.”
Sec. 5.12 of the statutes, as created by ch. 559, Laws 1947, reads:

“Exclusive Right to Party Name. Every political party now entitled to have the names of its candidates printed on the September primary and November election ballots is entitled to the exclusive right to the use of the name designating it. The secretary of state shall not certify to the county clerk, pursuant to section 5.08 (1), and the county clerk shall not place on any ballot prepared by him, pursuant to section 5.10 (1), the name of any person whose nomination papers designate a party name which comprises a combination of existing party names, or qualifying words, phrases, prefixes, or suffixes in connection with any existing party name.”

The entire provision must be read as a whole. The meaning of each sentence of an entire provision is to be determined from its context. The application of the second sentence of sec. 5.12 is expressly limited to the September primaries by its reference to sec. 5.08 (1) and sec. 5.10 (1). The committee report which was before the legislature when the law was adopted also indicates that it was not intended to apply to ballots for April and November elections. The law was recommended by the special joint committee on election laws which was created pursuant to Joint Resolution 29, S. (See assembly journal for July 2, 1947.) The same report was turned over to the legislative reference library with the committee's request for the drafting of ch. 559, Laws 1947. (See drafting file 3228.)

That the law was not intended to change the existing practices respecting candidates for delegate to a national convention is manifested by the fact that the report discussed the desirability of changes in those provisions and concluded that any revision affecting those matters should await study by an interim committee at a later date. A portion of the committee's report reads:

“* * * Likewise, under Section 5.23, Paragraph 1, any candidate for delegate to the national convention of a party has the right to file nomination papers as being in favor of a presidential candidate, and this can so appear on the ballot even though the presidential candidate, himself, does not want that specific individual running as a delegate. In fact, under this section there could be any number of slates of
delegates for an individual candidate for president, in which case no individual would have a chance of winning a delegation because the vote would be split. ** [Following is a discussion of possible changes]

"We have not, however, concluded to recommend such a bill at this session because of the inference that it is directed at the candidacy of certain individuals for president at the next presidential election. It would seem the part of wisdom, however, that this matter receive the attention in a subsequent session of the legislature."

The purpose of the limitations contained in sec. 5.12 as created by ch. 559, Laws 1947, is explained in the following portion of the committee's report:

"With respect to the use of party names, it would appear to be the present policy of this state that each political party now or hereafter entitled to have the name of its candidate printed on any official primary or election ballot should have the exclusive right to the party name and such party should be protected from the invasion of a person seeking nomination and election under its party name when they are in disagreement with its basic principles. Oftentimes, this invasion is accomplished by subterfuge in the use of prefixes, suffixes, or qualifying words or phrases in connection with the party designation. It would appear that this is a practice which should be prohibited. To this end, the committee herewith offers a bill to create Section 5.12 of the Wisconsin statutes relative to the protection of party designations." (Emphasis supplied)

The underlined phrase indicates that the protection sought to be afforded to parties was primarily against persons seeking nomination and election under the party name rather than as independent candidates.

BL
State—University—Negligence—Neither the state nor the board of regents of the university of Wisconsin are liable for injuries suffered by persons who climb the radio towers of station WHA without authority.

Officers and agents in charge of station are not liable to trespassers of mature intelligence.

If reasonable safeguards have been provided, officers and agents are not liable under the attractive nuisance doctrine for injuries to trespassing children.

November 17, 1947.

HAROLD A. ENGEL, Assistant Director,
Radio Station WHA,
University of Wisconsin.

You inquire what precautions must be taken by your station to avoid liability to someone who might be injured in a fall from your FM radio tower while climbing it without authorization.

Radio station WHA is a state agency operated by the board of regents of the university of Wisconsin pursuant to direction contained in sec. 36.33, Stats. In the leading case of Holzworth v. State, 238 Wis. 63, the court ruled that neither the state nor the board of regents were liable for the tortious acts of their officers or agents. This case involved injuries to a minor who fell some 12 feet over the edge of an exit at Camp Randall stadium. Liability was claimed on the ground that the stadium had not been constructed in a safe manner. The court overruled this claim and held there was no liability. Accordingly, in our opinion no claim against the state or the board of regents based upon the negligence of their agents can arise out of the construction and maintenance of the FM tower for station WHA.

Any personal liability of the officers and agents in charge of station WHA would have to be based upon their personal negligence. In the case of an ordinary trespasser of full age, it appears that there is no affirmative duty owing to such person and hence neither the owner nor any of his agents could be held guilty of negligence. Schulte v. Willow River Power Co., 234 Wis. 188. The rule regarding liability
under the attractive nuisance doctrine for injuries to children is stated in *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 53. It is there indicated that liability does not arise if reasonable safeguards have been provided which would obviate the inherent danger of the structure. See also *Larson v. Equity Co-operative Elevator Co.*, 248 Wis. 132.

Accordingly, if you carry out your suggestions that you will remove the ladder steps from the lower portion of the tower and place upon each tower leg a sign—"Danger, Keep Off," so that it would be difficult for any except an ingenious and wilful child to climb the tower, it appears that under the existing cases there is no basis for liability on the part of the officers and agents in charge of maintaining the tower.

RGT

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**Taxation—Public Utilities—Schools and School Districts**

The amendment of sec. 76.28 (3), Stats., by ch. 237, Laws 1947, does not limit the effect of the provision added by ch. 516, Laws 1939; but the later amendment applies only to cases where a part of the municipalities in a joint school district would otherwise be required to make apportionment and some would not.

November 19, 1947.

A. E. Wegner,

*Commissioner of Taxation,*

*Department of Taxation.*

You have called our attention to the amendment of sec. 76.28 (3) of the statutes by ch. 237, Laws 1947, and have asked the following questions respecting the effect of such amendment:

1. Does ch. 237, Laws 1947, refer to situations covered by ch. 516, Laws 1939? If so, does the recent amendment change the law in any respect?

2. Or, does ch. 237, Laws 1947, apply only to joint school districts located wholly within one county having a population of 50,000 or less?
Although sec. 76.28 (3) as it now exists has been built up in a more or less piecemeal fashion by a series of amendments, the subsection was intended as an entire provision relating to the same subject matter, and must be read as a whole. All of its provisions, even though they may have been added by separate amendments, must be read together and harmonized so far as possible; and effect must be given to each.

Doubt as to the meaning of the addition to the statute which was made by ch. 237, Laws 1947, is probably due to the fact that the proviso so created was added to a sentence to which it does not appear to be germane. To the sentence “Any excess above this amount shall be retained by and is allotted to the town or village;” there was added the following proviso:

“provided, however, no such apportionment shall be made by the governing body of any town, village or city to a joint school district unless the governing body of every other town, village and city located within such joint school district is required by law to likewise make such apportionment of its share of such taxes to the joint school district, and in such case the amount which otherwise would have been apportioned to the joint school district shall be retained by the town, village or city for its general purpose.”

The first part of the amended sentence deals with the excess above the amount to be apportioned, and refers back to an earlier sentence limiting the amount which must be apportioned under certain circumstances. The proviso deals with a different situation.

We do not believe the fact that it has been appended to another sentence and preceded by the words “provided however,” is indicative of a different legislative intent than the proviso would have if it stood as a separate sentence beginning with the word “No.” Mere matters of punctuation and sequence are not controlling where the intention of the legislature is otherwise apparent. The term “such apportionment” appears to relate the proviso to any apportionment made as a result of the requirements of the subsection.

It seems to us that a legislative intent is revealed to relieve any municipality from making an apportionment to a joint school district if the district’s territory comprises
another municipality which is not required by statute to make an apportionment. In specific answer to your questions:

1. Under the proviso created by ch. 516, Laws 1939, every city, village and town covered is “required by law” to make an apportionment; and so its terms are outside the scope of the proviso added by ch. 237, Laws 1947, which excepts such cases.

2. It follows that your second question would be answered in the affirmative, since the proviso added by ch. 516, Laws 1939, describes the only case in which the subsection applies to joint school districts located in counties of two different classes of population.

BL

Register of Deeds—Recording Instruments—Instrument which is acknowledged before a notary public but which is not subscribed and sworn to is not entitled to be recorded as an affidavit under sec. 235.46, Stats.

November 20, 1947.

ROBERT P. RUSSELL,
Assistant Corporation Counsel,
Milwaukee, Wisconsin.

You state that a written instrument has been presented to the register of deeds of Milwaukee county for recording under the provisions of sec. 235.46, Stats. The instrument is witnessed by two witnesses and is in the form of an affidavit except that instead of being subscribed and sworn to before a notary public it contains an acknowledgement by a notary public in the form commonly used in conveyances. The instrument relates to the identity of a party to a conveyance recorded in the office of register of deeds of Milwaukee county.

The question presented is whether the instrument qualifies for recording as an affidavit under sec. 235.46, Stats., which reads:

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

An “affidavit” is defined by Webster as a sworn statement in writing; especially, a declaration in writing, made upon oath before an authorized magistrate or officer. To make an “affidavit” to a thing is to testify to it upon oath in writing. Williams v. Stevenson, 103 Ind. 243, 2 N. E. 728. Its purpose is to evince the truth of certain facts. Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326.

An acknowledgement on the other hand is a declaration before a duly qualified public officer, by one who has executed an instrument that the execution was his free act and deed. It is merely a verification of the signature and does not extend to the body of the instrument itself. It establishes only that the instrument was duly signed and proves the identity of the person whose name appears thereon. Bristol v. Buck, 194 N. Y. S. 53, 201 App. Div. 100. In Lee James, Inc. v. Carr, 170 Wash. 29, 14 P. (2d) 1113 it was held that an acknowledgment is a statutory proceeding whereby a person executing an instrument may entitle it to be recorded and received in evidence without further proof of execution, by going before competent officers and declaring it to be his act and deed, whereas a jurat is that part of an affidavit where an officer states that it was sworn to before him and is merely evidence that the oath was properly administered. See also 1 C. J. S. Acknowledgments § 1.

Thus it will be seen that an affidavit and an acknowledgment are intended to serve entirely different purposes. The first is intended to furnish prima facie evidence that the truth of certain facts was sworn to and the second is to furnish prima facie evidence of the authenticity of a certain signature. Sec. 235.46 not only specifically uses the word “affidavit” rather than “acknowledgment” but pro
vides that the record of the affidavit shall be prima facie evidence of the facts therein stated where the facts relate among other things to the identity of a party to any conveyance of record which is the case in the instrument here under discussion.

Sec. 326.03 provides that any oath or affidavit required or authorized by law may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed as being lawfully sworn.

Sec. 137.01 (4) and (5) reads:

“(4) All certificates of acknowledgments of deeds and other conveyances, or any written instrument required or authorized by law to be acknowledged before any notary public, within the state of Wisconsin, shall be attested by a clear impression of the official seal of said officer, and in addition thereto shall be written or stamped the day, month and year, when the commission of said notary public will expire.

“(5) The official certificate of any notary public, when attested and completed in the manner provided by subsection (4) of this section, shall be presumptive evidence in all cases, and in all courts of the state of Wisconsin, of the facts therein stated, in cases where by law a notary public is authorized to certify such facts.”

The only fact or facts certified to before a notary in the instrument in question is that the person who signed the instrument personally came before the notary on a specified date, that he was known by the notary to be the person who executed the instrument and that such person acknowledged the same. The notary does not certify that such person swore to the truth of the facts recited in the body of the instrument as would be the case if a jurat were used in the usual form of “Subscribed and sworn to before me this _______ day of ______________, 1947.” See XXXII Op. Atty. Gen. 415 at 417.

The authorities appear to be in accord that the jurat is no part of the affidavit but is merely a certificate that the witness appeared before the officer and was sworn to the truth of what he had stated. See United States v. Julian, 162 U. S. 324. Although the jurat is ordinarily added at the foot of the affidavit by the officer the affidavit is suf-
ficient if it shows in the body thereof that the affiant was sworn by the officer before whom the affidavit was purported to be made. Garrard v. Hitsman, 16 N. J. L. 124. The instrument in question comes close to meeting the requirements in that it recites that the signer of the instrument "being first duly sworn on oath deposes and says," etc. However, the certificate of the notary does not indicate that he was the officer who administered the oath. Thus the affidavit is presently defective although it may be amended nunc pro tunc on proof of its authenticity. Young v. Wooden, 204 Ky. 695, 265 S. W. 24.

In view of the foregoing you are advised that the instrument in question is not entitled to be recorded in its present form as an affidavit pursuant to sec. 235.46, Stats.

WHR

Municipalities—Airports—Wisconsin cities, towns, villages and counties have authority under the Wisconsin statutes for 1947 to undertake and carry out airport projects with federal aid.

November 21, 1947.

WISCONSIN STATE AERONAUTICS COMMISSION.

You have asked an opinion giving the authority of cities, towns, villages and counties, and co-sponsorships of any combinations of the foregoing, with respect to carrying out airport projects under the federal airport act. You have requested opinions as to powers of such agencies in the following respects:

1. Authority to submit a project application and to receive a grant of federal funds under the act.

Ch. 548, Laws 1947, was enacted to provide for participation by the state of Wisconsin and its municipalities in development programs under the federal act. Under sec. 114.01 it was declared to be the policy of the state to co-operate with the government of the United States under the federal airport act, and to co-operate with the cities,
towns, villages and counties of the state in order that maximum benefits under the act may be derived. Sec. 114.32 (1) as amended by ch. 548, Laws 1947, authorizes the state aeronautics commission to submit project applications and receive grants of federal funds on behalf of the cities, towns, villages and counties of the state, and combinations thereof; and authorizes cities, towns, villages and counties to designate the commission as their agent for such purposes. The provision reads:

"(1) The commission is authorized to co-operate with the government of the United States, and any agency or department thereof in the acquisition, construction, improvement, maintenance and operation of airports and other air navigation facilities in this state, and to comply with the laws of the United States and any regulations made thereunder for the expenditure of federal moneys upon such airports and other air navigation facilities, and may enter into any contracts necessary to accomplish such purpose. It is authorized to accept, receive, and receipt for federal moneys and other moneys, either public or private, for and in behalf of this state, or any municipality thereof, for training and education programs, for the acquisition, construction, improvement, maintenance and operation of airports and other aeronautical facilities, whether such work is to be done by the state or by such municipalities, or jointly, aided by grants of aid from the United States, upon such terms and conditions as are or may be prescribed by laws of the United States and any rules or regulations made thereunder, and it is authorized to act as agent of any municipality of this state upon the request of such municipality, in accepting, receiving and receipting for such moneys in its behalf for airports, and in contracting for the acquisition, improvement, maintenance or operation of airports financed either in whole or in part by federal moneys, and the governing body of any such municipality is authorized to designate the commission as its agent for such purposes and to enter into an agreement with it prescribing the terms and conditions of such agency in accordance with federal laws, rules and regulations and with chapter 114. Such moneys as are paid over by the United States government shall be retained by the state or paid over to said municipalities under such terms and conditions as may be imposed by the United States government in making such grants."

The methods by which cities, towns, villages and counties may proceed with respect to a project where federal
aid is involved is described in secs. 114.32 (5) and 114.33 as created by ch. 548, Laws 1947.

2. Authority to engage in airport development as contemplated in the project and in the act.

Such authority is contained not only in the provisions above referred to but in sec. 114.11 (1) of the statutes which reads:

“The governing body of any county, city, village or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain and operate airports or landing fields or landing and take-off strips for the use of airplanes and other aircraft either within or without the limits of such counties, cities, villages and towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county, city, village or town, and may regulate the same, provided, such regulation shall not be in conflict with such rules and regulations as may be made by the federal government. The governing body of each and every county and municipality owning an airport or landing field or landing and take-off strip in the state of Wisconsin shall cause the surroundings of such airport, landing field or landing and take-off strip to be marked for aeronautical purposes, and maintain such marking, subject to and in accordance with law and such rules and regulations as may from time to time be made by the federal government and in so doing may co-operate with other states and subdivisions thereof and acquire rights and easements in property outside of the state.”

With respect to co-sponsorships, sec. 114.151 of the statutes as amended by ch. 437, Laws 1947, reads in part:

“All powers conferred upon any county, city, village or town by sections 114.11 to 114.15, relating to the acquisition, establishment, construction, ownership, control, lease, equipment, improvement, maintenance, operation and regulation of airports or landing fields may be exercised by any two or more municipalities in the establishment, acquisition, equipment and operation of joint airports or landing fields.

3. Authority to acquire, own or control land needed for the project and operation of the airport.

The statutes quoted under question 2 contain authority for cities, towns, villages, counties and combinations
thereof to acquire, own and control land needed for projects. In addition we call attention to secs. 114.12 and 114.13 which authorize condemnation and purchase of such lands.

