OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOL. 39

January 1, 1950, through December 31, 1950

THOMAS E. FAIRCHILD
Attorney General

MADISON, WISCONSIN
1950
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
STEPHENS 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
EMMET 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 June 5, 1948
GROVER L. BROADFOOT, Mondovi from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center from Jan. 1, 1951, to
"S^OLUME 39

Criminal Law—Lotteries—“Jingle Contest” does not violate sec. 348.01, Stats., where it is to be judged by a university professor and his staff and standard of judging is to be originality, aptness, uniqueness, neatness, spelling and meter-rhyme.

January 3, 1950.

WILLIAM J. MCCAULEY,
District Attorney,
Milwaukee County.

You have requested a further opinion with reference to the proposed “Jingle Contest” which was ruled to be a lottery in the opinion of this office dated December 29, 1949, 38 O. A. G. 654. You state that the promoters thereof have now proposed to announce additional rules, and you inquire whether these rules are sufficient to meet the objections raised in the opinion referred to.

So far as material, the new rules provide that the last line must be in English, that the jingles will be judged by a professor at Marquette university and his staff and that “the jingles will be judged on the basis of originality, aptness, uniqueness, neatness, spelling, meter-rhyme.”

It is my opinion that the rules as amended, together with the appointment of a reliable judge who will apply the
standards above quoted in determining the winners, remove the element of chance and convert the plan into a genuine literary contest. It does not therefore violate the lottery statute, sec. 348.01.

WAP

Criminal Law—Homicide—Insane—Central State Hospital—Guards at central state hospital may, under sec. 340.29, Stats., use deadly force to prevent the escape of inmates who are charged with felonies. But a mental hospital, though required to use ordinary care to prevent the escape of patients, may not use deadly force if the patient is not charged with felony. Employees of such hospitals have the right of self-defense, but must take account of the character of the attacking inmate and the special duty owed to him.

January 4, 1950.

State Department of Public Welfare.

You inquire whether it is legally permissible to arm the guards at the central state hospital, and whether they might shoot inmates to prevent their escape.

Sec. 51.21 (1), Stats., provides that the purpose of the central state hospital shall be for the "custody, care and treatment of persons committed or transferred thereto pursuant to this section and sections 357.11 and 357.13." Sec. 357.13 provides for the commitment to the hospital of persons charged with crime if found by the court to be feeble-minded or insane at the time of trial. Sec. 51.21 (2), Stats., provides that the department of public welfare may transfer to central state hospital male inmates of other state and county (mental) hospitals and of the colonies and training schools. These transferred persons are dangerous but are not charged with crime. Sec. 51.21 (3) authorizes removal to central state hospital of male insane, feeble-minded and epileptic inmates of the state and county penal institutions. Hence many, but not all, inmates of the central state hospital are convicted felons and many others are charged with
felonies but have not been tried because of their mental condition.

If this institution were used exclusively for the confinement of insane persons who are charged with or convicted of felonies, there would be little doubt that the guards or attendants could shoot to prevent escape. Sec. 340.29, Stats., defines as justifiable homicide the killing of any felon fleeing from justice. See also, 40 C. J. S. 963, Homicide §102b. Furthermore, the guard need not retreat and the doctrine of self-defense has no application.

However, as noted above, the inmates of the hospital are not exclusively felons. There are no doubt many inmates who are not even charged with misdemeanors, and the general rule is that an officer may not shoot or take a life in arresting or recapturing a misdemeanant. Gosezinski v. Carlson, (1914) 157 Wis. 551, 147 N. W. 1018; 40 C. J. S. 966, Homicide §102d. It is therefore doubtful that the attendants at central state hospital would have any authority to shoot to prevent escape of inmates not charged with felony.

This last proposition appears stronger when received in the light of the general duty owed towards the insane by their keepers, namely to provide good care, kindness and competent treatment. See 3 Witthaus & Becker, Medical Jurisprudence, (1909) 598 et seq. When a person is committed to a mental hospital “the state assumes the responsibility of caring for him and keeping him from harm and injury. Every reasonable precaution must be taken to protect him from injury either self-inflicted or otherwise.” 44 C. J. S. 171, Insane Persons §71.

The purpose of confining the dangerously insane seems to be two-fold: (1) To protect the patient from injury due to his own conduct or otherwise, and (2) to protect the public from injury due to his insane acts. In Re Sariyanis, (1940) 19 N. Y. S. 2d 431, 173 Misc. 881; Excelsior Ins. Co. of N. Y. v. State, (1945) 57 N. Y. S. 2d 60, 269 App. Div. 464, affirmed in 69 N. E. 2d 553, 296 N. Y. 40. See Sporza v. German Savings Bank, (1908) 192 N. Y. 8, 14, 84 N. E. 406; Matter of Colah, (1871) 3 Daly (N. Y.) 529.

This proposition has found support in Wisconsin, where it is held that it is incumbent upon an institution receiving
nervous and insane patients to use at all times during their treatment such means as would seem reasonably sufficient and prudent to prevent their escape and frightening or injuring others. *Torrey v. Riverside Sanitarium*, (1916) 163 Wis. 71, 157 N. W. 552; *Dahlberg v. Jones*, (1939) 232 Wis. 6, 285 N. W. 841. See also *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N. S.) 784 holding in substance that a hospital must use reasonable care in the restraint of its mentally deranged patients.

It is my opinion that (aside from felony cases) a mental hospital would be exceeding its authority if it permitted its guards to shoot to prevent the escape of its patients. This would be exerting greater force upon the persons so confined than is permitted under the foregoing authorities.

You are therefore advised that guards would be permitted to shoot, if necessary, to prevent the escape of an insane person charged with or convicted of a felony but they would not be so permitted where the patient was not in that class.

Possibly the two classes of inmates, felons and non-felons, could be segregated in some manner, either in separate buildings or wings or by some distinguishing mark on their wearing apparel. Then the guard, attendant or official could distinguish between the two and determine whether he could lawfully use deadly force if necessary to prevent escape.

The above analysis is not to be taken to mean that the guard or attendant in charge of an insane person may not use sufficient means to repel him if attacked. The guard has not by taking employment in a mental hospital given up his right of self-defense. However, in exercising that right the guard must take into account both the character of the attacking inmate and the special duty owed to him.

WAP
Juvenile Court—Schools and School Districts—Attendance—Consent of the proper superintendent of schools is a prerequisite under sec. 48.24, Stats., to a child being excused by juvenile court from attending school.

January 5, 1950.

G. E. Watson,
State Superintendent of Public Instruction.

You ask: "Does section 48.24 make the consent of the village, city or county superintendent a condition precedent to the issuance of an excuse by the juvenile court?"

The general policy of the legislature that children of designated ages shall be required to attend school is expressed in secs. 40.70 and 40.73 as amended by chs. 96 and 428, Laws 1949. Sec. 48.24 provides a means for procuring exceptions to those requirements, and in view of the fact that excuses issued under that section are exceptions to the general legislative policy, specific safeguards or conditions have been attached. Sec. 48.24 reads:

"The juvenile court upon written application and notice to the city, village or county superintendent and upon his consent and a showing of reasons satisfactory to the court, whether for causes or reasons specified in the statutes or not, may excuse a child from attending school (except a school to which committed) where the child would otherwise be required to attend school; any such excuse granted shall be deemed as to such child for the time stated in the order, a waiver of any statutory provision requiring school attendance. No provision of this section modifies or abrogates any other provision of law authorizing the granting of excuses, from attending school, by an authority other than the juvenile court."

The final determination under the foregoing section whether a child shall be excused is to be made by the juvenile court. The court's authority to grant such excuse, however, depends upon the statutory conditions having been met.

Our courts have recognized that proceedings involving juveniles under ch. 48 are strictly statutory, and that the jurisdiction of the juvenile courts depends upon compliance with the statutes. Miedzinowski v. St. Joseph's Orphan
Asylum, 193 Wis. 635, 215 N. W. 583; In re Willard, 225 Wis. 553, 275 N. W. 537, 225 Wis. 562, 275 N. W. 541.

The authority of the juvenile court to excuse a child under sec. 48.24 involves four conditions precedent: (1) A written application; (2) notice to the city, village or county superintendent; (3) "his" consent; (4) a showing of reasons satisfactory to the court.

Since the final action in the case is to be taken by the court, the written application obviously must be addressed to it. Notice of the application, however, must be given to the city, village or county superintendent. The statutory provision is to the effect that the court may excuse the child only upon "his" consent. The use of the pronoun "his" relates to the superintendent, because if it referred to the court the more appropriate pronoun would be "its." The fourth condition is addressed to the discretion of the court. It is the court's function to determine whether the reasons offered by or on behalf of the applicant are sufficient. The other three conditions, however, are conditions precedent, so that the exercise of the court's jurisdiction with respect to the reasons given comes into play only after an application has been filed, notice has been given to the proper superintendent, and the latter has given his consent. Thereafter an application might still be denied by the court if it deemed the reasons insufficient.

This view is consistent with the fact that the legislature has made enforcement of the compulsory school attendance requirements primarily a function of administrative authorities of the schools under sec. 40.73, and has dealt with attendance requirements primarily as a branch of the school laws. The juvenile court is designated as the tribunal by which such laws are to be enforced in the ordinary course after investigation and action by school officials under sec. 40.73.

The further question may arise in some cases who is the proper official to give consent under sec. 48.24 because the legislature has specified the "city, village or county superintendent." Provision is made in secs. 40.53 and 40.58 for the position of city school superintendent, and sec. 39.01 (5) provides that cities which have a city superintendent of schools shall form no part of the county superintendent's
district. Where there is a city superintendent of schools, there could be little question that he, rather than the county superintendent of schools, would be the official whose consent must be obtained. The difficulty arises from the fact that the statute also designates the "village" superintendent. No provision is made in the statutes for a village superintendent of schools. Many villages are parts of school districts including other territory, so that even if a superintendent were employed he could not be said to be the "village" superintendent. I will not endeavor to anticipate a question involving a village superintendent unless a case should arise in which specific facts and circumstances are presented.

As a general rule, the consent of the city superintendent of schools would be prerequisite under sec. 48.24 to excuse attendance of a child in such schools; and the consent of the county superintendent would be a prerequisite in other cases.

BL

Soldiers, Sailors and Marines—Counties—Veterans' Service Officer—County board may act at any time to fill a vacancy in office of county veterans' service officer which results from original vacancy or a holding over after expiration of a term.

January 5, 1950.

ROBERT N. LEDIN,
District Attorney,
Ashland County.

You state the following facts as the basis of a request for a formal opinion:

"The Service Officer for Ashland County, Wisconsin, was elected by the Ashland County Board of Supervisors pursuant to Section 45.43 of the Wisconsin Statutes at the November meeting of the board in 1943. Since that date, the Ashland County Board of Supervisors held no election for the office of county veterans' service officer until the date November 15, 1949, at which time they elected a man
other than the person holding office at the present time. The present Veterans' officer is of the opinion that this election is illegal and of no effect and that although he was not elected for the subsequent years, he held office as follows: From November 1943, until January 1st in 1945; that his second term should be considered as the 1945–1946 period, his third term as the 1947–1948 period and his fourth term as the 1949–1950 term expiring the first Monday in January 1951.”

You inquire whether the action of your county board of supervisors at their annual meeting on November 15, 1949 in electing a man to the office of county veterans' service officer is legally effective.

In my opinion the action taken by your county board at their November 1949 meeting is lawful and the man then chosen by them is now your county veterans' service officer.

Under the statutes of 1943, there was no officer designated as a “county veterans' service officer” whose office was created by state statute and whose election (or appointment) was compulsory on the counties. Under sec. 59.08 (23), Stats. 1943, the counties had the power to create the office of “county service officer.” There was also a provision under secs. 45.12 and 45.15 for the appointment of a “soldiers’ relief commission,” and for the employment of an assistant secretary for such commission at an annual compensation not to exceed $1,200. The duties of this commission and its assistant secretary were solely concerned with administering soldiers’ relief.

Ch. 550, sec. 8, Laws 1945, created sec. 45.40 of the statutes which required every county board to elect a county veterans' service officer and prescribed duties for him which were substantially the same as the duties of the county service officer under the old section 59.08 (23). Further by sec. 4 of ch. 550, sec. 45.12 was amended to rename the soldiers’ relief commission as the county veterans' service commission, and by sec. 5, ch. 550, sec. 45.13 was created to require the county veterans' service officer to act as secretary to the newly designated commission.

From the foregoing it would appear that the county veterans' service officer is charged with the duties of the previously existing county service officer and the secretary or assistant secretary of the old soldiers’ relief commission.
It is difficult to see how either of these persons, if their office or employment had been approved by the county prior to the passage of ch. 550, could claim a right to succeed to the position of county veterans' service officer without a formal election by the county board. Even if the old county service officer could make such claim, by the terms of the statute under which he was elected, sec. 59.08 (23), Stats. 1943, he held office only for two years, and thereafter only held over until his successor should be lawfully elected and qualified.

"* * * The general trend of judicial decisions in this country is to the effect that where the written law contains no provision, either express or implied, to the contrary, an officer is entitled to hold his office until his successor is elected and qualified. * * *" State ex rel. Pluntz v. Johnson, 176 Wis. 107, 109, 186 N. W. 729, cited in 35 O. A. G. 458.

"* * * Officers so holding over are generally regarded as de facto officers; they are entitled to the emoluments of the office, and cannot be punished as intruders, but their temporary occupation does not prevent the existence of a vacancy and the filling of the office by the duly empowered authority." 46 C. J. 969.

While there is some authority in Wisconsin that an officer holding over is a de jure rather than a de facto officer, there is no authority whatsoever which would prevent the electing or appointing body from choosing his successor at the first meeting at which it may lawfully do so.

There is no provision in sec. 45.40, renumbered sec. 45.43 by ch. 587, Laws 1945, which would prevent the county board from filling a vacancy in the office of county veterans' service officer at any annual, regular or special meeting. Accordingly, whether the office be considered as vacant for the reason that no county veterans' service officer was ever lawfully elected, or because the incumbent is holding over after the expiration of a previous term, it is my opinion that the action taken to fill the vacancy by the county board at its annual meeting in November 1949 is valid and that the person then elected is now the county veterans' service officer for Ashland county.

RGT
Licenses and Permits—Physicians and Surgeons—Medical Technician—Secs. 147.14 (1) and 147.02, Stats., do not prohibit a medical technician from making laboratory tests of a physician's patients at his direction where the technician neither diagnoses, treats, advises nor consults with the patient as to his ailments but merely transmits laboratory data to the physician for his use.

January 6, 1950.

DR. C. A. DAWSON, Secretary,
State Board of Medical Examiners.

You state that a medical technician maintains and operates a laboratory in the city of Milwaukee independently of any doctor of medicine or osteopathy. She is a graduate technologist and apparently adequately trained in her field. In the conduct of her laboratory, she makes the following tests without any supervision: Platelet count, bleeding and coagulation times, clot retraction, prothrombin time, sedimentation rate, hematocrit reading, urinalysis (including color, transparency, specific gravity, reaction—acid or alkaline, albumen, sugar, and microscopic examination for blood cells and casts), basal metabolism, gastric analysis (including titrations for free and total acid, blood and bile tests, and lactic acid), blood sugar, glucose tolerance test, blood P. N., serum cholesterol, blood typing (for Landsteiner groups), RH typing, anti-Rh titre, agglutination tests (Widal type), and heterophile antibody test.

Patients are sent to her by doctors and the results of the tests are forwarded to the doctors, together with a statement of her charges. She does not consult with or advise the patients.

I am asked whether the rendering of the above services constitutes the practice of medicine in violation of sec. 147.14 (1), Stats.

Sec. 147.14 (1) provides in part:

"147.14 (1) No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or
certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute * * *.”

Also, sec. 147.02 provides that no person shall treat, or attempt to treat, the sick unless he shall have a certificate of registration in the basic sciences. Sec. 147.01 (1) (a) defines the term “treat the sick” as follows:

“To ‘treat the sick’ is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof.”

This definition is about as far reaching as any that can be found. Ordinarily the practice of medicine has been said to mean, in its broadest sense, the practice of the art of healing disease and preserving health. 41 Am. Jur. 151. Diagnosis of the patient’s symptoms to determine what disease or infirmity he is afflicted with, and then to determine and prescribe the remedy or treatment to be used in attempting to cure him, have been said to be necessary elements in the practice of medicine or surgery. 41 Am. Jur. 152. Another definition is the treatment of human beings by another person for the purpose of relieving an ailment, with a public profession on the alleged doctor’s part of the ability to cure and heal. 41 Am. Jur. 151.

It is assumed under the facts stated that the giving of the tests in question involves purely technical or mechanical skills and that the technician neither decides which of a number of standardized tests ought to be given nor does she draw any conclusions from the results to be passed on either to the physician or the patient.

Under the statement of facts as so given it does not appear that the technician in question either diagnoses or treats bodily ailments: All she does is to perform certain laboratory tests and to transmit the factual data thus obtained to a licensed physician who draws his own conclusions from the data presented. His diagnosis and treatment of the patient’s ailment may or may not be based on the laboratory tests thus obtained, although normally such tests
are considered to be helpful or they would not have been ordered by the physician.

Whatever the responsibilities of the physician may be to make a correct diagnosis, the situation is not altered by the fact that the technician is not required to be licensed, and without attempting to analyze the relationship between the physician and the technician, it should perhaps be suggested that a physician may be liable for the neglect or fault of his agent or employe. See 41 Am. Jur. 223.

You are therefore advised that a medical technician maintaining a laboratory for the purpose of making various tests requested by physicians is not practicing medicine or treating the sick when she neither consults with nor advises patients but merely transmits what data she has derived from the tests to the physician who makes his own diagnosis and administers treatment.

WHR

Licenses and Permits—Nurses—Examination Fee—Under sec. 149.04, Stats., state board of nursing may not retain $25 examination fee of an applicant for registration as a registered nurse and refuse to examine the applicant upon grounds of inadequacy of qualifications.

January 9, 1950.

JOSEPHINE BALATY, Assistant Director,
Department of Nurses.

You state that in September of this year a nurse filed an application for examination and paid the $25 fee. Shortly thereafter she was informed that she would not be eligible for examination or registration until completing certain deficiencies in her qualifications. She refused to make up the deficiencies and has asked for return of the $25. You inquire if this fee may be returned.

Section 149.04 as amended by ch. 402, Laws 1949, reads:

"149.04 A nurse who is a citizen or who has legally declared her intention to become a citizen and of good moral character, who has graduated from a high school or its
equivalent as determined by the board, who holds a diploma of graduation from an accredited school of nursing, or who will complete a full course in an accredited school for nurses within 4 months following the date of application, may apply to the department for registration as a registered nurse, and upon payment of $25 shall be entitled to examination."

The words "and upon payment of $25 shall be entitled to examination" clearly imply that if the $25 is retained the applicant must be examined. The $25 need not accompany the application under the wording of the above statute by which it is apparently contemplated that the fee is to cover the expenses of the examination rather than the expense of examining the credentials of the applicant to see that she is qualified for the examination.

It should be pointed out that each licensing statute must be interpreted in the light of its own particular wording. There are other licensing statutes which contemplate a different sequence of events and procedure than that provided by sec. 149.04. For instance, sec. 153.05 relating to qualifications for licenses to practice optometry requires advance payment of the fee followed by presentation of proof as to age, moral character and professional training. That statute also provides for a refund of the fee if for sickness or other good cause the applicant is unable to complete the examination.

Under sec. 149.04, on the other hand, the presentation of qualifications comes first, and upon approval of qualifications the $25 fee becomes payable, after which the right to examination is absolute, subject, of course, to the inherent right of an examining board to re-examine qualifications at any time between the time of the application and the granting of the license. See State ex rel. Dubin v. State Board of Medical Examiners, 222 Wis. 227.

Presumably the fee was paid into the state treasury in error, either on the part of the applicant or on the part of the representative of the state who accepted it, in the belief that she was then entitled to take the examination. If so, the refund procedure prescribed by sec. 20.06 (2) may be followed.

WHR
Criminal Law—Lotteries—Business promotion plan in form of election to honorary office with prize to winners is a lottery in violation of sec. 348.01, Stats.

January 10, 1950.

HARRY E. WHITE,
District Attorney,
Marinette County.

In reply to my recent letter, 38 O. A. G. 507, in which I concluded that “Gold Flag Day” was a lottery in violation of the Wisconsin law, you have advised me that the merchants of the village of Coleman have decided to use a new plan—which, as is stated in the information you have sent me, still offers an attraction to their many customers. The plan works in the following manner:

“Every place of business in the Village of Coleman will be tendered a supply of ballots, said ballots to be used for the election of an honorary slate of officers for the Village of Coleman each week. Our customers or anyone so desiring to vote may do so for anyone they see fit for the following offices; Honorary Mayor, Honorary Vice-mayor, Honorary Dog Catcher, Honorary Street Superintendent, Honorary Constable, Honorary Sewer Inspector and Honorary Guide. Each Friday morning the ballots will be collected and the party receiving the largest number of votes will be elected Honorary Mayor for one week at a salary of $15.00. The person receiving the next largest number of votes will be elected Honorary Vice Mayor for a one week period at a salary of $10.00. The party receiving the third highest number of votes will be elected as Honorary Dog Catcher at a salary of $7.00. The next will receive $5.00 as Honorary Street Superintendent, the next $3.00 as Honorary Constable, the next who will be Honorary Sewer Inspector will be paid in merchandise and the last as Honorary Guide likewise will be paid in merchandise.”

It is claimed that the plan is not a lottery since the element of chance has been eliminated. It is conceded that prize and consideration, the other two elements of a lottery, exist.

Mr. Justice Holmes has stated: "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law." Dillingham v. McLaughlin, (1924) 264 U. S. 370, 373; 37 O. A. G. 16 and 126. In
this particular scheme a participant has no way of knowing how many votes are needed to win the "election." It is true that those most diligent in procuring ballots have a better chance to win for themselves or those for whom they are working, but they have no way of knowing how diligent others have been or how a casual participant may happen to mark a ballot, and what effect such "votes" may have on the final result. This is pure chance.

It is conceivable that a person might be elected who in no way attempted to procure votes for himself, and perhaps some might argue as to such person that the element of consideration would be lacking. Consideration, however, consists in either a disadvantage to the one party or an advantage to the other. *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 132.

In my opinion, the scheme is a lottery in violation of sec. 348.01 of the Wisconsin statutes.

REB

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**Criminal Law—Lotteries—“Musical Tune-O,” a modified form of Bingo, declared to be a lottery in violation of sec. 348.01, Stats.**

January 10, 1950.

**VICTOR O. TRONSDAL,**

*District Attorney*,

Eau Claire County.

You have requested my opinion as to whether a radio advertising scheme known as "Musical Tune-O" violates the state law against lotteries, sec. 348.01 of the Wisconsin statutes.

The plan operates by the distribution of cards or sheets containing the advertising of merchants. The sheets also contain an alphabetical list of some 250 song titles and a square subdivided into 25 sections, the center section being marked "free" and all other sections containing a number.

The play is similar to Bingo. The radio station broadcasts one of the songs listed on the sheet and if the participating
player is able to identify it he then marks the square on his sheet containing the corresponding number, providing, of course, this number is present on the playing chart. When he has a card marked with five squares in a line or has marked the four corners of the chart, he calls the radio station and has the card checked. The literature which you enclosed in your letter is vague as to just what happens then, merely stating that if you are successful in having a card with the required number of squares marked, “you may be a winner.” The advertising sheet contains a list of merchandise which “you may win.” There is no definite statement which elaborates further upon what condition you may win the particular prize. There is no indication as to how the cards are originally distributed, but a statement is made that additional cards are available from the “sponsors” or advertisers and that it is proper to use a facsimile of a chart “by copying your neighbor’s card.” The cards of course differ somewhat as to numbers on the playing chart.

Prize, chance and consideration are the three elements necessary in a lottery. All appear to be present. Usually a scheme such as this attempts to eliminate one particular element through some subterfuge. The only possible argument that could be made is that consideration is absent. In the case of State ex rel. Regez v. Blumer, (1940) 236 Wis. 129, 132, it is said that consideration may consist of an advantage to one person or a disadvantage to another. Here it is obviously of advantage to the advertiser to have his ad studied by the person participating. He also has a further advantage of the possibility of having players come to his store to get additional cards, and it is likely that the advertiser’s name might be mentioned on the song broadcast. The fact that a person may possibly copy the chart of another and may never actually see the advertisers’ names and that it is possible to broadcast the program without mentioning the sponsors, does not validate the scheme. I doubt that consideration could be thus eliminated. Even if it could be said that consideration was not present as to a few participants, courts will look behind such means of evasion and ascertain the true manner in which a scheme such as this is intended to be operated.
For a more detailed analysis of the lottery question in Wisconsin, may I refer you to State ex rel. Cowie v. La Crosse Theaters Co., (1939) 232 Wis. 153, and Stern v. Miner, (1941) 239 Wis. 41, and also to an opinion released by this office December 30, 1949, 38 O. A. G. 657, referring to a somewhat similar radio problem, also deemed a lottery. There, citing Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, 581–582, I stated that “advertising and the sales resulting thereby, based upon a desire to get something for nothing” are forms of consideration.

In my opinion, the proposed plan is a lottery in violation of sec. 348.01 of the statutes.

REB

Tuberculosis Sanatoriums — Outpatients — Words and Phrases — Treatment — The word “treatment” as used in sec. 50.08, Stats., as amended by ch. 201, Laws 1949, means costs of examination and diagnosis, as well as curative or remedial measures taken. Patients need not spend 24 hours in outpatient clinic to meet state aid requirements.

January 14, 1950.

JOHN G. BUCHEN,
District Attorney,
Sheboygan County.

You have requested my interpretation of the word “treatment” as used in sec. 50.08 of the statutes as amended by ch. 201, Laws 1949. You state that the state auditor has interpreted the word as used in this section to exclude the costs of x-ray and examination of patients.

I do not feel it necessary to quote the statute in question. It will suffice for our purposes to note that state benefits are granted counties providing “outpatient treatment” for tuberculosis patients. It is your conclusion that “treatment” is a broad term covering the necessary costs of diagnosis, as well as actual means taken to cure or treat the disease or condition. I quote the following portion of your letter in which you cite authority for your conclusion:
"According to Webster’s new international dictionary, second edition, unabridged, treatment is the ‘act, manner or an instance, of treating a person or animal, a patient, subject . . ’. The verb treat is defined: “to care for (a patient) medically or surgically; as to treat one for rheumatism or with x-rays; also, to seek cure or relief of (a disease, etc.).’

“It would appear from this definition that treatment may mean examination and diagnosis, because the purpose of diagnosis and examination is to seek cure or relief.

“In 42 Words and Phrases 421 the following cases are found in support of the interpretation of the word treatment to include examination and diagnosis:

“Allegation of negligence in ‘treatment of disease’ includes negligence in applying remedies and also in making examination and diagnosis. Stephens v. Williams, 147 So. 608, 612, 226 Ala. 534.

“In common parlance, ‘treatment’ is a broad term covering all steps taken to effect cure of injury or disease. In substance, ‘treatment’ includes examination and diagnosis as well as application of remedies. Hester v. Ford, 130 So. 203, 206, 221 Ala. 592.

“‘Treatment’ is a broad term covering all the steps taken to effect a cure of the injury or disease; the word including examination and diagnosis as well as application of remedies. Kirschner v. Equitable Life Assur. Soc. of U. S., 284 N. Y. S. 506, 510, 157 Misc. 635.”

Although the supreme court of this state has never directly construed the word “treatment,” it has used the word in several cases as it applied to former statutes prohibiting “malpractice,” and to our present law on this subject which defines “treat the sick.” In both Kuechler v. Vogelman, (1923) 180 Wis. 238, and Nickell v. State, (1931) 205 Wis. 614, the word “treatment” has been qualified by its use in connection with the words “examination” and “diagnosis” respectively, so that as there used, it has a limited meaning. The definition statute in question, sec. 147.01 (1) (a), reads as follows:

“To ‘treat the sick’ is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof.”
It would be noted that within this statute itself the word "treat" is used both in a broad and limited sense, but when used in the latter it is qualified by the context.

Sec. 370.01 on construction of statutes provides in part as follows:

"(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."

Medical authority does not appear to be of any particular help on the problem. Gould's Medical Dictionary, Fifth Edition (1941), gives the following meaning of the word: "The means employed in effecting the cure of disease; the management of disease or of diseased patients." Malloy's Medical Dictionary for Lawyers, 1942, states that it means: "The care of a sick person and the remedies or means employed to combat the disease affecting him." These definitions can be construed as both limited or broad, depending upon how one is to take the meaning of the word "means."

In my opinion, what the legislature meant to do when it passed ch. 201, Laws 1949, was to extend state aid to assist counties in their burden of medical costs in tuberculosis cases without any limiting qualification. You will note that sec. 50.08 provides that persons receiving the treatment for which the state awards credit must present the certificate mentioned in sec. 50.07 (1). That section, in part, reads:

"* * * Every applicant for admission shall furnish a certificate of a regularly licensed physician that he is suffering from tuberculosis, or that he presents symptoms of tuberculosis calling for careful observation in order to make a diagnosis."

It is logical that any procedure used after such certificate is presented is considered "treatment" for the purpose of this credit.

I believe that the word "treatment" is used in the broad sense of the statutory definition above quoted of "to treat the sick" which is also its common meaning, based on the authority you have cited. Therefore, your county is entitled
to appropriate credit for medical expenses incurred for both
diagnosis and curative or remedial measures taken.

The question which you have presented has also been
raised by the state board of health. In addition thereto, they
have asked whether or not a person admitted to the out-
patient department for treatment must remain in the insti-
tution for a 24-hour period in order to make the institution
eligible for state aid. I can find no provision in the statutes
which makes such procedure necessary. Sec. 50.08 (1) pro-
vides that the amount paid for each treatment is one-seventh
of the amount paid by the state for a person regularly ad-
mitted to a sanatorium, but this provision is merely for the
purpose of calculating the cost.

REB

District Attorney—Duties—Small Claims Court—Dis-

District attorney not required to represent judge of small
claims court in certiorari proceeding in circuit court.

January 17, 1950.

ROBERT W. ARTHUR,

District Attorney,

Dane County.

You have requested my opinion on the following question:

Is it the duty of the district attorney to represent the judge
of the small claims court for Dane county in a certiorari
proceeding in circuit court in which said judge is named
as the defendant, and in which action the sole question is
whether the small claims court lost jurisdiction for failure
to enter judgment within the prescribed period under jus-
tice court practice of 72 hours?

The applicable statute is sec. 59.47 (1) which provides
in part that the district attorney shall:

"Prosecute or defend all actions, applications or motions,
civil or criminal, in the courts of his county in which the
state or county is interested or a party * * *"
The only interest in the certiorari proceeding asserted for the county is that of protecting the jurisdiction of its small claims court to ensure its continuation as an instrument of economical and expeditious justice.

It has been held that the state is not interested in a question of jurisdiction involved in private litigation, *Fraser v. Freelon*, 53 Cal. 644.

Since the interest of the county here is derived through the court, the language of the California district court of appeals is apt:

"* * * While the general rule may be stated to be that the court is the only necessary party respondent in an action to review its orders, still the proceeding is against the completed act alleged to have been in excess of jurisdiction, rather than against the inferior tribunal. * * * The tribunal whose act is assailed has no greater interest in the matter in which it has simply acted in a judicial capacity than it has in ordinary appeals from its orders or judgments." *Lee v. Small Claims Court*, 92 P. 2d 937, 939.

It is my opinion, therefore, that the type of interest which Dane county has in the case under consideration is not the type of interest contemplated by sec. 59.47 (1), Stats.

To be consistent, a contrary conclusion would require the district attorney to intervene in all cases in the courts of his county in which the jurisdiction of the court was in issue, even though the litigation was between private parties. No such intention could be reasonably ascribed to the legislature under existing statutes and case law.

SGH
Taxation—Counties—Sale of Tax Deeded Lands—A county is expressly authorized by sec. 75.35 (2), Stats. 1949, to convey tax deed lands by warranty deed.

January 17, 1950.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

You ask whether a county board has the power to direct or order the conveyance of county owned tax deed lands by warranty deed.

In your request you correctly appraise the opinion in 28 O. A. G. 478 as merely stating that where the county board has not so ordered the county clerk has no authority to issue a warranty deed. The opinion expressly refrained from passing upon whether the county board had the power to authorize conveyance by warranty deed. Had that opinion involved tax deed property the answer would have been found in sec. 75.35, Stats. 1939, which then provided that the county board could authorize the county clerk to sell and convey tax deed lands “by quitclaim deed.”

Ch. 166, Laws 1945, repealed and recreated sec. 75.35 so that subsec. (2) now expressly authorizes a municipality, which by the definition in subsec. (1) includes a county, to sell and convey tax deed lands by warranty deed.

Credit Unions—Collection Expenses—Credit union may include in notes provision for payment of attorney’s fees in the event of default.

January 17, 1950.

WILLIAM J. MCCAULEY,
District Attorney,
Milwaukee County.

You inquire whether a credit union may lawfully include in its promissory note a provision for payment of a 25 per cent attorney’s fee in default of a note.
Opinions of the Attorney General

Credit unions are organized under the provisions of ch. 186, Stats., and are not subject to the provisions of secs. 115.07, 115.09 or ch. 214, Stats.

In the absence of any prohibitory statute it would appear there is no objection to including in a note a provision for payment of the expenses of collection including attorney’s fees in the event of default. Ordinarily “provisions for the payment by the borrower of the expenses of collection in the event of his default in the payment of the loan are commonly sustained when reasonable and not designed merely to cloak usurious transactions.” 55 Am. Jur. 372, Usury §70. 66 C. J. 235, Usury §174; Tallman v. Truesdell, 3 Wis. 443.

The latter case rules specifically that including in a note a provision for payment of $40 attorney’s fees in event of default did not render the note invalid.

While it is true that lending agencies licensed under either ch. 115 or ch. 214 may not contract for attorney’s fees, 34 O. A. G. 15, 28 O. A. G. 723, 21 O. A. G. 348, the reason they cannot so contract is that such charges are specifically prohibited by the controlling statutes. There is no similar provision in ch. 186. The only regulation of the terms of the contract found in ch. 186 is the provision in sec. 186.09 that “an interest charge on loans at a rate of one per cent per month on unpaid balances shall not be held to be usurious.”

Accordingly, in my opinion, in the absence of any prohibitory statute or of any rule adopted by the commissioner of banks under sec. 186.23, a credit union may lawfully include in its notes a provision for payment of attorney’s fees in the event of default.

You have not requested and I do not express an opinion whether a 25 per cent fee would be a reasonable attorney’s fee in every case, including those loans which are substantial in amount.

RGT
Automobiles and Motor Vehicles—Parking—Words and Phrases—Entrance—Sec. 85.19 (4) (h), Stats., construed. In view of general safety purpose of the statute the phrase "adjacent to the entrance to" means not less than the distance reasonably necessary to drive vehicle to and from curb to load and unload passengers, where the width of the entrance is less than required for such maneuvering, and not more than the actual width of the entrance where such width is equal to or greater than the distance necessary to execute such maneuver. Meaning of "entrance" discussed.

January 17, 1950.

Motor Vehicle Department.

You request my opinion as to the meaning of the word "adjacent" as used in the following statute:

"85.19 * * *
"(4) Parking Prohibited in Specified Places. It shall be unlawful for the operator of a vehicle to park such vehicle in any of the following places except to comply with the directions of a traffic officer or traffic control signal or sign:
"* * *
"(h) On a highway adjacent to the entrance to a school, church, theatre, hotel, hospital, or any other place of public assemblage during the hours designated by an official sign."

You suggest that it might be desirable for the safety division of your department "to recommend" that the words "adjacent to the entrance to a school," etc., be interpreted as a reasonable distance—say 40 feet—prohibiting parking within that distance of a school entrance on the near side of the street. You suggest that that would be adequate to assure the safety of school children and liberalize parking regulations near school buildings. Your letter of request discusses further reasons why a limitation in a specific number of feet is desirable.

Nowhere in the statute do I find any authority vested in the safety division of your department or in any other person to specify or designate in feet the area in which parking may be prohibited.

Perhaps the most basic rule of statutory construction is contained in sec. 370.01, Stats., which requires that all
words and phrases shall be construed and understood according to the common and approved usage of the language. We are dealing here not with technical terms, but with terms of common usage. The term “entrance” means a point or place of entering; an opening or passage for entering. The word “adjacent” means lying near, close or contiguous. It is said to be synonymous with abutting and bordering. The word contiguous is ordinarily understood to mean touching or in contact.

It is to be noted that the statute is not only applicable to the entrance to a school but also to the entrance to a church, a theatre, a hotel, a hospital, or any other place of public assemblage. The purpose of the statute is plain, namely, to permit unobstructed access to and exit from such entrances to vehicles upon the highway. The least area of the highway adjacent to the entrance concerning which there can be no question or dispute whatever would be embraced within an extension of lines bordering the width of the entrance at right angles to the highway.

For the reasons hereinafter set forth, even a “recommendation” of a particular number of feet may be misleading. The “entrance” referred to in the statute is not necessarily the door to the building, but may refer to a sidewalk or platform constructed for use in entering the grounds of a building, or to space customarily used by the public for that purpose but not marked in any way. It must be kept in mind that under certain circumstances a walk leading from a front door of a public building may not extend in a direct line but may widen as it approaches the street or may proceed at an oblique angle to the street. The entrance may be evidenced by a bare place in the lawn between the curb and walk. Schools and churches particularly may have several entrances to the grounds which lead to one doorway.

It will accordingly be seen that it is impossible to lay down a hard and fast rule in an opinion of this kind. The correct application of the statute will vary in each case according to the facts, i.e., what constitutes the “entrance,” its actual width, and the space necessary to bring a vehicle alongside the curb and drive away with safety in fulfillment of the obvious purpose of the statute. Where the width of the entrance is too narrow to do that, a reasonable appli-
cation of the statute might be to include the minimum distance to allow for approach and exit. But if the actual width of such entrance itself is ample to allow for approach and exit, then the actual width of such entrance would be the limits of the area within which parking may lawfully be prohibited.

If it comes to the attention of the motor vehicle department that the statute in question is not being correctly applied by the authorities having the duty to post the official signs referred to in the statute, it would not be amiss, in view of the function of the safety division of the motor vehicle department, for recommendations to be made in accordance with this opinion.

SGH

Public Assistance—Soldiers, Sailors and Marines—The provisions of chs. 45 and 49, Stats., provide for two separate systems of public assistance.

A veteran is entitled to relief under proper circumstances under the provisions of ch. 49 in the same manner as any other dependent person. Municipal authorities are not relieved from their obligations under ch. 49 by the provisions of ch. 45.

A municipality granting relief under ch. 49 to a veteran may not require reimbursement from the county for such relief by reason of any provisions of ch. 45.

January 17, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked a number of questions arising in connection with the aid and relief furnished to veterans under the provisions of chs. 45 and 49 of the Wisconsin statutes for 1949.

Your first question is:

"1. Generally, are secs. 45.10 and 45.20 and 49.02 et seq. actually three separate or concurrent statutory methods of according public assistance to needy veterans?"
That question appears to have been specifically answered by the opinion in 38 O. A. G. 145 from which we quote (p. 146):

"These statutes establish two separate and distinct systems under which needy veterans may obtain assistance. The first system, under secs. 45.10-45.19, is under the jurisdiction of the county veterans' service commission. ***

"The second method of obtaining relief, under sec. 45.20, is now simply an adjunct of the general relief provisions in ch. 49. It is not administered by the county veterans' service commission but by the regular relief agency of the particular county. ** Aid given under this section is identical with any other aid given under ch. 49. **"

The foregoing excerpt indicates that the statutes establish not three, but two, separate and independent systems for public assistance to veterans.

Your second and third questions are so interrelated that the answer to either involves considerations appropriate to the other, and so they are dealt with jointly. The questions are:

"2. Positively, may a municipality (including counties), or the veterans, exercise a choice in the method of relief as between the above provisions?

"3. Negatively, may the unit of legal settlement defend against a claim under sec. 49.11 based on secs. 45.20 or 49.02 et seq. on the ground that the veteran could or should have been aided under sec. 45.10, Stats.?"

Under the statutes a veteran in need of public assistance may elect to apply either to his county veterans' service commission or to local relief administrators. If he obtains assistance as desired, the only question which would arise under your letter is whether the agency granting it can claim reimbursement from some other unit of government. If the application is refused, the question might arise whether the statutes impose a mandatory duty so that compliance could be compelled.

We will consider first the nature of the rights and obligations created by secs. 45.10 to 45.19, Stats. Sec. 45.10 (1) provides that every county board "shall" annually levy a tax sufficient to provide aid to certain needy soldiers, sailors or marines and designated relatives. Sec. 45.14 provides that the county veterans' service commission "may" furnish
aid to any person within sec. 45.10, if the right of such person to aid shall be established to their satisfaction. Section 45.14 further provides that the total disbursements by the commission shall not exceed the amount collected from the tax levied. The language used by the legislature in sec. 45.10 with respect to the levy of a tax by the county board is in form mandatory. The language used in connection with the granting of aid to individuals by the county veterans’ commission, however, is permissive only; and it is expressly precluded from granting aid except within the confines of a levy made for that purpose by the county board.

The opinion was given in 29 O. A. G. 240 that a veterans’ commission could not function under sec. 45.14 without a specific appropriation by the county board. The opinion was given in 21 O. A. G. 1035 that sec. 45.10 imposed a mandatory duty upon the county board to levy a tax sufficient to cover such amount as it should reasonably determine would be needed to furnish the assistance contemplated by secs. 45.10 to 45.19. In another opinion issued the same year, 21 O. A. G. 960, it was indicated that “the fund is to be sufficient, not expressly to furnish the required relief to all of the needy veterans in the county, but to carry out the purpose of the law.” The opinion further stated:

“** * * Indication that the law contemplates that the county will furnish all of the relief required to needy veterans in the county is contained in the provision for estimates from each municipal unit. ** **”

The foregoing opinions, however, were given in 1932 and are not now necessarily applicable, because a substantial change was made in the provisions of secs. 45.10 to 45.19 by ch. 550, Laws 1945.

The legislative history and the philosophy back of the enactment of the provisions relating to public assistance for veterans were discussed in 37 O. A. G. 384. It was there indicated that in the first instance the special provisions for relief to veterans were intended to entitle them to a type of assistance not otherwise available. As the general relief laws were broadened, however, the statutory provision for the two separate systems developed into more or
less of a duplication, providing for almost identical assistance. That situation existed at the time when the 1932 opinions of the attorney general were written; and it apparently was recognized by the legislators when ch. 550, Laws 1945, was enacted.

By that chapter, secs. 45.10 to 45.19 were amended so as to deal with "aid," instead of "relief," whereas ch. 49 relating to general public assistance uses and defines the term "relief." Secs. 45.10 to 45.19 refer to aid to "needy" veterans and their relations, whereas the persons entitled to general assistance under ch. 49 must fall within the definition of "dependent" persons. Chapter 550, Laws 1945, eliminated the provision which was referred to in 21 O. A. G. 960 as indicating that the law contemplated that the county, instead of local units, should furnish relief for all veterans. Ch. 550 also struck out the provisions of sec. 45.11 of the earlier statutes, which had required town, village, and city officers to report to the county board the amount needed in their respective municipalities, and required the county board to levy "the necessary amount." A change was also made in sec. 45.14, which had previously required the soldiers' relief commission to "fix the amount" to be paid to each person listed on the reports of local officials, upon being satisfied that the persons named on such lists were entitled to assistance. The earlier statute also provided that the commission "may" furnish relief to other persons whose names were not on the lists submitted by local officials. The use of both mandatory and permissive language in the same section would indicate that the legislature intended under the earlier law to place upon the county some mandatory obligation with respect to the veterans reported as needy by local relief officials. The section as amended by ch. 550, Laws 1945, however, contains no mandatory language with respect to the granting of aid. It provides only that the commission "may" furnish aid to any person within sec. 45.10 if the right of such person to aid shall be established to their satisfaction.

The statutory language in ch. 49, relating to public assistance generally, contains mandatory provisions for furnishing relief. Sec. 49.02 provides that every municipality "shall" furnish relief to "all dependent persons therein."
If the county elects to operate under the county system, sec. 49.03 (1) (a) provides that the duties imposed upon municipalities "shall" be performed by the county. This language has been either expressly or tacitly recognized by the courts and by the opinions of the attorney general as imposing a mandatory duty under proper circumstances. See as examples: Coffeen \textit{v.} Preble, 142 Wis. 183; 20 O. A. G. 162; 21 O. A. G. 1141.

See also 21 O. A. G. 1141, in which the opinion was given that poor relief officials may be held criminally liable for wilful failure to care for needy persons under the general relief laws.

Even prior to the statutory amendments made by ch. 550, Laws 1945, the opinion had been given that whether relief should be given to an individual under the special laws relating to veterans was largely discretionary, and that upon refusal of aid by county authorities, "that would not prevent nor relieve the authorities charged with the care of the poor generally from furnishing relief if the same was necessary." 21 O. A. G. 522, 523.

The changes made in the statutes by ch. 550 seem to establish that the legislature did not desire the two systems to be mere duplications or that one should be a substitute for the other, but rather that the special aid provided for veterans should be in the nature of a supplement to the general relief laws within the discretion of the county officials. It is a familiar principle of law that courts will not compel administrative officials to exercise their discretionary authority in a particular manner.

I believe the legislature has shown by its revision of the law in ch. 550, Laws 1945, that the duty resides in agencies charged with administration of general relief, to furnish relief to veterans in the same manner as is done for any other class of dependents; and that the county authorities charged with the administration of the special laws relating to veterans should provide such "aid" to "needy" veterans and their relatives as may be deemed appropriate to the special problems arising out of their status.

There is nothing in sec. 45.20 to indicate a legislative intent inconsistent with the result here reached. See 37 O. A. G. 384, 387 in which it is said:
"At the present time * * * the law means nothing more than that an eligible person is entitled to aid for a specified period under ch. 49 without the social stigma of being sent to the county home. * * *

I find nothing in the statutes indicating that a municipality granting relief in accordance with its obligations under ch. 49 is entitled to recover from other units of government except in cases where the person assisted has no legal settlement in the municipality. In such cases the recovery is governed by secs. 49.11 and 49.04. The enumeration in those sections of the cases in which recovery may be effected impliedly negates the right to recover in other situations. As pointed out in Holland v. Cedar Grove, 230 Wis. 177, municipalities have no rights in this respect except such as are given by the legislature. A municipality, therefore, does not have any right to recover against a county by reason of appropriations made by the county under authority of ch. 45 of the statutes. Neither do I find any provision in ch. 45 which would entitle a county to recover from any other unit for aid which it elects to give under the provisions of secs. 45.10 to 45.19 inclusive. See also 21 O. A. G. 522, in which it was held that aid given by a county under ch. 45 of the statutes is not subject to reimbursement under the provisions of ch. 49, and 38 O. A. G. 145, in which it is stated that "liability remains where it falls, on the county of residence." Whether there might be a different result in a case where county authorities furnish relief to a veteran because he has been unable to procure relief from municipal authorities is not considered.

BL
Schools and School Districts—County Normal Schools—The treasurer of a joint county normal school board is the treasurer of the county in which the school is located under secs. 41.37 and 41.43, Stats. The board may not select one of its members for such position.

Moneys payable out of funds appropriated to a joint county normal school are to be paid by the county treasurer of the county in which the school is located, upon order of the board properly signed, under sec. 41.38, Stats.

January 17, 1950.

G. E. Watson,
State Superintendent of Public Instruction.

You have asked: Does the joint county normal school board choose its own treasurer from its own membership or does the treasurer of the county in which the school is located act as treasurer of the joint board?

A review of the legislative history of the statutory provisions involved makes it clear that the legislature intended that the treasurer of a joint county normal school board should be the county treasurer of the county in which the school is located.

Prior to the enactment of ch. 425, Laws of 1927, the statutes made specific provision that the county treasurer should be the treasurer of the board “except in case of a joint county training school board”; and that in the latter case the board should select its own treasurer. The pertinent parts of the statutes in existence at that time read:

“41.37 * * * The county superintendent of schools shall be ex officio secretary of the said board and, except in case of a joint county training school board, the county treasurer shall be ex officio treasurer of said board but not a member thereof. * * *”

“41.38 All moneys appropriated and expended under the provisions of sections 41.36 to 41.46, inclusive, shall be expended by the county training school board, and shall be paid by the county treasurer or the treasurer of the joint county training school board on orders issued by said board.”

“41.44 Such joint county training school board shall choose a member of said board as treasurer; provided that
the person so chosen shall not be president or secretary of such board. Such treasurer shall execute and file an official bond in the sum of fifteen thousand dollars with three or more sureties approved by said board; or in lieu of such bond may give a surety company's bond approved by said board and the cost thereof may be paid out of the funds of said joint training school, in the discretion of the board. All moneys appropriated to and expended for any such joint county training school shall be expended by the board of such school and shall be paid by the treasurer of said school on orders drawn by the secretary and countersigned by the president.”

Ch. 425, Laws 1927, was entitled “AN ACT to revise and codify chapters 39, 40 and 41 of the statutes relating to public schools, and various sections of the statutes relating to said subject.” It amended sec. 41.37 to delete the phrase “except in case of a joint county training school board” and added, after the term “treasurer,” the modifying phrase “of the county in which the school is located.” It amended sec. 41.38, relating to the expenditure of funds, by eliminating the phrase “or the treasurer of the joint county training school board,” and left the direction that the payment should be made by the “county treasurer.” It repealed sec. 41.44 by which joint county boards had theretofore been authorized to choose a member of the board as treasurer. The safeguards previously provided in that section with respect to the bonding of the treasurer were also eliminated. It is unlikely that would have been done if the legislature had not intended the treasurer to be an official whose bonding is required under other provisions.

By the 1927 revision, the legislature dealt with the whole subject of county normal schools (previously referred to in the statutes as “training schools”), both the schools maintained by a single county and those maintained by two or more counties jointly. Inasmuch as the entire subject matter was dealt with together, secs. 41.36 to 41.43 must be read together for the purpose of ascertaining legislative intent. When read together, the inclusion in sec. 41.37 of the provision that “the county treasurer of the county in which the school is located shall be treasurer of said board” indicates that the legislature intended the county treasurer to be the treasurer of the normal school board in all cases. If
that were not so, the phrase “in which the school is located” would have been superfluous.

The legislative intent is further borne out by the revisor’s notes printed in Bill 13, S., from which ch. 425, Laws 1927, was enacted. The revisor’s note under the proposed amendment to sec. 41.37 read:

“Why should the members of the board give a bond? The amendment makes the county treasurer the board’s treasurer in every case. It is best to use the county treasurer as custodian of funds in every case. His bookkeeping system is completed and well established; he is bonded, and his accounts are regularly audited. Economy and workability dictate that course and it is pursued with county agricultural schools; sec. 41.51. That section does not make it clear whether there is one or two treasurers in case of a joint school. One good treasurer is plenty.”

With respect to the proposed repeal of sec. 41.44, the revisor’s notes read:

“Sec. 41.44 is repealed. The provision for signing orders goes to sec. 41.38, and the rest of the last sentence is a duplication of sec. 41.38. The county treasurer should be the school treasurer. It is simpler and better to require that a county treasurer should be the school treasurer. That is done in case of a joint county agricultural school (sec. 41.51). There is no reason why the same rule should not be applied to both kinds of county school. That is done by the amendment to sec. 41.37.”

You have also asked: If the treasurer of the county in which the school is located is treasurer of the joint county normal school board, must the pay roll and bills of such joint board be processed through the office of county clerk of the county in which the school is located or are such pay roll and bills certified by signature of president and secretary of the joint normal school board directly to the treasurer for payment?

The above question is answered in substance by the opinion in 19 O. A. G. 414, to which you have referred. In that opinion the following statement was made with respect to the provisions of sec. 41.38, which still exists in the same form:

“* * * the expense account may, I think, be paid in the manner prescribed by sec. 41.38, Stats., without reference
to the county clerk, from the funds so appropriated for the maintenance of the normal school. Under the statutes above cited, the county board cannot properly attach conditions to its appropriations which would result in taking from the county normal school board the jurisdiction conferred upon it by the statutes above cited."

Under the amendment of the statutes effected by ch. 425, Laws 1927, it is apparent that the legislature intended the procedural provisions of sec. 41.38 to apply both to the normal school board of a single county and to the joint board where more than one county is involved. Funds properly payable out of appropriations for the school are to be paid by the county treasurer of the county in which the school is located, upon orders issued by the board and signed by its secretary and president, without being processed through other offices.

BL

Criminal Law—Lotteries—"Treasure hunt" and "Mr. Money Bags" schemes declared lotteries.

January 17, 1950.

WILLIAM J. McCauley,
District Attorney,
Milwaukee County.

You have requested my opinion as to the legality of two schemes proposed by merchants in your county.

The first of these is a so-called "treasure hunt." The merchants propose to distribute 10,000 numbered tickets. Numbered prizes donated by participating merchants are placed in their show windows. Persons finding a prize with the same number as a ticket in their possession are given the prize provided they are able to answer "a scrambled up sentence."

It is well settled that the elements of prize, chance and consideration be present in order that a scheme such as this violate sec. 348.01 of the Wisconsin statutes which prohibits lotteries. The prize element is present. There is chance
in the selection of numbers chosen for the prizes, and an-
swering a "scrambled sentence" does not remove this ele-
ment. "Consideration consists in a disadvantage to the one
party or an advantage to the other." State ex rel. Regez v.
Blumer, 236 Wis. 129, 132 (1940). As in the Regez case,
both advantage to the one party and disadvantage to the
other are present. Quite obviously this scheme is a lottery.
The second proposed scheme consists of distribution of a
small amount of money to persons on the streets selected
at random who happen to possess a sales slip of a partici-
pating merchant. Larger prizes are given over a time
period to the persons thus previously selected who happen
to possess the sales slips indicating the purchases of great-
est value.
Prize and chance unquestionably exist. Consideration
might not be present if the existence of the scheme were
unknown to the customers so that no more than the usual
purchases are made. However, as soon as the scheme be-
comes known so that it is of value to the merchants, con-
sideration exists and the scheme becomes a lottery.

**Counties — Insurance — Group Insurance** — Under sec.
59.08 (14) as amended by ch. 120, Laws 1949, a county may
provide for and pay all or part of the premiums for group
accident and health as well as hospitalization insurance for
county employes.

January 19, 1950.

**Arthur H. Strochan,**

*District Attorney,*

Langlade County.

You have requested an opinion as to the validity of a
group hospitalization and surgical benefit plan for Lang-
lade county employees and their dependents, plus a group
nonoccupational accident and health plan for the Langlade
county highway department employees.
Sec. 59.08 (14) originally authorized only Milwaukee county to "provide * * * for group insurance for officers and employes * * * and to make the necessary rules and regulations therefor." See 30 O. A. G. 222. This section was amended by ch. 120, Laws 1949, so as to empower county boards to

"Provide for group insurance for officers and employes of the county and to make the necessary rules and regulations therefor."

It is obvious, by the very wording of the statute, that today any county is authorized to set up a group insurance plan. The only doubt raised is whether or not the statute is broad enough to allow the county to pay all or any part of the premiums. The usage of the words "provide for" is of itself an inconclusive basis upon which to assume that the legislature intended to have the county finance any insurance plan.

However, the statute does include the words "group insurance," and sec. 204.31 (13) (a) (amended by ch. 194, Laws 1949), in defining group accident and health insurance reads:

"Group accident and health insurance is declared to be that form of accident and health insurance covering not less than 10 employes or members, including employes of members of associations, whether such association member be an individual, copartnership or corporation, and which may include the employe's or member's dependents, written under a master policy issued to any governmental corporation, unit, agency or department thereof * * *." 

Though this particular part of the statute does not specify that the recipient of the master policy can pay all or part of the premium, the state insurance department of Wisconsin has in the past construed this to be the correct interpretation. The statute, in a later paragraph, sec. 204.31 (14), defines franchise group accident and health insurance, and among other things provides:

"* * * the premiums on such policies are to be paid to the insurer periodically by the employer, with or without pay roll deductions * * * or by some designated person acting on behalf of such employer * * * or of such employes or members. * * *"
Thus, the employer may pay part or all of the premiums. The above sections are *in pari materia* and are to be read and construed together.

Also, sec. 206.60 (1) (b), in referring to group life insurance provides:

“The premium for the policy shall be paid by the policyholder, either wholly from the employer’s funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employes. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employes. * * *”

When the legislature used the term “group insurance” in sec. 59.08 (14) it undoubtedly did so having in mind the statutory definitions and provisions relating to this subject, and hence a county does have the right to pay all or part of group insurance premiums by virtue of the statutory provisions hereinbefore mentioned.

As to the instant situation, a group hospitalization and surgical benefit plan comes under the definitive scope of sec. 201.04 (4) as a health and accident classification, and as such is subject to sec. 204.31 (13) or 204.31 (14). The nonoccupational accident and health plan for the highway group is also controlled by sec. 204.31 (13) or 204.31 (14), in both cases the deciding factor being whether it is a master policy issued pursuant to sec. 204.31 (13) or individual policies pursuant to sec. 204.31 (14). As pointed out above, both of these sections are construed as allowing the employer, in this case the county, to pay all or part of the premiums.

WHR
Schools and School Districts—Reorganization—Counties—School Committee—The county school committee has authority under sec. 40.303 (4) (b), Stats., to detach a single farm from one school district and to add it to another.

A petition for referendum signed only by electors from the district from which land is detached does not require a referendum under sec. 40.303 (8) (a), Stats.

January 24, 1950.

J. L. McMonigal,
District Attorney,
Green Lake County.

You have asked two questions involving school district reorganizations under sec. 40.303 as amended by ch. 501, Laws 1949.

1. Does the county school committee have authority to detach a single farm from one school district and add it to another upon a petition presented only by the owner or tenant of the land?

Your question is to be determined primarily, if not wholly, from an examination of the terms of the statutes, to ascertain what authority has been given the county school committee and what, if any, limitations have been placed upon it. As was pointed out by the supreme court in School District v. Callahan, 237 Wis. 560, the questions whether and how school district boundaries are to be changed are purely matters of policy to be determined by the legislature. With respect to the reorganization of school districts, the court in that case quoted and adopted the following principles from Hunter v. Pittsburgh, 207 U. S. 161, 178, 179:

"* * * The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property
may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.’”

The case of School District v. Callahan, supra, further held that the legislature may delegate its power with respect to school district reorganizations to administrative officers.

Section 40.303 (4) (b) as amended by ch. 501, Laws 1949, provides that the county school committee shall have the power “upon the petition of an elector of the county or upon its own motion, to order the creation, alteration, consolidation or dissolution of school districts within the county.” Assuming the owner or tenant of the land involved is an elector of the county, his petition is sufficient to invoke the action of the county committee; and even if there were no petition the statute authorizes the committee to proceed on its own initiative. There is no limitation in the statute which would prevent it from detaching a single farm from one district and adding it to another.

2. Assuming the committee properly acted upon the individual petition of the tenant farmer in this instance, was subsequent petition, signed by approximately 90 per cent of the electors of the district from which the farm was detached, legally sufficient so as to require the committee to order a referendum on the question, or was the petition legally insufficient because it did not contain the names of at least 10 per cent of the electors of the district to which the farm was added?

While you do not give the date of the action taken by the committee we assume it was subsequent to July 1, 1949, and so governed by sec. 40.303 (8) (a) as amended by ch. 501, Laws 1949. The provisions of sec. 40.303 (4) (b), relating to the public hearing to be held before adoption of an order altering a school district, provide for notice to the clerks of all the districts “affected” by the proposed reorganization, so that a district from which land is to be detached would have an opportunity to present its views.
The provisions of sec. 40.303 (8) (a) relating to referendum, however, provide for a compulsory referendum only upon petition signed by the proper number of electors of the territory "to be included in the reorganized district." A petition signed solely by the electors of the district from which the land is detached does not require the holding of a referendum under sec. 40.303 (8) (a).

Superintendent of Public Instruction—Attorney General—Requests for opinion of attorney general made under authority of sec. 14.53 (4), Stats., should be confined to questions involving state superintendent's powers and duties when a present necessity for action is combined with an ambiguity in the law requiring clarification by interpretation or construction.

January 24, 1950.

George E. Watson,
State Superintendent of Public Instruction.

You have requested my opinion as to whether the superintendent of public instruction is required to relay to the attorney general for opinion various questions which reach his department from sundry correspondents.

The questions are classified into two groups: (1) Questions which concern subjects which do not fall within the limits of the state superintendent's powers and duties; and (2) questions which relate to matters that fall within the state superintendent's powers and duties, but concerning which the superintendent does not deem it necessary to request an opinion.

Your problem is not peculiar to your office but is one which confronts most of the attorney general's official clientele, including not only state officers and department heads but the 71 district attorneys of the state to whom the attorney general is required to render opinions.

The statute defining the attorney general's duty in this respect is sec. 14.53 (4), which reads as follows:
"14.53 The attorney-general shall:

"* * *

"(4) GIVE OPINION TO OFFICERS. Give his opinion in writing, when required, without fee, upon all questions of law submitted to him by the legislature or either branch thereof, or by the head of any department of the state government."

The practical construction heretofore given to the phrase "upon all questions of law" by the attorney general in determining the propriety of requests for opinion is that the advice sought by the department head or state officer must relate to his official duties and must be necessary in the sense that such department head or officer is unable to decide which of alternative or various courses of action he should pursue by reason of an ambiguity in the law which defines his duty. Further, such questions should relate to an existing state of facts, as the attorney general will not ordinarily answer hypothetical questions. Nor can he be expected to lay down definite rules with reference to a general statute which will satisfactorily cover a wide variety of factual situations arising in the future. That, of course, is merely stating in another way that he will not answer hypothetical questions.

Occasionally, state officers and department heads are exploited by private persons, officials of local governing bodies and school districts, in the procurement of opinions from the attorney general. There are, of course, situations in which there is a natural overlapping of duties at the state and local level, with the result that the attorney general's opinion to a state officer actually entitled thereto at once furnishes the solution of the local problem. But frequently, requests for opinions are generated and inspired by the desire of local officials to obtain the views of the attorney general on a purely local problem.

It should be explained, perhaps, that in defining the attorney general's duties the legislature had in mind satisfying the state government's needs for legal services in and out of court. There obviously was no intention on the part of the legislature to furnish legal services to local governments, except to the extent that at the county level the district attorney, as attorney for a county, has the right to
consult with and obtain the views of the attorney general, and that within certain limitations the attorney general indirectly may thus assume the role of legal adviser to counties.

The appropriation to the attorney general by the legislature of the funds necessary to the conduct of his office is directly related to the size of his official staff necessary to perform his official duties. This need must be demonstrated at the governor's budget hearings and before the joint finance committee every 2 years. The relationship of the volume of work arising out of official duties to the size of the staff is important. It may thus be seen that if the attorney general is to faithfully and efficiently discharge his duties, he must jealously protect the office against demands upon him and his staff for the performance of legal work which may be outside the official scope of his duties.

There is nothing in the enumeration of the duties of the superintendent of public instruction in sec. 14.57, Stats., which requires him to render legal advice to any person. If, in his relations with school administration and school district officials, legal problems arise, the solution of which depends solely on legal advice to the local officials, the superintendent should not seek the attorney general's opinion thereon. The local officials should consult a private attorney employed for that purpose or the municipal attorney whose duty it may be to counsel with such school administration or school district officers.

The answer to your first question, therefore, is that you should not request an opinion on any subject which does not concern the duties or powers of the superintendent.

As to the second question, it is, of course, the superintendent's responsibility to the public to correctly interpret and apply the law which defines his powers and duties. The attorney general's services are available to the superintendent whenever he feels in need of same. But the superintendent owes no duty to any individual to request an opinion of the attorney general merely because such individual differs with the superintendent upon a question of statutory construction. In situations where the superintendent is accountable in some manner for his actions, it is, of course,
evidence of good faith on his part to seek an opinion in a
doubtful case and to follow the advice. But he is not under
any compulsion to follow an opinion.
In summary, both questions are answered in the negative.

SGH

Minors—Residence—Teachers Colleges—Tuition—A minor
does not establish emancipation and a Wisconsin resi-
dence by stating that his sole support is a relative in this
state.
Liability of a minor for the payment of nonresident tui-
tion at state teachers colleges depends upon the residence
of his parents.

January 25, 1950.

The Stout Institute,
Menomonie, Wisconsin.

You ask the following question:

"May a student graduate from a high school in a neigh-
boring state, attend the University of that state, meanwhile
claiming residence of the aforementioned state and paying
tuition accordingly, and then upon withdrawal from that
state's University, immediately matriculate to a Wisconsin
Teachers' College and then claim residence in Wisconsin
by stating that a relative in the Wisconsin city is the sole
support? In other words, can one be 'emancipated' from his
parental home, which would yet be in the neighboring state,
and immediately become a resident of Wisconsin by the
above action? The case involves a minor."

The domicile of a minor child is the same as the domicile
of his father. 17 Am. Jur., Domicil §57. As stated in Re-
statement, Conflict of Laws, §30, comment c:

"The fact that the child lives apart from the father,
whether with the permission of the father or not, is imma-
terial. The child has no power to acquire a domicil of
choice nor can the father fix the domicil of the child at any
place other than that at which the father has his domicil.

If, however, the minor has been emancipated, he may ac-
quire a legal domicile or residence of his own. 17 Am. Jur.,
Domicil §67. See, also, *Kidd v. Joint School District*, (1927) 194 Wis. 353, 357. Whether a minor was emancipated is a question of fact to be determined in each particular case. The tests for emancipation are set forth in 4 O. A. G. 929, 931:

"Emancipation of a child is an entire surrender of all the parent's right to the care, custody and earnings of the child, as well as renunciation of parental duties, and leaves the child, so far as the parent is concerned, free to act on its own responsibility and in accordance with its own will.* * *"

Under these tests, the mere fact that a relative in a Wisconsin city is a minor's sole support is insufficient to establish emancipation.

Assuming that a minor had in fact been emancipated, he could acquire a Wisconsin residence immediately on coming to Wisconsin with the intention of making this state his permanent place of abode. As stated in 17 Am. Jur., Domicil §16:

"It is universally held that in order to acquire a domicile by choice these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain."

See, also, sec. 6.51 (2) and (4); Restatement, Conflict of Laws §15; *Baker v. Department of Taxation*, (1945) 246 Wis. 611, 617–618.

Attendance at an institution of learning for the sole purpose of acquiring an education does not establish a residence. *Seibold v. Wahl*, (1916) 164 Wis. 82, 85.

It should be pointed out that certain rights in Wisconsin are dependent on residence existing for a certain period of time. For instance, subsec. (8) of sec. 37.11, Stats., provides:

"* * * Any adult student who shall have been a resident of the state for one year or any minor student whose parents have been bona fide residents of this state for one year shall, while he continues a resident of the state, be entitled to exemption from fees for tuition but not from incidental fees in the teachers college except that the board may admit nonresidents to summer schools on the same basis as resi-
dents. So far as applicable the provisions of section 6.51 shall be used in determining such residence."

An adult student is not relieved from the payment of nonresident tuition at the state teachers colleges until he shall have been a resident of this state for one year. Under this subsection, too, it is immaterial whether the minor is emancipated and has acquired a Wisconsin residence; exemption from fees for tuition is dependent on establishing that his parents have been bona fide residents of this state for one year.

ML

_Towns—Sewerage System—Milwaukee County—_Town board in a county having a metropolitan sewerage commission may finance, construct and maintain a sewerage system under sec. 59.96 (9) (b), Stats., without reference to the requirements provided in sec. 60.29 (19), Stats.

February 8, 1950.

COMMITTEE ON WATER POLLUTION.

You have inquired whether town boards in Milwaukee county, in connection with the discharge of their responsibilities in extending sanitary sewers to provide for elimination of conditions inimical to public health, are to be governed by the provisions of sec. 60.29 (19), Stats., or whether they may proceed under the provisions of sec. 60.18 (12) or 59.96 (9) (b), Stats.

Sec. 60.29 (19) provides:

"(19) The town board of every town in counties having a population of one hundred and fifty thousand or more are hereby authorized upon petition of two-thirds of the property owners in any block, or of two-thirds of the owners of property fronting or abutting upon any street or portion of street, to build and construct water mains and sewers along the street or streets on which such blocks or property abut or front, and to assess property abutting and fronting upon such streets for the cost thereof."
Sec. 60.18 (12) provides that the qualified electors of each town shall have power at any annual town meeting by vote:

“(12) To direct, by resolution, the town board in towns having a population of not less than 500, and having therein, one or more unincorporated villages, and the town board in towns contiguous to the limits of any city, to exercise all powers relating to villages and conferred on village boards by chapter 61 of the statutes, except such power, the exercise of which would conflict with the statutes relating to towns and town boards. Any such resolution heretofore adopted pursuant to existing law or hereafter adopted pursuant to this law, shall remain in force until rescinded.”

Sec. 59.96 (9) (b) provides:

“(b) There is imposed upon all towns in counties in which under the provision of this section a metropolitan sewerage commission is created and appointed, all of the powers vested in villages under chapter 61 of the statutes relating to the power of villages to finance, assess, build, construct and maintain sewerage systems, mains, laterals, drains and all appurtenances, and all of the duties by such provision imposed upon the village boards or villages, their several committees and village clerk, shall be performed in such towns by the town boards and town clerks thereof; provided, that the town board of any such town may lay sewers or water mains along either or both sides of any street or highway in the town, and in that event shall assess the cost thereof only against the property abutting and adjoining upon that side of the street or highway in which the sewer or water main may be laid; and all notices and specifications required thereby may be made and given by the towns in such work where no newspaper is published therein by posting five copies thereof in five public places in said town, and all duties by such provision imposed upon village clerk and village treasurer in extending upon the tax roll and collecting all assessments and taxes relating to such improvements, shall be performed in the same manner by town clerks and town treasurers of such towns.”

It is a well established rule that where there is a conflict between a general and a special statute, the special statute prevails. *Jones v. Broadway Roller Rink Co.*, 136 Wis. 595, 118 N. W. 170, 19 L. R. A. (n. s.) 907.

Sec. 60.29 (19) is a general statute applicable to towns in counties of 150,000 or more population. By sec. 60.18
(12) the annual town meeting may authorize the town board to exercise the powers of a village board under certain circumstances. However, such authorization is not necessary so far as the power to construct sewerage systems is concerned in a county such as Milwaukee which has a metropolitan sewerage commission, by reason of the provisions of sec. 59.96 (9) (b) quoted above.

Since these provisions fully cover the situation and give the town board ample power to proceed, it is unnecessary to institute such an undertaking by petition of two-thirds of the property owners in the block or along the street where the sewers are to be built as provided in the general statute, sec. 60.29 (19).

WHR

Counties—Labor—County highway committee has authority to enter into valid agreement with a union representing its employes as to hours, wages, duties and terms of employment for a period not to exceed 2 years, but maintenance of membership in a union may not be made a condition of retaining employment.

February 9, 1950.

NATHAN E. WIESE,
District Attorney,
Waupaca County.

You have requested my opinion whether your county highway committee may enter into a contract with a labor union providing that all employes must maintain membership in such union in order to retain their employment.

This question may be divided into two questions for purposes of the opinion:

1. Does a county highway committee have authority to enter into an agreement with a union as to hours, wages, duties and terms of employment?

2. If such authority exists may maintenance of membership in the union be made a condition of retaining employment?
1. A former attorney general was of the opinion that as to a county there could not be an agreement with a union as to these matters but merely a statement of policy, "subject to change at any time that the county or the committee acting for it deems it in the public interest to make such change." 29 O. A. G. 82. The basis of this opinion was that, "In the absence of specific legislation authorizing same, neither the county board nor a county committee has any right to hire for a definite term or at a fixed wage for a definite period of time."

This opinion was rendered in 1940, and in 1945 the legislature did give power to counties to contract for services for periods not to exceed 2 years. Ch. 559, Laws 1945, created sec. 59.15 (2) (d), reading:

"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 employes setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years."

Since the enactment of the foregoing section in 1945, there appears to be no reason why the county highway committee (if authorized by the county board) cannot bind the county through an agreement with a union representing its employes for a period not to exceed 2 years as to hours, wages, duties and terms of employment, and it is my opinion that the county board may now properly delegate such authority to the county highway committee.

2. There is at least great doubt as to the validity of any law permitting a county to make maintenance of membership in a union a condition of retaining public employment. See 27 O. A. G. 30, and cases therein cited. This opinion asserts that a provision requiring all county highway employes to become members of the union is for a private and not a public purpose and that the legislature could not constitutionally authorize county officers to include the provision in the contract.

A requirement of membership in the union would essentially be a qualification or test for continued employment and as asserted in an opinion at 28 O. A. G. 446, any quali-
Opinions of the Attorney General

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ication for public employment must be germane to the duties of the office. Accordingly, and in view of the serious nature of the constitutional question which would otherwise arise, sec. 59.15 (2) (d) ought not (in my opinion) to be construed as authorizing a maintenance of membership requirement as one of the "terms of employment."

TEF

Sheriffs—Duties—Sheriff has duty to confine persons arrested by city police where he has reason to believe that the arrest has been proper. Duties and responsibilities of sheriff relative to custody of prisoners in county jail discussed (sec. 59.23 (1), Stats.).

February 9, 1950.

Nathan E. Wiese, District Attorney, Waupaca County.

You have asked my opinion as to whether the sheriff of your county has the legal duty to accept prisoners arrested by the police of the city of Waupaca. You point out that the city jail is unusable and that a contract between the city and county exists whereby the county agrees to accept city prisoners, the city to pay for their keep at the rate of $2 per day, the sheriff to be paid for their meals on the same basis as any other prisoner. You state that the sheriff has objected to the reception of these prisoners, who are usually drunks or vagrants and brought in at night, on the grounds of inconvenience, the fact that no such contract existed at the time of the sheriff's election, and because the city does not furnish him with a commitment to hold these prisoners. I assume since you use the term "city prisoners" that you mean those usually charged with the violations of city ordinances.

The first contention of the sheriff as to inconvenience is of no consequence. He takes his office cum onere, and he is obliged to carry out the duties imposed regardless of personal discomfort.
The second contention is likewise without merit. It is undoubtedly a proper function for the city government to provide for a municipal jail, but this is not required and in many cases is not done, especially in smaller cities where other arrangements can be made.

I was not able to find a statute covering this point directly, but sec. 62.24 (2) (b) states that prisoners confined in the county jail for violation of a city ordinance shall be kept at the expense of the city. It might be noted too that historically the county jail of Waupaca was designated as the place of confinement for persons arrested in the city for violation of an ordinance. Expense of confinement was paid by the city. See ch. 258, sec. 17, Laws 1875. If the city has a jail, it is actually relieving the sheriff of a portion of his duties and obligations which he has under the law. At common law, the sheriff is the jailer ex officio of the county. 57 C. J. 780. Sec. 59.23 (1) pertaining to the duties of the sheriff provides that he take the charge and custody of the jails of his county and the persons therein and keep them by himself or his deputy or jailer.

The third contention of the sheriff relative to the fact that no commitment papers are furnished with the prisoners deserves more serious consideration. Sec. 62.09 (13) provides that the chief and each policeman of a city possesses the powers imposed by law upon constables and "shall arrest with or without process and with reasonable diligence take before the police justice or other proper court every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city * * *

I also call your attention to sec. 361.44 (1) of the statutes as amended by ch. 313, Laws 1949:

"An arrest by a peace officer without a warrant for a misdemeanor or for the violation of an ordinance is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprehended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested. This subsection is supplemental to section 62.09 (13) and shall not in any way limit any powers to arrest granted by that section."
Since the power to arrest is apparent, it must reasonably follow that the power to confine is a necessary adjunct to it, since without this power arrest would be meaningless.

"The office of constable is ancient, his duties important, and his powers are large. One of his leading duties is to keep the peace; for this purpose he may arrest, imprison, break open doors, and in this respect he is endowed with the privileges appertaining to the sheriff. He may justify an arrest for reasonable cause of suspicion alone; he may arrest for a breach of the peace, committed in his presence, and lodge the offender in jail, and the jailer is bound to receive such a prisoner * * *" Murfree on Sheriffs, p. 614.

It is my opinion that it is the duty of the sheriff of your county, as the county jailer, to accept prisoners from the city police.

It should be noted, however, that the sheriff may, under certain circumstances, become liable for false imprisonment. You will find a note in 46 A. L. R. 806 which deals with this subject rather extensively. The law appears to be clear that where the sheriff has reasonable grounds to believe that the person arrested has committed the offense charged, and is diligent in seeing that he is brought before a magistrate as soon as is reasonably possible, there can be no responsibility for false imprisonment.

"No liability arises on the bond of an officer for the arrest of one charged with an offense of which he was not guilty, where the officer at the time of the arrest had reasonable grounds to believe that the person arrested had committed the offense," 57 C. J. 1048.

The sheriff's authority is superior to that of the constable's, 57 C. J. 780, and such being the case, I believe that he may properly refuse a prisoner where he does not have evidence that the arrest was made for proper cause. However, he has every right to rely upon the word of the arresting officer, and if such information gives him reasonable cause to believe an arrest was properly made, he is protected unless he has some other evidence to the contrary. I would therefore deem it proper that the sheriff or his deputy carefully examine the arresting officer as to the facts and circumstances concerning the arrest at the time the prisoner is brought in. The sheriff is chargeable with knowledge of the
law and should, of course, exercise every care possible to
see that there are no improper confinements. He has the
further duty to see that the prisoner is confined no longer
than is reasonably necessary before he is brought before a
magistrate or discharged. You will find discussion of this
subject in *Peloquin v. Hibner*, (1939) 231 Wis. 77.

You also ask whether it is the duty of the sheriff to re-
cieve prisoners who have been arrested by state and county
law officials for offenses committed in their presence at a
time when it is not possible to have the prisoner arraigned
before a justice of the peace.

The answer to this question would, of course, depend upon
the jurisdiction of the particular officer making the arrest,
the cause for which the arrest was made, and other facts
concerning each particular case. Generally speaking, what
has been said above applies with equal force in answering
this question. In other words, if the arrest is authorized by
law, then it necessarily follows that detention in the jail is
also authorized by law, subject to the right of the sheriff to
make inquiry into the facts of the same.

REB

Secretary of State—Corporations—Public Printing—The
cost of publishing the notice provided for in sec. 180.08,
Stats., is as provided in sec. 35.69, Stats.

February 9, 1950.

FRED R. ZIMMERMAN,
Secretary of State.

Sec. 180.08 of the Wisconsin statutes requires the secre-
tary of state to publish a notice to delinquent corporations
which have failed to file an annual report. Subsec. (3)
states that the cost of publishing that notice shall be “at the
same rate as legal notices.” You ask my opinion as to
whether this rate is that which is specified in sec. 35.69 of
the statutes as amended by ch. 262, Laws 1949, or whether
it is the rate specified in sec. 331.25 of the statutes.
Prior to 1947, sec. 35.69 provided for compensation to the official state paper for publishing laws, notices, accounts, statements, advertisements, proclamations or other matter required to be published at the expense of the state at the rate specified therein and provided that the rates in case of other papers than the official state paper should correspond with those provided for the publication of election notices in sec. 6.82 of the statutes. Sec. 6.82 originally contained its own schedule of rates but was amended so as to apply the schedule provided for in sec. 331.25.

In 1947 sec. 35.69 was amended to include other papers with the official state paper and in 1949 was again amended by inserting the word "legal" before the words "advertising space" and by striking out the reference to sec. 6.82 for the rates in other papers. This is the latest word of the legislature on this subject.

As it stands now, sec. 35.69 provides for the compensation to be paid to the official state paper or other papers for printing all matters required to be published at the expense of the state, and specifies that the amount "shall equal the amount regularly received by such newspaper for the same amount of legal advertising space, not exceeding, however, $1 per folio for the first insertion and 70 cents per folio for each subsequent insertion."