4. Authority to establish, maintain and operate an airport.

Authority to establish, maintain and operate airports is granted to cities, towns, villages and counties by secs. 114.11 and 114.151, quoted under question 2 above.

5. Authority to raise necessary funds to meet the sponsor's share of project costs and to finance the operation and maintenance of the airport.

Sec. 114.11 (4) of the statutes as created by ch. 437, Laws 1947, reads:

"The governing body of any county, city, village or town is authorized to appropriate money to any town, city, village or other county, for the operation, improvement or acquisition of an airport by such town, city, village or other county or any combination of such municipalities."

Sec. 114.15 of the statutes reads:

"The local authorities of a city, village, town or county to which this chapter is applicable having power to appropriate money therein may annually appropriate and cause to be raised by taxation in such city, village, town or county, a sum sufficient to carry out the provisions of this chapter."

In addition to the foregoing authority, counties are authorized to borrow money for airport purposes by sec. 67.04 (1) (k); cities by sec. 67.04 (2) (s); villages by sec. 67.04 (4) (a); and towns by sec. 67.04 (5) (n).

6. Authority to execute all necessary covenants and agreements and to assume the obligations of sponsorship as required by the regulations of this part.

Sec. 114.32 (1) of the statutes as amended by ch. 548, Laws 1947, above quoted, as amplified by sec. 114.32 (5), authorizes cities, towns, villages and counties through the agency of the state aeronautics commission to comply with the foregoing requirements. The last sentence of sec. 114.32 (5) as created by ch. 548, Laws 1947, provides that any county, city, village or town submitting a project applica-
tion under the federal airport act "shall enter into an agreement with the commission [state aeronautics commission] prescribing the terms and conditions of the commission's functions under such agency in accordance with federal laws, rules and regulations and applicable laws of this state."

We believe that the foregoing quoted provisions together with the general powers granted to the state aeronautics commission and to cities, towns, villages and counties under other provisions of the statutes are entirely adequate to enable such municipalities, with the assistance of the state commission, to comply fully with the requirements of the federal airport act.

BL

State Treasurer—Accounts—Sec. 14.42 (6), Stats., requires among other things that the state treasurer keep a cash book containing a detailed account of all money received and disbursed. No categorical answer can be given to what constitutes a detailed account, as said term has no fixed or certain meaning either in law or in accounting. The most that can be said as a general proposition is that sec. 14.42 (6) requires the state treasurer to keep a cash book containing such detail as will meet the requirements of good accounting practice under the circumstances.

November 24, 1947.

John Sonderregger,
State Treasurer.

You ask us to advise you as to the kind of records you must keep in your office to show receipts into and disbursements from the state treasury.

You state that detailed records are kept of all receipts that are received by you but that it duplicates records kept by the department of budget and accounts. The disbursement records are kept by funds only and detailed information of disbursements is not recorded.
The constitution provides that the powers, duties and compensation of the state treasurer "shall be prescribed by law." Art. VI, sec. 8. The duty to keep a record of receipts and disbursements is imposed upon the state treasurer by sec. 14.42 (6), Stats., which provides that the state treasurer shall:

"Keep, in books provided for that purpose, fair, full and separate accounts of all moneys received by him, clearly distinguishing the separate funds required to be kept; keep also a cash book, and enter therein a detailed account of all money received and disbursed. and at the end of each week, verify such accounts with the director of budget and accounts."

The foregoing leaves the state treasurer with no alternative. He is obliged to keep the various books and accounts mentioned, including a cash book in which there must be entered "a detailed account of all moneys received and disbursed." The state treasurer cannot avoid complying with this subsection even though like books or accounts are kept by some other department of our state government so that there is a duplication of effort.

The fact is that some duplication is contemplated, as the director of budget and accounts is specifically required by statute to keep separate accounts. Sec. 15.19 (1) provides:

"The director shall: (1) Keep in his office separate accounts of the revenues and funds of the state, and of all moneys and funds received or held by the state, and also of all encumbrances, expenditures, disbursements and investments thereof, showing the particulars of every encumbrance, expenditure, disbursement and investment."

The reason for such duplication is to provide a system whereby books kept by the state treasurer and the director of budget and accounts can be used as a check against one another. Specific provision for such a check is found in sec. 35.67 which provides that the state treasurer shall make, in addition to his biennial report, at the close of each odd-numbered fiscal year, a condensed statement of the financial condition of the state, and submit the same to the director of budget and accounts who shall carefully compare the same with his own accounts and attest the same as correct, if he
so finds, and thereupon publish the same in the official state newspaper and another newspaper as therein provided. If the state treasurer were to discontinue keeping detailed books or records of receipts and rely on those kept by the director of budget and accounts, it would completely nullify what the legislature intended to accomplish by enactment of the foregoing section.

The minimum requirement is that set up by the statute and that is "a detailed account of all money received and disbursed." What constitutes a detailed account is in a sense a legal question because the requirement is contained in a statute, but basically it presents an accounting problem. There is no fixed or certain meaning as to what constitutes a detailed account either in law or in accounting. Accountants consider that a detailed account is an account which is sufficient to give the information necessary to meet the needs of the particular case. The detail that would be reasonable or necessary in one case might be unreasonable or unnecessary in another. Hence the most we can advise you is that you must keep a cash book containing a detailed account of all money received and disbursed which meets the requirements of good accounting practice under the circumstances.

November 24, 1947.

Clarence G. Traeger,
District Attorney,
Horicon, Wisconsin.

You have submitted two questions with reference to the interpretation of sec. 51.21, Stats. 1947, as revised and renumbered by ch. 485, Laws 1947. Your first question is whether a jury trial is provided by that section and the second is whether, if so, the district attorney and the guard-
ian ad litem may stipulate for an earlier trial date than is provided in sec. 51.03, Stats. 1947.

All statute section numbers referred to in this opinion relate to the statutes of 1947 as created by ch. 485, Laws 1947, unless otherwise indicated.

Section 51.21 (3) is a revision of sec. 51.225, Stats. 1945. Under paragraph (a) the department of public welfare is authorized to transfer inmates of the state prison, home for women, state reformatory or county jail to the central state hospital or (in the case of female inmates) to the Winnebago state hospital, if it appears that the inmate is mentally ill, infirm or deficient or epileptic.

Paragraphs (b) and (c) provide as follows:

"(b) The superintendent of the hospital shall receive the prisoner and shall, within a reasonable time before his sentence expires, make a written application to the judge of the county court where the hospital is located for an inquiry as to the prisoner's mental condition. Thereafter the proceeding shall be as upon an application made under section 51.01, but no physician connected with the prison, reformatory, home for women, Winnebago or central state hospital or county jail shall be appointed as an examiner. If the judge is satisfied that the prisoner is not mentally ill or infirm or deficient or epileptic, he may dismiss the application and order the prisoner returned to the institution from which transferred. If the judge finds that the prisoner is mentally ill or infirm or deficient or epileptic, he may commit the prisoner to the central state hospital or commit her to the Winnebago state hospital.

"(c) The provisions of section 51.07 relating to fees and costs shall apply."

Section 51.225, Stats. 1945, contained detailed provisions for a jury trial in such cases. The revision bill resulting in ch. 485 was Bill 19, S., introduced by the joint interim committee on public welfare laws, which in its original form abolished all provision for jury trials in insanity hearings. The note to sec. 51.21 (3) (above quoted in part) reads in part:

"*** The provision for a jury trial is omitted. *** The procedure under 51.01 and new 51.21 should be practically identical and the procedure under the latter is by reference to 51.01." (Italics supplied.)
Section 51.01 does not contain the complete procedure to be followed in mental cases. It provides for the making of an application to a judge, and the appointment by the judge of two examining physicians who are required to report in writing to the judge. The provisions for *notice and hearing* are in sec. 51.02, subsec. (5) of which provides as follows:

"(5) JUDGE'S DECISION. At the conclusion of the hearing the judge may:

"(a) Discharge the patient if satisfied that he is not mentally ill or infirm or deficient or epileptic, so as to require care and treatment, or

"(b) Order him detained for observation if in doubt as to his mental condition, or

"(c) Order him committed if satisfied that he is mentally ill or infirm or deficient or epileptic and that he is a proper subject for custody and treatment, or

"(d) In case of trial by jury, order him discharged or committed in accordance with the jury verdict."

Paragraph (d) of subsec. (5) above quoted was not included in the original Bill 19, S. for the reason that no jury trial was contemplated by that bill in its original form.

The same amendment which added paragraph (d) to sec. 51.02 (5), above quoted, also added to the bill sec. 51.03, prescribing the procedure for a jury trial if demanded by or on behalf of the person whose mental condition is involved.

Therefore the question presented is whether the provision in sec. 51.21 (3) (b) that "thereafter the proceeding shall be as upon an application made under section 51.01" includes the jury trial provision of sec. 51.03. The question is not without difficulty but we are persuaded that the true interpretation is that the jury trial provision does not apply to proceedings under 51.21 (3) (b) for the following reasons:

Section 51.225, Stats. 1945, contained an elaborate provision for a jury trial which the interim committee struck out and to which they called attention in the above quoted note printed in the bill. In amending the bill to restore the jury trial provisions to proceedings upon applications made under sec. 51.01 the legislature did not *expressly* restore it to proceedings under 51.21 (3) (b).
It is obvious that not all the procedural provisions relating to applications under 51.01 can be carried over and applied to the applications made under 51.21 (3) (b). Section 51.02 (5), above quoted, which states what the judge may do at the conclusion of a hearing on an application made under 51.01 is inconsistent with the provisions of 51.21 (3) (b). Therefore the latter statute must control as to proceedings under that section. Now, sec. 51.02 (5) (d) requires the judge to abide by a jury verdict but sec. 51.21 (3) (b) makes no reference to a jury verdict, saying only that "if the judge is satisfied that the prisoner is not mentally ill or infirm or deficient or epileptic, he may dismiss the application and order the prisoner returned to the institution from which transferred" and "if the judge finds that the prisoner is mentally ill or infirm or deficient or epileptic, he may commit the prisoner to the central state hospital or commit her to the Winnebago state hospital."

Therefore it appears that under 51.21 (3) (b) it is the judge who must be satisfied as to the mental condition of the prisoner and no reference whatever is made to what he shall do in the event of a jury trial.

A jury trial is not a matter of right under the constitution in insanity proceedings. Crocker v. State, (1884) 60 Wis. 553; Steward v. State, (1905) 124 Wis. 623, 631. Therefore if there is a right to a jury trial it must be found in the statutes. Apparently no such right is given to inmates of the central state hospital or the Winnebago state hospital who are there by removal from the penal institutions mentioned in 51.21 (3) (a) and therefore no such right exists.

It may be pointed out that the inmate may later apply for re-examination of his mental condition under the provisions of sec. 51.11, and will then be entitled to a jury trial under that section.

This conclusion makes it unnecessary to answer your second question.

WAP
Opinions of the Attorney General

Public Welfare Department—Foster Home Permits—
Term “related” as used in sec. 48.38 (1) (a), Stats., includes adoption or consanguinity within the sixth degree of kindred computed according to the civil law, with the person referred to or his or her spouse.

November 24, 1947.

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

You have requested an opinion with reference to the meaning of the word “related” as used in sec. 48.38 (1) (a), Stats., which provides as follows:

“(1) The term ‘foster home’ as used in sections 48.35 to 48.42 shall mean the place of residence of any person or persons who receive therein a child or children under fourteen years of age for control, care and maintenance, with or without transfer of custody; provided
“(a) That any of such children are not related to such person or persons or either of them, * * *.”

Your questions are:
1. Does the term include marriage (affinity) as well as blood (consanguinity) relationships?
2. Are there any limitations as to degree of relationship?

Section 48.35 (1) provides in part that the term “related” as used in secs. 48.35 to 48.42 “is defined to include adoption or consanguinity within the sixth degree of kindred computed according to the civil law with the person referred to or his or her spouse.” This definition applies to the term “related” as used in sec. 48.38 (1) (a) above quoted. It follows that the answers to your questions are:
1. Relationship by marriage is included only insofar as the person himself is concerned, but is not included in computing the degree of kinship at other levels in the computation.
2. Relationship is limited to the sixth degree of kindred computed according to the civil law.

In connection with your request you submit the following situation which has given rise to the necessity for this opinion: A mother placed her child in the home of a woman who is the daughter of a first cousin of the child’s grand-
mother. Applying the rule of the civil law to this situation, it appears that the woman caring for the child is in the seventh degree of kindred with the child and is therefore not included within the term "related" as used in the statute.

WAP

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Public Welfare Department—Child Welfare Agency—
Milwaukee county department of public welfare, an agency created by county ordinance, headed by a director and under the supervision of the county judges, is not a "person, firm, association or corporation" or a "private institution" so as to be qualified for a license as a "child welfare agency" under secs. 48.35 and 48.36, Stats.

November 25, 1947.

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

You have requested an opinion as to whether your department has authority to license the new Milwaukee county department of public welfare created under sec. 46.01 and following of the general ordinances, county of Milwaukee, adopted October 7, 1947 and effective December 1, 1947.

The authority of the department to license "child welfare agencies" is found in secs. 48.35 and 48.36, Stats. The definition of the term is found in sec. 48.35 (1) which provides as follows:

"(1) The term 'child welfare agency' as used in sections 48.35 to 48.42 is defined as any person, firm, association or corporation, and any private institution which receives for control, care and maintenance, with or without transfer of custody, for more than seventy-five days in any consecutive twelve months' period at any one time more than four children under eighteen years of age unattended by their parents or guardians, but not counting, in the case of an individual, children related to such person, for the purpose of providing such children with care and maintenance or of placing them in foster homes whether for gain or otherwise. This term shall not apply to any boarding school which is essentially and primarily engaged in educational work. The term 'related' as used in said sections is defined to include
adoption or consanguinity within the sixth degree of kindred computed according to the civil law with the person referred to or his or her spouse."

Section 46.01 of the general ordinances of the county of Milwaukee cited above provides as follows:

"There is hereby created a Department of Public Welfare to be administered under the direction of the Judges of the County Courts and to consist of a Director of Public Welfare and such other officers and employes as may be hereafter authorized.

Section 46.02 of said ordinances provides in part as follows:

"* * *

"(2) The Department of Public Welfare is empowered to perform all child welfare functions related to the welfare of dependent, neglected, illegitimate, or mentally defective children including the following specific functions:

"* * *

"(b) To place any dependent or neglected child in the County Home for Dependent Children pursuant to the provisions of Section 48.28 (1), (4), and (5) of the Wisconsin Statutes;

"(c) When licensed by the State Department of Public Welfare, to assume the care, custody, and guardianship of the person of any child during the period of his minority, upon the order of a competent court to this effect;

"(d) To place any neglected or dependent child in a foster home or private institution and to contract with any parent, welfare agency, guardian, or other person for the care and maintenance of such child; provided, however, that any contract with a private institution or welfare agency shall be subject to the prior approval of the Committee on County Institutions;

"* * *

"(f) To consent to the adoption of any child placed in its permanent care, custody, and guardianship pursuant to the statutes regulating adoption proceedings or to provide for the care of any child as a member of a family otherwise than by adoption through a written agreement which shall clearly state the terms of the custody granted to the person or persons receiving the child and shall provide for the proper care, education, and maintenance of such child during his minority;

"(g) When authorized by the State Department of Public Welfare, to issue permits to conduct foster homes to persons
applying therefor and to supervise the operations of such homes pursuant to the rules and regulations issued by the State Department of Public Welfare;

"**

"(j) To perform any or all of the duties which may be performed by a 'licensed Welfare agency' pursuant to the Wisconsin Statutes when authorized to do so by the State Department of Public Welfare."

Section 46.03 of said ordinances provides as follows:

"All services to children shall be in cooperation with the Juvenile Court and shall not in any way conflict with the powers or jurisdiction of such court with respect to the delinquency of children; the involuntary transfer of the care, control, and custody of children; or the orders of the court with regard to the conduct of any adult who is believed to be guilty of contributing to, encouraging, or tending to cause by any act or omission the delinquency, neglect, or dependency of a child."

The ordinance creating the department was intended to be enacted pursuant to the authority of sec. 49.51 (1), Stats., as amended by ch. 584, Laws 1947, and sec. 59.08 (9a), which provide as follows:

"49.51 (1) The county administration of all laws relating to old-age assistance, aid to dependent children and blind aid shall be vested in the officers and agencies designated in the statutes. The county board may provide assistants for such officers and agencies and prescribe their qualifications and fix their compensation in conformity with the rules and regulations of the department as provided in section 49.50 (2). The county board may direct the county judge to administer such assistance and may fix his compensation therefor."

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

"**

"(9a) Establish such agencies and employ such personnel as it may deem necessary for the social welfare and protection of mentally defective, dependent, neglected, delinquent and illegitimate children within the county, fix the compensation of personnel so employed, and appropriate money for such agencies and personnel; provided that the
personnel authorized to be employed hereunder may include the services of a child welfare agency licensed under section 48.37. Nothing herein shall authorize any departure from any of the provisions of any other statute relating to the social welfare and protection of such children, nor to relieve any county from any obligation imposed by any such statute, but any county board may provide additional facilities and agencies for the social welfare and protection of such children."

It is apparent that the Milwaukee county board has attempted to vest in its department of public welfare a number of functions which can only be performed by licensed child welfare agencies. Sections 48.36, 48.37, and 48.38, Stats. The board has assumed that the county department can be so licensed by the state department.

But to be licensed as a "child welfare agency" it must be either a "person, firm, association or corporation" or a "private institution." Under sec. 370.01 (12) Stats. the word "person" extends and applies to bodies politic and corporate. A "body politic" is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. 5 Words and Phrases, 603. Clearly, the county department of public welfare is not a "body politic" although Milwaukee county is within the definition. So the county department of public welfare does not qualify as a "person."

The department is set up as an agency of county government administered under the supervision of the county judges. It is therefore not a "firm, association or corporation." It is not a separate entity as in the case of a private or municipal corporation. Certainly it is not a "private institution."

It follows that it is not such an organization as can be a licensed child welfare agency in the meaning of the statutes.

The suggestion has been made that the director of the county department might be licensed as a child welfare agency, since he is a "person" in the meaning of sec. 48.35 Stats. There are two objections to this, one based on the policy of the state department of public welfare and the
other based on the terms of the ordinance above quoted. The state department deems it inadvisable to license individuals as child welfare agencies for the reason that in case of their death or retirement, all children in their custody would have to be returned to court for other disposition. If the director were to be so licensed and should then resign or die, all control exercised by the department over the children in his custody would automatically cease.

Moreover, the ordinance provides that "the Department of Public Welfare is empowered" to perform said functions when licensed by the state department of public welfare as a child welfare agency. The ordinance therefore contemplates that it will be the department and not any of its personnel who are to be so licensed. If the department as such cannot be licensed the ordinance cannot be carried into effect by licensing its director.

In conclusion you are therefore advised that neither the Milwaukee county department of public welfare nor its director can be licensed as a child welfare agency by your department.

A possible solution, requiring an amendment of the ordinance, is suggested by the proviso in sec. 59.08 (9a), above quoted. WAP
Counties—Salaries and Wages—County Board—Number of days for which compensation may be paid to county board members is limited by sec. 59.03 (2) (f) and this provision cannot be circumvented by having the board meet as a committee of the whole. When so meeting board members are not entitled to compensation as members of a county board committee under sec. 59.06 (1) and (2), and action taken as a committee of the whole is not the action of the county board.

December 1, 1947.

Elmer R. Honkamp,
District Attorney,
Appleton, Wisconsin.

You state that the legal number of meeting days for the Outagamie county board in any one year is 25 and inquire whether the board by meeting as a committee of the whole can legally transact county business after the 25 days allowed by the statute have been used up.

We do not think that it is correct to say that the number of days on which the county board may meet is restricted to 25. Doubtless you have in mind that part of sec. 59.03 (2) (f) which provides that except for services as a member of a committee under sec. 59.06 no supervisor shall be paid for more than 25 days' attendance on the county board in any one year in a county of less than 100,000 population.

Thus it would be seen that the limitation is on the number of days' pay and not on the number of days on which the county board may legally meet. Under sec. 59.04 (1) (a) a county board is limited to one annual meeting each year. XX Op. Atty. Gen. 81. Under sec. 59.04 (1) (b) county boards, except in counties of over 500,000 population, also meet in April when they may transact all business permitted at the annual meeting in the fall. Also, special meetings may be held at any time as provided in sec. 59.04 (2). Such special meetings may be adjourned from time to time. Likewise the county board has the power to continue its annual meetings from time to time until it adjourns sine die. Dandoy v. Milwaukee County, 214 Wis. 586. There is no express limitation as to the number of days during the year on which the county board may legally meet,
Sec. 59.06 (1) reads:

"Any county board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before the first day of June in any year a committee or committees from the members of the county board elect, and the committees so appointed shall perform the duties and report as prescribed in such resolution."

Sec. 59.06 (2) sets up certain limitations as to mileage and the number of per diems which may be allowed to such county board committee members.

We assume that the question really intended to be raised is whether the county board by resolving itself into a committee of the whole can place the members thereof in a position to qualify for the per diems allowed to county board committee members under sec. 59.06 (2). It would seem that the committee as a whole consisting of the entire county board is not one of the committees referred to in sec. 59.06 (1) and even if it were it would not constitute the county board itself so as to be able to take legal action as such board.

The function of the committee as a whole is normally to consider a subject which the board does not wish to refer to a regular committee, and yet where the subject matter is not well digested and put into proper form for definite action, or when, for any other reason, it is desirable for the board to consider a subject with all the freedom of an ordinary committee. See Robert's Rules of Order, sec. 55, or, as Stevens puts it in Law of Assemblies, page 261, when an assembly desires to consider and perfect (but not adopt) a measure, with all the freedom of a committee, the practice is to resolve itself into a committee consisting of all the members.

When the committee as a whole is through with the subject referred to it, or it wishes to adjourn, or to have debate limited, a motion is made that the committee rise and report, specifying the result of its proceedings, Robert's Rules of Order, sec. 55. Usually the report of the committee of the whole is in the form of a resolution, expressive of the opinion of the committee, as to the subject referred to it. Cushing's Parliamentary Law, sec. 2011.
Hence it will be seen that the committee of the whole is not the board itself and has only limited powers so that while it may report back to the board it cannot itself act as the board. Since it is neither the board itself nor one of the regular or ordinary committees of the board appointed by the chairman pursuant to sec. 59.06 (1) it follows that the members thereof do not qualify for the compensation provided for committee members under sec. 59.06 (2) and the board cannot circumvent the limitations of sec. 59.03 (2) (f) as to compensation by purporting to carry on the business of the county board through the medium of a committee of the whole.

WHR

Fish and Game—Counties—County board outside of Milwaukee county does not have power to regulate hunting or the discharge of firearms during an open season established by the conservation commission.

December 2, 1947.

Ernest P. Swift, Director,
Conservation Department.

You state that the conservation commission has established a special open season for deer in the Necedah National Wild Life Refuge during the period December 6 to December 14, 1947. You state further that the Juneau county board has adopted an ordinance purporting to prohibit the discharge of firearms in Juneau county during this open deer season. You inquire whether such an ordinance is within the powers delegated to the county board by the Wisconsin statutes.

Reiterating our former opinion in XXXII Op. Atty. Gen. at 370, the answer is “No.” A county is only a subordinate agency of the state. It has only such powers as are expressly granted and necessarily implied from the statutes. Spaulding v. Wood County, (1935) 218 Wis. 224. This conclusion is in accord with our opinion in XXVII Op. Atty. Gen. 705 which states that a town board has no power to prohibit or regulate hunting.
We further direct your attention to the fact that any peace officer purporting to act under this invalid county ordinance does not have the protection of law in his interference with a citizen lawfully engaged in hunting and would be personally liable to such citizen for all damages resulting from an unlawful arrest.

RGT

Chiropractors—Licenses and Permits—Under sec. 147.23 (7), Stats., chiropractor unavoidably prevented from attending one of the two-day educational programs of the Wisconsin Chiropractic Association must present to the state board of examiners in chiropractic his claim for exemption from such attendance within a reasonable time.

December 2, 1947.

E. J. Wollschlaeger, D. C., Chairman,
State Board of Examiners in Chiropractic.

You have asked for our assistance in construing that portion of sec. 147.23 (7), Stats., relating to exemption from attendance at the educational programs conducted by the Wisconsin Chiropractic Association. Sec. 147.23 (7) reads:

“All licenses issued by the board shall expire on the thirty-first day of December following the issue thereof, except that any holder of a license may have the same renewed from year to year by the payment of an annual fee of five dollars; provided, that satisfactory evidence is presented to the board that said licensee in the year preceding the application for renewal has attended at least one of the two-day educational programs conducted, supervised and directed by the Wisconsin Chiropractic Association and exemption from this requirement shall be granted only upon showing satisfactory to said board that attendance at said educational programs was unavoidably prevented.”

The constitutionality of the provision requiring attendance at the educational programs of the Wisconsin Chiropractic Association as a condition precedent to renewal of annual licenses was challenged by a number of chiropractors in an action commenced in the circuit court for Dane
county, Wisconsin, in November, 1946. The validity of the law was upheld by the circuit court and the judgment has been appealed to the supreme court where it is now pending.

One of the plaintiffs in this action, as well as two others who, while not parties to the action, did not attend the educational program in either October 1946, or the one given in October 1947, have now filed affidavits with the board requesting exemption from the attendance requirements on the grounds that one of the three chiropractors was seriously ill and that the constant attendance of the other two was required in taking care of him so that it was impossible for any of the three to attend the meetings in either year.

We pass without comment any consideration of the affidavits on their merits as that is a function for your board rather than this office and we will assume for purposes of this opinion that the affidavits correctly state the facts, although we should perhaps add that the board itself must be convinced that the showing made in the affidavits is satisfactory. We will also assume for purposes of this opinion that the statute is a valid one since any statute is presumptively valid until held otherwise by the courts.

The question presented is whether a license which expired on December 31, 1946 for non-attendance at the educational program in October, 1946 can now be renewed for the balance of the year 1947 upon a showing satisfactory to the board that such attendance was unavoidably prevented, and whether a 1948 license can also be obtained by one who does not have a 1947 license upon a satisfactory showing that attendance at the October, 1947 session was unavoidably prevented.

The general rule for construction of statutes creating exemptions relating to licensing provisions is stated in 33 Am. Jur., Licenses § 38, as follows:

"Those who seek shelter under an exemption law must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public."

No claim to exemption can be sustained unless it is clearly within the scope of the exemption clause, 37 C. J. 237. It is apparent from reading the first part of 147.23 (7) that all
licenses issued by the board expire on the 31st day of December following the issue thereof although they may be renewed in the manner provided by statute. What then are the rights of the person who has permitted his license to expire by not taking the prescribed steps for renewal? Is he entitled to a renewal of the license at any time after it has expired upon a showing of having been unavoidably prevented from attending the educational programs which have been given in the meantime?

The chiropractic licensing statute, unlike some of the other licensing statutes, contains no express provision for reinstatement of a license which has lapsed or expired. For instance, sec. 153.06 (1) relating to optometric licenses provides that such licenses cease to be valid on December 31 for the year for which issued but "in case of the failure of any person to so register the board, in its discretion, may permit such person to register at a later date upon request and payment of $10 within one year from the date of default." Sec. 152.06 (1) relating to licenses to practice dentistry provides that the board of examiners may revoke a license when it is not renewed after 60 days' notice in writing, but the license may be reinstated at the discretion of the board by payment of $25 within one year from revocation. Under sec. 95.53 licenses to practice veterinary medicine and surgery cease to be valid on December 31 of the year for which issued. They are to be renewed before January 1 of each year but in case of the failure of any veterinarian to so register within the time required, the board, in its discretion, for cause shown, may permit registration at a later date upon request and payment of $15 within one year from the date of default. Under sec. 154.04 licenses to practice chiropody expire on February 1 of each year and are to be renewed upon payment of a $2 annual fee on or before January 31. A renewal fee of $7 is levied against any chiropodist who fails to renew his application on or before January 31, and the license may be revoked for failure to renew the certificate of registration before July 1 of any year. Other illustrations might be furnished but the foregoing are typical.

It is apparent that the problem is approached differently under different statutes. In some instances the license and
the certificate of annual registration are treated as two separate things, and the license does not expire automatically at the end of the registration year although failure to register within the time prescribed may constitute grounds for revocation of the license. In other instances as under the chiropractic statute and optometry statute the license actually expires at the end of the license year automatically and without board action.

In the interpretation of the statutes all words and phrases are to be construed and understood according to the common and approved usage of the language although technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law are to be construed and understood according to such peculiar and appropriate meaning. Sec. 370.01 (1). According to Webster "expire" means "to come to an end; to cease; to terminate." "Expiration" has been defined as coming to a close, Clevenger v. Kern, 100 Ind. App. 581, 197 N. E. 731. It means cessation or end. Marshall v. Rugg, 6 Wyo. 270, 45 P. 486; Petition of Prime, 335 Pa. 218, 6 A. (2d) 530. "Renew" means "to restore to existence; re-establish; recreate." Webster's New International Dictionary.

Thus we cannot conclude within the light of these definitions that it is impossible for the board to renew a license that has expired since, among other things, "renew" means to restore to existence that which may have expired. However, reading further in the provisions of license renewal contained in sec. 147.23 (7) we find the language "from year to year" modifying the word "renewed." This would imply continuity of the license, and we are therefore justified in concluding that there are to be no unreasonable gaps in the license of a practicing chiropractor. Certainly it would be contrary to public policy as well as to the express provisions of sec. 147.23 (1) to permit any person to practice chiropractic without a license whether the period of practice be one day, one year or ten years. Under statutes conferring privileges upon private individuals for a certain period of time such privileges cannot be exercised after the lapse of the time allowed. 59 C. J. 1079.

We do not feel that it is necessary for us here to explore the problem beyond pointing out such legal principles as
may be of assistance in disposing of the cases at hand. Sufficient has been said to analyze the problem presented. While the statute is silent as to the time limitation for granting the exemption it must be presumed that the claim is to be made within a reasonable time under all of the facts and circumstances involved in each individual case. In *Kerbs v. State Veterinary Board*, 154 Mich. 500, 118 N. W. 4, registration under a previous practice statute was required within a certain time, but the court indicated that even in the absence of the time limitation one seeking the advantage of the exemption from graduation from a veterinary college accorded to those in practice for five years prior to the passage of the license statute, would have to apply for registration within a reasonable time.

In view of the express legislative mandate embodied in sec. 147.23 (1) that no one shall practice chiropractic unless licensed it would seem that any chiropractor engaged in continuous practice in the state of Wisconsin would have to make his claim for exemption from attendance at the educational programs before his license expired on December 31. As we understand it these programs are offered during the month of October in each year so that normally there should be plenty of time in which to make the application for exemption prior to the license expiration date on December 31.

However, there might be a situation wherein the applicant's health was so precarious that it would be impossible for him to make the application or he might be in a foreign country or otherwise have some legitimate reason for not being able to claim the exemption before expiration of his current license.

We understand that one of the applicants for exemption has been seriously ill for a considerable period of time. If the affidavit or other facts presented to the board should establish to its satisfaction that he has been too ill to practice chiropractic and also too ill to make application for exemption until this time, we believe the board would be justified in now issuing to him a 1947 license even though he failed to attend the 1946 educational program and that it would also be justified in entertaining a claim for exemption.
from attendance at the 1947 session in connection with his application for a 1948 license.

However, it may seem inconceivable to the board that the other two applicants who have presumably been engaged continuously in the practice of chiropractic in Wisconsin at all times in question, can justify their failure to present their claims for exemption from attendance at the 1946 session until this time, and if the board concludes that there has been unreasonable delay it would be justified in now denying the claim for exemption as well as the application for a license for either 1947 or 1948. Since their licenses have expired and cannot be renewed under the exemption provision, and there being no other statutory provision for delayed reinstatement as in some of the other licensing statutes, it would appear that the only way these persons and others similarly situated can now qualify for licenses is by following the same procedure that is prescribed by sec. 147.23 for original applicants for licenses.

WHR

Banks and Banking—Mortgage Loans—Notwithstanding the provisions of sec. 221.32, Stats., state banks are authorized by sec. 219.01 to invest in a combination loan on real estate located outside of Wisconsin and adjoining states, where one part of such loan consists of an FHA insured mortgage, and the other part consists of a second mortgage on the same real estate which is fully guaranteed under the servicemen’s readjustment act of 1944. Such banks are also authorized by the latter section to invest in a mortgage on such real estate where the mortgage is not insured by FHA in full or in part, but is partially guaranteed or secured under said servicemen’s readjustment act of 1944.

December 3, 1947.

G. M. MATTHEWS,

Commissioner of Banks.