Sec. 331.25 provides that the fees for publishing a legal notice—without any reference to whether or not that is a notice required to be published at the expense of the state—shall not be more than $1.25 per folio for the first insertion and 90 cents for each insertion thereafter, with an exception made for newspapers published in counties of more than 200,000 population.

Accordingly, I conclude that the provisions of sec. 35.69 govern the rate to be paid for notices required to be published by the state pursuant to sec. 180.08.

GFS


Tuberculosis Sanatoriums—Maintenance Costs—Where fire damages county tuberculosis sanatorium, the expense of pumping water out of boiler room, installing piping to temporary kitchen and laundry and installing temporary partitions are proper items to be included in computing per capita cost of maintenance of patients under sec. 50.07, Stats., but replacement of privately owned clothing of employees destroyed in fire is not.

February 14, 1950.

STATE BOARD OF HEALTH.

You have inquired whether in computing actual cost of maintenance under sec. 50.07 (1) and (2), Stats., there should be included certain unusual expenditures arising out of a fire occurring about a year ago at a county tuberculosis sanatorium, the Mount Washington Tuberculosis Sanatorium in Eau Claire county. The items in question were not allowed in determining the per capita costs for the fiscal year ending June 30, 1949 as it was felt that they were not necessarily costs of operation. These items are as follows:

<table>
<thead>
<tr>
<th>Paid to</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clothing for sanatorium employes</td>
<td>$2,300.00</td>
</tr>
<tr>
<td>Eau Claire county highway dept.</td>
<td>2,076.54</td>
</tr>
<tr>
<td>(pumping water out of boiler room)</td>
<td></td>
</tr>
<tr>
<td>Bartingale Company</td>
<td>2,164.08</td>
</tr>
<tr>
<td>(piping to temporary kitchen and laundry)</td>
<td></td>
</tr>
<tr>
<td>L. G. Arnold, Inc.</td>
<td>2,218.05</td>
</tr>
<tr>
<td>($1,500 pumping water out of boiler room)</td>
<td></td>
</tr>
<tr>
<td>($718.05 installing partitions)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$8,758.67</td>
</tr>
</tbody>
</table>

The reason that the sanatorium employes lost their belongings in the fire was that as soon as the fire alarm was given they concentrated their efforts in removing the patients to safety and by the time this was done the building where their belongings were located was entirely aflame and the clothing could not be saved.

The employees were without money to purchase the clothing needed to enable them to carry on their work and the board of trustees agreed to purchase clothing for the nurses.
and maids so that they would be able to take care of the patients who had been removed to local hospitals.

The $2,300 spent for clothing was as follows:

**Twelve nurses received $150 each and they bought the following:**

- 4 uniforms $32.00
- 2 pr. Shoes $20.00
- Lingerie $32.00
- Stockings $13.00
- Caps $1.00
- Overshoes $6.00

**Total:**

$150.00

**Five maids received $100 each which was spent as follows:**

- 3 uniforms $24.00
- 2 pr. Shoes $20.00
- Lingerie $20.00
- Stockings $8.00
- Overshoes $6.00

**Total:**

$100.00

Sec. 50.07 (1) provides in part that any person suffering from tuberculosis may be received into such county institution (tuberculosis sanatorium) and cared for upon payment of a rate which shall not exceed the actual cost of maintenance therein. This section also provides that the actual cost of maintenance shall include depreciation charges and a formula is set up for computing depreciation.

Sec. 50.07 (2) provides that any person who is unable to pay for his care may be admitted and maintained at the charge of the county in which he has his legal settlement.

Sec. 50.07 (2a) provides that any patient who meets the legal settlement or residence requirements of sec. 50.03 (2a) shall be cared for without charge to him regardless of his ability to pay except as otherwise provided in that section and the cost of his care shall be charged to the state or the county in which he has legal settlement in accordance with the provisions of ch. 50. Sec. 50.07 (3) (a) and (b) provides that each county maintaining such an institution shall be credited by the state for each such patient whose support is chargeable against said county $15 per week and for each such patient whose support is chargeable against some other county the total cost of his maintenance as de-
terminated by the board of trustees of the institution and the state board of health; and the state shall charge over to such other county the difference between such total cost and $15 per week provided through state aid.

As I understand the facts it was necessary to pump water out of the boiler room, to install partitions and to install piping to a temporary kitchen and laundry in order to put the building back into serviceable condition. These appear to be proper items to be included in "actual cost of maintenance." Sec. 50.07 (1) makes a distinction between "maintenance" and construction costs, the latter being taken into account under the 2 per cent depreciation formula set up by the statute. None of the items here considered are of a permanent structural type. To build or construct is one thing, to maintain the structure after it is erected or built is another. Morehead v. Little Miami R. Co., 17 Ohio 340, 353. In other words, "maintenance" is distinct from "depreciation." International Railway Company v. Prendergast, 1 Fed. Supp. 623, 627. Here some unusual maintenance costs were incurred because of the fire, but any structural work done was purely of a makeshift and temporary character, and of course the pumping out of the water could by no stretch of the imagination be considered a capital expenditure. It involved no construction and it is something that had to be done regardless of whether the cause was fire, flood, leaky plumbing or what not.

It is my understanding that the uniforms and possibly some of the other items of clothing that were lost were furnished by the institution. There appears to be no impropriety in including the cost of these under "cost of maintenance" the same as would be done if the clothing were worn out and replaced.

However, as to the items of clothing privately owned by the employees the situation is different. These items were not furnished in the first instance by the institution and consequently their replacement is not a proper item of "cost of maintenance" of patients to be considered by the state in arriving at per capita cost of maintaining inmates of county tuberculosis sanatoriums.

WHR
Taxation—Tobacco Leaf—Tobacco in warehouses of cooperative tobacco growers association and pledged by it to secure loan from Commodity Credit Corporation is subject to state personal property taxation.

February 14, 1950.

Wisconsin Department of Taxation.

You submit the question of whether tobacco in warehouses of the Wisconsin Cooperative Tobacco Growers Association is subject to taxation in view of the fact that the federal Commodity Credit Corporation has advanced and made a loan thereon up to 90 per cent of the parity price. The request for opinion asks whether such tobacco is "assessable at its full market value and up to 100 per cent of the quantity or is there recognizably beneficial interest in an instrumentality of the federal government up to the amount of the loan which would make assessable only the quantity in excess of the loan?"

This tobacco is personal property which comes within the general property tax provisions of sec. 70.01, Stats., and the special provisions of sec. 70.16, Stats., relative to tobacco. It would thus be subject to Wisconsin personal property tax unless excepted therefrom by the immunity accorded the federal government and its property. As it does not appear that congress has expressly removed personal property of the Commodity Credit Corporation from such immunity, it is necessary to examine the loan agreement between the association and Commodity Credit Corporation to ascertain the interests of the federal government in the tobacco. The agreement nowhere purports to transfer to Commodity Credit Corporation an equitable interest in the tobacco. Rather, all that Commodity Credit Corporation acquires is a lien on the tobacco, with elaborate provisions to preserve that security.

In the first two clauses of the agreement the corporation agrees to make a loan to the association on the security of certain tobacco acquired by the association. In the fifth clause Commodity Credit Corporation agrees to assume all normally insurable risks, and, in the event of damage resulting from insurable hazards it is provided that the loan
shall be reduced by the amount loaned on the damaged tobacco, less the salvage value thereof. Clause 1 (e) provides that the amount of the indebtedness shall be increased by a certain formula to reimburse Commodity Credit Corporation for the assumption of insurable risks on the pledged tobacco. By clause 10 the association agrees to try to sell the tobacco at the highest prices attainable, and it is provided that if the association does not sell with sufficient rapidity to satisfy Commodity Credit Corporation, the latter itself may sell the tobacco, under certain conditions, for the account of and at the risk of the association. The 14th clause provides that upon maturity and nonpayment of the loan Commodity Credit Corporation may sell the tobacco and transfer title thereto; any proceeds from the sale after deducting the loan, interest and certain charges shall be paid to the association. The association is made liable for any deficiency only in the event it has made fraudulent representations or failed to comply with the provisions of the agreement.

The above mentioned provisions of the agreement are typical chattel mortgage provisions and clearly constitute it a chattel mortgage on the tobacco. While clause 10 (j) states that the association will not take or accept title to the tobacco but will act with respect thereto only for the purpose of discharging its obligations under the agreement, which includes (clause 11) distributing net gains from the sale of tobacco to the growers on an equitable basis, such provisions do not operate to destroy that basic character of the agreement.

The question of whether there is a tax immunity to this tobacco because of a lien thereon to an instrumentality of the federal government is answered by three recent cases in the United States supreme court which hold that where the rights or interest of the federal government in property are for security purposes only the property subject to such liens is assessable at its full value for state ad valorem tax purposes to the owner of the equitable interest therein. Oklahoma Tax Comm. v. Texas Co., (1949) 336 U. S. 342, 69 S. Ct. 561, 93 L. ed. 721; S. R. A., Inc., v. Minn., (1946) 327 U. S. 558, 66 S. Ct. 749, 90 L. ed. 851; Land O'Lakes Dairy Co. v. County of Wadena, (1949) 338 U. S. 897, 70
S. Ct. 251, 94 L. ed. (adv.) 197. The instant situation is much stronger for nonexistence of any immunity because as above shown no title to the tobacco is in the federal instrumental-ity and the agreement is in fact nothing more than a chattel mortgage to such instrumentality. The interest of Commodity Credit Corporation in the tobacco is solely for secu-

rity purposes and is not beneficial in nature. Legal title and the whole equitable interest therein is in the association or the growers. Accordingly the tobacco held by the association and pledged to the Commodity Credit Corporation to secure the loan under such agreement is subject to assessment and personal property taxation in Wisconsin at its full value.

Whether or not the association has any facilities for or has made any arrangements respecting payment or apportioning of the tax is wholly irrelevant, for the taxation of property cannot be defeated by private contract. Secs. 70.18 to 70.20, Stats., specifically cover the assessment of personal property in the possession or charge of one other than the owner of the beneficial interest therein. In this re-
gard it is sufficient to note that the tobacco held by the association in its warehouses and pledged to Commodity Credit Corporation is neither in the possession nor the charge of Commodity Credit Corporation.

HHP
Counties—Bids—If so authorized by the county board the county highway committee under sec. 83.015 (2), Stats., may purchase county road machinery either with or without bids and may call for bids on equipment of a particular manufacturer to the exclusion of other similar equipment of other manufacturers. Sec. 59.07 (4) and (7), Stats., does not apply.

February 17, 1950.

EDMUND H. DRAGER,
District Attorney,
Vilas County.

You state that the Vilas county highway department advertised for bids on certain trucks and equipment needed by the county and specified the brand or name of the equipment desired. When the bids were opened it appeared that the low bidder had not offered to furnish the equipment of the manufacturer specified in the advertisement but proposed to furnish similar equipment from another manufacturer.

We are asked whether it is necessary to ask for bids at all, and if so, whether the highway department has the authority to reject the low bid under the circumstances stated above.

Sec. 59.07 (7), Stats., provides in part that when the cost of needed supplies for the county exceeds $60 the purchasing agent shall advertise for bids of similar standard supplies of equal quantity and shall purchase from the lowest reliable bidder.

However, sec. 59.07 (7) specifically mentions items such as "books, stationery, blanks, safes, furniture, telephone service, fuel and lights necessary for the discharge of official business." By implication this would exclude road machinery.

Sec. 59.07 (4) (c) as amended by ch. 280, Laws 1949, provides:

"(c) All public work, including any contract for the construction, execution, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind whatsoever 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, except that the county board may by a three-fourths vote of all the members-elect provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

It may be an open question whether this paragraph is applicable to purchases of machinery. Even if it so applies generally, however, the last sentence provides that it shall not apply to highway contracts which the county highway committee is authorized by law to let or make. Sec. 83.015 (2), Stats., provides among other things that the county highway committee shall purchase and sell county road machinery as authorized by the county board.

Consequently, where the county board has authorized the county highway committee to purchase road machinery and has not limited the manner in which the purchases are to be made, the committee is free to purchase without calling for bids at all or, if it chooses, to call for bids on the equipment of a particular manufacturer.

WHR

Automobiles and Motor Vehicles—Weight Restrictions—Sec. 85.54 (1), Stats., as it applies to the transportation of unmanufactured forest products, exempts such products from gross weight restrictions upon a proper determination that the highways are so frozen that no damage may result thereto by reason of such transportation. Possible question of constitutionality recognized, but no opinion expressed thereon.

February 17, 1950.

STATE HIGHWAY COMMISSION.

You have requested my opinion relative to the effect of sec. 85.54 of the Wisconsin statutes as it pertains to the transportation of unmanufactured forest products over the state highway system.
Secs. 85.46 through and including 85.53, pertain to the classification of highways, the establishment of gross weight limits of vehicles, and the administrative matters relative thereto.

The first part of sec. 85.54 (1) grants highway maintenance authorities power to invoke further restrictions on gross weight allowances when seasonal conditions are such that action is necessary in the public interest. Following this portion of sec. 85.54 (1), and in the same paragraph, is the following:

"* * * The transportation of unmanufactured forest products shall not be restricted because of gross weight limitations during the winter months when the highways are so frozen that no damage may result thereto by reason of such transportation. If at any time any person is so transporting unmanufactured forest products upon a class ‘A’ highway in such frozen condition then he may likewise use a class ‘B’ highway without other limitation, except that chains and other traction devices are prohibited on class ‘A’ highways but such chains and devices may be used in cases of necessity. The officers in charge of maintenance of highways as herein designated upon determination of such frozen condition and freedom of damage to such highways by such transportation forthwith shall grant such operating right. Any person transporting any such product over any highway of this state under the provisions of 85.54 (1) shall be liable to the state for any damage caused to such highway."

Your question is whether the gross weight restrictions found in the statutes preceding sec. 85.54 apply regardless of the portion of sec. 85.54 (1) above quoted, or whether the gross weight restrictions may be disregarded completely upon a proper determination that the highway is so frozen that no damage will result thereto.

It is my opinion that that part of subsec. (1) of sec. 85.54, Stats., in question, authorizes the granting of permission to transport the products referred to in excess of the statutory maximum gross weights authorized by secs. 85.47 and 85.48, Stats. The language is sufficiently clear and unambiguous as to make it unnecessary to apply rules of statutory construction. Nothing more that I could say could do more to speak the legislative intent than the words of the statute itself.
It has been suggested, however, that the granting of this exemption from gross weight limitations to the transportation of unmanufactured forest products, to the exclusion of all other products which are transported over our state highway system, may constitute an unreasonable classification which is not germane to the purpose of the law; and that the exemption may accordingly be held unconstitutional if appropriately challenged. This issue has been raised in the case of Silver Fleet Trucking Co., Inc. v. Marcus, Commissioner, now pending in the circuit court for Dane county, Wisconsin, wherein the attorney general represents Commissioner B. L. Marcus. While the statute involved in that action (85.47, 85.48) is not the same one which is the subject of this opinion, it involves exemptions from certain weight limitations granted to two narrow classes of haulers—dump body and milk tank body trucks and trailers—which raises the identical question of reasonableness of classification and germaneness to the purpose of the law. Since this issue is now pending before a court, I refrain from expressing an opinion thereon.

REB

Licenses and Permits—Massage and Hydrotherapy—Person licensed to practice massage or hydrotherapy or both under sec. 147.185, Stats., may not hold himself out as a physiotherapist and practice as such.

February 20, 1950.

STATE BOARD OF MEDICAL EXAMINERS.

You have asked for my opinion on the following questions:

1. May a person who holds a "certificate of registration" to practice massage and hydrotherapy advertise himself as a physiotherapist and practice physiotherapy?

2. Does physiotherapy come within the statutes of practicing medicine?

3. Is it legal to practice physiotherapy without a basic science certificate?
Sec. 147.185, Stats., provides:

"The board of medical examiners may issue certificates of registration to practice massage or hydrotherapy. The applicant therefor shall present satisfactory evidence of good moral and professional character, and of having completed a preliminary education equivalent to graduation from an accredited high school of this state, and of the completion in a scientific or professional school of an adequate course in physiology, descriptive anatomy, pathology and hygiene, and shall file a verified statement that he is familiar with the state health laws and the rules and regulations of the state board of health relating to communicable diseases. The application shall be accompanied by a fee to be fixed by the board at not more than twenty dollars and five dollars additional for certificate if issued. The applicant shall be examined by the board in physiology, descriptive anatomy, pathology and hygiene, and shall be further examined in massage or hydrotherapy under the supervision of the board, by a registered practitioner in massage or hydrotherapy selected by the board and receiving the same compensation as board members. If a majority of the board find the applicant qualified, it shall issue a certificate of registration to practice massage or hydrotherapy, signed by the president and secretary and attested by the seal, which certificate shall authorize practice in massage or hydrotherapy or educational gymnastics, but not the treatment of a specific disease, except upon the advice of a licensed medical physician. A copy of the applicant's statements of familiarity with health laws and rules shall be forwarded to the state board of health. The provisions of section 147.15, relating to immigrant applicants and translations, shall apply to application under this section."

It is to be noted that the statute in two places refers to certificates of registration to practice "massage or hydrotherapy." Presumably such certificates may be issued to practice either "massage" or "hydrotherapy" and if an applicant is qualified in both fields the certificate may cover both massage and hydrotherapy.

From your question it appears that the individual has a certificate to practice both massage and hydrotherapy. If he has such a certificate there appears to be no reason why he should not hold himself out either as a masseur or hydrotherapist or both if he so desires.

However, there is nothing in sec. 147.185 which provides for a certificate of registration in physiotherapy, and if
physiotherapy constitutes the practice of medicine a person professing to so practice must have a medical license issued under sec. 147.17 and also a basic science certificate issued under sec. 147.07.

If his certificate as well as his practice is limited to massage or hydrotherapy, or both, he does not need a certificate of registration in the basic sciences. 26 O. A. G. 591.

Consequently it becomes necessary to analyze the word "physiotherapy" to determine whether it means anything more than "massage or hydrotherapy." According to the American College Dictionary (published by Random House) the word "physiotherapy" means "the treatment of diseases or bodily sicknesses or defects by physical remedies, such as massage, gymnastics, etc. (rather than by drugs)."

Gould’s Medical Dictionary (5th ed.) defines "physiotherapy" as "the use of the forces of nature in the treatment of disease; for example heat, light, electricity, exercise, air, water."

As so defined "physiotherapy" is something more than "massage" which is defined as the act or art of treating the body by rubbing, kneading, or the like, to stimulate circulation, increase suppleness, etc. American College Dictionary.

Gould defines massage as a method of rubbing, kneading or stroking of the superficial parts of the body by the hand or an instrument, for the purpose of modifying nutrition, restoring powers of movement, breaking up adhesions, etc. Hence "physiotherapy" is more comprehensive than massage and it is also more all inclusive than "hydrotherapy" which is the treatment of disease by means of water. American College Dictionary. See also Gould’s Medical Dictionary.

The attorney general has ruled that sec. 147.185 is applicable to practice of massage for therapeutic purposes but does not extend to athletic rubs given by clubs in connection with athletics or physical exercise. 26 O. A. G. 61.

Also, it has been ruled that a licensed beauty parlor operator using an electrical device which is designed for the purpose of stimulating muscles and thereby reducing excess flesh is not required to have a massage license. 29 O. A. G. 440. This was on the theory that such devices do not massage at
all, but merely stimulate the muscles by use of electricity which is specifically permitted to a licensed beauty parlor operator by virtue of sec. 159.01 (1), Stats.

But since physiotherapy encompasses the treatment of disease by means other than massage or water it is a branch of treating the sick for which a license to practice massage or hydrotherapy is not adequate, and as it does not come under any of the recognized exceptions to the medical practice act, e.g. dentistry or the exceptions mentioned in sec. 147.19, it is my opinion that a masseur or hydrotherapist licensed under sec. 147.185 may not hold himself out as a physiotherapist or do anything encompassed by the term "physiotherapy" other than massage or hydrotherapy. Sec. 147.14 (1) provides that no person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy "or any other system of treating bodily or mental ailments or injuries of human beings" without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute.

WHR

Adoption—Termination of Parental Rights—Judgment of divorce awarding permanent custody of a minor child to one parent does not judicially terminate the parental rights of the other parent so as to obviate consent of such other parent to an adoption under the provisions of sec. 322.04 (2), Stats.

February 21, 1950.

ARTHUR H. STROCHAN,
District Attorney,
Langlade County.

You have called our attention to subsec. (2) of sec. 322.04, Stats., relating to adoption, which provides that if the parental rights of one parent have been judicially terminated the consent of the other to the adoption is sufficient.
You have asked whether a judgment of divorce, awarding permanent custody of a minor child to a mother, judicially terminates the parental right of the father so that his consent to the adoption is unnecessary.

The award of custody in a divorce proceeding is not equivalent to a termination of parental rights. Custody is only one element of the respective rights and obligations in the parent-child relationship. See 39 Am. Jur. 595 et seq. The obligation of a father to support the child, for instance, may continue. See 39 Am. Jur. 648 in which it is said:

"Apart * * * from the effect of emancipation, legal adoption, or other change in status of the child which may have a bearing on the question, the father of a minor child is, in most jurisdictions, not relieved of his legal duty to support it by the mere fact that he does not have its actual or legal custody * * * ."

The legal effect of an award of custody, without further provision in the judgment affecting the parental status, is set out in 17 Am. Jur. 524–525:

"* * * The general rule is that where the custody of children is granted to one spouse, such custody does not forever cut off and bar the other spouse's right to their custody so long as the decree is unmodified, but only establishes the right between the two spouses during their lives; and upon the death of the one to whom the custody of the child was awarded, his or her right does not descend nor can it be transmitted, and therefore the right of the other spouse to the custody of the child revives or attaches as against third persons * * * ."

The Wisconsin court has followed this rule. In Yates v. Yates, 165 Wis. 250, it was held that upon the death of the parent to whom custody had been awarded, the other parent was entitled to the custody of the child.

The interim committee, 1947, with respect to the revision of sec. 322.04 (2) of the adoption laws, commented "Authority to terminate parental rights is in sec. 48.07 (7)." Under the Wisconsin statutes the exclusive jurisdiction for termination of parental rights is in juvenile courts, and the termination must be effected through the statutory procedure set out in sec. 48.07. Sec. 48.01 (5) (a) reads in part:
"Except as otherwise provided in this paragraph and paragraph (am) the juvenile court shall have exclusive jurisdiction of proceedings under this chapter involving:

"* * *

"2. * * * the termination of parental rights as provided in section 48.07 (7)."

BL

Public Assistance—Statute of Limitations—Poor Relief Claims—Secs. 49.04 and 49.11, Stats., construed. The state may not reimburse a county which has reimbursed a municipality for relief furnished an indigent without legal settlement where such claim was filed by the municipality more than one year late with respect to sec. 49.11 (5) (a) and barred by its operation.

February 21, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

Sec. 49.04, Stats., provides for the reimbursement of counties by the state for state dependents who have received public assistance from a county or from a municipality within such county. You ask whether the state may reimburse a county which has reimbursed a municipality on a verified claim filed more than one year late with respect to sec. 49.11 (5) (a), Stats.

Secs. 49.01 through 49.12 establish a system of public relief of indigents in Wisconsin and grant certain rights to dependent persons, to municipalities, counties and the state. Among them are the right of a county to be reimbursed by the state for relief granted to persons having no legal settlement as provided for in sec. 49.04 and the right of a municipality to be reimbursed by a county for relief granted to persons not having settlement in the municipality as provided in sec. 49.11. These rights being statutory are subject to the limitations provided for in the statutes.

Sec. 49.11 (5) (a) provides as follows:

"When relief is administered by municipalities, claims therefor against the county are barred unless they are filed within one year from the date the relief is granted."
Public grants are strictly construed. (Horack, Sutherland's Statutory Construction, 3rd Ed., Vol. 3, pp. 200-202) "Municipal powers are strictly limited to those expressly or impliedly authorized or necessarily incidental to the objectives of the corporation." (Horack, supra, p. 228)

The obligation of the county to pay and the right of the municipality to receive payment exist only when the claim is properly filed. It is elementary that a right created by statute does not come into existence unless the statutory requirements are strictly and literally complied with. (See Lewis' Sutherland on Statutory Construction, 1904, Vol. 2, pp. 1055-1056.)

It is my opinion that it would be improper for the state to reimburse a county which has reimbursed a municipality on a claim which was filed more than one year late with respect to sec. 49.11 (5) (a).

GFS

Taxation—Apportionment—Apportionment and certification of state and county taxes under sec. 70.63, Stats., is made upon the basis of the municipalities having legal existence at the time thereof.

February 28, 1950.

ROBERT D. DANIEL,
District Attorney,
Rock County.

Early in 1948 application was made pursuant to sec. 61.01 et seq. Stats., for incorporation of that part of the town of Milton previously known as the unincorporated village of Milton Junction. The hearing thereon by the circuit court was noticed for June 23, 1948. The previous day a protesting petition was filed. During the hearing several signers of the objecting petition withdrew their names therefrom. After taking the matter under advisement, the circuit court on December 6, 1948 held such withdrawals effective, found an insufficient number had signed the protesting petition,
and entered an order that such village be incorporated if a majority of the electors voted favorably at a referendum election. The vote was favorable and then early in 1949 an election was had of officers of the village. Upon appeal from the order of incorporation, the supreme court in *State ex rel. Tegt v. Circuit Court*, (Oct. 11, 1949) 255 Wis. 501, held the withdrawals were not timely, reversed the order of December 6, 1948, and by remittitur on November 7, 1949 remanded the case "with directions to determine the sufficiency of the protest as of 10 a. m. June 23, 1948, and thereafter to order or deny incorporation as the sufficiency of the protest requires."

At the time for the apportionment and certification of the state and county taxes pursuant to sec. 70.63, Stats., the circuit court had not as yet heard the matter upon such remand. As the order of incorporation had been reversed there was then no legally existing village of Milton Junction and accordingly the county clerk in making the apportionment of said taxes included the property in the erstwhile village of Milton Junction as property in the town of Milton and certified the apportioned taxes to the clerk of said town upon that basis. There was obviously no apportionment or certification to be made to the village and he made none.

You ask whether the clerk was correct in so making and certifying the apportionment of state and county taxes. In my opinion the county clerk had no other alternative. It was obviously his duty to make the apportionment among the municipalities having legal existence at the time he made the apportionment.

A valid order of the circuit court under sec. 61.08 is the first and a requisite step to incorporation of a village. When the county clerk made and certified the apportionment the order of the circuit court of December 6, 1948 had been reversed so it no longer existed as a valid and operative order. Sec. 61.10 (1) says that a village shall be a body corporate from the time of the recording of the court order of incorporation. During the time it stood unreversed, the recording of such order, the petition and the results of the election were effective, so that the village at least had a de facto existence, but such order was wholly ineffective after
its reversal, with the result that the prior recording thereof did not operate to validly incorporate the village. It seems obvious that such is the situation and that the county clerk was required to make the apportionment and certify the same as though such order of incorporation had never been entered and recorded.

HHP
Cities—Vocational and Adult Education—Board Member—Secs. 41.15, 62.09 and 17.03, Stats., construed. A person who is not a resident of a city is eligible to appointment on the board of vocational and adult education of that city. The removal of a member of a board of vocational and adult education of a city of his residence to without the city limits does not in and of itself create a vacancy in that position.

March 1, 1950.

State Board of Vocational and Adult Education.

Your letter raises two questions: (1) Is a person who is a citizen of the United States and a citizen of Wisconsin and who has his principal place of employment within a Wisconsin city but who resides outside of the city limits, eligible for appointment to the board of vocational and adult education in that city; and (2) if a person who is a member of such a board removes his residence beyond the city limits but retains his principal place of business within the city, does this removal automatically create a vacancy in that office?

As to both questions, sec. 41.15, which provides for the organization, powers and duties of local boards of vocational and adult education and for the method of their employment, is silent. A search indicates that it has not been interpreted with respect to these questions.

To answer question (1), we turn, therefore, to sec. 62.09 which sets forth, among other things, the methods of choosing and the eligibility requirements of officers of cities. This section provides, among other things, that the person to be eligible for election to a city office must at the time of his election be not only a citizen of the United States and this state but an elector of this city and a resident therein. There is no such requirement for appointive offices. This has been interpreted to mean that a person is eligible to hold non-elective city office even though he is not a resident of that city. See 25 O. A. G. 490 and State ex rel. Evjue v. Weatherly, (1949) 255 Wis. 225, 38 N. W. 2d 472, which, while based primarily on the interpretation of sec. 66.11, (which does not apply here) does state in reference to sec.
62.09 (2) (a), that it "is not applicable to the chief of police who is an appointive officer." (Italics supplied.) See also Evjue v. Howell, 255 Wis. 232, 38 N. W. 2d 476.

This follows the general principle stated in 42 Am. Jur. 915 that

"* * * where residence within the district or political unit is not made a condition of eligibility to holding office therein by express provisions of the law, such residence is generally considered not necessary * * *." (Authorities cited.)

See also 62 C. J. S. 917.

Since the vocational school board is set up as part of the city government and not as part of a school district, the laws relating to city officials rather than the laws relating to school districts apply.

In answering your second question, reference is made to sec. 17.03, Stats., which applies to vacancies in any public offices, including offices of cities, villages, and school districts, and states that any public office shall become vacant upon the happening of either of any of the following events:

"* * *"

"(4) His ceasing to be an inhabitant of this state; or if the office is local, his ceasing to be an inhabitant of the district, county, city, village, town, ward or school district for which he was elected or within which the duties of his office are required to be discharged; and in the case of a school district officer, and in addition to the foregoing, his being and remaining absent from the district for a period exceeding sixty days. But no office shall become vacant because the territory in which any officer resides is annexed to or consolidated with another governmental unit, and in such event such officer shall hold office until the expiration of his term; provided that this exception shall not apply to village or city officers when a part or the whole of such city or village is annexed to or consolidated with another governmental unit, or to district school officers when the whole of such district is annexed to or consolidated with another governmental unit.

"* * *"

This latter section cannot be properly interpreted without considering the following factors: (1) This section was originally created by sec. 31 of ch. 326, Laws 1889, at which
time it explicitly applied to officers "elected or appointed." This was subsequently amended in 1919 so as to omit these words. (2) This was originally part of the same statute which created the present sec. 62.09 which has been interpreted by our supreme court as recently as July, 1949, as noted above. (3) If the supreme court's interpretation of sec. 62.09 is adhered to and an appointive office such as the one about which you inquire is not required to be filled by a resident, then an interpretation of sec. 17.03 must be consistent with the interpretation of sec. 62.09 in order for either one to have any meaning. If it were held that the removal of the residence of a member of the board of vocational and adult education to without the city limits were to create a vacancy in his office, there would be nothing to prevent his being reappointed to fill that vacancy since residence is not a requirement of eligibility. Consequently, I am of the opinion that this does not apply to appointive offices and consequently the answer to your second question is "No."

GFS

Counties—Public Assistance—A county is liable for medical and hospital care under sec. 49.02 (5), Stats., only if it is established that the person receiving such care is a dependent person "entitled to" relief.

March 1, 1950.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

You state that claims have been made by a doctor and a hospital under sec. 49.02 (5), Stats., for emergency treatment of a patient whom they assert is destitute and unable to pay for the treatment. You state that notice was given to county officials in the manner provided by statute, but that such officials declined to recognize the claim on the ground that the patient was not in need so as to entitle him to public assistance; that the county officials so notified
the physician and hospital within a day or two after the first notice came to them; and that the medical care and hospitalization were continued for a period of 6 weeks thereafter. You ask whether the county is liable.

You state that you are of the opinion that under the rule of *St. Joseph's Hospital v. Withee*, 209 Wis. 424, the county cannot be liable because there was no contract between the county and the claimants covering the authorization and medical care. The rule in that case, which was decided in 1932, has been somewhat relaxed by statute. See ch. 165, Laws 1933, which created sec. 49.18 (2), now sec. 49.02 (5), and amendments effected by ch. 453, Laws 1935, ch. 215, Laws 1943, and ch. 585, Laws 1945. Under the present provisions of sec. 49.02 (5), it is possible for a county to be liable for emergency hospitalization and medical care without a prior contract.

The statute, however, does not automatically make a county liable in all cases where a doctor or hospital supplies care to a person whom they deem unable to pay for it. The section limits the county's liability to care "rendered to a person entitled to relief under this chapter," and to care for which prior authorization cannot be obtained without delay likely to injure the patient.

As to the 6 weeks of hospitalization after communication from the welfare department, it would hardly seem that there was an impossibility of obtaining prior authorization, since the matter was in fact submitted to the director of welfare. The remaining care could have been authorized if the county officials deemed it a proper case for public assistance.

Further, the liability cannot attach except with respect to a person "entitled to" relief under the statutes. In order to be entitled to relief, the recipient must be a dependent person within the provisions of sec. 49.01 (4). As pointed out in *Dane County v. Barron County*, 249 Wis. 618, the question whether one falls within the statutory definition of a person entitled to relief is one of fact to be determined in each case. Where the public officials charged with administration of assistance do not concede that the person involved is entitled to relief, final determination of the fact can only be made judicially. A claimant is not empowered
to determine the fact for himself, contrary to the finding of the appropriate officials.

A similar question arose in Carthaus v. Ozaukee County, 236 Wis. 438, relative to a claim for hospital care under sec. 49.18 (2) of the 1939 statutes. Under that section the same conditions applied as are set out in sec. 49.02 (5) with respect to medical and hospital care. Although the proper notice had been given in that case, the court held that the county was not liable for the payment because the claimant had not met the burden of showing that the patient was a poor person entitled to relief under the statute. The court made the following comments which I believe are applicable to your inquiry:

"** On the trial below appellants offered no evidence to establish a pauper status of the patient. It does appear that he was a young man twenty-two years of age, unmarried, living at home, and one of a large family none of whom had ever been on relief or asked for aid in maintaining themselves. The particular individual involved had been employed for several years before the injury and had earned considerable money. He had purchased an automobile although he had not fully paid for it at the time of the accident, and it appears that he was the average young man maintaining himself. In this state of the evidence, the burden of proof rested upon the appellants to show that Novak had the status of a pauper. But because he had no ready money with which to meet the extraordinary hospital and medical expenses he was to encounter, it does not follow that he was unable, by a fair effort, to discharge a debt which was peculiarly his own. It is a well-known fact that many people in an emergency similar to that facing Novak, pay their doctor's and hospital bills in instalments, and that the time taken to discharge the full debt often extends over many months. The fact that there may be resulting inconvenience to the doctor or the hospital by reason of the delay, or the fact that a patient must make some sacrifice to pay his bills does not alter the direct obligation, and ought not to shift the responsibility for that indebtedness to the shoulders of others, unless the one treated is destitute of resources or such means of security as to be unable to obtain the means of subsistence. Rhine v. Sheboygan, 82 Wis. 352, 52 N. W. 444.

"** The liability of towns to support poor persons is founded upon and limited by statute, and is not to be en-

"Doubtless it would be of advantage to doctors and hospitals generally to have the collection of their bills assured by the community in which the patient resides, but friends and relatives who may be willing to make loans or enter into some arrangement by which the fair charge for the services rendered may be paid are to be considered. The individual himself is not to be tempted to forfeit his self-respect by providing an easy way to pass his own just obligation to the taxpayers of a small community." (pp. 442-443, 444)

BL

State—Jurisdiction and Sovereignty—Taxation—Exemption—Machines owned by private corporation located in the federal forest products laboratory are not exempt from local taxation.

March 1, 1950.

STATE DEPARTMENT OF TAXATION.

You have requested this office to render an official opinion answering the question: "Is all property located in the federally owned forest products laboratory exempt from taxation?"

The question has been raised because of the fact that the assessor for the town of Madison has placed upon the tax roll certain machines owned by the X Corporation and located in the forest products laboratory. The town of Madison contends that it has authority to tax the machines in question, by virtue of the provisions of sec. 70.174, Wis. Stats., which reads:

"Improvements made by any person on land within this state owned by the United States may be assessed either as real or personal property to the person making the same, if ascertainable, and otherwise to the occupant thereof or the person receiving benefits therefrom."

The corporate owner of the machines contends that since these machines are located upon real estate owned by the
United States neither the state nor any municipal subdivision thereof has authority to levy a tax upon them.

Sec. 70.01 of the statutes provides:

"Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. * * *"

Sec. 70.11 enumerates the property exempt from taxation. No specific exemption is provided therein for the machines in question. The question thus presented is whether sec. 70.01 or 70.174, or both, authorize the town of Madison to place the machines upon the local tax roll, or whether, by virtue of the conveyance of the site of the forest products laboratory to the United States, the machines located in the building erected upon such site are outside of the jurisdiction of the state and its political subdivisions for taxation purposes.

Secs. 1.01, 1.02 and 1.03, Wis. Stats., provide:

"1.01 State sovereignty and jurisdiction. The sovereignty and jurisdiction of this state extend to all places within the boundaries thereof as declared in the constitution, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over any places therein; and it shall be the duty of the governor, and of all subordinate officers of the state, to maintain and defend its sovereignty and jurisdiction. * * *"

"1.02 United States sites and buildings. Subject to the conditions mentioned in section 1.03 the legislature hereby consents to the acquisitions heretofore effected and hereafter to be effected by the United States, by gift, purchase or condemnation proceedings, of the title to places or tracts of land within the state; and, subject to said conditions, the state hereby grants, cedes and confirms to the United States exclusive jurisdiction over all such places and tracts. Such acquisitions are limited to the following purposes:

"(1) To sites for the erection of forts, magazines, arsenals, dockyards, custom houses, courthouses, post offices, or other public buildings or for any purpose whatsoever contemplated by the seventeenth clause of section eight of article one of the constitution of the United States. * * *"

"1.03 Concurrent jurisdiction over United States sites; conveyances. The conditions mentioned in section 1.02 are the following conditions precedent:
“(1) That an application setting forth an exact description of the place or tract so acquired shall be made by an authorized officer of the United States to the governor, accompanied by a plat thereof, and by proof that all conveyances and a copy of the record of all judicial proceedings necessary to the acquisition of an unencumbered title by the United States have been recorded in the office of the register of deeds of each county in which such place or tract may be situated in whole or in part.

“(2) That the ceded jurisdiction shall not vest in the United States until they shall have complied with all the requirements on their part of sections 1.02 and 1.03, and shall continue so long only as the place or tract shall remain the property of the United States.

“(3) That the state shall forever retain concurrent jurisdiction over every such place or tract to the extent that all legal and military process issued under the authority of the state may be served anywhere thereon, or in any building situated in whole or in part thereon.”

Title to the real estate now occupied by the forest products laboratory formerly was held by the regents of the university of Wisconsin. Ch. 354, Laws 1923, purported to empower the regents of the university of Wisconsin to deed a site for the forest products laboratories to the United States and provided as follows:

“SECTION 1. The regents of the university of Wisconsin are hereby authorized in their discretion to convey to the United States the title to such portions of the university lands as in the judgment of the regents will afford a suitable site for federal forest products laboratories, and which are acceptable for such purposes by the federal authorities, whenever the federal authorities shall have available funds for the erection of such laboratories and shall have decided to locate such laboratories at Madison, Wisconsin.

“Should such conveyance be made the title thereby conveyed shall revert to the university of Wisconsin in case the United States fails to complete the erection of laboratories in accordance with a building program which meets with the approval of the regents of the university, or fails at any time to maintain and operate as forest products laboratories the buildings constructed by the United States government in accordance with an agreement approved by the regents of the university and the federal authorities. Upon such reversion the United States shall have a reasonable time within which to remove or otherwise dispose of the
buildings and other improvements constructed by it on said lands.

"The deed of conveyance shall recite these conditions subsequent by which the title might be defeated.

"SECTION 2. This act shall take effect upon passage and publication."

This act was published July 9, 1923.

Chapter 168, passed by the 71st congress, authorized the acceptance of a donation of land and the construction thereon of suitable buildings and appurtenances for a forest products laboratory, and provided:

"That the Secretary of Agriculture is hereby authorized to accept, on behalf of the United States, from the regents of the University of Wisconsin, a donation by deed of conveyance satisfactory to the United States of such tract or tracts of land as in his judgment may be suitable as a site for a building or buildings for the forest products laboratory, and to pay from the appropriation herein authorized all costs incident to examining, transferring, and perfecting title to said land. ***

"Sec. 2. The Secretary of Agriculture is hereby authorized to cause to be planned, by contract or otherwise, and to construct at Madison, Wisconsin, on said land, such fireproof building or buildings as in his judgment may be suitable for the use of the forest products laboratory of the Forest Service, with modern equipment for laboratory tests and experiments, including the moving and installation of existing equipment and the purchase and installation of necessary new equipment, the making of steam, sewer, water, gas, electrical, and other connections, and the construction of such railway sidings, roadways, sidewalks, and approaches as may be required.

"Sec. 3. For the purpose of carrying out the provisions of this Act there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $900,000."

Pursuant to the aforesaid acts, the regents of the university of Wisconsin and the secretary of agriculture agreed upon a site for a forest products laboratory and plans for the construction, equipment and operation thereof. This "building program and agreement" was reduced to writing in a form approved by the regents of the university of Wisconsin at a meeting held on January 21, 1931. In addition to approving the form of such contract, the regents spe-
Specifically authorized its president and secretary to execute and deliver said agreement to the secretary of agriculture of the United States and also directed said president and secretary to execute and deliver to the secretary of agriculture for and on behalf of the United States a deed of conveyance to certain premises particularly described when the title thereto had been approved by the attorney general of the United States, all pursuant to ch. 354, Laws of Wisconsin for 1923. Pursuant to such action, the president and secretary of the regents of the university of Wisconsin did, on January 24, 1931, on behalf of said regents, execute a deed to said premises which operated to convey said premises to the United States of America,

"* * * subject to the conditions that the title to said tract of land hereby conveyed shall revert to The Regents of the University of Wisconsin (or to such board or body as may by law succeed to its functions), in case the United States shall fail to complete the erection of a laboratory or laboratories, or shall fail at any time to maintain and operate the same as a forest products laboratory, in accordance with the above quoted building program and agreement;

"Provided, however, that upon such reversion the United States shall have a reasonable time within which to remove or otherwise dispose of the buildings and other improvements constructed by it on said tract of land."

This deed was recorded in the office of the register of deeds in and for Dane county, Wisconsin, on February 9, 1931 at 10:25 o'clock a.m., in Vol. 350 of Deeds on pages 210-215 as Document No. 524201.

A federal forest products laboratory was constructed pursuant to the aforesaid "building program and agreement" on the lands conveyed by the regents of the university of Wisconsin to the United States by the aforesaid deed.

Art. I, sec. 8, clause 17, of the United States constitution provides that the congress shall have power:

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which
the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;"

The X Corporation has taken the position that by virtue of this provision the machines which it owns but which are located in the forest products laboratory are not subject to assessment for local tax purposes.

It was stated in the case of Surplus Trading Co. v. Cook, 281 U. S. 647, 652:

"**It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."

In that case it was held that blankets owned by the defendant, Surplus Trading Co., but located in Camp Pike which had been purchased by the United States with the consent of the state of Arkansas, were exempt from local taxation under the aforesaid provision of the United States constitution. However, it was stated in Chicago & Pacific Railway Co. v. McGlinn, 114 U. S. 542, 545:

"**But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State."

And again in Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 538, the court quoted approvingly from another case as follows:

"**we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. **"

One of the leading cases concerning the jurisdiction of a state to tax is that of James v. Dravo Contracting Co., 302 U. S. 134. In that case the court held, pages 141, 143, 148:
"Clause 17 provides that Congress shall have power 'to exercise exclusive legislation' over 'all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.' 'Exclusive legislation' is consistent only with exclusive jurisdiction. Surplus Trading Co. v. Cook, supra. (281 U. S. 652, 74 L. ed. 1095, 50 S. Ct. 455). As we said in that case, it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. * * *

"* * *

"* * * We construe the phrase 'other needful buildings' as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government.

"* * *

"* * * a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases."

In James Stewart & Co. v. Sadrakula, 309 U. S. 94, 99, the court said:

"It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments. The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. * * *

In the case of Farrington v. Wilson and others, 29 Wis. 383, 392, our supreme court said, in reference to a statute
exempting from taxation the property of all Indians who are not citizens, except lands held by them by purchase:

"The question of a statutory construction thus presented, and which turns chiefly upon the meaning of the word 'purchase,' as used in the statute, is very fairly stated in the brief of the learned counsel for the defendants, who argues for the taxability of the land. He says: 'Title by purchase is defined to be in its technical sense, "the acquisition of real estate by any means whatever, except descent." It includes title by gift or devise. In a more limited sense, as used in common parlance, not in its technical sense, purchase is the acquisition of lands for a valuable consideration.'"

See also Quinney v. The Town of Stockbridge, 33 Wis. 505; Hilgers v. Quinney, 51 Wis. 62, 8 N. W. 17; McGeehan v. Ashland County, 192 Wis. 177, 212 N. W. 283.

"In Railroad Company v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. 995, and Chicago, R. I. & R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. 1005, the constitutional provision cited and relied upon is strictly construed, and it is held that the word 'purchase' as used in the clause of the Constitution under consideration, has not the general technical meaning attached to it at common law as including any acquisition of lands by some other way than such actual purchase * * *.

"That the right of a state to tax the property of others located upon lands owned by the United States, although it cannot tax such lands, will not be held to be abandoned by the state, except for the most compelling reasons, is quite manifest from several decisions of the Supreme Court of the United States." Nikis v. Commonwealth, 144 Va. 618, 131 S. E. 236.

The records do not disclose that any attempt was made to comply with the provisions of sec. 1.03 of the Wisconsin statutes. Consequently, it is unnecessary to determine what jurisdiction the United States might have acquired over the forest products laboratory property under sec. 1.02 if there had been compliance with the provisions of sec. 1.03.

In 1931 the land upon which the forest products laboratory was constructed was owned by the regents of the university of Wisconsin, a branch of the state government. By ch. 354, Laws 1923, the regents of the university of Wisconsin were "authorized in their discretion" to convey
certain of their lands to the United States upon specified conditions. An actual conveyance of lands may or may not have resulted from that act. The act itself clearly did not operate as a conveyance of land and cannot be construed as an attempt to cede exclusive jurisdiction. In fact, it is clear from said ch. 354 that the state of Wisconsin through the regents of the university of Wisconsin retained some control over the operation of the property and a reversionary interest therein in case of its abandonment for a specified purpose.

As the result of ch. 354, Laws 1923, ch. 168 passed by the 71st congress, and action taken pursuant to those acts, the regents of the university of Wisconsin made a qualified donation to the United States government of the lands upon which the forest products laboratory was erected. It is my opinion that the United States did not acquire this land by “purchase” within the meaning of art. I, sec. 8, clause 17, of the United States constitution and consequently that the machines of the X Corporation located in the forest products laboratory are not exempt from local taxation.

This conclusion is also in accordance with an opinion rendered in 31 O. A. G. 281, wherein it was held that personal property used in constructing an ordnance works upon real estate owned by the United States government but over which the state had not surrendered exclusive jurisdiction under the provisions of secs. 1.02 and 1.03, Wis. Stats., was subject to taxation by the state.

It is very doubtful that the machines in question would be classified as “improvements” within the meaning of sec. 70.174, Wis. Stats. See Words and Phrases, Permanent Edition, Vol. 20, page 313. However, even though they might not be classified as “improvements” within the meaning of said statute they would be classified as “general property” within the meaning of sec. 70.01 and within the definitions found in secs. 70.02, 70.03 and 70.04 and would be subject to taxation since they are not exempt therefrom under the provisions of sec. 70.11 as revised by ch. 63, Laws 1949.

JRW
Taxation — Weed Destruction — Weed Commissioner — Notice to Owner — In the absence of actual knowledge as to who is the owner, weed commissioner may serve the written notice required by sec. 94.22 (1), Stats., on the holder of the record title.

March 1, 1950.

Martin Gulbrandsen,
District Attorney,
Vernon County.

You submit a set of facts which raises the question whether the expenses of the weed commissioner in destroying noxious weeds on privately owned land may be charged as a tax against such land in the next tax roll, where notice to destroy the weeds was given by the weed commissioner by mail to the holder of the record title but not to the actual owner or the occupant.

Sec. 94.22 (1), Stats., so far as here material, provides:

"Every weed commissioner shall carefully investigate concerning the existence of noxious weeds in his district; and if any person therein shall neglect to destroy any weeds as required by section 94.20, he shall, after first giving five days' written notice by mail to the owner or occupant, destroy or cause all such weeds to be destroyed * * *".

The obvious general purpose of sec. 94.22, Stats., is to provide a summary abatement of a public nuisance, and that is a proper exercise of the police power. State v. Laabs, (1920) 171 Wis. 557, 177 N. W. 916; Miller v. Foster, (1943) 224 Wis. 99, 11 N. W. 2d 674. This purpose must be kept in mind so that whatever construction is given to it must be reasonable as effecting such purpose. Julius v. Druckrey, (1934) 214 Wis. 643, 254 N. W. 358.

There is nothing in the language used or the history of this statute which indicates that the word "owner" is intended to mean the owner of the record title or the actual owner of the fee. Although there is no decision in this state upon the point, there are decisions in other jurisdictions which have adopted the rule that an assessor may rely on the record title at least in the absence of any contrary knowledge. Roberts v. First Nat'l. Bank of Fargo, (1899)
It seems only consistent with the purpose of this statute in providing for a summary abatement of a public nuisance and the imposition of the cost thereof against the property itself that the weed commissioner would have to be allowed to rely on the record title in the absence of any knowledge on his part as to who is the actual owner of the property. Liability is rested on the property for the expense of this public representative in cutting the weeds to prevent them from going to seed and spreading when the owner of the property has failed to discharge the clear and express duty placed upon him by this statute. There might be conflicting claims as to who actually owns the property and yet there would be nothing of record to guide the weed commissioner in performing his function. He must act with dispatch or the entire purpose of the statute will be defeated. Were the word "owner" construed as meaning the actual owner or holder of the fee title and not the owner of the record title, the force of this provision could be easily avoided by annually conveying the property back and forth between members of a family or various parties, with no recording of the conveyances until late each year, especially where the land is unoccupied. It might be suggested that where the premises are occupied this would furnish no basis for serving on the record title holder. But there are many questions and uncertainties as to what constitutes occupancy. *Bebb v. McGowan*, (1932) 208 Wis. 400, 243 N. W. 460.

In view of the purpose of this statute, its intended application must be considered from the standpoint of the weed commissioner at the time he finds it necessary to perform his duties thereunder. He is to cut noxious weeds that have not been cut by the owners of property, but before he does so must give notice by mail to the property owner. This is a warning to the owner so he may have a last chance to cut the weeds at his own expense. The weed commissioner can see the weeds and the land but he does not know and must ascertain who owns the property. If he goes to the
records in the office of the register of deeds, that is the best evidence available as to who owns the property, where he does not have actual knowledge as to the ownership. Under such circumstances he has done all that can be expected of him and therefore all he can do is send the notice to the person there disclosed to be the owner. The very purpose of the recording statute is to give notice of ownership.

On the other hand if the weed commissioner has actual knowledge as to ownership, he then would have no occasion to go to the records in the office of the register of deeds and if he did he might find that the ownership there disclosed is inconsistent with his actual knowledge as to who is the owner. He would then be required to act in accordance with the best evidence he has as to the ownership, which would be his personal knowledge.

It is my opinion therefore that the weed commissioner, in the absence of knowledge as to who is the actual owner of the property, may serve the notice under sec. 94.22 (1) upon the record title owner and the same would constitute a sufficient notice. In so stating I am not unmindful of the long line of Wisconsin cases holding that special assessments made without notice to the property owner are void. Johnston v. Oshkosh, (1866) 21 Wis. *184; Boden v. Lake, (1943) 244 Wis. 215, 12 N. W. 2d 140. None of those cases, however, deals with the abatement of a public nuisance, in which case a property owner does not have the same constitutional guarantees as is the case with respect to special assessments.

The material submitted with your request for opinion indicates that it is claimed the weed commissioner knew the identity of the actual owner. If that be the fact then under the interpretation above stated the tax would not be valid, because the weed commissioner knew that the owner of the property was not the record title holder to whom he sent the notice. The fact that the holder of the record title forwarded the notice to the actual owner would not render the notice a proper one.

HHP
Counties—Board Member—Cities—Weed Commissioner—Public Officers—Compatibility—The offices of member of the county board and weed commissioner of a city are not incompatible and can be held by the same person.

March 6, 1950.

RAYMOND P. DOHR,
Corporation Counsel,
Outagamie County.

You ask in your letter whether a member of the Outagamie county board may contemporaneously serve as weed commissioner of the city of Appleton.

Sec. 59.03 (3), Stats., provides inter alia that a county board member may also be a member of a city common council or village board of trustees. This by itself does not answer your question, but it indicates that county board membership and holding local office are not necessarily incompatible.

Sec. 94.21 provides for the appointment of a weed commissioner and sec. 94.22 specifies his duties, but neither says anything relative to the compatibility of this job with any other.

We thus fall back on the common law rule that, "The same person may hold different offices which are not incompatible, unless forbidden by law." (3 McQuillin on Municipal Corporations 267, 3rd Ed.)

The question of the compatibility of two offices is essentially a question of the relationship of the duties. "Will the holder be able to fill both positions and perform the duties required of him in each capacity without one interfering with the other?" (1910 O. A. G. 604).

No opinion of the attorney general has applied to the holding of the offices of county supervisor and city weed commissioner. In 20 O. A. G. 212 the opinion was rendered that a county board member could not be appointed county weed commissioner because the selection of one of its members by the county board would violate sec. 66.11 (2), Stats.

While there is no simple rule for determining incompatibility, which is not simply the inability to physically per-
form both functions at the same time (42 Am. Jur. 935, 3 McQuillin, supra, 265), the following tests will be useful:

1. Is the character of the offices such that the holders would normally have official relations with each other?
2. Is one office either subordinate to or supervisory of the other in any degree?
3. Are the duties in any way conflicting or inconsistent?
4. Is there any reason of public policy why they should not be held by the same person?

Upon consideration of the duties of a city weed commissioner and of a member of the county board of supervisors as prescribed by the statutes, it is my opinion that the offices are not incompatible and may be held by the same person.

GFS

Counts—Sheriffs—Civil Service—Under sec. 59.21 (8), Stats. (civil service), county board may not delegate to sheriff power to suspend deputy without pay. Power to suspend deputy is vested in county board as incidental to power of removal for cause. When necessary, sheriff may order deputy to cease performance of duties.

March 8, 1950.

ARTHUR C. SNYDER,
District Attorney,
Washington County.

You present the question whether a civil service ordinance adopted by Washington county pursuant to sec. 59.21 (8), Stats., authorized the sheriff to suspend a deputy without pay for a stated period without any further authority or confirmation from the county board.

For the purposes of this opinion it is sufficient to quote sec. VI (2) of the ordinance which reads:

"A deputy sheriff may be suspended without pay by the sheriff within his discretion upon charges of malfeasance or neglect of duty being filed against such deputy and such suspension may continue until the charges so filed have
been heard by the Board of Supervisors and a finding made by them.

"In case such suspension is made, the Board of Supervisors shall consider as separate questions such suspension and the charges of dismissal from which it arose and shall, in addition to making a finding on the question of dismissal, make a finding either confirming or setting aside the suspension.

"If the Board, after hearing on the formal charges filed, shall find the temporary suspension unjustified, the deputy shall be deemed to have served continuously during the period of the suspension and shall be entitled to recover his pay from the County for such service; otherwise not."

In my opinion the county board cannot validly delegate to the sheriff power to suspend a deputy without pay.

Sec. 59.21 (8) (b), Stats., provides:

"The persons appointed shall hold the office of deputy sheriff on good behavior, but may be removed from such office at any time by an affirmative vote of three-fourths of the members-elect of the county board in such county upon charges of malfeasance or neglect of duty preferred to such board by the sheriff or any citizen and after notice and hearing before such county board."

The opinion of this office in 26 O. A. G. 22, 24, construing this statute in connection with a similar county ordinance, is applicable:

"It will be noted that the entire power to remove the deputy sheriff for malfeasance or neglect of office is vested in the county board itself and not the sheriff. You will also note that the statute gives no authority to the sheriff to suspend any deputy and without such statutory authority he does not have this power and it cannot be conferred upon him by ordinance."

The county board may neither take away nor enlarge the powers of county officers except where the legislature has authorized such limitation or enlargement. Reichert v. Milwaukee County, (1914) 159 Wis. 25, 35, 150 N. W. 401. See also State ex rel. Sullivan v. Benson, (1933) 211 Wis. 47, 49–50, 247 N. W. 450.

The legislature can limit the powers of the sheriff as was done here. The rule that the powers and duties of a constitutional officer cannot be taken away by the legislature is
confined to those immemorial principal duties that characterize and distinguish the office. State ex rel. Milwaukee County v. Buech, (1920) 171 Wis. 474, 482, 177 N. W. 781.

It will be noted that although the county board is granted authority under this statute to remove a deputy sheriff for malfeasance or neglect of duty, no power of suspension is expressed. An inference that by this omission the legislature intended to deny the county board power to suspend is unwarranted. Power of suspension is generally considered incidental to the power of removal for cause. 43 Am. Jur. 65, § 242. Examination of the legislative history of this statute fails to disclose that the legislature intended an exception to this general rule here.

I feel constrained to point out that while under sec. 59.21 (8) the sheriff may not suspend a deputy without pay, where circumstances require it the sheriff may tie the hands of a deputy until the county board meets to hear charges filed by ordering the deputy to desist from the further performance of official acts and duties. As chief law enforcement officer of the county, such authority is inherent in the sheriff.

GS

Criminal Law—Fish and Game—All violations of the conservation laws after the effective date of ch. 583, Laws 1949, are subject to the penalties therein prescribed, regardless of the date of prior conviction.

March 8, 1950.

State Conservation Department.

You have asked my opinion of the proper interpretation of sec. 2, ch. 583, Laws 1949, which applies the principle of the so-called "repeater" laws to violations of the conservation laws.

This act creates sec. 29.635 to read as follows:

"(1) When any person is convicted of any violation of this chapter or of any conservation commission order, and it is alleged in the indictment, information or complaint,
and proved or admitted on trial or ascertained by the court after conviction that he had been before convicted for a violation of this chapter or of a conservation commission order, by any court of this state such person shall be fined not less than $50 nor more than $100, or imprisoned not less than 10 days nor more than 6 months or both. In addition thereto, all licenses issued to such person pursuant to this chapter shall be revoked and no license shall be issued to him for a period of one year thereafter.

“(2) When any person is convicted and it is alleged in the indictment, information or complaint and proved or admitted on trial or ascertained by the court after conviction that he had been before convicted 3 times within a period of 3 years for violations of any provision of this chapter or conservation commission order punishable under sections 29.134 (11), 29.27 (2), 29.29 (1), or 29.63 (1) (a), (e) or (g), or for violation of section 29.48, or for violation of any statute or conservation commission order regulating the taking or possession of any wild animal or carcass thereof during the close season therefor or any combination of such violations by any court of this state, and that such convictions remain of record and unreversed, whether pardoned therefor or not, such person shall be punished by imprisonment not less than 10 days nor more than one year.

“(3) No penalty for any such violation shall be reduced or diminished by reason of this section.”

You inquire whether convictions prior to the date of creation of sec. 29.635 may be considered for the purpose of determining whether the section shall apply.

The answer to your question is “Yes.”

It is now well established that a repeater statute does not create a new crime, but merely increases the penalty for an offense which is already prohibited by some other statute. 24 C. J. S. 1143, 1152. State v. Miller, (1941) 239 Wis. 334; Watson v. State, (1926) 190 Wis. 245; Mundon v. State, (1928) 196 Wis. 469; Dahlgren v. State, (1916) 163 Wis. 141:

“** The increased severity of the punishment for the subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than
should be inflicted on the person guilty of a first crime.”

Since the particular crime which is punished under such a statute is committed after the effective date of the statute, it is clear that the statute is prospective in operation only and is not subject to challenge as an *ex post facto* law, 116 A. L. R. 211, and it has been specifically ruled that it is not necessary that the first conviction occur subsequent to the enactment of the statute. 24 C. J. S. 1152, § 1960. Armstrong v. Commonwealth, (Ky. 1917) 198 S. W. 24; State v. Cass, (La. 1937) 177 So. 682; State v. Adams, (Kans. 1913) 132 P. 171; People v. Dean, (1916) 94 Misc. 502, 159 N. Y. S. 601.

RGT

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Loans—Collection Charges—Loan companies, licensed under secs. 115.07, 115.09 or ch. 214, Stats., may not, in addition to interest and charges expressly authorized by such statutes, and in the absence of judgment, charge for and collect expenses of retaking, storage and sale under chattel mortgages or expenses of garnishment.

March 9, 1950.

G. M. MATTHEWS,
Commissioner of Banks.

You have asked for a clarification of various opinions of the attorney general concerning the right of licensees under secs. 115.07, 115.09, and ch. 214 to make certain collection charges without proceeding to judgment in the event of default on loans.

The charges which you are now concerned with are of two main classes: (1) Expenses of retaking, keeping and storing repossessed goods upon default of a chattel mortgage or conditional sales contract; and (2) expenses in connection with garnishment, such as sheriff’s fees, garnishee fees, or other disbursements.
The history of the regulation of small loan companies is a history of a continuing struggle on the part of the legislature to put definite restrictions upon the charges which can be made for small loans, and on the part of the companies to find or invent new charges which have not been prohibited by law. The fundamental theory behind all small loan legislation is based on several considerations: First, that credit facilities over and above those furnished by banks and similar agencies are vitally necessary to a substantial portion of the population; second, that risk of loss on this type of business is generally greater than on ordinary banking loans, and that therefore a higher interest rate proportioned to the risk involved is just and proper; and third, as a corollary to the second proposition, if the parties are enabled to secure such satisfactory security that the risk of loss disappears or becomes negligible, the justification for the high interest rate disappears along with the risk.

Various legislatures have had more or less difficulty in translating these principles into controlling legislation, as is indicated by the diversity of case law and the opinions on the subject.

Examining the language of the various statutes separately, we find sec. 115.07 (3) (a) authorizes, in addition to 10 per cent interest, a 4 per cent service fee "in lieu of all charges for examinations, views, fees, appraisals, commissions and charges of any kind or description whatsoever in the procuring, making and transacting of the business connected with such loan." The statute has been on the books in various forms since the revised statutes of 1858, and the substance of the language emphasized was added by ch. 327, Laws 1895.

Section 115.09 was created by ch. 408, Laws 1929 and provides for the licensing of the so-called "discount" companies. Subsec. (7), para. (d) authorizes a default charge of one per cent for a default lasting more than 10 days and an additional charge of one per cent for each succeeding 20-day period. Further, paragraph (e) continues: "In addition to the discount, service fee, and default charge provided for in paragraphs (a), (b), (c) and (d), no further or other amount whatsoever shall be directly or indi-
rectly charged, contracted for, deducted, or received, except as provided by paragraph (f)." Paragraph (f) authorizes the licensee to sell property insurance and term life insurance and to receive the commission on the premiums.

Ch. 214 provides for the regulation by the commissioner of banks of so-called "small loan" companies. These companies charge a higher rate of interest than is permissible under ch. 115, and this rate is fixed by the commissioner under the authority conferred by sec. 214.07. Sec. 214.14 (6) provides: "No licensee shall, in addition to the interest or charge herein provided, directly or indirectly charge, contract for or receive any other charge or amount whatsoever for any examination, service, brokerage, commission, expense, fee, bonus or other things or otherwise."

The foregoing statutes have been the subject of several opinions of the attorney general, but unfortunately those opinions do not appear to be consistent.

In 21 O. A. G. 348, it was stated that a licensee under ch. 214 could not include in its note a provision for attorney's fees.

In 22 O. A. G. 836, it was stated that discount companies may not make a default charge in excess of 10 per cent per annum on delinquent balances.

In 28 O. A. G. 723, it was stated that when judgment was not taken, various collection costs including attorney's fees and expenses of retaking, storing and selling property, could not lawfully be charged by a licensee under ch. 214. This opinion relied on the fact that the banking department had authority under sec. 214.07 to fix the "rate of interest or charge," and that pursuant thereto it had fixed the interest rates but had made no rule authorizing other charges.

In 29 O. A. G. 10, many questions arising under secs. 115.07 and 115.09 were considered. This opinion followed the principles set out in 28 O. A. G. 723, and stated that the three different statutes should be similarly construed, and that charges for attorneys' fees or collection costs on chattel mortgages not reduced to judgment were not permissible under the statute. This opinion also stated a lender could not profit from commissions on insurance.
However, in an opinion in 32 O. A. G. 50, which did not analyze or discuss the prior opinions, it was stated that licensees under all three statutes were entitled to the costs and expenses of enforcing chattel mortgages provided by sec. 241.13 without proceeding to judgment.

And again, in 34 O. A. G. 15, it was stated: "A licensee under sec. 115.09 may not contract for or charge a delinquent borrower any fee or charge for collection expenses, delinquency or repossession fees except such as may be allowed in event of judgment or in other cases provided for by statute." The "other cases provided for by statute" are not described in the opinion and there is no indication whether it intends to adopt the construction of 32 O. A. G. 50, or the construction of the prior opinions.

See also 32 O. A. G. 133, 138:

"** Under secs. 115.07, 115.09 and ch. 214, various schemes are provided for the licensing and regulation of lenders of money, which provide for certain charges to be made in addition to the ten per cent limit prescribed by sec. 115.05. It will be noted that in each of these laws rigid limits for any charges in addition to interest are fixed."

In 34 O. A. G. 298, it was stated that lenders under secs. 115.07 and 115.09 who have made maximum charge for interest and fees may not in addition collect a commission upon insurance required as a condition of loan. (The statute has since been amended to allow sale of certain insurance.)

In view of the foregoing, it is clear that there is no consistent interpretation of the statute in the opinions cited. You state, however, that it has been your administrative practice for the last 10 years to deny the right to make charges for collections under chattel mortgages even after the opinion in 32 O. A. G. 50. You state further that all licensees of your department except one have complied with your ruling. An administrative construction of a statute by the persons charged with its enforcement is always entitled to great respect, and in the absence of other evidence of legislative intent will control. Edwards Lessee v. Darby, 12 Wheat. 206; U. S. v. Moore, (1877) 95 U. S. 760; State ex rel. Owen v. Donald, 160 Wis. 21; State ex
Passing the question of whether there is sufficient evidence of administrative interpretation to bring the foregoing authorities into play, and approaching the matter as an original proposition, it is my opinion that under the language of the statutes above quoted, none of the charges under consideration herein, either in connection with chattel mortgages or garnishment, may be collected in the absence of judgment.

While it is established law that repeals by implication are not favored, Pabst Corp. v. City of Milwaukee, 190 Wis. 349, 208 N. W. 493, 45 A. L. R. 1164, that rule is merely a rule of construction and will not be applied contrary to the clear intent of a later statute. State ex rel. Thompson v. Beloit City School Dist., 215 Wis. 409, 253 N. W. 598.

In each of the statutes under consideration, after authorizing certain charges, the legislature has stated in effect that the authorized charges are in lieu of all "charges of any kind or description whatsoever." In my opinion no stronger language can be found to declare that the authorized charges are exclusive, and the statutory language must be given effect as it is written. Under sec. 115.07, the fact that the term "transacting business" includes business after the due date and in collecting the note is clearly evidenced by the fact that through 1945 the statute expressly mentioned renewals, and the fee formerly called a renewal is now regulated by sec. 115.07 (3) (b). Sec. 115.09 in addition expressly authorizes a named default charge and others are thereby excluded by implication. Expressio unius est exclusio alterius.

Finally under ch. 214, the commissioner of banks is authorized by sec. 214.07 (2) to fix the maximum interest rate or charge and no charges of the kind under consideration herein have been authorized. Presumably the matter has been taken care of by the substantial interest rate authorized for loans under this chapter.

Accordingly, the opinion in 32 O. A. G. 50 is expressly overruled and the reference in 34 O. A. G. 15 to "other cases provided for by statute" is withdrawn.

RGT
State Board of Health—Licenses and Permits—Restaurants—Under sec. 160.21, Stats., state board of health may refuse to issue or renew a restaurant permit where the requirements of the statutes and rules of the board have not been met, and such annual permits may likewise be suspended or revoked at any time for proper cause in the manner provided by the rules of the state board of health.

March 9, 1950.

STATE BOARD OF HEALTH.

In connection with the provisions of ch. 160, Stats., relating to restaurant permits, you call attention to the fact that some of the larger cities with full time health departments have local ordinances requiring annual licensing of restaurants. As a phase of coordinating their programs with that of the state board of health in issuing state permits, the board is requested from time to time to withhold issuance or renewal of annual permits where city inspectors find incomplete compliance with state as well as municipal regulations.

You therefore raise the question of whether or not the state board of health may refuse to issue or renew an annual restaurant permit without a hearing where it is satisfied that the requirements have not been met.

Sec. 160.02 (1) provides that everyone conducting a hotel or restaurant shall procure an annual permit from the state board of health. The annual fee is $3, and the permit expires on December 31 in the year in which it is issued under sec. 160.02 (2). The fee accompanies the application (sec. 160.03). Sec. 160.04 provides that the board shall upon request furnish an application blank. This contains the name and address of the owner and lessee of the building, the name of the lessee and manager of the restaurant, the location and a full description of the building and such other information as the board requires.

Sec. 160.05 provides:

"Every hotel and restaurant and tourist rooming house shall be conducted and maintained with a strict regard to the public health and safety and in conformity with this chapter and the rules, regulations and orders of the board."
Sec. 160.06 provides:

"The board shall appoint assistants with such qualifications as it deems necessary and fix their compensation, administer and enforce the laws relating to the public health and safety in hotels and restaurants and tourist rooming houses, ascertain and prescribe what alterations, improvements or other means or methods are necessary to protect the public health and safety therein, ascertain and fix standards, and enforce orders for the adoption of such improvements and other means or methods to be as nearly uniform as practicable."

Sec. 160.21 provides:

"The board may refuse or withhold issuance of a permit or may suspend or revoke a permit for violation of any provision of this chapter or any rule, regulation or order of the board."

I am informed that renewal applications are made on the same forms as original applications. It is apparent from the foregoing that the permits are issued on a year to year basis and are not to be compared, for instance, with licenses to practice medicine or dentistry where annual registration, upon payment of fees within the prescribed time, is more or less automatic and license revocation or suspension is dependent upon notice and hearing.

The restaurant permit law requires no notice or hearing either for a refusal to issue an original application or a refusal to renew a permit or for suspension or revocation during the permit year.

Ordinarily a license or permit may be revoked for any reason that would have justified a refusal to issue it in the first instance. 53 C. J. S. 650. While it is true that generally a license to practice a profession, trade or occupation can be revoked only after the licensee has been given notice and an opportunity to be heard, notice or hearing is not required where the authorities act properly in the exercise of the police power of the state, or where the license has been issued under a statute dispensing with the necessity for notice of hearing. 53 C. J. S. 654. This is especially true where there is reason to believe that the business is a nuisance, a menace to public health, or detri-

There is no doubt sound reason for a summary suspension or revocation statute such as sec. 160.21 relating to restaurant permits because of the incalculable harm that might result to public health if an unsanitary restaurant were to be permitted to operate during the considerable period of time which would necessarily elapse between the giving of a notice of hearing to be held at a time convenient to the board and an opportunity for the reporter to prepare a transcript of the hearing and for study of the same by the board members and a meeting of the board to take action in the matter, it being remembered that the state board of health usually meets but once a month.

While there is nothing in the statutes requiring any particular procedure in the case of suspension or revocation of a restaurant permit as has already been indicated, reference must nevertheless be made to any applicable rules of the state board of health, since if there are any rules governing the matter such rules have the force and effect of law. 25 Am. Jur. 289.

By definition supplied by Title I, Rule 1.01 of the rules of the state board of health, a restaurant permit is a license subject to suspension or revocation in the manner provided by the rules of the board. Under Rule 1.02 proceedings to revoke or suspend a license may be initiated on a verified complaint by an individual or an officer required to enforce the law. The rules further prescribe the procedure to be followed and Rule 1.11 provides that notice of hearing and statement of the charges may be accompanied by an order suspending the license pending final disposition of the case.

You are therefore advised that the board may withhold issuance of an original permit on the basis of an inspection
which indicates that the requirements of the statutes and the rules and regulations of the board have not been met; that annual renewals may likewise be withheld; and that there may be summary suspension or revocation for proper cause at any time during the permit year in the manner provided by the rules of the state board of health.

WHR

Cities—Schools and School Districts—City School Board
—Sec. 40.52 (1), Stats., requires that an ordinance changing the size of a city school board, in order to be effective, must be voted upon favorably by a referendum of the electors, even when the ordinance is initiated by a petition under sec. 10.43 and approved by the council.

March 14, 1950.

DEPARTMENT OF PUBLIC INSTRUCTION.

You ask whether a city ordinance reducing the number of members of a city board of education must be voted upon favorably at a referendum of the electors before it may become effectual, even when initiated by petition and approved by the council.

The answer involves the interpretation of sec. 40.52 (1), 1947 Stats., which provides in part as follows:

"The school affairs of each city referred to in section 40.50 shall be managed by a board of education consisting of the same number of members and selected in the same manner as such board was constituted and selected at the time of the taking effect of this subsection. Such board shall continue to be so constituted and selected until and unless changed by referendum vote of the electors of such city as herein provided. Any such city desiring to change the number of members of such board or the manner of selecting them, or both, may do so either by an ordinance adopted by the council and approved by a referendum vote of the electors or by an initiated ordinance under the provisions of section 10.43. Either of the following two plans may be adopted and the provisions thereof shall be set forth in the ordinance:"

The quoted portion has been amended by ch. 566, Laws 1949, to make provision for city school districts which are enlarged to include additional territory for school purposes only, but these changes do not alter the conclusion reached in answer to your question.

The first sentence which is material to your question is as follows: "Such board shall continue to be so constituted and selected until and unless changed by referendum vote of the electors of such city as herein provided." Standing alone, the sentence makes it perfectly clear that there must be a referendum vote before there can be a change. The phrase "as herein provided" suggests that limitations upon the referendum procedure or upon the changes to be made will be found within the subsection, but does not indicate, in my opinion, that there is any exception to the rule that there must be a referendum vote. The next succeeding sentence sets forth two alternative modes of procedure. The last sentence and the two paragraphs which follow it set forth two alternative plans for reorganization, either of which may be adopted.

The sentence relating to procedure reads as follows: "Any such city desiring to change the number of members of such board or the manner of selecting them, or both, may do so either by an ordinance adopted by the council and approved by a referendum vote of the electors or by an initiated ordinance under the provisions of section 10.43."

Sec. 10.43 is the general section on direct legislation in city affairs. It is not in any way limited to questions involving school matters or the framework of city government. It provides in substance that any ordinance or resolution may be proposed by petition signed by electors equal in number to not less than 15 per cent of the vote for governor. If a sufficient petition is filed, the ordinance or resolution proposed must either be passed by the council or submitted at an election. It thus was intended as a method of forcing a council to take a position on a specific question or submit the question to the people.

It is suggested that because the sentence relating to procedure refers to an "initial ordinance under the provisions of section 10.43" a change in the size of the board can be accomplished by a 15 per cent petition coupled with council
approval. The interpretation would make the reference to sec. 10.43 (a general statute) create an exception to the requirement of sec. 40.52, specifically relating to the size of the school board, that it continue unchanged unless "changed by referendum vote of the electors of such city."

In my opinion the sentence relating to alternative methods of procedure was intended to make it clear that a referendum election on the size of the school board could be initiated either by the council or by a voters' petition meeting the standards of sec. 10.43, and not to permit an exception to the requirement of a referendum election.

As has been pointed out, sec. 10.43 was originally intended to provide a method whereby a substantial group of voters desiring a certain ordinance or resolution could force action by the council. The suggested interpretation of the reference to sec. 10.43 in sec. 40.52 (1) would permit 15 per cent of the electors, by signing a petition, to give more power to the council than it otherwise would have.

The presentation of a petition proposing a change in the size of the school board and the submission thereof by the council to the voters at an election in accordance with the provisions of sec. 10.43, followed by a favorable vote of the electors is "an initiated ordinance under the provisions of section 10.43" so as to comply with the language. It also satisfies the basic requirement that the change be "by referendum vote of the electors" and at the same time is a referendum vote which is conducted "as herein provided." This procedure meets all the requirements of sec. 40.52 (1).

The adoption by the council of a proposal presented by petition, without submission to the electorate, could be said to be "an initiated ordinance under the provisions of section 10.43" if that were the only requirement, but it does not meet the requirement that the change be "by referendum vote of the electors."

It is of value to observe, in this connection, the provisions of sec. 64.10 (3). It relates to the discontinuance of the board of education in a city under the city manager plan, and does not directly affect the question you raise. It provides, however:

"The board of education shall continue to be elected or appointed as provided by law and shall continue to have the
same power and authority as possessed prior to the reorganization of such city under this chapter, provided that such board may be discontinued by a vote of the people held in accordance with the provisions of section 10.43 of the statutes, and in such case the powers and duties of such board shall be exercised and performed by the council and city manager in accordance with the general provisions of this chapter."

It is perfectly clear under this language that there must be a vote of the people, notwithstanding the reference to sec. 10.43, before the board of education may be abolished. It illustrates again the use of sec. 10.43 as a guide to procedure.

You have called my attention to an opinion in 21 O.A.G. 540, in which an opposite conclusion was expressed. The opinion referred to is erroneous in my opinion and I do not follow it.

TEF

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_State—Civil Service—Department of state government was without authority to agree to furnish transportation to civil service employe to and from place of employment outside the city limits, where bureau of personnel had not included provision for such transportation within the salary plan pursuant to sec. 16.105, Stats. Any agreement so entered is unenforceable as to the provision for such transportation. Appointment to positions in civil service may be made only pursuant to statute. Both parties chargeable with knowledge of civil service laws._

March 15, 1950.

_BUREAU OF PERSONNEL._

You request my opinion as to whether a department of state government has the authority to furnish transportation to civil service employees to and from place of employment or to agree to reimburse therefor without previous authorization by the bureau of personnel. By way of example, you suggest a situation wherein the permanent place of employment is located at a place "beyond the city lim-
its" not conveniently accessible, and wherein the employing department agrees to transport an employe between his home in the city and such place of employment.

Sec. 16.27 (1), Wis. Stats., provides:

"(1) Neither the secretary of state, nor other fiscal officer of this state, shall draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state; nor shall the treasurer or other disbursing officer of the state pay any salary or compensation to any person in the service of the state, unless an estimate, pay roll or account for such salary or compensation containing the names of every person to be paid, shall bear the certificate of the director that the persons named in such estimate, pay roll, or account have been appointed, employed, reinstated or promoted as required by law and the rules established thereunder and that the salary or compensation is within the salary ranges fixed pursuant to section 16.105."

This statute uses the words "pay" and "compensation." Compensation may assume different forms. In essence, it is the consideration flowing from the employer to the employe in exchange for the latter's services. It may in some instances assume the form of "maintenance." In the present example it assumes the form of "transportation." Under our statutes it is the exclusive province of the bureau of personnel to establish salary ranges for each position in the classified service. See sec. 16.105, Stats. See also, 18 O.A.G. 626 and 25 O.A.G. 17.

Since your question presumes that the bureau of personnel did not exercise its prerogative of providing to the employing department a salary range which included transportation facilities, it follows as a matter of course that the employing department is without power to enter into such an agreement with an employe. And if such an agreement was consummated it would be illegal and unenforceable, at least to the extent that transportation was agreed to be provided. Appointment to positions in the civil service may be made only in accordance with the provisions of the statutes. Both parties are charged with knowledge of those provisions. 


SGH
Conservation Commission—Powers—Fish and Game—Minnows—Conservation commission has no power to establish a system of controlled taking of minnows under permit from the commission.

March 18, 1950.

STATE CONSERVATION DEPARTMENT.