You ask for our answer to two questions regarding the power of state banks to invest its funds in mortgages on real estate located outside of Wisconsin and adjoining states when they are guaranteed in whole or in part under the
servicemen's readjustment act of 1944. The questions submitted are as follows:

1. May such banks invest in a combination loan on real estate located outside of Wisconsin and adjoining states where one part of such loan consists of a first mortgage insured by the federal housing administrator and the other part consists of a second mortgage on the same real estate which is fully guaranteed under the servicemen's readjustment act of 1944?

2. May such banks invest in a mortgage on such real estate located outside of Wisconsin and adjoining states where said mortgage is not insured by the federal housing administrator in full or in part, but is partially guaranteed or secured under the servicemen's readjustment act of 1944?

We start out with the fact that sec. 221.32 provides in part as follows:

"No bank shall lend any part of its capital, surplus or deposits upon real estate mortgages or on any other form of real estate security, directly or as collateral, except in this and adjoining states; * * *"

However sec. 219.01 authorizes state banks, savings banks and trust company banks, as well as others named therein:

"* * *

"(3) To invest their funds, and moneys in their custody or possession (which are eligible for investment and which they are by law permitted or required to invest), in notes or bonds secured by mortgage or trust deed insured by the federal housing administrator, and in debentures issued by the federal housing administrator, and in securities issued by national mortgage associations.

"(4) To invest their funds and moneys in their custody or possession (which are eligible for investment and which they are by law permitted or required to invest) in notes, bonds or other forms of evidence of indebtedness guaranteed by the administrator of veteran's affairs of the United States veteran administration or otherwise guaranteed or secured under service men's readjustment act of 1944, United States Public Law 346, 78th Congress, and acts amendatory thereof and supplemental thereto."

In an opinion of this department reported in XXVI Op. Atty. Gen. 481 it was held that insofar as sec. 219.01 (3)
permitted investments in notes or bonds secured by mortgages or trust deeds insured by the federal housing administrator, it was in conflict with the portion of sec. 221.32 referred to where the mortgages or trust deeds insured by the federal housing administrator are secured by real estate not located in the state of Wisconsin or adjoining states, and that in such event for reasons stated in said opinion, the provisions of 219.01 (3) would govern over those in sec. 221.32. For that reason it was concluded that the institutions mentioned in sec. 219.01 "may invest in FHA insured real estate mortgages no matter where the property may be located and that any restriction on the making of investments found in ch. 221, Stats., is not to be deemed to apply to investments made under ch. 219, Stats."

The opinion referred to was issued on October 18, 1937. Sec. 219.01 (4) did not come into existence until enacted by ch. 455, Laws 1945. The same reasoning as was applied in said opinion to investments authorized by sec. 219.01 (3) applies here with respect to investments authorized by sec. 219.01 (4), insofar and to the extent that the latter subsection authorizes state banks, savings banks, trust company banks and others mentioned in sec. 219.01 to invest their funds or moneys in notes, bonds or other forms of evidence of indebtedness guaranteed or secured under the servicemen's readjustment act of 1944. We therefore answer your first question "Yes."

Coming now to your second question, we note that sec. 219.01 (4) authorizes investments "in notes, bonds or other forms of evidence of indebtedness guaranteed by the administrator of veteran's affairs of the United States veteran administration or otherwise guaranteed or secured under servicemen's readjustment act of 1944, United States Public Law 346, 78th Congress, and acts amendatory thereof and supplemental thereto." There is nothing in this language that specifically states whether the obligation referred to must be guaranteed in full to fall within the scope of this subsection.

Said act as originally adopted by act of June 22, 1944, ch. 268, 58 Stat. 284, provided that a veteran might apply within a certain stated time to the administrator of veterans' affairs for a guaranty of the administrator of not to
exceed 50 per cent of a loan for certain stated purposes, provided the aggregate amount guaranteed did not exceed $2,000. It was also provided that where an authorized federal agency had made, guaranteed or insured a primary loan to a veteran for any of said purposes, the administrator might guarantee the amount of a second loan, not to exceed $2,000 in amount and in no event 20 per cent of the purchase price or cost. There were certain other limitations imposed by the act regarding these guarantees but they are not material so far as the question here is involved.

The act was amended by act of October 6, 1945, ch. 393, 59 Stat. 538 at 542 and also by act of December 28, 1945, ch. 588, 59 Stat. 623 which brought the act down to its present form. As last amended, the servicemen's readjustment act of 1944 provides that a maximum of 50 per cent of any loan made by a lending agency specified to a qualified veteran within the time and for the purposes stated is automatically guaranteed by the government, with a top of $2,000 for non-real estate loans and $4,000 for real estate loans. (38 USCA § 694) Where a principal loan is made, guaranteed or insured by a federal agency for any of the stated purposes, a secondary loan may be guaranteed in full by veterans' administrator, provided that such loan may not exceed 20 per cent of the purchase price or cost. (38 USCA § 694e.)

Thus both under the servicemen's readjustment act of 1944 as originally enacted and as subsequently amended, provision was made (a) for a guarantee of a primary loan which would not cover the full amount of the loan and (b) for a guarantee of the full amount of a secondary loan, not to exceed however, a certain amount. It must be presumed that the legislature had in mind the provisions of said act as originally enacted when it adopted sec. 219.01 (4) and intended that said subsection be construed in conformity with it in its entirety, not only as originally enacted but also as subsequently amended, because of the specific reference to said act and "acts amendatory thereof and supplemental thereto" in said sec. 219.01 (4). Under the circumstances it must be concluded that any loan guaranteed to the extent authorized by the servicemen's readjustment act of 1944 as originally enacted or subsequently amended, comes
within the scope of loans authorized by sec. 219.01 (4) even though such guarantee may not be for the full amount of the loan, because the legislature obviously could not have intended that sec. 219.01 (4) impose any requirement greater than the scope of any guarantee afforded by the federal act. We therefore answer your second question "Yes."

WET

Public Welfare Department—Prisons and Prisoners—Prison Made Goods—The department of public welfare may not, under sec. 56.01, Stats., sell prison manufactured articles other than those named in sec. 56.06, Stats., to such nonprofit organizations as denominational hospitals, the American Legion and the Veterans of Foreign Wars.

December 4, 1947.

H. B. Evans, Director of Administration,
State Department of Public Welfare.

You have requested an opinion whether the state department of public welfare may sell products manufactured at the Wisconsin state prison other than those enumerated in sec. 56.06 of the statutes as created by ch. 366, Laws 1947, to such nonprofit organizations as the American Legion, Veterans of Foreign Wars and denominational hospitals.

As is the case with all other government agencies, the department of public welfare has only such powers as are expressly granted or necessarily implied by statute. Sec. 56.01 of the statutes authorizes manufacture of articles "for the state and its political divisions and any tax-supported institution or agency" and manufacture for sale to "other states or political divisions thereof" or "the United States."

Sec. 56.06 of the statutes expressly prohibits offering for sale "in the open market" products other than those therein enumerated. Whatever implied authorization is contained in the exceptions enumerated in sec. 56.06 need not here be decided; because it seems clear that articles other than
those excepted may not be sold otherwise than as authorized in sec. 56.01.

We do not believe that such organizations as the American Legion, Veterans of Foreign Wars and denominational hospitals can be included in any of the terms in sec. 56.01. Since sec. 20.15 (4) and (5) makes appropriations for the annual encampments of the Veterans of Foreign Wars and the American Legion, the question might arise whether that appropriation brings them within the term "tax-supported institution or agency." We believe that the term "tax-supported institution or agency" as used in sec. 56.01, particularly in view of its association with the term "state and its political divisions" was intended to include only such institutions or agencies as are wholly, or at least primarily, supported by taxation. The term "support" is defined in Webster's New International Dictionary (unabridged): "To pay the costs of; to maintain; as a project is supported by taxes; * * *." The fact that a nominal appropriation is made toward the expense of encampments conducted by the American Legion and Veterans of Foreign Wars does not transform them into tax-supported agencies.

It is our opinion that any of the articles manufactured at the Wisconsin state prison which are not enumerated in sec. 56.06 may not be sold to nonprofit organizations such as those you have enumerated, including denominational hospitals, but that they may be sold only to agencies of the government.

BL
Counties—Contracts—Where contract for construction of public works has been entered into by county pursuant to provisions of sec. 59.07 (4) (c), sec. 66.29 and sec. 289.16, Stats., partial payments may be made to the contractor as the work progresses in accordance with the provisions of the contract without audit by entire county board under sec. 59.07 (3).

December 4, 1947.

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

You state that the county has entered into a contract for the construction of an administration and classroom building at the county owned airport. The contract price is in the neighborhood of $20,000 and it will probably take several months to complete the building. Also, the county board contemplates the construction of a county hospital at a cost of about $1,250,000. This project will likewise take considerable time to complete.

We are asked whether there is any way that the contractor on projects of this character can be paid once or twice a month as the work progresses without an audit by the entire county board which meets only at intervals of several months. In this connection you direct our attention to XXXII Op. Atty. Gen. 847 wherein this office expressed the opinion that except as otherwise provided by law it is contemplated by sec. 59.07 (3), sec. 59.17 (3) and sec. 59.20 (2), Stats., that all claims against the county are to be audited by the county board before payment.

Sec. 59.07 (4) authorizes the county board to build and keep in repair the county buildings. Sec. 59.07 (4) (c) provides in part:

“All public work, of the kinds mentioned in section 66.29 (1) (c), where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bidder, such contract shall be let, made and entered into pursuant to and in accordance with section 66.29. * * *”

Sec. 66.29, referred to in sec. 59.07 (4) (c), relates to bids and contracts for public works but it is silent as to the time and manner of payment. However, the practice
is almost universal in making contracts relating to public works to include provisions for partial payments from time to time upon the certificate of the architect as the work progresses. Usually 10 or 15 per cent of the total amount due under the contract is withheld until some 60 days after completion in order to give the architect time to ascertain that the contract has been fully performed and so certify to the public body which let the contract.

Sec. 289.16 (1) provides that all contracts involving $100 or more for the performance of labor or furnishing materials on public works must contain a provision for payment by the contractor of all claims for labor and material. The contractor must also give a bond in the amount of the contract price for the faithful performance of the contract and the payment for claims for labor and materials. Sec. 289.16 (2) provides that any party in interest may, not later than one year after the completion of the contract, maintain an action against the contractor and the sureties on the bond for the recovery of any damages he may have sustained by reason of the failure of the contractor to comply with the contract or to comply with his contract with subcontractors.

Thus it will be seen that there are ample safeguards to protect the county under the standard provisions of public works contracts for partial payments from time to time on the certificate of the architect as well as on his final certificate so as to eliminate any real necessity for audit by the entire county board on partial payments. Therefore, to the extent that there is any conflict between the procedure contemplated by secs. 59.07 (3), 59.17 (3) and 59.20 (2) on the one hand, and the procedure contemplated by specific provisions of the statutes relating to public works contracts on the other hand, such as 59.07 (4) and 289.16, the provisions of the specific statutes and of contracts lawfully made pursuant thereto are to be taken as controlling.

Where the county board has let a public works contract calling for partial payment from time to time on the architect’s certificate it may in a sense be deemed to have pre-audited such claims. In effect, the county board’s entry into a contract with such provisions constitutes a vote or resolution within the meaning of sec. 59.17 (3) authorizing the county clerk to sign orders in accordance with the provi-
sion of the contract and sec. 59.20 (2) authorizing the county treasurer to pay the same.

It would seem that to require audit by the entire county board of partial payments on county construction projects as the work progresses would practically preclude any large-scale construction projects by counties. Sec. 59.08 (38), whereby the county board may delegate to the standing finance, audit or executive committee the auditing of claims not exceeding $500, would help but little on a large project, and the contractor would be bankrupt if he had to carry all of the construction costs on a large job between semiannual or special county board meetings. The legislature should not be charged with having given counties the authority to construct county buildings in one breath while indirectly nullifying such power in the next breath by requiring action of the entire county board on partial payment of construction contracts.

You are therefore advised that such payments may be made without audit by the entire county board in accordance with the terms of the contract, assuming the same was entered into pursuant to law.

WHR

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Public Welfare Department—Foster Home Permits—
State department of public welfare may not license foster homes located outside the state under sec. 48.38 (2), Stats.

December 6, 1947.

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

You requested an opinion with reference to the following question arising under sec. 48.38 (2) Stats.: “Legally, can the board of public welfare issue a permit to a foster home in another state?” Section 48.38 (2) and (4) provides as follows:

“(2) No person shall conduct or maintain a foster home without first having obtained a permit to do so from the state department of public welfare or from a licensed child
welfare agency designated to issue such permits by the state department of public welfare. Such permits shall not be issued for a longer period than one year."

"(4) Every foster home shall be under the supervision of the licensed child welfare agency, if any, which issued a permit to it and of the state department of public welfare or of some person or agency designated by such department. The state department of public welfare shall adopt and enforce rules and regulations for the conduct of all foster homes to which it shall issue permits directly."

The above quoted statutes contemplate regulation and supervision by the department of foster homes to which it issues licenses. Nothing in the statute indicates an intention to give it extraterritorial effect and hence it must be construed as applying only to foster homes located in the state of Wisconsin where they can be supervised. La Forge v. State Board of Health, (1941) 237 Wis. 597, 601; 50 Am. Jur. 510—Statutes § 487.

You are therefore advised that foster homes located outside of the state may not be licensed by the department.

WAP

Marketing and Trade Practices—Trading Stamps—Sec. 100.15, Stats., prohibits theatre from giving certificate with each ticket purchased where such certificate is redeemable in merchandise at auctions held by the theatre.

December 9, 1947.

JOHN S. BARRY,
Deputy District Attorney,
Milwaukee, Wisconsin.

We have your request for an opinion in regard to a ticket selling plan which you believe is a violation of sec. 100.15, Wisconsin statutes. The plan, briefly, is organized as follows: A company known as the Golden Dough Company prints certificates and distributes them to theatres that subscribe to the plan. The company purchases merchandise such as watches, motorbikes, housewares and electrical ap-
pliances and these articles are auctioned off at the theatre to holders of these certificates. Every purchaser of a theatre ticket is given one Golden Dough certificate which has a redeemable cash value of 1/10 of 1 cent. The theatre patron accumulates these certificates and on auction night uses them as money to bid for the merchandise mentioned above. The purpose of the plan is to stimulate attendance on mid-week nights.

Sec. 100.15 provides in part:

“(1) No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device * * *.”

It is our opinion that the scheme as outlined in your request is a violation of the trading stamp statute. This department has ruled in XIV Op. Atty. Gen. 370 (1925) that the sale of a coupon book was a sale of goods, wares or merchandise. In XIX Op. Atty. Gen. 602, 603 (1927), that ruling was reaffirmed and this department held that a theatre thrift book entitling the purchaser to admission to the theatre was a sale of goods, wares and merchandise. The two opinions above cited have established the administrative practice for over 20 years. It must be presumed that the legislature was aware of the interpretation placed upon the statute, and since the legislature did not see fit to make any change therein, it must be presumed that the interpretation reflected the intent of the legislature.

There is other authority to the same effect. See, State v. Blair, 130 Kan. 863, 288 Pac. 729, 730; State v. Haining, 131 Kan. 854, 293 Pac. 952, 953. The question of whether theatre tickets are goods, wares and merchandise was considered by the court in Ex parte Dees, 50 Calif. App. 11, 194 Pac. 717, 718–719. The court in an extended opinion concluded that theatre tickets were goods and cited a large number of cases sustaining that conclusion.
It follows, therefore, that since the theatre owner is selling goods when he sells a theatre ticket, he cannot give a Golden Dough certificate with the ticket, since such certificate is redeemable in merchandise.

ES

Public Welfare Department—Feeble-Minded—The state department of public welfare is not authorized by sec. 51.12 (6) to act as a commission in lunacy to make a finding of mental deficiency as to a child received at Wisconsin child center since sec. 48.20 (1) prohibits admission of such child and requires immediate return to committing authority.

December 9, 1947.

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

You have requested an opinion relative to the powers of the state department of public welfare in regard to mentally deficient children committed to Wisconsin child center at Sparta. Specifically, you desire to know whether the department, acting as a commission in lunacy, can make a determination of feeble-mindedness and thereafter transfer such children from the child center to one of the colonies and training schools, pursuant to the provisions of sec. 51.12 (6). The section just mentioned applies to any state or county institution under the jurisdiction of your department. However, there is a specific provision regarding the child center which takes precedence over the general provisions.

Sec. 48.20 (1) relating to the child center provides as follows:

"The department shall admit to the center only dependent and neglected children under 16 years of age, but no child who is feeble-minded, insane or epileptic shall be admitted and if committed shall be returned to the committing authority."
It is apparent from this section that it was the intent of the legislature that no feeble-minded child should be received into the child center and that if through inadvertence a juvenile court did commit such child, it would become the duty of the state department to return the child to the committing authority.