You inquire whether the conservation commission has authority to prohibit the taking of minnows except under permit from your department. Such permit would require the taker to have specialized gear, facilities to handle the minnows for a commercial sale after taking, specify the waters to be fished, and impose other conditions on the permittee.

These are, in effect, the powers which the legislature refused to confer on the conservation commission when it failed to pass Bill No. 158, S., at the 1949 session.

The section of the statutes governing fishermen, sec. 29.145 (1), was amended by ch. 624, Laws 1949, to add the following provision:

"* * * but no license shall be required of any person to set, place or use in any waters of this state any landing net, dip net, minnow seine or minnow dip net for fish other than game fish."

The general considerations which govern the answer to your question are fully outlined in my opinion in 38 O.A.G. 148 in which I stated that your commission did not have power under the existing statutes to order controlled deer hunting. The present proposal may properly be described as nothing but controlled minnow taking.

Briefly, it is now well settled law that any administrative agency, including the conservation commission, has only such powers as are conferred on it by statute or may be reasonably implied therefrom. Under sec. 29.174 your commission has authority to establish open and closed seasons in any given area of the state, and establish conditions on taking for proper conservation purposes, but once it has done so every resident of the state has an equal right to take fish or game under the prescribed orders. Generally, a hunting or fishing license is a necessary prerequisite to taking, but
in the matter of minnows the statute above quoted expressly provides that no license shall be necessary. When the legislature has declared no license shall be necessary, it would appear clear that the commission has no authority to require a permit. In my opinion it has no such power.

RGT

Motor Carriers—Taxation—Exemption—Canned cream product described by canner as "scientifically processed" is not "fluid cream" nor a "dairy product" within the meaning of those terms as used in sec. 194.47 (5), Stats., as construed by our supreme court, and the transportation of such products is accordingly not exempt from the taxes imposed upon such transportation by secs. 194.48 and 194.49, Stats.

March 18, 1950.

Motor Vehicle Department.

You request my opinion as to whether a canned cream product marketed by the Liqua Dry Milk Company of Mauston is a "fluid cream" or a "dairy product" within the meaning of those terms as used in sec. 194.47 (5), Stats., which grants exemptions from certain taxes to operators of motor vehicles transporting such products.

The statute in question provides in part:

"194.47. The following operations are exempt from assessment of taxes provided by sections 194.48 and 194.49:

(5) Operations of motor vehicles which, * * * are engaged exclusively in any or all of the following operations:

(a) Transportation of fluid milk or cream, live stock or raw cheese.

(b) Transportation of butter, dairy products or unmanufactured agricultural or forest products or manufactured or burned clay or burnt limestone products immediately and directly from point of production, or * * * ."

This statute has been construed in State ex rel. Wis. Truck Owners Asso. v. Public Service Comm., (1932) 207 Wis. 664, 680, as not granting exemption in the case of
110 Opinions of the Attorney General

dairy products which have been processed. Our supreme
court in that case adopted the construction of the public
service commission, contained in an order which reads in
part:

"* * * cheese and butter produced at factories or cream-
eries may be dairy farm products in the intent of the legis-
lature. The same construction may not be put upon malted,
condensed, evaporated, powdered milk, or ice cream." (Em-
phasis supplied.)

Whether or not a product has been "processed" within
the meaning of the statute as construed by the court, is a
question of fact. The attorney general has no authority to
determine questions of fact. However, the canner or dis-
tributor of the product in question has substantially re-
solved that question by the label which he affixes to the
product. The label says that the cream contained in the can
"has been scientifically processed to maintain permanently
its freshness." (Emphasis supplied.) Accepting the de-
scription provided by the canner or distributor, it is my
opinion, upon the authority of the State ex rel. Wis. Truck
Owners Asso. v. Public Service Comm. case cited above,
that the exemption granted by sec. 194.47 (5), Stats., is not
applicable to transportation of the product in question.

For other opinions involving principles considered and
applied here, see 32 O.A.G. 267 and 38 O.A.G. 360.

SGH

Historical Society—Liability Insurance—State historical
society under sec. 44.01, Stats., is an official agency and
trustee of the state and has no liability for negligent opera-
tion or maintenance of elevators which could properly be
made the subject of public liability insurance.

March 18, 1950.

State Historical Society.

You have inquired whether the state historical society
may properly carry public liability insurance on its
elevators.
The answer to this question depends upon whether or not the state historical society partakes of the state's immunity from suit for the alleged negligence of its officers and agents. See Holzworth v. State, 238 Wis. 63. If the society is not liable in such cases its insurer would not be liable and there would be no point in paying insurance premiums. See Pohland v. Sheboygan, 251 Wis. 20.

As was pointed out in 36 O.A.G. 285 the state historical society was chartered by the legislature by ch. 17, Laws 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. Ch. 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." In addition to the funds appropriated to the society by the legislature it receives moneys 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. 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 in 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.

Sec. 44.01, Stats., as amended by ch. 52, Laws 1949, provides in part:

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

Sec. 20.78 provides in part:

"All appropriations made by law from state revenues for any department, board, commission, or institution of the state, or for the state historical society, are made on the express conditions that such department, board, commission, institution, or society pays all moneys received by it into the state treasury within one week of receipt, and conforms with the provisions of sections 14.31, 14.32 and 20.77 of the statutes, both as to appropriations of its own receipts, and as to appropriations made by the state from state revenues. * * *"

Sec. 20.785 provides:

"All moneys paid into the state treasury by the state historical society, which are paid into the state treasury pursuant to section 20.78, are reappropriated therefrom for the use of the state historical society, so paying its receipts into the state treasury."

Sec. 44.08 (1) provides in part that for the purpose of the permanent preservation of important state records and to provide for the disposition of other state records, there shall be established under the state historical society of Wisconsin a permanent committee on public records, to consist of the director of the state historical society, the attorney general, and the state auditor, or their designated representatives.

Sec. 44.08 (6) provides that the state historical society, as trustee for the state, shall be the ultimate depository of the archives of the state and the committee on public records may transfer to the said society such original records and reproductions as it may deem proper.

The employees of the society are on the state pay roll and are subject to civil service. Its printing is done by the state printer under sec. 35.33. Sec. 35.86 authorizes the director of the state historical society to procure the exchange of public printing or near printing or other reproduction for such public documents produced by federal, state, county, local and other agencies as may be desirable. In addition to the revolving appropriation made by sec. 20.785 mentioned above, there are also specific appropriations made to the society from the state general fund from time to time such as ch. 557, Laws 1949, which created sec. 20.16 (1) (f) ap-
propriating $15,000 to the society annually for micro-film purchase, and ch. 611, Laws 1949, creating sec. 20.16 (1) (e) appropriating $10,000 to the society annually for operation of its museum. There are in addition the general appropriations made under sec. 20.16 for items such as personal services, materials and expenses, property repairs and maintenance, and purchase of books, furniture, furnishings, and for other permanent property and improvements.

While the society has been considered to be a private corporation for a public purpose, State ex rel. W.D.A. v. Dammann, 228 Wis. 147, 172, it is apparent that the society has become over the years an official agency of the state and has been so declared to be by the legislature in ch. 52, Laws 1949. It can expend no funds except pursuant to legislative appropriation, and it is apparent that assuming a negligence case could be instituted against it and were carried through to judgment there would be no property out of which an execution could be satisfied. See Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242. Whatever the society owns it owns in trust for the state, and assuming liability on the part of the trustee for a tort committed in the administration of the trust, such liability is generally held to apply only in the individual and not in the representative capacity of the trustee. 54 Am. Jur. 892-3. The reason for excluding liability on the part of the beneficiary is particularly cogent where the beneficiary is the state itself. Laws in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. See Milwaukee v. McGregor, 140 Wis. 35, 37:

"* * * So it has been said, 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions, either express or implied, apply to all private parties, but 'are not rules for the conduct of the state.' Dollar Sav. Bank v. U. S., supra. That has been applied in many ways. For examples: The state may sue as freely as an individual, but cannot be sued except by its consent. It may have the benefit of a general cost statute, but it is not liable for costs without express written law to that effect. It may plead the statutes of limitations the same as an individual, or recover inter-
est as use or damages, but is not subordinate in adversary proceedings to the law on either subject, unless expressly named therein showing unmistakable legislative intent to that effect."

It is accordingly concluded that there is no liability on the part of the state historical society in the operation of its elevators which could properly be made the subject of public liability insurance in the absence of legislation on the subject.

WHR

Archparks—State and Federal Aid—Public Officers—Malfeasance—Where municipality enters into agreement with member of its own airport commission in the furtherance of an airport project being prosecuted under secs. 114.32 and 114.33, Stats., under circumstances resulting in the conviction of the member of the airport commission for violation of sec. 348.28, Stats., such agreement is null and void and the city has no liability thereunder, and accordingly cannot qualify for reimbursement from state and federal funds.

March 18, 1950.

Wisconsin State Aeronautics Commission.

You request my opinion as to "whether expenses incurred by the city of Wautoma in the prosecution of the Wautoma municipal airport project which have been determined by the circuit court of Waushara county to be the result of payments by the city of Wautoma to a municipal official in violation of sec. 348.28, Wis. Stats., are eligible expenses for reimbursement with state and federal aid."

The project in question was initiated in accordance with sec. 114.33, Stats., on January 20, 1948. An agency agreement was entered into between the city of Wautoma and your commission as provided by sec. 114.32, Stats. As agent for the city of Wautoma and in accordance with the agreement, your commission arranged for the preparation of project plans and the submission of project application to
the civil aeronautics administration with a view toward qualifying for federal aid. These plans were prepared and application approved by the civil aeronautics administration. Because of the nature of the work to be performed under the project it was decided that the project work could best be done by day labor, and an ordinance authorizing the work to be done in that manner was adopted by the city of Wautoma in accordance with sec. 62.15, Stats. The work was begun in May of 1949 under the immediate supervision of the city of Wautoma airport commission. The composition and authority of such a commission is set forth in sec. 114.14, Stats. One of the three members of this commission was one A, a resident of Wautoma. During the course of and in connection with the project, the city of Wautoma incurred expenses which it certified for reimbursement to the Wisconsin State Aeronautics Commission and for which reimbursement has been made in accordance with the statute. Certain requests for reimbursement involving payments by the city of Wautoma to A for contractual services rendered by him in connection with the execution of the airport project have been received by you, but have not been paid. On August 9, 1949, your commission was informed by the district attorney of Waushara county that criminal action had been commenced against A under sec. 348.28, Wis. Stats., for malfeasance in office in connection with the obtaining of a pecuniary interest in the contract for construction work on said airport. Thereafter your commission was advised by the clerk of the circuit court for Waushara county that A had pleaded guilty and had been sentenced by the court on the charge of malfeasance as a public officer.

Subsec. (3) of sec. 348.28, Stats., provides as follows:

"Any contract, to which the state or any county, city, village, town, school board or school district is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the state, county, city, village, town, school board or school district shall incur no liability whatever thereon."

The transaction which is the subject of the claim for reimbursement by the city of Wautoma is void. The city could incur no liability whatever thereon under the provisions of
the malfeasance statute quoted above. Your commission, therefore, cannot grant state aid nor release federal aid funds under the circumstances. The statute is clear and the matter would seem to require no further elaboration.

SGH

Fish and Game—Navigable Waters—Beaver Dams—Conservation commission is vested with exclusive jurisdiction to capture and remove beaver causing damage to private property.

When beaver have lawfully been removed from a flowage area by the conservation commission, continued maintenance of any dam renders the owner of the premises subject to the forfeiture provisions of sec. 31.23 (1), Stats., and to appropriate action by the public service commission.

March 22, 1950.

Public Service Commission of Wisconsin.

You have asked my opinion of your powers and duties under the following facts:

Beaver dams located on Rocky Run creek in Columbia county upon the land of one C have created a flowage on the lands of said C which extends farther upstream to flood the lands of an upper riparian owner, B. B is presently ditching his lands for drainage purposes and complains that the water level raised by the beaver dams is causing him injury. C who owns the land upon which the beaver dams are located considers the beavers as assets and does not want them removed. You state further that at the point where the beaver dams are located Rocky Run creek appears to be navigable in fact.

Your question is whether your commission, the conservation commission, or the two commissions acting jointly or successively have power to remedy the situation.

In my opinion the problem must be divided into two phases: (1) Removal of the beaver, (2) removal of the obstruction from the navigable water.
By the terms of sec. 29.24 (1) it is expressly provided that no person shall disturb or molest any beaver house or beaver dam. If any beaver are causing damage under the provisions of sec. 29.59 (1) it is the duty of the conservation commission to arrange for the removal of such beavers. See 37 O.A.G. 367. The facts outlined above appear to state a proper case for complaint to the conservation commission under sec. 29.59 (1). However, while the clear intent of that statute appears to be to create a remedy for the damage being done by the beavers, the conservation commission is given no statutory authority either to remove the dam or to bring any action for penalties for its maintenance, and we proceed to a consideration of the second half of the problem.

By the terms of sec. 31.02 your commission is authorized to regulate water levels in all navigable waters. Further under the provisions of sec. 31.23 (1) the maintenance of any obstruction not authorized by law in navigable waters is declared unlawful and under the provisions of sec. 31.24 (1) it is the duty of your commission to report such unlawful obstructions to the governor who thereupon will transmit that report to the attorney general for necessary legal action.

Once the beaver have been lawfully removed from their houses and flowage it would appear that the said dam is no longer protected by the provisions of sec. 29.24 (1). If the owner, by some affirmative act, should thereupon "maintain" the dam, it would thereupon become an unlawful obstruction in navigable water and the owner would subject himself to the forfeiture provided by sec. 31.23 (1). However, that question will not arise until the beaver have been removed.

RGT
Appropriations and Expenditures—Department of Veterans Affairs—Wisconsin General Hospital—Wisconsin department of veterans affairs has no power to pay to Wisconsin general hospital the cost of veteran’s care in excess of the sum of $5.90 per day provided by sec. 142.10, Stats.

March 22, 1950.

DEPARTMENT OF STATE AUDIT.

You state that Wisconsin general hospital, which, under sec. 142.10, Stats., is required to care for eligible Wisconsin veterans for a rate not in excess of $5.90 per day, has a current per patient cost for the year 1949-50 of $13.47 per day.

You inquire whether the Wisconsin general hospital can, under present statutes, collect from the Wisconsin department of veterans affairs the difference between the actual cost of care and the $5.90 rate prescribed by sec. 142.10, Stats.

The Wisconsin general hospital is operated under a revolving appropriation established by sec. 20.41 (10) and is financed by fees collected from or on behalf of patients for care furnished. There are three principal classes of patients in addition to the university students cared for through the university clinic. These three classes are (1) the veterans above referred to, (2) public patients admitted under ch. 142, and (3) private patients. By the terms of sec. 142.07 (1), Stats., it appears that fees for public patients cannot exceed actual costs, and if that cost is more than $5.90 per day, approval of the emergency board is necessary. Fees for private patients are established by the regents of the university of Wisconsin under their general authority to operate the hospital found in sec. 36.31, Stats.

As a result of the manner in which the appropriation statute is drawn, it logically follows that private patients will have to pay a greatly increased rate over cost to make up for the deficit in veterans’ fees resulting from sec. 142.10, or the revolving fund established by sec. 20.41 (10) will be operating under a permanent deficit.

Your present query is restricted, and this opinion will be likewise restricted, to the possibility of making up this
deficit through a grant of funds by the Wisconsin department of veterans affairs to the Wisconsin general hospital.

The post-war rehabilitation trust fund is established by sec. 20.037, Stats., “exclusively for health, educational and economic rehabilitation of returning Wisconsin veterans of World War II and their dependents.” By sec. 20.036 (1) (a) there is appropriated from that fund a sum sufficient for the payment of benefits to veterans and their dependents under ch. 45. (The language of this paragraph as it existed in 1945, including as an added purpose of the general appropriation “for the execution of its functions,” was expressly repealed by ch. 614, Laws 1947. Hence 35 O.A.G. 201 which relied on this language is no longer in point.) There is nothing in sec. 20.036 or elsewhere in ch. 20 which would appropriate any part of the post-war rehabilitation trust fund to the payment of the deficits of the Wisconsin general hospital. The question then remains whether such payment is a proper payment under the powers conferred on the department of veterans affairs under ch. 45 and particularly sec. 45.35 thereof. In my opinion, both the appropriation statute, sec. 20.036 (1) (a) and sec. 45.35 by their express terms limit the benefits thereby established to individual “veterans and their dependents.” In 37 O.A.G. 118 it was stated that sec. 45.35 (1) was only a declaration of policy and not an independent grant of power, and that the powers of the department were found in subsecs. (8), (8a), (8b) and (9). Any other construction of sec. 45.35 would result in an absurdity; if the department of veterans affairs could, under some implied power, make a donation to the hospital, it could likewise establish a hospital of its own, or a school, or a housing project. The fact that all these matters are specifically provided for elsewhere in the statutes clearly indicates that such was not the intent of the legislature. Further when the legislature declares that the hospital must extend care to the veteran at a daily cost of $5.90 it is difficult to see how the hospital can charge the veteran or any outside agency an amount in excess of that sum.

In my opinion, no such charge could be made, and the Wisconsin department of veterans affairs has no authority
to make a donation to the Wisconsin general hospital to cover any deficit arising out of the operation of sec. 142.10, Stats.

RGT

Automobiles and Motor Vehicles—Drunken Driving—Justice of the Peace—Jurisdiction—The fact that sec. 85.08 (24), Stats., requires court (justice of peace) to require physical surrender of operator’s license, registration, etc., does not oust justice of peace of jurisdiction to try persons on charge of operating motor vehicle while under influence of intoxicating liquor.

March 22, 1950.

Motor Vehicle Department.

You request my opinion as to whether a justice of the peace is ousted of jurisdiction to try a person on a charge of operating a motor vehicle while under the influence of intoxicating liquor, by reason of the fact that incident to the conviction of such person the statute empowers the justice of the peace to require the surrender of registration certificate and driver’s license, notwithstanding the administrative power to revoke the certificate and license is vested in the motor vehicle department.

You call my attention to 30 O.A.G. 110 as authority for the proposition that a justice of the peace is deprived of jurisdiction to try a person upon such charge. Under sec. 85.91 (3), Wis. Stats. 1939, which was in force at the time that opinion was written, the discretionary power to revoke the operator’s license was vested in the justice of the peace. The statute referred to the suspension or revocation of operator’s license as “punishment” in much the same sense as it did the fine and imprisonment penalties.

However, in 30 O.A.G. 269, following an amendment to the statute vesting the revocation power in the motor vehicle department, the opposite conclusion was reached that the revocation of license is not to be regarded as a punishment of the offender, but rather as a means of protection to the public on the theory that the conviction shows that the
defendant is not a fit person to hold a driver's license. See discussion at page 271 of that opinion.

You point out that notwithstanding the fact that the power of revocation was taken from the justice of the peace and vested in your department, there is still a requirement that the court shall require surrender of the certificate of registration and driver's license (sec. 85.08 (24), Stats.), which you suggest may be regarded as an "additional punishment" thereby ousting the justice of jurisdiction.

This point was specifically considered at pages 270 and 271 of the opinion referred to above. I adhere to the conclusion reached in that opinion and advise that it furnishes the answer to your question, namely, that justices of the peace do have jurisdiction to try persons accused of operating a motor vehicle while under the influence of intoxicating liquor, notwithstanding the court is required by statute to demand surrender of the certificate of registration and driver's license.

SGH

Automobiles and Motor Vehicles—License Plates—Failure of owner of automobile to affix and display metal insert showing expiration date of registration of motor vehicle registered under the monthly series system of registration is a violation of sec. 85.01 (6) (c), Stats., punishable under sec. 85.01 (12).

March 22, 1950.

Motor Vehicle Department.

You state that a municipal judge dismissed an action against an automobile owner for failure to have affixed to his automobile a license plate containing the metal insert showing expiration date. You do not indicate under what section of the statutes the motorist was prosecuted. You state the judge asserted the law makes no provision with respect to inserts.

You ask my opinion as to whether failure to exhibit an insert upon a license plate constitutes an offense under any
statutory provision. Sec. 85.01 (1), Wis. Stats., prohibits the operation of automobiles upon any highway unless the same shall have been registered and the prescribed fee paid. The same subsection provides: "The absence of number plates shall be prima facie evidence that the vehicle is not registered." This statute was in force prior to the adoption in the 1945 legislative session of the so-called "monthly series registration system." The practice under the old system of annual calendar year registration was to issue new plates annually. Under the new system the owner (registrant) retains his license plates permanently. This necessitates the use of some device to evidence compliance with the registration law. You have adopted the system of providing metal inserts to be affixed to the permanent plates, which show the year of expiration. When read in conjunction with the series number on the permanent plate it is clear to any law enforcement officer whether the owner is displaying evidence of proper registration.

Sec. 85.01 (6) (a) and (c), Stats., provides:

"(6) NUMBER PLATES. (a) Design, issue. The motor vehicle department shall devise, secure, issue and deliver prepaid to each owner of any motor vehicle registered in accordance with the provisions of this section except motor cycles, two official number plates, and to the owner of any trailer or semitrailer registered in accordance with the provisions of this section, one official number plate. The name: 'Wisconsin' or 'Wis.' and the registration year for which the license is issued shall be indicated thereon and the words 'America's Dairyland' shall in addition be indicated on all official number plates on automobiles.

"** **

"(c) Plates, how affixed. 1. One of the said number plates shall be firmly and rigidly fastened and placed horizontally in a conspicuous place on the front of each motor vehicle, and the other of such number plates shall be firmly and rigidly fastened and placed horizontally in a conspicuous place on the rear of such vehicle, and the number plate issued for a trailer or semitrailer shall be firmly attached in a horizontal position to the rear of such vehicle. All such number plates shall be so displayed and kept reasonably clean at all times that the same can be readily and distinctly seen and read. Any peace officer may require the operator of any vehicle on which plates are not properly displayed to display such plates as required by this paragraph. Plates shall not
be removed from any vehicle, until the plates for the succeeding year are attached, except as provided in subsection (6) (c) 2.

"2. Plates issued to owners of automobiles registered under the monthly series system of registration provided for in subsection (1b) shall remove such plates on sale or transfer of ownership of such vehicles. Such plates shall thereafter be retained and preserved by the person to whom issued, to be fastened to such other automobile as said person shall thereafter register in his name and for which he shall pay the required fee, if any be due under subsection (4) (am). It shall be a misdemeanor, punishable under subsection (12), to fasten said plates to any vehicle not validly registered in the name of the person to whom such plates have been issued."

It is my opinion that the combination use of the permanent plate and the annual insert fulfills your duty under the above statute to "devise, secure and issue" official number plates; and that an official number plate unquestionably includes the insert. The function and purpose of the insert is amply described in the literature furnished by your department to all motorists. I do not think anyone could be reasonably heard to claim misunderstanding of the duty to display the insert as part of the license plate.

Subsec. (12) provides:

"Penalty. Any person convicted of violating any provision of this section for which no penalty is otherwise prescribed shall be subject to a fine of not less than five dollars, nor more than one hundred dollars, or imprisonment in the county jail not to exceed ninety days, or to both such fine and imprisonment. The penalty provided by this subsection may be imposed by any judge or justice of the peace notwithstanding any statutes defining the jurisdiction of judges and justices in any county."

The phrase "this section" as used therein means the whole or any part (subsection) of sec. 85.01.

Any motorist reading no more than the foregoing quoted sections must clearly understand his duty to display the inserts, which are integral parts of the license plates, and his consequent liability under the penalty provision quoted for failure to so display same.

In specific answer to your question for advice upon how to instruct your officers in handling future violations, you
are advised that the offense to be charged is violation of sec. 85.01 (6) (c), Stats. Sec. 85.01 (12) is the applicable penalty provision.

SGH

Automobiles and Motor Vehicles—Drunken Driving—Criminal Law—Justice of the Peace—Jurisdiction—Unless prior conviction is alleged in complaint, justice of the peace has trial jurisdiction under sec. 360.01 (5), Stats., of criminal charge of drunken driving in violation of sec. 85.13. He is ousted of such jurisdiction only where prior conviction within one year is alleged in complaint.

March 30, 1950.

MARTIN GULBRANDSEN,
District Attorney,
Vernon County.

You have requested an opinion with reference to the following situation:
Two defendants were tried for drunken driving in violation of sec. 85.13, Stats., in the county court of Vernon county exercising the criminal jurisdiction of a justice of the peace. Sec. 85.91 (3) fixes a penalty for the said offense at not more than $100 fine or 6 months imprisonment in the county jail, or both. It provides that:

"* * * For the second or each subsequent conviction within one year thereafter such person shall be punished by a fine not to exceed $200 or by such imprisonment not to exceed one year, or by both such fine and imprisonment."

The complaints on which the defendants were tried alleged only the instant offense and made no reference to any previous conviction within one year. Both defendants were convicted and have obtained writs of certiorari from the circuit court, claiming that the penalty for second offenders, which is beyond the criminal trial jurisdiction of justices of the peace under sec. 360.01 (5), Stats., deprives the justice of jurisdiction to try any case of drunken driving.
You do not say whether these defendants have actually been previously convicted of the same offense within one year. That fact would be wholly immaterial, however.

These cases are ruled by the decision in *Belter v. State*, (1922) 178 Wis. 57, 189 N.W. 270. In that case the accused was charged in the lower (justice court) branch of the municipal court of Langlade county with unlawful possession of muskrat and mink skins. The penalty provided by statute for that offense was a fine of $50 to $100 or imprisonment in the county jail not less than 30 days nor more than 6 months or both, which penalty is within the jurisdiction of a justice of the peace. The complaint did not charge any prior conviction. The defendant pleaded guilty in the justice court branch. However, the defendant had previously been sentenced to the county jail on a charge of forgery, which sentence had been served. This fact seems to have been known to the court and if proved would have subjected the accused to a sentence up to 3 years in the state prison pursuant to sec. 4738, Stats. 1921 (359.14, Stats. 1947). The trial court, therefore, considered that the case was beyond the trial jurisdiction of the lower (justice court) branch, and therefore bound the defendant over to the upper (circuit court) branch.

The defendant was then arraigned upon an information in the upper branch, still without alleging the former conviction and sentence, and the defendant again pleaded guilty. Without requiring any proof of the former conviction and sentence the trial court sentenced the defendant to 18 months in the state prison.

The supreme court held that in any event the sentence was excessive because the prior conviction and sentence had not been proved. But it also held that because the former conviction and sentence had not been charged in the complaint, the case was within the trial jurisdiction of the lower branch and the defendant's plea of guilty placed him in jeopardy. His second arraignment in the upper branch and his plea of guilty to the information therefore constituted second jeopardy in violation of the constitution and the conviction was reversed with instructions to discharge the defendant.
It is clear from the foregoing case that unless the fact of a prior conviction is pleaded in the complaint, the case is within the trial jurisdiction of a justice of the peace if the penalty provided for a first offense does not exceed the jurisdiction prescribed by sec. 360.01 (5), even though the defendant is in fact a repeater subject to the increased penalty provided by statute.

It is even more clear that a justice of the peace may try the offense if the accused is not in fact a second offender. Almost every misdemeanor may carry a penalty in excess of the jurisdiction of a justice of the peace if the accused is a repeater. If this mere potential penalty could oust the justice of jurisdiction in a case where the facts pleaded do not show that the higher penalty may be imposed, then there would be practically no offense which justices of the peace might try and sec. 360.01 (5) would be deprived of all meaning.

WAP

Automobiles and Motor Vehicles—Finance Companies—
Banking Department—The commissioner of banks, in regulating the sale of automobile installment contracts, has power under sec. 218.01 (5), Stats., to require the inclusion in dealer participation of sums received by a finance company, 25 per cent or more of the stock of which is owned by the motor vehicle dealer or his stockholders or by his or their families.

March 30, 1950.

STATE BANKING DEPARTMENT.

You have inquired whether you have authority to issue the following order which is designed to prevent evasion of your regulations on dealer participation through the use of a dummy finance company.

“'No motor vehicle dealer licensed as a sales finance company shall increase its dealer participation in excess of the sums authorized by these rules by means of a dealer controlled sales finance company which engages in the purchase and subsequent sale or rediscount of installment sales
contracts, unless the amount of such dealer participation retained or received is disclosed to the purchaser in the manner prescribed in Rule II, D, 7 below. A dealer controlled sales finance company is defined to be a company in which 25% or more of the outstanding stock is owned by the dealer or his stockholders or by his or their families. The difference between the price at which any such controlled company shall purchase or acquire a retail installment contract and the price at which it shall sell or rediscount such contract shall be included in and constitute a part of the dealer participation.”

The powers of the commissioner of banks to regulate sales finance companies are set forth in sec. 218.01 (5), Stats., which provides:

“(a) The licensor shall promote the interests of the retail buyers of motor vehicles. It shall have power to define unfair practices in the motor vehicle industry and trade between licensees or between any licensees and retail buyers of motor vehicles.

“(c) The licensor may make such rules and regulations as it shall deem necessary or proper for the effective administration and enforcement of this section .”

Ch. 218 was created by ch. 474, Laws 1935, as an outgrowth of an investigation of finance companies conducted by the banking commission and interim advisory legislative committee created pursuant to Joint Resolution 48, A. and 61, S., Special Session of 1933–34. Sec. 218.01 (5) was repealed and recreated in its present form by ch. 417, Laws 1937.

One of the principal abuses considered by the committee was the matter of reserves, rebates and packs in installment sales of motor vehicles. In discussing this subject the committee stated:

“While installment financing of automobiles began in 1914 or 1915, the committee finds that somewhere during the period between 1923 and 1925 it really got under way and there were operating in the finance field several large national companies which purchased conditional sales contracts, chattel mortgages, and receivables from the dealers, with recourse. At the same time there were developing many individual and independent companies who seeking a larger share of this branch of consumer credit business be-
gan to purchase contracts without recourse and therefore diverted a large amount of automobile receivables into these channels.

"To counteract this trend, the large national companies began the practice of allowing reserves to their dealers, and the independent companies, in order to offset this likewise began the practice of allowing rebates on non-recourse paper. Keen competition then developed between all finance companies, whether independent or nationals, to secure the dealer's business. The result has been to enhance the evils of reserves, rebates and packs. Today, when a dealer makes arrangements to finance his paper, his first question is, 'How much do I get and when do I get it?'

"** Under the present mode of operation in the important field of automobile merchandising and credit finance, the original purpose of the dealer's reserve, rebate and pack has been lost sight of, and * * * said items are used to make additional profit not legitimately earned." pp. 34–5, Report of the State Banking Commission and Interim Advisory Legislative Committee to Investigate Finance Companies, adopted by the legislature, April 5, 1935.

From the foregoing it would appear that one of the express legislative purposes in the adoption of ch. 218 was to protect the consumer against excessive finance charges arising out of benefit to the dealer given to him to persuade him to channel his paper to a particular lending agency, and when sec. 218.01 (5) was amended to confer specific authority on the banking commission to define unfair trade practices, excessive benefits to the dealer were among the primary unfair practices that the legislature had in mind.

It is now well established that in construing an act of the legislature the court may consider the legislative journals and the reports of the legislative committees which recommend the enactment. Pellett v. Industrial Commission, 162 Wis. 596, 156 N.W. 956; Minneapolis St. P. & S. S. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N.W. 1119; Dane County v. Reindahl, 104 Wis. 302, 80 N.W. 438.

Pursuant to the authority so conferred, the banking commission proceeded on December 23, 1938 to adopt its order No. 1 relating to sales finance companies. This order defined the amounts paid to the dealer by a finance company in connection with the sale of an installment contract as "dealer
participation," determined the maximum participation that could be allowed, and declared that a dealer participation in excess of that allowed by the order was an unfair trade practice and unconscionable. The original order, with various amendments, is in effect today, and establishes the range of dealer participation from a minimum of $8 to a maximum of $20.

Since the time the order No. 1 was adopted, various lending agencies and finance companies, impelled by the highly lucrative nature of the auto finance business and the pressure of competition in the purchase of contracts, have sought to devise means of making extra payments to the dealer which would avoid the impact of the order and yet be effective in persuading the dealer to channel all his paper to the lending agency making the payment. One such scheme was the establishment of a wholly owned casualty insurance company which would appoint the dealer as agent and allow him to collect and retain 25 per cent of the insurance premium as a commission. This scheme is presently involved in litigation and will not be further discussed herein.

Another scheme, and the one to which your proposed order is addressed, is to establish a dummy finance company owned and controlled by the dealer, which does not acquire contracts for its own account and carry them with its own capital, but simply acts as a conduit to sell or rediscount the contracts with another lending agency or finance company. The difference between the price at which the dealer-owned company acquires the contract and the price at which it resells it thus enures to the dealer as an added profit over and above the amounts expressly retained as dealer participation. An analysis prepared for one rather large dealer, submitted with your opinion request, indicates that by this scheme the dealer could increase his participation from $12,532 allowable under order No. 1 on the basis of this dealer's volume to a gross of $86,568 and a net added profit of $22,388.

In my opinion, this is exactly the type of excessive dealer reserve, rebate or pack which the legislature which enacted ch. 218 intended to prevent, and if the scheme is lawful under your previously existing order No. 1, it renders the
maximum limits established by that order wholly nugatory. By the promulgation of your amended order as set forth herein, you avoid the difficult question of whether because of the nature of its ownership and control, the separate entity of the dummy finance corporation could be disregarded and the sums received by it could be charged directly against the dealer as an excessive participation received in violation of the existing order.

I conclude that the proposed order is clearly within the powers delegated to you by sec. 218.01 (5) and conforms to the legislative intention in adopting ch. 218.

RGT

Schools and School Districts—Counties—County School Committee—Mileage—Where the members of county school committee travel in car driven by one of such committee members, each member is entitled to 6 cents per mile for each mile traveled in going to and returning from the place of meeting by the most usual traveled route.

April 5, 1950.

FULTON COLLIP,
District Attorney,
Adams County.

You have advised that in performing some of their duties the members of the county school committee travel to the place of meeting in a car driven by one of the members of the committee. You inquire whether each member of the committee is entitled to mileage for such a trip or whether mileage should be paid only to the member who drives the car.

Sec. 40.303 (7), Wis. Stats., provides:

"COMPENSATION. Each member of the county school committee, except the county superintendent of schools, shall receive per diem, as fixed by the county board, of not less than $4 nor more than $8 per day for each day he attends a meeting of said county school committee. Each member of the committee shall also receive for each day he attends
a meeting of the committee compensation for other necessary expenses and mileage at the rate of 6 cents per mile for each mile traveled in going to and returning from the place of meeting by the most usual traveled route. Such per diem, mileage and expenses shall be paid by the county.”

In 24 O.A.G. 688 it was held that where the compensation of a county board committeeman is fixed at per diem and mileage, the allowance for mileage is additional compensation to cover trouble and expense connected with travel. The opinion states:

“In other words, ‘mileage’ has no direct relation to expenses actually incurred. ‘Mileage’ as used in this statute means extra compensation. The amount of such extra compensation is determined by the number of miles traveled.”

It was concluded in that opinion that where the members of a county board committee met at the courthouse and traveled from there in one automobile each member of the committee was entitled to mileage while the committee members were traveling together, in addition to a per diem. You will note that sec. 40.303 (7) states that each member of the committee shall receive in addition to the per diem “compensation for other necessary expenses and mileage at the rate of 6 cents per mile for each mile traveled in going to and returning from the place of meeting by the most usual traveled route.” In other words, the committee members are entitled to a per diem and certain other compensation. The other compensation includes other necessary expenses and also mileage at the rate of 6 cents per mile. The statute does not provide that the committee members shall be “reimbursed” for other necessary expenses and mileage. The last sentence of sec. 40.303 (7) makes it clear that the “other necessary expenses” does not include “mileage.” Under this statute there is not necessarily any relationship between the mileage to be paid and the travel expense actually incurred by the committee member.

Accordingly, it is my opinion that each member of the county school committee is entitled to mileage at the rate of 6 cents per mile for each mile traveled in going to and returning from the place of meeting by the most usual traveled route, even though several members of the commit-
tee may ride to such meeting in a car driven by one member. This does not mean, of course, that each member of the committee would be entitled to 6 cents per mile for each mile the car traveled, since the route which the driver followed might not be the most usual traveled route between the starting point and the meeting place for each member of the committee.

JRW

Fish and Game—Arrests—Sheriffs—Duties—Sheriffs have duty to accept prisoners from state conservation wardens when arrest is made without warrant under sec. 29.05 (1), Stats.

April 6, 1950.

STATE CONSERVATION DEPARTMENT.

You advise us that recently the sheriff refused to imprison a person arrested by a conservation warden for violation of the fish and game laws. You state that this took place on a Sunday, and that the arrest was made without a warrant having been issued. You ask whether or not sheriffs have a legal duty to accept prisoners who have been arrested by conservation wardens under these circumstances.

The powers of arrest of conservation wardens are set forth in sec. 29.05 (1) as follows:

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

The authority to confine after arrest is a necessary adjunct to the power of arrest. Since the wardens have the
power to make arrests without warrant, it necessarily fol-

lows that the power to confine the offender exists, or the

arresting power would be meaningless. It is public knowl-

dge that many violations of the fish and game laws take

place at night and on week ends when no magistrates are

available to issue warrants. I cannot believe that the legis-
lature intended to limit the power of arrest to instances

where a magistrate would be immediately available to issue

a warrant or set bail. This fact would, in many instances,

be almost impossible for the warden to ascertain before-

hand and would make enforcement of the fish and game

laws virtually impossible.

The sheriff is by common law and statute the jailer of his

county. As such, he is required to confine a person pre-
sented to him by a warden when the warden makes such

representations of fact as make it appear that the person

presented was properly arrested and that there is good

reason to believe that the offense charged has been com-
mited by him. The arresting officer and the sheriff have a

duty to see that the accused is brought before a magistrate

without any unreasonable delay, and they may, under some

circumstances, be liable for damages if this is not done.

You will find a discussion of the matter in the opinion is-

sued by this office on February 9, 1950, 39 O.A.G. 50.

Arrest which will result in confinement is a very serious

matter, and officers should be most circumspect in regard

to it. Once a person is under arrest, the sheriff (or warden)

has no authority to release him and allow him to go home

or intrust his care to unauthorized persons. Gebhardt v.

Holmes, (1912) 149 Wis. 428. The warden has no power to

set bail.

The question may, of course, be avoided on occasions

where the offender can be relied on to appear voluntarily at

the office of a magistrate or district attorney and where it

is probable that the arrest can be made at a later time if

required. Under these circumstances the warden would

doubtless make no arrest, but set a time for the offender to

appear voluntarily.

REB
Highways and Bridges—Counties—Under sec. 83.03 (1), Stats., county may construct or improve or repair or aid in constructing or improving or repairing any highway in the county. This includes maintenance, and under secs. 83.03 (1), 59.08 (35), 83.018 and 20.49 (8), Stats., counties may contract for the furnishing of labor, equipment and materials to local municipalities for highway purposes.

April 10, 1950.

CLARENCE G. TRAEGEER,
District Attorney,
Dodge County.

You have inquired whether a county may maintain town highways or county aid highways prior to the time they have been made a part of the county trunk system and whether the county highway commission may furnish labor and machinery on a rental basis to towns or cities.

The primary responsibility of the county for highway maintenance is that provided by sec. 83.025 (2), Stats., which provides that the county trunk system shall be marked and maintained by the county.

Sec. 83.02 designates what constitutes the county aid highway system, and sec. 83.06 provides:

"All streets and highways improved with county aid under this chapter shall be maintained by the towns, cities and villages in which they lie but this provision shall not diminish or otherwise affect the duty of the county with respect to any street or highway which is a portion of the county trunk highway system, nor the powers of the county conferred by section 83.03 (1) and (2) or 59.08 (35)."

Hence so far as legal duty is concerned the sole responsibility of the county for highway maintenance is with respect to county trunk highways. This, however, does not answer the question of how far the county may go by way of permissive or voluntary maintenance of highways other than county trunk highways, and it should be noted in passing that county financial aid to towns and villages for improvement of county aid highways may become mandatory under certain circumstances set forth in sec. 83.14.
Sec. 83.03 (1) provides that the county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county.

In 25 O.A.G. 702 it was ruled that the county may not take over or maintain town roads without making them part of the county trunk system of highways. It should be pointed out, however, that at that time sec. 83.03 (6) (now 83.03 (1)) was narrower in scope than it is today. Then the county could only "construct or improve or aid in constructing or improving any road or bridge in the county." Now it may also "repair or aid in repairing." See ch. 214, Laws 1939.

This gives rise to the question of whether or not the legislature by adding the words "repair or aid in repairing" to "construct or improve or aid in constructing or improving" has in effect so broadened the statute as if it were to read "maintain or aid in maintaining." If there is any distinction it would appear under the authorities to be a distinction without a material difference.

The word "maintain" is practically the same thing as "repair" which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction. Missouri K. & T. R. Co. v. Bryan, (Tex.) 107 S.W. 572, 576. The "maintenance" of a street has the same meaning practically as the word "repair:" Barber Asphalt-Pav. Co. v. Hezel, 155 Mo. 391, 56 S.W. 449, 451, 48 L.R.A. 285. In Beal v. Erie R. Co., 51 Ohio App. 397, 1 N.E. 2d 328, 330, it was considered that the word "maintain" in a statute relating to bridges and abutments was used in the sense of to keep in repair or in substantially the same condition as when constructed.

Thus to all practical intents and purposes sec. 83.03 (1) as now worded is sufficiently broad to authorize the county board to maintain or aid in maintaining any highway in the county, and the view expressed in 25 O.A.G. 702 is no longer applicable because of the subsequent amendment of the statute.

Your second question relating to the authority of the county highway commission to furnish labor and machinery for highway or street work by towns, cities, or villages on a contract or rental basis is answered by reference to sec.
59.08 (35) which confers upon the county board the authority:

“To provide by ordinance that the county, may, through its highway committee or other designated county official or officials, enter into contracts with cities, villages and towns within the county borders for the purpose of enabling the county to construct and maintain streets and highways in such municipalities.”

Attention is also called to sec. 20.49 (8) relating to the allotment of state aids for local roads and streets. Among other things this statute provides:

“* * * The above sums allotted for each such mile may be used for snow clearance, ice prevention, and dust alleviation purposes. The amounts allotted to the towns and villages shall be expended by the town and village officers, subject to the supervision and approval of the county highway committee, but the town and village boards may authorize the work to be done by the county. If the work is done by the county, the amount allotted for towns and villages shall be paid into the county treasury. A report of the work done shall be made each year by the town or village board, if the town or village does the work, and by the county highway commissioner if the work is done by the county. Copies shall be filed with the clerk of the town or village, the county clerk and the highway commission. * * *”

Also, sec. 83.018 provides:

“The county highway committee is authorized to sell road building and maintenance supplies on open account to any city, village or town within the county; and any such city, village or town is authorized to purchase such supplies, but no account with any municipality shall exceed $1,000 at any time.”

The provisions of secs. 59.08 (35), 83.018, 83.03 (1) and 20.49 (8) mentioned above furnish ample authority for arrangements between the county and local municipalities whereby the county can furnish labor, machinery and materials for local highway work. See 36 O.A.G. 69. While the statutes above discussed make no specific mention of machinery rental arrangements between the county and local municipalities, this authority would seem to be implied under all of the circumstances and especially under sec. 83.03 (1) which authorizes county aid in constructing or improv-
ing or repairing any highway in the county without specifying the particular form in which the aid is to be given. Presumably the aid could be in the form of machinery rental if the county and local municipality through their respective representatives should so agree.

WHR

Counties—Highways and Bridges—Where the state highway commission institutes proceedings under sec. 84.02 (3) (a), Stats., to relocate a portion of the state trunk highway system involving a deviation from the existing location exceeding 2½ miles in two counties, and one county board has approved the change but the other one has not, the latter may give its approval later in the absence of any county board rule of procedure to the contrary.

April 12, 1950.

STATE HIGHWAY COMMISSION.

You state that pursuant to sec. 84.02 (3) (a), Stats., the state highway commission initiated proceedings proposing changes in the location of a certain state trunk highway in La Crosse and Trempealeau counties. Since the proposed change affected more than 2½ miles of highway a public hearing was had and the decision of the commission was referred to the county boards of each of the counties for their approval which is required under the statute. The public hearing was held on March 31, 1949 and the Trempealeau county board approved the proposed change at its April 1949 meeting. In La Crosse county no action was taken until the September 1949 meeting of the board when the proposal failed to secure the approval of the board, although the commission has never received any official notice of the action of the La Crosse county board.

The question is raised as to whether such board could now approve the proposed change so as to make it effective.

Sec. 84.02 (3) (a) provides:

"Changes may be made in the state trunk system from time to time by the commission, if it deems that the public
good is best served by making such changes. The commission, in making such changes, may lay out new highways by the procedure under this subsection. Due notice shall be given to the localities concerned of the intention to make changes or discontinuances, and if the change proposes to lay a highway via a new location and the distance along such deviation from the existing location exceeds 2 1/2 miles, then a hearing in or near the region affected by the proposed change shall be held prior to making the change effective. Whenever the commission decides to thus change more than 2 1/2 miles of the system such change shall not be effective until the decision of the commission has been referred to and approved by the county board of each county in which any part of the proposed change is situated. A copy of the decision shall be filed in the office of the clerk of each county in which a change is made or proposed."

It will be seen that the statutory requisites for a change exceeding 2 1/2 miles are as follows: (1) Due notice to the localities concerned, (2) a hearing in or near the region affected prior to the making of the change, (3) referral to and approval by the county board of each county in which any part of the proposed change is situated, and (4) filing of a copy of the decision in the office of the clerk of each county in which a change is made or proposed. There are no time limits specified and there is no requirement to the effect that the entire procedure must be initiated anew if one of the county boards disapproves the change but thereafter approves the same.

There appears to be no statutory limitation on the power of the county board to act favorably upon a proposal which it has previously disapproved, and the general rule is that where a county board exercises functions which are legislative, administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action, provided rights in third persons have not become vested thereunder. 20 C.J.S. 872. A county board may, of course, adopt rules governing its reconsideration of acts which may be reconsidered. Such rules are controlling, and will be presumed to have been complied with, in the absence of proof to the contrary. 20 C.J.S. 873.
Consequently, in the absence of any rule of procedure of the La Crosse county board to the contrary, it would appear that favorable action may now be taken upon the proposed change and that such change will be effective assuming that all other requirements of sec. 84.02 (3) (a) have been met. WHR

Highways and Bridges—Counties—County aid to town is mandatory under sec. 83.14, Stats., only where the improvement is on a designated portion of a county aid highway as defined under sec. 83.02, Stats.

April 13, 1950.

JAMES L. McMONIGAL,
District Attorney,
Green Lake County.

You state that one of the villages in your county presented a petition to the county board requesting an appropriation by the county of $2,000 for the improvement of a road wholly within the village, and included with the petition a certified copy of a resolution adopted by the village board indicating that the village had theretofore appropriated a similar sum of $2,000 to match the $2,000 requested from the county.

The petition in question purports to be submitted under the authority of sec. 83.14, Stats., and the question is whether county aid under the circumstances is mandatory or discretionary. It might be mentioned at the outset that sec. 83.14 was amended in several respects by ch. 227, Laws 1949, but none of the amendments are material to this opinion.

Assuming that all of the conditions of sec. 83.14 have been met, its provisions for county aid are mandatory under subsec. (3) which provides that the county board shall thereupon appropriate for the improvement a sum equal to or greater than the amount voted therefor by the town or village.

However, sec. 83.14 (1) with reference to initiation of such an improvement refers to "a designated portion of a
county aid highway" and the petition to the county board should show that the project so qualifies. Otherwise the mandatory provision of sec. 83.14 (3) does not come into operation. It would therefore appear that the county board was acting properly in rejecting the petition which you inform us did not show that the road was a portion of a county aid highway. See 24 O.A.G. 253 to the effect that where a town strictly follows the provisions of sec. 83.14, Stats., for improving prospective state highways, county aid therein provided is mandatory and otherwise is discretionary. See also 26 O.A.G. 167.

In applying the provisions of sec. 83.14 (1) you inquire what is meant by a "county aid highway."

Sec. 88.02, Stats., provides:

"(1) The systems of prospective state highways heretofore selected by the county boards and approved by the state highway commission are hereby validated but without prejudice to the exercise of the power to change such systems. Such systems are hereby designated as the county aid highway system.

"(2) The state highway commission, on the petition of at least 100 freeholders, may, after investigation, make such alterations in the system of county aid highways as it deems necessary to serve the public interest.

"(3) The county board may alter such systems with the consent of the state highway commission."

Consequently the county board records as well as the records of the state highway commission should show what highways are county aid highways under subsecs. (1) and (3) and the state highway commission records alone should indicate what alterations have been made in the county aid highway system under subsec. (2).

WHR
Juvenile Court—Minors—Commitments—Ch. 117, Laws 1949, amending sec. 48.07, Stats., by inserting a provision for commitment direct to a suitable public institution was intended to apply only to dependent or neglected children and not delinquents, and does not conflict with sec. 54.09.

April 19, 1950.

State Department of Public Welfare.

You have asked whether the amendment of sec. 48.07, Stats., by ch. 117, Laws 1949, resulted in any change in the requirements of sec. 54.09 with respect to the commitment of a delinquent juvenile.

Ch. 546, Laws 1947, created the youth service act dealing principally with delinquent children. It provided in sec. 58.69 (now 54.09):

“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.”

Prior to the enactment of the youth service act, sec. 48.07 (1) (b) provided that a child found to be delinquent, neglected or dependent might be placed on probation or under private supervision or in private custody, or committed to a suitable public institution or to a suitable licensed child welfare agency. Ch. 546, Laws 1947, for the apparent principal purpose of making sec. 48.07 (1) consistent with the requirements of sec. 54.09, above, amended it so as to authorize the commitment of a child found to be delinquent, neglected or dependent to “the department of public welfare, or to a suitable child welfare agency.”

While the creation of sec. 54.09 changed the rule only as to delinquent children, sec. 48.07 (1) (b) applied to neglected and dependent children as well. You inform me that this raised a question as to the handling of such children. Although advised that authority to commit a neglected or dependent child to the child center might still be found in sec. 48.07 (1) (c) (36 O.A.G. 626, at p. 630) your department requested the introduction of a bill which became ch.
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117, Laws 1949. This chapter again amended sec. 48.07 (1) (b) so that it specifically authorized commitment to a suitable public institution.

As so amended, sec. 48.07 (1) (b) read as follows:

“(1) If the court shall find that the child is delinquent, neglected or dependent, it may:

"* * *

“(b) Commit the child to a suitable public institution, 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 suitable institution or agency; or,”

There were further amendments, not here material, effected by ch. 393, Laws 1949, and ch. 639, Laws 1949.

Hence the question presented is whether the 1949 amendment to sec. 48.07 (1) (b) impliedly amends or repeals sec. 54.09 as it applies to delinquent children, or whether the power to commit to a public institution, now found in sec. 48.07 (1) (b) applies only to dependent and neglected children.

The youth service act was passed by the legislature after a great deal of study and consideration. It is modeled after a proposal of the American Law Institute after a long national study of the problem of juvenile delinquency. The provision for the commitment of delinquents to the department instead of directly to the institution is a vital part of the act. I believe that had the legislature intended to make such an important change, it would have done so by amending sec. 54.09 itself and not by any implied repeal or amendment of this section.

There is a well established rule of statutory construction that implied repeals are not favored and that all statutes, or parts thereof, must be given effect if possible.

Ch. 232, Laws 1949, is entitled “An Act to amend 48.09 (1), 48.15, 48.17 (1) and (2), 48.18, 58.07 (4) of the statutes, relating to clarification of statutes on commitment of
children." It deals with statutes in pari materia with sec. 48.07. The effect of this law is to harmonize the statutes amended thereby with the commitment procedure change in the youth service act. The statutes pertain to administrative procedure and are clearly indicative of the intent of the legislature to carry out the plan of direct commitments of all delinquents to the department of public welfare.

There are very liberal rules of statutory construction that may be used when the wording of a statute obscures the intent. In the case of State v. Maas, (1944) 246 Wis. 159, 164–165, the court said:

""* * * To discover the legislative purpose in an enactment, hidden in obscurity, as has often been said, the court can and should consider the "surrounding circumstances, the existing condition of things, the evils to be remedied, the objects to be attained" (Clark v. Janesville, 10 Wis. *186), "look at the whole and every part of the statute and the apparent intention derived from the whole, to its subject matter, to its effect and consequences, and to the reason and spirit, and thus ascertain the true meaning of the legislature." Harrington v. Smith, 28 Wis. 43. Having discovered the evident legislative intent, the letter should be sacrificed, within the uttermost boundaries of reason, to effect it.' State ex rel. McGrael v. Phelps (1910), 144 Wis. 1, 9, 128 N.W. 1041, and cases there cited; Price v. State (1919), 168 Wis. 603, 616, 171 N.W. 77; Bewley v. Kipp (1930), 202 Wis. 411, 233 N.W. 71."

It is my opinion that the only reasonable intent that can be ascertained was that the provision of sec. 48.07 allowing direct commitment was meant to apply only to dependent and neglected children and not to those found to be delinquent.

TEF
REB
County Judge—Salaries and Wages—Statutes—Repeal of Specific by General Statute—Opinion published September 30, 1935 in 24 O.A.G. 631 to effect that provision relating to salary of county judge of Marquette county as contained in ch. 450, Laws 1921, is not modified by amendment to sec. 253.15, Stats., made by ch. 468, Laws 1935, reaffirmed.

ANDREW P. COTTER,
District Attorney,
Marquette County.

You have asked whether it is still the opinion of this office, as discussed in 24 O.A.G. 631, that the salary of the county judge is fixed by ch. 199, Laws 1931, so that the county board has no power to change it.

Ch. 450, Laws 1921, as amended by ch. 199, Laws 1931, provides in part:

"An act conferring additional jurisdiction on the county court of Marquette county.

"* * *

"Section 12. The county judge of Marquette county shall receive an annual salary of fifteen hundred dollars, for performing the duties of his office, to be paid out of the county treasury in equal monthly installments at the end of each month. In addition he shall be paid out of the county treasury fifty dollars per month for the performance of the additional duties imposed through the increase in his civil jurisdiction to two thousand dollars."

An amendment to sec. 253.15 of the statutes by ch. 468, Laws 1935, created subsec. (1) which provides:

"The annual salary of the county judge shall be payable out of the county treasury and shall be fixed by the county board at the annual meeting preceding the ensuing year in which he is to be elected. The salary so fixed shall not be increased or diminished during the term of the county judge."

The question is primarily one of ascertaining legislative intent, because the legislature has full power over the ques-
tion how the compensation of county judges shall be fixed. See the discussion of the history and development of county courts in the dissenting opinion in *State ex rel. Sanderson v. Mann*, (1890) 76 Wis. 469, 480, 487, 45 N.W. 526. *Anderson v. Industrial Commission*, 250 Wis. 330, 336.

The provisions of ch. 199, Laws 1931, which fix the salary of the county judge so as to place it beyond the power of the county board to change it, are inconsistent with the provisions of sec. 253.15 (1) which authorize and require the county board to fix the salary before the commencement of each term. The question is resolved into the narrow one whether the legislature intended the general enactment in sec. 253.15 (1) to repeal and supersede the inconsistent provision in the previously enacted private and local law relating to Marquette county court.

You are evidently not in accord with the result reached in 24 O.A.G. 631.

I see no reason for departing from that opinion, however. It was issued 13 days after the enactment of ch. 468, Laws 1935, which it construes. It has remained unchallenged through seven successive sessions of the legislature. The legislature's failure to change the law suggests acquiescence and is entitled to weight.

Sec. 59.15, Stats., at all times, including 1921, contained the general rule that the county judge's salary be fixed by the county board. The special act for Marquette county made a specific exception. The 1935 enactment of sec. 253.15 (1) relating to county courts substantially restated the general rule which previously (and thereafter) appeared in sec. 59.15. Under the circumstances I see no evidence of an intention in 1935 to repeal all specific limitations in previous local laws.

TEF
SGH
Automobiles and Motor Vehicles—Licenses and Permits
—Driver's License—Statutes—Construction—Legislative history of chs. 38 and 634, Laws 1949, amending sec. 85.08 (25c) (a), Stats., clearly supports conclusion that petition for occupational driver's license is to be filed in the designated courts located in the county of petitioner's residence. Phrase "in the county of residence" modifies "court of record" as well as "municipal court having criminal jurisdiction." Rule of modification of last antecedent not applicable.

May 3, 1950.

Motor Vehicle Department.

You request my opinion as to whether an application for order for issuance of occupational driver's license under sec. 85.08 (25c) (a), Stats., as amended by chs. 38 and 634, Laws 1949, may be filed in the courts located in counties other than the county of residence of the petitioner. The statute reads:

"85.08 (25c) OCCUPATIONAL LICENSES. (a) Upon verified petition setting forth in detail the need of any person convicted of violating any law or ordinance prohibiting a person from operating a motor vehicle while under the influence of intoxicating liquor, a judge of a court of record or of a municipal court having criminal jurisdiction in the county of residence may order the commissioner to issue an occupational license to such person provided that such person has not been convicted of any such offense within the preceding 18-month period. A copy of the petition shall be mailed to the department with the occupational order. No occupational license shall be ordered or issued until after 90 days following the date of the conviction."

It has been suggested that the "last antecedent" rule of construction requires that the phrase "in the county of residence" applies only to "municipal courts having criminal jurisdiction."

For the reasons hereinafter stated, it is my opinion that the phrase does not modify only the last antecedent but modifies all classes of courts vested with jurisdiction to entertain petitions under the statute in question.

An ambiguity is apparent when the practical aspects of the problem are encountered under varied factual situa-
You state that various courts are construing the statute differently. The orders are issued in *ex parte* proceedings to which you are not made party, and hence you cannot appeal from such orders. The petitioner, obtaining the order for which he applies, is not aggrieved and is neither entitled nor disposed to raise the question. It is at the instance of one of the judges who made an order contrary to your interpretation of the statute that this opinion is requested. Otherwise, I would refrain from expressing opinion thereon.

Legislative history of a statute is a reliable and valuable aid to statutory construction. In the present instance the legislative intent is patent from the history, and under such circumstances the arbitrary "last antecedent" rule must yield.

It will serve no useful purpose to set down in complete detail the various steps of progress of the statute through the legislature. The files are available as public records for all to see. It is sufficient to note that in substance the earlier drafts provided for petition to courts of record in the county of *conviction*; and that subsequently the phrase "of residence" was substituted for "of conviction." The bill then conferred jurisdiction upon all courts of record in the county of petitioner's residence. Thereafter, the class of courts was enlarged to include "municipal courts having criminal jurisdiction." The designation of this class of courts was inserted in a preliminary typewritten draft by longhand interlineation. It was ultimately printed in a proposed amendment. It is clear from the time sequence of the changes in the draft that the phrase "county of residence" modified "courts of record" before the class of courts was enlarged to include the municipal courts having criminal jurisdiction.

It is further significant from other information you communicated to me that the change from *county of conviction* to *county of residence* was intended to make it more convenient for petitioners to apply to judges of courts in their own counties, rather than to have to travel to distant places to obtain their occupational licenses. Under the former statute, courts could grant occupational licenses at the time of conviction. If a licensee were convicted in a court located in
a county distant from his county of residence, he could obtain his occupational license upon a proper showing at the same time his unrestricted license was revoked. However, since there is now a 90-day mandatory waiting period before the licensee is eligible to apply for an occupational license, the situation might frequently occur where a person is convicted of operating under the influence of intoxicating liquor in a county in the opposite end of the state. If required to apply to the court of conviction, and if an issue were made of whether applicant’s employment required the use of an automobile, he might have to transport witnesses at substantial expense to the opposite end of the state. This affords a logical and reasonable explanation of why the legislature chose to permit all the courts described in the statute located within the county of residence to receive such petitions. On the other hand, there is no logical reason which I can perceive why the legislature would single out municipal courts having criminal jurisdiction and limit the jurisdiction in the proceedings under consideration to only those in the county of petitioner’s residence.

The foregoing explanation fortifies the conclusion reached by consideration of the legislative history.

SGH

Public Assistance—Old-Age Assistance—32 O.A.G. 10 modified to conform to amendment of sec. 233.23, Stats., which enlarges husband’s right of curtesy from a life estate to a one-third part of the lands of which his wife died seized. Old-age assistance lien enforceable against curtesy right in real estate.

May 4, 1950.

LARRY D. GILBERTSON,
District Attorney,
Jackson County.

You have inquired whether there has been any change in the opinion printed in 32 O.A.G. 10 and request that such opinion be brought down to date unless there has been no material change.
In the opinion above referred to it was ruled that the:

(1) "Property acquired by wife upon death of her husband, through assignment of her dower and homestead rights, is subject upon her death to claim under sec. 49.25, Stats., for old-age assistance given her, except for her homestead rights when such rights are limited to life estate."

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

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

In the absence of any suggestion to the effect that the conclusions reached in such opinion are incorrect or doubtful, my re-examination of the opinion is limited to such changes as may be indicated by amendments of the statutes involved since the date of such opinion.

While there have been some minor changes in the wording of sec. 49.25 relating to the recovery of assistance from the estates of deceased persons, such changes in no way affect the conclusions reached in 32 O.A.G. 10.

There have been some substantial changes in the organization and content of the material in sec. 49.26 (4) and (5) since the date of the above opinion, but here again such changes do not affect the precise questions considered in that opinion.

There have been no changes in sec. 233.01 respecting the widow's right of dower with which the opinion is primarily concerned.

Sec. 237.02 relating to homesteads has had substantial revision by ch. 316, Laws 1943, and ch. 245, Laws 1949, but not so far as the homestead rights of the widow are concerned for the purposes considered in the opinion.

However, there has been such a fundamental change in sec. 233.23 relating to the husband's right of curtesy as to require a modification in the answer to the third question covered by the previous opinion.

Sec. 233.23 formerly read:

"The husband on the death of his wife shall hold the lands of which she died seized and which were not disposed
of by her last will and testament for his life as tenant thereof by the curtesy; provided, that if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same discharged from the right of the surviving husband to hold the same as tenant by the curtesy; provided further, that in case of any husband whose wife dies after August 31, 1921, then any right of curtesy he may have attained shall be extinguished upon his remarriage.” (1941 statutes.)

By ch. 316, Laws 1943, this was amended to read:

“The husband on the death of his wife shall be entitled to one-third of the lands of which she died seized and which were not disposed of by her last will and testament; provided, that if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same discharged from the right of the surviving husband to the same.”

By ch. 371, Laws 1947, sec. 233.23 was repealed and re-created to read:

“The husband of every wife dying after September 1, 1947 shall be entitled to curtesy defined to be a one-third part of all the lands of which she died seized of an estate of inheritance and which were not disposed of by her last will and testament. But such surviving husband shall have no curtesy in any homestead of which his wife died seized, except in the proceeds thereof in lieu of his homestead rights in case of the sale of the premises while he has homestead rights therein.”

There have been no changes in this section since 1947. Hence it is no longer true as was stated in 32 O.A.G. 10 that a husband’s right of curtesy is limited to a life estate and that an old-age assistance lien is not enforceable as against the husband’s curtesy right unless he attempts to transfer such right during his lifetime. In other words his curtesy rights are now quite similar to the dower rights of a widow and would stand on the same footing so far as enforcement of an old-age assistance lien is concerned.

WHR
Automobiles and Motor Vehicles—Insurance—A foreign insurance company which has not complied with sec. 201.32, Stats., is not authorized to do business in this state within the meaning of sec. 85.09 (5) (c), Stats. Motor vehicle department may not accept notice of insurance forms from such companies.

May 5, 1950.

Motor Vehicle Department.

I have your request for an opinion as to whether your department may accept written notices of insurance under the safety responsibility law from companies writing insurance in accordance with sec. 201.63, created by ch. 436, Laws 1949.

The so-called safety responsibility law is embraced in subsecs. (5) through (16) and (31) through (40) of sec. 85.09, Stats. Subsec. (5) prescribes the terms and conditions under which security is required following an accident, and states the conditions under which owners and operators of motor vehicles involved in the class of accidents which render the section operative are excused from posting security. Para. (b) of said subsec. (5) provides among other things that the section shall not apply under various circumstances if an automobile liability policy with respect to the motor vehicle involved in the accident was in effect at the time of such accident.

Para. (c) of subsec. (5) provides in part as follows:

"No such policy or bond shall be effective under this subsection unless issued by an insurance company or surety company authorized to do business in this state, except that if such motor vehicle was not registered in this state, or was a motor vehicle which was registered elsewhere than in this state at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this subsection unless the insurance company or surety company if not authorized to do business in this state shall execute a power of attorney authorizing the commissioner to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however * * *.”

It is clear from the foregoing that the safety responsibility law requires that the automobile liability policy with
respect to vehicles registered in the state of Wisconsin be written by insurance companies authorized to do business in this state. The only circumstances under which a notice of insurance from an unlicensed out-of-state company may be accepted and recognized by your department under the language of the quoted paragraph is when the motor vehicle covered by such notice of insurance was registered elsewhere than in the state of Wisconsin at the effective date of the policy or the most recent renewal thereof, provided, however, such unlicensed company complies with the requirement that it execute a power of attorney authorizing the commissioner to accept service on its behalf of notice or process in any action upon the policy within the statutory limits.

The pertinent part of ch. 436, Laws 1949, to which you refer me, sec. 201.63 (1) and (2), reads as follows:

"(1) The commissioner of insurance may issue a surplus lines license to any agent authorized under section 209.04 which shall grant such agent authority to procure the kinds of insurance provided for under section 201.04 (1), (2), (5), (12) and (15) from companies not licensed in this state under the conditions prescribed in this section. Every license issued pursuant to this section shall be for a term expiring on January 31 next following the date of issuance and may be renewed for ensuing periods of 12 months. Before any such license shall be issued and before each renewal thereof a written application shall be filed by the applicant in such form as the commissioner may prescribe and the fee provided therefor by section 200.03 (6) shall be paid.

"(2) Before any insurance shall be procured in an unlicensed company the agent shall make an affidavit which shall be promptly filed with the commissioner, that he is after diligent effort unable to procure, from any licensed insurer or insurers, the full amount of insurance required to protect the interest of the insured."

The question necessitates the interpretation of sec. 85.09 (5) (c), set forth at length above, to determine whether the words "an insurance company * * * authorized to do business in this state" include so-called unlicensed companies whose insurance may be procured by agents qualifying for a so-called "surplus lines license" under sec. 201.63.

Sec. 201.63 does not expressly authorize or license insurance companies to do business in this state. In fact, subsec.
(4) actually employs the words “unauthorized insurer or insurers.” By its express terms, the statute does no more than to permit the issuance of a “surplus lines license” to insurance agents to enable them, under prescribed conditions, to procure designated types of insurance from companies not licensed in this state.

It has been suggested that if the present question were litigated, our supreme court would follow the case of Ferm v. Moore, (1930) 201 Wis. 273. I do not agree. That case involved a construction together of secs. 201.47, 201.49, 203.07 (2) and 348.488, Stats., with reference to an insurance agent’s liability, both civilly and criminally, for an act which would have been unlawful unless full effect was given to a license specifically authorizing him to perform the act. In that case the court was dealing with a square conflict in statutes and had to resolve a substantial inconsistency. In the present case there is no inconsistency to resolve. In the Ferm case the agent was entitled to the doubt being resolved in his favor, for if it were not so resolved, he would have been guilty of commission of a felony. Criminal statutes are construed strictly against the state and in favor of the accused.

In enacting sec. 201.63, the legislature was considering the interest of the person desiring to be insured. As to him the usual requirements were relaxed upon a showing that he could not procure the insurance elsewhere in any licensed company. However, the dominant interest under sec. 85.09 is not that of the insured, but rather of the person damaged. Different considerations of public policy are present. Under sec. 85.09 the convenience of a direct suit against the insurer is preserved to an injured person. By following the Ferm decision, that convenience would be lost.

The one exception already permitted in sec. 85.09 is conditioned upon the filing of a power of attorney. It seems unlikely that the legislature would establish an additional exception by implication, where there is no conflict of a character that compels a construction. For these reasons I do not regard the Ferm case as controlling here.

In addition to automobile insurance, the surplus lines with which sec. 201.63 deals are fire insurance, marine insurance, liability insurance and sprinkler leakage insur-
ance. Automobile insurance, therefore, is but one of five enumerated kinds which may be written under the section in question. While the underwriting difficulty sought to be surmounted by the enactment of the section in question is not made clear by any factual presentation in your request, the fact that four other principal kinds of insurance are involved strongly negatives the suggestion that it was intended that sec. 85.09 (5) (c), Stats., be amended by implication.

An insurance company authorized to do business in this state within the meaning of sec. 85.09 (5) (c), in my opinion, is either a domestic insurance company organized under and by virtue of the laws of the state of Wisconsin, or a foreign company which has complied with sec. 201.32, Stats., which prohibits the direct or indirect transaction of insurance business in this state except upon compliance with the requirements of said section. Sec. 201.63, created by ch. 436, Laws 1949, does not purport to amend or alter in any way the provisions of sec. 201.32, Stats.

You therefore may not accept written notices of insurance under the safety responsibility law from companies issuing insurance in accordance with sec. 201.63, Stats.

SGH

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**Taxation—Saw Logs or Timber**—Subsec. (7) of sec. 70.13, created by ch. 123, Laws 1949, does not impose a special severance tax but merely provides that saw logs or timber cut from public lands and on hand on May 1 are assessable as personal property in the assessment district where the public lands are located against the person owning the same on May 1.

May 8, 1950.

WISCONSIN DEPARTMENT OF TAXATION.

You ask whether subsec. (7) of sec. 70.13, Stats. 1949, created by ch. 123, Laws 1949, imposes a severance tax upon all saw logs or timber that were removed from public
lands during the year next preceding May 1, which tax is computed by the application of the general property tax rate of the district where such public lands are located to the value of such saw logs or timber, or whether it merely fixes the district in which public lands are located as the tax situs of such saw logs or timber removed therefrom during said year as are on hand and exist on May 1, even though physically located on that date in another assessment district.

For this subsection to impose a severance tax it would have to contain clear and impelling language to that effect and constitute a complete tax law. It would necessarily have to provide all of the requisites for such a tax to operate. This it might do either by specifically setting them out or by express reference adopting or making applicable provisions elsewhere in the statute. It does not do so. In all instances of special taxes such as in secs. 70.41 to 70.425, Stats., the legislature has so provided.

There is no provision as to the rate, the base upon which to be computed, the method of assessment or levy, when and by whom collected, whom the tax is against or the disposition of the proceeds. In all the other special tax provisions, such as in secs. 70.41 to 70.425, Stats., it is stated expressly that a tax is thereby imposed and the rate and tax base are expressly provided. Likewise those provisions specifically authorize the local assessor to include such special tax in the assessment roll and state that the tax is collectible in the same manner as taxes on personal property.

Any resort to the general property tax provisions in ch. 70 of the statutes in an attempt to give this provision operative effect as imposing a special tax would be ineffective. Nothing in sec. 70.66, Stats., providing for the rate and its extension by the clerk into the tax roll is applicable, for that is a general property tax rate solely applicable to general property tax assessments. While sec. 70.10 provides that the assessor is the one to fix the tax base it relates only to general property assessments and specifies clearly that the assessment is to be on the basis of value as of the close of the first day of May in each year. Sec.70.34, Stats., provides that personal property shall be valued by the assessor at true cash value. Such provisions would be inapplicable
because they authorize and provide for the determination of assessed value solely for general tax purposes and definitely fix the time of such value as of the close of May 1 each year. Thus, no provisions in ch. 70, Stats., confer any power upon local assessors to make the assessment of such a special severance tax. Furthermore, no provision in ch. 70 would authorize the inclusion of such tax in the general property tax assessment roll.

The legislature had before it the form of the special tax provisions in said secs. 70.41 to 70.425, Stats. Instead of following the pattern thereof and making this provision a separate section it was placed as a new subsection in sec. 70.13, which deals with the place of assessment of personal property. It is therefore my opinion that it was not intended to impose a new and separate severance tax but rather to give saw logs or timber removed from public lands a tax situs in the district in which such public lands are located, regardless of the fact that on the assessment date of May 1 such logs or timber may no longer be in that district but in another assessment district.

Sec. 70.18, Stats., provides that personal property shall be assessed to the owner thereof except when in the charge or possession of some other person. As the assessment is made as of the close of May 1 the assessment is to be made against the person who is the owner thereof on May 1 or the person who is in charge of or possesses the same on that date. The next to the last sentence in subsec. (7) of sec. 70.13 reads as follows:

"The term 'owner' as used in this subsection is deemed to mean the person owning the logs or timber at the time of severing."

Thus there is a question whether this sentence conflicts with sec. 70.18 with the result that the assessment is to be made against the one who removed the logs or timber from the public lands or the one who is the owner thereof on May 1. If there is a conflict then the provisions of subsec. (7) would control as there is a provision therein that it "shall supersede any provision of law in conflict therewith."

However, the rule is well established that if at all possible statutes are to be so construed as to avoid conflict. The only
The subsection definitely places the obligation of making the report upon the person who severed the logs or timber. It will be of no assistance to the assessor in that district if the report includes all of the logs or timber removed from the public lands during the preceding year. The information needed is the amount, character and value of such saw logs or timber as were cut during the year which are still in existence on May 1 and the location and ownership thereof on that date. This provision should be given a practical construction as merely requiring a verified statement in respect to such saw logs and timber as still have existence on May 1, with their location and ownership. Such a report may impose somewhat of a burden upon the one who has severed the logs or timber. But if the report is to have any value as the basis for making an assessment such must be its content, and in my opinion the provision in respect thereto must be given that interpretation so as to be consistent with the operative effect of the subsection as merely constituting an exception to the general provisions in subsec. (1) of sec. 70.13 that all personal property shall be assessed in a district where it is located on May 1.

You also ask, in the event the subsection is construed as not imposing a severance tax, how the portion of an owner's saw logs or timber on hand on May 1, which is to be attributable to and assessable in the district where the public lands are located, is to be determined when the saw logs or timber on hand are the result of commingling saw logs or timber removed from public lands with saw logs or timber
from other sources. There is no provision in this subsection for any such apportionment on any percentage, pro rata, or fractional basis. As subsec. (7) is construed as merely providing an exception to the general provision in subsec. (1) that all personal property be assessed where located, for it to operate and be applicable it is necessary that saw logs or timber to which it is applied must be capable of identification. In other words practicalities necessitate the identification of saw logs or timber as being cut from public lands in order for them to be given a special tax situs in a district other than the one where they are located on May 1 and excluded from the general property assessment made against the owner thereof in a district where they are physically present on May 1. Unless so identifiable there is no basis upon which to apply this subsection.

Another question submitted is whether the identity of saw logs or timber as coming within the applicability of this subsection is lost when they are processed into lumber or manufactured articles prior to May 1. Under the construction given herein to this subsection it would follow that they would no longer have an existence on May 1 as saw logs or timber and thus would not come within its application.

HHP

Schools and School Districts—Referendum Election—Words and Phrases—School Year—The school year referred to in sec. 40.303 (14) (a), Stats., expires at the end of the school term fixed by the district meeting or board authorized under the statutes to fix such term for the district involved.

May 12, 1950.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You have referred to sec. 40.303 (14) (a) of the statutes, as created by ch. 501, Laws 1949, providing for referenda on certain orders altering the boundaries of school dis-
and you inquire the meaning of the term "one school year" as used in the following sentence:

"* * * a referendum election may be held to approve any order of a county school committee creating, altering, consolidating or dissolving school districts * * * provided a petition for such referendum election * * * is filed with the county school committee within 30 days after such reorganized district has been operating one school year under the state aid system * * *.”

Sec. 370.01 (10), Stats., provides that the word "year" shall be a calendar year unless otherwise expressed. In using the term "school year" in the section above quoted, the legislature has removed the provision from the scope of sec. 370.01 (10) and has indicated a recognition that there is a difference between a year as defined under sec. 370.01 (10) and a school year.

It was stated in Francis v. Shawnee Mission Rural High School, 170 P. 2d 807, 811, 161 Kan. 634, that the term "school year" has a "recognized meaning not only in educational circles but quite generally." The court said in Smith v. Board of Education, 113 S.E. 147, 149, 153 Ga. 758, that the phrase "school year" is generally understood to mean a term of about 9 months.

The Wisconsin legislature has not expressly defined the term "school year." It has made a number of statutory references, however, which we believe throw light upon what is meant by the term as used in the statutes. In sec. 40.04 (11), which is entitled "SCHOOL YEAR, NINE MONTHS MINIMUM," authority is conferred upon the annual district meeting of common school districts "to determine the length of time the school shall be taught during the current year (not less than nine months) but if it shall not be so determined the district board shall determine the same." Sec. 40.371 (1) (c) provides that school must be held at least 180 days per year before a district may qualify for state aid. Sec. 40.41 (5) authorizes high school district meetings "to determine the length of time the high school shall be taught * * * which shall not be less than nine months." Sec. 40.53 (1) gives to school boards of cities the same right to determine the length of the school term as is given to common school districts.
The legislature has fixed a minimum of 9 months, or 180 days, as the basic school term, but has given to the district meetings or school boards of the various districts the right to determine whether they will adopt a longer term and to determine when the term shall begin and end.

As suggested in the opinion in 35 O.A.G. 164 the beginning and end of a period designated in a statute must be determined from the purpose and context of the statute if it is not expressly fixed.

The legislative purpose in sec. 40.303 (14) (a) was to insure an adequate trial period before commencement of referendum procedure, by requiring operation under the new district for an entire school year. See 38 O.A.G. 381. To insure the trial period the legislature intended, the operation would have to cover the full period during which the school was operated in the district involved as fixed by the proper agency after the alteration of the boundaries. That period is determined in each case by the district meeting or school board, with the statutory limitation that it may not be less than 9 months.

In fixing the dates for filing referendum petitions, the legislature may also have had in mind the practical consideration of making it possible to carry out all the procedure necessary to effectuate a change, during the period when the operation of the school would be least affected, that is, between school terms.

The standard provided by the legislature contemplates a fixed date as the end of the school year, but it need not be the same for each district. The date in each case is the one fixed according to law for the end of the school term in the district involved.

BL
Schools and School Districts—Automobiles and Motor Vehicles—School Busses—If a motor vehicle is owned and operated by a municipality or school district, exclusively in the public service, the question of whether a charge is made for the service need not be considered in determining whether the vehicle may be registered under sec. 85.01 (4) (g), Stats.

A vehicle owned by a private individual and operated under contract with a school district for transportation of school children may not be registered under sec. 85.01 (4) (g), Stats.

May 17, 1950.

Motor Vehicle Department.

You have asked two questions relating to operation and licensing of school busses. Your first question is:

“1. Can a municipality or school district operating a school bus which is registered under the provisions of 85.01 (4) (g) make a charge, either of individual passengers or for an entire group when transporting school children or various groups of adults, when such transportation does not fall into the categories set forth in 85.08 (1) (c) or 110.035? If your answer is in the negative, should such school busses be required to pay the registration fees provided in Section 85.01 (4) (dm) if such transportation is furnished and such charges made?”

You state that for many years it has been the policy of your department to register school busses owned by municipalities or school districts under the provisions of sec. 85.01 (4) (g), and privately owned school busses operated under a contract with a municipality or school district under sec. 85.01 (4) (dm). I am assuming without specific consideration, as was done in 29 O.A.G. 398, that registration of school busses owned and operated by municipalities and districts, generally, is covered by sec. 85.01 (4) (g).

Sec. 85.01 (4) (g) reads in part:

“State and municipal vehicles. Automobiles, motor trucks, motor delivery wagons, trailers or semitrailers owned and operated exclusively in the public service by the state of Wisconsin, or by any county or municipality
thereof, and motor busses owned and operated by a private school or college and used exclusively for transportation of students to and from such school or college and not used for hire shall be registered by the motor vehicle department upon receipt of a properly filled out application blank accompanied by the payment of a registration fee of $1 for each of said vehicles or trailers. * * *"

I assume that your question arises primarily because of the use of the words "and not used for hire" in the foregoing provision. That restriction, however, was apparently not intended to apply to vehicles "owned and operated exclusively in the public service by the state of Wisconsin, or by any county or municipality thereof."

The phrase "and not used for hire" was included in the statute by ch. 373, Laws 1935, when provision was made for extending its coverage to motor busses owned and operated by private schools and colleges. Prior to that amendment, sec. 85.01 (4) (g) provided for registration of enumerated motor vehicles "owned and operated exclusively in the public service" by the state or its divisions, without any reference to use of the vehicles for hire. The words added by ch. 373, Laws 1935, were obviously not intended to change the law as it related to publicly owned and operated vehicles, but only to add provision for vehicles owned by private schools and colleges.

Sec. 40.34 places certain limitations upon the powers of school districts and municipalities with respect to transportation. Sec. 40.34 (10) provides that no part of the costs shall be charged to the children transported or their parents or guardians for transportation to and from school. Sec. 40.34 (8a) (b) authorizes a charge for transportation to extracurricular school activities. Certain costs may be charged by the transporting district to other districts and municipalities. See sec. 40.34 (10). See also sec. 40.34 (1) (c) and (d), which provides that transportation may be furnished under contracts between two or more school districts. In such cases, presumably some arrangement would be made for apportionment of costs.

In any event, the legislature provided for the enforcement of the restrictions contained in sec. 40.34 through the administration of school aids; because sec. 40.34 (11) says
that no state aid shall be paid to a district which charges the cost of transportation against pupils transported or their parents or guardians.

The commissioner of the motor vehicle department has authority to enforce rules and regulations respecting the design, construction, inspection and operation of vehicles used for the transportation of school children. Sec. 40.34 (3). His duties in that respect relate to such matters as affect administration of licensing and registration, and safety of operation. They do not extend to general administration of the school laws. As pointed out in 21 O.A.G. 859, questions involving the authority of districts or municipalities are not ordinarily to be determined by the official administering the registration and traffic laws. The limitations upon the authority of districts and municipalities may involve widely varied factual situations, and application of legal principles. Administration of the registration law would be unduly complicated if the propriety of a municipality's acts had to be determined upon each application for registration.

If a vehicle is owned and operated exclusively in the public service by a school district or municipality, that satisfies the conditions of sec. 85.01 (4) (g) so far as registration is concerned.

Your second question is:

"2. Is the department correct in requiring privately owned school busses under contract to a municipality or school district for the transportation of school children to be registered under the provisions of 85.01 (4) (dm) when such vehicles are operated for hire as stated in the foregoing paragraph?"

As pointed out in 29 O.A.G. 398 a vehicle must be both owned and operated by the state or a subdivision thereof in order to fall within the terms of sec. 85.01 (4) (g). If the vehicle is privately owned, other than by a private school or college, it is excluded from the section. The legislature has not changed the terminology which was the subject of the interpretation in the opinion in 29 O.A.G. 398. Presumably it is satisfied with such interpretation. A privately owned school bus, under contract to a municipality or school
district, therefore, would be subject to registration under sec. 85.01 (4) (d) or (dm) depending upon the nature of the operation.

BL GS

Criminal Law—Abandonment—Venue of Prosecution—
A Wisconsin court would not have jurisdiction under secs. 351.30 and 351.31, Stats., to penalize a father residing in Wisconsin for failure to support his children during periods when the latter were residing in another state with their mother.

May 22, 1950.

RONALD J. CAREY,
District Attorney,
Dunn County.

In your letter of March 30, 1950, you present a question involving a husband and wife who are divorced. The judgment awarded custody of the minor children to the wife and required the husband to pay support money for their care. The wife later moved, with the children, to another state. The husband, who remained in Wisconsin, has since neglected and refused to contribute toward the support of his children. You ask if a criminal action can be brought against him in Wisconsin under sec. 351.30, Stats.

You referred to 4 O.A.G. 1109, 11 O.A.G. 527, 12 O.A.G. 643, 13 O.A.G. 227 and 20 O.A.G. 47. Under these opinions and the case of Adams v. State, 164 Wis. 223, it is the place where the children were located during the period of the violation that fixes the venue in prosecution of the father for failure to support them.

The facts you report are the same as those involved in the Adams case, supra, except that here the wife and children moved out of the state instead of moving to another county. This circumstance would not render inapplicable the principle of the Adams case. The facts are not such as
to fall within the reciprocal provisions of sec. 351.30 (1a),
Stats., created by ch. 67, Laws 1949.

This opinion has no bearing upon the enforcement of the
judgment of divorce through contempt proceeding.
BL

Automobiles and Motor Vehicles—Railroad Crossings—
Supreme court decisions in civil negligence cases hold that
tucks operated as contract, private and common carriers
of property are required by sec. 85.92 (2), Stats., to stop at
railroad tracks, but a number of reasons are suggested why
the court might in a future case decline to follow the earlier
decisions and might limit the statutory requirement to
passenger busses, school busses and trucks carrying more
than 100 gallons of inflammable liquids.

May 23, 1950.

You have requested an opinion as to whether all motor
vehicles are required by sec. 85.92 (2), Stats. (as
amended by ch. 610, Laws 1949), to stop at railroad cross-
ings, "or only vehicles engaged in the common or contract
carrying of persons or property, in addition to school busses
and vehicles carrying more than 100 gallons of inflammable
liquids."

Sec. 85.92 (2) provides as follows:

"Any person operating any motor vehicle described in
sections 40.34 and 194.01 or a vehicle carrying inflammable
liquids in quantities over 100 gallons who shall drive any
such vehicle on or across a grade crossing with the main
line tracks of any railroad or interurban railway company,
whether or not such crossing is protected by crossing pro-
tective devices or by flagmen, without coming to a full
stop at a distance from such tracks of at least 20 and not
more than 40 feet, shall be fined not less than $10 nor more
than $100, or imprisoned not less than 10 nor more than 90
days, or both. The provisions of this section do not apply
to crossings with interurban railroad tracks which are laid
on or along public streets within the corporate limits of
any incorporated city or village. The school board or public service commission may refuse to accept the bond of any person who has been convicted of a violation of the provisions of this section, and may cancel any such bond theretofore issued if it believes that the safety of the public requires such action."

The words italicized, together with certain other changes, were added by ch. 610, Laws 1949.

The foregoing section was first enacted by ch. 206, Laws 1923, and appears as sec. 85.23, Stats. 1923. That section was captioned "Busses stop at railroads" and applied to "any person operating any motor vehicle described in section 194.01." Section 194.01, Stats. 1923, provided as follows:

"194.01 Jitneys declared common carriers; regulation. Every person, firm or corporation operating any motor vehicle along and upon any public street or highway for the carriage of passengers for hire and affording a means of local, street or highway transportation similar to that afforded by street railways, by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the course on which such vehicle is operated or may be running is hereby declared to be a common carrier, and is hereby required to furnish reasonable and adequate service at just and reasonable rates, and is hereby required to operate over such general routes or within such territory, and during such hours as may be reasonably required for the accommodation of the public in accordance with the following provisions."

Since the original enactment in 1923 of what is now sec. 85.92 (2), sec. 194.01 has been repealed three times and each time a new sec. 194.01 was enacted. The original sec. 194.01 (quoted above) described only motor vehicles used as common carriers of passengers. That was repealed by ch. 390, sec. 1, Laws 1925 and a new sec. 194.01 was enacted in very much the same form, but including also common carriers of property. Again, by ch. 395, sec. 1, Laws 1927, that was repealed and a new sec. 194.01 was enacted which defines motor vehicle as including all self-propelled vehicles used for the transportation of persons or property for compensation, but defining "auto transportation company" in such a way as to include only common carriers, with certain exceptions. Finally, by ch. 488, sec. 1, Laws 1933, sec. 194.01
was again repealed and a new sec. 194.01 was enacted defining “motor vehicle” so as to include practically every self-propelled or motor driven vehicle except motor cycles, motor vehicles operated on rails and trackless trolley cars, and defining the carriers regulated to include common carriers of passengers and freight and contract and private carriers of freight. That is, in substance, what sec. 194.01 of the current statutes now provides.

Then, by ch. 181, Laws 1939, sec. 85.92 was amended so as to include school busses (sec. 40.34) in the class of vehicles required to stop at railroad crossings, and again by ch. 610, Laws 1949, the statute was renumbered and amended to include vehicles carrying more than 100 gallons of inflammable liquids.

The question is, to what does the reference to sec. 194.01 in sec. 85.92 (2) relate? Does it relate only to sec. 194.01, Stats. 1923, which was in force at the time of the original enactment of sec. 85.92 (2) (then 85.23)? If so, then it refers only to common carriers of passengers.

On the other hand, did the repeal of sec. 194.01, Stats. 1923, and the enactment of a new sec. 194.01 in 1925 operate to amend sec. 85.92 (2) (then 85.23) so as to include common carriers of property as well as of passengers? And does sec. 85.92 (2) now refer to sec. 194.01 of the present statutes, and if so to what vehicles mentioned therein does it refer?

Certainly, when sec. 85.92 (2) was first enacted as sec. 85.23, Stats. 1923, the legislature intended thereby to require that only busses carrying passengers for hire should make the required stop. The obvious purpose was to provide for the safety of passengers riding in the busses. In the subsequent repeals and new enactments of sec. 194.01 the legislature did not have in mind the question of what vehicles must stop at railroad crossings, but was considering only what operators of vehicles should be subject to regulation by the railroad commission (now the public service commission and the motor vehicle department). To say that any vehicles other than common carriers of passengers, school busses, and trucks carrying more than 100 gallons of inflammable liquids are required under penalty of criminal prosecution, to stop before driving upon a main line rail-
road track is to say that drivers of such other vehicles are subject to a criminal statute which the legislature did not, at the time the statute was enacted, intend to apply to them. Such a construction would be contrary to the general rules (a) that statutes should be so construed as to effectuate the legislative purpose, and (b) that in case of uncertainty penal statutes should ordinarily be read so as to minimize rather than to extend their penal character.

There is another rule of construction which would seem to apply to the present situation: We have here a case of so-called "legislation by reference." Sec. 85.92 (2) refers to sec. 194.01 for the sole and specific purpose of determining what vehicles are included within the requirements of sec. 85.92 (2). It is not a general reference to ch. 194 relating to the regulation of motor carriers by the public service commission and the motor vehicle department. The rule of construction relating to "legislation by reference" has been succinctly stated as follows by the Wisconsin supreme court in George Williams College v. Williams Bay, (1943) 242 Wis. 311, 316, 7 N.W. 2d 891:

"* * * By this doctrine when a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. This is to be contrasted with adoption by reference of limited and particular provisions of another statute, in which case the reference does not include subsequent amendments. 2 Lewis' Sutherland Statutory Construction (2d ed.), p. 787 et seq., secs. 405, 406. See Cole v. Donovan, 106 Mich. 692, 64 N.W. 741." (Italics supplied.)

In the third edition of Sutherland, Statutory Construction, see §§ 5207, 5208. Here we do not have a mere amendment—we have a repeal of the adopted statute.

This interpretation of the statute would be fortified to some extent, also, by the fact that sec. 85.23, later sec. 85.92, up to and including the 1947 statutes, was entitled "busses stop at railroads." However, the section title is no part of the statute, and therefore no very strong inference can be drawn therefrom. Sec. 370.01 (48), Stats.

The 1949 legislature evidently did not consider sec. 85.92 (2) as being applicable to all vehicles subject to regulation
under ch. 194, Stats. 1947. If it had so considered the statute, it would have been apparent that it included gasoline trucks regardless of whether they carry more than 100 gallons of inflammable liquid. Yet, the legislature industriously inserted into the statute a requirement that trucks carrying more than 100 gallons of inflammable liquids should make the required stop. This amendment is wholly meaningless if the statute is to be construed as applicable to carriers of property as defined in sec. 194.01 of the current statutes.

In summary, the application of the usual rules of statutory construction would appear to require the conclusion that the reference in sec. 85.92 (2) to sec. 194.01 refers only to 194.01, Stats. 1923, and not to the present or current statutes. However, a number of decisions of the state supreme court are inconsistent with that interpretation.

Zenner v. Chicago, St.P.,M.&O.R.Co., (1935) 219 Wis. 124, 130, 262 N.W. 581, was a wrongful death action arising out of a collision between a milk truck operated as a contract carrier and a railroad train. The only reference in the briefs to the statutes here under consideration was at page 2 of the brief of the railroad company, which stated as follows, with reference to the deceased: "He failed to bring his truck to a full stop as required by sections 85.92 and 194.01, Wisconsin statutes, which statutes are applicable to drivers of motor vehicles used for the purpose of transporting property."

Counsel for the plaintiff made no mention whatsoever of either statute. Their history was not related to the court, and the assertion that sec. 85.92 was applicable to drivers of motor vehicles used for the purpose of transporting property was not challenged. In the opinion of the court the following appears:

"* * * When it is further considered that deceased was a carrier of freight for hire, and required by the provisions of secs. 85.92 and 194.01, Stats., to stop at a distance not more than forty nor less than twenty feet of the railroad track, it becomes at least doubtful whether a jury could hold deceased less negligent than defendant, even if neither warning was sounded by defendant."
Keegan v. Chicago, M., St. P. & P. R. Co., (1947) 251 Wis. 7, 10, 27 N.W. 2d 739, was a wrongful death action arising out of a collision between a truck used as a common carrier of freight and a railroad train. The brief for the railroad company gives some attention to the construction, but not the history, of secs. 85.92 and 194.01, and asserts that 85.92 applies to common and contract carriers, relying on the Zenner case, supra. The plaintiff's brief concedes the point. The supreme court held that the driver of the truck was guilty of negligence because he failed to stop as required by sec. 85.92, Stats.

Garlock v. Chicago, M., St. P. & P. R. Co., (1948) 252 Wis. 269, 274, 31 N.W. 2d 582, was also an action for wrongful death, arising out of a collision between a truck operated as a contract motor carrier and a railroad train. In its brief the railroad company cited sec. 85.92 and relied on the Keegan and Zenner cases. Sec. 194.01 was not mentioned. Neither statute was mentioned in the briefs of the plaintiff. The supreme court stated in part as follows:

"** As Garlock was engaged in the business of transporting milk for hire as a duly licensed 'contract motor carrier' (within the definition of that term in sec. 194.01 (11), Stats.), there were applicable to him the provisions in sec. 85.92, Stats. **"*

The deceased was held to have been negligent, based partly upon the fact that he failed to stop the truck before entering upon the tracks.

In none of the foregoing cases did counsel for the plaintiff question whether or not sec. 85.92 applied to carriers other than common carriers of passengers.

The foregoing three cases expressly hold that sec. 85.92 (now 85.92 (2)) applies to trucks operated as common and contract carriers and by implication clearly indicate that the same rule would be applied to private carriers since they are also defined in present sec. 194.01. Nevertheless, the legislature in 1949 amended 85.92 (after renumbering it) by inserting the requirement relating to gasoline trucks. Since then two additional cases have reached the supreme court, which arose, however, before the 1949 amendment.

Glendenning Motorways v. Green Bay & W. R. Co., (1949) 256 Wis. 69, 72–73, 39 N.W. 2d 694, was a suit for
property damage arising out of a collision between plaintiff’s truck, a common motor carrier, and a railroad train. Plaintiff’s brief contained an argument, without referring to the history of the statutes, that sec. 85.92 was intended to apply only to busses. However, a separate two-page document entitled “Memorandum on Legislative History of Section 85.92, Wisconsin Statutes” seems to have been submitted to the court although the opinion makes no reference to it nor to its contents. This latter document points out that when sec. 85.92 (then 85.23) was enacted in 1923, sec. 194.01 then referred only to “transportation of passengers for hire by motor vehicle.” It also mentions the fact that sec. 85.23 was renumbered 85.92 in 1929 and mentions the 1939 amendment which added the reference to sec. 40.34. It does not point out that sec. 194.01, Stats. 1923, was repealed and that sec. 194.01, Stats. 1947, was an entirely new and different statute. It does not mention the rule of construction above referred to relating to “legislation by reference.” It does not mention the 1949 amendment incorporating into the statute vehicles carrying inflammable liquids. In answer to the contention that sec. 85.92 was intended to apply only to busses, the opinion of the supreme court states as follows:

“(1) Examining the portion of the statute, ‘Any person operating any motor vehicle described in sections 40.34 and 194.01,’ sec. 40.34, Stats., refers generally to the transportation of school children, and sec. 194.01 (1) describes motor vehicles as follows:

“‘Motor vehicle’ means any automobile, truck, trailer, semitrailer, tractor, motor bus or any self-propelled or motor-driven vehicle, except a motor-driven cycle or a vehicle operated on rails, or trackless trolley car.’

‘Ch. 194, Stats., is the Motor Vehicle Transportation Act and confers upon the motor vehicle department and the public service commission the power, authority, and duty to supervise and regulate common motor carriers of passengers and property, contract motor carriers, and private motor carriers for which a certificate, license, or motor-vehicle permit must be issued.

‘Plaintiff’s argument that every private automobile would have to stop is not material here. However, its claim is without merit for an automobile would not be included under ch. 194, Stats., unless it were used for hire in the transportation of passengers or property. [Italics supplied.]
"In the present case plaintiff's vehicle was one of those described by sec. 194.01, Stats., and it was the driver's duty to come to the full stop contemplated by sec. 85.92.

"See Zenner v. Chicago, St.P.,M.&O.R.Co. (1935), 219 Wis. 124, 130, 262 N.W. 581; Keegan v. Chicago, M.,St.P.& P.R.Co. (1947), 251 Wis. 7, 10, 27 N.W. (2d) 739; and Garlock v. Chicago, M.,St.P.&P.R.Co. (1948), 252 Wis. 269, 275, 31 N.W. (2d) 582, wherein it was held that it was the duty of the motor carrier to stop."

A month and a half later the supreme court again applied sec. 85.92 in Lang v. Chicago & N.W.R.Co., (1949) 256 Wis. 131, 135, 138, 40 N.W. 2d 548. This was an action by the driver of a truck for injuries sustained by him in a collision between his truck and a railroad train. Reference to the brief of plaintiff shows that it was conceded that the truck had a statutory duty to stop under sec. 85.92. Without mentioning whether the truck was operated as a common, contract or private carrier, the court laid down the general rule that "a truck driver is required under the statute to come to a full stop, not to stop at his discretion," citing the Glendenning case.

Accordingly it is difficult to advise you with any degree of certainty. On the one hand, the rule of construction referred to above, as asserted by the author of a standard legal treatise and expressly recognized by the Wisconsin supreme court, and the interpretation evidently placed on the law by the 1949 legislature, as described above, both lead to the conclusion that the reference to 194.01 refers to 194.01 as it existed in the 1923 statutes and not to common, contract and private carriers of property.

On the other hand five decisions of the supreme court have been inconsistent with the interpretation suggested above.

Of course it is my duty to advise you of the law as interpreted by the court. Normally nothing further need be said. If, however, you enforce the law in accordance with these decisions, a criminal proceeding involving the question may reach the supreme court, and it seems to me that it is fair to you to point out that in this situation there are several reasons why the court might not follow its earlier decisions. They are:
(1) We find by checking the briefs in these five cases that the rule of construction above referred to and the legislative history of this statute were not fully presented to the court.

(2) The act of the 1949 legislature amending sec. 85.92 (2) would have been unnecessary if the interpretation of the section in the supreme court decisions was correct; this fact indicates that the understanding of the legislature is contrary to that of the court. In a future case the court might give great weight to this legislative interpretation.

(3) The five previous decisions were in civil actions. While the interpretation of the law should be the same in both civil actions and criminal proceedings, the court might, in a criminal proceeding where the question was squarely presented as the main issue, be more likely to re-examine the basis for its prior decisions.

TEF
WAP

_Municipalities—Housing Authorities—Taxation—Payment in lieu of taxes which may be made by local housing authority to city under secs. 66.40 (22) and 66.404 (1), Stats., may not exceed the amount which would result from the application of the city tax rate to the valuation of the property of the local housing authority._

Under secs. 66.40 (22) and 66.404 (1), Stats., local housing authority may not make payments in lieu of taxes to either the state or county.

May 24, 1950.

RONALD J. CAREY,
District Attorney,
Dunn County.

During the year 1945 the city of Menomonie organized a local housing authority pursuant to the provisions of sec. 66.40, Wis. Stats. This authority acquired land and placed thereon certain housing units which it obtained as bailee of the Federal Public Housing Authority. From January 1,
1946 to July 9, 1946 the housing authority of the city of Menomonie operated this housing project under the terms of a contract with the FPHA dated November 1, 1945. On July 9, 1946 the FPHA and the housing authority of the city of Menomonie entered into another contract relative to the operation of this housing project. The contract of July 9, 1946 was executed by the FPHA pursuant to Title V of the Lanham Act (Public Law 849, 76th Congress) and provided in part:

"1.01 Termination. The aforesaid contract entered into the 1st day of November, 1945 and the bailment provided therein is terminated as of the execution of this contract and the provisions of the former contract are superseded by this contract which shall hereafter evidence the only agreement between the parties with respect to the subject matter hereof. * * *

"1.02 As of the date hereof the FPHA hereby sells, conveys and quitclaims unto the local body, and the local body accepts, all right, title and interest in and to the dwelling accommodations identified in the aforesaid contract entered into the 1st day of November, 1945.

"* * *

"2.01 Management by Local Body. * * *

"The local body shall manage and operate the project with efficiency and economy and in accordance with the provisions of this contract (including the approved project management plan) and in accordance with such further rules, regulations and standards as may be deemed appropriate by the local body and consistent with the provisions of this contract.

"* * *

"2.04 Expense of Management and Operation. All necessary and normal expense for the management and operation of the project incurred by the local body in accordance with the provisions of this contract may be charged to and paid from the rents and revenues derived from the project. Such expense may include all taxes, special assessments, licenses, and other fees (or payments in lieu of any thereof) which would normally be assessed against the property if it were privately owned and which are attributable (on a pro rata basis) to the period for which the site is used pursuant to the provisions and for the purposes of this contract; provided that the amount of any of such taxes, assessments or payments shall be submitted to and approved by FPHA before any such item may be charged against operating expense. (In the event the FPHA disapproves the amount of any such tax, assessment or payment, the local body shall exhaust its remedies to obtain a reduction or correction in
the amount thereof in a manner satisfactory to FPHA before any such disapproved item is charged as an operating expense.) ** **

“2.07 Payment of Net Revenue to FPHA. Within 30 days after the end of each fiscal year ending June 30, (and within 30 days after the closing of occupancy of the project for the purposes hereof) the local body shall pay to FPHA all net revenue derived from the operating and management of the project during the preceding fiscal year or portion thereof. The term ‘net revenue’ shall mean the amount by which project operating income exceeds project operating expense, computed in accordance with the provisions of this contract.”

The contract of July 9, 1946 was amended by a contract entered into between the same parties on April 18, 1947. However, it does not appear that the amendment modified the provisions of the contract of July 9, 1946 in any respect which would be material in determining the answer to your question.

The city of Menomonie furnished the local housing authority certain services, improvements and facilities toward which neither the state nor the county made any contribution. In a letter dated May 14, 1947, the National Housing Agency, FPHA, advised:

“It is acceptable to this Authority that full 1946 tax equivalents be paid to all tax levying bodies that would otherwise be empowered to levy a tax against the project real estate.

“Based on an otherwise assessable value of $80,200.00, the distributive shares going to the respective tax levying bodies would therefore be as follows:

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<tr>
<td>State of Wisconsin</td>
<td>20.85</td>
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<tr>
<td>County of Dunn</td>
<td>1,113.98</td>
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<tr>
<td>City of Menomonie</td>
<td>2,375.52</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>3,510.35</strong></td>
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The housing authority of the city of Menomonie made payments to the city of Menomonie in lieu of taxes based on a valuation of the housing units established by the city assessor and approved by the FPHA. The total amount of these payments was determined by applying the full city, county and state tax rates for the year 1946 to the valuation so determined.
Upon the foregoing facts you inquire whether the city of Menomonie must remit out of such total payment in lieu of taxes those sums to which the state and county would have been entitled as their respective share had such payment in fact been made as the result of a regular tax levy for 1946.

The following statutes relate to the creation and powers of the housing authority of the city of Menomonie:

"66.40 (3) DEFINITIONS. The following terms, wherever used or referred to in sections 66.40 to 66.404 shall have the following respective meanings, unless a different meaning clearly appears from the context:

(a) ‘Authority’ or ‘housing authority’ means any of the public corporations established pursuant to subsection (4).

(b) ‘City’ means any city. ‘The city’ means the particular city for which a particular housing authority is created.

"** * *

"(4) CREATION OF HOUSING AUTHORITIES. (a) When the council of a city by proper resolution shall declare at any time hereafter that there is need for an authority to function in the city, a public body corporate and politic shall then exist in the city and be known as the ‘housing authority’ of the city. Such authority shall then be authorized to transact business and exercise any powers herein granted to it.

"** * *

"(9) POWERS OF AUTHORITY. 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 and provisions of sections 66.40 to 66.404, including the following powers in addition to others herein granted:

(a) Within its area of operation to prepare, carry out, acquire, lease and operate housing projects approved by the council; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof.

(b) To take over by purchase, lease or otherwise any housing project undertaken by any government and located within the area of operation of the authority when approved by the council; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise, any real or personal property or any interest therein.

(c) To act as agent for any government in connection with the acquisition, construction, operation or management of a housing project or any part thereof.

"** * *
“(21) CONTRACTS WITH FEDERAL GOVERNMENT. In addition to the powers conferred upon the authority by other provisions of sections 66.40 to 66.404, the authority is empowered * * * to enter into such contracts, * * * or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. * * *

“(22) TAX EXEMPTION AND PAYMENTS IN LIEU OF TAXES. The property of an authority is declared to be public property used for essential public and governmental purposes and such property and an authority shall be exempt from all taxes of the state or any state public body; provided, however, that the city in which a project or projects are located may fix a sum to be paid annually in lieu of such taxes by the authority for the services, improvements or facilities furnished to such project or projects by such city, but in no event shall such sum exceed the amount that would be levied as the annual tax of such city upon such project or projects.”

“66.404 (1) CONTRACTS BETWEEN AUTHORITY AND CITY. In connection with any housing project located wholly or partly within the area in which it is authorized to act, any city may agree with an authority or government that a certain sum (subject to the limitations imposed by section 66.40 (22)), or that no sum, shall be paid by the authority in lieu of taxes for any year or period of years.”

From the foregoing statutes it is apparent that the housing authority of the city of Menomonie is a public body created pursuant to statute. A statutory agency has only such powers as are specifically delegated to it or necessarily implied from those specifically delegated. American Brass Co. v. State Board of Health, 245 Wis. 440, 15 N.W. 2d 27; Wisconsin Telephone Co. v. Public Service Comm., 232 Wis. 274, 287 N.W. 122, 287 N.W. 593.

Sec. 66.40 (22) quoted above, exempts the property of a local housing authority “from all taxes of the state or any state public body.” Said statute then authorizes the city in which a local housing project is located to fix a sum to be paid annually by such authority for services, improvements or facilities furnished to the project by the city, with the limitation that such sum may not exceed the amount that would be levied “as the annual tax of such city” upon such project. Sec. 66.404 (1) provides that the city “may agree
with an authority * * * that a certain sum (subject to the limitations imposed by section 66.40 (22)) * * * shall be paid by the authority in lieu of taxes for any year.” It is clear that secs. 66.40 (22) and 66.404 (1) were intended to grant a local housing authority the right to make a payment in lieu of taxes. However, those two statutes authorize the local housing authority to pay a sum which may not exceed the amount that would be levied “as the annual tax of such city upon such project.”

In my opinion this means not more than the sum which would result from the application of the city tax rate to the valuation agreed upon by the assessor of the city of Menomonie and the FPHA—in this case $2,375.52. No statute authorized the housing authority of the city of Menomonie to make any payment to the city of Menomonie in lieu of taxes which would have resulted from the application of the state or county tax rates to the valuation so fixed. No statute authorized the city of Menomonie to distribute to the state or county any sums which it received from the housing authority of the city of Menomonie in lieu of taxes. The total amount paid in lieu of taxes was $3,510.85. It appears that the housing authority of the city of Menomonie was authorized to pay only $2,375.52 of this amount to the city of Menomonie. Hence the excess should be returned by the city of Menomonie to the housing authority of the city of Menomonie.

Under the FPHA letter of May 14, 1947 and the contracts between the FPHA and the housing authority of the city of Menomonie, the latter would have had the right to make payments directly to the state of Wisconsin and the county of Dunn in lieu of taxes which might have been levied by such state and county if the local housing authority had power to do so under secs. 66.40 and 66.404 (1) of the statutes. It is my opinion, however, that the housing authority of the city of Menomonie had the right to make a payment in lieu of taxes only to the city of Menomonie.

JRW
Osteopaths—Physicians and Surgeons—Wisconsin state board of medical examiners is authorized to accept the statement of the medical school of the university of Wisconsin (or of any reputable medical school recognized by said board) that an applicant for examination in materia medica and pharmacology has satisfactorily completed a refresher course of the required number of hours in said courses as required by sec. 147.17 (3), Stats. In using the term "osteopathic" in said section the legislature obviously meant "professional," thereby including and not excluding the medical school of the university of Wisconsin and other medical schools having substantially equivalent standards of education and training.

May 31, 1950.

STATE BOARD OF MEDICAL EXAMINERS.

You request my opinion as to whether a doctor of osteopathy licensed to practice osteopathy and surgery in this state, who enrolls in and successfully completes courses in materia medica and pharmacology of the required number of hours, offered at the medical school of the university of Wisconsin or other medical school approved by the Wisconsin state board of medical examiners, is eligible to apply to your board to be examined in materia medica and pharmacology as a condition precedent to his being licensed to practice medicine and surgery under sec. 147.17 (3), Stats.

It is my opinion that a doctor of osteopathy who has successfully completed such courses at the medical school of the university of Wisconsin or other medical school approved by your board, is eligible to be examined in such subjects, and upon successfully passing such examination is eligible to be licensed to practice medicine and surgery as authorized by said statute.

Your question arose as a result of the following situation: Several doctors of osteopathy who were duly licensed to practice osteopathy and surgery under ch. 147 of the statutes as it existed prior to the enactment of ch. 431, Laws 1949 (which created the subsection in question, 147.17 (3)) have applied to the medical school of the university of Wisconsin to enroll as graduate students or as students in spe-
cial refresher courses in materia medica and pharmacology. The school has accepted their applications and indicated that they may pursue the courses, and upon successful completion they will be furnished with suitable evidence of such fact. The doctors in question have asked your board for an expression as to whether credits thus earned at the state university’s medical school will be recognized by your board as rendering them eligible to take the examination provided for in said sec. 147.17 (3), Stats.

Ch. 431, Laws 1949, amended secs. 147.15 and 147.16 and created sec. 147.17 (3), (4), (5) and (6) of the statutes, relating to the qualification, examination and license of osteopathic applicants and osteopathic physicians and surgeons to practice medicine and surgery. A reading of the whole of said chapter is necessary to an understanding of the reasons for my conclusion as stated above. The chapter is here set forth as it appears in the session laws, with deleted matter indicated by asterisks, and new matter printed in italics:

"SECTION 1. 147.15 and 147.16 of the statutes are amended to read:

"147.15 Application may be made at the time and place designated by the board or at a regular meeting. Applicants for license to practice medicine and surgery * * * shall present satisfactory evidence of good moral and professional character, and of having completed a preliminary education equivalent to graduation from an accredited high school of this state, and also a diploma from a reputable professional college. Applicants for license to practice medicine and surgery, in addition to having a diploma from a reputable * * * medical or osteopathic college with standards of education and training substantially equivalent to the University of Wisconsin medical school, approved and recognized by the board, shall present also satisfactory evidence of having completed a college course in physics, chemistry, and biology, * * * substantially equivalent * * * to the premedical course at the university of Wisconsin, and if the professional college from which a diploma is presented does not require for graduation a hospital internship of at least 12 months in addition to a 4 years’ course, a certificate of completion of such internship in a reputable medical or osteopathic hospital. * * * Each applicant shall file a verified statement that he is familiar with the state health laws and the rules and regulations of the state board of health relat-
ing to communicable diseases. The application shall be
accompanied by a fee, to be fixed by the board at not more
than $20 and $5 additional for license if issued. An immi-
gnant applicant shall present satisfactory evidence of hav-
ing first citizenship papers, and if his professional educa-
tion was completed in a foreign college, the application shall
be accompanied by a fee of $50, and the further fee of $5
upon the issuance of license shall not be required; however,
any applicant who by reason of his nationality is ineligible
to citizenship and who is a graduate of a reputable profes-
sional college in this country prior to the taking effect of
this section and is possessed of all other necessary qualifica-
tions to secure a license shall be issued a license provided at
least one of his parents shall have been a native of the state
of Wisconsin. Applicants shall pay also the cost of transla-
tion into English by the board of documents and papers in
a foreign language.

"147.16 Having complied with section 147.15, the appli-
cant shall be examined in anatomy, physiology, general
diagnosis, pathology, histology, chemistry, hygiene, * * *
sanitation, materia medica and pharmacology. All appli-
cants shall be given the same examination in the foregoing
subjects * * *. Medical and osteopathic applicants * * *
shall be further examined in the branches usually taught
in reputable professional colleges.

"SECTION 2. 147.17 (3), (4), (5) and (6) of the statutes
are created to read:

"147.17 (3) A person licensed to practice osteopathy and
surgery may apply to the board to be examined in materia
medica and pharmacology as may be required by the board.
Such applicants shall be given the same examination in
materia medica and pharmacology as is given to applicants
from medical colleges at any regular meeting of the board.
Such application shall set forth the date such person was
licensed to practice, the number of years and place or places
in which he has practiced together with a statement from a
reputable osteopathic college that applicant has successfully
completed a refresher course approved by the board in
materia medica and pharmacology consisting of not less
than 64 hours of lectures and 60 hours of laboratory work
while in actual attendance at such college; if the applicant
shall be unsuccessful he may apply for re-examination at
any subsequent meeting of the board. The application shall
be accompanied by a fee of $20. Upon successfully passing
such examination and payment of a fee of $5 and upon sur-
render of the old license the board shall issue a new license
to practice medicine and surgery.

"* * *"
Of course, your question could have been summarily answered in the negative, and the reason assigned that the furnishing of a statement of successful completion of a refresher course from the *medical* school of the university of Wisconsin does not constitute literal compliance with that part of sec. 147.17 (3), Stats., which prescribes that the statement shall be from a reputable *osteopathic* college. However, you were obviously aroused to request an opinion by the recognition that a literal interpretation and application of the statute to the stated facts would result in the absurd and patently unintended result that your board would have to *exclude*, as evidence of eligibility for an examination in materia medica and pharmacology, a certificate of successful completion of those courses issued by the medical school of the university of Wisconsin when the standards of education and professional training which are maintained by said institution have been adopted by the legislature as the standards for evaluating the competency of other institutions. See sec. 147.15, *supra*.

The problem presented is a classic case for invoking the principles of "whole statute" interpretation. While the practical inquiry in litigation is usually to determine what a particular provision, clause, or word means, the answer requires that one proceed as he would with any other composition—that he construe it with reference to the leading idea or purpose of the whole instrument. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Sutherland, Statutory Construction, Vol. 2, p. 336, §4703. "Neither clinical construction nor the letter of the statute nor its rhetorical framework should be permitted to defeat its clear and definite purpose to be gathered from the whole act, compared part with part." *Adams v. Yazoo & M.V.R. Co.*, (Miss.) 22 So. 824. This concept of interpretation is likewise embraced in the doctrine of construing statutes *in pari materia*. Here we find the legislature acted upon secs. 147.15 through 147.17 in a single bill which became ch. 431, Laws 1949. The interpretation of any part
of said chapter, be it a word, a sentence or a paragraph, requires a consideration of the whole of said chapter.

It is indisputable that the broad purpose of ch. 431, Laws 1949, was to empower the state board of medical examiners to license osteopathic physicians and surgeons to practice medicine and surgery upon the completion of prescribed studies and the successful passing of an examination in such studies. The university of Wisconsin medical school does not teach osteopathy. It is easy to understand that the framers of the statute wrote it so as to bring within the circle of eligibility all professional schools, both medical and osteopathic, the standards of education and training of which are substantially equivalent to the university of Wisconsin. It was a matter of making a class of schools eligible to train a class of applicants in designated professional courses of study which heretofore were ineligible. There isn't the slightest evidence of an intention on the part of the legislature to render the state medical school ineligible to train these applicants. The error apparently occurred as a result of an assumption that the medical schools in question would not, at any future time, offer the prescribed refresher courses to osteopathic physicians and surgeons.

The fact now having been established that the medical school of the university of Wisconsin does offer such courses, an ambiguity is created in the statute, calling for construction in order to avoid the absurd result which follows from a literal application.

The Wisconsin supreme court has not hesitated, when satisfied on substantial grounds from the context of an enactment or from the injustice, inconvenience or absurdity of the consequences to which it would lead, to interpolate, reject or transpose words to achieve the fulfillment of the legislature's obvious intention when the legislature's own words failed to do so. In Neacy v. Supervisors of Milwaukee County, 144 Wis. 210, at pp. 216–218, the court said:

"Many examples of interpolation and rejection and transposition of words to render a legislative enactment capable of being given a sensible effect in accordance with the purpose of the lawmakers, are given in Endlich on Construction of Statutes at §§298 to 305, inclusive, and §§317 to 319, inclusive."
"The author cited says, referring to authority:

"'A mistake apparent on the face of an act, which may be corrected by other language of the act, is never fatal. In all such cases, it may, with propriety, be said that the context rectifies the error, and it is not the court that assumes to correct the legislature... The judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does.' [Sec. 319, p. 437.]

"The stated doctrine has been often applied by this court to the extent of transposing, striking out, interpolating, and giving words a very restrictive or very broad meaning to carry out a manifest intent, or to avoid a very unreasonable or absurd result; one that could not reasonably have been intended, or to turn the literal sense, which is expressionless, into sensible, reasonable meaning. The following are good illustrations: Att'y Gen. v. West Wis. R. Co. 36 Wis. 466, 'or' eliminated and 'and' substituted; Palms v. Shavano Co. 61 Wis. 211, 21 N.W. 77, words regarded as surplusage and correct words substituted for those wrongly used; Custin v. Viroqua, 67 Wis. 314, 30 N.W. 515, omission in a recital supplied; State ex rel. Heiden v. Ryan, 99 Wis. 123, 74 N.W. 544, 'state prison' construed to mean the place commonly known by that name, or any other place in the state for similar use by whatever name known; State ex rel. McGrael v. Phelps, ante, p. 1, 128 N.W. 1041, modifying phrases interpolated.

"The citations from our own reports are ample, but this field of construction has become so important in recent years by reason of the many legislative crudities with which we have had to deal, that it may be well to indicate by the general trend of authority that the application of rules for construction here has been none too radical."

I am satisfied that if the present question were litigated the courts would hold that the legislature intended to use the word "osteopathic" in subsec. (3) of sec. 147.17 synonymously with the word "professional" as used in sec. 147.16, Stats.

SGH
Criminal Law—Lotteries—Scheme whereby automobile license number is drawn from a container and posted in filling station window, enabling the owner of the number to call at the station and claim a prize within a specified time is a lottery in violation of sec. 348.01, Stats., the consideration consisting in the attraction of additional patronage to the filling station by persons desiring to view the number to determine whether it is their own.

June 1, 1950.

DAVID L. DANCEY,
District Attorney,
Waukesha County.

You have requested an opinion as to whether the following scheme constitutes a violation of the lottery statute, sec. 348.01:

"A gasoline station desires to advertise that a list of all passenger automobile licenses for a city and its immediate vicinity would be placed in a bowl, and that a disinterested person each week would draw a license number, which number would be posted in the filling station window. The owner would personally have to come to the filling station and establish the fact that that was his license number, and he would then receive $25 in cash. No purchase of any kind would be required. The winner would not have to personally see the number in the window. The information could be passed on to him by anyone who would see it or know of it. If no one called for the prize within a certain number of days, the $25 prize money would go into a general pot until the pot accumulated $200."

The elements of a lottery are prize, chance and consideration. Prize and chance are clearly involved in the foregoing scheme and the only question is whether there is consideration. It is my opinion that consideration is present and that the scheme is therefore a lottery in violation of the statute cited above.

It is true that every owner of an automobile in the city or its vicinity has a chance to win without paying anything or doing anything for the benefit of the filling station owner. But it will be a practical necessity for him to visit the station from time to time to determine whether his license number is posted. If his name were posted it might
well be that the information would soon come to him from other persons who observed it. But this is not true of a license number, the ownership of which would be recognized only by the owner himself or possibly a few of his friends and acquaintances. The purpose of the scheme is to attract persons into the filling station—not to give away the owner’s money. Visiting the filling station, even without making a purchase, is a consideration, and it may be presumed that the owner would not operate the scheme unless he expected it to pay him in increased patronage. This is all the consideration that is necessary to support a lottery. *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 131-132.

WAP

Constitutional Law—Municipalities—Housing Authorities—Soldiers, Sailors and Marines—Sec. 66.39 (11), Stats., by its terms provides that a veteran who elects to purchase a single family home from a housing authority is entitled to the benefit of the 10 per cent state grant.

Under the statute as written, each successive veteran renter could assert a right to a 5-year option to purchase a single family home, but would be entitled to no more credit for capital retirement than he himself had paid.

The department of veterans affairs has the power to prevent speculative resale of homes by requiring the execution of an option to purchase on a first refusal basis running to a local housing authority.

The department is advised to proceed on the presumption that the portion of sec. 66.39 (11) providing that on the purchase of a single unit dwelling by a tenant there shall be a credit equivalent to the amount of the 10 per cent state incentive grant, is constitutional.

June 8, 1950.

Wisconsin Department of Veterans Affairs.

You have asked my opinion of the proper interpretation and the constitutional validity of those portions of the veterans housing act, ch. 627, Laws 1949, which grant a vet-
eran who rents a single family dwelling constructed by a housing authority a 5-year option to purchase such dwelling at not to exceed cost less the amount of the state incentive grant and less the amount of his rentals applied to capital retirement.

The applicable statutes read as follows:

"66.39 (11) It is declared to be the policy of this state that each housing authority shall operate in an efficient manner so as to provide veterans with permanent housing at the lowest possible cost and that no housing authority shall realize any profit on its operations. Any veteran who occupies a single dwelling unit shall have an option to purchase such unit within 5 years from the date of occupancy at an amount not to exceed the total costs to the housing authority of the land on which said dwelling unit is located, the improvements and the dwelling unit, less a proportionate amount for such allotment as may be received by the authority under sections 20.036 (12) and 45.354. The purchase contract shall be in such form and on such terms as may be prescribed by the Wisconsin department of veterans' affairs. If said veteran occupant desires to exercise his option to purchase he shall notify the housing authority of his intention to exercise that option in writing and he shall be allowed a credit on said purchase price of an amount equal to that portion of the monthly rentals for said unit paid by him that has been credited to or expended for capital retirement or repayment of the principal amount of any mortgage indebtedness, bond indebtedness, or any other indebtedness incurred for the purpose of acquiring the land, improving the land, or constructing the dwelling unit.

"(12) ***

"(13) *** Selection between veterans shall be made in accordance with rules and regulations promulgated and adopted by the Wisconsin department of veterans' affairs which regulation said department is authorized to make and from time to time change as it deems proper. Such rules and regulations, however, shall give veterans of World War II preference over veterans of all other wars. ***"

You raise the following questions:

1. Does the veteran get the benefit of the 10 per cent state incentive grant? That is, if the state contributes $1,000 to the construction of a single family home which has a total cost of $10,000, may the veteran buy the home for $9,000 less proper credits to capital?
2. Does the 5-year option inure to the benefit of only the first veteran renter or may each successive veteran renter claim a right to a 5-year option? Where the option is exercised by a veteran renter after the first, will the credit for capital retirement be limited to the appropriate portions of the rent paid by the tenant exercising the option or will it include corresponding portions of the rent paid by previous tenants?

3. If the veteran renter receives the benefit of the 10 per cent grant, what safeguard if any may be provided by regulation of the department of veterans affairs, or otherwise, to prevent the speculative resale by the veteran of his home?

4. If the statute is construed to give the veteran the benefit of the 10 per cent grant, is it constitutional?

Your questions will be answered in order.

First, by the express terms of the statute a veteran renter who purchased the home in which he was dwelling would be entitled to a credit for the 10 per cent grant from the state. This is clearly shown by the language in subsec. (11) "at an amount not to exceed the total costs * * * less a proportionate amount for such allotment as may be received by the authority under sections 20.036 (12) and 45.354." These latter are the sections which create the appropriation and the authority for the 10 per cent grants from the department of veterans affairs to the local housing authorities.

Second, while the statute is not clear on whether the 5-year option period terminates after the initial occupancy of the dwelling, it would appear that the better view is that any veteran has the right to exercise such option within 5 years after the commencement of his occupancy without regard to the number of veterans who have previously occupied and rented the dwelling. If the legislators had intended the 5-year term to run only from the commencement of the project, it would have been easy for them so to specify. When they used the term "any veteran" it would appear that any veteran is in a position to assert a right to the 5-year term.

Where the option is exercised by a veteran tenant after the first, credit for capital retirement will be limited to the
appropriate portions of the rent paid by the tenant exercising the option and will not include the corresponding portions of rent paid by previous tenants. This result follows the clear terms of the statute "that portion of the monthly rentals for said unit paid by him."

Third, assuming for the purpose of this answer that the 10 per cent grant may validly inure to the benefit of the veteran, it would appear that the department of veterans affairs has ample authority to provide regulations which would prevent the speculative resale of the home. Subsec. (11) supra specifically provides: "The purchase contract shall be * * * on such terms as may be prescribed by the Wisconsin department of veterans' affairs." This provision, together with the general provision in sec. 45.35 (1) that the department shall be administered for the benefit of veterans and its powers shall be liberally construed, appear to be sufficient authority for any regulation designed to protect the veteran, or veterans as a class.

Such protection could easily be achieved by an option to purchase on a first refusal basis signed by the veteran, running to the housing authority from which he is purchasing his home and specifying the same sale price as he is paying. Such options could run for a period of 1, 2, or 5 years, or whatever is deemed desirable. The department of veterans affairs could provide by regulation that no sale should be made unless such an option on a first refusal basis were executed.

Fourth, it is my opinion that the state may properly make a gift to a veteran for housing or sell him a house for less than it is worth or use state funds to make it possible for housing authorities to do so. An amendment to the Wisconsin constitution adopted April 5, 1949 authorized the state to appropriate money for the "acquisition, improvement or construction of veterans' housing." This amendment was first agreed to by the 1948 special session of the legislature. The judiciary committees of both houses formally stated that among other things the amendment, if adopted, would authorize the legislature "to make direct grants to veterans for housing" and that the state would have the right to dispose of housing as well as to acquire, improve or construct it, either directly by the state or by
local housing agencies. This explanation was included in the notice of the referendum on the constitutional amendment published according to law by the secretary of state (see 38 O.A.G. 72). In my opinion, giving weight to the contemporaneous construction, the mere fact that the state money may be used to make a house available to a veteran for less than it is worth, or less than it cost to build it, does not make the law invalid. Furthermore, the law is to be presumed valid and constitutional unless the contrary conclusion is inescapable. Mere doubts are to be resolved in favor of constitutionality.

Whence do doubts arise as to this provision?
It is known that there are more than 350,000 veterans in the state of Wisconsin who are eligible for benefits under the housing law. On March 1, 1950, which was the final date for applying for incentive grants, only seven housing authorities had applied for such grants for a total of 2,669 units. That is, if all the housing authorities which have applied for grants were to devote their total construction to single family homes, there would be enough of such units for only three-fourths of one per cent of all the veterans in the state.

The option provision (sec. 66.39 (11)) does not apply to all housing constructed under the state grants but only to single unit dwellings, so that even if housing authorities constructed all the housing disclosed by their applications, it is conceivable that only a few units will be constructed as single unit dwellings and subject to the option provision. The option provision will be of value only to veteran tenants who are able to exercise it. Conceivably some single unit dwellings will be rented by veterans who are unable to buy a home even at a 10 per cent discount. Hence, it is possible that the gift involved may be made to a relatively small number of veteran tenants who have been chosen, not by reason of any excessive financial need or need for housing as compared to other veterans, but fortuitously.

Thus arises the question whether the law considered in the light of all the facts as to the manner in which it may operate constitutes a denial of equal protection of the law. Does it arbitrarily confer benefits upon individuals whose
selection has no conceivable relationship to the proper purpose of the law?

It must be presumed that you and the respective housing authorities will make your decisions as to how many single unit dwellings shall be built and as to the selection of the veterans to occupy them in good faith and for the purpose of accomplishing the objects for which the law was enacted. It is not to be presumed that these decisions will be arbitrary or unlawfully discriminatory. Under the terms of the controlling statute, sec. 66.39 (13), the only qualifications of the class of veterans entitled to benefits are that they be honorably discharged veterans of the wars of the United States and that they be residents of the state of Wisconsin at the time of induction. The power to make further classifications within this class is delegated by subsec. (13) to the Wisconsin department of veterans affairs. The only express standards for the guidance of the department established by (13) are that preference shall be given to veterans of World War II and the negative qualification that classes cannot be based upon race, creed, color or national origin.

Upon an examination of all the applicable statutes, however, it is my opinion that an additional standard of need has been sufficiently spelled out and that hence the department of veterans affairs should formulate its regulations to give preference to those veterans in need of housing assistance. Sec. 45.35 (1) declares that the state will give assistance in matters of health, education and economic affairs, and sec. 45.35 authorizes grants to prevent want or distress and loans for rehabilitation, education or purchase of a property or business. Under sec. 45.352 in regard to the loan section of the housing act, it is clearly stated that the veteran must show that he requires the loan in order to be able to buy a home. In sec. 45.354 relating to grants to local housing authorities, these grants are named as incentive grants. The use of the term "incentive" would indicate that they are intended to inspire action in cases where without the grants no such action could or would be taken by the local community. In sec. 66.39 (11) it is stated that veterans' housing authorities must conduct their operations so as to provide veterans with housing at the lowest possible cost, and in sec. 66.39 (2) relating to county veterans' hous-
ing authorities it is stated that such authorities shall be formed only upon a finding that the housing shortage will not be alleviated without the authority.

In opposition to such a construction we find sec. 66.40 (9) (r) which states that the powers of a housing authority are to provide housing for veterans and their families regardless of their income. In my opinion, that section does not negative the duty of the department of veterans affairs to provide that preference shall be given to veterans in need of housing as long as the funds are inadequate to provide housing for all.

Considering again the special provision for an option to purchase single unit dwellings, conceivably the legislature may have determined that private ownership of homes is to be encouraged, that the option provision is desirable as an incentive for such ownership, and that it can only be feasibly applied to single dwelling units. Leaving aside the wisdom of the particular statute, can it be said that it is entirely beyond the power of the legislature to serve the suggested purpose by the means which it has chosen?

This opinion can do little more than to point out the doubts as to constitutionality above outlined. No opinion of the attorney general nor act of yours can decide this question. The question will probably not be determined by a court until a single unit dwelling is built and the option exercised and either the tenant or other person with sufficient legal interest challenges the amount of the sale price. When that time arrives, there will be information available as to how many single units have been built in communities and whether the selections of tenants have, in fact, been arbitrary. Those facts are not available now and yet may be material in the opinion of the court which will ultimately decide the question. My advice is to proceed as if the option provision, including its prescribed credit equivalent to the allotment by the state, is valid and constitutional. In my opinion the presumption in favor of constitutionality should be relied upon unless and until a court determines to the contrary.

TEF
RGT
State Board of Health—Barbers—Under sec. 158.05, Stats., the board of examiners and the inspectors in the barber division of the state board of health are to be appointed by the state board of health, but under sec. 14.71 (2), Stats., the supervisor and necessary clerks or assistants of that division are to be selected by the executive officer of the board, who under sec. 140.02, Stats., is its secretary, and he also selects the assistant state health officer and other employes of the board of health employed to carry out the functions of the board under ch. 140, Stats.

June 14, 1950.

State Board of Health.

You direct attention to sec. 14.71 (2), Stats., as amended by ch. 410, Laws 1949, and which now reads:

“(2) Unless otherwise provided by statute, each department is authorized to appoint such deputies, assistants, experts, clerks, stenographers or other employes as are necessary for the execution of its functions, and to designate the titles, prescribe the duties, and fix the compensation of such subordinates, but these powers shall be exercised subject to the state civil service law, unless the position filled by any such subordinate has been expressly exempted from the operation of chapter 16 and subject, also, to the approval of such other officer or body as may be prescribed by law. If a department contains a board or commission which is authorized to appoint an executive officer by whatever name called, the appointing power resides in the executive officer and the board or commission has no further appointing power except as it is specifically given such power.”

This section has given rise to a question as to what is meant by the wording “except as it is specifically given such power” in certain situations arising under the statutes relating to the state board of health.

In this connection reference is made to sec. 158.05 providing for a “barber division” in the state board of health and you inquire whether the state board of health or its executive officer is authorized to appoint the three examiners, the three inspectors, the supervisor of the division and such clerks and other assistants as the board may deem necessary.
Sec. 158.05 (1) reads:

"(1) There is created and the state board of health shall maintain a division thereof to be known as the 'barber division.' Said division shall be composed of a supervisor, three inspectors and three examiners, and such clerks and other assistants as the board may deem necessary to effectively carry out the provisions of this chapter."

Sec. 158.05 (2) provides in part:

"(2) The state board of health shall appoint and may remove for cause 3 barbers, who shall constitute the board of examiners in the barber division. * * *"

Sec. 158.05 (5) reads:

"(5) The state board of health shall appoint, in accordance with the civil service law, not less than 3 barbers as inspectors, each of whom shall have been engaged in the practice of barbering in this state for at least 5 years immediately preceding his appointment."

It is apparent under the plain wording of sec. 158.05 (2) and (5) that the appointing power as to the three examiners and the three inspectors is specifically given to the state board of health. This makes inapplicable that provision of sec. 14.71 (2) which places the appointing power in the executive officer since here the board itself has been "specifically given such power" so as to come within the exception to the general appointing power otherwise delegated to the executive officer by sec. 14.71 (2).

However, sec. 158.05 is silent as to the appointing power in the case of the supervisor and such clerks and other assistants as the board may deem necessary for discharging the duties of the barber division. This being true, the appointing power resides in the executive officer of the board by virtue of the last sentence contained in sec. 14.71 (2).

Also, you inquire who is to appoint the assistant state health officer and other employees such as stenographers, clerks, etc. needed to carry out the functions of the state board of health under ch. 140, Stats.

Ch. 140 relating to the state board of health is silent as to these appointments, and the provisions of sec. 14.71 (2)
vesting the appointing power in the executive officer would therefore appear to apply. Sec. 140.02 provides that the secretary of the state board of health shall be the executive officer of the board, and hence the appointing power is in him as to all persons in the department except in those instances such as the ones discussed under sec. 158.05 where the appointing power is specifically given to the state board of health.

WHR

Navigable Waters—Shore Line—The term "shore line" as used in sec. 30.02 (1), Stats., means the ordinary high water line.

The term "bed of any navigable water" for both rivers and lakes means the area bounded by an ordinary high water line.

June 15, 1950.

PUBLIC SERVICE COMMISSION.

You have asked for an interpretation of the term "shore line" as used in sec. 30.02 (1), Stats. You state that you have previously considered the ordinary high water line to be the shore line within the meaning of this statute.

In my opinion your interpretation of the term is correct. It is true that various technical definitions of the term "shore" relate to something entirely different than a line at the ordinary high water mark and it is even claimed that rivers properly speaking do not have any shores. However, in interpreting any statute the intent of the legislature must prevail if that can be determined from the face of the statute or under proper rules of construction. It would appear clear on the face of the present statute that the legislative purpose is to protect public rights in all navigable waters in both rivers and lakes against artificial encroachment. Hence it is only necessary to determine what those public rights would be prior to encroachment to determine the extent of the area to be protected.
Under the rule laid down in *Doemel v. Jantz*, 180 Wis. 225, the public rights in navigable waters extend up to the ordinary high water mark when the waters actually reach such mark. Hence if any fill or encroachment were allowed below the ordinary high water mark public rights would be adversely affected to that extent.

Hence in sec. 30.02 (1) (a) where it is provided “shore lines shall conform as nearly as practicable to existing shores,” it is my opinion that the ordinary high water line is intended. This line is defined as “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. *Lawrence v. American W. P. Co.*, 144 Wis. 556, 562, 128 N.W. 440.” *Polebitzke v. John Week L. Co.*, 163 Wis. 322.

It is notable that in sec. 30.02 (1) (b) reference is made only to a shore line which has been artificially established. The prohibition in that subsection is against the deposit of materials or erection of structures upon “the bed of any navigable water.” Under *Doemel v. Jantz*, supra, it would appear clear that the bed of a navigable lake in which the state has a trust title extends up to the ordinary high water mark, subject of course to the exclusive easement in favor of the riparian owner over that portion of the bed between high and low water marks when the waters have receded.

In view of the fact that riparian owners on a river can claim only a qualified title to the river bed and that the public retains the same rights of navigation as it does in a lake, it would appear that the term “bed of any navigable water” has the same meaning when applied to a river as to a lake.
RGT
Oil Inspection—Notice to Deputy Inspector—Under sec. 168.05, Stats., a deputy oil inspector is notified of the receipt of a petroleum product subject to inspection by him only when knowledge thereof is received by him.

As a practical matter, such notice almost always must be given personally, either directly or by telephone or messenger.

June 19, 1950.

WARD WINTON,
District Attorney,
Washburn County.

You inquire whether the notice which a petroleum dealer must give to the deputy inspector of illuminating oils of his district relative to the receipt of a petroleum product which is subject to inspection may be given by the mailing of such notice.

In the southern part of the state it is customary for the petroleum dealer to give this notice by telephone. However, in the northern part of the state the territory serviced by the deputy inspector may be large. For example, in your own district such deputy inspector covers an area approximately 175 miles east and west and 35 miles north and south. Many of the petroleum dealers in the northern part of the state do not wish to incur the expense of giving this notice by telephone. Consequently they have been in the habit of mailing a notice of the receipt of petroleum products to the deputy inspector. This mailed notice is never received within such time as to enable the deputy inspector to inspect the petroleum product within the time specified in ch. 168. Therefore, practically all samples of petroleum products are taken by the dealer himself under the provisions of sec. 168.05 (3), in your district.

Sec. 168.05 provides:

“(1) No petroleum product * * * received in this state * * * shall be unloaded from its original container, sold, offered for sale or used until a true sample of not less than 8 ounces is taken therefrom as hereinafter provided * * *. Each person * * * receiving a petroleum product which has not been previously inspected shall notify the deputy in-
spectator in his district of the receipt thereof, and such agent or employee shall take a sample of such petroleum product.

"(2) If such petroleum product is received on a regular business day between the hours of 8 o'clock a.m. and 5 o'clock p.m., such notice shall be given forthwith upon receipt of such petroleum product. If received at any time after the hour of 5 o'clock p.m. and prior to the hour of 12 o'clock midnight, such notice shall be given on the next following regular business day between the hours of 7 o'clock a.m. and 9 o'clock a.m. If received at any time on and after 12 o'clock midnight and prior to the hour of 8 o'clock a.m. of a regular business day, such notice shall be given on the same day between the hours of 7 o'clock a.m. and 9 o'clock a.m.; provided, that if such petroleum product is received before the hour of 12 o'clock noon on a regular business day that falls on Saturday, such notice shall be given forthwith upon receipt of such petroleum product. If received after the hour of 12 o'clock noon on such day, such notice shall be given on the next following regular business day between the hours of 7 o'clock a.m. and 9 o'clock a.m. Provided, further, that if any petroleum product is received on Sunday or any legal holiday, under the laws of this state, such notice shall be given on the next following regular business day between the hours of 7 o'clock a.m. and 9 o'clock a.m. Such notice shall set forth such information as the head of the division of petroleum products may reasonably require.

"(3) If the deputy inspector does not, upon proper notice, after a reasonable length of time, take such sample, the recipient of such petroleum product may, in the presence of a disinterested witness, unseal such original container and take a true sample of not less than 8 ounces of the contents thereof. * * * Such sample thus taken shall be held for delivery, upon demand, to the deputy inspector. After such sample is thus taken such petroleum product may be unloaded, sold, offered for sale or used the same as if sampled by the deputy inspector.

"(4) For the purpose of this section, the following shall constitute a reasonable length of time in which a deputy inspector shall take the sample herein required: If notice is properly given to such deputy inspector before the hour of 12 o'clock noon, he shall take such sample before the hour of 5 o'clock p.m. of the same day; provided, however, that if such notice is properly given before the hour of 12 o'clock noon on a regular business day that falls on Saturday, such sample shall be taken before the hour of 12 o'clock noon of the next following regular business day; if notice is properly given between the hours of 12 o'clock noon and 5 o'clock p.m., such sample shall be
taken before the hour of 12 o'lock noon of the next following regular business day. Saturdays after the hour of 12 o'lock noon, Sundays and legal holidays, under the laws of this state, shall not be considered regular business days."

Sec. 168.05 (1) requires the person receiving the petroleum product to "notify" the deputy inspector of the receipt thereof. To "notify" one of a fact is to "make it known to him." Huntington v. City of Calais, 105 Me. 144, 73 A. 829, 830. Generally, the word "notify" means to give notice to; to inform by words or writing in person or by message, or by any signs which are understood; to make known. Fast v. Scruggs, 164 Okl. 196, 23 P. 2d 383. In the case of Metcalf v. Mutual Fire Ins. Co., 132 Wis. 67, 112 N.W. 22, our court said "notice is held to mean information by whatever means communicated; knowledge given or received. U.S. v. Foote, 13 Blatch. 418, 25 Fed. Cas. 1140."

"Notify" as used in a statute making it a condition precedent for a person, in order to recover for injuries caused by a defective highway, to notify the town officers by letter or otherwise in writing, setting forth his claim for damages, within 14 days after the injury, means "to make known." In that case it was held that the statute required that the town officers should have information or knowledge and that it was not enough for the injured party to write a notice however formal, and it was not enough for him to mail it even within the 14 days. The writing and mailing of the notice were not equivalent to notifying the town officers as the statute required. Chase v. Inhabitants of Surry, 88 Me. 468, 34 A. 270, 272. See Rapid Motor Lines v. Cox, 134 Conn. 235, 56 A. 2d 519 and note in 175 A.L.R. 299.

Sec. 168.05 (2) provides that the notice must be given "forthwith" upon the receipt of a petroleum product on a regular business day between the hours of 8:00 a.m. and 5:00 p.m.

"'Forthwith,' like 'reasonable time,' is a term which is dependent upon the circumstances of each case for the interpretation which is to be placed upon it. In some cases it means instanter (Hull v. Mallory, 56 Wis. 355, 14 N.W. 374), in others it means a reasonable time (Rainer v. Schulte, 133 Wis. 130, 113 N.W. 396). See 26 Corp. Jur. p.
997 and cases cited.” Geldon v. Finnegan, 213 Wis. 539 at 547, 252 N.W. 369. See also State ex rel. Department of Finance, Budget and Business v. Thurston County, 6 Wash. 2d 633, 108 P. 2d 828.


Sec. 168.05 (2) specifies particularly when such notice must be given if the petroleum product is received at any time other than between the hours of 8:00 a.m. and 5:00 p.m. of a regular business day. From such specification it is clear that said notice must always be given very promptly. In my opinion “forthwith” as used in said statute means “immediately, without undue delay.”

Under sec. 168.05 (3) the recipient of the petroleum product may take a sample of such product only if the deputy inspector does not, upon proper notice after a reasonable length of time, take such sample. Under sec. 168.05 (4) the “reasonable length of time” referred to in sec. 168.05 (3) may be as little as 5 hours if the petroleum product is received before the hour of 12 o’clock noon of a regular business day which will not be succeeded by a Sunday or a legal holiday. The reasonable length of time could not begin to run until the deputy inspector had actual notice of the receipt of the petroleum product which required inspection. The recipient of the petroleum product could not know when the reasonable length of time had expired so that he could take the sample himself unless he knew when the notice had been “properly given” to the deputy inspector within the meaning of sec. 168.05 (4).

It is my opinion that the “notice” of the receipt of a petroleum product which must be given by the petroleum dealer to the deputy oil inspector is information or knowl-
edge thereof which must have been received by such inspector. Since the statute does not specify how the notice shall be given, it may be given either orally or in writing. However, since this information or knowledge must be given either "forthwith" upon receipt of the petroleum product or within the time limits specified in sec. 168.05 (2) it would be almost impossible to use the mail as a means by which to give such notice except in the case of a petroleum product received on a week end or just prior to a holiday or when neither the deputy inspector nor his agent can be reached by one of the means of communication approved herein. In most cases the notice could not be received within the time specified in sec. 168.05 (2) if sent by mail. Even if such a mailed notice were received, the recipient of the petroleum product would not know of such fact unless it were communicated to him by the deputy inspector or someone on his behalf. Since the statute imposes upon the petroleum dealer the duty of giving the deputy inspector actual notice of the receipt of a petroleum product, it would appear as a practical matter that such notice must be given personally, either directly by telephone or messenger so that the dealer would know that the notice had in fact been received by the deputy oil inspector or some person authorized by him to receive such notice on his behalf.

If it costs the petroleum dealer more money to give notice in this manner than it would by mail, the additional cost must be regarded as an expense of doing business imposed by statute. Sec. 168.05 contemplates that samples of petroleum products are to be taken by the petroleum dealer himself only in exceptional cases and not as a matter of custom. Jrw
District Attorney—Assistants—Assistant district attorney, appointed under sec. 59.45, Stats., pursuant to county board resolution for the sole purpose of handling highway right of way acquisitions, may not undertake defense of criminal prosecutions nor represent private clients in matters adverse to the interests of the county.

June 20, 1950.

Arthur C. Snyder,
District Attorney,
Washington County.

You request an opinion with reference to the following:

On January 26, 1948 the county board adopted a resolution authorizing the district attorney to appoint and compensate an assistant district attorney pursuant to sec. 59.45, Stats. During the April meeting of the board this year another resolution was adopted authorizing the district attorney to appoint an assistant district attorney to handle legal work in connection with the acquisition of rights of way, to be compensated by the state highway commission. That resolution amended the resolution of January 26, 1948 so that the district attorney is required to provide compensation for the assistant district attorney except where the assistant performs legal work in connection with the acquisition of highway rights of way and compensation and expenses of said assistant are provided by the state highway commission.

You inquire whether the assistant district attorney appointed to perform only the legal work in matters pertaining to highway rights of way may represent defendants in criminal matters and any other parties whose interests are in opposition to those of the county.

The answer to this question is that he clearly may not do so. Sec. 59.45, Stats., provides as follows:

"The district attorney, except in counties containing a city of the first class, may, when authorized by the county board by a majority of all of its members, appoint one or more assistant district attorneys and a stenographer and a clerk to aid him in the performance of his duties. Such assistant district attorneys shall be attorneys admitted to
practice law in this state. The assistant district attorneys so appointed shall have authority to perform all the duties of the district attorney. No assistant district attorney so appointed shall be required to give an official bond.”

Canon 6 of the American Bar Association canons of professional ethics, relates to the representation of conflicting interests by attorneys. Under this canon the American Bar Association committee on professional ethics and grievances has ruled that it is unethical and improper for a district attorney to apply for a pardon or parole of one convicted in another county. Opinion 118. The committee stated in part as follows:

“* * * The statutory permission to practice law while in office must have been intended to be limited to matters in which the State is not a party. For one county attorney to engage in undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public’s confidence in and respect for law enforcement. The application for a pardon or parole appears to be a proceeding in which the state is interested adversely to the convict. The convict’s representation should be left to those who are not attorneys for the state. * * *”

The committee has also ruled that where a county attorney, before his election, represented a person convicted of murder in several applications for a pardon, he could no longer represent the convict before the pardon board after his election to office, notwithstanding that he believed the conviction to be a flagrant miscarriage of justice. Opinion 136. The committee stated in part as follows:

“* * * He now holds an office which makes it his duty to align himself on the side of the public’s ostensible interest with reference to matters pertaining to law enforcement. If he does otherwise, as appears to be the case here, he tends to destroy the public’s confidence in the integrity of its machinery for the administration of criminal justice.”

An opinion dealing with a problem very similar to the one you submit is Opinion 186 of the committee on professional ethics and grievances. It involved a statutory county attorney elected by county justices of the peace to represent
the county in civil matters only. The prosecution of crimes was in the hands of a “district attorney general” elected by popular vote. The committee ruled that the county attorney could not undertake the defense of a person accused of crime, stating in part as follows:

“Because of the distinctions between civil and criminal actions and the capacities in which the two officials serve, it might at first glance appear that there is no conflict.

“But the situation presented is that of two public officials both charged with loyalty to the public, one representing the public in a criminal prosecution and the other defending the accused in the criminal prosecution.

“The county attorney should not accept employment where his duties to his private client and his public duties may conflict either directly or indirectly. Furthermore, for the county attorney charged with public duties to accept employment adverse to this public employer puts the county attorney in an unseemly situation likely to destroy public confidence in him as a public officer, and bring reproach to his profession.

“The county attorney, in our opinion, should refrain from accepting such employment, as the interests of the accused for whom he appears and the interest of the county of which he is an officer, are conflicting.”

That opinion is especially applicable to your situation, where the assistant district attorney holds office by appointment from you and has by statute the right to perform all the duties of the district attorney (including the prosecution of crimes) even though he is employed for the special purpose of handling a certain type of civil litigation.

WAP
Counties—Public Assistance—Under sec. 49.53, Stats., and rules or regulations made by the state department of public welfare in conformity with the federal social security act, county pension director may not furnish to county board member list of names of persons in his district with amounts of aid they have received monthly as aid to blind, aid to dependent children, or old-age assistance.

June 21, 1950.

John A. Moore,
District Attorney,
Winnebago County.

You state that despite the opinions in 36 O.A.G. 409, 38 O.A.G. 251 and the provisions of sec. 49.53, Stats., the county board of your county has adopted a resolution requiring the pension director to submit a list to each supervisor monthly advising him of the names of persons in his particular district and the amounts of assistance each is receiving for aid to the blind, aid to dependent children, and old-age assistance.

The county board has been advised by your office that the pension director cannot comply with this resolution and the board adopted a resolution requiring your office to submit to the attorney general for an opinion the following three questions:

1. May the pension director apprize the supervisor monthly of the names of persons, and the amounts of, and types of assistance each receives in the district which the supervisor represents?
2. In view of the fact that the county board appropriates the money for the various forms of assistance, including aid to dependent children, aid to the blind, and old-age assistance, even though state and federal funds later offset such appropriations, how much information may the pension director give such board as to names of persons, amounts and types of aid that are receiving such assistance?
3. How much information may the pension director give each individual supervisor if he makes personal inquiry at the pension office relative to a particular person receiving any assistance in the district represented by that supervisor?
Sec. 49.53 reads:

"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. The department shall in conformity with the federal social security act and rules or regulations made pursuant thereto adopt rules and regulations restricting the use and disclosure of information concerning such applicants and recipients to become effective upon publication in the official state paper, and copies thereof shall be filed with the secretary of state and county clerks. Any person violating this section or any rule or regulation promulgated hereunder shall be punished by a fine of not less than $25 nor more than $500 or by imprisonment not less than 10 days nor more than one year, or by both fine and imprisonment."

This language is very clear and express.

Your request does not describe or suggest any unusual situation under which disclosure of such information could be said to be for a purpose "connected with the administration of aid."

The first question is therefore answered in the negative and the answer to the second question as well as the third question is "None."

In 38 O.A.G. 251, 254, it was stated that general statistical information concerning aid to the blind might be given to the legislature by the state department of public welfare. The same principle would apply here, but so far as information concerning particular recipients of aid is concerned the answer is that no information may be given for any purpose not connected with the administration of such aid.

WHR
Appropriations and Expenditures—Highway Commission.—Appropriation made by sec. 20.49 (7b), Stats. 1949, does not lapse at the end of each year.

June 26, 1950.

PUBLIC SERVICE COMMISSION.

An opinion has been requested as to whether the appropriation made by sec. 20.49 (7b), Stats. 1949, lapses at the end of the current fiscal year.

So far as here material the provision involved is as follows:

"20.49 State highway commission. There is appropriated to the state highway commission as received in the state highway fund the surplus of the motor vehicle registration fees, operator's license fees, motor vehicle fuel taxes, and motor carrier fees and taxes, after deducting the actual costs of administration paid from the appropriations made by sections 20.052, 20.091 and 20.511. The amount thereof collected in each fiscal year and appropriated by this section shall be apportioned and allotted by the commission in the amounts and on the dates hereinafter provided; and if no date is specified, then at such time or times during such fiscal year as the commission may determine.

"(7b) Railroad Grade Crossing Protection. Annually, beginning July 1, 1949, not to exceed $250,000 to pay the cost of crossing protection under section 195.28.

Under this language of the opening paragraph of the section the motor vehicle registration fees, etc., going into the highway fund each year are appropriated annually to the highway commission. On July 1 each year it determines the amount thereof that is to be expended for the purpose set out in subsec. (7b) and makes an apportionment and allotment of that amount therefor. The amount so set aside each year for such purpose may be whatever the highway commission fixes but by virtue of the language in subsec. (7b) it may not exceed $250,000. This annual determination by the highway commission on July 1 each year operates to complete an appropriation of the amount that is to be expended in paying the state's share of railroad crossing protection.
Sec. 20.77 (8), Stats., provides that generally appropriations and the balances unexpended at the end of each year lapse and revert to the fund from which appropriated. But it also contains an exception that such rule does not apply *inter alia* to "highway appropriations." The appropriation made by the annual allotment for the purpose of sec. 20.49 (7b) being for highway purposes, it is within this express exception in sec. 20.77 (8) and therefore it does not lapse at the end of each fiscal year.

HHP

*Public Welfare Department—Salaries and Wages—Reduction of salary and retirement benefits of former division head of department of public welfare employed in subordinate position (with possible exception of supervisor of section) is not prohibited by sec. 14a, (2), ch. 376, Laws 1949.*

Department of Public Welfare.

You have asked for an interpretation of sec. 14a (2) of ch. 376, Laws 1949. That chapter provided that the department be organized to include five named divisions. Previously there had been seven. Sec. 14a (2) reads:

"Incumbent division heads of the department on the effective date of this act who are retained in the department as directors or bureau chiefs shall suffer no reduction in salary or retirement benefits."

Your question is: Would a former division head, if retained in a position of reduced administrative responsibility, be entitled to not less than his former salary?

You have informed me that as your department is now organized, the division head of each of the five divisions normally carries the title "director" and reports directly to you. In my opinion, the term "directors or bureau chiefs" as used in the statute must be construed to include division heads.

June 27, 1950.
You have advised me that each division of the department is subdivided for administrative purposes. The subdivision is generally referred to as a "section" or "unit" and not as a "bureau." The supervisor of each section is subject to civil service, as are all employes except the director, deputy director and heads of divisions. This opinion does not, however, pass upon the question whether a subdivision constitutes a bureau and whether the supervisor of a subdivision would be a "bureau chief" as the phrase is used in sec. 14a (2). If it becomes necessary to request an opinion with respect to this particular question, I will be glad to respond.

It is my opinion that a former division head who is appointed to some subordinate position other than those mentioned above would not be protected from reduction in salary and retirement benefits by sec. 14a (2).

TEF

_Criminal Law—Costs_—Under sec. 353.25 (1), Stats., costs may be taxed against convicted criminal defendant only if he is fined. Court may not order costs collected from cash bail under sec. 354.42, Stats., unless accused is sentenced to pay a fine and costs. Fine and costs properly taxed against defendant may be collected out of cash bail notwithstanding that such bail was posted by a person other than the defendant.

June 28, 1950.

David L. Dancey,
_District Attorney_,
Waukesha County.

You state that cash bail for a defendant in a criminal case was furnished by a relative of the defendant in the amount of $2,000. Thereafter the defendant was convicted and sentenced to a year in the county jail and to the payment of costs (including attorney fees for an attorney appointed
by the court to represent him, he being indigent) but no fine was imposed. The court has ordered that the costs be collected out of the $2,000 bail money.

Your first question is whether the court had authority to tax costs against the defendant where no fine was imposed as part of the sentence. It is clear that so much of the judgment as requires the defendant to pay the costs of the prosecution is erroneous. It is stated in 20 C.J.S. 677—Costs, §435:

“The recovery and allowance of costs in criminal cases depend entirely on statutory provisions which are to be strictly construed.”

Sec. 353.25, Stats. 1947, 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 defendant, 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, however, 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.”

This section is in substance preserved in the 1949 revision of criminal procedure as sec. 353.25 (1), Stats. 1949.

Prior to the enactment of the foregoing statute, which originated as sec. 4633, R.S. 1878, it was held that courts other than justice courts had no authority to tax costs against the defendant in a criminal case. Justice courts had that authority under a different statute. Taylor v. State, (1874) 35 Wis. 298; Faust v. State, (1878) 45 Wis. 273.

Since the statute authorizes the taxing of costs only where a fine is imposed, it follows that the order taxing costs in this case is erroneous.

Your second question is whether or not the court has authority in such a situation to provide that the cash bail be
applied toward payment of the costs taxed against the defendant.

Sec. 361.42, Stats. 1947, provides that a person accused of a crime may in lieu of sureties enter into his own personal recognizance or bond without sureties, upon depositing with the court the amount thereof in money "which * * * shall be applied by the magistrate or court before whom the accused is tried, in satisfaction of so much of the judgment as is required by the payment of money, rendering the surplus money, if any there be, to the person depositing the same."

The substance of the foregoing statute is preserved in the 1949 revision of criminal procedure as sec. 354.42, Stats. 1949.

The order of the court requiring payment of the costs out of the cash bail is erroneous for the reasons stated in answer to your first question. There is no authority for taking the costs out of the bail money unless costs are included in the judgment and as pointed out above that can be done only where the defendant is fined.

However, if the costs were properly taxed against the defendant, they and the fine which would have had to be imposed could be collected out of the cash bail regardless of the fact that the bail was posted in defendant's behalf by another person.

The bail is conclusively presumed to be the property of the defendant so far as it may be necessary to use it for the purposes for which it was posted, although under some circumstances the true owner of the money may contest the right of the defendant to be paid the surplus. State ex rel. Glidden v. Fowler, (1927) 192 Wis. 151, 212 N.W. 263. See Gentilli v. Brennan, (1930) 202 Wis. 465, 468-9, 233 N.W. 98.

WAP
Teachers Colleges—Teachers—Under sec. 37.31 (1), Stats., right of teacher in a state teachers college to permanent employment subject to removal for cause arises upon completion of 3 years of teaching in such college, irrespective of any notice to the teacher, either prior to or subsequent to the completion of the third year of teaching, that he will or will not be employed for a fourth year.

June 29, 1950.

STATE TEACHERS COLLEGE,
Milwaukee, Wisconsin.

You have raised a question under sec. 37.31 (1), Stats., which reads:

“(1) All teachers in any state teachers college shall be employed on probation and after successful probation for three years, the employment shall be permanent, during efficiency and good behavior, provided, that teachers having taught three years or more in any such college shall be deemed to have served their term of probation. No teacher who has become permanently employed as herein provided, by reason of three or more years of continuous service, shall be discharged except for cause upon written charges. Said charges shall after ten days' written notice thereof to such teacher, and upon such teacher's written request, be investigated, heard and determined by the board of normal school regents, whose action and decision in the matter shall be final. The term 'teachers' as used in this section shall include all persons engaged in teaching as their principal occupation but shall not include the president or acting president of any state teachers college.”

The question which you have raised is at what stage during the 3-year probationary period the teacher must be notified as to whether or not he is to receive permanent employment or will not be re-employed, and you state there appears to be some conflict between the statute and the interpretation given it in 21 O.A.G. 38.