This provision appears to preclude the department from sitting as a commission in lunacy as provided in sec. 51.12 (6), 1947 statutes (formerly sec. 52.02 (4), 1945 statutes). Therefore, if the authorities in charge of the center at Sparta find upon examining a child committed there that such child is feeble-minded, insane or epileptic, the committing authority should be notified and the child returned to such authority as quickly as possible for further proceedings according to law.

We believe it must be inferred that the department will reach the determination as to the mental deficiency of the child by the usual testing methods employed at the institution. In other words, if the mental examinations given to the child upon admission by the child center indicate that there is mental deficiency, such child should be promptly returned to the committing authority. This does not mean that there must be a formal determination of mental deficiency by the department.

You are therefore advised that the Wisconsin child center is not authorized to admit a mentally deficient child and that if such child is received, it should promptly be returned to the committing authority.

ES
Public Welfare Department—Feeble-Minded—Under sec. 51.12 (6), Stats. 1947 (formerly sec. 52.02 (4)), state department of public welfare has authority to make a finding as to feeble-mindedness of a child in either Wisconsin school for boys or Wisconsin school for girls and to commit such child to one of the colonies and training schools.

December 9, 1947.

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

You have requested an opinion relative to the authority of the state department of public welfare to sit as a commission in lunacy for the purpose of determining mental deficiency of inmates of the Wisconsin school for girls and the Wisconsin school for boys. Under the 1945 statutes, sec. 52.02 (4) and sec. 51.11, the department sat as a commission in lunacy, made findings as to the mental condition of inmates of the two schools mentioned above, and transferred such inmates when found to be mentally deficient to the colonies and training schools. Chapter 485, Laws 1947, revised and consolidated chapters 51 and 52 of the statutes. Sec. 52.02 (4) was renumbered sec. 51.12 (6) and now provides as follows:

“If the department, acting under section 51.11, determines that any person in any state or county institution under its jurisdiction is mentally deficient or epileptic, it may transfer him to an institution mentioned in section 51.22.”

It is our view that the language used in the revision is as broad as that which appeared in old section 52.02 (4). It is our opinion that the department has the authority to act as a commission in lunacy and to determine whether any person in any state institution under its jurisdiction is mentally deficient. Upon such determination the department has the power to transfer such person to the colonies and training schools provided in sec. 51.22.

In the revision of sec. 51.11 by ch. 485, Laws 1947, the language was somewhat changed and the words “acting as a commission in lunacy” no longer appear in subsection (7) of sec. 51.11. We do not believe this change in language
worked any material change in the meaning of the law. Sec. 51.12 (6) confers the power upon the department to determine if any child in either the boys or girls school is mentally deficient. The reference to sec. 51.11 is merely a reference to the procedure as set forth in the latter section.

The result in this situation differs from that involving the Wisconsin child center only because as to the latter there is specific provision in sec. 48.20 which orders the department to return a mentally deficient child received at such center to the committing authority. In other words, the difference is this: The legislature has decreed that mentally deficient children should not be admitted to the Wisconsin child center and that if such child is inadvertently sent there by the court or other authority it should immediately be returned for commitment to the proper institution. In regard to the Wisconsin schools for girls and boys, the legislature did not decree that the mentally deficient be excluded. The legislature did, however, vest in the state department the authority to determine the mental condition of any of the inmates of those two schools and upon the finding of mental deficiency to transfer such cases to the colonies and training schools.

ES

Public Welfare Department—Juvenile Court—Sheriffs—Commitment of Children—Under sec. 54.23 (3) and (4), Stats. 1947, the state department of public welfare has authority to establish reception centers for delinquent children committed to it by juvenile courts. Under sec. 59.23 (4) it is the duty of the sheriff to convey such delinquent children to the appropriate centers established by the department, upon delivery to him of the commitment.

December 10, 1947.

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

You have requested an opinion with reference to the following situation. Since the enactment of ch. 546, Laws 1947, it has become the duty of juvenile courts to commit delinquent children to the state department of public welfare instead of to the Wisconsin school for boys and the Wiscon-
sin school for girls as formerly. Under date of November 19, 1947, you notified the judges of all juvenile courts that reception centers for delinquent children are being established at the Wisconsin school for boys at Waukesha and the Wisconsin school for girls at Oregon. Your letter to the judges states in part: "All juvenile delinquents committed to the state department of public welfare will hereafter be received and cared for during the period of time essential for their isolation at one of these two facilities."

One of the juvenile judges has raised the question whether he has any authority to order the sheriff to take the juvenile to the Wisconsin school for boys after he has "exhausted my power in the commitment of the youth to the state department of public welfare." Your question is: "What procedure shall be followed after commitment by a juvenile court of the state of a delinquent male juvenile to the department of public welfare under the provisions of ch. 546, Laws 1947, to accomplish his transfer from the jurisdiction of the juvenile court and the sheriff of the county from which committed to the Wisconsin school for boys, Waukesha?"

Section 48.17 (2) Stats. provides as follows:

"(2) When any sheriff or other officer or other person appointed by the department shall execute a commitment to any such school he shall be entitled to receive therefor from the proper county his actual and necessary expenses and the further sum of $5, and no more, for each day while necessarily engaged in executing such commitment."

The term "such school" refers to the schools for boys and girls. It may be doubted that the foregoing statute has any further application since direct commitment to those schools may no longer be made. Nevertheless, you are advised that it is the duty of the sheriff to convey delinquent boys to the facility at Waukesha and delinquent girls to the facility at Oregon for the following reasons.

Under section 54.23 (3) and (4), Stats. 1947, created by ch. 546 and renumbered by ch. 560, Laws 1947, the department is given authority among other things to "(3) Establish and operate places for detention and examination of all persons committed to it; and (4) Approve or establish places for detention prior to the examination and study of
all persons committed to it.” Pursuant to such authority you have created facilities for the reception of delinquent children at the boys’ and girls’ schools. Those are the places at which the department receives such children pursuant to commitments made by the juvenile courts.

“A commitment is a warrant, order, or process by which a court or magistrate directs a ministerial officer to take a person to prison, or to detain him there.” Reardon v. Frace, (1939) 344 Mo. 448, 126 S. W. (2d) 1167, 1168, quoting People ex rel. Allen v. Hagan, (1902) 170 N. Y. 46, 62 N. E. 1086, 1087.

The commitment “is the final process for carrying the judgment into effect.” Watkins v. Merry, (C. C. A. 10th, 1939) 106 F. 2d 360, 361. See also IV Op. Atty. Gen. 943, 944.

The sheriff is a ministerial officer of the court. 14 Am. Jur. 262, Courts § 22. He is the proper officer to “serve or execute according to law all processes, writs, precepts and orders issued or made by lawful authority and to him delivered.” Sec. 59.23 (4), Stats. 47 Am. Jur. 822, Sheriffs § 3.

It has always been considered in this state that it is the duty of the sheriff to convey persons to the institutions to which they are committed by the courts. See IV Op. Atty. Gen. 943; XX Op. Atty. Gen. 1058. This is known as “executing the commitment.” Cf. sec. 48.17 (2), Stats., quoted above. If the court were merely to order a person committed without delivering the commitment to the sheriff to be executed, the court would not have fulfilled its entire function in making such a commitment. The court’s power is not “exhausted” until the commitment is delivered to an officer for execution.

Upon receiving a commitment of a delinquent child to the department of public welfare, it is the duty of the sheriff to execute the commitment by delivering the child into the custody of the department. As noted above, the department has authority to establish reception centers. Obviously, it is the duty of the sheriff to execute the commitment by taking and conveying the delinquent child to the appropriate reception center, turning him over to the persons appointed to receive him, and taking a receipt.

WAP
Adjutant General—National Guard—Disbandment—Armories—When national guard company has been disbanded as provided by law its property becomes the property of the state of Wisconsin by virtue of sec. 21.42 (4), Stats., and under sec. 21.24, Stats., the adjutant general in his capacity as quartermaster-general is charged with the care of such property.

December 12, 1947.

JOHN F. MULLEN,  
Adjutant General.

You have asked us who is the legal owner of armories which belong to various national guard companies mustered into federal service and which companies have been subsequently deactivated.

Sec. 21.42 relating to the status, powers and property of national guard companies provides:

"(1) Such company, when such organization is perfected, shall without any further proceeding constitute a corporate body to be known by the name by which such company is officially designated under the military laws and regulations of the state, and shall possess all the powers necessary and convenient to accomplish the objects and perform the duties prescribed by law.

"(2) The members of such military company in good standing and no others shall constitute the members of such corporation and shall elect three trustees who shall manage and administer the business of such corporation. The trustees shall elect one of their number president, and one vice president and shall also elect a secretary.

"(3) Each such company may take by purchase, devise, gift or otherwise and hold property, both real and personal, and with the approval of the adjutant general sell, convey and mortgage such property, so long as such company is an existing company and a part of the national guard of Wisconsin. All such property shall be in the custody and control of the trustees hereinbefore provided for.

"(4) Whenever any such company shall be disbanded as provided by law such corporation shall cease to exist and all property belonging to it shall become the property of the state of Wisconsin."

Subsection (4) quoted above was construed in IX Op. Atty. Gen. 338. It appeared there that all members of a particular company had been drafted into the military service
of the United States and in pursuance of federal law were discharged from the national guard. It was considered that this effected the mustering out and disbanding of the organization. In addition to the statutory provision quoted above it appeared that the corporate articles of the organization provided that all of its funds and property should become the property of the state of Wisconsin in the event of the dissolution of the association.

It was accordingly concluded that title to the organization's real estate had become absolute in this state but that in order to perfect the record evidence thereof some record of the facts in question should be made and that such record might consist of a certified copy of the order or whatever other action was taken by which the particular company was transferred to the federal service. It was further suggested that if a formal order of this character was not available, an affidavit should be procured as to the fact of the transfer from an officer of the organization and that the same should be recorded in the office of the register of deeds in the county where the organization's real estate was located.

It should perhaps be pointed out here that sec. 21.42 (4) would not be operative so as to result in transfer to the state of armory property acquired for the use of national guard companies by the board of supervisors of any county or the common council of any city pursuant to sec. 21.61 (1), since sec. 21.61 (3) provides in part:

"* * * In case however a city or county shall have aided in the erection of said armory and the company or companies of the national guard for which said armory was erected shall at any time be disbanded, then such armory shall become the property of said city or county in which said armory is erected."

We assume when you use the word "deactivated" in asking who becomes the legal owner of the property of a national guard company mustered into federal service that you mean "disbanded as provided by law" within the meaning of sec. 21.42 (4), and it seems very clear under the statute that the state of Wisconsin is the legal owner of the armories formerly owned by units of the Wisconsin national
Secondly, you have inquired whether the reactivation of a former unit restores any of its legal rights to armory property.

The answer is, "No." When a unit has been disbanded as provided by law the statutes make no provision for a reconveyance of the property to it upon its reactivation and in the absence of such statutory provision legal title remains in the state.

You next inquire what rights the armory board has with respect to the care and custody of such property.

Sec. 21.615 relates to the powers and duties of the armory board. Subsection (2) provides that the object, purpose and duty of the board is to construct or acquire armory buildings suitable for the use of the Wisconsin national guard. The board may lease property to the state of Wisconsin and under subsection (3) if it does lease property to the state the rental shall be sufficient for operation and maintenance as well as retirement for indebtedness against the property. Subsection (4) provides, among other things, that when all of the property acquired or constructed by the board shall be fully paid for, the board shall donate, transfer and convey all such property to the state of Wisconsin by appropriate instruments of transfer and conveyance.

Nowhere does sec. 21.615 make any provision for care and custody of armory property by the armory board after title has vested in the state whether such title is acquired by the state through conveyance from the armory board under sec. 21.615 (4) or by operation of sec. 21.42 (4) upon disbandment of a national guard unit, or otherwise. Administrative agencies have only such powers as are expressly granted to them or as necessarily implied, and any power sought to be exercised by a state agency must be found within the four corners of the statutes under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 440. Accordingly, you are advised that armories which have become the property of the state under sec. 21.42 (4) are not subject to the care and custody of the armory board.
Lastly, you have inquired what state agency is charged with the responsibility if the armory board is not the proper custodian.

Sec. 21.19 (1) provides, among other things, that the adjutant general shall be the quartermaster-general and sec. 21.24 provides in part that, "The quartermaster-general shall have charge of all the military property of the state, and carefully preserve, repair and account for the same." While from a reading of this entire section it is apparent that such military property for the most part consists of personal property, it is nevertheless true that the language "all the military property of the state" is broad enough to encompass both real and personal military property and we understand it has been the practice of the adjutant general to assume jurisdiction of armory property formerly belonging to national guard units which have been inducted into federal service, although local custodians have frequently managed such property subject to supervision by the adjutant general's office.

That the adjutant general (who is also quartermaster-general) is the proper agency for having charge of the state's military property in the form of real estate was recognized by the 1947 legislature in the enactment of chapter 33, creating sec. 21.19 (2) of the statutes to read as follows:

"The adjutant general on behalf of the state may lease to Juneau county lands, buildings and facilities at Camp Williams when not required for use by the Wisconsin National Guard, and may lease or rent other state owned lands, buildings and facilities used by, acquired for, or erected for the Wisconsin National Guard when not required for use by the Wisconsin National Guard. No such lease shall be effective unless in writing and approved by the governor in writing."

It is hardly probable that the legislature would have empowered the adjutant general to lease such properties if it had not considered them to be under his care and custody.

You are therefore advised that the adjutant general in his capacity as quartermaster-general is charged with the care of military property which belongs to the state by virtue of the operation of sec. 21.42 (4) upon the disbandment of a national guard company.

WHR
Insane—Conditional Release of Patients—Sec. 51.13 (3), Stats., as amended by ch. 485, Laws 1947, provides that patient on conditional release from mental hospital is presumed competent upon expiration of one year from date of such release and thereupon superintendent has no authority to require summary return of said patient irrespective of whether such release took place before or after the effective date of ch. 485.

December 13, 1947.

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

You have requested an interpretation of sec. 51.13, Stats., as amended by ch. 485, Laws 1947, relating to conditional release of patients from mental hospitals. Your question pertains to subsec. (3) thereof, which provides as follows:

“(3) Upon the expiration of one year from the granting of a conditional release the authority of the superintendent to require the patient’s return shall end, and the patient shall be presumed competent and his civil rights thereby restored.”

Sec. 51.13 (3), Stats. 1945, provided as follows:

“(3) Upon the expiration of 2 years from the time of granting such parole or such leave of absence the authority of the superintendent to require the return to the hospital or asylum or senile ward of the person paroled or granted leave shall end, and the presumption of insanity or senility against such person because of the original adjudication that he was insane or senile shall cease, and until a new adjudication to the contrary, he shall be presumed sane the same as though his sanity had been established by a judicial determination.”

The most important change is the shortening of the period of parole from two years to one year. The question confronting your department is whether the new period of time applies to all patients now on parole or conditional release or whether it is limited to those released after the effective date of ch. 485, namely, August 7, 1947. You state in your request that there were a number of patients released under the old law who had been out on parole for over one year on August 7, 1947.
In the first place, we must consider that the legislature has in the revision changed a rule of evidence. The usual rule is that sanity is presumed to be the normal state of the human mind. However, when insanity is once proved to exist, such as by a commitment to a mental hospital, the state of insanity is presumed to continue until the presumption is overcome by contrary or repelling evidence. See, *In re Hogan*, (1939) 232 Wis. 521, 525, 287 N. W. 725. From this it is clear that in the absence of a legislative rule such as laid down in subsec. (3), a patient on parole would be presumed insane until adjudged sane by a court of competent jurisdiction on evidence showing that sanity had been regained. The legislature has, however, in sec. 51.13 (3) created a rule of evidence which gives the benefit of a presumption of sanity to a patient who has successfully completed one full year of conditional release from a mental hospital. Since this is simply a rule of evidence it is a matter of procedure which would not arise unless someone in a legal proceeding challenged the sanity of the patient. In other words, the patient after one year of successful experience on conditional release would start off in any legal proceeding with the presumption of sanity in his favor. In view of the fact that this change in the rule of evidence is procedural there is no reason why the rule should not apply to patients released before August 7, 1947, the effective date of ch. 485, as well as to patients released after that date. Applying the presumption to both classes of patients does no violence to any constitutional rights or privileges of either class.

The legislature having established the rule that one year of successful parole has presumptively restored the patient to sanity, there is, of course, no authority for the superintendent of the mental hospital to return such patient summarily. The result is that the patient after the year on conditional release will be entitled to full and complete discharge because he is presumed to be sane.