There is no conflict between the statute and the ruling given in 21 O.A.G. 38 to the effect that a teacher in a teachers college who is permitted to serve 3 years acquires permanent tenure and the action of the board of regents in thereafter discharging a teacher is reviewable by certiorari.
Neither the statute nor the opinion mentions the matter of notice during the probationary period, and the tenure of the teacher in no way depends upon the receipt of or the failure to receive notice. After teaching 3 or more years in a teachers college the teacher is deemed to have served his term of probation under the statute. His right to permanent employment subject to removal for cause is complete after having taught for 3 years, and nothing can be added to this right or taken away from it by the giving of any sort of notice or failing to give notice.

Notice becomes important under the statute only when it is sought to discharge for cause a teacher who has acquired tenure. The charges in such case must be in writing and "said charges shall after ten days' written notice thereof to such teacher, and upon such teacher's written request, be investigated, heard and determined by the board of normal school regents." The foregoing provision, however, has no application to probationary teachers, who presumably may be discharged with or without cause and without prior notice at any time prior to but not after the 3-year probationary period.

It would, for instance, be of no avail to notify a probationary teacher during his third year of teaching that he could finish out the third year but would not be hired thereafter, since it is the 3 years of teaching which give him his permanent tenure and his rights under the law cannot be taken away from him by some sort of notice for which the statute makes no provision. This right will accrue unless the teacher resigns or is discharged before he has completed his third year of teaching.

WHR
Vocational and Adult Education—Soldiers, Sailors and Marines—Secs. 41.18, 41.19, and 41.215, Stats., construed.

An out-of-state resident who is an eligible veteran under Public Law 16 and Public Law 346 may be enrolled in an agricultural vocational course given by a Wisconsin high or vocational school under contract with the veterans administration.

An instructor in such a school may cross the state line to visit the farm of the out-of-state resident for purposes of carrying out this educational program.

If the instructor were otherwise eligible, he would not be deprived of the protection of the workmen's compensation act by crossing the state line in the course of his employment.

June 30, 1950.

State Board of Vocational and Adult Education.

You state that the state board of vocational and adult education has entered into a contract with the veterans administration whereby the state board organizes and conducts vocational training in agriculture for veterans eligible for such training under Public Law 16 and Public Law 346 and is recompensed therefor. The state in turn signs local contracts with any high school board or vocational board which desires to make available to local veterans the benefits of this program. Current costs of the program are met with local funds, but at the end of each 4-month period the local school is reimbursed 100 per cent by the state board of vocational and adult education from funds received for that purpose from the veterans administration. Authority for these contracts is found in secs. 41.215 and 20.33 (8) (b), Stats.

The program of agricultural vocational training which has been agreed to by your board and the veterans administration calls for, among other things, a minimum of 200 hours a year of group instruction (which would largely be conducted in the school) plus a minimum of 100 hours a year of individual instruction on the home farm of the trainee, of which at least 50 hours are provided by the instructor's visiting the trainee's home farm at least twice
each month and the balance consists of home study assignments.

In the case of high schools or vocational schools located near the state line, a small number of student veterans would normally be drawn across the state line for this training. In this connection you raise three questions:

1. Is there any state law which would prohibit the enrollment for farm training in a Wisconsin school of an out-of-state resident?

2. Since the type of instruction demanded by federal law and by the state board of vocational and adult education stipulates 100 hours a year of individual instruction on the veteran’s home farm, is there any state law which would forbid the instructor from crossing a state line to give such instruction if the enrollment of an out-of-state resident is adjudged legal?

3. If the enrollment of such veteran is found legal and his instruction on his home farm found to be a necessary and recognized duty of his instructor, would said instructor, in case of accident while performing instructional duties across a state line, be protected under the workmen’s compensation law?

Sec. 41.18 (1) reads in part as follows:

"* * * Any person over the age of fourteen years who shall reside in any town, village or city not having a vocational and adult education school, and who is otherwise qualified to pursue the course of study, may with the approval of the board of vocational and adult education, be allowed to attend any school under its supervision. Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

Sec. 41.19 (3) provides for tuition charges for pupils who are nonresidents of the state, which indicates that the admission of out-of-state residents is definitely contemplated.

An opinion of the then attorney general in 1923, reported in 12 O.A.G. 547, to the effect that a nonresident of the state could not be admitted to a vocational school, no longer applies because of the changes in legislation since then. The reasoning—that such a pupil could not be admitted because there was no provision for reimbursing the town, city or
village maintaining the vocational school for the cost of educating him—if applied to the present situation would support the opposite conclusion, namely, that a nonresident of the state can be admitted under the veterans training program.

It is my opinion that there is nothing illegal about enrolling an out-of-state resident for farm training in a Wisconsin school under the circumstances you describe.

The answer to your second question is to be found in sec. 41.215, Wis. Stats., which reads as follows:

"The state board of vocational and adult education is authorized to enter into contracts with the federal veterans' administration when so authorized by a local board of education or a board of vocational and adult education for training to be provided by the local boards of education or boards of vocational and adult education in the field of vocational agriculture to veterans eligible for benefits under the provisions of U. S. Public Law No. 16, chapter 22, 1st session, 78th Congress and U.S. Public Law No. 346, chapter 268, 2d session, 78th Congress and any acts amendatory thereof or supplementary thereto and to receive from the federal veterans' administration such payments for tuition, supplies, materials and services, as may be granted to cover the cost of such training, and for costs of administration by the state board of vocational and adult education. All payments received by the state board of vocational and adult education under the provisions of this section shall be paid within one week after receipt into the general fund and are appropriated therefrom to said board under section 20.33 (8) (b) to be expended as provided in this section."

The board is authorized to enter into contracts with the veterans administration whereby the local high school or vocational school provides agricultural training for eligible veterans and the veterans administration meets the expenses. In order for the program to be effective, the trainees must spend part of their time in the classroom and part of their time working on a farm, and in order to perform his duties and fulfill the contract, the instructor must visit the farm to supervise and grade the trainee's farming activities at regular intervals. There is nothing in this statute to suggest that if all or part of the farm on which the trainee is conducting his practical exercises is in a different political unit from that in which the vocational or
high school is located, the instructor is prohibited from crossing that political boundary to carry out his instruction. If that were contemplated the enrollment of nonresidents would not have been provided for.

It is my opinion, therefore, that the instructor is not prohibited from crossing a state line for purposes of carrying out this program under the conditions you have described.

In answer to your third question, an employee otherwise eligible would be entitled to the protection of the workmen's compensation law if he suffered a compensable injury in the course of his employment, even though at the time of injury his employment had taken him out of the state.

GFS
Counties—Sheriffs—Prisons and Prisoners—While county board has no statutory authority to compel sheriff to maintain and furnish records of his expenditures for expense of feeding prisoners in county jail, he must nevertheless be able to furnish such records in order to substantiate any claim he may present to the county under sec. 53.33, Stats., for maintenance of such prisoners, or to attack the fairness of any schedule of compensation for maintenance of prisoners adopted by the board under sec. 59.15 (3), Stats.

July 1, 1950.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You have inquired whether the county board may compel the sheriff to maintain and furnish to the board or the proper committee thereof, accurate records of his expenditures for food for prisoners at the county jail including costs of preparing such food.

At the present time you state there is an arrangement between the county and the sheriff whereby a certain sum per day is allowed to the sheriff for feeding each prisoner, with a sliding scale provision based on the number of prisoners, the unit prices decreasing as the number of prisoners increases.

The duty of the sheriff to feed prisoners does not rest upon contract with the county but upon statute. Prielipp v. Sauk County, 215 Wis. 16.

Sec. 59.23 (1) provides that the sheriff shall take the charge and custody of the jails of his county and the persons therein, and keep them himself or by his deputy or jailer. Sec. 53.37 (1) among other things provides that the sheriff shall serve each prisoner three times daily with enough well-cooked, wholesome food and that the county board shall prescribe an adequate diet for the prisoners in the county jail.

Sec. 53.33 reads:

"The maintenance of persons who have been sentenced to the state penal institutions, persons accused of crime and
committed for trial, persons committed for the nonpay-
ment of fines and expenses, and persons sentenced to im-
prisonment therein, while in the county jail, shall be paid
out of the county treasury; but no claim shall be allowed to
any sheriff for keeping or boarding any person in the county
jail unless he was lawfully detained therein."

In Doty v. Sauk County, 93 Wis. 102, it was held that a
sheriff can recover only the actual expense of boarding or
maintaining prisoners, and in order to recover more than
is allowed by the county board he must show that such
expense is in excess thereof, and in Deissner v. Waukesha
County, 95 Wis. 588, it was held that to recover such ex-
 pense the sheriff must keep accurate accounts thereof and
present them to the county board. The court further stated
in this case that if the sheriff neglects to keep such accounts
he can recover by action against the county only such ex-
penses as he shows he incurred and such as are reasonable.
In Bell v. Fond du Lac County, 53 Wis. 433, it was again
ruled that the sheriff is to be reimbursed by the county the
actual expense which he incurs in boarding or maintaining
the prisoners, and that the county board cannot bind the
sheriff by resolution fixing in advance the cost of such
board, but that it may make a contract with him. See also
20 O.A.G. 35.

In Doty v. Sauk County, supra, the sheriff brought suit
for the difference between what the county board had al-
lowed him for the board of prisoners and the amount for
which he had billed the county. In his testimony the sheriff
admitted in effect that he did not know and could not tell
the amount of the cost or expense and that he kept no ac-
count of the same. The court accordingly granted the
county’s motion for a nonsuit at the close of the plaintiff’s
testimony and the judgment was affirmed upon appeal.

In Deissner v. Waukesha County, supra, the sheriff made
a charge to the county of 35 cents per day for board and
washing of each prisoner, but the county board allowed only
25 cents per day. The court pointed out that under the
statutes, secs. 4947 and 4950, “the sheriff shall be paid . . .
the accounts having been first allowed by the county board,”
and that this clearly contemplated that the sheriff was to
keep accounts of all expenses for which the county is liable,
failure in that regard constituting a clear violation of his official duty. Justice Marshall in writing the court's opinion stated that stringent rules should be applied in determining how much should be paid to an officer under such circumstances and that the rule should be as stringent as that applied to the adjustment of the accounts of trustees under similar circumstances. It was further stated in the opinion at pages 591–592:

"* * * Every intendment of fact should be made against the claim, and the lowest estimate put upon all charges and expenses, and only such allowed as are reasonable and established by clear and satisfactory evidence. If the result of such rule works a loss to the sheriff, it is because of his violation of official duty, for which he alone is responsible and alone should bear the loss. No reason exists why all the items of expense incurred in maintaining prisoners should not be carefully kept, the same as a good business man would keep his business accounts, so that all such expense can be audited with certainty of doing exact justice to the sheriff and the public as well. The statutes contemplate that the accounts will be so kept and so audited.

"The principle of this decision is that, under the statutes of this state, the sheriff is entitled to pay for his actual expenses in maintaining prisoners confined in county jails under his charge (following Bell v. Fond du Lac Co. 53 Wis. 433; Nickell v. Waukesha Co. 62 Wis. 469; Parsons v. Waukesha Co. 83 Wis. 288, and Doty v. Sauk Co., supra); that the law contemplates that he shall keep accurate accounts of all such expenses, and present the same to the county board, and have the same audited, before receiving payment; that, if he neglects so to do, he can recover of the county, in an action therefor, only such expenses as he is able to show he incurred, by clear and satisfactory testimony, and only such as are reasonable."

In this case the sheriff had charged for full days from the day of commitment to and including the day of discharge without regard to the number of meals furnished, and no account of expenses was produced on the trial although there was testimony that it was entirely practicable to keep accounts so as to show the cost of keeping all prisoners for any given time, and the supreme court accordingly reversed the judgment of the circuit court allowing the additional 10 cents per day claimed by the sheriff.
I do not understand that the per diem rates for prisoners now allowed to the sheriff in your county are the result of any actual contract between the county and the sheriff, but it is assumed that the schedule was set up by the county board pursuant to sec. 59.15 (3) which was amended by ch. 559, Laws 1945, so as to provide that the county board may 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.

There should be no conflict between the provisions of sec. 59.15 (3) when properly applied and the provisions of sec. 53.33 providing that the maintenance of such prisoners shall be paid out of the county treasury, since the schedule established under sec. 59.15 (3) must provide "a fair rate of compensation" which could not very well be a fair one if it were less than the actual cost of maintenance.

However, the establishment of a schedule for maintenance under sec. 59.15 (3) is optional with the county board, and if it were to abolish the existing schedule it would then be incumbent upon the sheriff under the authorities hereinbefore discussed to furnish accurate records of the cost of feeding prisoners or run the risk of having the county board deny his claim. Also, if the sheriff were to contend that the existing schedule set up under sec. 59.15 (3) or any amendment of such schedule violated the statute by not providing "a fair rate of compensation" the burden would be upon him to show the unfairness by producing accurate cost figures.

WHR
Tuberculosis Sanatoriums—Outpatients—The administrative procedure prescribed in secs. 50.07 and 50.02, Stats., must be followed in the case of persons receiving outpatient treatment as provided by sec. 50.08, Stats.

July 3, 1950.

STATE BOARD OF HEALTH.

You have pointed out that by ch. 201, Laws 1949, the legislature extended state aid given to counties providing outpatient care for tuberculous patients. This chapter amended sec. 50.08 in the following manner:

"50.08 Any county may establish and maintain an outpatient department or a public health dispensary for tuberculosis and other communicable diseases; which may also be used in connection with the correction of physical defects of school children and child welfare work. In counties whose population is 250,000 or more such institution shall be governed either pursuant to section 46.21, or sections 46.18 and 46.19. In all other counties it shall be governed pursuant to sections 46.18 and 46.19. Any county which provides outpatient treatment in a county institution to a person who presents the certificate mentioned in section 50.07 (1) shall be credited by the state, to be adjusted as provided in section 50.11 for each patient cared for at public charge, as follows:

"(1) For each treatment given to a patient whose care is chargeable against said county, one-seventh of the amount paid by the state per week to the county under section 50.07 (3) (a) and (b).

"(2) For each treatment given to a patient whose care is chargeable against some other county, one-seventh of the amount paid by the state per week to the county, or one-seventh of the cost of his care as determined by the institution and the state board of health, whichever is greater; the state shall charge over to such other county any excess over the amount as provided in section 50.07 (3) (a) and (b)."

Your question is whether or not provisions of sec. 50.07 and sec. 50.02, Stats., relating to admission and determination of legal settlement of tuberculous patients also apply to persons receiving outpatient treatment at dispensaries or outpatient clinics.

While sec. 50.08 does not state specifically that the provisions for admission and determination of legal settlement
contained in secs. 50.07 and 50.02 are applicable to out-
patients receiving care as provided in sec. 50.08, it is my
opinion that sec. 50.08 necessarily implies that the adminis-
trative procedure provided by secs. 50.07 and 50.02 are
applicable to it.

You will note that the first paragraph of sec. 50.08, Stats.,
states that adjustments will be made as provided by sec.
50.11. Sec. 50.08 (1) refers to patients "whose care is
chargeable against said county" and sec. 50.08 (2) refers
to "a patient whose care is chargeable against some other
county." There is nothing set forth in the statute either ex-
pressly or by implication which indicates the use of any
procedure other than that prescribed for patients admitted
to tuberculosis sanatoriums.

In the construction of statutes, it is proper to refer to
statutes in pari materia. Thus we may consider secs. 50.07
and 50.02 in connection with sec. 50.08 since together they
indicate the whole statutory scheme as adopted by the leg-
islature and its purpose or object. State ex rel. Plouman v.
Lear, (1922) 176 Wis. 406.

The plan of the legislature as is indicated by ch. 50 of the
statutes is to provide counties with authority to fight tuber-
culosis and to provide state aid in helping to eradicate this
disease. The authority to expend funds in this regard is in
the nature of a charity and the power granted by the legis-
lature in the statutes relating to tuberculosis must be closely
followed or public officers may risk personal liability for
unauthorized expenditures. You will find a discussion of
this subject in 31 O.A.G. 124 (1942).

I realize that following the usual procedure of determina-
tion of legal settlement may be inconvenient in the case of
persons receiving brief treatments which may consist
merely of a diagnosis. However, this is not an adequate rea-
son to circumvent the statutory procedure.
REB
Nurses—Licenses and Permits—Under sec. 149.06 (1), Stats., holder of a certificate of registration in another state is entitled to registration in Wisconsin without examination upon submitting credentials of general and professional educational qualifications equivalent to those required for original registration in Wisconsin at the time the nurse was registered in the other state. Board of nursing may accept certificate of other state board in lieu of original documents. Board may not consider whether state board examination given in the other state was equivalent to that given in Wisconsin but is concluded by the fact that a certificate of registration was granted by the other state.

July 3, 1950.

ADELE G. STAHL, Director,
State Department of Nurses.

You have requested an opinion with reference to the interpretation of sec. 149.06 (1), Stats., which provides as follows:

“One complying with the provisions of this chapter relating to applicants for registration as nurses and passing a satisfactory examination shall receive a certificate of registration. The holder of such a certificate of another state shall be granted a certificate without examination if her credentials of general and professional educational qualifications are comparable to those required in Wisconsin during the same period. The board shall evaluate the credentials and determine the equivalency in each such case.”

Before taking up your questions, which relate to the credentials of applicants registered in another state, attention is invited to sec. 149.04 relating to the general and professional educational qualifications of nurses applying for original registration in this state:

“A nurse who is a citizen or who has legally declared her intention to become a citizen and of good moral character, who has graduated from a high school or its equivalent as determined by the board, who holds a diploma of graduation from an accredited school of nursing, or who will complete a full course in an accredited school for nurses within 4 months following the date of application, may apply to the department for registration as a registered nurse, and upon payment of $25 shall be entitled to examination.”
The word "credential" is defined as follows in Webster's New International Dictionary:

"Credential—That which gives a title to credit or confidence; specif., pl., testimonials showing that a person is entitled to credit, or has a right to exercise official power, as the letters given by a government to an ambassador."

Your questions are as follows:

"1. General Education. Is it necessary for the Department to have a copy of the high school transcript or may we accept the certification of another State Board of Nurse Examiners who have checked on the candidate's general education and who are able to supply us with information as to whether she has 1, 2, 3 or 4 years of high school?

"2. Professional Education. Does this refer only to the content of the curriculum in her school of nursing or does it include certification by the state granting the original license?

"3. State Certification. Is a general statement from the original licensing board certifying to the satisfactory completion of the examination sufficient or are we required to ascertain the subjects in which the applicant was examined? Should we require applicants to have written in the same subjects as required for licensure in Wisconsin by examination?"

The answer to the first two of these questions is that you would demand of the applicant for registration under sec. 149.06 (1) the same or equivalent credentials as would be required if she were applying for examination for original registration in Wisconsin, as of the time that she was registered in the other state. 37 O.A.G. 399.

In answer to question No. 1, it is my opinion that if at the time she was registered in another state the Wisconsin law required an applicant for an original registration here to be a high school graduate or its equivalent (as now provided by sec. 149.04) then you should require of her proof of that fact comparable or equivalent to that which you would demand of a nurse applying for an original registration here. If you require a high school transcript under sec. 149.04, it or a certified copy should be required under sec. 149.06 (1). If a diploma is all that is required under sec. 149.04, that or a certificate of its existence is likewise sufficient under sec. 149.06 (1).
In answer to question No. 2, it is my opinion that at the present time the applicant must show graduation from an "accredited school of nursing" and that if the school is "accredited" you are not concerned with the question of what its curriculum may be. If at the time of her registration in the other state, Wisconsin did not require graduation from an "accredited" school of nursing, then you will apply whatever test would have been applied at that time to entitle her to examination in this state.

Sec. 149.06 (1) does not require that the credentials be identical with those required in Wisconsin, but only that they be "comparable" or "equivalent." In my opinion the certificate of the board of another state certifying that its records show that credentials of general and professional educational requirements of the applicant are on file with it, or have been submitted to it and returned to the applicant, and further certifying what such credentials show as to high school education and graduation from an accredited nursing school, may be accepted in lieu of the original documents. But such a certificate must disclose that the credentials accepted by the other state were equivalent to those required in Wisconsin at that time.

In answer to question No. 3, you are advised that the only thing that is required is that the applicant be registered in another state. You are not concerned with what examination was given in the other state or whether the examination so given was in any way comparable to that given in Wisconsin. It is only the "credentials of general and professional educational qualifications" which are required to be "comparable" to those required in Wisconsin.

WAP
State—Public Printing—Amendment to sec. 35.69, Stats., by revisor's bill, ch. 262, Laws 1949, does not alter the basic and material considerations upon which opinion reported in 36 O.A.G. 535 was rendered and said opinion is reaffirmed.

July 7, 1950.

Bureau of Purchases.

You renew the question (answered in 36 O.A.G. 535) relating to rates to be paid for publication of election notices, which arises out of the conflict which is apparent from a reading of secs. 6.82, 331.25 and 35.69, Stats. 1947. Your question is precipitated by virtue of ch. 262, Laws 1949, a revisor's bill, which effected an amendment to sec. 35.69, Stats.

I advise that the change worked by said revisor's bill does not alter the basic considerations upon which the above mentioned opinion was rendered. I reaffirm said opinion and recommend that you be guided thereby in computing the amount of rates to be paid for the notices involved.

SGH

Insane—Legal Settlement—Person conditionally released from mental institution and not required to return within one year is presumed competent at end of year. Such presumption may be rebutted by proper proof.

Incompetent person cannot change place of legal settlement.

July 7, 1950.

JOHN E. ARMSTRONG,
District Attorney,
Juneau County.

You have requested my opinion on the following state of facts:

"A woman born January 10, 1925 requires medical attention and has made a request to this county to be admitted to the Wisconsin General Hospital. She is suffering from a mental condition."
"She resided with her parents in Monroe County and listed below is a statement of the residence.

Wilton, Monroe Co., Wis. __________ 1-10-25—Fall, 1930
Indian Creek, Monroe Co., Wis. __________ Fall, 1930—1932
Tomah, Monroe Co., Wis. __________ 1932—10-42
Milwaukee, Milwaukee Co., Wis. __________ 10-42—5-43
Camp McCoy, Monroe Co., Wis. __________ 5-43—11-44
Washington, D. C. __________ 1-25-45—7-15-46
Camp Douglas, Juneau Co., Wis. __________ 7-15-46—12-3-46
Mendota __________ 12-3-46—1-19-47
Camp Douglas, Juneau Co., Wis. __________ 1-19-47—1-18-48
Mendota __________ 1-18-48—2-10-49
Camp Douglas, Juneau Co., Wis. __________ 2-10-49—Present

“She was committed to the Mendota State Hospital on December 3, 1946 by the Monroe County Court. She remained there until January 19, 1947; returned to the Institution on January 18, 1948 where she remained until February 10, 1949. On both occasions she was adjudged legally insane. When she left the Institution on February 10, 1949 she was on conditional release to her mother, the period of her most recent commitment expiring February 10, 1950. All the time she was in the Mendota State Hospital she was mentally incompetent and totally incapacitated because of her mental illness and it was the opinion of the Superintendent that the patient would not show any improvement in the foreseeable future and that no treatment would benefit her. She has at no time since her initial commitment been adjudged sane."

Your question in effect is whether this person has a legal settlement in Juneau county which was acquired during her last period of presence in Juneau county from the 10th of February, 1949 down to the date of your request.

In 21 O.A.G. 390 it was stated that an insane person cannot voluntarily fix his residence in any place, nor his legal settlement.

Under the provisions of sec. 49.10 (4), Stats., it is in substance declared that an adult person gains a legal settlement within the municipality by residing therein for one year without being supported as a pauper. Under sec. 51.13, Stats., it is provided that the superintendent of the Mendota state hospital, among others, may grant conditional release to patients, and in subsec. (3) it is provided:

“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."

In my opinion, it appears that the incompetent herein has not acquired a legal settlement in Juneau county. Under the statute last quoted it would appear that the superintendent at Mendota could have required the patient's return to the state hospital at any time up to February 10, 1950, and the presumption of competency did not arise until that date. That is, at the outside, February 10, 1950 is the first time this person could voluntarily choose a residence and so start the year running which is necessary for legal settlement under sec. 49.10 (4).

Further, sec. 51.13 only establishes a presumption of competency. The statute does not state that such presumption is conclusive, and hence it may be rebutted by proper evidence like any other presumption.

Your facts do not state whether the residence in Washington of the person during the years 1945 and 1946 was with her parents. If her parents then resided in Washington, it is possible that the parents lost their legal settlement in Monroe county and hence her settlement in that county, which is dependent on theirs during her minority, was also lost. On the facts given, I can express no opinion on this latter point.

RGT
Constitutional Law—Navigable Waters—Legislature has no power to make a grant of the bed of a navigable lake for a private purpose in excess of the ordinary riparian rights of the owner of the uplands. Attempt of legislature to make a permanent grant of the right to occupy the bed of a navigable river for a private purpose not connected with riparian rights cannot safely be regarded as constitutional.

July 7, 1950.

PUBLIC SERVICE COMMISSION.

You have asked my opinion of the proper interpretation of sec. 30.02 (1) (b), Stats. 1949, as amended by ch. 335, Laws 1949. That section now reads:

"It shall be unlawful to deposit any material or to place any structures upon the bed of any navigable water where no shore line has been established or beyond such shore line where the same has been established, provided, however, that the public service commission may grant to any riparian owner the right to build a structure, or to maintain a structure already built and now existing, for his own use, if the same does not materially obstruct navigation. Upon complaint by any person, the public service commission shall hold a hearing thereon to determine whether or not such present structure, or one proposed to be built, does materially obstruct navigation."

The underlined portion was added by the amendment to ch. 335, Laws 1949.

You ask in substance the following questions:

1. Does the word "structure" as used in the above section include any of the following: (a) A harbor of rocks, or a rock breakwater; (b) a concrete or rock retaining wall along the shore of the water which has been back filled with earth; (c) masses of rock or earth designed for use as piers or docks; (d) boat houses; (e) conventional type piers made from wood, metal or concrete, or a combination thereof; (f) other structures similar to those described under sections (d) and (e).

2. What is meant by the words "materially obstruct navigation" as they appear in sec. 30.02 (1) (b) as amended?

3. Would the section above quoted authorize the construction of a proposed addition to a building adjacent to the
Rock river which addition would be supported by piers and pilings on the bed of the river, assuming that any construction would not materially obstruct navigation?

4. Is the section constitutional as applied to any of the aforesaid situations?

Your questions will be answered in order.

1. In the case of Vikes v. Pedersen, 247 Wis. 288, our court has stated that the term “structure” must be construed in accordance with the intent and purpose of the instrument in which it is used. In that case the court stated that the term “structure” could be extended so far as to cover “possible accumulations of material in piles.” It would appear unnecessary to give such an extended definition to the term “structure” in the present statute, for the reason that the statute by its terms specifically distinguishes between deposit of materials and the erection of structures. Construing the statute in the light of its clear purpose to prevent any encroachment upon or diminution of public rights in navigable waters, it would appear that the term “structure” should be extended to any artificial creation which has a utility because of its form as opposed to a mere pile or dump of materials. Accordingly it would appear that all the items enumerated in your first question which have some utility in connection with the use of the water or the adjoining land may properly be denominated as structures.

2. It does not appear possible or desirable to attempt to lay down in advance any all-embracing and comprehensive rule which would attempt to define the structures which “materially obstruct navigation” and those which do not constitute such obstruction. Such a determination can be made only by examining all the facts in each case as it arises. We note in passing that the language you use is similar to that found in sec. 31.06 (3), Stats., under which permits for dams are granted upon a finding that they do not “materially obstruct existing navigation.” It is obvious that a dam without locks completely severs navigation between the two portions of the river affected. It would appear that the elimination of the word “existing” would indicate that such complete blocks are not intended under sec. 30.02 (1) (b) and that the intention is to authorize minor or com-
paratively small encroachments in navigable waters if such action is constitutionally permissible.

3. It would appear that a building on piles is clearly included within the term “structure.” Bouvier’s Law Dictionary defines structure as “that which is built or constructed; an edifice of any kind.” In Kresge v. Maryland Casualty Company, (1913) 154 Wis. 627, the court in construing an insurance policy states “in its usual and ordinary sense the word ‘structure’ is applied to a building of some size, an edifice,” and in Favro v. State, (Crim. App. Tex. 1898) 46 S.W. 932, a structure is defined as that “which is built or constructed; an edifice or a building of any kind. In the widest sense, any production or piece of work artificially built up, or composed of parts joined together in some definite manner.” In S. S. Kresge Co. v. Railroad Comm., (1931) 204 Wis. 479, at 486, the court refers to a similar building in the following terms: “There is no allegation in the complaint to the effect that the proposed structure when erected will constitute no obstruction to the navigation of the river.” It seems clear that a building of the type you refer to would be a structure within the meaning of the statute as amended.

4. The constitutional issues raised by the amendment of 1949 cannot be disposed of so readily. An examination of all the Wisconsin cases passing upon issues of water law and the conflict between public and private rights in our navigable waters and the underlying lands leads inevitably to the conclusion that there are two distinct and irreconcilable bodies of authority and therefore it is difficult to predict how a particular court will react to a given situation.

In passing upon a constitutional issue under such circumstances, I can only offer my opinion as to the sounder view, together with the reasons for that opinion.

In my opinion the divergence in views has arisen because the supreme court at various times has failed to give due weight to the trust doctrine established in Wisconsin on the basis of the declaration in the Northwest Ordinance that the navigable waters shall be forever free, and has further failed to recognize that this issue fundamentally is an issue of title to real property. That is, under the trust doctrine the public rights in navigable waters and the underlying lands
arise out of the fact that the waters and lands were actually conveyed to the state in trust for the public and the state was the original holder of the fee just as any private trustee would be. Under the opposing view, the court ignores the question of title and either asserts the trust extends only to navigation and its incidents or asserts that the state has plenary powers over the waters and the underlying lands.

Title to lands in Wisconsin is derived ultimately from the proclamations of discovery by the English Crown. Thompson on Title to Real Property, § 181, gives the chain as follows: (1) Proclamation of discovery; (2) grant by the king to the Virginia patentees; (3) treaty of Paris (did not convey, but merely confirmed colonists in their rights); (4) act of cession of the Virginia legislature of 1783, which authorized the delegates to cede the Northwest Territory; (5) the Northwest Ordinance of 1787; (6) treaties by United States with Indian tribes; and (7) United States patent.

To the foregoing might properly be added the actual deed of conveyance from Virginia dated March 1, 1784 signed by Thomas Jefferson, James Monroe, Samuel Hardy and Arthur Lee, and the act of ratification of the Virginia legislature of 1788 which ratified the conveyance to the federated states in accordance with the ordinance of 1787, anything to the contrary in the deed of cession notwithstanding.

In addition, any possible claims of title which Massachusetts, Connecticut or New York may have had were conveyed as follows: Massachusetts, March 1, 1781 and April 19, 1785; Connecticut, September 13, 1786; New York, March 1, 1781. Hibbard, A History of Public Land Policies, p. 13.

The act of cession of Virginia of 1783 set out the conditions for organizing new states and provided specifically that the conveyance to the United States was on condition that “the states so formed shall be distinct republican states, and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states.” The ordinance of 1787 provided: “And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States on an
equal footing [emphasis added] with the original states in all respects whatsoever.’

As a result of this series of conveyances, it has been determined that the United States was vested with the full fee title to the uplands which were to be sold to pay the public debt incurred by the Revolution, and held the navigable waters and the underlying lands only in trust to convey to the states as they should be formed. *Pollard Lessee v. Hagan*, (1845) 44 U.S. 212.

Since new states were to be admitted on an equal footing with the original states, it is necessary to determine the nature of the rights of the original states in their navigable waters and underlying lands. In *Martin v. Waddell*, 16 Peters *367, 410* the court stated: ‘When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution.’ In this latter case the court also states that under the English common law the sovereign held the dominion and property in navigable waters and underlying lands in public trust. While he had asserted the right to make exclusive grants prior to Magna Carta, after the signing there is doubt concerning his right to do so, and as a matter of policy no exclusive grants were made.

Magna Carta contains no direct prohibition against such grants in the future, but their existence at the time was one of the evils to be remedied by Articles 47 and 48 of the Charter.

Now, on the basis of the foregoing, can it be stated that Wisconsin, upon its entry into the Union in 1848, took title to its navigable waters and the underlying lands subject to an irrevocable public trust under which no exclusive private grants could be made, or did it acquire title with a plenary power of disposal?

In *Barney v. Keokuk*, 94 U.S. 324, 388, the court declares that the individual states have the right to determine the ownership of land under navigable waters, and apparently need not reserve ownership for the public. This case is of questionable authority in that it does not discuss the effect of the Northwest Ordinance (the state involved was not
part of the Northwest Territory), but it does establish the right of a state to make its own determination. At an early date in its history, Wisconsin put itself on record as favoring the trust doctrine, subject only to the qualification that riparians on navigable streams took a qualified title in the stream bed. While there is no opinion of our court that specifically recites all the bases of the trust, it would appear that the trust is based on: (1) The act of cession of Virginia declaring that the states to be formed shall have the same rights of sovereignty as the original states; (2) the Northwest Ordinance of 1787 which declared the states to be formed should be admitted on an equal footing, and the further express declaration that the navigable waters shall be "forever free"; (3) the ratification of the Northwest Ordinance by Virginia; (4) the provision of the United States constitution whereby the United States recognized all obligations of the states under the articles of confederation, which may properly include a recognition of the trust in public waters for future states; (5) the policy under the English common law, based on Magna Carta, that exclusive grants would not be made in navigable waters or underlying lands; (6) the inclusion in art. IX, sec. 1 of the Wisconsin constitution of the provision of the Northwest Ordinance regarding navigable waters.

One of the clearest statements of the trust doctrine is found in United States Steel Co. v. Bilot and wife, (1901) 109 Wis. 418, 426:

"* * * The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. * * *"

And in Milwaukee v. State, 193 Wis. 423, 441, the court stated:

"* * * Wisconsin, therefore, as it had a right to do, and as is recognized by all the authorities, when the constitution was adopted, placed itself fundamentally on record in
favor of the trust doctrine, and we must therefore reckon with this doctrine at every phase of the discussion of the issues in this case."

See also Attorney General v. The City of Eau Claire and others, 37 Wis. 400; McLennan v. Prentice, 85 Wis. 427; Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534; Smith and others v. Youmans and others, 96 Wis. 103; Ne-Pee-Nauk Club v. Wilson and others, 96 Wis. 290; Willow River Club v. Wade, 100 Wis. 86; Mendota Club v. Anderson and another, 101 Wis. 479; In re Horicon Drainage District, 136 Wis. 227; In re Crawford County L. & D. Dist., 182 Wis. 404; Nekoosa–Edwards Paper Co. v. Railroad Comm., 201 Wis. 40.

A clear expression of the contrary view is found in Flambeau River L. Co. v. Railroad Comm., 204 Wis. 524, 537, 540, wherein Chief Justice Rosenberry asserts that the power of the state over its navigable waters not only was plenary at the time of the formation of the state, but continues to be so at the present time. It is notable that the Flambeau River L. Co. case does not discuss any of the foregoing cases with the exception of the Crawford County case in 182 Wis. 404, and does not discuss the trust doctrine or the right of the state to adopt it. Among the later cases in which the trust doctrine was not followed or was limited are State v. Adelmeyer, 221 Wis. 246, and Lundberg v. University of Notre Dame, 231 Wis. 187.

In view of this conflict of authority, is it now open to us to argue that the trust doctrine had previously become so firmly established in the law of the state that it has become a rule of property and must be followed whenever properly presented to the court? In Franzini v. Layland, (1903) 120 Wis. 72, 81, the court stated:

"** This state, by judicial authority so long acquiesced in as to become a rule of property, quite early established as its policy the doctrine that the title to a riparian proprietor upon a navigable stream goes not by force of his patent, whether received from the government or from the state, but by the mere favor or concession of the state to the center of the stream, subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in it
in trust for their use. Willow River Club v. Wade, 100 Wis. 103, 118, 76 N.W. 273; Illinois S. Co. v. Bilot, 109 Wis. 418, 426, 84 N.W. 855, 85 N.W. 402; Illinois C. R. Co. v. Illinois, 146 U.S. 387, 13 Sup. Ct. 110. Whether such policy be out of harmony with the original design, or whether it was the best one to establish, cannot now be a subject for judicial consideration. There is no opportunity now for retreat. The state has taken its position, and property rights upon all our rivers have become vested with regard thereto, and the supreme judicial authority has many times affirmed that it possesses discretionary authority to part with its trust property to the extent mentioned,—that is, in such ways as do not substantially affect the purposes of the trust. Railroad Co. v. Schurmeir, 7 Wall. 272; Rundle v. Delaware & R. C. Co. 14 How. 80; Barney v Keokuk, 94 U.S. 324."

In Wisconsin Power & Light Co. v. Beloit, (1934) 215 Wis. 439, 445, the court stated:

"* * * Under the principle of stare decisis, a rule of law in the nature of a rule of property once established and acquiesced in without change by the legislature should be adhered to. A multitude of cases to that effect is cited in 2 Callaghan's Wis. Dig. p. 1448. Courts hesitate long before they overrule such decisions and disturb rights and interests which have become vested thereunder. They will not overrule them except for compelling reasons."

And in Doemel v. Jantz, 180 Wis. 225, it is declared that the rights of riparians as set forth in the adjudications of the court have become rules of property.

In spite of the strong language used in the Franzini v. Layland case and similar cases, that fact that the trust doctrine has not always been followed would indicate that it is difficult to predict whether the court would presently recognize it as a rule of property on behalf of the public even upon a full presentation. However, in my opinion it represents the better view and it must be borne in mind at all times in arriving at a solution to our present problem.

No constitutional issue arises in the case of those structures which are in aid of navigation. The right to erect such structures as wharves, piers, docks, and booms is included in the riparian rights of the owner of the uplands and, while subject to reasonable regulation, cannot be taken from him without compensation. Doemel v. Jantz, supra.
Such rights exist in similar form both on rivers and lakes and are not based on title to the submerged lands. *Diedrich v. The N.W.U. Ry. Co.*, 42 Wis. 248, 262.

Passing now to a consideration of those structures not in aid of navigation, it seems desirable to consider lakes and rivers separately, for the reason that it is established that the state has retained full title to the lake bottoms, *Milwaukee v. State, Ne-Pee-Nauk Club v. Wilson*, supra, while by judicial fiat it has conceded a qualified title to river beds to the owner of the uplands. *Diana Shooting Club v. Hustling*, 156 Wis. 261; *Willow River Club v. Wade*, 100 Wis. 86; *Jones v. Pettibone*, 2 Wis. 225.

*Milwaukee v. State*, supra, which follows the trust doctrine, appears to be clear authority that a grant of the lake bottom can only be made for a public purpose, which purpose in that case was the improvement of navigation by constructing and protecting Milwaukee harbor. While there is *dictum* in this case that parcels can be aliened which can be disposed of without detriment to the public interest in the lands and waters remaining, such *dictum* cannot safely be relied on since the point was not before the court and the court does not discuss the point that public property cannot be conveyed for a private purpose without compensation. Cf. *Loomis v. Callahan*, 196 Wis. 518.

In the matter of funds in the public treasury, it is abundantly clear that an attempt to devote such funds to a private purpose is unconstitutional equally whether the sum involved be $50 or $50,000. On principle there is no reason why the same rule should not apply to all other public property and in particular to the lake beds to which the state has the fee title.

In my opinion, any attempt by the legislature, either acting directly or through your commission, to make a grant or license of any lake bed for a private purpose is unconstitutional whether the area involved be great or small, and particularly when made without any compensation to the state.

The issue in the case of navigable rivers is complicated by the fact, as indicated above, that the state has conceded a qualified title to the bed to the owner of the uplands. The most notable consequence of this qualified title is, of course,
the privilege of the riparian under proper authority to build a dam in the river to make use of a water power on his premises. However, it is abundantly clear that use of this water power is not a matter of right and it can be taken from him without compensation whenever necessary to promote or improve the navigability of the river. U.S. v. Chandler Dunbar Co., 229 U.S. 53. Title to the river bed can be conveyed separately from the title to the uplands. Norcross v. Griffiths, 65 Wis. 599, 27 N.W. 606; Kelley v. Salvas, 146 Wis. 543, 131 N.W. 436. And when a harbor has been established by the federal government, or a shore line pursuant to sec. 30.02 (1) (a), the area may be filled to such line and used by the owner of the underlying fee. Bright v. Superior, 163 Wis. 1. (It is notable that the Wisconsin statute requires the shore line to conform as nearly as practicable to existing shores.) And in all waters the owner of the uplands has the right to protect his lands from erosion and may, at his peril of obstructing the public use and at his peril of the necessity, intrude into the waters for the purpose of constructing works to protect his land. Diedrich v. The N.W.U. Ry. Co., 42 Wis. 248, cited with approval in Atty. Gen. ex rel. Becker v. Bay Boom W.R. & F. Co., 172 Wis. 363, 178 N.W. 569.

The right or privilege of a riparian owner on a stream to erect structures (buildings) in the stream bed which are not in aid of navigation, in aid of the lawful use of the waters for power purposes, or for the protection of the uplands was the subject of the opinions in The State v. Carpenter, 68 Wis. 165, 31 N.W. 730; Janesville v. Carpenter, 77 Wis. 288, 46 N.W. 128; State v. Sutherland, 166 Wis. 511, 166 N.W. 14; S. S. Kresge Co. v. Railroad Comm., 204 Wis. 479, 235 N.W. 4. In the first two cases, prayers for injunction against the driving of piling in the Rock river at Janesville for the purpose of supporting buildings were denied. In State v. Sutherland, an attempt was made by the attorney general to abate as a public nuisance a building standing on piles in the bed of the Rock river at Janesville, and such relief was denied. In the Kresge case, the plaintiff sought a declaratory judgment to establish its right to erect and maintain a building to be located on piles in the Rock river at Beloit and on the site of an existing building owned by
plaintiff. Such relief was denied, and plaintiff's claim that it had a vested right under the theory of State v. Sutherland was overruled. The court analyzed the three earlier cases and pointed out that they turned on questions of the right to equitable relief and the fact that the structures did not interfere with navigation.

The essence of the court's ruling is found in the statement in the opinion on rehearing, p. 493:

"* * * since the enactment of secs. 30.01 (2) and 31.23 (1), no riparian has without the consent of the state a right to invade the bed of a navigable stream with a structure of any kind even though it be one in aid of navigation; that under the existing law state authorities cannot give a consent to an invasion of the bed of a navigable stream, which consent would conclude the state if in the future it shall be necessary for the state to remove the structure in aid of navigation; that as to such structures as are now in the bed of Rock river at the point in question, which do not in fact obstruct navigation, we see no occasion to add to what has been declared in former cases, as that is not within the scope of a judgment for declaratory relief."

Since the decision in the Kresge case, the statutes have been amended as set forth above to purport to give your commission power to authorize structures in navigable waters not materially obstructing navigation. The Kresge case, based on differing statutes, does not constitute any direct authority on the right of the state to adopt such a permissive statute. However, the court does state, pp. 490, 491:

"* * * Under our decisions, from Jones v. Pettibone, 2 Wis. 308, and Wis. River Imp. Co. v. Lyons, 30 Wis. 61, down, it has been consistently held that the right of a riparian to erect structures in a navigable stream is subordinate to the right of the state to improve the stream in aid of navigation. This right was vindicated in Black River Imp. Co. v. La Crosse B. & T. Co. 54 Wis. 659, 11 N.W. 443, and Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N.W. 546.

"* * * Milwaukee v. State, supra, contains a strong intimation that the state can part with such title as it has in execution of the trust imposed upon it by law only when that act is done in aid of navigation. * * * Whatever the plaintiff's rights may be, they are and must remain subordinate to the right of the state to improve navigation and as trustee for the public."
Whether the state has retained sufficient interest in the river bed and the waters so that they cannot be aliened for a private purpose in excess of the ordinary riparian rights would appear to be an open question. On principle, it is difficult to see how any public property of any nature whatsoever can be turned over for private use without compensation to the state, and more particularly, if the trust doctrine is followed, it is difficult to see how the rights of the people in the trust property can be infringed on in any degree, however small.

In any event, no matter what the state attempts to do, the United States supreme court has ruled that the power of the states over navigable waters is subordinate to that of congress and the state can grant no right to the soil of the bed of navigable waters which is not subject to federal regulation or change. Congress may establish harbor lines and is not precluded thereby from changing them. *Philadelphia Company v. Stimson*, 223 U.S. 605. The United States has power to remove a fill established under consent from the state and is not liable to compensate the owner of the fill for the removal. *Greenleaf Lumber Co. v. Garrison*, 237 U.S. 251. Compare *Luther J. Bailey and James E. Fulgham v. United States*, 62 Ct. Cl. 77, which denied compensation for oyster beds destroyed by the construction of a naval base. Certiorari denied, 273 U.S. 751.

From the foregoing it would appear that, even if the trust doctrine were held inoperative in the case of navigable rivers, the only power of the state in the premises would be to grant a revocable license to occupy the river bed, which license would be revocable at the instance of either the state or the federal government when necessary to improve navigation. I note that the statute, ch. 335, Laws 1949, does not by its terms limit the “right” to be granted by your commission to a revocable license. A statute expressly authorizing the grant of an irrevocable right would appear to be beyond the power of the legislature, both because of the Wisconsin trust doctrine in regard to navigable waters, and because of the paramount power of the United States to improve navigation.
My advice to you is to treat the statute, as applied to river beds, as a delegation of authority to grant a revocable license only.

RGT

Savings and Loan Associations—Appeal to Advisory Committee—Savings and loan advisory committee, hearing an appeal from the commissioner of savings and loan associations, has clear statutory power to receive additional evidence at the hearing on appeal.

July 8, 1950.

ROBERT C. SCHISSLER,

Commissioner of Savings and Loan Associations.

You have asked my opinion on the following question: Can the savings and loan advisory committee, on an appeal to review a decision of the commissioner relative to an application of an association to change its location, accept and entertain additional evidence offered by the appellant or respondent?

By the terms of the statute which authorizes an appeal from the commissioner to the savings and loan advisory committee, sec. 215.02 (19), Stats., it is specifically provided that "the review procedure under this section shall be the same as that provided for said board of review to a bank in section 220.085." Sec. 220.085 provides for the powers and duties of the banking review board and for the procedure before that board. Subsec. (2) (c) specifically provides: "The board shall base its determination upon the record made by the commissioner and may also receive additional evidence to supplement such record if it finds it necessary. * * * Any findings of fact made by the commissioner shall be sustained if supported by substantial evidence in the record made by him or in such record supplemented by evidence taken by the board."

In my opinion this last quoted section establishes clear authority in the savings and loan advisory committee to accept additional evidence offered by any party at the hearing on appeal before that committee.

RGT
Counties—Appropriations and Expenditures—Public Assistance—Propriety of county expenditures for training of employees discussed.

July 10, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

Your letter states that two employees of a county welfare department which administers social security aids plan to take a course in social work in the graduate school of the university of Wisconsin. They can arrange to commute and attend classes and seminars presumably without sacrificing their work for the agency. You inquire whether their expenses for books, tuition, travel, and meals can be considered as part of the county agency's administrative expenses so as to be reimbursable from state and federal funds under secs. 20.18 (6) and 49.51 (3), Stats.

You do not describe the exact nature of the course of study nor the relationship between the information to be acquired and the day to day operation of the department. You do, however, express your own doubt whether these items can properly be classed as expenditures incurred in the administration of public assistance.

It is difficult to suggest a test which will suffice as a matter of law to separate proper from improper expenditures in this field. There is no statute expressly authorizing a county to incur these expenditures and any power to do so must rest upon the power of a public employer such as the county to provide its employees with necessary tools with which to perform their duties. I suggest that it may be proper for the county to aid its employees in acquiring information if (1) the information is necessary to the proper performance of duties, (2) the same information would not be gained quickly enough by experience in the particular job, (3) the information is more specialized than the employee would be expected to have as one of his qualifications for the job, and (4) the information will immediately and directly aid the employee in performing his duties.

Without more information as to how the courses involved in your request meet the suggested standards, I can express no definite opinion with respect to them. A standardized
formal course of study is less likely to meet the standards than, for example, a handbook containing information for daily use. In view of the doubt which you have expressed, I advise that you decline to recognize these items as properly reimbursable.

TEF

**Intoxicating Liquors—Licenses and Permits—“Class B”**

Liquor license issued in complete disregard of the jurisdictional requirement of sec. 176.05 (6a), Stats., that no license shall be issued unless the premises conform to the rules and regulations of the state board of health governing sanitation in restaurants, is null and void under sec. 176.05 (5), Stats.

July 18, 1950.

LEO P. LOWNIK,

*District Attorney*,

Richland County.

You state that an individual made application to a town board for a “Class B” license to dispense fermented malt beverages and intoxicating liquor on certain premises described by lot and block number only. At the time of the application and up until July 1, 1950 there was no building on the premises suitable for the purpose of operating a tavern. A license was issued effective July 1, 1950 and the licensee has now moved a building on to the premises and is remodeling it for the purpose of making it into a tavern.

You raise the question of whether or not the license is void because of the provisions of sec. 176.05 (6a), Stats., which reads:

“The rules and regulations made by the state board of health governing sanitation in restaurants shall apply to all ‘Class B’ licenses issued under this section. No ‘Class B’ license shall be issued unless the premises to be licensed conform to such rules and regulations.”

In addition to the language of sec. 176.05 (6a) to which you have referred, I also call attention to the second to the
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The last sentence in sec. 176.05 (5) which reads: “No license shall be issued to any person in violation of any provision of this chapter, and any license so issued shall be null and void.”

In Hoyt v. McLaughlin, 250 Ill. 442, 95 N.E. 464, it was held that a dramshop license, issued without compliance with an ordinance requiring the application to be signed by a majority of the property owners according to frontage on both sides of the street in the block where the dramshop was to be kept or by a majority of the bona fide holders and persons or firms living in or doing business on each side of the street in the block on which the dramshop had its entrance, was invalid, and a dramshop operated under such a license was “operated without a license” within the meaning of the statute providing that an unlicensed dramshop shall be a nuisance.

There is no good reason why a similar result should not be reached here if no attempt whatsoever was made by either the applicant or the town board to insure compliance with the jurisdictional prerequisite for a license prescribed in sec. 176.05 (6a).

No attempt will be made in this opinion to discuss what the legal effect of the issuance of a license might be in a situation where the applicant has made a good faith attempt to comply with all of the rules and regulations in question and the town board after examining the premises is of the opinion that the premises properly qualify, but through some honest mistake or oversight it develops that the premises failed to comply in some particular or another. Suffice it to say that we have no such borderline case here. If such a case did arise and it were considered doubtful that a prosecution for sale of liquor under a void license could successfully be maintained, the issue could be expeditiously determined in revocation proceedings instituted under sec. 176.121 (1). Among other things, that subsection makes failure to maintain the premises in accordance with the standards of sanitation prescribed by the state board of health grounds for license revocation.

WHR
Taxation—National Guard—Armories—Municipality has no power to levy special assessments against national guard armory property owned by the state armory board, no such authority being found in the statutes and exemptions being specifically granted in secs. 21.615 and 62.16 (7), Stats.

July 19, 1950.

Adjutant General's Office.

You have asked my opinion as to whether a national guard armory owned by the state armory board is subject to a special assessment tax for street resurfacing.

The right of a municipality to levy a special tax against property owners is a statutory right and the municipality has only the authority to levy such tax as may be found in the statute granting such right.

In the absence of specific mention of the state, our courts have held that "general statutes are not to be construed to include, to its hurt, the sovereign." Necedah Mfg. Corp. v. Juneau County, (1932) 206 Wis. 316, 322. See also, Milwaukee v. McGregor, (1909) 140 Wis. 35.

Sec. 62.16, Stats., pertains to street improvements and repair. Subsec. (7) (a) reads:

"No lot or parcel of land in any city shall be exempted from the payment of its portion of any tax for the improvement of streets or the building or repairing of sidewalks upon which such lots or parcels of land may border, excepting only property belonging to the United States or this state."

Lands owned by state boards have been held to be lands owned by the state. See Milwaukee v. McGregor, supra.

Sec. 21.615, which pertains to the state armory board, states in part in subsec. (4):

"* * * So long as any property of any kind or character shall be owned by the board such property, together with the rents, issues and profits thereof, shall be exempt from taxation, both general and special, by the state of Wisconsin or by any municipal corporation, county or other political subdivision or taxing body in the state."

This appears to settle all doubt in the matter.
It is my conclusion that a municipality has no power to tax armory property owned by the state armory board for street improvements.

REB

Annuity and Investment Board—State Treasurer—Public Deposits—Under sec. 34.03 (1) (j) and (k), Stats., the board of deposits has authority to determine the minimum average daily balance which must be maintained to the credit of the state of Wisconsin in its working banks.

In executing the investment policy established by the state annuity and investment board, the director of investments thereof may reduce the average daily balance to the credit of the state of Wisconsin in the working banks below the figure recommended by the state treasurer but not below the figure which could be fixed by the board of deposits.

July 24, 1950.

WARREN R. SMITH,

State Treasurer.

You have requested an opinion upon the question of whether the director of investments of the state annuity and investment board, in investing surplus state funds, may reduce the average daily balance to the credit of the state of Wisconsin in the working banks below the figure recommended by the state treasurer.

The following statutes appear to be relevant:

"25.16 (1) The executive head of the state annuity and investment board shall be the director of investments. * * *

"(2) * * * He shall be authorized to act for the board, pursuant to its direction and under such rules and regulations as it may adopt, in all matters concerning investments made or to be made by said board."

"25.17 The state annuity and investment board shall have power and authority and it shall be its duty:

"(1) 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 23.14, 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 **.

"(2) To invest any of the funds specified in subsections (1) and (2a) in the securities authorized by section 206.34 and to dispose of such securities when in their judgment it is to best interest of these funds to do so. In making such investments of operating funds and in disposing of securities in which such funds are invested the board shall give due consideration to periodic statements of such fund balances and operating requirements. Such statements as to balances shall be furnished weekly by the state treasurer. The state agency having authority to expend money from any such fund shall furnish the board from time to time statements as to operating balances required therein for current operation. * * *"

"34.01 As used in this chapter: (1) 'Public deposit' shall mean moneys deposited by the state *** in any state bank *** or national bank in this state ***.

"34.03 (1) The board of deposits shall have power:

"(j) To and shall designate public depositories for deposits of state funds and public money coming into the hands of the state treasurer, prescribe and allocate the deposits of state moneys and limit the amount of public moneys which may be deposited in any public depository so designated. It shall have all the powers and duties with relation to the state treasurer and state moneys that are herein granted and imposed upon other governing boards, and only such banks as have been named by the board of deposits as working banks shall carry state deposits on which checks are drawn to conduct the daily business of the state, all of which deposits shall be payable on demand. ***

"(k) To prescribe rules and regulations fixing *** the terms and conditions under which public deposits may be received and held; ***."

There are five working banks in the state in addition to numerous special depositories. Excluding sums placed in special depositories, which are not subject to investment by the state annuity and investment board, the total daily bal-
ance to the credit of the state is composed of the balances in the various funds in all of the working banks. A very substantial part of such total balance is attributable to the general fund which has sums to its credit in at least three of the five working banks.

Pursuant to sec. 25.17 (2) various state agencies have indicated the minimum balances which they wish maintained in the respective funds from which these agencies have authority to expend moneys. The moneys in several state funds are not subject to investment by the state annuity and investment board. Several of the funds have only small amounts which may be invested. The size of the average daily balance to the credit of the state in the five working banks depends largely upon the size of the daily balance maintained in the general fund. Since many departments of the state government have authority to expend money from the general fund there is no one "state agency" within the meaning of sec. 25.17 (2) which is required to furnish the state annuity and investment board a statement as to the operating balance required by the general fund for current operations. Sec. 14.42 enumerates the principal duties of the state treasurer. It would serve no useful purpose to itemize those duties in this opinion. Suffice it to say that in my opinion none of the duties imposed by sec. 14.42 or any other statute authorizes the state treasurer to fix the minimum balance which must be maintained in the general fund.

Sec. 42.24 provides that "the state treasurer shall be ex officio treasurer of the state annuity and investment board and of the state retirement system." In Attorney General ex rel. Blied v. Levitan, 195 Wis. 561, 563, 219 N.W. 97, our court said of sec. 42.24:

"* * * 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 not 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 man-
agement 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."

Since that case was decided the duties of the state annuity and investment board have been enlarged substantially to provide that it shall have charge of the investment of many other state funds in addition to those of the state retirement system. However, there would seem to be no reason why the same relationship should not exist between the state annuity and investment board and the state treasurer with respect to the investment of these other funds as exists with respect to the funds of the state retirement system.

In my opinion, sec. 34.03 (1) (j) and (k) which authorizes the board of deposits to allocate the deposits of state moneys and fix the terms and conditions under which public deposits may be received and held are sufficiently broad to authorize the board of deposits to determine the minimum average daily balances which should be maintained in each of the working banks and incidentally determine the total average daily balance to the credit of the state in all of these banks.

Hence, it is my opinion that in carrying out the investment policies of the state annuity and investment board, the director of investments thereof would be authorized to reduce the average daily balance to the credit of the state of Wisconsin in the working banks below the figure recommended by the state treasurer but not below the figure which could be fixed by the board of deposits.

JRW
Schools and School Districts—Referendum Petition—The duty of determining the sufficiency of a petition to invoke an election under sec. 40.303 (8), Stats., is upon the county clerk as the official upon whom the statute places the duty of calling the election.

The sufficiency of the percentage of signatures of electors from territory outside cities and villages to invoke an election under sec. 40.303 (8) (a), must be based upon the total of electors in all such territory within the district as reorganized, including not only such territory as is to be added by the particular order in question but all such territory previously within the district.

The period allowed by statute for the filing of a petition for referendum under sec. 40.303 (8) may not be changed because of erroneous advice from any public official respecting the statutory requirements.

July 28, 1950.

John S. Coleman,
District Attorney,
La Crosse County.

Your inquiries relate to the conduct of referenda on school district consolidations under sec. 40.303, Stats. Your first question is: By whom must the sufficiency of a petition filed under sec. 40.303 (8) (a), Stats., be determined and if, as indicated by the opinion in 38 O.A.G. 381, it is a public official, should it be the county clerk or the county school committee?

Sec. 40.303 (8) (a) provides that the petition for referendum shall be filed with the county school committee. Sec. 40.303 (8) (b) provides that the referendum election pursuant to the petition "shall be called by the county clerk." The terms of the statute do not impose any duty upon the school committee with respect to the election. The filing of the petition with that committee is apparently required primarily to facilitate performance of other statutory duties imposed upon it.

The general rule is that when the sufficiency of a petition must be determined in the process of carrying out the duties of a public official, the determination of the sufficiency of
the petition falls in the first instance upon such official unless contrary provision is made by statute.

When the statutes make no other provision, the duty of determining the sufficiency of a petition, insofar as it affects the obligation to call an election, falls in the first instance upon the official who has the duty of calling the election. The rule is stated in 18 Am. Jur. 244:

"* * * in the absence of any provision of law to the contrary, the duty of determining whether a petition presented is in accordance with the requirements of law falls upon the officers to whom it is presented and who are to call the election. Accordingly it has been held that a secretary of state, in performing the duties cast upon him by an initiative and referendum amendment to the Constitution, acts as a ministerial administrative officer; and that he is vested with power to examine the petitions presented to him to determine their sufficiency, and a discretion, subject to review by the courts, to refuse to accept or file such as are legally insufficient. * * *"

You ask whether the petitioners themselves are required to file some affirmative affidavit as to the sufficiency of the petition. I find no such requirement in the statute. The same question was raised in Piuser v. Sioux City, 220 Ia. 308, 262 N.W. 551, 100 A.L.R. 1298, where a petition was challenged because of a lack of affidavits. The court held that the petitions could not be rejected as insufficient for lack of affidavits when the statutes did not specifically impose such a requirement.

The statutes do not direct how the clerk shall proceed to make his initial determination with respect to the sufficiency of the petitions. He may resort, if he wishes, to inquiry among the petitioners. He could not, however, reject the petitions as insufficient on the sole ground that they do not contain affidavits which the statutes do not require. If the legislature desires that affidavits shall be one of the requisites to the sufficiency of a petition, it can make specific provision for them in some manner similar to that used in secs. 5.05 (5) (b), 5.26 (3) and 10.44 (2).

Your second question is: What is meant by the phrase: "A petition * * * signed by a number of such electors [to be included in the reorganized district] residing in all the
territory outside the incorporated cities and villages within the reorganized district equal to not less than 10 per cent of the vote cast in the last general election’? That is, must the percentage of signers on such petition include rural areas previously annexed or attached to an urban area?

I am of the opinion that the number of required signatures of electors residing in rural territory must be determined by the number of electors in all rural territory in the district, including such territory attached in earlier proceedings as well as that added by the order in question.

That result follows from the legislative history of the provision to which you have called our attention. As originally created by ch. 61, Laws 1949, sec. 40.303 (8) (a) provided for a referendum upon a petition signed by a certain percentage of the electors “of the territory to be placed in the proposed reorganized district.” The same phrase was used in the section as amended by ch. 248, Laws 1949. As amended by ch. 501, Laws 1949, however, the percentage of electors from rural territory is to be based on a percentage of the electors residing in “all the territory outside the incorporated cities and villages within the reorganized district.”

When the legislature changed the wording of the statute so as to eliminate reference to territory “to be placed in the proposed reorganized district” and to refer to “all the territory outside the incorporated cities and villages within the reorganized district” it manifested its intent to provide a different standard. There should not be ascribed to the phrase “all the territory * * * within the reorganized district” the same meaning as would be ascribed to the totally different phrase first used and later rejected.

Your third question is: Have the electors of a school district the right to rely on representations made by the county school committee to the effect that only 10 per cent of the electors in the area currently to be annexed to the school district need sign the petition, and if they have such right, is the 30-day period prescribed by the statute extended so as to enable the electors to circulate a second petition within a reasonable time?

The authority of the county school committee is limited by the statute. It has no power to relax the provisions of the
statute either as to the length of time within which petitions may be filed or as to the percentage of signatures required. A public official may not bind the government by erroneous representations with respect to what the law requires. An agent of the government may bind it only within the scope of his powers. The law is well summarized in *State v. Hastings*, 10 Wis. *525, 535*:

"*** There is a broad distinction *** between the acts of general agents of the public and those of general agents of private individuals or corporations. Whilst the latter may, and oftentimes do, bind their principals, when acting beyond the scope of their authority or instructions, yet the former never can. In the case of the latter, it is enough that the agent may be apparently clothed with authority to do the act, and that third persons deal with him innocently; then, although he violates the private instructions and directions of his principal, yet he will be bound. Good faith requires this, for he has held him out to the public as competent to do the acts, and to bind him thereby. But it is not so with public agents of the character under consideration. Their warrant of attorney is a part of the law of the land, of which all men, whether they be acting in a public or private capacity, are bound to take notice. ***"

The situation to which you refer with respect to tax sales is not comparable. It has been held in the cases to which you refer, *Menasha Wooden Ware Co. v. Thayer*, 150 Wis. 611, and *Nelson v. Churchill*, 117 Wis. 10, that, when a property owner's offer to redeem his land from a tax sale is prevented by the statement of a county treasurer that no taxes are due, later issuance of a tax deed does not divest him of title.

There are several reasons why the situation is not analogous to an erroneous representation by a public official respecting the law involving consolidation of school districts. In the issuance of tax deeds, individual property rights are involved. The rights of the owner are guaranteed by the constitution and may not be divested except in compliance with due process. School district boundaries, on the other hand, are solely a matter of governmental concern in which no individual has any vested right. In *School Dist. v. Callahan*, 237 Wis. 560, 570, the following excerpt was quoted
approvingly from *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 179, 28 S. Ct. 40, 52 L. ed. 151:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

Furthermore in the cases involving the issuance of tax deeds the altercation is primarily between the original property owner and the purchaser of the tax deed rather than between an individual and the government. It is not held in any of the cases you cite that a public official might, by erroneous representations, relieve a property owner of the obligation to pay taxes to the government.

BL
You ask whether under the facts as hereinafter stated there now exists a vacancy in the office of county superintendent of schools of Shawano county so as to entitle and require you to make an appointment to such office.

At the April 1949 election Arthur L. Pahr, the then incumbent, and Rex Krull were candidates for county superintendent and the latter received the highest number of votes. He received a certificate of election and assumed the office July 5, 1949. In an action of *quo warranto* the supreme court on June 6, 1950, reversed the judgment of the circuit court confirming Krull in the office, held that he did not possess the necessary qualifications in sec. 39.01 (2), Stats., and directed the circuit court to enter judgment that he is and has been unqualified for the office and is unlawfully holding the same. *State ex rel. Schmidt v. Krull,* (1950) 257 Wis. 184. Judgment pursuant thereto has not been entered by the circuit court although the case has been remitted. On July 11, 1950, Krull delivered to the sheriff of Shawano county his written resignation from said office. The sheriff has notified you thereof in writing and filed said resignation with the county clerk.

Sec. 17.03, Stats., provides when a public office is vacant. Under subsec. (6) a vacancy exists upon "the decision of a competent tribunal declaring void" the election of the incumbent. Subsec. (2) provides that a vacancy happens upon his "resignation." Sec. 17.21 (4), Stats., provides that a vacancy in the office of county superintendent of schools is to be filled "by appointment by the state superintendent of public instruction for the residue of the unexpired term."
There is no case directly upon the question of whether under the circumstances in said case the decision of the supreme court established a vacancy under sec. 17.03 (6) or it is not until the circuit court enters the judgment pursuant to the mandate of the supreme court that the vacancy under such provision is established. However, the decision in State ex rel. Knutson v. Johnson, (1920) 171 Wis. 521, might be taken as supporting the conclusion that the decision of the supreme court on June 6, 1950, operated to establish the vacancy. If such be the correct view there has been since June 6, 1950, and now is a vacancy in the office under sec. 17.03 (6).

On the other hand, if there is no presently operative declaration that Krull's election was and is void, then there will be none until a circuit court judgment to that effect is entered pursuant to the supreme court mandate. Under such view Krull is presently the incumbent. As such he may resign. His written resignation having been made to the sheriff, who has transmitted notice thereof to you and filed it, all as provided in sec. 17.01 (7), Stats., there is a present vacancy under sec. 17.03 (2).

Regardless of which is the correct view, there now clearly exists a vacancy upon one or the other, and it is your duty under sec. 17.21 (4) to make an appointment to fill the office.

Any suggestion that there is no vacancy on the basis that Pahr, the previous incumbent who received less votes than Krull at the April 1949 election, was thereby legally elected and entitled to the office because Krull was ineligible is contrary to principle long established in this state. In State ex rel. Dunning v. Giles, (1849) 2 Pinney (Wis.) 166, it was held that in the event of ineligibility of the person receiving the highest number of votes at an election, the person receiving the next highest number of votes is not thereby elected. This proposition was reaffirmed in State ex rel. Off v. Smith, (1861) 14 Wis. *497; State ex rel. Holden v. Tierney, (1868) 23 Wis. 430; State ex rel. Guernsey v. Meilike, (1892) 81 Wis. 574; and State ex rel. Bancroft v. Frear, (1910) 144 Wis. 79.

HHP
Counties—Public Officers—Bonds—County has authority under sec. 19.01 (8), Stats., to pay premiums on surety bonds of officers and employees only where such bonds are required by some provision of the statutes or by some appropriate action of the county board or by some duly delegated agency thereof in a proper case, requiring such bonds.

August 4, 1950.

ANDY BORG,
District Attorney,
Douglas County.

Since adoption of the following resolution the county board of your county has been paying the premiums on corporate bonds furnished by the named officials in said amounts.

"RESOLVED, by the County Board of Douglas County, that the bonds of the County Officers for the term beginning the first Monday in January, 1925, shall be surety bonds to be paid by Douglas County in the following sums:

"County Clerk $ 5,000.00
District Attorney 1,000.00
Coroner 1,000.00
Surveyor 1,000.00
Clerk of Circuit Court 5,000.00
Clerk of Superior Court 10,000.00
Register of Deeds 3,000.00
Sheriff 10,000.00
County Treasurer 260,000.00"

It also appears that the county board has been paying the premiums for corporate surety bonds in the following amounts given by those holding the following positions, although no specific action requiring bonds therefor or providing for payment of premiums thereon has been taken by the board:

Deputy County Clerk $ 2,000.00
Deputy County Treasurer 25,000.00
Clerk—Treasurer’s Office 10,000.00
3 Clerks—Treasurer’s Office, each 1,000.00
Director—Public Welfare Department 5,000.00
Accountant—Public Welfare Department 2,000.00
Undersheriff $3,000.00
2 Deputy Sheriffs, each 2,000.00
4 Deputy Sheriffs — Veterans’ Office, each 2,000.00
2 Deputy Sheriffs — Veterans’ Office, each 1,000.00
Deputy Sheriff—Conservation 1,000.00
Deputy Clerk of Circuit Court 1,000.00
Deputy Clerk of Courts 1,000.00
Patrolman 2,000.00
2 Highway Patrolmen, each 2,000.00
Clerk of Municipal Court 2,500.00
3 Trustees—County Institutions, each 500.00

You request an opinion whether the county may legally pay the premiums on all of the above bonds.

The authority for the county to do so must be found in the constitution, statutes and private and local laws because it has only such power as is expressly given to it or is necessarily implied in any specific authority which is given to it. Except for sec. 59.13 (3) discussed later, the only provisions are in secs. 19.01 (8) and 204.11 (1), Stats.

Sec. 19.01 (8) provides:

“PREMIUM ON BOND ALLOWED AS EXPENSE. The state and any county, town, village, city or school district may pay the cost of any official bond furnished by an officer or employe thereof pursuant to law or any rules or regulations requiring the same if said officer or employe shall furnish a bond with a licensed surety company as surety, said cost not to exceed the current rate of premium per annum. The cost of any such bond to the state shall be charged to the proper expense appropriation.”

This language does not say it is where the official bond furnished is required by law or by rule or regulation to be a corporate surety bond that the applicable governmental unit may pay the premium thereon. All it provides is that the giving of a bond is required by law or by rule or regulation. In such case if the bond furnished pursuant to such requirement is a corporate surety bond, then authority is given to pay the premium out of public money.

Procedural considerations necessitate either that the governing body of the governmental unit authorize expense in advance of the incurring thereof and then itself, or through
a duly empowered agency in a proper case, approve the payment when a voucher is presented, or that said body, or some other agency of the unit in a proper case, approve the expense item after it is incurred and direct payment thereof. The last sentence in sec. 19.01 (8), Stats., takes care of this only so far as premiums on bonds to the state are concerned. It constitutes legislative approval of the payment of premiums on surety bonds and authorization for the use of the appropriation made to the officer or department concerned to pay the same. But as respects a county some action is necessary by way of approval of the payment as a county expense.

It would be preferable if bonds required to be furnished are to be corporate surety bonds and the premiums thereon payable by the county, that appropriate county action to such effect be taken in advance of the giving of the bond. Then the approval of vouchers therefor would amount to an audit. However, nothing in sec. 19.01 (8) restricts the authority to pay such premiums to where the county has undertaken to pay the same in advance of the giving of the bonds. All that is stated is that the giving of the bonds be required by law or by rule or regulation. This excludes payment on a bond given where no provision of law or any rule or regulation of the county required such officer or employe to give the bond.

Sec. 19.01 (8) is not limited to the bonds of officers, for it expressly mentions employes. Sec. 204.11 (1), the other provision dealing with authority to pay premiums on surety bonds, is limited by its terms to the bond of a "public officer." It provides, so far as material:

"** Any public officer, required by law to give a suretyship obligation, may pay the lawful premium for the execution of such obligation out of any moneys available for the payment of expenses of his office or department, unless such payment is otherwise provided for or is prohibited by law."

This provision in sec. 204.11 (1), in contrast to sec. 19.01 (8), applies only where the bond of a "public officer" is required to be a corporate surety bond. An example of its application would be where, pursuant to the last sentence in sec. 59.13 (3), a county treasurer, clerk or abstractor
were required to give a corporate surety bond. It is not a grant of authority but the imposition of an obligation so as to protect the officer in the giving of a bond when required to give a corporate surety bond by furnishing a source from which the premium may be paid if no other provision is made therefor.

The next consideration is whether the county has the authority to require bonds from the above named officers and employees and in the amounts set forth above. The county cannot require any bond to be given by an elective officer unless the statute provides such officer shall furnish a bond and the amount of the bond is in accordance with the statute. In 26 O.A.G. 617, it was stated that a county has no power to require an elective county officer, in that case a county judge, to file a bond where the statute does not prescribe a bond by such official, and thus may not pay the premium on a bond given by such elected official. It was early held that where there is no provision of law requiring an officer to give any bond whatsoever, a bond voluntarily given by such officer is without consideration and cannot be enforced. Mechem, Public Officers (1890 ed.) § 273, citing State v. Bartlett, (1856) 30 Miss. 624; State v. Heisey, (1881) 56 Iowa 404; contra, Commonwealth v. Wolbert, 6 Binn. (Pa.) 292; Montville v. Haughton, 7 Conn. 543. Although we find no recent authority upon this proposition, the case of Pohland v. City of Sheboygan, (1947) 251 Wis. 20, 27 N.W. 2d 736, would appear to support it.

Sec. 59.13, Stats., deals with the bonds of all the county officers included in the resolution, with the exception of the clerk of the superior court of Douglas county. Subsec. (1) specifies definite amounts for the bonds of district attorney, surveyor and register of deeds. For county clerk and clerk of the circuit court it provides the bonds shall be “not less than” a stated figure. The bonds of the sheriff and coroner are to be “not less than” stated figures “nor more than” other specified amounts. As to county treasurer the bond is twice the amount of the taxes for the ensuing year if signed by personal sureties, but if a corporate surety bond then in such amount as is fixed by the county board. By the special acts relating to the superior court it is provided that clerk
of the circuit court is *ex officio* clerk thereof and shall furnish a bond of $10,000 as such.

Subsec. (2) of sec. 59.13 provides:

"Each such official bond shall be in sum fixed by law; or if not so fixed, in sum fixed by resolution of the county board, within the limitations prescribed by law, if any, at the annual meeting in November prior to the commencement of the term of office of the particular officer. * * *"

The amounts of the bonds in the resolution being either the amount set out in the applicable legislative enactment, permitted thereby, or within the range for county board determination, as the case may be, it is within the power of the county board to require the furnishing of bonds in those amounts by the named officers.

However, except for sec. 59.13 (3), Stats., which provides as follows:

"Each such bond shall be guaranteed by the number of personal sureties prescribed by law, or if not prescribed, by the number fixed by the county board within the limitations, if any, prescribed by law, or by a surety company as provided by section 204.07. In the case of the county clerk, county treasurer and county abstractor the county board may by resolution require them to furnish bonds guaranteed by surety companies and direct that the premiums therefor, agreed upon between the board and the companies, be paid out of the county treasury."

we find no provision giving the county board the authority to require that the bonds which said officers furnish must be corporate surety bonds. In 20 O.A.G. 3, it was ruled that except as to those three officers, i.e., county clerk, county treasurer and county abstractor, the county board has no power to require that the bond of an elective official be a corporate surety bond. In this connection it was stated in 22 O.A.G. 94, that it is not mandatory that the county pay for surety bonds furnished by elected officials except in the case of the three officers so mentioned in sec. 59.13 (3), and then only when the county board requires that the bond of such official be a corporate surety bond.

The authority of the county in respect to the bonds of the officers and employees not included in the resolution rests on
somewhat different considerations, although in the instance of the clerk of the municipal court, as in the case of the clerk of the superior court, the acts relating to the municipal court provide that the clerk shall give a bond of $2,500.

Where the county does not have civil service covering sheriff's deputies, sec. 59.22 (1) and (2) providing that the sheriff is responsible for their acts does not provide for any bond by them to the county, but only to the sheriff. But, where the county civil service system covers them, and it is assumed this is your situation, sec. 59.22 (4), Stats., provides each deputy sheriff shall file an official bond "in such principal amount as the county board shall determine" which shall be a corporate surety bond and the premium thereon shall be paid by the county.

Sec. 83.016 (1), Stats., provides for the appointment of traffic patrolmen by the county board and sec. 83.016 (3) requires them to furnish bonds "in a sum fixed by the county board," the cost thereof to be paid by the county.

Sec. 46.18 (4), Stats., expressly says each trustee of a county institution "shall ** file an official bond to the county, in the amount determined by the county board."

While sec. 59.19 (1), Stats., provides that the county treasurer may appoint a deputy and that the county board "may in its discretion ** provide a salary for such deputy," there is nothing requiring or even mentioning a bond. Similarly, sec. 59.16 (1) provides that the county clerk shall appoint "one or more deputies" and that the county board "may in its discretion ** provide a salary for such deputy or deputies," but contains nothing in respect to a bond thereby. Sec. 59.38 provides that the clerk of the circuit court shall appoint one or more deputies, but there is nothing therein in respect to either salary or a bond.

Sec. 46.32 provides that the county board of public welfare, which is itself appointed by the county board of supervisors under sec. 46.31, shall appoint a county director of the county department of public welfare whose qualifications, appointment and tenure, and salary, shall be fixed by the said county board of public welfare. Sec. 46.33 provides that such director, after consultation and agreement with the county board of public welfare, shall appoint the necessary employes for such department.
Thus the county board is expressly given the authority to fix, by appropriate action, the amount of bond to be furnished by deputy sheriffs under civil service, traffic patrolmen and trustees of county institutions, and where it does so to require that the bonds of deputy sheriffs and patrolmen be corporate surety bonds, the premium thereon being payable by the county. Although there is nothing provided as respects bonds of deputies of the county clerk and county treasurer, the provision that the county board may fix a salary therefor would furnish sufficient basis for attaching to the salary a condition that a bond be furnished in a prescribed amount and that it be a surety bond. Sec. 46.32 commits to the county board of public welfare, the fixing of the salary, qualifications, etc., of the director of the county welfare department which would encompass prescribing a bond. Sec. 46.33 reposes the appointment of employees of that department in such director, along with said board, which would include fixing of the salary and requiring of a bond of such employees. A bond thus could be validly required of the director and employees of the department without county board action. But, under the power conferred on the county board by sec. 59.15 (2) (c) to “establish the number of employees in any department or office including deputies to elective officers” and to “establish rules and regulations of employment for any or all persons paid from the county treasury,” it could fix the salary for and require the giving of bond by such director and employees of that department, unless the doing so is contrary to rules and regulations of the state department of public welfare pursuant to sec. 49.50 (2) to (5) which is there expressly prohibited.

These provisions in sec. 59.15 (2) (c) also furnish authority to the county board to determine the number of employees in the various county departments and offices generally, fix their salaries, and provide for the giving of bonds thereby. They would be a sufficient basis for appropriate county board action requiring that a bond in a prescribed amount and by a corporate surety with the cost thereof to be paid by the county as its own expense, be given by deputy county clerk, deputy county treasurer, deputy clerk of circuit court, deputy clerk of courts, and clerks in the county
The final consideration is whether in view of the foregoing and the circumstances you recite relative to the giving of the bonds here involved, payment by the county of the premiums thereon falls within the provisions of sec. 19.01 (8), Stats.

The bonds given by the district attorney, register of deeds and surveyor, as set out in the resolution, are in the amounts stated in paragraphs (f), (g) and (h) of sec. 59.13 (1), Stats. The bond of the clerk of the circuit court is at the minimum which sec. 59.13 (1) specifies as the amount of bond required thereof. The bond as clerk of the superior court, and also the bond of the clerk of the municipal court which is not mentioned in the resolution, are in the specific amounts required to be furnished by the legislative acts pertaining to said courts. No action of the county board constituting a “rule or regulation,” either requiring the furnishing of bonds or fixing the amount thereof, is necessary. Thus the furnishing of such bonds, both as respects the necessity to do so and the amounts, is “pursuant to” such statutory provisions. Accordingly, under the interpretation above of sec. 19.01 (8), and wholly aside from the resolution, the premiums on the bonds in said amounts may be paid by the county upon appropriate action allowing them as county disbursements, even though such action is taken subsequent to the filing of said bonds.

The amounts of the bonds furnished by the coroner, sheriff and county treasurer, as specified in the resolution, are above the minimums stated for the bonds of said officers in sec. 59.13 (1), Stats. The county board apparently adopted this resolution in 1924 and has taken no subsequent action relating to fixing the amounts of the bonds set out therein. It thus has been operating thereunder since its adoption. Sec. 59.13 (2) says that the official bonds mentioned in that section

“* * * shall be in sum fixed by law; or if not so fixed, in sum fixed by resolution of the county board, within the limitations prescribed by law, if any, at the annual meeting in November prior to the commencement of the term of office of the particular officer. * * *”
While there is no provision such as is found in sec. 59.15 (1), relating to the somewhat parallel situation respecting fixing of salaries of county elective officials, that when the amount is established it "shall remain for ensuing terms unless changed by the county board by timely action," as a practical matter that has been the effect given to the resolution by the county board. It must be deemed to be fully cognizant of its power given by sec. 59.13 to fix the amount of bonds, if it desired to do so, at a different figure than as set out in the resolution. These bonds were given by such officers in said amounts in good faith in response to the commands of the resolution. The purpose of sec. 19.01 (8) is to encourage the giving of corporate surety bonds rather than with personal sureties by authorizing the premium to be paid as a public expense. While careful and good administration would suggest current action by the county board, there is nothing in the statutes which precludes action of the kind here taken by the county board from being given effect and acted upon as continuing in operation and effect until changed, rescinded or superseded. It is, therefore, my opinion that until then the resolution is sufficient so that premiums on bonds furnished pursuant thereto may be paid by the county.

As respects traffic patrolmen, trustees of county institutions, and deputy sheriffs under civil service, the applicable statutes are mandatory that some bond be furnished by them, but the amount is left to the discretion of the county board. Thus, it is a statutory requirement that such persons respond to when furnishing bonds, although how much of a bond is for the county board to decide. The approval by the county board of the payment of premiums on bonds furnished by them in the amounts recited is itself a sufficient address by the board to what amount it deems proper and stands as a determination by it that those amounts of bonds are satisfactory. Therefore in my opinion the premiums on bonds so furnished by such persons may be properly paid by the county as furnished "pursuant to law."

But, although, as previously noted, the county board is given the power in the statutes relating or applicable to deputy county clerk and deputy county treasurer, to require that bond be given thereby and to fix the amount, and its
power under sec. 59.15 (2) (c) is sufficient to be made the basis for requiring a bond and in a prescribed amount from the other deputies or employees in county offices or departments, under the facts submitted no such action appears to have been taken in respect to any of such officials or employees. There being no provision of law requiring the furnishing of bonds by any of them and there being no action of the county board that may be taken as constituting a "rule or regulation" which has the effect of requiring bonds therefrom, the bonds furnished cannot be said to have been furnished pursuant to law or a rule or regulation requiring the same. Therefore, unless there is some action of the county board, or in a proper case by some duly delegated agency thereof, relative to bonds therefrom, the premiums on bonds furnished by such officials or employes are not within the language in sec. 19.01 (8), Stats., and the county has no authority to pay the same or reimburse the individuals therefor.

As indicated above, the county board probably could specify that the director of the county public welfare department furnish a bond and also require bonds from employees of that department. In the absence of such action it would be within the power of the county board of public welfare to require a bond of the director. Likewise, the director and the county board of public welfare in hiring employees of the department could require bonds thereof. In the absence of action by the county board of supervisors on the subject, unless there has been sufficient action by the county board of public welfare requiring a bond of the director, or by said board or the director, or both, requiring bonds of employees of the department, there cannot be said to be any rule or regulation requiring bonds therefrom and so the premium on bonds given thereby would not be legally payable by the county under sec. 19.01 (8), Stats. Here again, careful and good administration would suggest that formal action by the county board in the case of the director, and by the director or the board, or both, in respect to the employees of the department, would be advisable in advance of the engagement of such director or employees. But, even though there has been no formal action of that kind, if as a matter of fact it was stated as a condition of employment
and made perfectly clear at the actual hiring of the director or of each of such employees that a bond in the amount stated was required, in my opinion that would be sufficient requirement of such bond to make it furnished pursuant to law, rule or regulation, and therefore the premium thereon may be legally paid by the county.

HHP

Justice Court—Removal to Other Court—Where an action commenced before a justice of the peace is removed under sec. 301.245, Stats., to a county court having a justice court branch, the action proceeds as if originally commenced in that branch and not as an action commenced under the limited circuit court jurisdiction of such county court, in the absence of any provision to the contrary in the special act relating to the jurisdiction and practice in such county court.

August 5, 1950.

HERBERT A. BUNDE,
District Attorney,
Wood County.

You have directed our attention to sec. 301.245, Stats., which reads:

"In counties having a population of less than 500,000, and in which a small claims court or a civil, municipal, superior or county court empowered to exercise civil jurisdiction has been established, the defendant in any action brought in justice court may, on the return day of the process, transfer the cause to the small claims court or to such civil, municipal, superior or county court of said county. Upon receipt of such a request, accompanied by a fee of 75 cents, the justice shall forthwith transmit all the papers in such cause to the clerk of said court of said county."

This statute is silent as to the procedure which is to be followed subsequent to the transfer of a case, and you inquire whether the action remains a justice court action to be tried in the justice court branch of the county court or whether the case becomes a county court action to be docketed and tried as such with fees to be charged accordingly
and with the defendant being liable for the filing fees. Also you inquire whether criminal matters go into the justice branch of county court or are to be transferred to the county court on the criminal calendar for trial.

Sec. 301.245 was created by ch. 423, Laws 1945. At that time it was applicable only to counties of more than 125,000 and less than 500,000 population. By ch. 212, Laws 1949, the uniform small claims court act, sec. 301.245, was amended so as to be applicable in all counties having a population of less than 500,000.

Sec. 301.245 is a part of Title XXVIII of the statutes relating to "Courts of Justices of the Peace and Proceedings Therein in Civil Actions." It is not an appeal statute but a removal statute and supplements sec. 301.24 which authorizes removal of an action from one justice of the peace to another for prejudice and upon payment of a 75 cent fee to the justice before whom the process is returnable. Since there are a growing number of small claims courts as well as civil, municipal, superior and county courts having justice court jurisdiction, it was no doubt considered desirable to give the defendant an option of having his justice court case tried in one of these courts where available instead of limiting him to the nearest justice of the peace as is the case under sec. 301.24.

There is nothing in the language of sec. 301.245 which indicates any legislative intent to change the status of the case from a justice court action to a circuit court action by transferring the case to a special court or county court having both justice court and limited circuit court jurisdiction as is true of the county court in Wood county.

In general, section 1 of the Wood county court act gives that court concurrent jurisdiction with the circuit court in matters where the amount in controversy does not exceed $10,000, and criminal jurisdiction except in felony cases.

Section 7 of the act provides in part as follows:

"1. The county judge shall have all the jurisdiction and powers that are now or hereafter may be conferred upon the justices of the peace in said county in all civil and criminal actions and proceedings and the power to hear and determine all such cases although the title to land may come into question therein, but shall not have the power to hold
preliminary examinations in bastardy actions or in criminal cases, except felonies.

"2. All provisions of law which may at any time be in force relative to justices' courts, to actions and proceedings and judgments therein, and appeals therefrom, in civil and criminal cases, shall apply to said county court, so far as applicable, except as otherwise provided in this section.

"4. The clerk of said court shall keep a justice docket, shall have the care and custody of all books, papers and records therein, shall be present at all trials, shall administer oaths, shall issue process as in other cases, shall tax the costs, and perform all other clerical and ministerial duties required of and imposed upon justices of the peace in such cases, and perform all such duties by and under the direction of the judge of said court. For all services so performed he shall receive the same compensation a justice of the peace would receive, except he shall receive nothing for taking testimony and his fees shall in no case exceed five dollars.

"5. All fines and all costs collected by the clerk in every civil action and in all criminal prosecutions and proceedings under the general statutes of this state tried or determined by the county court, which, if tried or determined by a justice of the peace would be paid over to the county treasurer, shall be accounted for and paid over quarterly by the clerk of said county court unto the county treasurer of the county of Wood.

"6. 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 $5 and the taking down of evidence shall not be charged for or taxed.

"7. The fees of the witnesses, jurors and officers shall be the same as would be allowed in justice court for similar services except when otherwise provided.

"10. When acting under the provisions of this section said court shall not be a court of record and no state tax shall be collected on cases commenced in said court by virtue of this section.

"12. Whenever any criminal action exclusive of preliminary examinations in criminal cases and bastardy actions, shall be removed from any justice of the peace of said county of Wood upon the oath of the defendant, his agent or attorney according to the provisions of law for such removal, the said action shall be removed to said county court, and all papers therein shall be transmitted by mail or otherwise to the said county judge at the city of Wisconsin
Rapids, in said county, who shall then proceed with such action in the same manner as if originally instituted before him; and when any criminal action is removed to said county court in the manner provided in this section, the justice of the peace before whom the same was originally brought, may, without the consent of either party, adjourn said action not exceeding three days for hearing before said county court and admit the defendant or defendants to bail to appear before said county court on such adjourned day and from time to time thereafter until discharged by law."

The foregoing provisions of your county court act pretty well cover the problems raised, and it would appear that a justice court action when transferred from a justice of the peace under sec. 301.245 would be handled in the same way as a justice court action commenced in the justice court branch of the county court. Paragraph 12 of section 7 specifically so provides in criminal cases.

WHR

Peddlers—Transient Merchants—Licenses and Permits—
Person engaging temporarily in restaurant business is not engaged in "sale of merchandise" and hence need not obtain a transient merchant license under sec. 129.05, Stats.

August 8, 1950.

RODNEY O. KITTELSEN,
District Attorney,
Green County.

You have requested an opinion with reference to the following situation. A nonprofit organization of the city of Monroe is planning to hold a celebration known as "Cheese Day" which has been held at various intervals in the past for the purpose of publicizing the sale of cheese. It is anticipated that approximately 60,000 persons will attend the celebration, and in order to feed this multitude arrangements have been made with various church groups, restaurant proprietors and other persons to set up temporary restaurant facilities.
You inquire whether it will be necessary for the proprietors of such temporary eating places to obtain state transient merchant licenses, in view of the 1949 amendment to sec. 129.05 (1), Stats., which adds the following sentence to that subsection:

"* * * For purposes of this section, sale of merchandise includes sales in which the personal services rendered upon or in connection with such merchandise, constitutes the greatest part of value given for the price received."

Previously this office had expressed the opinion that persons engaged in the restaurant business were not selling merchandise within the meaning of the transient merchant law. It was stated in 12 O.A.G. 363, 365-366 as follows:

"As to managers of dining halls, the question is somewhat different. These men are clearly not peddlers. On the other hand, it is my opinion that they do not come within the definition of a transient merchant, and need not be licensed as such. As to their operation of the dining hall, they are not engaged in 'vending or sale of merchandise.' A restaurant proprietor does not sell goods. One who dines in a restaurant acquires no title to the food served as a part of his meal. The restaurant proprietor sells service. Merrill v. Hodson, 88 Conn. 314. See also III Op. Atty. Gen. 613. Managers of such dining halls are all subject to regulation by the state as restaurant proprietors.

"In so far, however, as such restaurant proprietors also sell cigars, tobacco, candy and the like as a distinct business, and to persons who are not necessarily diners, they are similar to the operators of refreshment stands and refreshment booths, and must be licensed as transient merchants."

See also 35 O.A.G. 276 and 37 O.A.G. 356, 357.

It is my opinion that the view announced in those opinions is not altered by reason of the 1949 amendment quoted above. It still requires that there be a "sale of merchandise." As pointed out in the above quotation from the opinion in 12 O.A.G. 363, a restaurant proprietor is not engaged in the sale of merchandise, but is regarded in law as selling a service only. No title to the food served passes to the consumer. Even as amended, the statute does not purport to cover persons engaged in the sale of services alone.
It is therefore my opinion that the persons who plan to engage in the operation of temporary restaurant stands at the Monroe Cheese Day celebration are not required to obtain licenses as transient merchants.

WAP

Highways and Bridges—Towns—Counties—County highway committee may not refuse county aid provided by sec. 81.38 (3), Stats., to towns because they have made application for state disaster aid under the provisions of sec. 86.24.

August 11, 1950.

JOHN E. ARMSTRONG,
District Attorney,
Juneau County.

You have requested our opinion as to whether the county highway committee is justified in refusing to grant county aid in the repair of bridges provided by sec. 81.38 (3), Stats., where it has knowledge that certain townships requesting the aid have also made application to the state for assistance.

Sec. 81.38 (3) reads as follows:

"Whenever the construction or repair of any such bridge must be made without delay, the town board may file its petition with the county clerk and the county highway committee, setting forth the facts respecting the necessity for immediate construction or repairs. It shall then be the duty of the town board and the county highway committee to make such construction or repairs with the least possible delay. The town board is authorized to borrow the entire cost of the work, and to include the town's share of such cost in the next tax levy. But if the said town's share of such cost shall exceed the amount produced by a tax of 2 mills on the dollar the action of a town meeting shall be required. The construction or repair of a bridge performed and accepted pursuant to this subsection shall entitle the town to the same county aid that the town would have been entitled to had it filed its petition with the county board as provided in subsection (1)."
Sec. 86.24, the statute pertaining to state highway commission disaster funds, provides that where a public highway, street, alley or bridge not on the state trunk highway system is damaged by flood, the governing body of the municipality having jurisdiction over the maintenance may petition the state highway commission for aid. The commission then investigates and within 6 months from the date of the petition makes a finding and determination as to the granting of aid, the amount thereof, and the conditions under which it is granted. The statute contains a formula as to the amount of aid that may be granted and then reads:

"* * * The county, town, village or city shall pay the remainder of the cost not allowed as aid, but this shall not invalidate any other provision of the statutes whereby the cost may be shared by the county and the town, village or city."

Sec. 81.38 thus appears to have been taken into consideration by sec. 86.24 as indicated by the last portion of sec. 86.24 above quoted.

It is my opinion that the county highway committee would not have the power to refuse to carry out the provisions set forth in sec. 81.38 on the grounds that state aid has been requested. I note that sec. 81.38 (3) pertains to bridge work that must be made "without delay" while sec. 86.24 allows as much as 6 months from the date of filing the petition before a determination must be made. I think it proper for your county to act without delay under the provisions of sec. 81.38 (3), and should state aid be granted, the proper provisions for adjusting any amount of overpayment could be made when the amount of state aid is determined. I call your attention to the fact that sec. 81.38 (3) also provides authority for the town itself initially financing bridge construction or repairs needed without delay, and also that sec. 86.24 authorizes the town to arrange to have the work for which aid is granted performed by the county.

REB
Teachers Colleges—Board of Regents—Powers—Board of regents of normal schools has no statutory authority to lease lands to a city on a 15-year lease for recreational purposes.

August 11, 1950.

EUGENE R. MCPHEE,
Director, Board of Regents of Normal Schools.

You state that the board of regents of normal schools is considering a 15-year lease with the city of Superior under which an athletic and recreational facility would be developed on land owned by the board of regents of normal schools and the city of Superior would use the athletic and recreational facility.

You ask whether the city can enter into a lease for a period of 15 years for the use of such property.

Since both the board of regents of normal schools and the city would have to be parties to such a lease it is necessary to determine whether there is any lack of legal authority on the part of either of the proposed contracting parties in order to advise you properly in this matter, and if either the board or the city does not have the legal capacity to enter into such a contract it becomes unnecessary to discuss the powers of the other.

With this approach to the problem I will discuss the powers of the board of regents of normal schools with respect to the proposed lease, and for reasons which will be apparent this discussion will so dispose of the matter that the question of the city's power to make such a lease will not be reached in this opinion.

State agencies such as the board of regents of normal schools 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.

Sec. 37.02 (1), Stats., among other things provides that "the board of regents [of normal schools] shall not sell, mortgage or dispose of in any way any real estate."

In 6 O.A.G. 527 it was ruled that the board of regents of normal schools has no power to lease any of the lands under
its control for hospital purposes without express authority of the legislature. In 20 O.A.G. 330 it was concluded that the board has no power to grant or convey easements in or across normal school grounds for construction of electric power lines, and again in 34 O.A.G. 178 it was ruled that the board has no power in the absence of express authority from the legislature to lease real estate held by it. See also 18 O.A.G. 181.

The only specific power to lease normal school lands is that found in sec. 37.02 (3), Stats., which reads:

“(3) For the purpose of providing dormitories, commons and other buildings, improvements, additions, and equipment therefor, necessary for educational purposes, and to enable the construction, financing and ultimate acquisition thereof, the board of regents of normal schools is authorized to lease and re-lease teachers college lands and improvements to a nonprofit-sharing corporation or corporations for terms not exceeding 50 years each, upon condition that such corporation or corporations shall construct on such leased land or portion thereof such dormitories, commons or other buildings, improvements and additions and provide such equipment therefor, for educational purposes as the board of regents shall designate or approve, and shall lease the same to the board of regents upon satisfactory terms as to the current rental, maintenance and ultimate purchase by the regents. Revenues derived from the operation by the regents of such dormitories, commons, buildings, improvements or additions for educational purposes shall, and revenues derived from the operation by the regents of other dormitories, commons, buildings, improvements or additions for educational purposes may, be applied to the payment of such rentals, any surplus which from time to time may accrue to be applied toward the purchase price of the building, improvement, addition or equipment, or accumulated for subsequent application upon the purchase price. The board of regents is authorized to enter into such leases or contracts with such corporation or corporations for the above purposes as they shall deem for the best interest of the teachers college. This subsection does not authorize the board of regents to incur any state debt for the construction of such dormitories, commons, buildings, improvements or additions or for the furnishing of equipment therefor. The plans for buildings and all contracts and leases made pursuant to this subsection shall before they are finally adopted or become effective be submitted to and approved by the state chief engineer and the governor. Such dormi-
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...tories, commons, buildings, improvements, additions and equipment so constructed or installed on teachers college lands and devoted to teachers college purposes, and the leasehold interest in such lands shall be exempt from taxation."

This statute authorizes the board to lease and re-lease teachers college lands to a nonprofit-sharing corporation upon condition that such corporation shall construct buildings thereon and lease the same to the board of regents upon satisfactory terms as to rental, maintenance and ultimate purchase by the regents.

Passing the question of whether or not a city is a nonprofit-sharing corporation within the meaning of sec. 37.02 (3) you do not state that it is proposed to have the city construct any building or buildings on the land and lease the same to the regents or otherwise proceed as provided in this section.

You are accordingly advised that the board of regents of normal schools is not authorized to lease teachers college lands to a city for recreational use by the city on a 15-year lease.

WHR

Schools and School Districts—Referendum Petition—A county clerk may not call a referendum under sec. 40.303 (14), Stats., pursuant to a petition filed after the statutory period for filing petitions has expired.

August 14, 1950.

Allan M. Stranz, District Attorney, Forest County.

You inquire whether the county clerk may refuse to hold a referendum under sec. 40.303, Stats., pursuant to a petition filed purportedly under sec. 40.303 (14) but more than 30 days after the time specified in that subsection.

As was pointed out by the supreme court in School District v. Callahan, (1941) 237 Wis. 560, the legislature may provide for alteration of school district boundaries in any
manner it chooses “conditionally or unconditionally, with or without the consent of the citizens, or even against their protests.” This rule follows from the fact that boundaries of the political subdivisions of the state are matters over which the legislature has complete control. Accordingly, the inhabitants of an area affected by a change have no right to a referendum unless a provision is made for it by law. If provision is made by law for a referendum, it may be held only when the conditions imposed by the law are met. It was pointed out in an opinion issued by this office, July 28, 1950, “the duty of determining whether a petition presented is in accordance with the requirements of law falls upon the officers to whom it is presented and who are to call the election.” The excerpt quoted is from 18 Am. Jur. 244.

A county clerk is neither required nor authorized to set in motion the machinery for a referendum unless he finds that the statutory conditions have been met. The sufficiency of a petition depends on a number of things, including not only the number of signatures appended but also the time of its filing. Where the legislature has granted a referendum only upon the filing of a petition within a certain period, the county clerk has no authority to call a referendum pursuant to a petition filed after that period.

BL

Barbers—Apprentices—Under sec. 158.09 (2), Stats., state board of health would be authorized to adopt a rule providing that no portion of a barber’s apprenticeship can be served while attending a full-time school for barbering, but in the absence of such a rule a student should not be denied credit for such work where he can show compliance with all existing rules and statutes.

August 15, 1950.

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

You have inquired whether the state board of health may allow a full-time barber student credit for part-time work in a barber shop in computing his period of apprenticeship.
Sec. 158.09 (5), Stats., provides:

“The period of apprenticeship shall be three years. Attendance at a school or college teaching barbering, approved by the state board of health, for a period of not less than twelve hundred forty-eight hours of instruction shall entitle the apprentice to a credit of six months toward the completion of such apprenticeship period.”

Sec. 158.09 (1) provides:

“Any person may receive an indentured apprentice registration card:

(a) Who is at least sixteen years of age; and

(b) Who is of good moral character and temperate habits; and

(c) Who, as shown by affidavits, has completed the eighth grade or has an equivalent education as determined by the state board of vocational and adult education; and

(d) Who is indentured as an apprentice; and

(e) Who has graduated from a school or college teaching barbering, or, if the one thousand two hundred forty-eight hours preliminary schooling has not been completed prior to entrance upon apprenticeship, shall attend a vocational and adult education school offering instruction in the theory of barbering, which shall not be construed to include haircutting and shaving, where one is available in the city in which the apprentice resides or works, or in a nearby city, at least eight hours a week in the daytime on the employer’s time, until his apprenticeship contract is completed or until he registers for a full-time course in a school teaching barbering and so notifies the industrial commission and procures a student permit from the state board of health. Provided, however, that during such period of full-time instruction the employer shall be relieved from having to pay any compensation to the apprentice. Completion of the one thousand two hundred forty-eight hours of instruction, in a manner satisfactory to the state board of health, shall not terminate the requirement, under the indenture, of at least one hundred forty-four hours per year daytime attendance at a vocational and adult education school.”

Sec. 106.01 (5) (d) provides that every indenture shall contain:

“An agreement stating the number of hours to be spent in work, and the number of hours to be spent in instruction. During the first two years of his apprenticeship, his period of instruction shall be not less than four hours per week or
the equivalent. If the apprenticeship is for a longer period than two years, the total hours of instruction shall be not less than four hundred hours. The total number of hours of instruction and service shall not exceed fifty-five per week; provided, that nothing in this paragraph shall be construed to forbid overtime work as provided in subsection (7) of this section."

Sec. 106.01 (7) provides that an apprentice over 18 years of age may be allowed to work overtime not to exceed 30 hours in any one month.

The industrial commission rules for barber apprentices provide among other things that the minimum hours of service per year shall be 1,500.

The only three barber schools accredited by the state board of health at the present time are the vocational schools at Milwaukee, Green Bay and Eau Claire. Generally speaking, a barber student at such schools attends classes 7 hours a day for 5 days a week during the school year of 36 weeks from sometime in September until sometime in June with vacations at Christmas and Easter time and during the summer months. This would mean that the 1,248-hour course referred to in sec. 158.09 (1) (e) and 158.09 (5) would normally be completed during the average school year of 36 weeks of 35 hours per week, totalling 1,260 hours.

It is to be noted that no direct answer to the question you have asked is given either in the statutes or in the rules and regulations of the industrial commission or the state board of health so far as I am able to find, and the question resolves itself down to a mathematical problem of whether or not it is possible for a full-time barber student to complete both his 1,248-hour barber course and his 1,500 hours of required apprenticeship during the same calendar year.

Theoretically at least, it can be demonstrated by computation that this could be done, although it might not as a practical matter be possible to so adjust the timing as to fit into the required pattern.

While, as indicated above, the answer to your question is not to be found in any specific language of either the statutes or the rules of the industrial commission or state board of health, there is some minor implication at least in the language of sec. 158.09 (1) (e) that it was not intended that
a student should be serving any portion of his apprenticeship while in attendance at a full-time barbering school. Such implication is to be found in the words “until his apprenticeship contract is completed or until he registers for a full-time course in a school teaching barbering.” While the two procedures may not be mutually exclusive there is suggestion that they are alternative rather than simultaneous methods of training. However, this suggestion is pretty well negatived by the further language in this section reading: “Provided, however, that during such period of full-time instruction the employer shall be relieved from having to pay any compensation to the apprentice.” This apparently means that the employer-employe relationship may exist during the period of full-time instruction which would normally encompass the rendering of some services.

There may be considerations of policy for discouraging the practice of serving any portion of an apprenticeship while in full-time attendance at a barber school. As previously pointed out such a schedule could be followed only under optimum conditions and there would be a strong tendency to “cut the corners” in order to meet the necessary requirements, thereby increasing the problems of supervision. Moreover, from the standpoint of the health and welfare of the student, such a rigorous schedule might be quite detrimental indeed.

Since sec. 158.09 (2) authorizes the state board of health, as well as the industrial commission, to make rules and regulations governing barber apprentices, I advise that if the state board of health feels that the public interests and the health and welfare of students will be best promoted by a rule prohibiting the practice in question, the board is empowered to adopt one.

Unless and until such a rule is adopted it is my opinion that an applicant for an examination for a journeyman’s license should not be rejected solely upon the ground that a portion of his apprenticeship was served at a time when he was in full-time attendance at a barbering school.

WHR
Appropriations and Expenditures—Public Welfare Department—Department of public welfare does not presently have power to purchase real estate from appropriations established by sec. 20.173, Stats. 1949.

Appropriations under sec. 20.171 not approved for expenditure prior to August 7, 1949, on that date reverted to the post-war construction and improvement fund.

August 19, 1950.

DEPARTMENT OF PUBLIC WELFARE.

You have inquired whether your department has presently any power to purchase real estate from the funds appropriated under sec. 20.171 or 20.173, Stats. 1949.

It would appear that such power presently does not exist. Ch. 589, Laws 1945, which amended ch. 373, Laws 1945, to provide a specific authorization for the purchase of real estate applied by its terms only to appropriations established under ch. 373, Laws 1945. Sec. 25 of ch. 373 as amended provided in part: “the purposes for which each appropriation in this act is made shall be deemed to include * * * [sewer construction] and to include the purchase of land necessary for any construction or improvement project.” The phraseology of this sentence shows that the powers created thereby are limited to the appropriations established in ch. 373. This chapter did provide various appropriations under sec. 20.171 for the department of public welfare institutions.

By sec. 20.173 created by ch. 602, Laws 1949, it was specifically provided that all appropriations under sec. 20.171 for which no order of approval had been filed by the governor prior to the effective date thereof would revert to the post-war construction and improvement fund. Therefore as to all appropriations under sec. 20.171 not approved for expenditure by August 7, 1949, there is no present right of expenditure or power to purchase real estate. The only possible exception would be in a situation where the governor had issued a timely approval of expenditure under 20.171 and contracts for the purchase of real estate from such funds might still be pending.
Subsequent expenditures for construction of department of public welfare institutions are detailed in sec. 20.173, Stats. 1949. Subsec. (2) of this section provides that the funds may be used for “construction, equipment, remodeling, fireproofing of and for making needed improvements” in the state institutions under the department's management and direction. The enumerated powers do not authorize the purchase of real estate but only construction upon premises already owned.

Pharmacy—Drugs—Licenses and Permits—21 O.A.G. 25 to the effect that rural permit to sell drugs and medicines under sec. 151.03, Stats., may not be issued to a person who is a resident of incorporated city or village, is withdrawn.


STATE BOARD OF PHARMACY.

You have directed our attention to sec. 151.03, Stats., which reads:

“In rural districts with no registered pharmacist or assistant pharmacist within three miles, the board may issue to merchants permit to sell for one year drugs and medicines specified therein, upon payment of the fee fixed by the board, not exceeding five dollars.”

Also reference is made to 21 O.A.G. 25 in which it was ruled that the board of pharmacy may not issue a rural permit under this section to a person who is a resident of an incorporated city or village. While the caption of the opinion refers to a resident of an incorporated city or village, which would imply that it is the place where the person lives rather than the place where the business is to be conducted that controls, the text of the opinion seems to make it clear that the opinion is based upon the latter as it should be.

The suggestion is made that strict adherence to this opinion is working a hardship to the public in many communities. Rural communities which are not incorporated are re-
ceiving a limited service through the holders of rural permits issued under sec. 151.03. The larger incorporated villages and cities are able to attract licensed pharmacists and receive full pharmaceutical service, but the small incorporated villages and cities are unable to attract licensed pharmacists and under the ruling mentioned above are denied such limited service as could be offered under rural permits so that they are much worse off than the smaller unincorporated communities.

The board of pharmacy feels that it has some responsibility at least for determining what can be done to correct this somewhat anomalous and discriminatory situation and you have accordingly asked this office to review the matter and advise the board how it should proceed.

There has been no change in the wording of sec. 151.03 since the opinion referred to above was written in 1932. Seemingly the construction given the statute by the attorney general has met with legislative approval since the legislature has not seen fit to change the law as so construed although there has been ample opportunity to do so in the many legislative sessions that have come and gone since 1932. Under such circumstances the administrative construction which has been followed all of these years is significant although not controlling. Union Free High School Dist. v. Union Free High School Dist., 216 Wis. 102.

Since you have asked me to review the correctness of the former opinion I do so with some reluctance in light of the principle discussed above, but inasmuch as such rule of construction is not absolutely controlling but is merely entitled to considerable weight the attorney general should not be foreclosed from reappraising the problem nor from reaching an opposite conclusion if the former opinion appears to be clearly incorrect.

No doubt there is much that can be said in favor of the former opinion from the standpoint of convenience in administering sec. 151.03, but none of the authorities cited in that opinion go so far as to actually establish a distinction between "rural districts" and nonrural or urban districts based upon the somewhat unrealistic test of incorporation.
As a matter of fact there are a number of unincorporated communities in Wisconsin which are more heavily populated and more urban in general character than many of the incorporated villages or cities. There are sometimes very compelling reasons why a well populated area refuses to incorporate. For instance, there may be property out in the town which is carrying much of the tax load, e.g. resort property, mines, or utilities, which would be lost for taxing purposes if the residence area located perhaps some distance away from such properties were incorporated, or it might be that existing quotas as to liquor licenses would be seriously disturbed by incorporating some area in the town. These of course are considerations which have no relevancy whatsoever to the underlying purpose of sec. 151.03 which is to provide some sort of drug and medicine service to country areas having no registered pharmacist or assistant pharmacist within 3 miles.

Moreover, a search of the authorities where courts have been called upon to define the term “rural” reveals no case where incorporation is applied as one of the essential tests. In City of Philadelphia v. Brady, 308 Pa. 135, 162 A. 173, it was held that as regards liability for sewer assessments, property should be classified as “rural” or “urban” according to the general characteristics of the neighborhood, and in People v. Pratt, 14 N.Y.S. 804, it was held that the word “rural” as used in a statute authorizing the incorporation of rural cemetery associations, did not require that the cemetery should hold and use land outside of city limits. The court stated that while the word “rural” commonly means the country as separated from the city it was nevertheless manifestly used in this statute as descriptive of the picturesque character of the place of burial, rather than as something beyond city boundaries, for there may be and often is “rus in urbe.”

In Philadelphia E. & W. R. Co. v. Mayor and Council of Wilmington, (Del. 1948) 57 A. 2d 759, it was held that the character and use of property and not its distance from built-up portions of the city is the controlling factor in determining whether it is “rural” within a statute classifying realty in the city of Wilmington as built-up or rural and providing for two rates of taxation.
Thus the general characteristics of the area rather than any artificial or unrealistic test such as incorporation determine whether or not the district is rural rather than urban in nature, and the test seems to be whether or not such characteristics are predominately of the type associated with the country rather than urban areas.

Perhaps this test may be difficult of application in borderline cases but there is the additional safeguard that no rural permit may be granted if there is a registered pharmacist or assistant pharmacist within three miles, and if further safeguards or tests are needed the statute should be referred to the legislature for such amendment as may appear to be necessary.

The opinion expressed in 21 O.A.G. 25 is accordingly withdrawn.

WHR

Counties—County Board—Salaries and Wages—District Attorney—Duties—Resolution changing the county board from per diem to salary basis was invalid because it was not passed by a two-thirds vote as prescribed by sec. 59.03 (2) (f), Stats. Further payment of salaries under this resolution is not authorized. District attorney has no duty to sue to recover such salaries without county board authorization.

August 29, 1950.

John G. Buchen,
District Attorney,
Sheboygan County.

You advise us that on November 30, 1946 the Sheboygan county board of supervisors passed a resolution adopting the alternative method of compensating members of the board by an annual salary of $400 instead of amounts computed on a per diem basis under the provisions of sec. 59.03 (2) (f) of the statutes. This section allows the board to fix compensation of the members to be elected at the next election at an annual salary not to exceed $500. This is applic-
able to counties of over 25,000 population and may be done “at its annual meeting, by a two-thirds vote of the members elected.” You state that the vote was 19 ayes, 15 noes and 2 excused, out of a total membership of 36. Apparently in good faith and without knowledge of the two-thirds vote required, the resolution has until recently been recorded and considered as if effectively adopted.

You ask several questions, the first of which is: What is the present status of the annual salary resolution? Is any future payment of the annual salary illegal?

The action taken by the board, since the resolution was not adopted by a two-thirds vote of the members elected as required by the statute, was ineffective. It is well established that county boards have only such authority as is delegated to them by statute or necessarily implied therefrom. It is therefore my opinion that further salary should not be paid and that the county is presently on a per diem basis as it was prior to the invalid enactment.

Your second question is: What, if anything, must be done in regard to the salaries which have been paid since the passage of the resolution?

Subject to certain limitations noted below, our courts have allowed recovery against individual and also against ministerial officers responsible for illegal payments. See Menasha Wooden Ware Co. v. Winter, (1915) 159 Wis. 437; Neacy v. Drew, (1922) 176 Wis. 348; Milwaukee v. Binner, (1914) 158 Wis. 529; United States F. & G. Co. v. Hooper, (1935) 219 Wis. 373. In St. Croix County v. Webster, (1901) 111 Wis. 270 at page 273, the court said:

"** A public officer takes his office cum onere, and all services performed by him within the scope of his official duties, or which are voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. A municipal corporation has no jurisdiction to allow to such officer additional compensation not authorized by law for the performance of such services, and if such allowance be in fact made it is a void act. If such officer receives such additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action at law. If the proper corporate officers in such case refuse or neglect to bring such action, an equitable
action may be successfully maintained by any taxpayer to recover such moneys for the benefit of the corporation, if the action be a timely one and there are no equitable considerations which will operate as an estoppel. * * *"

There have been a number of cases, however, in which recovery has not been allowed. Perhaps the leading case is that of *Frederick v. Douglas County and others*, (1897) 96 Wis. 411. In this case an attorney was hired by the county to do certain tax work and was paid a reasonable sum therefor. It was held that although there was no proper authority for his retention as counsel his work was a benefit to the county and he was allowed to keep the moneys paid. The opinion written by Justice Cassoday states that there was a disagreement as to the exact grounds for holding that there could be no recovery and that he had requested the majority of the court to file an opinion expressing their reasons for such conclusion. The concurring opinion expressing such views was written by Justice Winslow, and in it he stated in part as follows (pp. 425-427):

"* * * But while we believe it to be salutary and a correct principle of law to hold that moneys paid out by municipal officials in violation of law may be recovered from the recipient in an action seasonably brought, especially where the transaction is marked by haste, fraud, collusion, or concealment, we believe there are cases in which the circumstances are such that a court of equity ought not to decree the return of money merely because the appropriation thereof was unauthorized, and such a case we believe to be before us now.

"The evidence and the findings show that *Mr. Grace's* employment began in January, 1895, and it was a matter of public notoriety, and the plaintiff himself and presumably all taxpayers who kept track of the public proceedings knew that he was employed as early as the spring of 1895; that he performed large and valuable services, for which he was from time to time paid; and that not only he, but the county board, acted in entire good faith in the matter. There was no haste and no evidence of collusion or concealment. *Mr. Grace's* services ran through a number of months, and he undoubtedly has fully earned all the money which has been paid him. During all this time the plaintiff and his fellow taxpayers remained silent, and allowed the services to be rendered and the money to be paid. They took no action until the latter part of November, 1895. Then they
came into a court of equity, and asked for the stoppage of all payments in the future, and to this they are undoubtedly entitled. But he who comes into a court of equity must do equity. Could it, under any view of the circumstances, be said to be equitable to compel Mr. Grace to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and concerning which the taxpayers of Superior were, or ought to have been, fully informed during their entire progress? Were a court of equity to make this judgment under the circumstances, we should regard it as having become an engine of oppression, rather than an instrument of justice. We do not rest this decision entirely upon the ground that the remedy has been lost by laches, or that the county has become estopped, but upon the ground that under all the circumstances, the plaintiff having invoked the relief of a court of equity, that court, in granting the relief, will not take away the fruit of honest labor. Macon v. Huff, 60 Ga. 221.”

This case has been cited as an authority on numerous occasions and has never been overruled.

In the case of Northern Trust Co. v. Snyder, (1902) 113 Wis. 516, it was claimed that no recovery could lie against the sheriff for illegal expenditures because the action was barred by laches under the rule of the case of Frederick v. Douglas County and others, supra. In discussing this, the court said (p. 528):

“* * * Three things, at least, are essential to the maintenance of that claim: (1) Knowledge on the part of the plaintiff of the course of dealing with the sheriff, indicating acquiescence therein; (2) performance of the services by the sheriff, for which the alleged illegal charges were made, when he might and within reasonable probability would have omitted to do the work if he had supposed in advance, or had any reasonable ground to suppose, that his right to compensation therefor would be challenged; (3) benefit to the corporation reasonably commensurate with the charges for the services performed.* * *”

This language is also quoted in Henry v. Dolen, (1925) 186 Wis. 622. In Bechthold v. Wauwatosa, (1938) 228 Wis. 544, 563, the court said:

“Commencing with Frederick v. Douglas County (1897), 96 Wis. 411, 71 N.W. 798, there are decisions which hold
that, although the contract is illegal, if the money has been
paid, a court of equity will not decree its repayment into the
public treasury upon a showing of entire good faith. * * *"

See also Webster and others v. Douglas County and others,
(1899) 102 Wis. 181; Kollock v. Dodge and others, (1900)
105 Wis. 187; Etsell v. Knight, (1903) 117 Wis. 540; Doug-
las Co. v. Sommer, (1904) 120 Wis. 424; Chippewa Bridge
Co. v. Durand, (1904) 122 Wis. 85; Dorner v. School Dis-
trict, (1908) 137 Wis. 147. In the latter case the court
said (p. 150):

"* * * The court will not coerce the enforcement of a
strict legal right, however clear, if thereby injustice and
inequity will be done. In development of this rule it is well
settled that a court of equity may and should refuse to
upset consummated and completed transactions to the hurt
of those who have acted in good faith at the suit of plain-
tiffs who, by laches or failure to protest upon opportunity
before the acts were done, have induced or justified belief
that they acquiesced in and approved such acts. * * *"

As district attorney you have no duty to commence law-
suits for the collection of money which may be owed the
county and it appears that you cannot do so without author-

You have the general duty of advising the county board
when requested, and while the weighing of the equities in-
volved is, in the last analysis, a judicial question, I can
suggest that the following seem to me to be proper matters
to be taken into account:

(1) The members receiving the salary acted in good
faith. They did not receive the salaries, nor render the serv-
ices for which they were paid, in the same term that the
resolution was purportedly passed. Perhaps some of the
members who received the salary were not members of the
board when the resolution was purportedly passed.

(2) It would be unlikely at this time that the members
could produce accurate records of the amount of per diem
they would be entitled to. In this connection I note that sec.
59.06 allows the board to increase the number of days for
which compensation and mileage may be paid in any one
year when such action is necessary to expedite and properly
conduct the business of county board committees. No one has any way of knowing at this time whether or not such action would ever have been taken if the board members had realized they were on a per diem basis as a matter of law.

(3) The amount of money they would receive is allowed by law, that is, the statute does authorize such a salary. In the case of Frederick v. Douglas County and others, supra, the court pointed out that no estoppel exists "in respect to acts which are in violation of the constitution or of an act of the legislature, or which are obviously, and in the strict and proper sense of the term, ultra vires . . . We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question." Such is not the case here since sec. 59.03 (2) (f) authorizes a salary $100 higher than that taken by the board members.

The probable cost to the county of legal proceedings and the probability of recovery are both factors which can be legitimately considered in determining whether action to recover is for the best interest of the county.

Your last question is whether or not the county board may validate the past act by ratification at this time. In my opinion this is not proper. As you point out in your request, ratification is only proper where there is no legal infirmity in the contract sought to be ratified. 27 O.A.G. 247. As pointed out above, the statute must be followed closely. The board has no power to change the salary of the preceding board even though such salary has already been received.

REB
Towns—Zoning—The notice required for a public hearing specified in sec. 60.74 (2), Stats., is the same for the original ordinance as for an amendment: Publication in the official town newspaper at the times specified, if there is one; if not, in the official county newspaper; and in either case, posting in at least three public places in the town, as specified.

The language "shall hold public hearings," means one or more hearings, depending upon the circumstances.

If as a consequence of a hearing, substantial changes in the proposed ordinance or amendment are proposed, another public hearing on those proposed changes is necessary.

August 30, 1950.

STATE PLANNING BOARD.

You ask three questions involving interpretations of sec. 60.74:

1. How should the notice be given of public hearings by the town park commission or zoning committee required before the submission of the final report?

2. Does the statute, by the use of the language, "shall hold public hearings," contemplate more than one public hearing?

3. If, as a consequence of the hearing on the tentative report of the town park commission or zoning committee, it should be decided by such commission or committee to make amendments in the ordinance to be submitted to the town board as a part of the commission's or committee's final report, would another hearing be necessary?

Sec. 60.74 (2) reads as follows:

"If such town has a town park commission organized as provided by law, such commission shall recommend boundaries of such districts and appropriate regulations and restrictions to be imposed therein. If the town has no town park commission, the town board may appoint a town zoning committee of 5 members to perform the duties of the town park commission under this section. The town park commission or zoning committee shall first formulate a tentative report and shall hold public hearings thereon before submitting a final report to the town board. After such final report is submitted, and the ordinance pursuant thereto
adopted, the town board may from time to time alter, supplement or change the boundaries or regulations contained in such ordinance in the manner herein set forth, but not less than 15 days' notice of any such proposed changes shall first be published in the official newspapers for publication in the town, or if there be none, then in the county, and notices be posted in at least 3 public places in the town. A hearing shall be granted to any person interested, at a time and place to be specified in the notice. Each notice shall be published at least 3 times during the 15 days prior to the date of hearing."

While at first reading it might appear that the procedure prescribed for giving public notice applies only to the amending of the ordinance, a reading of the statute as a whole makes it apparent that the legislature intended this procedure to apply to both the original ordinance and any subsequent amendments. Hence, the notice must be published in the official town newspaper if there is any official town newspaper. If not, it must be published in the official county newspaper, at the times prescribed. In addition to that it must in either case be posted in at least three public places in the town.

Your second question is answered by sec. 370.01 (2), Stats., which reads as follows:

"Singular and Plural Numbers; Males and Females. Every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing; and every word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things, and every word importing the masculine gender only may extend and be applied to females as well as to males."

Since there is nothing in this statute to manifest an intention of the legislature that more than one hearing should be required, it is my opinion that this provision requires one or more hearings as the occasion requires. If the work can be accomplished in one hearing, that one hearing meets the requirement of the statute on this particular point. This view is further supported by subsec. (5) of sec. 60.74, which reads as follows:
"The powers herein granted shall be liberally construed in favor of the town exercising them, and this section shall not be construed to limit or repeal any powers now possessed by any such town."

Your third question raises still another question, namely, are the amendments substantial? The purpose of the notice and hearing procedure is to give all interested parties an adequate opportunity to make their wishes known and to protect their interests. Whether or not a given change is substantial must be decided upon the individual circumstances. The rule is well stated in, The Law of Zoning and Planning (3rd ed.), by Rathkopf and Rathkopf, New York, 1949, p. 106:

"If substantial changes and amendments are made subsequent to public hearing held upon a proposed ordinance and without any new public hearing upon such changes and amendments, the ordinance is void." Citing Village of Mill Neck v. Nolan, 233 App. Div. 248, 251 N.Y.S. 553, 554, affirmed 259 N.Y. 596, 182 N.E. 196 (1932) and Hall v. Leonard, 194 Misc. 454, 21 N.Y.S. 2d, 43, 45 (1948).

While I have discovered no Wisconsin authority upon this question, the following foreign cases are useful examples of changes which were held not to be substantial: Village of Northport v. Walsh, (1934) 241 App. Div. 683, 269 N.Y.S. 966, affirmed 265 N.Y. 458; Town of Burlington v. Dunn, (1945) 318 Mass. 216, 219, 61 N.E. 2d 243.

GFS
Public Assistance — Legal Settlement — Residence—The county or municipality in which a dependent person is present is the one obligated to make the initial grant of relief under sec. 49.02, Stats.

If the relieved person does not have settlement in the county or municipality granting the relief, the question to what unit the relief should be charged is dependent on legal settlement, which is an issue of fact to be determined under sec. 49.11 (7) if there is a dispute.

Old-age assistance is to be granted, under sec. 49.27, by the county in which the applicant has legal residence.

LARRY D. GILBERTSON,
District Attorney,
Jackson County.

You have asked two questions, one involving legal settlement for relief purposes and the other involving place of residence for purposes of old-age assistance, but both related to the same person and the same facts. The circumstances set out in your inquiry are:

A resided in a town in X county for 77 years. She then went to a hospital in a city in Y county for treatment and remained for 14 months. At the end of that time she was unable to return to her home and so she went to stay with a daughter in a town in Z county. She remained there about 8 months, until the daughter became ill and had to be removed to the hospital in Y county. A returned to the hospital at that time. She has remained in the hospital for more than 2 years. The daughter died in the hospital a few months after A was admitted the second time. About 9 months after A’s second entry into the hospital, a petition was filed in the county court of Y county for appointment of a guardian. A resident of Y county was appointed. All of A’s property is located in Y county. Statements made by A and others at the present time indicate that she considers the hospital her home, that she has no other home, and that she is unlikely ever to leave the hospital.

Your first question asks what is A’s legal settlement, and what county is responsible for her relief.

August 30, 1950.
If A is a dependent person within the meaning of sec. 49.01 (4), Stats., Y county (or the city in Y county in which A is located, depending upon what unit administers relief) is responsible for the initial grant of relief, regardless of whether A has a legal settlement in that county, or in any county. Secs. 49.02 and 49.03 require the municipality or the county, as the case may be, to furnish relief to all dependent persons "therein," irrespective of legal settlement. If the person relieved has no settlement in the municipality or the county furnishing relief, the cost may be charged back to the municipality in which the dependent person has a settlement, or to the state in some cases if he has none. Secs. 49.04, 49.09, 49.11.

If the legal settlement is in doubt, the procedure by which it may be established is set out in sec. 49.11 (7). Under that provision the settlement is to be determined by the department of public welfare pursuant to a hearing at which all municipalities or counties connected with the controversy are parties and may present testimony. The issue of legal settlement is a question of fact to be determined by the department on the basis of evidence given in such a hearing. See Holland v. Cedar Grove, 230 Wis. 177, 185–186, in which the court said:

"* * * Whether or not the poor person was legally settled in the town claimed is to be determined in accordance with the provisions of sec. 49.02 [now 49.11] and is likewise a question of fact."

The findings of the welfare department on a question of fact are conclusive in the absence of fraud, if they are supported by substantial evidence. Milwaukee County v. Stratford, 245 Wis. 505; Waushara County v. Green Lake County, 238 Wis. 608; Green Lake County v. Leon, 190 Wis. 166. The findings are not conclusive if they are grounded on an erroneous view of the law or if they represent an erroneous conclusion on the basis of undisputed facts. Waushara County v. Calumet County, 238 Wis. 230; Milwaukee County v. Oconto County, 235 Wis. 601.

I cannot assume the functions of the fact-finding agency designated by the legislature; but a summation of the rules
of law under which the determination must be made may be adequate for your guidance.

Legal settlement is governed by statute (see sec. 49.10). It is not necessarily the same as residence, but it is possible for a person to have a legal residence in one place and a legal settlement in another. See, for an example, La Crosse County v. Vernon County, 233 Wis. 664. Determination of legal settlement sometimes involves a determination of residence, because a legal settlement may be acquired by residence for a particular period under specified conditions. See sec. 49.10 (4). Although the term “residence” is elastic, so that it may mean different things in different statutes (Smith v. Whitewater, 251 Wis. 313, 316), the supreme court has held that the term as used in the statutes relating to relief means “legal residence,” or domicile. Waushara County v. Calumet County, 238 Wis. 230.

In determining legal residence, the intent of the party involved is a controlling element. Miller v. Sovereign Camp W.O.W., 140 Wis. 505; Guardianship of Figi, 181 Wis. 136. Determination of residence and of intent also involve findings of fact. Retail Clerks’ Union v. Wisconsin E. R. Board, 242 Wis. 21; In re Burke, 229 Wis. 545.

Assuming that A originally had a legal settlement in X county, it could be lost under sec. 49.10 (7) only by acquiring a new one or by “residing” for one whole year elsewhere. Whether A ever acquired a legal settlement in Z county when she went there to stay with her daughter depends largely upon whether she intended to make it her home thereafter. The fact that she was physically present in that county only 8 months would not of itself establish that she had not “resided” there for a year; because as stated in Topsham v. Lewiston, cited approvingly in Waushara County v. Calumet County, 238 Wis. 230, 235:

“‘When a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence * * *.’”

Settlement in Z county, if acquired, would be lost by A’s later stay in Y county for more than a year if A’s presence there concurred with the intent to make it her
home. In order to establish legal settlement in Y county, it would seem under the rule of the *Waushara case*, supra, that A’s intent to make it her home must have persisted for a year.

Your second question asks whether Z county is responsible for granting old-age assistance to A.

Sec. 49.27 requires that an applicant for old-age assistance shall file his application in the county in which he “resides.” The opinions were given in 24 O.A.G. 624, 711, and 25 O.A.G. 485 that the obligation to grant old-age assistance, is based on residence in a county and is not affected by legal settlement. Residence still appears to be the basis for determining what county shall grant old-age assistance, despite some changes in the law.

At the time the opinions in 24 O.A.G. 624, 711, and 25 O.A.G. 485 were given there was no reference to legal settlement in the statutes governing old-age assistance. The statutes at that time provided that a county granting old-age assistance might charge the cost to the municipality in which the beneficiary resided. The statutes respecting the power of the county to charge back the old-age assistance have been changed, to authorize the county to charge the cost against municipalities in which the beneficiaries have legal settlement. See sec. 49.37 (2).

When the legislature provided that the ultimate liability for old-age assistance might be determined on the basis of legal settlement, it did not change the basis on which the original grant of assistance by the county should be made. The application is still to be made in the county in which the applicant “resides.”

Under the case of *Waushara County v. Calumet County*, 238 Wis. 230, “residence” as used in ch. 49, Stats., was apparently intended to mean “legal residence”; and the intent of the individual involved is a controlling element.

Removal of A from X county to Y county did not necessarily effectuate a change in residence, nor did any of the subsequent moves of themselves accomplish that result unless the intent to change residence existed. *Taylor v. Thiemann*, 132 Wis. 38; *Miller v. Sovereign Camp W.O.W.*, 140 Wis. 505. If one makes a change of abode with the intent of changing his residence, that establishes a change in legal
residence, no matter how short the sojourn may be. See Kempster v. City of Milwaukee, 97 Wis. 343. The new status need not continue for any particular period as in the case of legal settlement.

The rules appear in Restatement, Conflicts of Law, § 15 (2) and (3):

“(2) To acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home.
“(3) The fact of physical presence at a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicil takes place.”

The fact that a guardian was appointed by the county court of Y county may carry weight in establishing that A acquired residence in that county. The jurisdiction of the county court was dependent upon A’s residence. See Guardianship of Figi, 181 Wis. 136. On the basis of the facts that you have given us with respect to A’s present intentions, her legal residence would not be in Z county; and Z county would not be obligated to grant old-age assistance.

BL
Elections—Corrupt Practices—Distribution by a candidate of campaign card with a baseball schedule printed thereon is not an unauthorized disbursement under the corrupt practices act where the value is the same as, or slighter than, the value of book matches.

September 2, 1950.

H. E. R B E R T  B U N D E,  
District Attorney,  
Wood County.

You furnished a cardboard folder containing printed matter and a photograph which advertises the candidacy for public office of the publisher and distributor thereof. It bears the identification of the candidate as the author and states that it was paid for by him as required by sec. 12.16, Stats. The card is folded, presenting a front and back cover. On the top of the front cover appears the name of a baseball club, followed by the word “schedule.” Across the inside of the card, when opened, appears the baseball schedule of the team named on the cover. The information usually contained in such schedules is included in the form under consideration, such as dates of games, where played, whether day or night games, and time of day or night when games begin. On the rear cover is spread the candidate’s qualifications and experience and what may be regarded as his solicitation of the reader to vote for him in the fall election.

You request my opinion upon two questions:

1. Is the distribution of the combination baseball schedule and political advertisement a violation of the corrupt practices act (ch. 12)?

2. Is the card a “thing of value”?

The gift of “money, property, office or position or other thing of value” is a disbursement under the definition in sec. 12.01 (3), Stats. So also is the payment of money to acquire property and other things of value.

Secs. 12.06 and 12.07 list the types of disbursement which a candidate or his committee is permitted to make. Only two are significant here, 12.07 (3) and 12.06 (1) (e).

Sec. 12.07 (3) permits disbursements “for necessary expenses, incident ** to the printing and posting of hand-
bills, posters, lithographs and other campaign literature, and the distribution thereof through the mails or otherwise."

In the matter inquired about, we have a piece of campaign literature which also contains information independent of the political message. This problem has been treated in a decision of the supreme court, and in previous opinions of the attorney general and in legislative changes.

In 1934 the attorney general considered whether the distribution by a candidate of book matches was illegal. (23 O.A.G. 666) In his opinion the usefulness of book matches made them things of value. Although conceding that the value was slight, he stated that distributing them was a violation of law because disbursements for that purpose were not expressly authorized by statute.

In 1935, the legislature expressly recognized that distribution of matches or match containers was a disbursement by including them as "property" in sec. 12.01 (3), defining disbursement. Ch. 308, Laws 1935.

In 1936, the attorney general considered whether the distribution of blotters bearing campaign material was in violation of the statute (25 O.A.G. 518) and suggested that authorized campaign literature could be as properly printed on blotting paper as any other.

In a campaign just prior to April 6, 1937 a candidate made disbursement for and distributed mirrors and match containers with political advertising printed thereon. Our supreme court held that the disbursement for and distribution of "such property" was in wilful violation of sec. 12.06. State ex rel. Orvis v. Evans, 229 Wis. 304. The court relied on the phrasing "property, including all matches or match containers" in the statute applicable at the time.

On April 30, 1937, the legislature changed the law with respect to book matches (ch. 101, Laws 1937). It was done by deleting any reference to matches or containers from inclusion in the word "property" in the definition of disbursement and by expressly authorizing disbursements "for necessary expenses, incident to the furnishing of and printing political advertising upon paper book matches and the distribution thereof." Sec. 12.06 (1) (e).
Accordingly the actual gift of the match book is no longer a disbursement, and the necessary expenses for furnishing and distributing the match books are expressly authorized. It is my opinion that this history of the law with respect to book matches indicates the legislative intent with respect to material which is not only campaign literature, but also has a slight utility value distinct from the campaign information contained. Where, as appears to be true in the instance now under consideration, the independent utility of the material is more slight than in the case of book matches, it is to be considered as "campaign literature," but not as property or a thing of value.

In dealing with book matches the legislature was dealing with what it considered to be a "borderline" case, and when a piece of campaign literature has a utility or value independent of its political message, which utility or value is the same as or slighter than book matches, the same result should follow.

The answer to both your questions is "No."

TEF

Schools and School Districts—Reorganization—The fact that a school district has been created or altered under the provisions of sec. 40.303, Stats., does not prevent later alteration under sec. 40.30.

September 2, 1950.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You ask whether procedure under sec. 40.30, Stats., to detach territory from a school district is precluded by the fact that such territory was previously added to the school district in the manner provided under sec. 40.303.

Sec. 40.30 provides a method whereby alteration of school districts may be effectuated through action of the governing boards of the areas involved. Sec. 40.303 provides a method whereby similar alterations in school districts can be effec-
tuated through action of the county school committee. The statutes contain no specific provision to the effect that action taken under either section shall preclude future action under the other.

The two sections set up two distinct and independent schemes for alteration of districts, giving to two sets of agencies a concurrent authority, which the supreme court indicated in *School District v. Callahan*, (1941) 237 Wis. 560, 575, might be done.

In accordance with the general rules of comity with respect to exercise of concurrent authority, the opinion was given in 38 O.A.G. 150 that where a petition is filed with the county school committee under sec. 40.303, steps may not be taken to deal with the same subject matter under other statutory sections until the county school committee has disposed of the matter before it. The opinion did not indicate that after one agency had completed its action, the district involved should not thereafter be subject to operation of other statutes.

A district created under the provision of sec. 40.303 would later be subject to alteration under the provisions of sec. 40.30, assuming all the statutory requirements of the latter section are met. Action under sec. 40.30 would be subject to certiorari to the proper court if questions of authority or procedure should arise (see *State ex rel. Grotegut v. Wuenisch*, (1912) 148 Wis. 218, and *State ex rel. Bidgood v. Clifton*, (1902) 113 Wis. 107), and subject to appeal to the state superintendent of public instruction under sec. 40.30 (1) (b).

BL
Constitutional Law—Minors—Public Welfare Department—Secs. 48.09 (2) and 48.20 (2) which provide the department of public welfare with authority to transfer children to and from the Wisconsin school for boys or the Wisconsin school for girls and the Wisconsin child center are a proper delegation of authority and not in violation of the due process of law safeguard of the constitution.

September 6, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You call our attention to sec. 48.09 (2) and sec. 48.20 (2) of the Wisconsin statutes authorizing you to make transfers to and from the Wisconsin school for boys or the Wisconsin school for girls and the Wisconsin child center. You state that several juvenile judges have advised you that such procedure is without due process of law. You ask whether such transfers may legally be made.

The statutes in question read as follows:

Sec. 48.09 (2):

"Whenever in the opinion of the state department of public welfare it shall be for the best interest of a child committed to the Wisconsin child center that such child become an inmate of the Wisconsin school for boys or the Wisconsin school for girls, that department may cause such child to be transferred to such school. Any child so transferred or the parent, guardian or next friend of any such child may have the action of the state department of public welfare in ordering such transfer reviewed by the court making original commitment of said child, on filing a petition in said court and after notice to the state department of public welfare in such manner as the court may direct."

Sec. 48.20 (2):

"Children received into the center may in the discretion of the department be retained until they are 21 years of age. Any child may at any time be transferred by the department from the center to some more appropriate institution."

It is my opinion that such transfers may legally be made and that there is no violation of the due process of law protection provided by the constitution. For authority, I refer
you to the very excellent opinion written by Chief Justice Ryan of our supreme court in 1876 in the case of The Milwaukee Industrial School v. The Supervisors of Milwaukee County, (1876) 40 Wis. 328. This case considered the then new statutory provision which provided for the commitment of both destitute children and those convicted of crime alike, to industrial schools. At that time destitute children and those committing crimes were placed in county poor-houses. The point you raise here is dealt with by the court as follows (p. 336):

"It was strongly objected to the statute, that it authorizes the same disposition of children destitute by misfortune, and of children convicted of crime; committing them alike to these schools, during minority, there to associate together. It must be remembered, however, that this evil, if evil it be, is subject to judicial discretion, and that in sentencing criminal children courts will not overlook the discretion to confine them in ordinary prisons or in these schools, or the degree of depravity of convicted children, or the liability of destitute children in these schools to be demoralized by association. Children guilty of crime are not always, perhaps not often, so depraved as to make their presence in such schools dangerous to their associates. The state, providing for children dependent upon it, whether from indigence or crime, has an essential discretion in the manner of doing so. And it appears to have been in the mind of the legislature, that children guilty of accidental offenses might be more sure to gain than children destitute by misfortune would be to lose by the association, under the careful discipline provided by the act, subject to the supervision of the state board of charities and reform. But, if the objection were as grave as represented, it would be a defect of detail only, not of power; a blemish, not surprising in the infancy of so benign a reform, and readily to be obviated in time by amendment of the statute."

In the case above referred to the commitments were made by a court. It is true that the procedure here is administrative, but nevertheless it is subject to court review which, in my opinion, provides sufficient judicial safeguard for the child against any arbitrary abuse of the law and thus the child is afforded protection under the due process safeguard of the constitution.

It should also be remembered that great strides have been made in juvenile protection and reform in recent years.
This field of endeavor has come under close study and persons working in it are now highly trained and thoroughly competent. This is reflected by the trust the legislature saw fit to place in your department evidenced by the broad authority delegated to the department of public welfare in the youth service act.

REB

Public Lands—Forests—Sale—Sales of forest lands, as defined in sec. 28.02 (1), Stats., are no longer subject to the restrictions contained in sec. 24.11 (3) since enactment of ch. 474, Laws 1949.

September 7, 1950.

STATE CONSERVATION DEPARTMENT.

You have asked whether the restrictions set out in sec. 24.11 (3) of the statutes apply to sales of forest lands.

The restrictions of sec. 24.11 (3) apply, under the terms of that provision, only to "public lands." Public lands are defined in sec. 24.01 of the statutes. The definition does not, since the enactment of ch. 474, Laws 1949, include forest lands as it did formerly. Ch. 474, Laws 1949, removed forest lands from the definition of public lands, changed the title of ch. 28 of the statutes from "State Forests" to "Public Forests," and included in that chapter a new provision, sec. 28.02 (4), relative to the sale of forest lands. The title of ch. 474, Laws 1949, indicates that it relates to "revising and codifying numerous provisions pertaining to public forests." It was, however, intended to make some substantive changes in the law in addition to regrouping and codifying, as was apparent from the comment printed on Bill No. 496, S. from which the law was enacted. The printed comment stated in part:

"The provisions on state forests would be difficult to codify by amendment and renumbering and the same applies to community forests. They are, therefore, repealed and recreated. New provisions pertaining to state forests are largely codification of present commission policy and in some cases more restrictive than the present law. * * *"
It is my opinion that since the enactment of ch. 474, Laws 1949, sales of forest lands, as defined in sec. 28.02 (1) of the statutes, are not subject to the restrictive provisions of sec. 24.11 (3).

BL

Juvenile Court—Minors—Commitments—Commitments of juvenile judges of delinquents direct to Wisconsin school for boys or Wisconsin school for girls contrary to the provisions of sec. 48.07 and sec. 54.09 of the youth service act are immaterial errors in the commitment not affecting the jurisdiction of the department of public welfare. Such errors are subject to remedy at any time even after habeas corpus proceedings.

September 8, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

In my opinion written April 19, 1950* I concluded that the amendment to sec. 48.07 by ch. 117, Laws 1949, inserting a provision for commitment of juveniles direct to a suitable public institution was intended by the legislature to apply only to dependent or neglected children and not to delinquents. You state that you are, however, still receiving cases of delinquents whose commitments are made out directly to the Wisconsin school for boys or girls and not to the department of public welfare as is provided by the youth service act and sec. 48.07 as interpreted by me. You ask whether such commitments provide you with proper authority to hold the juveniles so committed.

It is my opinion that such commitments are sufficient protection for your department to exercise its usual custody and control of the juvenile. The defect in the commitment does not appear to be a material one. Once the judge makes a finding of delinquency, commitment must be made to your department. For all practical purposes the judge has done this by a commitment to a state institution operated and controlled by your department and a part or arm of it. The

* Page 141 of this volume.
reception centers provided by the youth service act are located, I understand, at the school for boys or the school for girls. This further shows the immateriality of the error.

The law appears to be clear that a commitment is invalid only where it departs from the substance of the judgment back of it, 15 Am. Jur. 153. In the case of Hack v. Mineral Point, (1931) 203 Wis. 215, our court stated that where a prisoner was confined by virtue of a judgment of a court of competent jurisdiction a defective commitment was subject to remedy at any time even after the bringing of habeas corpus. Thus, even if the defect were held to be a material one, the rule in the Hack case affords him ample protection. REB

Chiropractors—Licenses and Permits—Naturopathy—

One who is licensed to practice chiropractic in Wisconsin under sec. 147.23, Stats., is not thereby authorized to treat the sick by other methods such as naturopathy, and a chiropractor who advertises as a naturopath may have his license suspended or revoked for unprofessional conduct under secs. 147.24, 147.25 and 147.26.

September 9, 1950.

STATE BOARD OF EXAMINERS IN CHIROPRACTIC.

You have inquired whether a licensed chiropractor may properly have himself listed as a naturopath in the classified section of a telephone directory.

What is a naturopath and what is the practice of naturopathy? The answer calls for some research and discussion inasmuch as these terms are not widely used or understood.

Naturopathy according to Webster’s New International Dictionary is “a system of physical culture and drugless treatment of disease by methods supposed to simulate or assist nature.” In Gould’s Medical Dictionary (5th ed.) it is defined as “a school of healing which employs air, light, water, vibration, heat, electricity, psychotherapy, dietetics and massage. It excludes the use of drugs, surgery, x-ray
or radium.” In Blakeston’s New Gould Medical Dictionary the word “naturopathy” is defined as “a therapeutic system embracing a complete physianthropy employing nature’s agencies, forces, processes, and products, except major surgery.”

The above definitions have been somewhat enlarged upon or at least have been somewhat more particularized by the naturopaths in the phraseology which they have employed from time to time. From the case of *Millsap v. Anderson*, (1923) 63 Cal. App. 518, 219 P. 469, it appears that the California medical practice act was amended in 1909 so as to permit the holders of certificates from the board of examiners of the Association of Naturopathy to practice naturopathy, and the articles of incorporation of this association provided that its materia medica should consist of the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, and physical and mental culture. Apparently such practice in California must be conducted without severing or penetrating any of the tissues of human beings except the severing of the umbilical cord. *Dare v. Board of Medical Examiners of State of California*, (Cal. App.) 127 P. 2d 977.

The foregoing definitions give but slight insight, if any, into the techniques employed by naturopaths, and it may be helpful for the purposes of this opinion if some further explanation were given. In the May, 1950, issue of The American Mercury, Vol. LXX, No. 317, there is an article at page 542 and following entitled “The Case for Naturopathy” by Dr. Robert A. Wood, a Chicago practitioner who was for many years president of the American Naturopathic Association of the State of Illinois. Naturopathic methods of treatment are described at some length in this article. In treating fever the naturopath uses distilled water with lemon juice, fresh raw fruits, colonic irrigations and hot wet bath towels. In the treatment of appendicitis he states that the only appendix that should be removed is a ruptured, gangrenous one and that the ordinary inflamed appendix can be successfully treated by fasting from 3 to 7 days and when all of the pain and inflammation have departed a cold water enema is to be taken every day for 4
days to be followed by a diet of fruit, raw milk, etc. for 2 or 3 days. Syphilis is likewise treated by the naturopath by the eliminative, fast, and health-food treatments. Pernicious anemia is treated by warm poultices, manipulations, vegetable and fruit juices, and sun bathing, and Dr. Wood treated one case of gall stones successfully by having the patient fast on river water and lemon juice, followed by a 10-day acid fruit diet, hot packs and sun baths. He treated a bone tuberculosis case with sitzbaths, sun baths, cold sprays, hot packs, infrared vibrations, exercise, manipulations, colonic irrigations and "other natural remedies."

It is apparent from the foregoing that a naturopath treats the sick as that term is defined in ch. 147, the medical practice act. See sec. 147.01 (1) (a) and (b).

Sec. 147.14 (1) provides in part:

"(1) No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute **.*"

One of the exceptions "otherwise specifically provided by statute" is the practice of chiropractic, which type of practice is regulated and licensed under the provisions of secs. 147.23 to 147.26 inclusive.

While chiropractic is not defined by statute in Wisconsin, the definition given by the Wisconsin Chiropractic Association is as follows:

"The science of chiropractic is based upon the premise that disease or abnormal function is caused by interference with normal nerve transmission and expression, due primarily to pressure, strain, irritation or tension upon the spinal nerves as they emit from the spinal column, as a result of bony segments, especially of the spine, deviating from their normal juxtaposition."

"The practice of chiropractic consists of the analysis of any interference with normal nerve transmission and expression and the correction thereof by a specific adjustment with the hands of the abnormal deviations of the bony articulations, especially of the spine, for the removal of the cause of the disease, without the use of drugs or surgery."
See also 21 O.A.G. 646 to the effect that chiropractic is confined to manipulations of articulations of the human body and that under practically all definitions the adjustment is of the spinal column by hand.

It is quite evident from what has been said that a chiropractic license does not authorize or encompass the employment of many of the techniques employed by naturopaths in the diagnosis, prescribing for, and treating of human illnesses. While naturopaths are licensed in some states such as California, Texas, Indiana, South Carolina, and Florida, and possibly some others, they are not licensed in Wisconsin, although attempts have been made to secure the passage of such legislation, e.g. Bill No. 161, A., 1947 legislature, which passed in the assembly but was defeated in the senate.

This being true, one who is licensed only to practice chiropractic and who holds himself out to the public by classified telephone directory listing or otherwise as being authorized to engage in a practice which is prohibited to him is guilty of conduct of a character likely to deceive or defraud the public. Such unprofessional conduct and unprofessional advertising constitute grounds for license suspension or revocation by the state board of examiners in chiropractic under secs. 147.24 (5), 147.25 (1), 147.25 (5) (a) and 147.26, Stats.

Sec. 147.24 (5) provides for license suspension or revocation of one who is guilty of immoral or unprofessional conduct. Sec. 147.25 defines unprofessional conduct to include, without limitation because of enumeration:

"(1) Any conduct of a character likely to deceive or defraud the public;
"* * *

"(5) Use of unprofessional advertising which shall include without limitation because of enumeration:
"(a) Any advertising statement of a character tending to deceive or mislead the public;
"* * *"

Sec. 147.26 sets up the procedure for the board to follow in suspending or revoking a license in such cases.
You are therefore advised that the board is authorized to suspend or revoke the license of a chiropractor who persists in holding himself out to the public as a naturopath.

WHR

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**Athletic Commission—Licenses and Permits—Boxing**—State athletic commission held to have power under sec. 169.02, Stats., to promulgate rule regulating announcements of boxing cards. Corrected phraseology suggested. Power to revoke licenses to conduct boxing cards held to reside in commission and not in secretary.

September 11, 1950.

**STATE ATHLETIC COMMISSION.**

You request our opinion on the phraseology of a proposed rule of the commission. The proposed rule is as follows:

“No newspaper, radio, or television announcement of main or principal contest on a professional boxing card shall be made by any promoter, matchmaker, or officer of any licensed club before contracts for such boxers are filed with the Commission, and the Commission or its Secretary have approved such match.

“For first violation of this rule it shall be within the province of this Commission to suspend the license of such club for a period of not less than three months nor more than six months. For second violation of this rule this Commission may revoke the license of the offending club.”

As to the power to make the proposed rule, sec. 169.02, Stats., insofar as it is pertinent provides: “The commission shall * * * make such rules and regulations for the administration of the office, not inconsistent herewith, as it deems expedient and may from time to time amend or abrogate the same.”

Sec. 169.05 provides *inter alia*:

“The commission shall have the sole direction, management and control of, and jurisdiction over, all boxing and sparring exhibitions conducted within the state by any club; and no boxing or sparring exhibitions shall be conducted within the state except pursuant to authority therefor
granted by the commission and in accordance with this chapter and the rules and regulations of the commission. The commission may issue, and for cause revoke, a license to conduct boxing and sparring exhibitions to any incorporated club formed as hereinafter provided. * * * Every license shall be subject to such rules and regulations as the commission prescribes."

The power to make the proposed rule is clear from the above quoted sections of the statutes. The provision relative to the secretary's approving a contest must, however, be deleted. Such approval must be by the commission itself. Sec. 169.05 states "and no boxing or sparring exhibitions shall be conducted within the state except pursuant to authority therefor granted by the commission."

The duties of the secretary are prescribed by sec. 169.03 as follows:

"The commission shall appoint a secretary, who shall keep a full and true record of all the proceedings of the commission, preserve at its general office all its books, documents and papers, prepare such notices and other papers and perform such other duties as the commission prescribes; * * * ." Authority of the secretary to approve contests is not expressed nor can it be implied from the statutes. The clause "and perform such other duties as the commission prescribes" being of a general nature, following specific duties, must be construed to include only those duties of the same class—here clerical—as are specifically enumerated. State v. Black, 75 Wis. 490, 44 N.W. 635.

As to the phraseology of the proposed rule, the following would be preferable:

"No newspaper, radio, television or other announcement concerning the main or principal contest on a professional boxing card shall be made by any promoter, matchmaker, officer, or other representative of any licensed club until such time as: (a) Contracts engaging boxers for the principal contest have been filed with the Commission and (b) approval of such contest has been given by the Commission. "For the first violation of this rule the Commission may suspend the license of the offending club for a period of not less than three months nor more than six months. For the second or subsequent violation of this rule, the Commission may revoke the license of the offending club."
You will observe that I have added "or other representative" to the designated individuals in the first paragraph. This is done in an effort to escape the familiar rule of *expressio unius est exclusio alterius* or the expression of one implies the exclusion of another.

In the second paragraph I have substituted "may" for "it shall be within the province of." Since it is a power of the commission to revoke a license "for cause" and to subject a licensee to the commission's rules per sec. 169.05, the original wording adds nothing. The wording of the paragraph, which the commission obviously intends to be directory rather than mandatory, will serve notice of what may be in store for any licensed club which violates the rule.

SGH

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**Counties—Pensions**—County board is not authorized to set up a system whereby employes reaching the age of 65 are to be retired upon payment of cash bonuses. The only county pension system authorized by law is that contemplated by sec. 59.073, Stats., for counties of less than 500,000 population.

September 12, 1950.

**FULTON COLLIPP,**

*District Attorney,*

Adams County.

You have asked for an opinion on the legality of a county board resolution providing for a bonus for county highway employes who have reached the age of 65 years and who are thinking about retiring.

The material part of the resolution reads:

"WHEREAS, some of the county highway employees of Adams County have reached the age of 65 years and are thinking of retiring;"

"And Adams County desiring to recognize these men for the faithful service they have given Adams County;"

"NOW, THEREFORE, BE IT RESOLVED by the County Board of Adams County, Wisconsin, that any county highway employee who is working at the date of the enact-
ment of this resolution for Adams County and who has worked for Adams County continuously for a period of not less than 10 years at the time of his retirement from service be given $50.00 for each year of service said bonus not to exceed the sum of $750.00 for any one employee;

“This resolution not to take effect until approved for legality by the District Attorney and the District Attorney is ordered to report back to this board at its next regular meeting so that the board can take final action on the same.”

The county board had previously been requested to make provisions under sec. 59.073, Stats., for placing such employees under the Wisconsin retirement fund but it has not done so because of the expense involved and has proposed the bonus plan rather than dismiss the older employees with nothing. If the plan is approved the retirement of 65-year-old employees will be made compulsory.

County boards have only such powers as are expressly granted or necessarily implied from the statutes, and if there is a reasonable doubt as to an implied power it is fatal to its being. Dodge County v. Kaiser, 243 Wis. 551.

While the county board has wide powers in fixing the salaries or compensation of county employes under sec. 59.15, Stats., there is no statutory authority express or implied for paying additional bonuses or gratuities for services previously performed and for which payment has already been made.

Perhaps it might be argued that this bonus does not constitute extra compensation for services already rendered but is intended to induce experienced employees to remain in the service and therefore is compensation for services to be rendered in the future. See State ex rel. Dudgeon v. Levitan, 181 Wis. 326, where this view was taken in upholding a statute providing for additional pensions to teachers who had been in service more than 25 years before the enactment of the statute, based on a computation of what they would have received if the act had been in force during their period of service.

However, the program considered here when realistically approached is a modified form of pension system without being so designated in the resolution and there is no author-
ity for any county pension system other than the one contemplated under sec. 59.073, Stats., relating to the Wisconsin retirement fund.

You are therefore advised that the resolution is contrary to law.

WHR

_Schools and School Districts—Referendum Petition—_
County school committee's order under sec. 40.303 (4) (b), Stats., is not issued within the meaning of sec. 40.303 (8) (a) until the order has been filed as provided in sec. 40.303 (13).

September 13, 1950.

JOHN S. COLEMAN,  
_District Attorney,  
La Crosse County._

You ask whether the time for filing a petition under sec. 40.303 (8) (a), Stats., is extended beyond the 30 days provided when the county school committee fails to file its order promptly with the clerks of the proper municipalities as provided in sec. 40.303 (13).

You state that the county school committee on May 29, 1950 “issued” its order altering two school districts, that the order was not mailed to the municipal clerks until June 8, 1950, and that a petition for referendum was filed June 29, 1950, 31 days after “issuance” of the order.

Strictly speaking, the answer to your question is “No.” A petition for a referendum election must be filed “within 30 days after the date of issuance of any order.” Sec. 40.303 (8) (a), Stats. However, it is my opinion that the order of the county school committee is not issued within the meaning of sec. 40.303 (8) (a) until the order is recorded with the proper municipal clerks.

Sec. 40.303 (13) provides:

“Every order issued as provided in subsection (4) (b) shall be promptly filed and recorded in the office of the clerk of the municipality in which the school districts affected by the order are situated (and if in more than one,
a sufficient number of originals shall be executed so that one may be filed with each municipal clerk, and a copy of such order shall be mailed to the clerk of each school district affected, to the county superintendent, and to the state superintendent."

This is the only provision for filing, service or publication of the order.

The language of sec. 40.303 (13) which was passed by ch. 501, Laws 1949, is taken from sec. 40.30 (6). This language did not cause any ambiguity as to the time for taking an appeal under sec. 40.30. Sec. 40.30 (1) (b) provides that an appeal from an order of a municipal board altering school districts may be taken "within 30 days following the issuing and recording of any such order." Similarly, sec. 40.303 (4), Stats. 1947, provided for an appeal from an order of a county school committee "within 30 days following the issuing and recording of any order."

The referendum provision of sec. 40.303 (8) originated in ch. 61, Laws 1949. There is no apparent basis for any legislative intent to adopt a different period within which to petition for a referendum than is allowed for taking an appeal; and the word "issuance" in sec. 40.303 (8) (a) was not intended to be limited to "issuing" as used in sec. 40.303 (4), Stats. 1947, but was intended to embrace both issuing and recording.

"Issue" means "to be given or sent out, officially or publicly." Until the committee has released its order in such a manner that the committee is powerless to change or reconsider it—in short, until the committee has filed its order with the proper officials—it cannot be said that the order has been issued. Popnoe v. Corbin, (1948) (Tex. Civ. App.) 215 S.W. 2d 197; Thomas v. Abbott, (1895) 105 Mich. 687, 63 N.W. 984.

It is true that sec. 40.303 (13) provides that the committee's order "shall be promptly filed and recorded," but the requirement of promptness is merely directory. State v. Ind. Comm., (1940) 233 Wis. 461, 289 N.W. 769; Appleton v. Outagamie County, (1928) 197 Wis. 4, 220 N.W. 393.
Insane—Courts—Entry of an order for observation under sec. 51.02 (5) (b), Stats., does not exhaust the court's jurisdiction, but it retains jurisdiction to complete the proceeding by discharge or commitment.

An opportunity to be heard should be provided before discharge or commitment on the basis of observation reports, but the patient's personal presence is not necessary if the jurisdictional requirements of sec. 51.02 have been met earlier in the proceeding.

September 13, 1950.

Leary E. Peterson,
District Attorney,
Crawford County.