You are advised that any patient on parole or conditional release pursuant to sec. 51.13 is by the provisions of subsec. (3) thereof presumed competent at the expiration of one year from the date of such release and that the superintendent of the hospital thereupon no longer has the au-
authority to require the summary return of such patient irrespective of whether such conditional release or parole was granted before or after the effective date of ch. 485, namely, August 7, 1947.

ES

_Counties—Public Assistance—County Judge—Salaries and Wages—Prior to enactment of ch. 584, Laws 1947, amending sec. 49.51 (1), Stats., the county board had no authority to allocate portion of county judge's salary to his duty as administrator of social security aids. Upon being relieved of such duties, judge retains right to entire salary notwithstanding attempt by board to make such allocation in previous resolution._

December 15, 1947.

LARRY D. GILBERTSON,  
_District Attorney,_  
Black River Falls, Wisconsin.

You state that in 1942 the county board of Jackson county passed a resolution fixing the salary of the county judge on and after January 1, 1944 as follows:

"For services as county judge _______________ $2,400
"For services as administrator of Jackson county welfare department _______________ $1,600

"Be it further resolved that the said sum of $1,600 be paid only during the time the county judge is such administrator."

In 1945 the salary of the county judge was fixed at $4,400 by the board.

The county board has now adopted an ordinance by which the judge's function as administrator of public welfare was terminated and a new administrator has since been appointed. You inquire whether the salary of the judge should now be decreased in the amount of $1,600 so that his net salary would be $2,800.

As pointed out in our opinion of December 22, 1945, the county board at that time had no authority to allocate por-
tions of the judge's salary to the various functions of his office. XXXIV Op. Atty. Gen. 428. At that time the salary was required to be fixed as an entirety. Therefore the attempt of the county board to allocate $1,600 annually as the salary of the judge for acting as administrator of public welfare was invalid and the entire salary of $4,000, later raised to $4,400, became attached to the office of the judge and was not subject to being reduced during the term for which he had been elected.

You are therefore advised that the salary of the judge for the remainder of the term will be $4,400 annually notwithstanding that he has been relieved of his duties as public welfare administrator.

By ch. 584, Laws 1947, sec. 49.51' (1) was amended to authorize the county board to fix the judge's (separate) compensation for administering social security aids, but of course this statute does not have retroactive effect and cannot be considered in connection with your present problem.

WAP

Public Assistance—Legal Settlement—Indians—Under secs. 49.02 and 49.10, Stats., Indian who has legal settlement in a town is entitled to relief from said town if otherwise qualified, and such relief is not to be denied because of his race or because the federal government owns, in a proprietary capacity, the land upon which the Indian resides.

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

You state that the United States government owns certain lands in Burnett county upon which Indians are permitted to live. The lands being government owned are exempt from taxation. In one instance an Indian family of seven has been living on such lands for about six years, and the members of the family are in need of relief. The town officials take the position that these lands constitute
Indian territory and that the family has not gained a legal settlement so that the result is that the members of the family constitute nonresident indigents who must be supported by the county. We are asked whether the family has acquired a legal settlement in the town.

While we have not been furnished with all of the facts concerning the status of these Indians we will assume from what you have said that they are not tribal Indians residing on any reservation. Sec. 49.02 places the duty of furnishing relief to dependent persons upon the municipality and sec. 49.10 provides rules for determining legal settlement. However, sec. 49.10 (4) among other things provides that the time spent by a person while residing or while employed in any Indian reservation over which the state has no jurisdiction is not included as part of the statutory period of one year necessary to acquire or lose a legal settlement.

In XX Op. Atty. Gen. 534 this department expressed the opinion that an Indian who has a legal settlement in a town is entitled to relief from the town if he is poor and indigent even though he is still a member of the Indian tribe. In that instance it appeared that he owned land but had not received his certificate of competency to this land and therefore was a ward of the federal government. Reference was made in this opinion to XII Op. Atty. Gen. 843 where it was pointed out that the statutes imposing liabilities on municipalities for relief of indigent or dependent "persons" include all, whether citizens or aliens and whether belonging to the white, red, black, yellow or brown races and regardless of age or sex. Also, attention was called to VIII Op. Atty. Gen. 659 where it was ruled that an Indian not living on a reservation and not receiving an annuity from the federal government may receive aid under the mothers' pension law if otherwise qualified.

The mere fact that the federal government owns the lands upon which the indigent Indian resides and that such land is tax exempt in no way alters the result. Where the United States without consent to purchase or cession of jurisdiction by the state merely purchases land from private owners for the purpose of allotment to individual Indians, the state does not lose its sovereignty over such lands, and the United States is only a proprietor of the land the same as any pri-
vate individual except that the state may not interfere with the performance of the functions of the United States government for which the land was acquired. State v. Shepard, 239 Wis. 345. See also XXVIII Op. Atty. Gen. 259. To this of course should be added the further qualification that lands owned exclusively by the United States, with certain exceptions not material here, are exempt from taxation by virtue of sec. 70.11 (1), Stats.

We are not advised that anything was done here which would have the effect of withdrawing the lands in question from the complete and exclusive political jurisdiction of the state, county and town. Thus the residents on such lands are entitled to the benefits of all applicable provisions of chapter 49, the public assistance law, irrespective of race, color, citizenship, age or sex, and if the Indians in question are otherwise qualified they are not to be denied assistance by the town because of their race or the ownership of the lands upon which they happen to reside.

WHR

Public Assistance—Legal Settlement—Section 49.10 (11), Stats. 1947, applies only to counties in which general relief is wholly administered by the county under sec. 49.03 (1) (a).

December 17, 1947.

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

You have requested an opinion with reference to the effect of sec. 49.10 (11), Stats. 1947, created by ch. 343, Laws 1947, which provides as follows:

"When this section is applied to any county operating under the county system of administering public assistance the term 'municipality' as used herein shall mean and include such county unless the context clearly requires otherwise."

This means that legal settlement is to be determined on a county-wide rather than a municipal basis in the counties "operating under the county system of administering public assistance."
The term "public assistance" is not defined in the statutes but ch. 49 is entitled "public assistance" and includes relief administration, admissions to the county home and county hospital and social security aids. Social security aids are administered on a county-wide basis in every county of the state. If the term "county system of administering public assistance" were construed to include social security aids, then the new statute would apply to every county of the state and it would be a most unusual way for the legislature to enact that hereafter legal settlement shall be determined on a county-wide rather than a municipal basis throughout the state. Evidently the legislature had in mind that there would be some counties in which the legal settlement would continue to be determined on the municipal basis. Therefore the social security aids cannot be considered in determining the meaning of the term "county system of administering public assistance."

The term "county system" is used in connection with general relief. For instance, sec. 49.03 is entitled, "Optional county systems." That section authorizes the county board to go either wholly or partially on the "county system" of administering general relief. If it goes wholly on the "county system," then the municipalities have no further functions in the matter of administering general relief. If it goes partially on the "county system," then the municipalities retain the duty and responsibility of furnishing relief except insofar as the county has undertaken the duty of furnishing medical relief. The county may either undertake all medical relief or undertake medical relief to persons receiving social security aids.

The term "county system" is also used in sec. 49.11 (3) (c) as amended by ch. 121, Laws 1947, where the entire expression is "the county system of maintaining its dependents."

In general parlance the term "county system" is used to describe the system of administering relief under sec. 49.03 (1) (a), as distinguished from the "unit system" under which relief is administered by the municipalities. It seems that that was the sense in which the legislature used the words "county system" in sec. 49.10 (11) above quoted. Any other construction would lead to an extremely confused and
complicated system of ascertaining legal settlement. If the
municipalities administer relief, even though the county
may have undertaken all or part of the medical relief, it
is necessary to the administration of the relief law that
legal settlement be determined on a municipal basis. If the
county undertakes responsibility for all general relief, then
it is possible to administer it under a system whereby legal
settlement is determined on a county-wide basis. That was
undoubtedly in the mind of the legislature at the time it
enacted this amendment to the legal settlement law.

You are therefore advised that legal settlements will con-
tinue to be determined on a municipal basis in every county
where general relief is administered wholly or partly by the
municipalities and that a county-wide legal settlement will
apply only in those counties where general relief is admin-
istered wholly by the county.

WAP

Savings and Loan Associations—Stock Certificate—The
practice of a savings and loan association of inserting the
words "statutory limit" in blank spaces provided in its form
of certificate of installment stock to indicate the number
of shares owned by the person named therein and the total
dollar amount represented thereby is legally objectionable
because a certificate drawn and issued in such form is con-
trary to the form of certificate prescribed by the associa-
tion's by-laws.

December 17, 1947.

ROBERT C. SCHISSLER,
Commissioner of Savings and Loan Associations.

You advise that the by-laws of a certain savings and loan
association provide for a form of certificate of installment
stock which provides spaces to insert the number of shares
and dollar amount of installment stock owned by the person
named in the certificate, and that it is customary to fill in
these blanks by inserting the number of shares owned and
the total dollar amount represented thereby in the appropri-
ate blanks. The savings and loan association mentioned does not do it this way but instead writes in the words “statutory limit” in these blanks so they read as follows: “Number of shares: statutory limit; amount: statutory limit” and that the person named “is the owner of statutory limit,” installment shares etc. The “statutory limit” referred to is that provided by sec. 215.20 (1) which states *inter alia* that no person shall become the owner of shares of installment stock exceeding in par value the sum of $25,000.

The question you ask is whether there is any legal objection to inserting in the blanks referred to in such certificate of installment stock, the words “statutory limit” instead of the number of shares and the amount.

In the absence of a requirement in a statute, articles of association or by-laws, a certificate of stock of a savings and loan association need not be in any particular form. See Sundheim on The Law of Building and Loan Associations (3rd ed.) sec. 45.

We find no statute in Wisconsin which prescribes the form of a certificate of either installment or paid up stock of a savings and loan association. It would appear that this is something which it is contemplated will be covered in the articles of association or by-laws because in sec. 215.26 (1) it is provided *inter alia*: “The articles of association or by-laws of each local association must specify: * * * the terms on which certificates for shares are to be issued, the form thereof * * *.” [Emphasis ours]

In the instant case the by-laws prescribe the form of the certificate. The form so designated clearly requires that there be inserted in the blanks provided for that purpose, the number of shares and the total dollar amount represented thereby which are owned by the person named in the certificate. This requirement is not complied with by inserting in these blanks the words “statutory limit.” A certificate which contains such words inserted in the blanks mentioned instead of the number of shares and total dollar amount represented thereby is not in the form prescribed by the by-laws and for that reason we advise you that it cannot be used. We therefore answer your question “Yes.”

As a practical matter some danger might exist if an association issues shares of stock, either installment or paid up,
with the words "statutory limit" inserted in the blanks indicating the number of shares and dollar amount represented thereby which are owned by the person named therein instead of putting in said blanks the actual figures showing the number of shares and the actual dollar amount represented thereby owned by such person. A certificate of stock is regarded as evidence of ownership of a certain number of shares of stock. As such it should accurately state the facts with respect thereto. A certificate which employs the words "statutory limit" in designating the number and dollar amount of stock owned by the person named therein so as to read in effect that such person is the owner of "statutory limit" installment shares of the capital stock of the savings and loan association mentioned, might or might not state the true facts. A certificate in such form would be open to the construction that the person named is the owner of installment shares of the association in an amount aggregating the statutory limit which is $25,000. If the person mentioned actually owned installment shares in said amount, the certificate would state the correct facts, but if the person mentioned actually owned one installment share of $100 par value, a certificate in such form would not state the correct facts. It is possible that if a person in the latter class were issued a certificate reciting he was the owner of "statutory limit" installment shares, a claim might be made on the basis of such certificate that such person owned more stock than he actually did, and any attempt to resist such claim by showing the true facts might be made difficult by reason of objections based on the parol evidence rule, or under certain circumstances on the statute relating to the competency of witnesses to testify as to transactions with a deceased. We do not say that such a situation is one which would surely arise or, if it did arise, that such a claim could be successfully maintained against a savings and loan association. What we do wish to point out is that such a claim might arise and cause trouble and that we think it would be dangerous for any association to issue a certificate in such form for such reason.

WET
Public Assistance—Dependent Children—Juvenile Court—Commitments—Juvenile court may not rescind commitment of child committed to either school for boys or school for girls after such child has been paroled by state department of public welfare and is under supervision of department. Children committed to the department under sec. 48.07 (1) (b) as revised by ch. 546, Laws 1947, are subject to the same rule.

Juvenile court has authority to rescind commitment to Wisconsin child center at Sparta and may thereupon place such child directly in foster home, the child then being eligible for aid to dependent children under sec. 49.19.

Juvenile court cannot place dependent child in licensed foster home in order to make child eligible for aid to dependent children under sec. 49.19 and at the same time turn over custody, control and supervision of the child to private welfare agency; county agency administering aid under the statutes is alone empowered to supervise and control the expenditure of such public funds and there is no authority for having two conflicting commitments running at the same time.

Although sec. 48.07 (1) (b), Stats. 1947, no longer contains provision for juvenile court to commit to a public institution, the court has such power under sec. 48.07 (1) (c) and therefore may commit neglected or dependent child to Wisconsin child center at Sparta.

December 18, 1947.

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

We have your recent request for an opinion in regard to several problems involving foster home care for dependent children. We shall treat the several problems separately.

1. You have inquired whether a child committed to the school for boys at Waukesha or the school for girls at Oregon and later paroled, can be returned to court for rescinding the order of commitment and with the juvenile court then making a placement in a foster home, such placement presumably rendering the child eligible for aid to dependent children (hereafter referred to as ADC) under sec. 49.19
Sec. 49.19 (1) (a) and sec. 49.19 (10), Stats. 1947. (See ch. 526, Laws 1947.) Sec. 49.19 (1) (a) includes in its definition of a dependent child one who is placed in a foster home by a county agency pursuant to ch. 48. This department has ruled that the juvenile court is a county agency. XXXVI Op. Atty. Gen. 366.

Sec. 48.07 (1) (b), Stats. 1945, provided that if the juvenile court should find a child delinquent, neglected or dependent, it could “commit the child to a suitable public institution or to a suitable child welfare agency licensed by the state department of public welfare and authorized to care for children or to place them in suitable family homes. The terms and duration of such commitments, other than to the Wisconsin school for boys or to the Wisconsin school for girls, shall in each case be fixed by the court, subject to modification by the court on its own motion or otherwise.”

The portion underlined above clearly withholds from the juvenile court authority to alter or modify the terms and duration of commitments to the two named schools. Sec. 48.16 (2) (b) clothes the state department of public welfare with sole power to parole any child committed to either of the schools, and, furthermore, provides that every paroled child shall remain in the legal custody of the department until such child is 21 years of age.

Sec. 48.16 (3) clothes the state department of public welfare with authority to place any child under commitment to either of the schools in a suitable “foster boarding home” under such terms and conditions as the department shall determine.

It is our opinion that once the child has been properly committed to either of the schools named, full control is vested in the state department of public welfare and the court cannot revoke such commitment. If the child is paroled from either of the schools the jurisdiction of the department over such child continues. In fact, while the child is out on parole he is merely serving out the term of his commitment outside the walls of the school.

The supreme court of this state thoroughly analyzed a number of the provisions of ch. 48, including the sections herein cited in the case of In re Willard, 225 Wis. 553, 275 N. W. 587. That case clearly holds that the juvenile court
has no discretion with respect to the terms of commitment of a child sent to either one of the state schools. See pp. 557-558.

You are therefore advised that on all commitments made to the two schools under ch. 48, prior to the changes made by the 1947 legislature, the juvenile court has no authority to rescind commitment of a child paroled from either of the schools and the court cannot place such child in a foster home simply to qualify such child for aid to dependent children.

Ch. 546, Laws 1947, amended sec. 48.07 (1) (b) so that it now provides that the juvenile court may upon a finding of neglect, dependency or delinquency "commit the child to the department of public welfare, or to a suitable child welfare agency licensed by the state department of public welfare * * * The terms and duration of such commitments, other than to the department of public welfare, shall in each case be fixed by the court, subject to modification by the court on its own motion or otherwise."

The same chapter also amended sec. 48.14, Stats. The latter section in the 1945 statutes read as follows:

"The Wisconsin school for boys, shall be the place of confinement and instruction of all male delinquent children and the Wisconsin school for girls of all female delinquent children, who are committed to these institutions pursuant to section 48.07 * * * ."

As amended the section now provides that the respective schools shall be the place of confinement of delinquent children who are "placed there by the department of public welfare."

It is apparent from the sections just quoted that the statutes no longer provide for direct commitment to the two schools by the juvenile courts. Commitments hereafter are to be made to the department and it, in turn, will make such disposition as will best serve the interests of the child.