You present a situation in which a court has made an order for medical observation of a person believed to be mentally ill, for a period not to exceed 30 days as provided by sec. 51.04 (3), Stats. You ask, if during the period of observation a conclusion is reached that the patient is mentally ill, whether the court retains jurisdiction under the original proceedings to make findings, and enter judgment, for commitment. You ask further whether the patient must be produced in court for a further hearing or whether he can be found mentally ill and committed upon the recommendation of the superintendent of the institution.

In answer to your first query, the court does retain jurisdiction to complete the proceedings by commitment or discharge.

Under sec. 51.02 (5) (b), Stats., the judge may order the patient "detained for observation if in doubt as to his mental condition." Such an order is interlocutory, reserving to the court matters not disposed of. See sec. 270.54, Stats.

The rule is stated in 14 Am. Jur. 370:

"Ordinarily, the jurisdiction of a court over both subject matter and parties, once fully attached in a cause, continues until all issues, both of fact and of law, have been finally determined, in other words, until complete relief is afforded within the general scope of the subject matter of the action."
That is true even though some of the parties do not continue to participate. See *Comstock v. Boyle*, 134 Wis. 613, 616, and *State ex rel. Walling v. Sullivan*, 245 Wis. 180.

The Wisconsin supreme court has held that judgments passing upon the merits of a dispute and leaving accounts to be taken are interlocutory. See *Estate of Pardee*, 240 Wis. 19, and *Estate of Curtis*, 253 Wis. 119.

It has also held that an order leaving an issue undetermined is interlocutory, whether or not so denominated, so as to leave the agency with jurisdiction to dispose of that issue. See *Levy v. Industrial Comm.*, 234 Wis. 670.

If the court’s jurisdiction was properly invoked, no new application is necessary to enable the court to complete the proceeding after entering an order for observation under sec. 51.02 (5) (b).

You have also asked whether further hearing is required, and whether the presence of the patient is essential to a commitment based upon the recommendations resulting from the observations.

Assuming that all the procedural requirements of secs. 51.01 and 51.02 with respect to hearing and notice have already been met, there are no specific statutory instructions for the procedure after entry of order under sec. 51.02 (5) (b). Even in the absence of specific statutory requirement, further proceedings would have to be so conducted as to avoid violation of the due process requirements of the constitution. Due process of law requires opportunity to be heard. While due process does not necessarily require more than one hearing in any proceeding, it does require an opportunity to be heard on all the issues and opportunity to know of all the evidence to be considered. It is said in 12 Am. Jur. 303:

“A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.

“There is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute.”
It would seem that under the rules of due process some kind of opportunity to be heard with respect to the reports and recommendations based on the observation period should be given. Our court has ruled that:

"We see no reason why a man who is proceeded against as an insane or incompetent person, under the statute, is not the proper person to defend against the proceeding; and until he is finally adjudged to be insane or incompetent, he may appear by his attorneys as any other person." (Appeal of Royston, 53 Wis. 612, 625.)

If the patient is given an opportunity to be heard his presence at the hearing on the question of his commitment is not necessary to meet the requirements of due process. Simon v. Craft, 182 U.S. 427, 21 S.Ct. 836, 45 L.ed. 1165. In other words, he may voluntarily forego the opportunity.

If such a requirement is imposed by statute, however, it may be necessary to the validity of the proceedings.

Our court held in Guardianship of Simmons, 236 Wis. 305, that if the statute requires presence of the supposed insane or incompetent person at a hearing, it may be an abuse of discretion sufficient to warrant reversal, even if it be not jurisdictional, for the court to enter a judgment without taking steps to require such appearance unless it is manifestly impossible. The statute there involved was sec. 319.16.

Sec. 51.02 (2) does not require the presence of the patient at any particular hearing, but only that: "Before making his decision the judge shall personally observe the patient."

If the judge has already complied with that requirement in the same proceeding, he has met the jurisdictional requirements. There can be no objection to meeting more than the minimum requirements and if there be any doubt with respect to the patient's condition it would be advisable for the court to observe him again to remove the possibility of abuse of discretion such as was involved in Guardianship of Simmons, 236 Wis. 305.

Sec. 51.02 (2) provides that the hearing may be had either in the court room "or elsewhere," so that there is nothing to prevent its being held at the point where the patient is under observation if that appears to be to the best interest of those involved.
Automobiles and Motor Vehicles—Accidents—Criminal Law—County Court—Jurisdiction—Crime of failure to stop after accident is a felony punishable in a state prison under secs. 85.141 (1) and 353.27, Stats. County court of Vilas county does not have trial jurisdiction of crimes punishable in the state prison under Laws 1943, ch. 294, sec. 2.

September 14, 1950.

EDMUND H. DRAGER,
District Attorney,
Vilas County.

You have inquired as to whether the county court of Vilas county has trial jurisdiction of violations of sec. 85.141 (1) (failure to stop after accident). The penalty prescribed for violation of that subsection is "imprisonment for not less than ten days nor more than one year or by fine of not less than five dollars nor more than five thousand dollars, or by both such fine and imprisonment."

Since the place of imprisonment is not stated in the statute, sec. 353.27 (2) is applicable, which provides in part as follows:

"When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, (a) a sentence of less than one year shall be to the county jail, (b) a sentence of more than one year shall be to the state prison and the minimum under the indeterminate sentence law shall be one year, and (c) a sentence of one year may be to either the state prison or the county jail. ** **"

Since sec. 85.141 (1) may be punished by imprisonment of exactly one year, such a sentence may be to either the state prison or the county jail under sec. 353.27 (2) (c) above quoted. The crime is therefore a felony within the meaning of sec. 353.31, Stats., which provides as follows:

"A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

Under Laws 1943, ch. 294, sec. 2 (1), relating to the county court of Vilas county, it is provided in part as follows:
The said judge shall have and exercise in said county the criminal jurisdiction of the justices of the peace and in addition thereto shall have jurisdiction of all offenses within said county which are not punishable by imprisonment in the state prison. * * *

Since violations of sec. 85.141 (1) are punishable in the state prison, the county court does not have trial jurisdiction but is limited to holding preliminary examinations in such cases, pursuant to ch. 354, Stats.

Elections—Justice of the Peace—Justice of peace election to fill vacancy may not be held at same time as regular election for the office but can only be held at annual town or village meeting in even-numbered year. Justice holds office until successor qualifies. Milwaukee county justices not considered.

September 15, 1950.

Fred R. Zimmerman,
Secretary of State.

You have asked my opinion on the following questions pertaining to the election and term of office of justices of the peace. You state that these inquiries relate to town and village justices in all counties except Milwaukee, which is subject to special statutory provisions. Accordingly, my opinion is concerned only with election and term of justices in counties other than Milwaukee.

1. Can a justice of the peace of a town be elected to fill a vacancy at the same time other justices are elected for full terms?

Sec. 60.57, Stats., provides that each town shall elect a justice of the peace at the annual town meeting in every odd-numbered year, whose term of office shall be 2 years from the first Monday of May next following such town meeting.

The procedure for filling vacancies in that office is set forth in sec. 17.25 (1), Stats., which reads in part:
Persons appointed under the provisions of this subsection to fill vacancies shall hold office for the residue of the unexpired term, except persons appointed to fill vacancies in the office of justice of the peace and member of the water or light commission, which persons shall hold office only until their successors are elected and qualify and such successors shall be elected at the annual town meeting next after the vacancy occurs if such vacancy occurs twelve days or more prior to such meeting; otherwise at the annual town meeting held in the year next succeeding; but no election to fill a vacancy in such office shall be held at the time of holding the regular election for such office.

Clearly, under the section quoted, the question must be answered in the negative.

My conclusion is not altered by the ballot form in sec. 10.52 (1), Stats., which indicates that a justice of the peace for a town may be elected to fill a vacancy at the same time other justices are elected for full terms, nor by the language of sec. 10.56 (2), which specifies that the ballot shall be made to distinguish between persons seeking to fill a vacancy in the office of justice of the peace and candidates for full terms to that office. Obviously, these sections prescribing the form of election ballot to be used cannot affect the categorical prohibition in sec. 17.25 (1) against holding an election to fill a vacancy at the same time the regular election is held.

The requirement that the ballot distinguish between persons being elected as justices to fill vacancies and for full terms originated in ch. 12, sec. 92, Rev. Stats. 1849. The last clause of sec. 17.25 (1) was added by ch. 671, Laws 1919. Ch. 362, Laws 1919, completely revising the laws relating to resignation, vacancies and removals, created sec. 17.29, which states that the provisions of ch. 17 shall supersede all contrary provisions of the statutes except certain ones enumerated. Sec. 10.52 (1) and 10.56 (2) are not among the exceptions and, therefore, must be declared inoperative so far as they are inconsistent with sec. 17.25 (1).

2. If elections are held for unexpired terms, what statute or statutes govern and when are such elections held?

By necessary implication from the provisions of sec. 17.25 (1), the time when towns may elect justices of the peace for unexpired terms is restricted to the annual town meet-
ing in even-numbered years. Elections for unexpired terms are to be held in accordance with the ordinary method of holding town elections. See sec. 10.55.

The time for holding elections to fill a vacancy in the office of village justice is similarly circumscribed by secs. 17.24 (1) and 17.23 (1) (a). Here also, the ordinary statutory provisions relating to village elections would govern such election.

3. Due to the language of sec. 61.30, can a justice of the peace serve beyond the term for which he was elected?

Sec. 61.30 states that a village justice “shall hold his office for two years from the time of his election and until his successor is elected and qualified.” This language conforms with the provisions of Art. VII, Sec. 15, Wis. Const., fixing the term of office as follows:

“The electors of the several towns at their annual town meeting, and the electors of cities and villages at their charter elections except in cities of the first class, shall, in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be for 2 years and until their successors in office shall be elected and qualified. ** *”

See also sec. 60.22 relating to the terms of town officers.

It is well settled that the indefinite period of time included by the phrase “until their successors in office shall be elected and qualified” is part of the term of office. 31 Am. Jur. 712; 16 O.A.G. 166; 18 O.A.G. 536; 23 O.A.G. 140. The purpose of the holdover provision is to prevent vacancies in office. The law contemplates that there may be delay in appointing or electing a successor who will qualify, and meets this contingency by making the time a justice holds over as much a part of his term of office as the period he is entitled absolutely to hold.

GS
Automobiles and Motor Vehicles—Taxes—Exemption—
Motor vehicle used to transport cement blocks is not exempt from ton-mile tax under sec. 194.47 (4), Stats.

September 15, 1950.

MOTOR VEHICLE DEPARTMENT,

You ask whether the operation of motor vehicles with dump bodies engaged exclusively in the transportation of "cement blocks" is exempt from the so-called ton-mile tax.

Sec. 194.47 (4) provides an exemption for:

"All motor vehicles equipped with dump bodies while engaged exclusively in the transportation of dirt, sand, gravel, stone, asphalt, cinders, ashes or cement for highway and building construction and maintenance, not more than 20 miles from the point of loading, and all such motor vehicles while operated empty for the purpose of moving such vehicles from one location to another."

A taxpayer claiming an exemption must show that he is plainly within its terms. Bowman Dairy Co. v. Tax Comm., 240 Wis. 1, 5.

Webster's International Dictionary defines cement as:

"(1) A substance used in a soft or pasty state to join stones or bricks in a building, to cover floors, etc., which afterwards becomes hard like stone; esp., a kind of strong mortar made with lime, or a calcined mixture of clay and limestone. (2) Any substance used by men or animals for making bodies adhere to each other, as asphalt, glue, gypsum, lime, paste, plaster of Paris, Portland cement, etc. (3) The powder being used in cementation."

On the other hand concrete is defined as "a mixture of sand, gravel, pebbles, or stone chippings with cement or with tar, etc., used for sidewalks, etc."

Reasonably it may be said that the definition of cement conveys the idea of an ingredient, and the definition of concrete the idea of a product.

Under sec. 194.47 (4) "motor vehicles equipped with dump bodies" carrying the eight enumerated items are exempt from the tax. A dump body is the first requirement of exemption. Use of dump bodies is clearly consistent with hauling any of the seven other items (dirt, sand, gravel,
stone, asphalt, cinders, ashes) and with cement when the narrow definition given above is used, but much less so with the idea of hauling cement blocks.

The other items in the list are not fabricated as a cement block would be. Bricks, tile and blocks fabricated from other substances are clearly not included. Cement, as distinct from products of cement, appears to be similar in type and to be readily classified with the other materials listed in the exemption. It is a principle of statutory construction that the meaning of a doubtful word may be ascertained by reference to the meaning of words with which it is associated. See cases cited under *Noscitur a Sociis*, 28 Words and Phrases, Permanent Edition, p. 766 ff.

In my opinion the answer to your question is "No."

TEF

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**Secretary of State—Foreign Corporations—Annual Report**—In determining the value of nonpar stock for the purpose of ascertaining the corporate filing fee required by sec. 226.04 (1), Stats., the secretary of state may not consider the fact that articles of incorporation provide that upon the liquidation of the corporation all of the corporate assets in excess of a certain amount must go to the holders of the par-value common stock rather than to the holders of the nonpar-value preferred stock.

September 16, 1950.

**Fred R. Zimmerman,**

*Secretary of State.*

Sec. 226.04 (1), Stats., relates to the filing of annual reports by foreign corporations which transact business in this state and provides:

“(1) CONTENTS, FILING FEES. Every foreign corporation transacting business in this state shall annually, between the first day of January and the first day of April, file with the secretary of state a report signed by its president, secretary, treasurer or general manager as of the first day of January, which shall state:
“(d) The amount of capital paid in money, property or services, and the number and value of shares of capital stock without par value. The value of capital stock without par value for purposes of such statement and for the purpose of computing filing fees shall be the amount by which the entire property of said corporation shall exceed its liabilities other than such capital stock without par value, but each share of capital stock without par value shall be deemed to be of the value of not less than ten dollars.

“(e) The proportion of the capital represented in Wisconsin by its property located and business transacted therein during the preceding year. The proportion of capital employed in the state shall be computed by taking the gross business of the corporation in the state and add the same to the value of its property located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of its total gross business of said year added to the value of its entire property. The fraction so obtained shall represent the proportion of the capital within the state. * * *

“(f) The corporation shall pay a fee of two dollars for filing such report, and, in case said report shows that it employs in this state capital in excess of twenty-five thousand dollars, it shall pay an additional fee which with previous payments will amount to one dollar for each one thousand dollars of such excess.”

A certain foreign corporation which has been licensed to transact business in this state has issued par-value common stock and preferred stock which does not have any fixed par value. However, its articles of incorporation provide that in case of liquidation the excess of the corporate assets over a certain fixed amount would go to the holders of the par-value common stock rather than to the preferred stock which has no par value. In view of this fact the corporation contends that the provisions of sec. 226.04 (1) (d) should not be applied literally in determining the value of the outstanding preferred stock of this corporation. In effect, it contends that its preferred stock is not “capital stock without par value” within the meaning of sec. 226.04 (1) (d). It claims that sec. 226.04 (1) (d) contemplates treating all stock issues as liabilities, that it first requires the determination of the value of the common stock after the addition thereto of the excess of the value of the corporate properties over its liabilities, including stock liabilities,
which would leave the stock liability of the preferred stock, and also its value for the purpose of computing filing fees, at its maximum value which would be the amount distributable thereon in the event of liquidation.

You wish to be advised whether or not the law requires or permits you to take into consideration the question of where the assets of this corporation go on liquidation in determining the value of its nonpar-value stock and the amount of its filing fee under sec. 226.04 (1).

Sec. 370.01 (1) 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) GENERAL RULE. All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.”

The “par value” of a share of stock means simply the face value of the stock. Commonwealth Bonding & Casualty Ins. Co. v. Hollifield, Tex., 184 S.W. 776; Security Trust Co. v. Ford, 75 Ohio St. 322, 79 N.E. 474; Whelan v. Conroy, 126 N.J. Eq. 607, 10 A. 2d 636. “Par value means what the words signify, and no definition of the phrase occurs to us which can make its meaning plainer.” Miller v. Park City, (1912) 126 Tenn. 427, 150 S.W. 90.

The preferred stock issued by the corporation in question does not have any face value, although it might have a maximum value if and when a liquidation of the corporation should take place.

It is argued on behalf of the corporation that a “realistic” approach should be used in determining the value of its nonpar-value preferred stock to avoid placing a valuation upon this stock for the purpose of determining the corporate filing fee in excess of the amount which would be realized therefor in the event of liquidation of the corporation. It is to be noted, however, that regardless of the actual value of nonpar-value stock or the maximum amount which might
be realized therefor, sec. 226.04 (1) provides "but each share of capital stock without par value shall be deemed to be of the value of not less than $10." Several states have passed statutes providing that under similar circumstances each share of nonpar-value stock shall be deemed to have a value of $25, $100 or some other specified sum. These statutes have been sustained. Roberts & S. Co. v. Emmerson, 271 U.S. 50; State v. Pierce Petroleum Corp., 318 Mo. 1020, 2 S.W. 2d 790; Gilliland Oil Co. v. State, 171 Ark. 415, 285 S.W. 16 (affirmed in 274 U.S. 717); People v. Latrobe, 279 U.S. 421; International Shoe Co. v. Shartel, 279 U.S. 429. In the Latrobe case, supra, the court said:

"** In Roberts & S. Co. v. Emmerson, ** it was pointed out that there were such differences between par and nonpar shares, both in their legal incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, as to justify the classification for purposes of a franchise tax on domestic corporations. It was accordingly held that such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to nonpar shares, regardless of their actual value or the varying amounts paid in upon them."

In the case of State v. Margay Oil Corp., 167 Ark. 614, 269 S.W. 63, (1925) the supreme court of that state observed:

"** It may be true, as urged by counsel for appellees, and as shown by illustrations in the brief, that the statute may work a difference in the amount of tax as between corporations having the same amount of assets, but this argument is answered by the fact that a corporation may choose for itself whether it shall or shall not bring itself within the terms of this statute. It is a voluntary act of the corporation in accepting the statutory basis of par value, rather than to express a value in the face of the certificate. Such statutes are not uncommon, but, on the contrary, are in vogue in a great many of the states, such statutes generally prescribing a par value of $100. **"

In conclusion, it is my opinion that the nonpar-value preferred stock issued by the corporation in question is "capital stock without par value" within the meaning of sec. 226.04 (1) and that in determining the value of this stock and the
amount of the corporate filing fee under sec. 226.04 (1) you
would not be authorized to consider the fact that upon the
liquidation of the corporation all corporate assets in excess
of a certain fixed amount would go to the holders of the
par-value common stock rather than to the holders of the
nonpar-value preferred stock.

JRW

Counties—Institutions—The management of a county
hospital by the trustees is subject to the regulation of the
county board. A rule of that board giving the supervision
of repairs of county institutions to an institution committee
of the board gives that committee the right to let contracts
for repairs caused by wind damage.

September 18, 1950.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You state that the county hospital suffered wind damage
and that the question arises as to whether the institution
committee of the county board or the board of trustees of
the institution has the authority to enter into a contract
for its repair.

Sec. 46.18 (1), Stats., provides inter alia that the county
hospital shall be managed by three trustees elected by the
county board and subject to regulations approved by the
county board. Subsec. (11) provides for appropriations by
the county board to cover operation and maintenance.

Sec. 59.07 (4), Stats., empowers the county board to
"build and keep in repair the county buildings."

In accordance with its powers granted under these stat-
utes, the county board adopted the following rule:

"The Committee on County institutions shall have super-
vision over the County Home and Infirmary, the La Crosse
County Hospital at West Salem, Oak Forest Sanatorium at
Onalaska, and buildings and grounds adjacent thereto. Such
supervision shall extend to and be limited to maintenance,
repairs, and construction of buildings and shall not in any
way interfere with any management of said organizations
by the board of trustees established by law."
A search of the authorities reveals that our court has not passed on this question, but it is clear from the wording of the statutes that the legislature intended that the county board should have the final say, both from its power to make regulations and appropriations, and from its jurisdiction over the construction and repair of public buildings. Since the county board has specifically reserved this jurisdiction to itself in the rule quoted above, it is within the power of the institution committee acting on behalf of the county board to contract for the repair.

In the absence of such a rule, however, the normal procedure would be for the county board to make the appropriation and the trustees to make the expenditure. This is the type of situation to which 20 O.A.G. 130 and 21 O.A.G. 59 and 919 were addressed.

GFS

Vocational and Adult Education—Tuition—A nonresident student less than 21 years of age, attending a school of vocational and adult education outside of his municipality under the provisions of secs. 41.18 and 41.19, Stats., need not ordinarily return home every week end in order to continue to be eligible for payment of tuition by the municipality of his residence.

A nonresident student less than 21 years of age, attending a school of vocational and adult education may accept part time jobs in the municipality where he is attending school without affecting his residence status for school purposes provided he does not thereby become emancipated or become an indentured apprentice.

September 20, 1950.

STATE BOARD OF VOCATIONAL AND ADULT EDUCATION.

Your letter raises two related questions:
1. Must nonresident students less than 21 years of age, attending a school of vocational and adult education outside their municipality under the provisions of secs. 41.18 and 41.19 of the statutes, return home every week end in order
to continue to be eligible for payment of tuition by the municipality of residence?

2. May nonresident students less than 21 years of age, attending schools of vocational and adult education, accept part time jobs in the municipality where they are attending school and continue to be eligible for payment of nonresident tuition by the municipality of residence?

It is my opinion that the answer to your first question is in the negative unless the minor is emancipated. This is a question of fact. The student under 21 years of age who remains under the control of his parents retains his residence with them so long as he is not in fact emancipated. The fact that he remains away from home over week ends does not in and of itself establish that he has been emancipated.


The answer to your second question is in the affirmative unless the nonresident student is emancipated or unless he is apprenticed in the municipality where he is attending the vocational school. For a thorough discussion of this point see 31 O.A.G. 155 at pages 159 to 162.

GFS

Highways and Bridges—Acquisition of Lands—An easement to maintain a power line is an interest in land. Where highway construction across land acquired subject to the easement necessitates relocation of line, the company is entitled to compensation.

September 20, 1950.

State Highway Commission.

You state that the highway commission contemplates constructing a highway through lands subject to a duly recorded easement granting to a power company the right to erect and maintain a transmission line through the same.
You find that the highway will interfere with the line as it exists at the present time and that it will be necessary to substantially alter the present location of the line. You desire to be advised as to the respective rights of the highway commission and the power company.

An easement is a permanent interest in another's land with the right to enjoy such easement fully and without obstruction. *Hazelton v. Putnam and another*, (1850) 3 Wis. (Pin.) 107. Your purchase of land for highway purposes was subject to the terms of the easement to the power company. Assuming that the existing line is maintained within the rights granted by the easement, the power company is entitled to compensation for the expense of the relocation to the extent made necessary by the construction of the highway. It is not necessary, of course, for you to pay for the entire value of the easement.

In *Tenny Telephone Co. v. U.S.*, 82 F. 2d 788, it was held that the federal government having acquired no paramount title to an easement of a telephone company on lands in Wisconsin could not dispute title of the telephone company to the easement and must compensate the company therefor. The view expressed above is also in accord with 22 O.A.G. 864.

You are undoubtedly familiar with the methods prescribed in sec. 84.09 (2), Stats., for acquiring interests in land in situations where the terms cannot be agreed upon.
Constitutional Law—Minors—Public Welfare Department—Sec. 53.18, Stats., allows transfer of certain inmates of Wisconsin school for girls to the Wisconsin home for women by the department of public welfare. Such is a lawful delegation of authority and not unconstitutional. This authority not applicable to neglected or dependent children.

September 21, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked my opinion as to whether or not the state department of public welfare has the power to transfer a girl, aged 20, from the Wisconsin school for girls at Oregon to the Wisconsin home for women at Taycheedah. The girl in question was committed to your department as a delinquent, under the provisions of sec. 48.07 of the statutes. You state that you believe such power exists by virtue of sec. 53.18 of the statutes and by authority of the broad provisions of the youth service act, ch. 54 of the statutes.

Sec. 53.18, the prison transfer law, reads as follows:

"53.18 (1) Inmates of the Wisconsin state reformatory may be transferred by the department to the Wisconsin state prison.

"(2) Inmates of the Wisconsin state prison and of the Milwaukee county house of correction (except those convicted of murder in the first or second degree) may be transferred to the reformatory or to the home for women and may be returned to the institution from which they were taken. If any county discontinues its workhouse or house of correction, inmates at the time of such discontinuance may be transferred to the state prison or to the county jail of the county as the commitment may indicate.

"(3) Inmates of the Wisconsin school for boys or of the Wisconsin school for girls who have reached the age of 16 years and inmates of other institutions, public or private, who have reached that age and who were lawfully committed thereto and were then subject to commitment to said schools, may also be transferred to the reformatory or to the home for women by the department. The term 'inmates' as used in this subsection includes children on parole from the Wisconsin school for boys and the Wisconsin school for girls. The department may return such children at any time to the school or to the county from which they were sent to the school. Any child so transferred to the reformatory..."
or home for women, or the parent, guardian or next friend of any such child may have the action of the department in ordering such transfer reviewed by the court which made the original commitment, on petition to said court and after notice to the department in such manner as the court may direct.

"(4) With each person transferred to a state prison from another institution, the warden or superintendent of such other institution shall transmit copies of the original commitment and of his prison record of service, conduct and history.

"(5) Any person who is legally transferred by the department to a penal institution shall be subject to the same statutes, regulations and discipline as if he had been originally sentenced to that institution, but the transfer shall not change the term of sentence."

The prison transfer law, sec. 53.18, was originally sec. 54.07. This law has been changed at numerous times but for our purposes it is sufficient to review its history since 1919 for it was that year that the first reference to the transfer of female persons under the age of 21 was inserted. Ch. 349, sec. 12, Laws 1919, amended sec. 54.07 in the following manner:

"54.07 TRANSFERS OF CONVICTS. (1) * * * With the approval of the governor any inmate of the reformatory or of the industrial home, belonging to class one, whose continued presence there is considered detrimental to the other inmates may be transferred by the * * * board of control to the state prison, and his original term of imprisonment shall be continued therein.

"(2) Convicts in the state prison and in the Milwaukee county house of correction belonging to class one, * * * and in any county jail belonging to class two, may with like executive approval be transferred from any of these institutions to the reformatory or to the industrial home and may be returned to the institution from which they were respectively taken.

"(3) Inmates of the industrial school for boys who have reached the age of * * * seventeen years and inmates of the industrial school for girls who have reached the age of eighteen years, and inmates of other institutions, public or private, who have reached like ages, respectively, and who were committed to said institutions by court orders and were then eligible for commitment to said industrial schools, may also be transferred to the reformatory or to the indus-
trial home, respectively, by the board of control; * * * but such boys may be retained * * * at the reformatory only until they are * * * eighteen years of age. Or they may sooner be returned to the school or to the counties from which they were sent to the school. * * *

"(4) * * * With each person transferred to the reformatory or to the industrial home from any other institution * * * the warden or superintendent of such other institution shall transmit to the superintendent of the reformatory, or of the industrial home copies of the original commitment of such person, and of his record of service, conduct and history; and * * * with each person transferred from the reformatory or industrial home the superintendent * * * shall furnish * * * to the institution to which such convict is transferred * * * a like record of service, * * * conduct, * * * and * * * personal history of the convict while in the reformatory or industrial home. * * *"

Ch. 439, Laws 1929, was a revision of the Wisconsin children's code. The juvenile jurisdiction law, sec. 48.01 (5) (b), was changed to extend jurisdiction over delinquents of both sexes to 21 years of age. Sec. 54.07 (3) was amended as follows:

"54.07 (3) Inmates of the industrial school for boys who have reached the age of seventeen years and inmates of the industrial school for girls who have reached the age of eighteen years, and inmates of other institutions, public or private, who have reached like ages, respectively, and who were committed to said institutions by a court * * * and were then eligible for commitment to said industrial schools, may also be transferred to the reformatory or to the industrial home, respectively, by the board of control; but such * * * children may be retained at the reformatory or industrial home only until they are * * * twenty-one years of age. * * * The term inmates as used in this subsection shall include children on parole from the industrial school for boys or the industrial school for girls. The board of control may return such children at any time to the school or to the * * * county from which they were sent to the school. Any child so transferred to a reformatory or industrial home, or the parent, guardian or next friend of any such child may have the action of the board of control in ordering such transfer reviewed by the court which made the original commitment of such child, on filing a petition in said court and after notice to the board of control in such manner as the court may direct."
As the law then stood transfers of delinquent females could be made from the industrial school for girls to the industrial home provided that such persons were originally committed to the industrial school by a court. They could not be transferred to the women’s state prison since they were not members of “class one.” See sec. 54.07 (1) quoted above. “Class one” convicts were those convicted of a felony for the first time, except male prisoners convicted of murder in the first or second degree and female persons convicted of murder in the first, second or third degree.

I think there can be no question that sec. 54.07 (3) pertained to delinquents or there would have been no point in a provision for compulsory discharge at age 21. The use of the word “inmates” in subsec. (3) and the use of the term “convicts” elsewhere in the statute also indicate that the law was to apply to delinquents.

There were changes made in sec. 54.07 by ch. 207, Laws 1931, ch. 98, Laws 1943, and chs. 158, 185, 239, 343 and 506, Laws 1945. It is not necessary to discuss all these changes here except the change made by ch. 343, Laws 1945. This chapter, sec. 1, stated that the Wisconsin industrial home for women and the Wisconsin prison for women were “consolidated into one institution to be known as the Wisconsin home for women which shall be the general prison for the punishment and reformation of all female offenders committed and sentenced according to law by any court of the state of Wisconsin or any court of the United States held in the districts of Wisconsin to imprisonment therein.” This was embodied in sec. 54.015. Sec. 15 of the same chapter amended sec. 54.07 which was then the prison transfer law by eliminating the reference to the Wisconsin industrial home and replacing it by the Wisconsin home for women.

In my opinion there is no doubt that the legislature intended that your department have power to transfer delinquents from the Wisconsin school for girls to the Wisconsin home for women, and that such authority is contained in sec. 53.18, Stats., at the present time. It may also be that similar authority is contained in sec. 54.24 of the youth service act which authorizes your department to make use of law enforcement, detention, parole, medical, psychiatric, educational, correctional, segregative and other
facilities, institutions and agencies, whether public or private, within the state to carry out the purpose of the youth service act. You will note, however, that subsec. (2) states that nothing in this law requires existing facilities to serve your department inconsistently with their functions or with the authority of their officers or with the laws or regulations governing their activities.

I call your attention to the fact that sec. 53.18 still provides that those transferred must have been "lawfully committed" to the Wisconsin school for girls and so has not been brought up to date with sec. 48.07 and the youth service act which provide for the commitments of delinquents only to the department of public welfare. I think it can safely be said, however, that the transfer act still applies to those delinquents committed to your department, especially in view of the broad provisions of the youth service act. I do not believe, however, that it was meant to apply to neglected or dependent children since these persons were ordinarily committed to the child center at Sparta. I can find no indication of legislative intent in sec. 53.18 which would allow such transfers.

In the case of In re Linden, (1902) 112 Wis. 523, the court held that a transfer of convicts from the state reformatory to the state prison by the state board of control was not an illegal exercise of judicial power. The court said (pp. 530-582):

"** In the nature of things there must be disciplinary power exercised by those who execute the sentence of the court, and certainly, where those powers are declared by legislation in advance, the court's judgment must be deemed to be framed in contemplation thereof. **"

"** We are therefore constrained to the conclusion that the legislation, as such, is proper, and if executed in accordance with its purpose neither takes from the courts nor confers upon the board of control and governor those judicial powers which, under the constitution, must be confined to the former. Should the executive officers so pervert the law as to make its exercise invasive of the courts' field or subversive of the constitutional guaranty against deprivation of liberty without due process of law, it may well be that their action could be reviewed and corrected by the courts; **" [Emphasis supplied.]"
As a general proposition, there is no doubt that a statute allowing transfers of delinquents from schools to reformatories is valid. There is excellent authority to that effect. See 31 Am. Jur. 793. The reason for allowing such transfers is that the state in its position as guardian is exercising necessary restraint and that the institution in which the child is confined facilitates the child's reformation and it is for his or her best interests to be so dealt with under the circumstances.

In the case of Milwaukee Industrial School v. The Supervisors of Milwaukee County, (1876) 40 Wis. 328, the court upheld the validity of the statute which authorized the commitment of destitute children and those convicted of crime to industrial schools. Chief Justice Ryan pointed out that the exercise by the state of the parental power of restraint over a child is not imprisonment. While he did say that in his opinion common jails and penitentiaries were unfit places for the confinement of children because of association with practiced criminals and lack of proper educational opportunities, it is clear that present day penal institutions have vastly progressed over the common jails and penitentiaries to which he referred in 1876. Apparently also he was suggesting that such confinement was unwise as a matter of policy and did not say that it would violate the constitution.

Does the exercise of parental restraint by the state become invalid if exercised at an institution which is also a prison? Persons imprisoned as punishment for conviction of crime may be subjected to involuntary servitude. Those not convicted of crime may not be so subjected. Sec. 2, Art. I, Wis. Const. Does confinement of a delinquent minor in a prison subject the minor to involuntary servitude?

The Wisconsin home for women is a state penitentiary. See sec. 53.01, Stats., and State ex rel. Maloney v. Proctor, (1946) 249 Wis. 377.

The state is authorized to exercise certain restraints as an incident of its function as guardian. If it does not exceed that power, its treatment of a minor does not become involuntary servitude merely because the same treatment is accorded in the same place to other persons who have been convicted of crime. It is well known that the state is now striving to make its penal institutions, including prisons,
instruments of education and reform. While it would not violate the constitution to subject convicted criminals to terms of servitude merely as retribution for crime, it is not our policy to do so. Emphasis is now placed upon considerations of education and reconstruction. While only a judicial determination can settle the question of whether the discipline of a particular institution does, when imposed upon a minor, go beyond the reasonable and proper restraints which the state may impose as a guardian and constitute involuntary servitude, it is my opinion that the mere fact that Wisconsin home for women is a state penitentiary does not compel the conclusion that subjecting a delinquent minor to its discipline violates the constitution.

Criminal Law—Courts—Jurisdiction—Court which has criminal jurisdiction only of offenses not punishable in the state prison cannot impose repeater sentence under sec. 359.12 (3) (a), Stats.

September 21, 1950.

ROBERT C. ALTMAN,
District Attorney,
Marathon County.

The county court of Marathon county has by virtue of ch. 127, sec. 2, Laws 1927, jurisdiction of “all crimes and offenses arising within said county not punishable by imprisonment in the state prison.” You inquire whether that court has jurisdiction to impose sentence under sec. 359.12 (3) (a), a part of the repeater statute which provides as follows:

“(3) The court may sentence repeaters as follows:
“(a) If the present conviction be for a crime punishable by imprisonment only in the county jail, the sentence may be to imprisonment in the county jail not less than the minimum provided by law for the crime nor more than one year or to the state prison not less than one nor more than 3 years.”
The answer is that the court does not have trial jurisdiction of such cases, if the three prior misdemeanors or the one prior felony necessary to constitute the offender a repeater are alleged in the complaint. Degutes v. State, (1926), 189 Wis. 435, 439, 207 N.W. 948; Miller v. State (1937) 226 Wis. 149, 152, 275 N.W. 894.

But if the former convictions are not alleged in the complaint, the court has trial jurisdiction of the misdemeanor but cannot impose sentence under the repeater law. Belter v. State, (1922) 178 Wis. 57, 189 N.W. 270.


September 22, 1950.

Edward J. Morse, Jr.,
District Attorney,
Grant County.

You inquire whether or not sec. 12.16, Stats., is applicable to a school district referendum election. The answer is, "Yes."

Sec. 12.16, Stats., provides:

"No person shall publish, issue or circulate or cause to be published, issued or circulated otherwise than in a newspaper, as provided in subsection (1), of section 12.14, any literature or any publication tending to influence voting at any election or primary, which fails to bear on the face thereof the name, given and surname, and address of the author, the name, given and surname, and address of the candidate in whose behalf the same is published, issued or circulated, and the name, given and surname, and address of any other person causing the same to be published, issued or circulated."

The word "election," as used in sec. 12.16, is defined in sec. 5.01 to include "a general or municipal election, as distinguished from a primary election," "unless the same be
inconsistent with the context." The words "any election or primary," as used in ch. 12, are broad enough to cover a school district referendum unless such a construction would be inconsistent with the context of a particular section in which they appear.

In many jurisdictions the word "election" has been restricted to elections of candidates for public offices, but such a construction is inconsistent with the definition contained in sec. 5.01, Stats., as well as with the title of ch. 650, Laws 1911, by which the corrupt practices act was first enacted. That title refers to "corrupt practices at primaries and elections, and candidates and issues to be voted for therein," ***

Other sections of ch. 12, Stats., demonstrate that the legislature did not intend the corrupt practices act to be limited to political activities connected with the election of officers. Sec. 12.13 specifically applies to services performed on behalf of a "measure" to be voted upon at "any primary or election."

Furthermore, our supreme court has repudiated the narrow construction of the word "election" in the following terms:

"** In the first place it should be said that an 'election,' within the meaning of the statutes of this state, includes a referendum vote to decide a question of policy such as the issuance of bonds, ** just as well as it includes an ordinary election to choose between candidates for public office. ** Whether it is a choice between alternative policies or a choice between persons, it is equally an election."

Hall v. Madison, (1906) 128 Wis. 132, 137-138, 107 N.W. 31. The Hall case antedated the enactment of the corrupt practices act in 1911, and the broad definition of "election" adopted by the court in that case was followed in Vulcan Last Co. v. State, (1928) 194 Wis. 636, 217 N.W. 412, so that for many years prior to and since the enactment of sec. 12.16 our court has followed the broad definition.

Thus, in construing sec. 12.16, Stats., we start with the proposition that the word "election" includes a referendum election in a municipality or school district unless such a broad definition would be inconsistent with the context.
That sec. 12.16 is capable of application to a school district referendum election cannot be denied except as to the requirement that campaign literature must bear the name and address of the candidate on whose behalf it is published. Obviously this particular requirement of the section is inapplicable since there is no candidate in a referendum election. The other two requirements—that the literature bear the name and address of the author and of the person causing it to be circulated—not only can be complied with but are entirely consistent with the general purpose of the corrupt practices act.

In my opinion, sec. 12.16 is applicable to a school district referendum, and the requirement of publication of the candidate's name and address is mere surplusage in such an application of the statute.

One of the basic purposes of the whole act is to require a full disclosure of the identity of persons attempting to influence elections, whether the elections be for the purpose of selecting public officials or submitting specific issues to the electorate. Also, such identification of the author and circulator of political campaign literature provides a method of checking possible violations of various sections of the act, such as secs. 12.11 and 12.13. The opinion here expressed as to the applicability of sec. 12.16 is in harmony with both those objectives of the corrupt practices act.

Secretary of State—Music Brokers—Secretary of state's duties to enforce provisions of sec. 177.01, Stats., pertaining to music brokers stand upon the same plane as his other duties prescribed by law.

Fred R. Zimmerman,  
Secretary of State.

You have requested my opinion relative to your duties provided in sec. 177.01 of the Wisconsin statutes pertaining to music brokers. Briefly it provides that no person, firm or
corporation, other than original composer, may issue licenses or other agreements for the public rendition of copyrighted musical numbers without first obtaining a license from the secretary of state to transact business within this state. It further imposes a franchise tax equivalent to 25 per cent of the entire gross receipts received from persons within this state. Subsec. (8) of this statute reads:

"The secretary of state shall enforce the provisions of this section to the end that all persons, firms and corporations affected by this section shall secure the required licenses and otherwise comply with its provisions. The secretary of state on his own initiative or upon complaint may investigate suspected or reported violations of this section and shall report the facts in connection therewith to the proper enforcement officers for prosecution."

You state that your position in the past was that you could not enforce the law without receiving additional appropriations to do so. You state that no such funds were ever made available and that you have therefore assumed that no duty of enforcement has ever rested upon you. You ask if this position is correct.

Public officials are said to take their positions cum onere, that is, they accept all the burdens and obligations of an office as well as its benefits. St. Croix County v. Webster, (1901) 111 Wis. 270; Forest County v. Poppy, (1927) 193 Wis. 274; 43 Am. Jur. 80. It appears clear that failure to perform an administrative act described by statute ordinarily may subject the public officer to suit for damage by those injured thereby. This rule, of course, does not extend liability to cases of failure to perform that which is virtually impossible. 43 Am. Jur. 96. And the absence of funds may constitute a valid excuse when the obligation of the officer is simply to act when he has the means in his power to do so. 43 Am. Jur. 91.

The general duties of your office are prescribed by sec. 14.29, and subsec. (11) of this statute states that the secretary of state shall "perform such other duties as are imposed upon him by the constitution or by law." Your appropriation provided for in sec. 20.04 is not allocated to specific purposes.
It is my opinion that your duty to perform the acts required in enforcing sec. 177.01 stands upon the same plane as the other statutory duties of your office. Of course none of your duties can properly be arbitrarily ignored.

The manner in which you carry out the duties imposed upon you by sec. 177.01 is a matter for your administrative judgment. Whether or not the manner in which you have performed the duties required of you by sec. 177.01 is sufficient to protect you from liability is a question of fact upon which I am not in a position to advise you.

On December 1, 1939 the attorney general advised you that you had no duty to enforce compliance with the provisions of ch. 177, Stats., and that your duty was confined to issuing licenses and collecting license fees (28 O.A.G. 690). Subsec. (8), above quoted, which enjoins the duty of enforcement upon you, did not exist when the 1939 opinion was written. Subsec. (8) was created by ch. 47, Laws 1941, thus changing the law.

REB

Public Assistance—Dependent Children—Residence—
Where children, whose custody has been awarded to a parent by decree of divorce, do not reside with the parent but live with another relative in a different county, the county in which they reside with such relative is the one in which request for aid should be made pursuant to sec. 49.19 (1) (b), Stats.

September 23, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked an opinion relative to the residence of a child, for purposes of aid under sec. 49.19 (1) (b), Stats., where the custody of the child was awarded by a divorce decree to one of its parents, but where the child resides with relatives other than the parent having legal custody.

Under most circumstances, a child would have the legal residence, or domicile, of the parent having legal custody, but the opinion was given in 37 O.A.G. 66 that the term "resides" as used in sec. 49.19 (1) (b) does not mean "legal
residence” or “domicile.” Under that statute, the term is used in the sense of “current residence.” The reasons for such interpretation of the statute are set out in the opinion. That opinion stated (p. 68):

“It is therefore clear that in cases where children are living with relatives as provided in sec. 49.19 (1) (a), that is the county where such children ‘reside’ as that word is used in sec. 49.19 (1) (b) as amended by ch. 121, Laws 1947. Hence that county is the one responsible for granting aids to such children.”

Under the facts reported by you, the county in which the children reside with their grandmother is the one in which the request for aid should be made under sec. 49.19 (1) (b).

BL

Insane—Physicians and Surgeons—Privileged Communications—In seeking to collect benefits on an insurance policy on the health of a patient, which has been assigned to the department of public welfare to help defray the cost of maintenance of an inmate, it is proper for the superintendent of the Winnebago state hospital to release as much information as is necessary to the insurance company to establish proof of loss and meet the requirements of the policy, upon the consent of the beneficiary.

September 23, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask whether the superintendent of the Winnebago state hospital may release medical information on a patient to an insurance company which has written a hospitalization policy on her under the following circumstances: (1) The patient herself is incapable of giving consent, but the consent has been given by the husband; (2) the husband is the named beneficiary of the policy in question; (3) the husband assigned his interest in the policy to your department to help meet his statutory liability for the maintenance of the patient pursuant to sec. 46.10 of the statutes;
(4) the policy requires affirmative proof of disability as a condition of liability; (5) you are attempting to collect on this policy to help defray the cost of maintenance of the patient and the information, if given, will presumably facilitate this collection.

Sec. 325.21 reads as follows:

"No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition."

It is my opinion that this section covers and that the superintendent or your department is permitted to give out as much information as is necessary to secure the collection of the benefits from this policy and thereby to properly administer the case.

GFS

Intoxicating Liquors—Public Printing—Newspapers—Legal Notices—Under sec. 331.20, Stats., a newspaper without any paid circulation is not a qualified medium for publication of the notices required by sec. 176.09.

September 25, 1950.

DEPARTMENT OF TAXATION.

You have asked whether a so-called "throw-away newspaper" is qualified for publication of notice of applications for liquor and beer licenses under sec. 176.09.

We are assuming from your letter that by "throw-away newspaper" you mean one which has no paid subscribers, but which in other respects meets the requisites of sec. 176.09 and which is "a publication appearing at regular
intervals, which shall be at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, and designed for the information of the general reader.” (Sec. 331.20.)

It has been held in a number of cases that if a paper otherwise falls within the definition of a newspaper it is not removed from that category because it has no paid circulation but is distributed free. See State ex rel. v. Herman, 70 Ohio App. 103, 42 N.E. 2d 703, 704; Norton v. City of Duluth, 56 N.W. 80, 81; L. H. Henry & Sons v. Rhinesmith, 219 Ia. 1088, 260 N.W. 9.

The fact that a publication may be classified as a newspaper under one statute or for one purpose, however, does not necessarily establish that it does so under other statutes or for other purposes.

If we were to consider sec. 176.09 in isolation, the above cited cases would furnish persuasive authority that a paper with unpaid circulation would meet the statutory requirements. Sec. 331.20, however, provides that no publisher of any newspaper shall be entitled to compensation for publishing any “legal notice” unless the paper has, among other things, had “a bona fide paid circulation to actual subscribers” for a certain period. A paper without any paid circulation would not meet the requirements of sec. 331.20, if that is applicable to notices published pursuant to sec. 176.09.

A legal notice is defined to “embrace every * * * notice and every other advertisement of any description, required to be published by law, or in pursuance of any law.” As stated in Bohan v. Ozaukee County, 88 Wis. 498, 60 N.W. 702, that definition is “very comprehensive.” Notice of application for license under sec. 176.09 is “required to be published by law”; and the opinion was given in 23 O.A.G. 676 that the duty falls upon local public officials. They would, accordingly, be liable to penalty under sec. 331.20 (2) for using improper mediums of publication if sec. 331.20 applies.

The opinion was given in 23 O.A.G. 500 that sec. 176.09, as a specific provision, is controlling over the general provisions of sec. 331.20 in the event of conflict; but that rule could be invoked only if the terms of the two provisions
were repugnant. The general rule was stated in The Attorney General ex rel. Taylor v. Brown, (1853) 1 Wis. *513, *525, to be that

"** * * Whenever the two acts are susceptible of a construction which will give an operation to both, without doing violence to either, it is incumbent on the court to search for some allowable means to give them such a construction. * * *

To follow the requirements of sec. 331.20 together with those of sec. 176.09 with respect to the qualifications of a newspaper would do no violence to the terms of either statute. Indeed, the legislature has referred to the fees for "legal notices" in sec. 176.09 (3), thus giving an indication that it intended the publication under sec. 176.09 to accord with the general requirements as to legal notices, rather than to be an exception from them.

BL

Schools and School Districts—Appeal from Order of County School Committee—The procedure for an appeal from an order of a county school committee under sec. 40.303 (9), Stats., should follow that outlined in School Dist. v. Callahan, 237 Wis. 560.

September 26, 1950.

W. R. Davis,
District Attorney,
Sawyer County.

You have asked for an opinion as to the steps necessary in taking an appeal under sec. 40.303 (9), Stats.

As you have indicated, the statute contains no directions for the procedure to be followed. In that respect it is similar to the statutory provision involved in School Dist. v. Callahan, 237 Wis. 560, which provided that an appeal might be taken from any decision of the state superintendent within 30 days from date of his decision, to the circuit court of any county affected, and provided no further details on the question of procedure. The court there held that the provision
for appeal did not permit a trial *de novo*, but limited the court’s functions “to exercise his appropriate judicial power in respect to acts done by the administrative tribunal in excess of its power or in the unlawful abuse of that power.” It was, therefore, necessary for the appellant under such a provision to bring to the court’s attention by some sort of initial pleading the circumstances out of which it is claimed the order appealed from is in excess of the power or in unlawful abuse of the power of the agency which issued it.

In view of the fact that the legislature enacted a substantially identical provision for appeal from orders of the county school committee as was involved in the case of *School Dist. v. Callahan*, supra, it would seem thus to have indicated its satisfaction with the procedure there outlined. In that case the reviewing court caused the issues to be framed by the filing of a complaint by the appellants and responsive pleadings by the superintendent of public instruction.

In following the procedure under that case, it would be essential for an appellant to serve a notice of appeal initiating the proceedings, and unless the grounds of attack can be adequately stated in the notice of appeal it would be advisable to serve a complaint setting out the grounds for appeal. The county committee thereupon should proceed in the manner in which the state superintendent of public instruction proceeded in the above case, by filing its answer or demurrer. Thereafter the matter can be noticed for trial or hearing and handled according to the usual court provisions governing the issues raised by the pleadings.

BL
Conservation Commission — Forests — Civil Service — Workmen's Compensation — Unemployment Compensation — Pensions — Employment of seasonal labor by the forestry division of the conservation department under sec. 28.06 (1), Stats., is subject to the provisions of ch. 16, Stats.

Sec. 28.06 (1) authorizes employment for a period not exceeding 500 hours per year.

Such employment is subject to the provisions of the workmen's compensation act and the unemployment compensation act. Employes are not covered by the Wisconsin retirement system.

The prevailing wage is to be determined by the director of personnel.

September 26, 1950.

STATE CONSERVATION DEPARTMENT.

You have requested an interpretation of ch. 474, Laws 1949, which creates sec. 28.06 (1), Stats., as follows:

"Only planting stock of species and sizes suitable for forest and woodlot planting shall be produced in state forest nurseries. The commission may employ labor, up to 500 hours, at prevailing local wages for nursery operation or reforestation, during the spring and fall planting seasons."

You have asked four questions in regard to the employment provided for in sec. 28.06 (1).

1. Is the employment provided for subject to the provisions of ch. 16 which creates a state civil service system?

Sec. 16.02 defines "civil service" to include all employment in the service of the state. Therefore the employment provided for by sec. 28.06 (1) is clearly under civil service. It is also clear that this employment comes under the heading of "classified service" as provided for by sec. 16.08 (3). Sec. 16.09 (2) sets up an "exempt division" within the classified service as well as a "competitive division," and sec. 16.16 expressly limits appointments in the exempt division to those "specifically exempted by law or * * * named in such division in the rules." Therefore, since the employment in question is not specifically exempted by law it must be considered to be within the competitive division of the classified service unless the personnel board sees fit to make
rules under its authority in sec. 16.05 (1) specifically designating this employment to be within the exempt division.

2. Does the limitation of 500 hours of labor established in sec. 28.06 (1) mean 500 hours in a calendar year or 500 hours in each spring season and 500 hours in each fall season?

If the legislature had intended to authorize 500 hours per season, it would have been easy for it to so specify by using language such as "during each planting season." Its failure to do so would indicate the two seasons were to be combined. Any doubt should be resolved against the authority of the agency to make the greater expenditures.

3. Is such employment included in the provisions of ch. 102, workmen's compensation; ch. 108, unemployment compensation; and sec. 66.90 et seq., Wisconsin retirement system?

In sec. 102.04 (1) the definition of an "employer" under the workmen's compensation act includes the state as an employer subject to its provisions. Sec. 102.07 defines "employe" under the act very broadly and clearly covers workers of the type provided for by sec. 28.06 (1). Sec. 102.11 (1) (b) indicates that seasonal employment was contemplated to be covered by the act in that it defines seasonal employment and provides a method of arriving at the average weekly earnings for this type of employe. There would appear to be no doubt but that this type of employment is covered by the workmen's compensation act.

In view of the opinion rendered above that no more than 500 hours per year of employment are authorized by sec. 28.06 (1), and of the provisions of sec. 66.901 (4) (c) which define an employe for the purposes of the Wisconsin retirement system as one who "is employed in a position normally requiring actual performance of duty during not less than 600 hours a year," it would appear that the employment in question here is not covered by the retirement provisions.

The provisions of ch. 108 on unemployment compensation so define an employe in sec. 108.02 (3) (a) as to include seasonal laborers. Further, sec. 108.161 makes each of the state's budget subdivisions subject to the act as employers.
Sec. 108.02 (5) (f) lists types of work which do not constitute "employment" when performed for a governmental unit. It contains no exception covering the type of work considered in this opinion. It is my conclusion that para. (f) contains the only list of exceptions applying to work for a governmental unit and that the list of exceptions in sec. 108.02 (5) (g) is immaterial when the state is the employer. Accordingly the type of work about which you inquire is "employment" for the purposes of ch. 108.

4. Is the prevailing wage rate to be paid under sec. 28.06 (1) to be determined by the employing agency or the bureau of personnel?

Since I am of the opinion that this labor is subject to the civil service provisions of ch. 16, it would follow that sec. 16.105 (2) (a) which provides that "the director shall, after a public hearing and with the advice and approval of the personnel board, establish and maintain salary ranges for all positions and employments in the state service to which this chapter applies," would apply, and the director of personnel would have the duty to determine the prevailing local wages.

RGT

Intoxicating Liquors — Sale — Licenses and Permits —

When two or more are associated in the business of selling liquor for future delivery, the firm must obtain a permit under sec. 176.70 (1) and its representatives must also obtain permits.

September 27, 1950.

DEPARTMENT OF TAXATION,
Division of Beverage and Cigarette Taxes.

You present a situation where three individuals solicit orders for intoxicating liquor and engage in the sale of it for future delivery. They all do business under a general business name "_______ Sales." They all use a letterhead and order blank on which only that name appears. "_______ Sales" has not obtained a permit under sec.
176.70 (1), but each of the three individuals has obtained one, each in his own name, "d.b.a. ________ Sales."

You have not described the legal relationship which exists among the three individuals. The general business name might refer to a corporation, association, partnership or other kind of firm. Sec. 176.70 (1), however, applies alike to any "firm, partnership, corporation or association." I cannot conceive of any set of facts under which the three individuals, all operating under the same name and at the same address, would not constitute one of the types of organization mentioned in the statutes. Regardless of which kind of organization is involved here, it is clear that "_______ Sales" must obtain a permit. The three individuals act as representatives of "_______ Sales" and each is required to obtain a permit as a salesman or solicitor.

TEF

Conservation Commission — Powers — The conservation department has authority to provide uniforms for its wardens. If the uniforms are issued to the wardens and returned to the department when the wardens have finished using them on departmental duties, they are department equipment and such issuance does not represent an increase in salary.

September 28, 1950.

STATE CONSERVATION DEPARTMENT.

You ask in your letter whether the conservation department has the authority to purchase and furnish uniforms to conservation warden personnel and to provide an annual allowance for the replacement and maintenance of such uniforms. While your authority relative to wardens, as outlined in sec. 23.10 of the statutes, and with respect to expenditures, as outlined in sec. 20.20 of the statutes, does not specifically include this, I am of the opinion that under the general powers granted to your department by sec. 23.11, part of which reads as follows:
"* * * 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 * * *"

your authority is sufficiently broad to enable you to direct that wardens shall wear uniforms at certain times in the performance of their duties and to furnish them with such uniforms.

It should be noted, however, that if a uniform becomes the property of the warden or if the monetary allowance for maintaining and replacing it differs from the actual cost of so doing, this is in effect a change in his compensation and the requirements of sec. 16.105, which requires among other things that this must be done through the director of the bureau of personnel, must be complied with. For a discussion of the bureau’s authority in this matter, see 25 O.A.G. 17.

I understand that you have made it a practice of issuing special rain coats, rubber boots, waders and other items of clothing which may be necessary to a warden in the performance of special duties and that such items are treated as equipment, remain the property of the commission, and are returned to the commission when the warden is through using them. The commission then stands the cost of any repairs or replacement of this equipment. Should the uniforms in question be treated in this manner, it is my opinion that they would be part of the equipment furnished by the commission and would not represent increased compensation to the warden. Consequently, sec. 16.105 would not apply to this operation.

GFS
Schools and School Districts—Taxation—Territory in a city school district but outside of the city limits is not subject to the county tax under sec. 70.62 (1), Stats., for the operation of the office of county superintendent of schools.

September 29, 1950.

FRANK R. SENNOT,
District Attorney,
Kewaunee County.

You state that when the city of Algoma, a fourth class city, a few years ago adopted the city school plan pursuant to secs. 40.50 to 40.60, Stats., the school district extended beyond the city limits and included a part of the town of Ahnapee, which adjoined the city. An opinion is requested as to whether the lands in said town which are within the city school district although they are outside of the city limits are subject to the county tax under sec. 70.62 (1) to pay the expense of the county superintendent of schools.

Sec. 70.62 (1) provides that the county board by separate resolution shall determine the "amount of tax to be levied to pay the compensation and allowances of the county superintendents of schools and designate therein the cities exempt from taxation therefor." Sec. 39.01 (5) provides:

"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 ***."

It is true that the language in sec. 70.62 (1) is that in levying such tax the county board shall designate "the cities exempt from taxation therefor" and that the language in sec. 39.01 (5) is that "cities" shall bear no part of the expense of the office of county superintendent. Such language, however, is to be read in connection with the provision in sec. 40.50 (2) (b) that "any territory in the same school district but outside of such city adopting the city school plan is hereby attached to such city as provided by section 40.51"; the provision in sec. 40.51 (1) that "any territory outside of the city which is joined with city territory in the formation of a school district, when this plan
becomes effective, is hereby attached to the city for school purposes"; and the provision in sec. 40.56 (1) that "all property attached to a city for school purposes shall be taxed for such purposes the same as property within the city."

Except for the suggestion that the quoted language of sec. 40.56 (1) does no more than subject the outside property to taxation by the city for city school district purposes, the above provisions, given their literal meaning, state that property outside of the limits of a city but within the city school district of a city which is operating on the city school plan under secs. 40.50 to 40.60, Stats., is to be taxed for all school purposes the same as though such property actually were within the limits of the city.

Some support for giving the quoted language in sec. 40.56 (1) the suggested restrictive effect might appear from the history of sec. 40.56. Ch. 425, Laws 1927, which was a general revision of the school laws and by sec. 87 consolidated and revised various provisions to set up the city school plan in secs. 40.50 to 40.60, created sec. 40.56 in its present form. The revisor's notes state that said sec. 40.56, as so created, was derived from old sec. 40.64 (8) (b), which provided that outside property attached to a city for school purposes "shall be subject to be taxed for the support and maintenance of the schools of such city, the same as property within such city."

Were the quoted language of sec. 40.56 (1) the only provision involved, the application of the rule that no change in substance is effected by a revision unless the context clearly indicates a change would possibly result in said language being given the above suggested restrictive application. However, said revision enactment in 1927 also created what is now sec. 40.50 (1) and what is now sec. 40.51 (1). It also created what is now sec. 39.01 (5), which the revisor's notes say was derived from old secs. 39.04 (8) and 39.05 without change in substance. At that time the language in sec. 70.62 (1) pertaining to the county levy to support the county superintendent of schools was the same as it is now. The provisions of old secs. 39.04 (8) and 39.05 quite clearly provided that the schools of a city having a superintendent or other comparable officer supervising and
managing its schools should not be supervised by or be in any way under the control of the county superintendent of schools, and that property in the city was not to be subjected to taxation for the support of that office. Old sec. 39.05 specifically said that such a city "shall be exempt from the provisions of this section and all provisions relating to county superintendent of schools."

Taking these statutory provisions altogether there is the underlying concept, although expressed not too clearly, that for school purposes property outside of the limits of a city but within the city school district of a city operating on the city school plan is to be treated and considered as though it were within the city boundaries. Such property pays taxes to the city as a part of the city school district for the support and operation of the schools in such city school district. The schools in such city school district are not supervised by the county superintendent of schools and the property which is outside of the city limits but within the city school district pays the same taxes as property actually within the city limits. Such property outside the city limits receives no benefit from the operation of the office of county superintendent. Likewise property within the city limits receives no benefit therefrom. The property which does receive the benefit from the operation of said office is property in school districts which are not a part of or attached to a city school district operating under the city school plan.

There is no reason why just because property is located out of the city limits it should pay any tax for the support of the county superintendent of schools. So far as school purposes are concerned it is in exactly the same position as property that is within the city limits. A part of the school taxes paid by property within a city school district goes to pay the salary and expenses of the city superintendent of schools.

Under the circumstances it is my opinion that these statutes should be interpreted and applied so that property outside of the city limits but within the city school district of a city operating under the city school plan is not subject to the county tax under sec. 70.62 (1) for support of the office of county superintendent of schools, because for all school purposes such territory is to be treated and accorded a
status the same as though it were actually within the city limits and a part of the city. So interpreted these statutes effectuate a logical result, which in my opinion is what the legislature intended. It does not seem rational that it was intended that territory within such a city school district and thus not subject to and deriving no benefit from the office of county superintendent of schools is to be subjected to county tax to pay the expenses of the operation of said office. Rather the legislature must have intended that each of the properties through separate taxation should bear the burden of the cost of the supervision that is operative in respect thereto.

HHP

Counties—County Board—Powers—Subject to the general rules of the enactment of ordinances and the exercise of police power, a county board may regulate the use and operation of bicycles on highways maintained at the expense of the state or county or both.

September 30, 1950.

ALEX J. RAINERI,
District Attorney,
Iron County.

You ask whether the county has authority to enact an ordinance regulating the use of bicycles on a county-wide basis.

This question is covered by sec. 59.07 which reads as follows:

"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 pro-
vide for the policing of such highways and to provide for
what purposes all forfeitures collected shall be used.”

It is my opinion that the regulation of the use of bicycles
is included in the regulation of traffic of all kinds and the
policing of highways as provided in this section and is
therefore within the power of the county board. An ordi-
nance for this purpose would be confined in its operation to
highways maintained at the expense of the state or county,
or both of them.

The prospective ordinance must, of course, be governed
by the general rules governing the enactment of ordinances
and the exercise of police power, and the regulations must
not be arbitrary.

GFS

Constitution — Apportionment — Legislature — Members
of the senate continue to hold their office for a full term of
4 years and represent the district from which elected even
though a reapportionment act is passed during their term.

Realignment of senatorial district boundaries and renum-
bering of districts is solely within the power of the legisla-
ture reasonably exercised.

October 2, 1950.

LEGISLATIVE COUNCIL.

Attention: Marvin B. Rosenberry, Chairman,
Committee on Reapportionment.

You state that your committee is considering the problem
of the reapportionment of the senatorial and assembly dis-
tricts in the state of Wisconsin under the appropriate con-
stitutional provisions as construed by our court.

You have requested my opinion on the following
questions:

1. In addition to the command of sec. 3 of art. IV of the
constitution must we also consider the effect of the reappor-
tionment on the holdover senators?
2. If we must consider hold-over senators, are we obliged to so number the reapportioned districts that the hold-over senators elected in 1950 will continue to be residents of the district they now represent, or will they continue to represent the same numbered district although they may not be residents of that district?

The applicable constitutional provisions which must be considered in answering your questions provide:

“ARTICLE IV. Section 2. The number of the members of the assembly shall never be less than fifty-four nor more than one hundred. The senate shall consist of a number not more than one-third nor less than one-fourth of the number of the members of the assembly.

“Section 3. [As amended Nov. 1910] At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding Indians not taxed, soldiers, and officers of the United States army and navy. [1907 J.R. 30, 1909 J.R. 55, 1909 c. 478, vote Nov. 1910]

“Section 4. [As amended Nov. 1881] The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable. [1880 J.R. 9S, 1881 J.R. 7A, 1881 c. 262, vote Nov. 1881]

“Section 5. [As amended Nov. 1881] The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and after the adoption of this amendment all senators shall be chosen for the term of four years. [1880 J.R. 9S, 1881 J.R. 7A, 1881 c. 262, vote Nov. 1881]

“Section 6. No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent.
“Section 8. Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.”

“ARTICLE VII. Section 1. [As amended Nov. 1932] The court for the trial of impeachments shall be composed of the senate. * * *”

The number of members in the legislature is presently fixed at the maximum of 100 members in the assembly and 33 members in the senate. The senatorial districts have been numbered in accordance with the constitution in a regular series from 1 to 33 and elections will be held in the odd-numbered districts in November, 1950 for the term extending through the general sessions of 1951 and 1953, and expiring January 1, 1955. The senators elected in said odd-numbered districts are herein referred to as the “hold-over senators.”

In answer to your first question, it is my opinion that a reapportionment statute will not affect the tenure of office of hold-over senators, no matter how it is drawn, and accordingly there is no effect on the senators themselves to be considered.

There are no express provisions in the constitution for the termination of office of a senator once duly elected other than the provision in art. IV, sec. 8, that a member of either house may be expelled by a two-thirds vote of that house, to which provision the rule expressio unius est exclusio alterius may be applied, and the provision for impeachment of civil officers in art. VII, sec. 1. The power to reapportion in art. IV, sec. 3, in no way necessarily implies a power of removal, and in fact art. IV, sec. 5 expressly provides that “after the adoption of this amendment [1881] all senators shall be chosen for the term of four years.”

The only constitutional difficulty arises from the argument based on art. IV, sec. 6, that a senator must continue to reside in the district for which he is elected, and if as a result of reapportionment the boundaries of a district are changed or the district renumbered so that he no longer resides in a district bearing the number of the district for which he was elected, that his office is vacated. Such inter-
pretation is not the necessary or most plausible interpretation of the section, and, if necessary in order to harmonize this section with other sections of the constitution, the section should be strictly construed to relate only to residence in “the district which he may be chosen to represent” which is the district in existence on the date of his election.

This construction is supported by the proposition that reapportionment laws are prospective in operation only and intended to affect only full terms commencing after the date of the reapportionment law. In two well-considered cases passing upon special congressional elections to fill vacancies in the house of representatives arising during the term and wherein a reapportionment law had been passed after the general election, it was held that the special election should be held in the district which existed at the commencement of the term and not in the district as it existed after the passage of the reapportionment law. Hunt v. Menard, 2 Bartlett’s Cases on Contested Elections 477; Sloan v. Donoghue, (1942) 20 Cal. 2d 607, 127 P. 2d 922.

In the Hunt case, in the protest filed by Mr. Hunt with the speaker of the house of representatives, he stated:

“1. Mr. Menard and I were candidates for election to fill the unexpired term or vacancy caused by the death of said James Mann.

“2. But after his election as representative to the fortieth Congress, and before the election to fill the vacancy occasioned by his death, the legislature of Louisiana reapportioned the State for congressional purposes, changing the districts in very material respects.

“3. And in what was Mann’s district, that is, the second district, Mr. Menard received only 93 votes and I received 11,535 votes; but all the votes of this precinct or parish were rejected by the committee of canvassers on purely technical grounds of informality in their returns, in most manifest violation both of law and justice, so that the certificate was awarded Mr. Menard by the governor upon a state of facts showing that Mr. Menard did not receive a single vote in Mr. Mann’s late district.”

The committee considering the protest quoted with approval from the minority report in a prior case, Perkins v. Morrison, 1 Bart. Cas. Cont. El. 142, to the effect that “If the people who choose a representative are not entitled to
fill the vacancy happening by his resignation, it is impossible to tell what portion of the population may most properly exercise this privilege,” and then continued:

“This reasoning, which your committee considers as sound and pertinent, applied to the case under consideration seems to be conclusive against this election; and it may also be added that whatever power a State legislature may have in the matter, it is absurd to say that a district when once established and a representative chosen therein, is not to continue for the whole Congress for which the election has once been operative.”

The fact situation in the Sloan v. Donoghue case was substantially similar to that in the Hunt case. In this case the court specifically ruled that a reapportionment law was intended only to apply to the next general election and quoted with approval from McCrary on Elections, 4th ed., p. 141:

“* * * The true rule, therefore, must be that a district once created, and having elected a Representative in Congress, should be allowed to continue intact for the purpose of filling any vacancy which may occur, until the end of the Congress in which it is represented.”

See, also, 20 C.J. 89; 29 C.J.S., Elections, § 54.

By a parity of reasoning, the senatorial districts in Wisconsin should be allowed to continue intact until the expiration of the 4-year term for which the senators are elected, and hence there is no ground for claiming that an intervening reapportionment act deprives any senator of his office.

Further, it has been held that a representative in Congress is an officer of the federal government and not the state, Ekwall v. Stadelman, 146 Ore. 439, 30 P. 2d 1037, and it logically follows that a member of the Wisconsin legislature, once elected, is an officer of the state government and is unaffected by changes which might be made in the district from which he was elected. Election districts are therefore different from municipal or other public corporations in which the rule appears well founded that abolition of the municipality terminates all offices such as mayor or council of that municipality.

While the foregoing authorities appear to establish that the hold-over senators themselves are not affected by any
reapportionment law which may be passed, it does not necessarily follow that their existence and the location of the districts from which they were originally elected may be entirely disregarded in the preparation of a new apportionment law. While it is true that our court has stated in *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 531, that the power of the legislature with respect to numbering the new districts is absolute, there is substantial authority that that power must be exercised within the bounds of discretion and cannot be exercised arbitrarily to disenfranchise a large portion of the state for the term of one legislature, but must be reasonably based on the needs of the reapportionment. That is, if in the reapportionment act the boundaries of the senatorial districts were identical or substantially similar to the previously existing boundaries, and the legislature should renumber all even districts to be odd and 16 of the old odd districts to be even, the result would be that the even districts electing a new senator in 1952 would be represented by two senators, the one newly elected and the hold-over, while the old even-numbered districts would have no senatorial representation in the session of 1953. Such a renumbering would be without purpose, and therefore in my opinion would be invalid. However, in the course of the normal and reasonable realignment of senatorial district boundaries it may be necessary to move certain areas from an even-numbered district into an odd-numbered district, and the people in the areas so transferred will not have an opportunity to vote in the senatorial election of 1952. Further, it may be necessary to transfer areas from districts presently odd-numbered into districts which are even-numbered. The people in those districts who have already voted for a senator in 1950 will be permitted to vote for senator again in 1952. However, it is my opinion that the framers of the constitution in authorizing and directing reapportionment must have contemplated that such transfers were necessary; otherwise senatorial districts, once established, would be frozen, their boundaries could not be altered, and a reapportionment could not be accomplished. This issue was raised in *State ex rel. Attorney General v. Cunningham* and, as indicated above, the court declared the power of the legislature to be sufficient
to accomplish the shifting of areas from one district to another, even though it would affect certain voting rights. In my opinion such transfers of territory are within the power of the legislature, with the sole exception that the reapportionment act cannot show on its face an intent arbitrarily to deprive voters of their franchise.

Accordingly, my advice to your committee on the subject is that as long as the plan of reapportionment recommended by your committee or enacted by the legislature does not fall within the exception just noted with respect to intentional arbitrary disenfranchisement of voters, it is unnecessary to consider the location or tenure of the hold-over senators.

In summary:

1. No hold-over senator will be deprived of his office as a result of the reapportionment act.

2. The boundaries of senatorial districts may be so altered that there are two hold-over senators, one hold-over senator, or no hold-over senators residing in the new district.

3. The reapportionment act would presumably be valid even if it were necessary to establish a new odd-numbered district in which no hold-over senator resided and in which no election for senator is scheduled in 1952.

4. Renumbering of districts is wholly within the control of the legislature, with the sole exception that the act cannot show on its face an intent arbitrarily to deprive large portions of the voters of their franchise.

RGT
Counts—Fairgrounds—County may build grandstand on county-owned fairgrounds subject to approval of electors in counties of 50,000 to 300,000 population where cost exceeds $1,000 per thousand of population as provided in sec. 59.69 (2), Stats., and where electors have authorized the county board to conduct county fair pursuant to sec. 59.865.

Bonds may be issued for such purpose subject to limitations provided in sec. 67.04 (1) (a).

No referendum vote on such bond issue is required.

Entire cost of construction can be defrayed in annual budget subject to tax limitation provided by sec. 70.62 (2). County cannot build up unappropriated sinking fund.

October 11, 1950.

Jerold E. Murphy,
District Attorney,
Fond du Lac, Wisconsin.

You state that Fond du Lac county owns a fairgrounds and that it is proposed to erect a new grandstand at an estimated cost of approximately $487,841.73.

In connection with this proposal you submit several questions.

1. Can Fond du Lac county construct a grandstand on the property owned by the county for the sum mentioned?

Sec. 59.69 (2), Stats., provides:

"59.69 Land upon which to hold agricultural and industrial fairs and exhibitions may be acquired by county boards and improvements made thereon as follows:

"* * *

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

Since the population of Fond du Lac County is officially 62,353 according to the information you have furnished, it would be subject to the provisions of sec. 59.69 (2) quoted above, and the improvement in question could be constructed if approved by the electors of the county as therein provided.

In this connection it is recommended that since Fond du Lac county has apparently never had a referendum under sec. 59.865 on the question of whether or not the county should conduct county fairs and exhibitions, this question should also be submitted to the electors along with the question of making the expenditure for constructing a grandstand.

2. If construction is possible can $350,000 of the cost be furnished by floating a bond issue, subject to the limitations of sec. 67.04 (1) (a)?

Sec. 67.04 (1) (a) provides:

“67.04 Municipalities are empowered to borrow money, subject to the general limitation of amounts prescribed by section 67.03, and subject in some specific cases to the further limitations prescribed by this section, and to issue
bonds therefor, for the purposes enumerated in this section. Such bonds may be issued:

"(1) By any county:

"(a) To provide joint county normal school buildings, county buildings, including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses and houses of correction; but all outstanding unpaid bonds for these purposes shall not exceed in amount at one time one and one-half per centum of the value of the taxable property in such county."

It appears that a grandstand containing an exposition hall and club rooms such as you have described would constitute a "county building" within the meaning of the above statute. I find no cases specifically holding that a "grandstand" is a "building" but in McGalliard v. Chapman, (N.J.) 129 A. 256, it was held that a covenant in a deed against erection of any building within a certain distance of a street was violated by the erection of a canvas-roofed structure for the sale of fruit and vegetables within the prohibited area, a "building" being that which is built, a fabric or edifice, designed to stand more or less permanently and adapted to some useful purpose.

Also in the case of Lowden v. Jefferson County, 190 Okla. 276, 122 P. 2d 991, it was held that the term "public building" as used in a constitutional provision relating to the erection of public buildings in school districts, was used in a broad sense and was sufficient to authorize the expenditure of funds to erect bleachers on a football field, which the district was authorized to maintain.

Does the fact that the words "county buildings" in sec. 67.04 (1) (a) are followed by a clause reading, "including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses and houses of correction," limit the application of the words "county buildings" to those structures specifically named in the clause above quoted under the rule of noscitur a sociis or ejusdem generis?

I think not. The doctrine of noscitur a sociis may not be so applied as to render general words used in legislative enactments meaningless. Neenah v. Krueger, 206 Wis. 473.
Also in *Boardman v. State*, 203 Wis. 173, in construing a statute enumerating certain buildings and containing the words "or other building" it was held that the words "or other building" included a building of a type other than those specifically described and that the rule of *noscitur a sociis* or of *ejusdem generis* did not apply. Consequently it is considered that the words "county buildings" in sec. 67.04 (1) (a) refer to any buildings which by law the county is authorized to own and maintain.

3. If a bond issue is floated, is it necessary to have a referendum?

The answer is "No." Sec. 67.05 (4) relating to county referendums provides for special elections on resolutions relating to the issuance of county bonds for certain purposes and provides further that no resolution of a county board other than those specified in this subsection need be submitted to county electors except as provided otherwise in subsec. (7). Nothing in either subsec. (4) or subsec. (7) relates in any way to bonds issued for the construction of a grandstand by the county.

4. If construction is possible but bonding impossible can the entire cost of construction be defrayed in the annual budget?

You have called attention to the fact that $100,000 has already been accumulated by putting $25,000 in the annual budget for the past 4 years, and if it is proposed to continue building up this fund over a period of years until the total construction fund has been accumulated, careful attention should be given to what was said in 34 O.A.G. 345 and particularly in *Immega v. Elkhorn*, 253 Wis. 282. In the *Elkhorn* case the court pointed out that there is apparently no statute authorizing the creation of a sinking or unappropriated fund, and it would seem from the language in this case that there must be an effective determination, undertaking, and commitment to incur a binding obligation for the building, or at least an actual appropriation of the sinking fund for that purpose.

On the other hand, if Fond du Lac county is so situated that it is in a position to raise the entire balance needed for construction of the grandstand out of taxes to be levied
for the current year I can see no legal objection to its doing so, having in mind, of course, the maximum limitation as to county taxes provided by sec. 70.62 (2).

WHR

Criminal Law—Elections—Giving of flag emblem of slight intrinsic value at the polls to persons who have already voted is not a violation of law.

October 16, 1950.

WILLIAM J. McCauley,
District Attorney,
Milwaukee County.

You have asked whether it is permissible to give away at the polls a button which contains the facsimile of the flag of the United States and, next to the flag, the words "I voted."

As I understand it, it is contemplated that one of these buttons will be handed to each elector after he has cast his vote and this process is a part of a campaign to interest citizens in exercising their right of suffrage. The button contains no suggestion of any kind which could be characterized as partisan or advocacy of the election of any candidate. The button is of such slight intrinsic value that its significance is confined to being evidence that the wearer has participated in the election.

Sec. 346.09 (1) (a), Stats., provides that every person who shall give "any money or valuable consideration" to a voter corruptly on account of such voter having voted at an election shall be deemed guilty of bribery. It is clear that the plan you describe has no corrupt intent and the pin described could not be deemed valuable consideration under this statutory provision. Similar comments apply to the provisions of sec. 346.10.

Sec. 348.234 prohibits officers of elections from engaging in electioneering on the day on which the election is held and prohibits other persons from electioneering within 100 feet of any polling place. It is my opinion that the presenta-
tion of these buttons in the manner which you describe is not electioneering.

I have given consideration to secs. 348.479 to 348.484, an act prohibiting improper use, mutilation and disrespect of the flag of the United States. One provision prohibits the display of a flag when connected to "any word, figure, mark, picture, design, drawing or advertisement of any nature." Sec. 348.484 provides that the act shall be "so construed as to effectuate its general purpose." Clearly the inscription on this button relates to the exercise of one of the important rights of citizenship symbolized by the flag. It is entirely consistent with the dignity and honor of the flag, which it is the purpose of the act to protect. Furthermore, sec. 348.481 provides an exception for an ornament depicting the flag "with no design or words thereon and disconnected with any advertisement." In my opinion the display of the button will not violate these provisions.

In expressing this opinion it is assumed that any private individuals or groups making an expenditure for the purpose of purchasing these buttons have made or will make any reports which may be required of them under ch. 12 of the statutes.

TEF

Counties—County Clerk—County clerk must make report required by sec. 59.17 (16), Stats., at annual November meeting of county board.

George W. Peterson,
District Attorney,
Polk County.

You inquire whether the county clerk of your county may submit his report of receipts and disbursements, as required by sec. 59.17 (16), Stats., to the county board at its April meeting rather than at the meeting held in November. The section cited states that the county clerk shall make his report to the county board "at the annual meeting," but
does not otherwise specify which of these two meetings is intended.

Sec. 59.04 (1), Stats., provides in part:

"(a) Every county board shall hold an annual meeting on the Tuesday next succeeding the second Monday of November in each year at the county seat for the purpose of transacting business as a board of supervisors, * * *.

"(b) Every county board except in counties having a population of 500,000 or more, shall meet on the third Tuesday of April in each year for the purpose of organizing and for the purpose of transacting business as a board of supervisors. At such organization meeting such board may transact any and all business permitted by law to be transacted at the annual meeting. Such meeting may be adjourned in the same manner as the annual meeting."

It is apparent from this section that the legislature meant to distinguish the "organization meeting" in April from the "annual meeting" in November. The statute requiring the clerk to submit his report at the board's annual meeting was enacted, substantially in its present form, in 1860, many years before provision was made by ch. 235, Laws 1935, for a second meeting of the board in the spring. Clearly, the words "annual meeting" have always referred only to the meeting held in November. This interpretation accords with our opinions in 20 O.A.G. 81 and 36 O.A.G. 587.