Sec. 58.69 (renumbered sec. 54.09, Stats. 1947, chs. 546 and 560, Laws 1947) makes the following provision:

"When any juvenile is found to be delinquent under the provisions of chapter 48 and the juvenile court does not release such person unconditionally, place him on probation or in a family home or private institution, the court shall commit such juvenile to the department."
Considering all of these sections together it is clear that they no longer vest in the juvenile court any authority to commit a delinquent child directly to a public institution, including the school at Oregon and the school at Waukesha.

In view of the fact that sec. 48.07 (1) (b) as revised by the 1947 legislature provides that all commitments to the department are not subject to modification by the court, the juvenile court is therefore without authority to modify or alter such commitment under the new law as well as the old one. In other words, the Willard case, supra, would apply to the new type commitment to the department as well as to the old commitments which were made directly to the schools.

We wish to point out that sec. 48.16 (2) (b), Stats. 1945, providing for parole of children committed to either of the schools has not been materially altered by the 1947 legislature. However, it must be kept in mind that the parole provisions of this section apply to children committed to the schools. It is thus limited to commitments made under the old law because under the 1947 statutes children are no longer committed to the schools but to the department instead.

2. Your second question involves the case of a child under permanent commitment to the child center at Sparta (formerly state public school), the parental rights of the parents having been terminated and the child placed by the school in a boarding home in a county other than the county of the child’s residence. The juvenile court of the county of residence has entered an order commanding the county treasurer of said county to pay to the foster home parents a certain sum per month for the support of the child.

The court has apparently treated this arrangement as a placement of its own. From this the court has concluded that since it is a placement by a county agency, the county is eligible for state reimbursement under sec. 49.19 (10), Stats. 1947 (ch. 526, Laws 1947). It is to be noted, however, that in this case the placement was made by the Wisconsin child center at Sparta. The center is not a county agency. Therefore, the child is not eligible for aid to dependent children under sec. 49.19.
The court could revoke the commitment to the center and then directly place the child in a foster home and in such instance the child would be eligible for ADC. However, the court cannot have two separate commitments in effect at the same time and through such arrangement render the dependent child eligible for ADC. The court must first revoke the commitment to Sparta and then make the placement in the foster home.

In this connection one other matter requires careful consideration: Sec. 48.07 (1) (b), which has been referred to several times in the earlier part of this opinion, was amended by ch. 546, Laws 1947. The subsection now provides that the juvenile court may "commit the child to the department of public welfare, or to a suitable child welfare agency licensed by the * * * department * * *. The terms and duration of such commitments, other than to the department of public welfare, shall in each case be fixed by the court subject to modification by the court on its own motion or otherwise."

In the 1945 statutes sec. 48.07 (1) (b) provided for commitments to a "public institution" but this provision is omitted in the 1947 statutes. The question then arises whether there is any power for the juvenile court to commit to the institution at Sparta. Sec. 48.07 (1) (c) provides that if the court finds a child neglected or dependent, the court may "make such further disposition as the court may deem to be for the best interests of the child." It appears that this section is sufficiently broad to empower the courts to commit directly to the child center. The legislature clearly did not intend to take away from the juvenile courts all power to commit to the child center.

We call your attention to ch. 540, Laws 1947, which amended secs. 48.18, 48.19, 48.20, 48.21 and 48.22, all of which deal with the Sparta institution. This chapter renamed the state public school the Wisconsin child center. Sec. 48.18 as amended by that chapter refers to "each child committed to either of said schools for boys or girls or to the Wisconsin child center." Sec. 4 of ch. 540 amended sec. 48.20, Stats., and refers to dependent and neglected children committed. Sec. 6 of chapter 540, which amended sec. 48.22 (2), Stats., provides that the department may place
"children permanently or temporarily committed in families." The same section of chapter 540 further amended sec. 48.22 and again refers to permanently committed wards.

All this strongly indicates that the legislature was definitely thinking of commitments to the Wisconsin child center at Sparta by the several juvenile courts of the state. Despite the fact that sec. 48.07 (1) (b), as amended by the 1947 legislature, no longer contains authority for the court to commit to a public institution, the courts retain that power under sec. 48.07 (1) (c). The legislature certainly would not have gone to the trouble of making extensive revisions of those sections of ch. 48 which deal with the child center, all the while talking of commitments to that institution, if that body were of the opinion that all power to commit to such institution had been removed.

Therefore, insofar as the juvenile courts have the power to make commitments to the child center they are authorized to rescind, revoke or modify such commitments.

We wish to point out further that ch. 54, Stats. 1947, (created by ch. 546 and renumbered by ch. 560, Laws 1947) does not confer upon the department the power to make commitments to the Wisconsin child center. Ch. 54, Stats., deals with delinquent children and was not intended to apply to neglected or dependent children. Since the Wisconsin child center is an institution for the care of dependent and neglected children, it appears that the department does not have authority to place children there under the provisions of sec. 54.24, Stats. 1947. In an earlier part of the opinion we referred to the fact that sec. 48.14, Stats., had been amended by ch. 546, Laws 1947, and now provides that the school for boys at Waukesha and the school for girls at Oregon, shall be places of confinement of delinquent children "placed there by the department of public welfare." No such provision was made for placing children by the department in the child center at Sparta. The legislature certainly did not intend to abolish the Wisconsin child center. Since the department can make no commitments to the center under ch. 54, Stats., the only source from which the Sparta cases can flow is the juvenile court.
3. You have brought to our attention a third problem which involves an order of a juvenile court providing that a dependent child be placed in a particular licensed foster home under the supervision and care of a private agency. In this particular case the court placed the child directly in the foster home. Apparently it is the view of the committing court that the child is eligible to ADC under sec. 49.19 (10) created by ch. 526, Laws 1947. It appears also to be the view of the court that the private agency may continue to exercise both supervision and control over the child to the exclusion of the governmental agency administering ADC in the county where the child resides. If the foster home where the child is placed was issued a permit by a private agency, that agency still retains power of supervision over the home pursuant to sec. 48.38 (4), Stats. However, it is clear that when ADC is granted, the county agency administering such aid has control and supervision over all financial arrangements such as the budget for the care of the child. The private child welfare agency is not vested with any authority under the statutes over the control and expenditure of the funds of the ADC. Secs. 49.50 and 49.51, Stats., deal with state supervision and county administration of the social security aids, including ADC.

In connection with the case just discussed, we wish to point out that if a juvenile court originally committed the child to the licensed child welfare agency and such agency placed the child in a foster home, the child would not be eligible for ADC under secs. 49.19 (1) and 49.19 (10) because the child was not placed by a county agency. See XXXVI Op. Atty. Gen. 366, supra. Therefore, if the court wishes to gain the advantage of state reimbursement under sec. 49.19 (10) by placing the child directly in the foster home, the commitment to the child welfare agency must be revoked. In other words, here, as in the other situation involving a child placed by the child center at Sparta, we cannot have two concurrent commitments running at the same time. The county agency must take full control of the child and make the placement. Only under those circumstances can the benefits afforded by sec. 49.19 be realized.
CONCLUSION

(1) The juvenile court may not rescind the commitment of a child to the Wisconsin school for boys or the Wisconsin school for girls after such committed child has been paroled by the state department of public welfare and is under the supervision of the department. The same rule applies to children committed to the department under sec. 48.07 as revised by ch. 546, Laws 1947.

(2) The juvenile court has authority to rescind a commitment to the Wisconsin child center at Sparta and the court may thereupon place such dependent child directly in a licensed foster home, such child then being eligible for ADC under sec. 49.19.

(3) The juvenile court cannot place a dependent child in a licensed foster home thereby making the child eligible for ADC under sec. 49.19, and, at the same time turn over the custody, control and supervision of the child to some private welfare agency. The county agency administering ADC under the statutes is alone empowered to supervise and control the expenditure of such public funds. There cannot be two conflicting commitments running at the same time.

ES

State Board of Health—Rules—Vital Statistics—The state board of health does not have power under secs. 140.05 (3) and 69.03, Stats., to promulgate a rule prohibiting distribution of information shown on registrations of births and deaths, except to the extent that such a rule might be made applicable to the state and local registrars in performance of their duties under ch. 69 if it affects efficient administration.

December 19, 1947.

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

You have asked whether the state board of health has power to promulgate a rule to prohibit state registrars, city health officers, county registers of deeds, hospital administrators and funeral directors and embalmers from prepar-
ing for sale or gift for commercial purposes information identifying persons recorded on birth and death certificates.

As pointed out in the *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 448, 15 N. W. 2d 27:

"* * * No proposition of law is better established than that administrative agencies 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 four corners of the statute under which the agency proceeds. * * *"

The rule-making power of the state board of health under sec. 140.05 (3) of the statutes is limited to those regulations which "shall be necessary to efficient administration and to protect health." The type of rule contemplated under that section is apparently one which may bind members of the public generally as well as subordinates of the board of health, because it is required that such rules must be published, and thereafter violation is made punishable by fine.

The provision of sec. 69.03 appears to contemplate that the rule-making power of the board of health in connection with vital statistics shall be of a different nature from the general power to make rules for the protection of public health, because sec. 69.03 makes no provision for publication or penalty. The provision says that "The state board of health may make, and from time to time amend, such rules and regulations as it considers necessary to carry out the provisions of this chapter." The wording, together with the failure of the provision to require publication and penalty for violation, point to a legislative intent to limit the rule-making power of the board in connection with vital statistics to matters pertaining to efficient administration.

Your request for an opinion indicates that the rule which the board has under contemplation is grounded in ethical considerations. We do not believe the legislative authorization contained in either sec. 140.05 (3) or sec. 69.03 would enable the state board of health to promulgate a rule for which the sole basis is one of ethics. The legislative standards within which that board is authorized to act are based primarily on considerations of public health and appurtenant administration.
Furthermore, we believe that the restrictive effect of rules under sec. 69.03 was intended to govern only such persons whose official duties under ch. 69 are made subject to the supervision of the state board of health, at least to the extent that the rules may be made practically enforceable by penalty or other form of deterrent.

While ch. 69 imposes certain duties upon hospital administrators, funeral directors and embalmers, those duties are not imposed upon them as public officials subject to the supervision of the state board of health.

State registrars, city health officers and county registers of deeds are, by the statutes, expressly made subject to the supervision of the state board of health in the performance of their duties relating to vital statistics. Sec. 69.02 (1) provides that the bureau of vital statistics shall be subject to the "immediate supervision and direction of the state board of health." The state registrar appointed by such board is "under the supervision of the secretary of the state board of health." Sec. 69.07 charges the state registrar "with supervising registers of deeds and local registrars with their work under this chapter." Sec. 69.09 makes the health officer or commissioner of health in cities the local registrar. These officials, then, are subject, either directly or indirectly, to the supervision of the state board of health with respect to all duties imposed upon them in connection with the collection and filing of vital statistics. In the performance of such duties we believe they are subject to any reasonable rule made by the state board under sec. 69.03 which has a bearing upon efficient and proper administration. If there is a factual basis for a finding that the practice sought to be prohibited interferes with efficient administration of the vital statistics statutes, or tends to undermine public confidence so as to complicate enforcement of the law, such a rule as is proposed might be promulgated on that basis for the guidance of state and local registrars. Even upon such a basis, however, we do not believe that the restriction could be extended to other persons.

The power of the board of health to make rules affecting the use of birth and death records and the like, except as those rules affect public officials under the board's supervision, may also be restricted by the provisions of sec. 18.01
(2) to the effect that any person may examine or copy public records. It would be beyond the power of the state board of health to place any restriction upon the use of public records inconsistent with this specific legislative provision.

Perhaps it should be noted with respect to funeral directors and embalmers, that while the state board of health alone would have no authority to promulgate such a rule as you have described, sec. 156.03 (2) authorizes that board together with a committee of examiners "to make and enforce reasonable rules and regulations, not inconsistent with this chapter, covering * * * business ethics for the profession of funeral directors and embalmers." Such rules are to be published and are subject to penalty under sec. 156.15.

_____

Highway Commission—Highways and Bridges—Acquisition of Lands—State highway commission may acquire limited easement on lands adjoining highway for drainage purposes under sec. 84.09 (1), Stats., and if the commission elects under sec. 84.09 (3) to have the county highway committee act as its agent in acquiring such interests the county highway committee may proceed by condemnation under ch. 32 or in the manner provided in sec. 83.07 or under sec. 83.08 (2) subject to the approval of the commission. The county highway committee in so proceeding is not bound to follow the procedure prescribed by sec. 83.07 although that procedure is probably controlling where the acquisition is instituted by the county highway committee on its own motion under sec. 83.07 (2) rather than as agent for the state highway commission under sec. 84.09 (3).

December 24, 1947.

James R. Law, Chairman,
State Highway Commission of Wisconsin.

You state that recently the state highway commission, proceeding under sec. 84.09 (1) determined that it was necessary to acquire a limited easement in certain lands adjoining a state trunk highway. It was proposed to acquire such easement for the purpose of constructing and maintaining
a drainage ditch and the county highway committee was directed to acquire the easement as provided in sec. 84.09 (3).

The needed easement could not be purchased expeditiously from the owner of the lands involved and an award was made pursuant to sec. 83.08 (2). The award was filed with the county clerk and was recorded with the register of deeds. The drainage ditch was constructed but the property owner returned the check for the amount of the award and filled in the drainage ditch.

An action was commenced in municipal court for the purpose of obtaining a mandatory injunction to compel the property owner to restore the drainage ditch to its previous condition. After the testimony was in a motion was made to dismiss the complaint on the grounds that the award of damages as made under secs. 84.09 (3) and 83.08 (2) was improper. The defendant contended that in acquiring lands for drainage purposes the proceedings should have been under secs. 83.07 (2) and (4) which relate specifically to acquisition of drainage rights by county highway committees, and that inasmuch as secs. 84.09 (3) and 83.08 (2) are general in their application the specific statute relating to drainage controls.

Because the court indicated that it was of the same view the parties stipulated to dismissal of the action without prejudice and without costs.

You have asked for our interpretation of the statutes involved.

Sec. 84.09 (1) sets up in the broadest language the authority of the state highway commission to acquire lands and interests therein. It reads in part:

"The state highway commission may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving, and maintaining highways, streets and roadside parks which it is empowered to improve or maintain, or interests in lands in and about and along and leading to any or all of the same; and after establishment, layout and completion of such improvements, the commission may convey as hereinafter provided such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation"
of such lands so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. Whenever the commission deems it necessary to acquire any such lands or interests therein for any of such purposes, it shall so order and in such order or on a map or plat show the old and new locations and the lands and interests required, and shall file a copy of the order and map with the county clerk and county highway committee of each county in which such lands or interests are required. For the purposes of this section the commission may acquire private or public lands or interests therein. * * *"

The statute then goes on to provide in effect that unless it elects to proceed under subsection (3) the state highway commission may proceed to acquire the necessary rights in the name of the state and the procedure to be followed is set forth in subsections (1) and (2). However, in this case the commission elected to proceed under subsection (3) which reads:

"The commission may order that all or certain parts of the required land or interests therein shall be acquired by the county highway committee. When so ordered, the committee and the commission shall appraise and agree on the maximum price, including damages, considered reasonable for the lands or interests to be so acquired. The committee shall endeavor to obtain easements or title in fee simple by conveyance of the lands or interests required, as directed in the commission's order. The instrument of conveyance shall name the county as grantee, shall be subject to approval by the commission, and shall be filed with the county clerk and recorded in the office of the register of deeds. If the needed lands or interests therein cannot be purchased expeditiously within the appraised price, the county highway committee may acquire them by condemnation under chapter 32, or in the manner provided in section 83.07 or, subject to approval by the commission, in the manner provided in section 83.08 (2). Any lands or interests therein acquired pursuant to this subsection shall be conveyed to the state without charge by the county highway committee in the name of the county when so ordered by the commission." (Stats. 1945)

Sec. 83.08 (2) referred to in subsection (3) provides among other things that where the needed lands or interests therein cannot be purchased expeditiously for a reasonable price the county highway committee may acquire the same
by making and signing an award of damages which is filed with the county clerk, and thereupon the amount so awarded becomes payable to the owner who is given a right of appeal if he is dissatisfied with the amount of the award. Provision is also made for recording the award of damages in the office of the register of deeds. This was the procedure followed in the instant case.

Another alternative method of procedure referred to in sec. 84.09 (3) under which the state highway commission purported to act is that prescribed by sec. 83.07.

Sec. 83.07 (2) reads:

"In case the county highway committee or town board deems it desirable to acquire any lands or the right to take stone, gravel, clay or other material, from private lands for use in the execution of the committee's or board's duty, or to acquire the right of access to any lands, or the right of drainage across any lands, the committee or board may purchase or condemn such lands or right and take title thereto in the name of the county or town, and the cost thereof shall be paid out of the highway improvement funds."

Sec. 83.07 (4) provides in part:

"In case the committee or board is unable to acquire needed lands or rights by contract the committee or board may acquire the same in the name of the county or town by eminent domain, as provided in chapter 32 or in the following manner: They may, upon not less than 5 days' notice in writing, exclusive of Sundays and holidays, to the owner, describing the property and stating the time and place of hearing the application, apply to the county judge of the county to appraise the value of the property sought to be taken. * * *

It is to be noted that under sec. 83.07 (4) the county highway committee does not have the power to make and file an award as it does under sec. 83.08 (2) which was followed in this case.

Thus the question presented is whether or not the county highway committee was bound to follow the procedure prescribed in sec. 83.07 (4) on an acquisition instituted by the state highway commission under secs. 84.09 (1) and (3).
Chapter 83 relates to county highways and if this procedure had been instituted by the county highway committee on its own motion to acquire the right of drainage across lands under sec. 83.07 (2) it would appear that such committee might well be limited to the procedure prescribed by the remaining subsections in sec. 83.07.

We have here, however, an entirely different situation. This is not a case where the proceedings were instituted after "the county highway committee * * * deems it desirable to acquire * * * the right of drainage across any lands." The county highway committee had no discretion in the matter whatsoever. It was merely acting as an arm or agency of the state highway commission under sec. 84.09 (1) and (3). Sec. 84.09 (1) gives the state highway commission the power to acquire any interests in lands whether in the highway limits itself or in and about and along and leading to the same. Subsection (3) sets up the procedure where the state highway commission does not elect to handle the acquisition directly. It orders that "the required land or interests therein shall be acquired by the county highway committee."

When the county highway committee then proceeds, it is doing so not because it has deemed it desirable to acquire the drainage rights in question on behalf of the county pursuant to sec. 83.07 (2) but because it has been ordered to do so by the state highway commission pursuant to sec. 84.09 (3).

When acting as an arm or agency of the state highway commission under sec. 84.09 (3) the county highway committee is given three options or alternatives as to how it may proceed if the owner is unwilling to sell at the appraised price. The committee may institute a regular condemnation action under ch. 32 of the statutes or it may proceed in the manner provided in sec. 83.07, or it may, subject to the approval of the state highway commission, proceed in the manner provided by sec. 83.08 (2) which was done in this case.

Sec. 84.09 (3) incorporates by reference only the procedural provisions of ch. 32, sec. 83.07 and sec. 83.08 (2). Sec. 83.07 (2) relating to the powers of a county highway committee to acquire drainage rights on its own initiative
for county purposes has no application and is not to be deemed as having been incorporated by reference into sec. 84.09 (1) or (3) under which we are here proceeding.

Sec. 83.07 (2) could not possibly apply to the situation here presented. It confers no powers or duties whatsoever on the state highway commission, and the state highway commission could not have proceeded under this section if it had wanted to, since administrative agencies have only such powers as are expressly granted to them or necessarily implied. *American Brass Co. v. State Board of Health*, 245 Wis. 440. If sec. 83.07 (2) does not apply, it follows that the procedure to be observed in an acquisition instituted under sec. 83.07 (2) is not controlling.

While the procedure outlined under sec. 83.07 is available in this type of case, such procedure is only one of the three alternative procedures made applicable by sec. 84.09 (3) and it was entirely permissible to follow either of the other methods;—that is, by condemnation under ch. 32 or the procedure presented by sec. 83.08 (2), the latter method having been selected in the instant proceedings.

We are also asked whether it is possible to reopen the case which was dismissed without prejudice.

A dismissal without prejudice leaves the parties as if no action was instituted and it leaves the issues open to be litigated again in a subsequent proceeding between the parties, notwithstanding the fact that it is recited in the judgment that testimony was taken and was not sufficient to warrant the relief asked. See 45 Words and Phrases 439 and following.

While there would be little point in commencing the action over in the same court where it was dismissed without prejudice, the case could be commenced in circuit court. Apparently this will have to be done in order to compel the defendant to restore the drainage ditch to its previous condition. See XXVII Op. Atty. Gen. 645, to the effect that an injunction may be applied for restraining the owner from interfering with the highway authorities’ possession of lands for which an award has been made under sec. 83.08 (2).

While apparently the defendant concedes that acquisition proceedings under sec. 83.07 would be proper there is a
serious question as to whether such procedure could now be followed.

If the procedure followed under sec. 83.08 (2) was proper as contended here, it may well be that jurisdiction is gone so far as now proceeding under sec. 83.07 is concerned. Where an agency has power to proceed in one of several ways and does proceed in one of the ways designated by the statute its jurisdiction is exhausted and the matter may not be reopened for action under some other alternative. See *Baken v. Vanderwall*, 245 Wis. 147. When the award under sec. 83.08 (2) was filed and the amount tendered to the landowner, title passed and the only question left open was the right of the landowner to establish his claim to a greater sum in the manner provided in the statute in case he were dissatisfied with the amount of the award. In XIV Op. Atty. Gen. 489 it was ruled that condemnation proceedings may be discontinued at any time before actual payment or tender and deposit of the amount of the award and that such discontinuance does not operate as a bar to a new condemnation proceeding. The inference is clear that thereafter it would be too late to discontinue the procedure and commence over in one of the other ways permitted by statute. See also IV Op. Atty. Gen. 739. While it is true that the statute discussed in IV Op. Atty. Gen. 739 specifically provided that the title to the property and rights sought to be acquired vested in the county upon payment or tender of the award, the situation is not materially different under sec. 83.08 (2). This section provides in part: “When the award has been filed, the highway authorities and their contractors and employes may take possession of the lands and exercise full control of the interests in lands acquired.” This in substance is equivalent to saying that title has passed. Certainly the statute would be anomalous indeed if title did not pass prior to the time contractors moved in and substantially changed the character of the property and if the county were to be permitted thereafter to abandon the proceeding. See also XXV Op. Atty. Gen. 352 to the effect that the county highway committee lacks power to revise an award which it has made under sec. 83.08 (2).

WHR
Public Service Commission—Motor Carriers—Assignment of Contract Motor Carrier License—The addition of a new general partner to a partnership holding a license under sec. 194.34, Stats., requires approval of assignment of the license and payment of a fee under sec. 194.04.

The withdrawal of a general partner from such a partnership requires similar approval and payment if the business is to be carried on beyond the period necessary for winding up.

December 30, 1947.

PUBLIC SERVICE COMMISSION.

You have asked whether changes in personnel of a partnership holding a contract motor carrier license necessitate approval of assignment of the license by the public service commission and the incidental payment of a filing fee; or whether such changes may be authorized and approved by the commission as license amendments for which no fee would be required so long as they do not involve service at new municipalities.

For purposes of administration we assume you desire a specific rule which can be uniformly applied without necessity of resort to interpretation of facts in any given case. We will endeavor to give you as specific a rule as possible but we believe that there are some situations which require different treatment than others.

Certain general rules are given in 37 C. J. 245, 246, §§ 106 and 108, respecting the effect of a change in personnel of a partnership upon a license held by such partnership. The rules, however, include exceptions which, though simply worded, cover more ramifications than the rules. The dominant principle of law apparent from a reading of the cases is that the effect upon a license of a change in personnel of a partnership depends upon the particular law under which the license was issued.

Different considerations are involved under a law enacted primarily for revenue purposes than for one enacted primarily for regulatory purposes. While ch. 194 of the statutes contains both revenue and regulatory measures, we think the legislature has made it clear that the portions of
the law which the public service commission administers are regulatory in nature and those provisions relating primarily to collection of revenue have been segregated for administration by another department.

If express provisions of a regulatory law are not adequate to determine any question relating to transfer of a license, various aspects of the law may have a bearing, including the element whether the regulation is directed primarily to the \textit{place} where a business is to be conducted or to the \textit{persons} by whom it may be conducted. Ch. 194 indicates no particular concern with the regulation of the headquarters from which a motor carrier carries on his services. It does, however, evince some concern with the reliability of the person to whom authority is issued. As an example, sec. 194.20 provides that interstate assignments may be denied if the commission finds that the record and experience of the applicant evinces a disposition to violate or evade the laws or regulations of the state. Since the record and experience of a carrier may have some weight in whether he shall be permitted to operate under ch. 194 of the statutes, we believe the legislature intended that any change in the \textit{entity} of a licensee should be passed upon by the commission as an assignment rather than an amendment and should require the incidental payment of an application fee.

Under the Wisconsin statutes relating to partnership there are some changes as between partners which may be made without effecting a dissolution of the partnership or the substitution of a new entity. Under sec. 123.23 the mere assignment of the interest of one partner does not necessarily dissolve the partnership, particularly if the assignment is merely of a financial nature to enable the assignee to collect profits. In the case of a limited partnership, the assignment of a limited partner's interest does not of itself dissolve the partnership. See sec. 124.19. In such cases no assignment would be necessary.

If one of the general partners to whom a license is issued discontinues to be associated in carrying on the business by reason of retirement or death, the partnership is dissolved. Sec. 123.25. A partnership may also be dissolved for other reasons. In the event of dissolution of the partnership, the business may still be carried on for the purpose of wind-
ing up. If the carrying on of the business of the partnership is limited to that purpose, we believe no assignment of the license under ch. 194 is required.

In either of the above cases the license is adequate authority for the continuance of the business under the altered circumstances without either assignment or amendment; but if the commission deems it advisable from the point of view of having its records complete, we see no objection to recording the change by routine amendment without fee.

If, upon the death or retirement of one partner, a new general partner is taken in to carry on the business for the future, that results in the formation of a new partnership which requires approval of an assignment and payment of a fee.

To summarize, we believe that in any case where a new partner is taken into active participation in the business of a motor carrier, an assignment is involved which must be approved by the public service commission and a fee must be paid. If a general (as distinguished from a limited or silent) partner severs his connection with the partnership or dies, no assignment is essential for the winding up of the business; but if the business is to be carried on by remaining partners beyond the time necessary for winding up, that also involves an assignment for which the commission's approval and payment of a fee are necessary.

This, we believe, accords both with the rules as to what constitutes a change in legal entity and with the regulatory purposes of ch. 194. Addition of a new partner to participate in carrying on of the business may involve considerations affecting the responsibility of the firm and its ability to conform to the requirements of the law. Similarly the withdrawal of one general partner and the permanent carrying on of the business by those remaining might detract from the responsibility of the firm to which the license was originally issued.

BL
Counties—Budget—Public Officers—Delegation of Power—County board has no authority to delegate power to put in effect a program to fireproof a county asylum and to spend the money appropriated for this purpose to the superintendent of the asylum. Secs. 59.07 (4), 46.18 (1) and (8), and 59.06.

Where budget adopted by county board made no provision for fireproofing a county asylum, an appropriation of a sum of money from the general fund to be used for such fireproofing is a change in the budget within meaning of sec. 65.90 (5).

February 28, 1947.

ANDY BORG,
District Attorney,
Superior, Wisconsin.

You ask us to advise you as to the legality of a resolution adopted by the county board of Douglas county on December 19, 1946. The vote on adoption was 31 in the affirmative, 1 in the negative and 7 members were absent. Said resolution reads in part as follows:

"Whereas, it is deemed necessary at this time to take some action for the protection of the inmates of the Douglas County Asylum, and to lengthen the life of the Asylum building,"

"BE IT FURTHER RESOLVED, that the Superintendent of the Douglas County Asylum be authorized to expend a sum not to exceed $17,500 during the year 1947 for the purpose of commencing a program to fire proof the Asylum, and there is hereby appropriated the sum of $17,500 from the General Fund;

"BE IT FURTHER RESOLVED, that the sum of $17,500 be and the same is hereby included in the 1947 levy, and when levy is collected the general fund is to be reimbursed to the extent of $17,500.

"BE IT FURTHER RESOLVED, that the Advisory Committee and the Board of Trustees for Douglas County Institutions act as a Building Committee to supervise the proposed improvement."

You advise that on November 18, 1946 the budget for the year 1947 was adopted by the county board, which budget contained no item which provided the sum of $17,500 for
The amount of taxes levied in 1946 for county purposes, exclusive of highway taxes and soldiers' relief, amounted to $543,395.38. The equalized valuation for the county for the year 1946 was $54,407,820.

We are of the opinion that the resolution of December 19, 1946 is invalid because it attempts to delegate the power to put into effect the program to fireproof the asylum and to spend the money appropriated for this purpose to the superintendent of the Douglas county asylum.

The county board has power to build and keep the county buildings in repair. Sec. 59.07 (4). The management of the asylum is under the control and direction of the board of trustees, subject to regulations approved by the county board. Sec. 46.18 (1). The county board is also required to appropriate annually for operation and maintenance of various county institutions, in addition to the amount appropriated for construction and improvement of grounds and buildings, a sum not less than the amount of state aid estimated by the trustees to accrue to said institutions or such lesser sum as the trustees may estimate is necessary for operation and maintenance. Sec. 46.18 (3).

The county board could delegate such power to one of its own committees composed entirely of its own members. Sec. 59.06; Forest County v. Shaw, 150 Wis. 294; First Savings & Trust Co. v. Milwaukee, 158 Wis. 207; XXIV Op. Atty. Gen. 326. This is as far as it can go with respect to the subject matter here involved and we find nothing which would sanction the delegation of such power to the superintendent who is merely an employee of the board of trustees. Sec. 46.19. See XIII Op. Atty. Gen. 328.

The fact that the resolution provides that the advisory committee of the county board and the board of trustees act as a building committee to supervise the proposed improvement does not help the situation. A fair construction of the resolution indicates that the superintendent will be the one who will have the active part in putting the fireproofing program into effect. He is the one who is authorized to expend the money; the advisory committee and board of trustees are only authorized to supervise.

Had this resolution clearly delegated the power to put into effect the program for fireproofing the county asylum
and to expend this money to a committee composed of members of the county board, we would have come to the conclusion that the resolution was valid provided the notice required by sec. 65.90 (5) had been given.

In absence of statute, there is no reason why the county board could not by an appropriation take the sum of $17,500 out of the general fund and use it for any lawful purpose. XXI Op. Atty. Gen. 1056; XXIV Op. Atty. Gen. 584. Today this can be done by the county board in counties having a population of less than 300,000 only if it is in accord with a budget adopted as provided by sec. 65.90 or if the budget is changed, as provided in subsection (5) of that section, by a two-thirds vote of the entire membership of the board and by publishing a notice of such change within 8 days thereafter in a newspaper having general circulation in the county.

We regard the appropriation of $17,500 from the general fund to be used in fireproofing the asylum as a change in the budget adopted November 18, 1946. XXX Op. Atty. Gen. 304 at 309. XXXV Op. Atty. Gen. 259. For rule in case of an appropriation from a contingent fund, see XXXII Op. Atty. Gen. 301. The resolution making it was adopted by a vote in excess of the necessary two-thirds of the entire membership of the county board and hence the provisions of sec. 65.90 were complied with, assuming that notice of the change was given as provided in subsection (5) of that section. If such notice was not given, the resolution will, of course, be invalid because of failure to comply with sec. 65.90.

We appreciate the fact that the tax levied by the county in 1946 is right up to the limit permitted by sec. 70.62 (2). However, that does not affect the validity of the resolution here involved. The money which was appropriated here already had been raised by taxation and was in the general fund. We regard the portion of the resolution which provides that the sum appropriated ($17,500) be included in the 1947 levy so as to reimburse the general fund, as a statement of intention or of policy which is not binding on the county board when it meets at its next annual session. XXI Op. Atty. Gen. 1056. The county board at its next annual meeting may or may not include said item in the 1947 levy.
If it does not, such item could not operate to bring the levy over the maximum permitted by sec. 70.62 (2). If it does, it does not necessarily follow that the total levy will exceed the maximum permitted since other items may change so as to bring the levy within the limit.

You also refer to the cases of Indiana Road Machinery Co. v. Town of Lake, 149 Wis. 541, and Beyer v. Crandon, 98 Wis. 306. The situation here is different because the money appropriated here already had been raised by taxation and was in the general fund when appropriated.

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Grand Army Home—Control and management is vested in director of department of veterans affairs as statutory administrator, subject to the power of approval of the board of managers of the Home. Board of managers is a policy forming body, advisory in nature. Files of the Home transferred by adjutant general to the director as new administrator are properly in his possession. Budget estimates for the Home should be prepared by the department of veterans affairs

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