I conclude, therefore, that it is the duty of the county clerk to make his report under sec. 59.17 (16), Stats., at the annual November meeting of the county board.

GS
Criminal Law—Lotteries—Principles stated for determining whether radio giveaway programs are lotteries in violation of sec. 348.01, Stats. Fact that facilities of interstate commerce are used and that congress has legislated against radio lotteries (18 U.S.C. § 1304) does not prevent enforcement of state laws covering same subject, especially in view of 18 U.S.C. § 3231. Following programs analyzed and considered to be lotteries: Bread Quiz No. 1; “Tello-Test”; Bread Quiz No. 2; “Jack Pot Quiz”; “Stop the Music” (network television show); “Food for Thought” (local television show); “Radio Auction.”

October 18, 1950.

WILLIAM J. McCauley,
District Attorney,
Milwaukee County.

You have requested an opinion as to whether or not each of a number of radio programs, of some of which you have submitted scripts, violates the Wisconsin lottery statute, sec. 348.01, which provides as follows:

“Any person who shall set up or promote any lottery for money, or shall dispose of any property of value, real or personal, by way of a lottery, or who shall aid, either by printing or writing, or shall in any way be concerned in setting up, managing or drawing any such lottery, or who shall, in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing of any such lottery, or the sale of any lottery ticket, share of a ticket, or any other writing, certificate, bill, token or any other device purporting or intended to entitle the holder, bearer or any other person to any prize or interest or share of any prize to be drawn in a lottery shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars.”

Before discussion of the particular programs which you have submitted, some general considerations applicable to all these problems may be briefly stated.

The elements of a lottery, as we have had occasion to state in numerous recent opinions, are universally held to be consideration, chance and prize. State ex rel. Cowie v.
The element of prize is present in all of the programs submitted for consideration.

The element of chance is present when the outcome depends in whole or in part upon an unknown and unpredictable future event. It is of no consequence that the outcome of such event may be known in advance by the promoter of the scheme or his agent, so long as it is unknown to the persons hoping to win the prize. The principle has been stated as follows by Mr. Justice Holmes in *Dillingham v. McLaughlin*, (1924) 264 U.S. 370, 373:

"What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

Thus, chance is clearly present when the participant's opportunity to win the prize depends upon the selection of his telephone number at random from the directory published by the phone company.

Chance is also present when the opportunity of the participant to win depends upon his knowing the answer to a specific question asked of him. 37 O.A.G. 126. See also, paragraph 9 of the opinion of the Federal Communications Commission *In The Matter of Northern Virginia Broadcasters, Inc. (WARL)*, (1948) Docket No. 8559, FCC 48–1929. By the same token, chance is present when the opportunity to win depends upon the ability to identify a musical selection played over the radio. We regard it as insignificant, in this connection, that the questions asked or the musical selections played are within the common knowledge of the great majority of the residents of the area, since experience has shown that persons participating in such programs frequently fail to answer the simplest questions or to identify the most widely known musical selections.

As to the element of consideration, the Wisconsin supreme court has taken a very broad view. It is not necessary that the consideration be monetary or even that it be valuable to the promoter of the lottery. In holding that it is a sufficient consideration to support a lottery that the
promoter requires the participants to enter his store and procure coupons, without requiring that any purchase be made, the court stated as follows in State ex rel. Regez v. Blumer, (1940) 236 Wis. 129, 131-132:

"* * * The trial court was of the opinion that the facts of the registrants' going to the store each day to get the daily coupon, and that the operation of the scheme paid the defendant or he would not operate it, constitute a consideration. Consideration consists in a disadvantage to the one party or an advantage to the other. We here have both. * * *"

Accordingly, this office has expressed the opinion that "the enticement of an audience [for a radio program] under the inducement of winning a prize by chance is consideration accruing to the station and to the sponsors of the program." 38 O.A.G. 657, 658. The program involved in the opinion just cited was one in which clues to the combination of a safe containing the prize were broadcast from time to time. In a subsequent opinion, the view was expressed that a form of bingo called "Musical Tune-O," which involved the identification of musical selections played over the radio, was also a form of lottery. 39 O.A.G. 15.

In determining whether consideration is present, each program must be analyzed to determine whether members of the radio audience are enticed to listen to the program in the hope of participating in the distribution of prizes or to enhance their chances of winning, or whether, on the other hand, the listeners are attracted by the entertainment value of the program without any reference to actual participation therein. In determining this question, this department cannot set itself up as a judge of what constitutes good entertainment. A wholly objective test must be applied. It would have to be assumed that curiosity alone would impel persons to listen to programs in order to find out what other persons have been the beneficiaries of the sponsor's largesse in any case where the program on its face did not offer the listener any clues or any improved chance of winning. The listener as such would then be a mere "kibitzer," not a potential participant.

It is the opinion of some that the slightest inconvenience required to participate in a giveaway scheme is sufficient
consideration to constitute such scheme a lottery. According to this view, the mere effort required to answer a telephone, or the inconvenience of remaining at home in the hope of being called rather than going some place else, would be a sufficient consideration. I do not here adopt that view. It is my view that where the inconvenience to the participant is slight and is of no benefit to the station or the sponsor, it falls within the maxim de minimis non curat lex.

Neither do I consider that the mere fact that the participant’s name is read over the radio constitutes a consideration.

We come now to a discussion of the particular programs which you have submitted for review.

BREAD QUIZ NO. 1

This program is of the type known as a “telephone quiz show.” It is broadcast Monday through Saturday from 6:15 to 6:30 p.m. Questions to be asked and telephone numbers to be called are chosen by the sponsor’s advertising agency in Milwaukee. A number of telephone calls, varying according to the time available, are made to persons in the area. The same question is used throughout the week, but the correct answer is not announced over the air until the end of the Saturday’s program. The question for the following week is announced at the close of the Saturday night broadcast.

One question which has been used is, “How many counties are there in the state of Wisconsin and which counties are the largest and smallest in land area?” Another question was, “Name two presidents of the United States who served as army officers in Wisconsin during the Indian wars.”

Listeners to the program are advised that they can get the answers by calling any public library, by using a standard reference book which they may have in their own homes, or perhaps they or their children may remember the answer from their school day history lessons or from reading it in the daily paper. The “quiz master” then continues as follows: “Now to make things still easier, you can get these same facts by keeping up on the little history lessons you’ll
find in the colorful counter display card at your friendly neighborhood grocer. Ask him to show you the answer next time you're shopping for a loaf of [the sponsor's] bread. And because [the sponsors] bake eight different kinds of bread—you'll find the kind of bread you want.”

Each person called is given 80 seconds in which to answer the question. If he fails to answer it correctly the sponsor sends him a check for $1. If he answers it correctly he receives a prize which, in some cases, consists of “your choice of all the money on deposit in our Bread Basket [amount not specified] or a brand new de luxe Schwinn bicycle worth approximately $75.” On some of the calls a choice of the bicycle is not offered.

The program opens with theme music which fades out and is followed exclusively by telephone calls copiously interspersed with references to and praise of the sponsor’s product.

In my opinion the foregoing program constitutes a lottery. The elements of prize and chance are very clearly present.

The element of consideration is present because the potential participant must listen to the program in order to learn what question is to be asked the following week, or if he misses that program he can find it out by listening to any of the programs during the week while the question is being asked. With advance knowledge of the question, he can fortify himself with the correct answer to be given in case he is called on the telephone, and thus he is enticed to listen to the program in order to further his chances of winning the prize.

Moreover, the easiest way for him to learn the correct answer, as stated by the “quiz master” in the announcement quoted above, is to go to a grocery store and seek out the advertisement of the sponsor. This is clearly a consideration within the above quoted language from the decision in State ex rel. Regez v. Blumer, (1940) 236 Wis. 129, 131.

It is true that there is a possibility of a person learning what the question is without listening to the program, by inquiring of someone who has listened. Such person may also learn the correct answer by conducting personal research in reference books either in his own home or in the
public library, without ever going near a grocery store or examining the advertising material of the sponsor. But the purpose and intent of the scheme is to get persons to listen to the radio program and to obtain the correct answer from the sponsor's advertising material displayed in grocery stores. We are told that the program has been on the air for one year. If it did not produce results it would undoubtedly have been discontinued long ago.

So long as consideration passes from the great mass of the participants in a lottery, it is immaterial that some persons may obtain their chance to participate without consideration. In disposing of the contention that a bank night was not a lottery because persons might participate without having purchased a ticket to the theater, the supreme court of Wisconsin stated as follows:

"** The reason most generally given for holding the scheme a lottery is that the great number of those who purchase tickets for the chance of participating in the drawing, thus making the scheme profitable to the theater, furnish the consideration, although others are given chances free. Others base their ruling upon the fact, or at least place emphasis upon it, that furnishing free chances is only a means taken to evade the point of necessary consideration, and thus save the scheme from being held a lottery. We agree with the majority of the courts and hold that the instant scheme constitutes a lottery. Manifestly, a lottery is no less a lottery because the management of it gives away numbers entitling participation in the draw to some persons. It is only all the more objectionable because it does not limit the drawees to the persons buying tickets and thus lessens the chance of those who pay for their tickets." State ex rel. Cowie v. La Crosse Theater Co., (1939) 232 Wis. 153, 159.

"TELLO-TEST"

The "Tello-Test" is a telephone quiz show apparently similar to the bread quiz discussed above. It is broadcast Monday through Friday from 11:30 to 11:45 a.m. A brief summary of its method of operation, but no script, has been submitted to us.

We have obtained an advertising prospectus of Radio Features, Inc., extolling the value of this program, which
is sold by Radio Features, Inc. to various sponsors. This describes the program briefly as follows:

“How TELLO-TEST WORKS

“To operate ‘TELLO-TEST’ all you need is a telephone book, a telephone—and the right guy at the mike . . . an emcee [i.e., M. C.—master of ceremonies] who can make his personality an integral part of the show.

“Stripped to its essential elements: You select phone numbers according to a safe and sane system we’ve worked out. You call folks, you ask them questions—the prizes accumulate until someone wins the jackpot.”

Other representations made by Radio Features, Inc. on the prospectus are the following:

“WHY A MERCHANDISE AWARD SHOW?

“If you have a telephone giveaway that awards cash, it takes days and weeks for the jackpot to mount high enough to excite listeners! With a jackpot of prizes, every question starts right off with genuine values—and increases those values the longer the question remains unanswered. TELLO-TEST with a jackpot of PRIZES guarantees you listenership pressure from the instant a question is asked until the moment it’s answered . . . and then there’s another jackpot ready for the next question!

“A MERCHANDISE SHOW WILL DOUBLE YOUR LISTENERSHIP—THEN DOUBLE IT AGAIN!”

“WIRL—PEORIA, ILLINOIS HAS 100% LISTENERSHIP!

“During the month of January, the library answered 6,440 calls relative to TELLO-TEST. I can report that we have had virtually 100% listenership on persons called since we have had our jackpot program, with the exception of only two calls. That will show you the intense interest in TELLO-TEST here in Peoria.”

“HARLAN E. RALSTON
“Program Director
“WIRL, Peoria, Ill.

“The experience of WIRL is not unique! In Green Bay, Wisconsin (WDUZ), everybody in town listens to TELLO-TEST with PRIZES. * * *”
In view of the foregoing representations by the producer, it is apparent that this program is designed to increase the radio audience and that it in fact has that result. There can be no doubt that the element of consideration is present. The fact that 6,440 persons called the Peoria library in one month indicates that the persons making the calls had some information as to what question was being asked.* It may be inferred that they obtained the information from listening to the program, which brings it within the test of consideration announced above.

BREAD QUIZ NO. 2

This is a telephone quiz show similar to the bread quiz No. 1. It is broadcast Monday through Friday from 8:30 to 8:45 a.m. A brief summary of the program states that the questions change daily and are selected from questions sent in by listeners. The “quiz master” gives the correct answer at the close of each day’s program. While we have not been supplied with a printed script, we have had the opportunity of hearing a tape recording of part of one of the daily broadcasts of this program. Persons called on the telephone were asked to complete the following adage: “You can lead a horse to water but—.” This would seem to be a very simple and easy question, yet the first housewife who was called on the telephone was unable to complete the same. In response to a question from the “quiz master” she stated that she had not been listening to the program.

In view of the fact that the question is read repeatedly over the air and thus can be learned in advance by one who listens to the program, the scheme involves an enticement to listen to the program in the hope of improving one’s chances of winning the prize by obtaining advance knowledge of what the question is, and the scheme is therefore a lottery within the principles previously discussed.

*The Milwaukee Journal reports that on 3 consecutive days in July, 1950, the Milwaukee public library had an average of 800 calls between 9:00 a.m. and noon, mostly “from people hunting the key to a prize and having no interest at all in the information as information.”
"JACK POT QUIZ"

The Jack Pot Quiz is broadcast from 11:45 a.m. to 12:00 noon Monday through Friday. The amount of the prize depends upon how many previous participants have failed to answer the question correctly. For each one who misses, $5 is added to the "jack pot" which will be won by the first participant who gives the correct answer. The sponsor is a bakery which sells its goods at retail by door-to-door salesmen. Three telephone calls are made on each daily 15-minute program. We have not been supplied with any samples of the questions asked. Neither does it appear whether the same question is used more than once or whether the correct answer is announced over the air at any time. But in addition to the so-called "jack pot question," each participant is asked the name of the sponsor's salesman who serves his neighborhood. For the correct answer to this question the participant wins $5. The obvious intent and purpose of asking this question is to encourage persons to inquire as to the name of the appropriate salesman, a subject in which they might otherwise be wholly disinterested and which is of inestimable advertising value to the sponsor. A discussion of the merits and training of the salesmen is included in the script. Regardless of any other element of consideration which may be present, this advertising value is sufficient consideration to render this entire scheme a lottery within the principles announced in State ex rel. Regez v. Blumer, supra. See also Brooklyn Daily Eagle v. Voorhies, (C.C.E.D. N.Y. 1910) 181 Fed. 579, 581-2; 38 O.A.G. 651, 658.

"STOP THE MUSIC"

"Stop the Music" is a television network program originating outside the state of Wisconsin but broadcast over at least one station in this state. At the beginning of the program a so-called "mystery melody" is played after an announcement that "right now still another giant jack pot waits for the first person who gives us the name of this new mystery melody." This is followed by the announcer extolling the virtues of the sponsor's product, followed by a so-
called singing commercial, followed by a musical number unrelated to the "contest."

There is then played a so-called "prize melody" which is interrupted before it is completed by the announcer breaking in and saying, "Stop the music!" At this point a long distance call to a person somewhere in the United States is completed, and the person thus called is asked to identify the "prize melody" which has just been partly performed over the program. To identify this musical selection, the person must have been listening to the program since no part of it is played over the telephone line.

If the person called correctly identifies the "prize melody" he wins a valuable prize, usually one of the sponsor's products. Then the so-called "mystery melody" is again played and the person on the telephone is asked to identify it. If he does so he wins the so-called "giant jack pot" described by the announcer as "a sensational fortune in fabulous prizes."

If the person called fails to identify the "prize melody" a so-called "studio contestant" is called up from the audience in the studio and is given an opportunity to identify the song. If he correctly identifies it he receives the preliminary prize but is not given an opportunity to identify the so-called "mystery melody." A person called on the telephone who fails to identify the "prize melody" is not given an opportunity to identify the "mystery melody."

That this entire scheme is a lottery within the principles heretofore stated in this opinion is too clear to require further comment. An important distinction is, however, that the transaction crosses state lines at two points. First, the program itself originates outside the state and is transmitted into Wisconsin for rebroadcast over a Wisconsin television station. Second, the telephone call to the participants, so far as the latter may reside in this state, originates outside of the state and terminates in Wisconsin. Clearly, however, the interstate character of the transaction does not make lawful the activity of any Wisconsin television station in rebroadcasting the program.

Under sec. 348.01 a penalty is provided for any person who "shall in any way be concerned in setting up, managing or drawing any such lottery." This statute can be
violated by acts committed in Wisconsin in furtherance of the setting up of a lottery in another state.

But aside from that, it is beyond question that the lottery is conducted partly in Wisconsin. The information regarding the lottery is broadcast from a Wisconsin station. The consideration flows in part from Wisconsin television listeners. Part of the prospective participants are located in this state. From time to time a member of the Wisconsin audience receives a phone call in connection with the lottery and is given an opportunity to win it. When a television network company deliberately conducts a lottery in an area which includes a part of Wisconsin, and which is in violation of the laws of Wisconsin, it has violated those laws.

It is elementary that when a force is set in motion in one state resulting in a crime committed in another, it may be prosecuted in the state where the crime is consummated. 14 Am. Jur. 926–927—Criminal Law § 227. This fact is recognized by sec. 6 of the uniform criminal extradition act, which is sec. 364.06, Stats., and provides as follows:

"The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 364.03 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand; and the provisions of this chapter not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

71 N.J.L. 442, 59 A. 558, 559; McInerney v. Ervin, (Fla. 1950) 46 So. 2d 458, 461-462.

It is true that congress has legislated in the field of broadcasting lottery information by enacting 18 U.S.C. § 1304. But 18 U.S.C. § 3231 provides in part as follows:

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Federal decisions holding that state censorship agencies may not censor in advance the content of television programs, Allen B. Dumont Laboratories v. Carroll, (E.D.Pa. 1949) 86 F. Supp. 813, aff'd (C.C.A. 3rd 1950) 184 F. 2d 153, must be distinguished in the light of the foregoing statute, notwithstanding their general language to the effect that congress has shown an intent to occupy the field of broadcasting in its entirety. Taken literally, this would mean that all sorts of libelous and other publications prohibited by state laws could be made with impunity so long as the means of communication was subject to regulation by the Federal Communications Commission, which would be a new and startling development. 44 Am. Jur. 196—Radio § § 21, 22.


Moreover, the rule of construction is that federal legislation will not be construed to interfere with the penal laws of the states, where they are not leveled against the legitimate powers of the Union, unless its provisions are such as to render the construction inevitable. Cohens v. Virginia, (1821) 6 Wheat. 264, 443.

"FOOD FOR THOUGHT"

The "Food for Thought" program is a television production apparently originating over a Wisconsin station. So far as we are informed, this appears to be a studio audience participation show in which the members of the television audience are mere "kibitzers." At the close of the program
members of the television audience are urged to make arrangements to be members of a future studio audience, by writing to the station.

The object of the "contest" is to identify a certain person by means of clues furnished at the beginning of the program, which is broadcast from 4:30 to 4:45 p.m. For example, in one program it was announced that the character was a great scientist from the past. A shadow supposed to represent the scientist appeared on the wall and was interviewed by members of the cast as follows:

Q. Sir, where were you born? A. Ask the old women with their black cats and brooms.
Q. Then when were you born? A. Two years before they hung the lanterns in the church tower.
Q. What is your name? A. For the first, you might call me a gift from God.
Q. Did you go to school? A. I was acquainted with Gaul as a whole.
Q. Well then, how did you spend your youth? A. With ships and shoes, candle wax, and barrel hoops and things.
Q. Then you were a sailor? A. Yes, I helped that business quite a bit.
Q. Well how did you help the sailing business? A. Science my good woman, science.
Q. You are not being very cooperative. A. I cooperated with Hamilton Moore in a sense.
Q. If you are not going to tell us more than that we might as well leave. A. In '95 and '96 and '98 and '99 I sailed but it wasn't until 1802 that I became a Captain.

On the basis of the foregoing, the members of the audience were expected to identify the character in question. At the close of the program they were invited to write their answers and shortly thereafter the results were announced. The prize appeared to be 21 articles of groceries. In this instance the broadcasting of the program is not a part of the lottery. The lottery is conducted wholly within the studio and the only participants are members of the studio audience.

Attending the television station for the purpose of being a member of the studio audience, even though no admission fee is charged, is clearly a sufficient consideration to support a lottery within the decision in State ex rel. Regez v. Blumer, supra. (The situation would be materially different
if the proceedings were not broadcast or if no product were advertised. In other words, I do not mean to be understood as saying that such a game played at a private party would be illegal.)

The element of chance is involved because the ability to win the prize depends upon the participant's knowledge of the correct answer to a number of clues and knowing the name of the scientist involved in the interview quoted above. The controlling principles are fully explained in a former opinion of this office relating to the "telequiz" machine. 37 O.A.G. 126.

"RADIO AUCTION"

You have separately submitted for opinion a different form of radio giveaway known as "Radio Auction." The program is described as follows:

"We obtain, from nationally known manufacturers a group of articles. These articles are then auctioned, over the air, to the highest bidder—all such bidders making their bids by telephone. The 'price' of the goods so auctioned is figured in 'stage money.' This money is distributed to WMIL advertisers. Listeners are told that they can obtain the money by going to any of these advertisers. They are told (and so are our clients) that there must be no condition attached to the distribution of the money. In other words, if a listener visits one of our advertisers and asks for 'Radio Auction Money' it must be given to that person freely. Listeners are also told that if they do not know where to go for the money—or if they do not wish to visit a merchant's place of business—they may write or visit us and the money will be given to them. The sole purpose of distributing this money, as freely and widely as possible, is to make it available to as many persons as possible, so that listener interest in the radio game may be as high as possible."

This scheme is in principle identical with that involved in my opinion to you reported in 38 O.A.G. 644, and is a lottery for the reasons therein set forth.

WAP
State Board of Health—Maternity Hospitals—Under secs. 48.43 (1) and 48.44 (1) and (2), Stats., the state board of health may make rules and regulations relating to the use of physical equipment of maternity hospitals, including use of separate rooms for surgery and obstetrics.

Whether state board of health may make rules regarding the staffing and personnel of maternity hospitals depends largely upon the scope of the specific rule or rules proposed.

October 23, 1950.

State Board of Health.

Attention is directed to the provisions of secs. 48.43 to 48.47, Stats., inclusive, relating to the licensing and supervision of maternity hospitals by the state board of health, and you have inquired whether these statutory provisions are broad enough to authorize the adoption of rules by the state board of health relating to the operation of such hospitals as well as to physical requirements. By way of example you ask whether the board could require that a delivery room be not used for general surgery or for obstetrical cases with puerperal infection or that surgical operating rooms be not used for the delivery of uninfected obstetrical patients; also whether the board could establish reasonable rules relating to the staffing and personnel of maternity hospitals.

No attempt will be made here to set up all of the provisions of the statutes mentioned above.

Sec. 48.43 (3) provides in part that no license for a maternity hospital shall be renewed unless the person licensed to conduct the same shall have faithfully observed all of the provisions of secs. 48.43 to 48.46 “and the rules and regulations of the state board of health issued thereunder.”

Sec. 48.44 (1) among other things states:

“* * * The investigation of any application for a license to conduct a maternity hospital shall include an inquiry as to the number of cubic feet of air space available for each patient, the facilities for ventilation and the admission of sunlight to the rooms used for the care of mothers and their infants. No license shall be issued unless the state
board of health is satisfied that the physical equipment of the place to be used as a maternity hospital is adequate for the proper care of mothers and infants. The state board of health and the local health officer shall keep informed of the nature and reputation of every such maternity hospital and shall visit and inspect the same as often as they deem necessary and for such purposes shall at all reasonable hours be given free and unrestricted access to every part thereof.* * *"

In sec. 48.44 (2) it is provided that the state board of health shall make such general rules and regulations for the various kinds of maternity hospitals as shall be necessary to effect the purposes of secs. 48.43 to 48.45. Sec. 48.46 (1) provides that the state board of health may revoke the license for any maternity hospital if the persons licensed to conduct the same shall have violated any provision of secs. 48.43 to 48.46 or any of the rules and regulations of the state board of health issued thereunder or the provisions of such license.

The state board of health has only such powers as are expressly granted to it or are necessarily implied, and any power sought to be exercised by it must be found within the four corners of the statute under which the board proceeds. American Brass Co. v. State Board of Health, 245 Wis. 440.

While sec. 48.44 (1) is express as to the authority of the board to investigate and license upon the basis of physical equipment, cubic feet of air space, facilities for ventilation and admission of sunlight it would appear that the board also has some implied powers with respect to supervision of operation, although such powers are by no means clearly defined. Sec. 48.44 (1) states that the state board of health and the local health officer "shall keep informed of the nature and reputation of every such maternity hospital and shall visit and inspect the same as often as they deem necessary." This implies far more than the initial investigation as to cubic feet of air space, ventilation, sunlight, etc., although the standards of "nature and reputation" are admittedly vague.

However, if the investigation as to nature and reputation and the inspections called for by the statute are to be given
any meaning at all as they should be under the rules of statutory construction it would appear that the board is acting within its statutory powers in requiring not only that such a hospital have separate surgical and delivery rooms as a part of its physical equipment but also that they be used as such so as to safeguard against the spread of puerperal infection, etc. In other words a requirement as to physical equipment alone would serve no useful purpose unless there be adequately enforced rules and regulations governing the use of such equipment.

It is a little more difficult to advise with respect to rules regarding the staffing and personnel of maternity hospitals without knowing in detail what such proposed rules might encompass. Certainly the rules could require that the staff consist of physicians duly licensed in Wisconsin and that all nursing be supervised by registered nurses, since this would be required by law in any event. On the other hand, the board would have no statutory authority for making rules for instance which would discriminate in favor of or against a physician or nurse on account of race, religion, sex, or membership in some particular society or association, and it would be doubtful, for example, whether the board could require staff physicians to be not only licensed in Wisconsin but to have also some sort of certificate from the American Board of Obstetrics and Gynecology or fellowship in the American College of Surgeons under the classification of obstetrics and gynecology or other evidence of having specialized training and experience in the fields of obstetrics or gynecology beyond that required by law to practice as physicians generally in this state.

If you have any particular rules or regulations in mind which the board proposes to adopt regarding the staffing and personnel of maternity hospitals I shall be glad to give specific advice with respect thereto, but in the absence thereof it will be necessary to leave the matter with the general observations made above.

WHR
Constitutional Law—Appropriations and Expenditures—Taxation—Schools and School Districts—Appropriation in sec. 20.276, Stats. 1949, to make payments in lieu of school taxes to school districts in certain named counties for state forest lands within such school districts, is invalid as an appropriation for a local purpose.

October 24, 1950.

STATE DEPARTMENT OF BUDGET AND ACCOUNTS.

You inquire whether the state legally may make the payments to school districts in which certain state forest lands are located, as provided by sec. 20.276, Stats. 1949, in view of the fact that the law does not provide similar payments to all school districts in the state which have state forest lands within their boundaries.

Sec. 20.276, Stats., enacted by ch. 571, Laws 1949, appropriates "from the general fund to school districts entitled thereto under section 70.114 a sum sufficient to pay the amounts certified as provided in said section."

Sec. 70.114, Stats. 1949, created by said ch. 571, provides:

"Notwithstanding any provision of section 70.11, the conservation commission shall certify to the director of budget and accounts who shall draw his warrant on the state treasurer for the amount so certified, the amount due each school district in which any state forest lands acquired pursuant to section 20.20 (14) (a) are located, an amount which the department of taxation in its judgment shall determine would be payable in that year as school taxes upon such lands within the district, were the same fully subject to taxation for school purposes."

Sec. 20.20 (14) (a), Stats. 1949, allots $150,000 annually from "the proceeds of the tax which is levied in section 70.58 (2), [state forestation tax] and all moneys paid into the state treasury as the counties' share of compensation of emergency fire wardens pursuant to section 26.14 of the statutes" for the acquisition and development of state forest lands in 16 specified counties, including inter alia the area known as the "Kettle Moraine State Forest." See sec. 28.03 (2) (d), Stats.
Prior to July 3, 1937 (the effective date of ch. 332, Laws 1937) sec. 20.20 (14), Stats., contained no subdivisions and read the same, except for the date, as the context presently in the opening paragraph of sec. 20.20 (14), Stats. 1949. It made an appropriation to be used for any or all of the stated purposes, which included the acquisition and development of state forest lands generally, without any allotment either for the acquisition and development of state forest lands in the 16 named counties, or for the acquisition and development of state forest lands generally. Ch. 332, Laws 1937, amended it by adding a proviso at the end “that seventy-five thousand dollars annually shall be used to acquire and develop state forest lands” in the 16 named counties. Ch. 142, Laws 1939, took said proviso and made it a separate paragraph (a) and then added two more subparagraphs containing other specific allotments not here material. Ch. 266, Laws 1943, increased the $75,000 allotment in sec. 20.20 (14) (a) to $150,000 as it now stands.

It appears that a part of the state forest lands in the 16 counties mentioned in sec. 20.20 (14) (a) was purchased by the state prior to the effective date of said ch. 332, Laws 1937. While it is clear that secs. 20.276 and 70.114, Stats. 1949, apply only to state forest lands in the 16 counties named in sec. 20.20 (14) (a), it is not clear what is meant by the language in sec. 70.114 restricting their application to “state forest lands acquired pursuant to section 20.20 (14) (a).”

Literally this language would limit the payments in lieu of taxes to state forest lands which were acquired after there existed a provision in the statutes designated as para. (a) of sec. 20.20 (14). Sec. 3 of ch. 142, Laws 1939, effective by its terms on July 1, 1939, first set apart the allotment of a specific amount to be used to acquire and develop state forest lands in the 16 named counties as a separate para. (a). Literal construction thus would make secs. 20.276 and 70.114 applicable only as respects state forest lands in said counties acquired after July 1, 1939.

However, an allocation in the same language, except as to date and amount, as now in para. (a) of subsec. (14) of sec. 20.20, was in sec. 20.20 (14), Stats. 1937, but not as a separate paragraph. In view thereof it would not seem
reasonable that the legislature in using "20.20 (14) (a)" in the language in sec. 70.114 intended to make a differentiation and exclude some of the state forest lands in said counties upon the basis of the mechanical set-up of the appropriation statute. Under this view the two statutes would be applicable to any state forest lands which were acquired in such counties at a time when there was a specific allocation in sec. 20.20 (14) for such purposes.

It would, however, still exclude the lands previously mentioned which were acquired before July 3, 1937, the date the specific allocation took effect. To say that the language in sec. 70.114 is to have a still wider coverage and include all state forest lands in said counties that were acquired by use of the appropriation made in sec. 20.20 (14), regardless of whether at the time of the acquisition there was a specific allocation for such purpose, would be going a long way. The 1949 legislature knew of the progress of acquisition of state forest lands in said area and had it intended to include within the scope of secs. 20.276 and 70.114 all of the state forest lands acquired out of the appropriations made over the years by sec. 20.20 (14) and not restrict their application to lands purchased out of the specific allotments, it would seem that instead of tying them down to lands acquired pursuant to the specific allocation it would have merely said lands acquired through use of the appropriations made by sec. 20.20 (14). But, it is arguable that what the 1949 legislature had in mind was relief to the school districts in the 16 named counties from the impact of the exemption from taxation of lands therein because of their acquisition by the state for state forestry purposes, and therefore the statutes involved should be construed so as to have as broad an application as the objective of the legislature. Considerable difficulty is experienced in arriving at that result in view of the language used, because it is not usual to use specific references in expressing such an over-all or general intent. However, as will appear later, it is not necessary to resolve the question at this time.

The question as to the validity of sec. 20.276 is one of constitutionality and is whether the appropriation there made is for a proper public purpose, that is, a state-wide
public purpose. While appropriations in aid of education are clearly for a public purpose it does not follow that every state appropriation in aid of education is valid as being for a proper state purpose. In order to be valid such an appropriation must be for a state purpose and not local in its nature and application. As the court said in State ex rel. W.D.A. v. Dammann, (1938) 228 Wis. 147 at 183, 277 N.W. 278, 280 N.W. 698, "a tax must be spent at the level at which it is raised. Applied to an appropriation by the legislature, this means that the appropriation must not merely be for a public purpose but for a state purpose."

In State ex rel. New Richmond v. Davidson, (1902) 114 Wis. 563, 88 N.W. 596, 90 N.W. 1067, the court upheld an appropriation by the legislature to discharge an obligation of the city of New Richmond arising out of a loan made from the state trust funds to that city for the relief of sufferers from a severe tornado. The appropriation was upheld on the ground that the state as a whole was concerned in the object of the appropriation and that, therefore, the appropriation was not for a purely local purpose. The court stressed the extent of the suffering caused by the storm, the fact that the calamity could not have been anticipated, the claims of humanity and the necessity for the immediate exercise of the police power of the state on a large scale, and concluded that the purpose of the appropriation was to subserve the common interest of the people of the state at large and was not purely local.

In State ex rel. Owen v. Donald, (1915) 160 Wis. 21, 151 N.W. 331, the court suggested, at pp. 149 and 150, that the legislature could not deplete the general fund for the purpose of paying local taxes upon trust lands of the state in certain counties while the same kinds of lands elsewhere were not subject to such taxes, on the ground that this was an appropriation of state money for a local purpose and on the further ground that the act in question violated the constitutional prohibition against special legislation for the assessment or collection of taxes contained in sec. 31, art. IV.

In State ex rel. W.D.A. v. Dammann, (1938) 228 Wis. 147, 277 N.W. 278, 280 N.W. 698, the court held that an appropriation for the purpose of promoting the construction
or acquisition of any utility plant of certain classes by a municipality was invalid as an appropriation of state funds for a local purpose. The decision clearly states that, while the legislature may appropriate state funds to foster municipal acquisition in general, it may not appropriate state funds for the purpose of assisting a particular municipality to acquire or construct a particular plant, and cites the *New Richmond* case, *supra*, as authority. The court at p. 186, distinguishes the practice of giving aids to local communities for the promotion of public health and education on the ground that health and education are matters affecting the whole state and are proper state functions. This is not to say, however, that every appropriation to aid a particular school is necessarily valid as a proper state purpose.

To be valid an appropriation for aid to school districts must have as its purpose a matter of state-wide concern. It must be applicable to all school districts of the state which meet the standard prescribed by the legislature as the basis for the aid and such standard must be capable of uniform application throughout the state. In the absence thereof the matter is local in character and purpose and therefore not a proper state expenditure.

The only exception to the rule that the appropriation must be capable of uniform application throughout the state is the type of situation involved in the *New Richmond* case, *supra*, where particular circumstances affecting only one or more specified municipalities make the needs of those municipalities a matter of state-wide concern.

An example of a valid state appropriation is sec. 20.74 (6), Stats., which appropriates $200,000 to the emergency board to aid "elementary and high schools which are in such financial distress that they cannot continue." In 38 O.A.G. 546 it was pointed out that this statute permitted the emergency board to grant aid to a school district for construction purposes. The opinion states that "aids to local communities for the promotion of education and public health are concededly matters affecting the whole state." The statute there under consideration, however, was capable of uniform application throughout the state, and the opinion is not to be taken as an indication that every state aid to a local school is necessarily valid solely because it is an aid
to education. Except where there are special circumstances of something like in the New Richmond case which although localized are of such a nature as to permeate the state at large, there must be state-wide applicability.

At 88 O.A.G. 265, there is an opinion holding that the legislature cannot limit the distribution of the proceeds of the occupational tax upon liquor dealers to those communities which either (1) do not prohibit the sale of alcoholic beverages or (2) had prohibited such sale before the date the act went into effect. The opinion contains, at pp. 269–270, a discussion of the basic restriction upon the legislature’s power to appropriate state funds—the purpose of the appropriation must be a matter of state-wide concern.

In 88 O.A.G. 288 there is an opinion holding that the legislature may appropriate state funds to encourage the development and improvement of municipal airports on the ground that an airport is part of a state-wide transportation system and is therefore a matter of state-wide concern. Here again is state-wide applicability as it is not limited to any particular locality but extends to all wherever they be that come within the provision. The opinion held invalid that portion of the bill under consideration which would have extended state aids to privately owned airports on the ground that the benefits to result would inure to the airport owners and that the improvement of privately-owned airports was not a proper public purpose.

The three previously mentioned decisions of the supreme court establish the principle that legislative appropriations must be for public purposes of state-wide concern and that an appropriation to a specific municipality comes within the rule only when, by reason of a major emergency, the particular municipality is unable to continue the essential functions of government without assistance. The opinions regarding the proposed distribution of the liquor tax and the proposed state aids to airports were based upon this same principle that state funds may be appropriated only for purposes of state-wide concern.

Accordingly the crucial question is whether the impact of the purchase of state forest land in the 16 named counties differs sufficiently from the impact of purchase in other counties so as to be a matter of state-wide concern. Careful
consideration has been given to this proposition because of the presumption favoring constitutionality of laws enacted by the legislature.

I have been unable to find any basis for saying that the state purchase of land in the 16 named counties impairs the ability of school districts in those counties to carry out their function to any greater degree than it does in other counties in the state. And in fact extensive purchases of state forest land have occurred in other counties since 1937. In Douglas county, the 1937 acreage was 6,781.08 and the 1949 acreage 18,012.54; in Price, the 1937 acreage was 877.12 and the 1949 acreage was 6,800.55; in Rusk, there was no acreage in 1937, and 8,986.74 in 1949. In Sawyer, the 1937 acreage was 2,283.65 and the 1949 acreage 51,719.62. The following counties named in sec. 20.20 (14) (a) still had no state forest lands in 1949: Calumet, Dodge, Kenosha, Milwaukee, Outagamie, Ozaukee, Racine, Rock, Washington and Winnebago. There is no apparent reason why the purchase of land by the state in any of the last named counties will impair the financial status of school districts as much as it will in the parts of Douglas, Price, Rusk and Sawyer where a considerable acreage has already been taken from the tax rolls.

In addition to the foregoing comparison of counties on an over-all basis, the tabulation made by the department of taxation, pursuant to sec. 70.114, shows that the effect of the state's acquisition of forest lands in the counties named in sec. 20.20 (14) (a) upon the school districts varies considerably from one district to another. In one-quarter of those school districts in the named 16 counties in which the state has acquired forest lands with funds appropriated under sec. 20.20 (14) (a), the state's portion of the 1949 school tax levy would be less than 1 per cent. In 25 of the 36 districts concerned, the state would contribute less than 5 per cent of the 1949 school tax levy. The total of the 1949 school tax levies for these 36 districts is $93,135.21, and the state's portion under sec. 20.276 would be $3,925.26, or 4.2 per cent of the total.
In these circumstances it is my opinion that the attempted appropriation is invalid under the state constitution on the ground that the appropriation is not for a purpose of statewide concern.

EWW
HHP

Appropriations and Expenditures—Free Library Commission—Demonstration Service—Traveling and administrative expenses incurred by free library commission in guiding and supervising library service demonstration project under sec. 43.32 (1) (b), Stats., may be paid out of appropriation made by sec. 20.14 (5), Stats. Such items are not included in the budget or budgets of the county or counties equipping and maintaining the demonstration service under sec. 43.32 (11) (a), Stats., and are not subject to the limitation that the state contribution shall not exceed one-half of the cost of the demonstration project.

October 25, 1950.

WISCONSIN FREE LIBRARY COMMISSION.

You have directed our attention to various provisions of ch. 640, Laws 1949, relating to a demonstration of library service and you have raised a number of questions relating to the interpretation of the act.

Among other things sec. 43.32, Stats., was created by said ch. 640 for the purpose of demonstrating the effectiveness of a specified type of rural library service. Sec. 43.32 contains numerous provisions and no attempt will be made here to set forth all of such provisions at length. Sec. 43.32 (3) provides that such service shall be operated not to exceed 3 years from actual commencement thereof in the area selected and in no event after June 30, 1953.

Sec. 43.32 (11) sets forth the fiscal policies applicable to the demonstration service as follows:

“(a) The demonstration service shall be equipped and maintained by the county or counties included but the com-
mission may contract in advance with such county or counties to defray not to exceed one-half of the actual cost.

"(b) The initial tentative budget may be outlined in the contract. Subsequent tentative budgets shall be prepared by the director subject to review by the demonstration library board and the commission. All tentative budgets shall be subject to section 65.90 and to final approval of the county board of supervisors.

"(c) The state's share of expenses shall be paid quarterly in advance in accordance with the approved budget and the contract to the treasurer of each participating county pro rata, upon determination and certification by the commission to the director of budget and accounts.

"(d) Expenses of the demonstration area not defrayed by the state shall be apportioned among the participating counties, according to the total state equalized assessment of the participating towns, cities and villages therein.

"(e) Each county included shall prorate its budgeted expenditures annually among the towns, cities and villages participating in the service according to their state equalized assessments and the same shall be assessed, levied, collected and paid over to the county treasury by the treasurer of each such town, city or village annually in the same manner as other county taxes. No part of any expense incurred under this section shall be levied against any property within a city, village or town not included within the demonstration area.

"(f) Vouchers for expenditures for demonstration services within the budget shall be examined and approved by the county clerk when certified to him by the director and when so approved shall be paid by the county treasurer. In areas containing more than one county, the treasurer of one county specified in the contract shall act as disbursing agent and shall recover from the treasury of the other participating counties their pro rata share of such expense monthly.

"(g) The department of state audit shall assist and advise the commission and demonstration library boards in establishing a uniform system of accounting for demonstration areas."

Sec. 20.14 (5) was also created by ch. 640, Laws 1949, and among other things it appropriates to the free library commission $25,000 on July 1, 1949 and $50,000 annually, beginning July 1, 1950 for execution of its functions under sec. 43.32.
The free library commission and the counties of Door and Kewaunee contracted on February 1, 1950 to establish such a demonstration of library service, and the original budget approved by both counties and the commission was $57,000. Of this Door county appropriated $15,000 and Kewaunee county $13,500. The remaining $28,500 will have been appropriated by the commission by the end of the current county fiscal year. In this connection you call attention to the fact that sec. 48.32 (1) (b) states that the commission is to furnish sufficient guidance and supervision to insure that the objectives may be realized. This entails certain expenditures and you therefore inquire whether the funds appropriated by sec. 20.14 (5) may be used for all or any of the following purposes:

1. Travel expense incident to the supervision of the demonstration.
2. Payment of "direct charges," i.e., telephone calls, supplies, etc., incident to supervision of the demonstration.
3. Payment for the personal services of personnel whose employment is required in the guidance and training program needed in the demonstration area.
4. Payment for the personal services of those who would analyze, classify, collate, and interpret the demonstration to the people of Wisconsin, and payment for the publication of material based upon such analysis and interpretation.

You have raised the question of whether the commission may expend more than one-half of the actual cost of the demonstration in the execution of its functions under sec. 43.32 and have verified the fact that none of the four items mentioned above were covered in the $57,000 budget set up for the project or in the contract with the commission.

It seems reasonably clear that the supervisory and administrative expenses of the state were not intended to be included in the project budget mentioned in sec. 43.32 (11). There would be no point for instance in providing that salaries and expenses of state employes should be subject to sec. 65.90 and to final approval of the county board of supervisors as is specified in sec. 43.32 (11) (b). Moreover, tremendous practical difficulties would arise from a cost accounting standpoint if any attempt were made to break down the salary of a commission employe so as to allocate
a portion thereof to this project and the balance to general administrative overhead of the commission.

Perhaps more important is the language of sec. 43.32 (11) (a) quoted above. This provides two things. In the first place the demonstration service is to be equipped and maintained by the county or counties included. In the second place not to exceed one-half of the actual cost thereof may be defrayed by the commission pursuant to contract. The words “one-half of the actual cost” must be related to the next preceding antecedent, namely, “the demonstration service equipped and maintained by the county or counties.” This does not include either expressly or impliedly the guidance and supervision provided by the commission as required under sec. 43.32 (1) (b).

It is true that in sec. 43.32 (1) (b) providing for guidance and supervision by the commission it is stated:

“* * * To achieve these ends, the commission may contract with local authorities to establish and operate a specified type of service in return for support with state funds up to one-half of the total budget for the duration of the demonstration period.”

However, this is in a subsection which purports to declare policy merely, and the details of the policy are set forth in the more particularized provisions of sec. 43.32 (11) quoted above. To the extent that there is or may be any conflict between general declarations of policy in a statute and specific statutory provisions covering the same subject matter in detail, the latter must be controlling.

You are therefore advised that all of the four items of expense referred to may be paid out of the appropriation made by sec. 20.14 (5) irrespective of the fact that when said items are added to the equipment and maintenance budget of the counties for the demonstration project the state will be contributing more than one-half of the over-all cost of the venture.

WHR
Counties — Taxation — Tax Deed — Old-Age Assistance Lien—When a county takes a tax deed to realty on which it has an old-age assistance lien under sec. 49.26, Stats., the lien is extinguished so that there is no need to execute a release.

October 25, 1950.

GEORGE W. PETERSON,
District Attorney,
Polk County.

You have asked whether a county welfare department may release an old-age assistance lien when the real estate affected by such lien is taken by the county on a tax deed, and if so, when and in whose favor such release should be made.

It was pointed out in 35 O.A.G. 429 that:

"* * * The law is well settled that a valid tax deed cuts off all former titles and liens. Sec. 75.14 (1), Stats.; XX Op. Atty. Gen. 409; Jarvis v. Peck, 19 Wis. *74; Cole v. Van Ostrand, 131 Wis. 454, 465; Doherty v. Rice, 240 Wis. 389."

In addition to the principle above cited, it is said in 53 C.J.S. 865-866:

"As a general rule, under the equitable doctrine of merger, the acquisition of the fee in the land by the owner of the lien thereon results in a merger extinguishing the lien. * * *"

Under the provisions of sec. 49.26 (7), the old-age assistance lien is enforceable by the county. When the county takes a tax deed its lien would be merged in the larger title.

If a lien has been extinguished, there is no need to release it; and a document purporting to release a nonexisting lien would have no legal effect.

The fact that a lien may have been extinguished does not of itself operate to extinguish the obligation which the lien secured; but the property in the hands of the county, and of a purchaser from the county, would no longer be subject to the lien.

BL
Public Welfare Department—Rule-Making Powers—Public Assistance—Uniform Standards—Under secs. 49.50 (2) and 46.016, Stats., the state department of public welfare is authorized to establish uniform standards for the granting of old-age assistance, aid to dependent children, aid to the blind, and aid to the totally and permanently disabled, and under sec. 49.50 (7), Stats., county agencies administering these programs are required to use such standards in determining eligibility and need.

October 26, 1950.

State Department of Public Welfare.

You have inquired whether it is within the rule-making authority of the state department of public welfare to establish uniform standards for the granting of old-age assistance, aid to dependent children, aid to the blind, and aid to the totally and permanently disabled, and to require county agencies administering these programs to use such standards in determining eligibility and need.

In this connection you call attention to the fact that the department recently filed with the federal bureau of public assistance, a plan which if approved would have qualified the state of Wisconsin to receive federal aid for totally and permanently disabled persons pursuant to Public Law 734 and sec. 49.61, Stats.

However, the department was notified by the director of the federal bureau of public assistance that the plan was disapproved because it failed to include a certification to the effect that the plan was mandatory upon local subdivisions of government in Wisconsin administering the plan and would be in effect throughout the state. Moreover, it was pointed out that present federal requirements for determining need specify that the state plan must include a statewide standard to be applied uniformly, and that the plan provisions now in effect in Wisconsin for determining need in the old-age assistance, aid to dependent children and aid to the blind programs do not yet meet these requirements. The director further stated that in presenting any new plan such as the one mentioned for totally and permanently disabled persons it will be necessary to meet the requirements
of the Social Security Act immediately, and that as to the
other aids mentioned above the state has been allowed time
to bring its plans into line with the requirements but is on
notice that it must do so at the earliest possible date.

Among other things sec. 49.50 (1), Stats., provides that
the department of public welfare shall supervise the admin-
istration of such aids and submit to the federal authorities
plans for the administration of these forms of public assist-
ance in such form and containing such information as the
federal authorities require and shall comply with all re-
quirements prescribed to insure correctness.

Sec. 49.50 (2) provides:

"The department shall adopt rules and regulations, not in
conflict with law, for the efficient administration of these
forms of public assistance, in agreement with the require-
ment for federal aid, including the establishment and main-
tenance of personnel standards on a merit basis. The provi-
sions of this section relating to personnel standards on a
merit basis supersede any inconsistent provisions of any
law relating to county personnel."

Sec. 49.18 (1) regarding aid to the blind provides that:
"The amount granted shall be determined on the basis of
need taking into consideration all income and resources as
well as ordinary and special expenses incidental to blind-
ness."

Sec. 49.19 (5) pertaining to aid to dependent children
provides: "The amount granted shall be determined by a
budget for the family in which all income as well as ex-
penses shall be considered. Such family budget shall be
based on a standard budget, including the parents or other
person who may be found eligible to receive aid under sub-
section (1) (a), which budget shall be worked out peri-
odically by the judge or agency administering such aid and
the county board or a committee of the board."

Sec. 49.21 (1) relating to old-age assistance provides
that: "The amount granted shall be determined by a budget
in which all income and resources as well as expense shall
be considered, and the aid per month shall not exceed the
maximum amount the federal government will take into
account in making reimbursement."
Sec. 49.61 (6) relating to aid for the totally and permanently disabled provides that: "The amount of aid which a person may receive under this section shall be according to his need but shall not exceed $80 per month. Any person receiving aid under this section shall not be eligible for old-age assistance, aid to the blind or aid to dependent children."

It is difficult to see how the adoption of state-wide standards as required by federal regulations would be in conflict with law, having in mind the flexibility implied in the language of the director of the bureau of public assistance reading:

"These requirements recognize, of course, that the money amount needed to purchase the basic items in a state-wide standard or to provide those items to be included in specified circumstances may vary from one part of the state to another if pricing surveys reveal price differentials."

The mere suggestion that the Wisconsin statutes relating to public assistance were ever intended to authorize or permit the department of public welfare to establish or allow 71 different standards for the 71 counties of the state is a shocking one and there can be no basis for implying any such conflict between state law and federal requirements, having in mind the basic concept in our system of law that people in similar circumstances be treated equally and that no person should be denied the equal protection of the laws. Any inferences which may be drawn from the statutes in question are entirely to the contrary.

In addition to sec. 49.50 (2) quoted above, sec. 46.016 provides:

"The department may co-operate with the United States in carrying out federal acts concerning public assistance, social security, child welfare, mental hygiene and corrections, services for the blind, and in other matters of mutual concern pertaining to public welfare."

Sec. 49.50 (2) which is mandatory in requiring the adoption of rules and regulations in agreement with the requirements for federal aid was created by ch. 585, Laws 1945, and it is significant to note that the federal agency manual
of state public assistance legislation issued on April 1, 1940 states at page 54, section 4010:

"The state's criteria of eligibility and its standards of need and assistance must be uniformly and equitably applied. In other words, in applying the state's criteria of standards, variations must be justified by variations in the circumstances of the individual case, and not on the basis of the applicant or recipient living in one part of the state rather than another, except insofar as this factor may affect actual need.

"Equitable treatment of individuals under similar circumstances would also be rendered impossible by inefficient administration, as it would obviously be impossible to maintain state-wide standards for the determination of eligibility and assistance without efficient administration."

Hence the federal requirements were a matter of record when the legislature in 1945 directed the department to adopt rules and regulations, not in conflict with law, in agreement with the requirements for federal aid. Presumably sec. 49.50 (2) would not have been adopted by the legislature if it had felt that the requirements for federal aid were in conflict with state law.

Nor is there any conflict between proposed uniform standards and the laws relating to administration of any of the forms of assistance by the counties, since sec. 49.50 (7) specifically provides that:

"All county officers and employes performing any duties in connection with the administration of these forms of public assistance shall observe all rules and regulations promulgated by the department pursuant to subsection (2) and shall keep such records and furnish such reports as the department requires in relation to their performance of such duties. * * *

You are therefore advised that the state department of public welfare is authorized to establish and enforce throughout the state rules providing for uniform standards in the granting of old-age assistance, aid to dependent children, aid to the blind and aid to the totally and permanently disabled.

WHR
Cities—Landlord and Tenant—Rent Control—Subject to possible doubt created by preamble to state rent law, sec. 234.26, Stats. 1949, any city, including Milwaukee, under proper conditions, has present power under sec. 62.11 (5), Stats., to enact ordinances limiting maximum rents and imposing conditions upon terminations of tenancies.

October 26, 1950.

Oscar Rennebohm,
Governor.

You have requested a formal opinion on the following question: May the city council of Milwaukee, or the city council of any other municipality of Wisconsin, pass an ordinance fixing rental ceilings upon residential properties and otherwise regulating rentals in the event of emergency affecting the welfare of the public?

At the outset this opinion obviously is limited to the legality of any such ordinance and in no way expresses any view upon questions of policy or the practicalities of any such municipal regulation of rents.

Sec. 62.11 (5), Stats. 1949, reads as follows:

"Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

Sec. 62.04, Stats. 1949, provides:

"It is declared to be the intention of the revision of the city charter law, to grant all the privileges, rights and powers, to cities which they heretofore had unless the contrary is patent from the revision. For the purpose of giving to cities the largest measure of self-government compatible with the constitution and general law, it is hereby declared that sections 62.01 to 62.26, inclusive, shall be liberally con-
strued in favor of the rights, powers and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and the inhabitants thereof."

It is provided in sec. 62.03 (1), Stats., that the powers thus specifically given by sec. 62.11 (5), Stats., do not apply to cities of the first class, in which the city of Milwaukee falls, but subsec. (2) of sec. 62.03 authorizes a city of the first class to adopt the same by ordinance. The city of Milwaukee has already done this by an ordinance, No. 6.04 (File No. 50790, Feb. 6, 1933), using the exact language in present sec. 62.11 (5). By force of this ordinance the city of Milwaukee thus has the same powers as any other city operating under sec. 62.11 (5), Stats.

In Hack v. Mineral Point, (1931) 203 Wis. 215, 219, 233 N.W. 82, the supreme court said of this language:

"That sec. 62.11 confers power far beyond that conferred in the so-called general welfare clause of the general charter as it stood prior to 1921 is plain, and a city operating under the general charter, finding no limitations in express language, has under the provisions of this chapter all the powers that the legislature could by any possibility confer upon it. * * *" (Emphasis supplied.)

This statement of law was reaffirmed by the court in Fox v. Racine, (1937) 225 Wis. 542, 545, 275 N.W. 513.

In the absence of conflicting state legislation on a subject of state-wide concern or an express statutory limitation upon the power granted by sec. 62.11 (5), a city has full power to enact ordinances to protect the health, safety and welfare of the public.

It is clear that there is now no presently operative state statute upon the subject of rent control which would be conflicting state legislation upon a subject of state-wide concern. Sec. 234.26 (9) of the state rent control statute enacted in 1949 provided:

"(9) TERMINATION. This section shall continue in effect until June 1, 1950."

It is equally clear there is no provision in the statutes that expressly limits the power of a city in respect to rent control, unless the language in the preamble to the 1949
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state rent law can be so construed. Sec. 234.26 (1) (b), Stats. 1949, reads:

"(b) The legislature of 1949 hereby declares that while such emergency is less serious at the present time it has not completely passed in the defense-rental areas in the state; that the federal government has and is presently exercising controls over rentals of and evictions from housing facilities in such areas; that the problems which presently exist in respect to housing accommodations in this state can best be dealt with by state regulation; that all controls over rentals and evictions should be terminated at the earliest date which will not jeopardize the public health, safety and welfare; that a present cessation of all controls over rentals and evictions might result in undue hardship and cause some threat to the public health, safety and welfare; that state regulation and control of rentals and evictions in such defense-rental areas for a definite but limited period hereafter will provide a reasonable time for such economic and social adjustments as will warrant a complete cessation of all controls over such rentals and evictions thereafter; that the period ending June 1, 1950 is such a reasonable time; that it is therefore imperative that the state of Wisconsin provide regulation and control of rentals of and evictions from housing accommodations in the defense-rental areas in this state which are now subject to federal rent control; and that the provisions of this section are necessary and designed to protect the public health, safety and welfare."

It may be argued that this language is to be construed as a declaration that from and after June 1, 1950 there shall be no rent control in the state. On the other hand it is suggested that this language refers only to state and federal regulation of rentals and that the legislature never intended thereby to affect possible local controls. In this connection it is observed that the language is not that there shall be no rent controls after June 1, 1950 but that there shall be a "cessation" of the same thereafter. The word cessation in its normal use would apply only to something then in existence. Therefore it is urged that in any event this language does not constitute prohibitory "express language" as is required by sec. 62.11 (5), Stats. Furthermore, it may be recognized that the legislature was only prophesying as to the future duration of the then existing emergency and therefore their pronouncement was of less force because of
that fact. That language would not appear to be directed to any new emergency and the present situation does not arise out of the emergency which the legislature was considering but is due to a large extent to a new outbreak of hostilities which occurred subsequent to June 1, 1950. Any question arising from this language can only be answered with certainty by a court.

A city may impose a money forfeiture for the violation of a valid rent control ordinance. It could not create a criminal offense and almost certainly could not create a cause of action for treble damages or other similar type of device for the enforcement of an ordinance of that nature.

I do not consider chs. 234 and 291 of the statutes as covering the field of rent control to the extent of excluding local controls of the type above mentioned. No city ordinance could change the provisions of these chapters but it does not seem to me that these chapters were intended to cover all phases of landlord and tenant relationships nor to guarantee that evictions can legally be effected in every instance where those chapters are complied with.

Subject to the above doubt expressed, a city in my opinion has the power, assuming emergency conditions to render the same necessary, to prohibit the charging of rents in excess of specified ceilings and to place conditions upon termination of tenancies similar to the grounds set out in subsec. (5) of sec. 234.26, Stats. 1949.

TEF
SGH
Taxation—Exemption—Tools and Machinery—Sprayers, tractors, plows, drags and similar machinery owned by a corporation and used for commercial work on farms not operated by the corporation are not exempt from taxation under sec. 70.111 (9), Stats.

November 2, 1950.

DEPARTMENT OF TAXATION.

You have asked: Does farm machinery, consisting of sprayers, tractors, plows, drags, etc. owned by a corporation which does commercial work with the machines on other farms qualify for exemption under the farm machinery exemption referred to in sec. 70.111 (9), Stats.?

Sec. 70.111 (9) exempts from general property taxes "farm ** machinery ** actually used in the operation of any farm." The above quoted provision was formerly contained in sec. 70.11 (12) of the statutes and was included in sec. 70.111 (9) by the revision effected by ch. 63, Laws 1949, in the identical wording in which it had previously existed. As pointed out in Yazoo & M. V. R. Co. v. Thomas, 132 U.S. 185, cited approvingly in State ex rel. Bell v. Harshaw, 76 Wis. 230, 240, 45 N.W. 308:

"* * * 'Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed strictissimi juris.' * * *"

The court also commented in Albion v. Trask, 256 Wis. 485, that statutes providing tax exemptions “are to be strictly construed”; and so applied the principle as to render the exemption provision here involved inapplicable to turkey brooders mounted on skids so as to be movable from one location to another.

See, also, Weston v. Supervisors of Shawano County, 44 Wis. 242.

The term “farm ** machinery ** actually used in the operation of any farm” may be construed as more limited in meaning than if it were used in law relating to different subject matter. Indeed, it must be construed in the most restricted sense compatible with the language used.
It is significant that in limiting the exemption of farm machinery to that actually used in the operation of "any farm," the legislature used the word "farm" in the singular rather than in the plural. Machinery maintained by a commercial enterprise, to be used for hire, is not ordinarily used upon a single farm but upon many farms.

The opinion was given in 28 O.A.G. 302, with respect to tax exemption under the above quoted words, that a chicken hatchery is exempt only if the primary use is in the operation of a farm; and that the hatchery is not exempt if the commercial use is primary. It was there stated (p. 303):

"** Accordingly, as you state, the Wisconsin tax commission has taken the position that farm equipment which is used 'commercially' does not fall within the terms of the statute, since such use of equipment is not restricted to the operation of a farm as a unit."

The foregoing opinion was issued in 1939, and the legislature has made no change in the wording upon which the opinion was based. On the contrary, the legislature reenacted the provision in identical phraseology, by ch. 63, Laws 1949. The opinion issued in 1939 recognized that the state agency charged with enforcement of the provision had already taken the position that farm equipment used commercially did not fall within the terms of the statute. As pointed out in State v. Johnson, 186 Wis. 59, 68–69, 202 N.W. 319:

"** This is the construction placed upon the statute by the proper state officers and the board of deposits. Such a practical construction is of great weight and is oftentimes decisive. **"

To strengthen the weight of the administrative presumption, there is the fact that the legislature took no steps to make any change in the terminology construed in the attorney general's opinion published in 1939. With respect to the weight to be accorded to such a construction, the court said in Union F.H.S. Dist. v. Union F.H.S. Dist., 216 Wis. 102, 106, 256 N.W. 788:

"In construing this proviso it is significant, though not of course controlling, that the attorney general of this state has repeatedly construed this law to mean that any child of
school age residing more than four miles from the school of his district may attend the school of another district notwithstanding his home district affords him transportation *. * *. Since that time two legislatures have come and gone without amending the law; this they would in all probability have done if they had deemed the opinion of the attorney general unsound * * *.

If the phrase "farm * * * machinery * * * actually used in the operation of any farm" permits of the interpretation reached by the tax department and the attorney general, that interpretation would seem to be controlling in the light of the failure of the legislature to make any change in the terminology.

The decided cases indicate that the term "farm machinery" is susceptible of a definition excluding machinery used in a commercial enterprise by hiring it out for use on farms generally. See, for instance, In re Baldwin, 12 P. 44, 45, 71 Cal. 74, in which a threshing machine owned by three farmers and used on their own farms, but also used for hire, was held not to be exempt from execution as a farming utensil. See, also, Janssen v. Empl. Sec. Comm., 192 P. 2d 606, 609, where it was held that a social security tax exemption with respect to agricultural products might be applicable to operations by a farmer but not to the same operations performed as a part of a commercial enterprise. The same distinction was recognized in Walling v. Peacock Corp., 58 F. Supp. 880, 883, with respect to the Fair Labor Standards Act, where the court said:

"** Where an employer's business regularly involves the handling of commodities grown by others, those activities are not a practice incidental to farming, even though the handling and processing of his own grown commodities would be incidental to his farming operations. * * **"

The Wisconsin court also has recognized that operations which would be included in the term "farming" when performed by an individual in the operation of his own farm, are not necessarily so classified when they are performed as a part of a commercial enterprise. See Eberlein v. Industrial Comm., 237 Wis. 555, 297 N.W. 429.
It is my opinion that farm machinery used by a corporation primarily for commercial work, on farms not operated by the corporation, is not exempt from taxation under sec. 70.111 (9).

Schools and School Districts — Reorganization — The county school committee is not precluded from entering an order under sec. 40.303 (4) by lack of consent of the school boards of the districts involved.

Where territory formerly comprising a city school district is affected by an order of the county school committee under sec. 40.303, the board of education for future operation of the district is to be provided under sec. 40.07 if the order results in such a reorganization as to abolish the city district; or under sec. 40.52 if it merely results in alteration of the existing city district.

The authority of the county school committee under sec. 40.303 to alter and consolidate districts includes power to annex one district to another.

A city involved in a school district consolidation order issued under sec. 40.303 (4), Stats., retains title to schools owned by it until divested in the manner provided by sec. 66.08, Stats.

Fred G. Dicke,
District Attorney,
Manitowoc County.

You have asked several questions about the statutes relating to consolidation of school districts.

Your first question is whether the words “and the order issued shall represent the decision reached at this conference,” in sec. 40.303 (4) (b), means that no order consolidating school districts may be issued by the county school committee without concurrence of the school boards involved in the proposed plan.

Sec. 40.303 (4) (b) reads in full:

November 2, 1950.
“(4) The county school committee shall:
“(a) * * *
“(b) Have the power, upon the petition of an elector of the county or upon its own motion, to order the creation, alteration, consolidation or dissolution of school districts within the county, subject to the referendum provisions of subsection (8) but all orders of the county school committee providing for the reorganization of school districts shall not take effect until the end of the school year except those involving one or less school districts. Before voting upon any such order it shall be the duty of the committee, at a regular or special meeting, by resolution, to provide for a public hearing on the proposed reorganization which shall be held not more than 15 days after the date of the resolution at a place within the district proposed to be reorganized or within a reasonable distance of such district. Notice in writing of the time and place of the hearing shall be served forthwith upon the clerks of the school districts affected by the proposed reorganization. It shall be the duty of the clerks of the districts affected to post notices of such hearing in 4 or more public places in their respective districts and cause such notice to be published once in a newspaper having general circulation in the area affected, not less than 10 days before such hearing. One of the notices shall be posted on the outer door of the school house. Failure of the school clerk to post such notices shall constitute malfeasance in office. Within 10 days after the hearing on any proposed plan of reorganization and prior to the issuance of any order thereon, the county committee shall hold a conference on the plan of reorganization which they propose to order with the school boards of the districts involved in the proposed plan, and the order issued shall represent the decision reached at this conference.”

The statute requires the county committee to hold a conference with the boards of the districts involved and that the order represent the decision reached at the conference. It does not specify in so many words by whom the decision is to be made, and so the question of whose decision is to govern must be ascertained by the context.

If the legislature had intended that the decision of the conference, acting as a body, should be binding, it seems likely that it would have specified whether the vote should be by a majority of the boards as units, by a majority of members present, by a majority of the members entitled to attend, by valuation, or by one of many other possible meth-
ods. Such a provision is made in sec. 66.03 with respect to adjustment of assets and liabilities, where subsecs. (5) and (6) provide in part:

"(5) The boards or councils of the municipalities, or committees, thereof selected for that purpose, acting together, shall constitute an apportionment board. * * *

"(6) * * * The apportionment may be made only by a majority of the members from each municipality who attend * * *"

See, also, sec. 40.50 (4), which reads:

"(4) Whenever a plan of reorganization which involves a city school system has been made effective either by order of the county school committee or by referendum, and a board of education of 3, 5, 7 or 9 members has been created, the city council or commission and the town chairmen and village presidents of the municipalities involved in the reorganization shall determine by the method of voting prescribed in paragraph (b) which of the following plans shall be put into operation for the fiscal control of the school affairs of the school district:

"(a) Abolish the fiscal controls of the city council or commission over the city school system and create an integrated common school district operating as an independent fiscal unit with power to tax, to hold property for school purposes and to incur indebtedness.

"(b) Provided that for fiscal control of the school affairs of the school district the several municipalities in which part of the reorganized district is located shall act with the city council or commission in the following manner: the town chairmen, village presidents and each member of the city council or commission shall have one vote for each full $200,000 of equalized valuation of the school district which is within their municipality. In the case of city council or commission members, the amount of equalized valuation per councilman or commissioner shall be determined by dividing the total equalized valuation of the city within the school district by the total number of city councilmen or commissioners. In no case shall any town chairman or village president have less than one vote. The city council or commission acting with the town chairmen and village presidents shall have the power to approve the school budget, levy the general property tax for school purposes, and all other fiscal controls now exercised by the city council or commission over city school systems. The provisions of this subsection shall not apply to cities of the first class."
The absence of such a provision in sec. 40.303 (4) (b), together with the context, indicates that the legislature contemplated that the action under such section should be by the county committee, and that the requirements of public hearing and conference were imposed to insure that the final action should be taken only after consideration of all interests and viewpoints.

Sec. 40.303 (4) (b) gives to the county committee the "power * * * to order" the consolidation of districts. Power to "order" implies authority to impose a requirement without the consent of the parties against whom the order may be directed. Recourse against the order is provided by referendum if the action should be contrary to popular will.

Provision is made in sec. 40.30 for alteration of districts by the concurrence of the governing bodies of the municipalities in which the districts are located. Sec. 40.303 was intended to set up a wholly different scheme. For these reasons, I am of the opinion that the phrase "shall represent the decision reached at this conference" means the decision of the county committee made in the light of information acquired at the conference.

Your second question relates to how the county committee could provide a board of education for a consolidated district which includes a city formerly operating as a city system under sec. 40.51, Stats.

Sec. 40.303 (4) does not authorize the committee to provide a district with a board of education. Boards of education are to be provided in the manner specified by secs. 40.07 and 40.52, Stats., as amended by ch. 566, Laws 1949, depending upon whether the district involved is governed by the laws relating to common school districts or city school districts. The statutes appear to contemplate that the county school committee shall be empowered to order reorganizations which would have the effect of abolishing a city school district and including the territory within a common school district. See sec. 40.50 (4), as created by ch. 501, Laws 1949, which relates to the subject matter of reorganization by county school committees, and must therefore be considered in connection with sec. 40.303.

It was the theory of some of the participants in the conferences which resulted in the recommendations upon which
chs. 501 and 566, Laws 1949, were based, that any reorganization which includes territory formerly operating as a city school district should automatically abolish that district and include it in a new, integrated common school district. That result would follow, if it be assumed that is the correct interpretation of the statute, only in cases where the change made by the order of the county school committee is sufficiently extensive to amount to a "reorganization"; because sec. 40.50 (4) relates only to plans of "reorganization." That term is different from those used in sec. 40.303 (4) (b) relating to the powers of the county school committee. Under sec. 40.303 (4) (b), the county committee is not authorized to "reorganize" but rather to create, alter, consolidate or dissolve districts. The term "reorganize," being different from any used in sec. 40.303, may be construed to relate only to such extensive changes as are intended to abolish all existing districts affected, and to include them in a single new district. Whether an order is such as to accomplish that result must be determined upon the facts involved in connection with a specific order.

The original Bill 284, A., upon which ch. 501, Laws 1949, was based, contained provision that the county school committee should

"(c) Have the authority to abolish any city school system if in its opinion the educational plan for the county requires the creation of an integrated common school district including substantial amounts of territory outside the city as well as the city. In city school districts where less than 80 per cent of the school population resides within the corporate limits of the city, it shall be mandatory upon the committee to abolish such city district and to create an integrated common school district."

Such provision was omitted from sec. 40.303 (4) when the law was enacted, but the provisions of sec. 40.50 (4), hereinabove quoted, were substituted. The change may indicate a legislative intent that the question whether a city school district should be abolished by any particular action of the county school committee should be determined by the substance of the action rather than by specific determination of the committee. The statute appears to contemplate, however, that a city district may be abolished and included
within a common school district, else the language of sec. 40.50 (4) (a) providing that the local officers may "create an integrated common school district" would appear to be meaningless.

It is possible for governmental functions to be carried on by one administrative unit, with a different fiscal unit to govern financial questions. It is also possible for the administrative and fiscal units to be the same. The two alternatives provided in sec. 40.50 (4) contemplate that either situation may be possible in connection with a reorganized school district.

Under the theory that an order of reorganization automatically abolishes any city district included in the territory and that a new common school district is created, the fiscal and administrative control would coincide if the alternative provided in sec. 40.50 (4) (a) were adopted; and would be separate if that provided in sec. 40.50 (4) (b) were adopted. The fact that sec. 40.50 (4) provides that the determination of the plan to be adopted shall be made after "a board of education of 3, 5, 7 or 9 members has been created" would support that theory. Unless the administrative unit has been established it would be impossible to organize a board, since it could not be known whether the board should be organized under the provisions of sec. 40.07 or sec. 40.52.

If an order of the county school committee is of such a nature that it results in "reorganization" and creation of a common school district, the first board would have to be created under sec. 40.07 by an annual district meeting called by the county committee under the provisions of sec. 40.303 (4) (c). Thereafter, a method of election might be adopted as described in sec. 40.07 (8) (b). It would be difficult to give a rule of thumb exactly defining what would amount to a "reorganization" under sec. 40.50 (4). That question can best be considered in relation to specific proposals.

Your third question is whether the fact that the legislature has limited the authority of the county school committee to "creation, alteration, consolidation or dissolution" of school districts precludes the county committee from annexing a common school district to a city district. You have pointed out that sec. 40.303 does not use the word "annexa-
tion.” If there be any restriction by reason of the omission of such term in the enumeration of the county committee’s powers, it applies to orders affecting all school districts—not only city districts—because sec. 40.303 is general in its application. The reference in sec. 40.303 (10) to governing bodies of cities, as well as of towns and villages, indicates that the legislature intended that city districts should be subject to the section, whatever its scope is determined to be.

Sec. 40.303 (4) authorizes the county school committee not only to create and dissolve new districts, but also to take action by way of “alteration” or “consolidation.” The term “consolidation” has been held to mean the same thing as annexation. Evans v. Hurlburt, 243 P. 553, 554, 117 Ore. 274. The term “alter” has been held to have a broader meaning: People v. Sassovich, 29 Cal. 480, 483; Kuhn v. Curran, 53 N.Y.S. 2d 30, 33, 183 Misc. 942.

Even if an alteration by which one whole district is attached to another be considered more precisely described as a consolidation, that would not necessarily prevent it from having the same legal effect as an annexation. See 62 C.J.S. 180–182, in which the following excerpts appear:

“The effect of a change in the territory or boundaries of a municipal corporation is to be ascertained by determining the legislative intent. * * *

“* * * Under some statutes relating to the consolidation of two municipal corporations, the name, identity, and classification of one corporation continues; it succeeds to the corporate rights, burdens, and capacities of the other corporation, which ceases to exist; and the effect is practically and substantially the same as that of the annexation of one municipal corporation to another. * * *”

In view of the broad power given to the county committee, the legislature apparently intended it to include the addition of one district to another, whether that authority be deemed to emanate from the term “alteration” or “consolidation.”

If the provisions of sec. 40.50 (4) had been intended to apply to all changes which might properly be classed as “consolidations,” the legislature would presumably have used that term instead of the term “reorganization.” The use of a different term indicates a legislative recognition.
that there might be consolidations under sec. 40.303 for which the legal effect should not be governed by sec. 40.50 (4).

The legislature appears to have intended sufficient flexibility to permit the organizational result most practicable for the specific case; so that a different administrative system might be applicable if one or two small districts were joined to a large district with extensive existing facilities than if two or three districts of comparable size and resources were joined.

Your last question relates to the effect of a reorganization involving a city school system upon ownership and control of a school building previously owned by the city.

The mere transfer of territory from one municipal entity to another does not effect a transfer of the real estate owned by the former if it continues to exist. Adjustment of assets and liabilities is to be made according to sec. 66.03, Stats. Subsec. (3) (a) of that section, which is definitive of the common law, provides:

"The title to real estate shall not be transferred except by agreement, but the value thereof shall be included in determining the assets of the municipality owning the same and in making the adjustment of assets and liabilities."

BL

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Cities—Public Officers—Compatibility—No city councilman, during the term for which he is elected, is eligible to the office of chief of a volunteer fire department. However, a person who accepts compensation as fire chief while a member of the common council does not violate sec. 348.28, Stats.

O. Strossenreuther,
District Attorney,
Shawano County.

You have requested my opinion on the following two questions: (1) Is the office of councilman of a city of the fourth class compatible with the office of fire chief of a
volunteer fire department of that city, such that one person
may hold both offices? (2) Does a person who accepts com-
ensation for services as fire chief while a member of the
common council violate sec. 348.28, Stats.?

You state that the common council of the city of Shawano
appoints the members of the police and fire commission, and
that this commission, without supervision by the council,
appoints volunteer firemen and a fire chief who receives a
salary of $40 per month plus a specified sum for each fire
call. After his appointment the fire chief was elected to the
common council and is now serving in both capacities.

Your first question is answered in the negative. Sec. 62.09
(1) (a) provides that the officers of a city include the chief
of the fire department. Sec. 62.09 (2) (b) provides in part
that "no alderman shall during the term for which he is
elected be eligible to any other city office except mayor." The statute makes no exception of the office of volunteer
fire chief.

Your second question is also answered in the negative, on
the authority of State v. Bennett, 213 Wis. 456, cited by
you in your letter.

GFS
Public Assistance—Minors—Legal Settlement—Where parents of minor children are divorced, and neither parent has legal custody, the children have no legal settlement under sec. 49.10, Stats.

An agency to which a child is committed under sec. 48.07, Stats., may not recover from a county under sec. 48.07 (6) for the support of children who have no legal settlement.

The state is not chargeable for the support of children without legal settlement, who are committed to the custody of an agency under sec. 48.07, Stats., unless the commitment is to a state agency or institution.

November 2, 1950.

ROBERT J. PARINS,
District Attorney,
Brown County.

You have asked an opinion as to the legal settlement of minor children under the following circumstances:

The parents are divorced, but neither has legal custody of the children. A court order entered in another state in 1948 gave custody to a relative of the father, and the children have resided with such relative in Brown county, Wisconsin, since that time. The relative has been receiving aid under sec. 49.19 for the care of the children throughout the period.

Legal settlement, in Wisconsin, is a status governed by statute. It does not necessarily follow the rules laid down by the courts for determination of domicile or legal residence. The terms of the statutes show that it is not contemplated that all persons residing in Wisconsin must have a legal settlement. It is possible for a person to be physically present in the state for a period of years without acquiring a legal settlement here.

The settlement of legitimate minor children is governed by sec. 49.10 (2), Stats., which reads:

"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."
Under the foregoing provision the legal settlement of minor children is wholly derivative. In the case of divorced parents, the children acquire the settlement of one or the other parent only if that parent has legal custody of them. If neither parent has custody the children have no settlement, because the statute makes no provision for it. The children would not acquire the settlement of any other relative unless the statute so provided. See 22 O.A.G. 116 and 22 O.A.G. 279.

You have also asked whether the receipt of aid under sec. 49.19 for the care of the children would prevent the father from acquiring a legal settlement under the provisions of sec. 49.10 (4). While the question does not appear to be pertinent in the situation described, since the children's settlement does not follow that of the father, we call your attention to Milwaukee County v. Waukesha County, 236 Wis. 233, and Jefferson County v. Dodge County, 236 Wis. 238. Those cases indicate that a grant of aid to dependent children prevents acquisition of legal settlement by a parent liable for their support.

You indicate that it is contemplated that custody of the children will be transferred, by order under sec. 48.07, to a child welfare agency, and you ask whether the children would be a charge on Brown county or on the state.

There is no liability on the part of either the county or the state unless it is created by statute. Sec. 48.07 (6) provides that a licensed child welfare agency to whose custody a child is committed may recover from "the county chargeable," without specifying the basis of the chargeability. The opinion was given in 29 O.A.G. 159 that the county chargeable is the county of legal settlement. The result was reached partly because of the reference to legal settlement in sec. 48.20 (4) of the statutes as it existed at that time. The provision no longer exists but a similar reference to legal settlement is found in sec. 48.18. The legislature has made no statutory change to indicate its dissatisfaction with the interpretation; although it did change the basis upon which aid to dependent children is given, from legal settlement to residence. See ch. 121, Laws 1947, discussed in 37 O.A.G. 66.

Under the statutes as heretofore interpreted, an agency could recover under sec. 48.07 (6) only from the county of
legal settlement, and if there is no legal settlement there can be no such recovery.

We find no statute authorizing an agency to collect from the state in such case. If the commitment under sec. 48.07 were made to a state institution, the chargeability would be governed by sec. 48.18. That section provides for a charge to the county of legal settlement but provides for adjustment in accordance with sec. 46.106. Under sec. 46.106 the state is charged with the support if it be found that there is no legal settlement.

BL

Collection Agencies — License — Persons holding themselves out as able to effect the collection of accounts through the use of demands made under their trade names are engaged in the business of collecting accounts and are subject to license under the provisions of sec. 218.04, Stats.

November 3, 1950.

STATE BANKING DEPARTMENT.

You have asked my opinion of the proper interpretation of sec. 218.04, Stats., which relates to collection agencies, and of its applicability to some eight businesses offering so-called collection systems for sale to merchants, business and professional men in the state of Wisconsin.

You have described these businesses in your letter of request and submitted copies of the series of forms used by each. Prior to answering the specific questions raised by each system of business, it seems desirable first to consider the scope of the statute and the nature of the business of collecting accounts covered thereby. Insofar as material herein, the applicable statute reads:

"218.04 (1) DEFINITIONS. The following terms, as used in this section, shall have the meaning stated, unless the context requires a different meaning:

"* * *"

"(f) 'Collection agency' means any person engaging in the business of collecting or receiving for payment for others of
any account, bill or other indebtedness. It shall not include attorneys at law authorized to practice in this state and resident herein, banks, express companies, savings and loan associations organized under the laws of Wisconsin, insurance companies and their agents, trust companies, or professional men's associations collecting accounts for its members on a nonprofit basis, where such members are required by law to have a license, diploma or permit to practice or follow their profession, real estate brokers, real estate salesmen and justices of the peace whose principal business is not collections.

"(g) 'Collector' or 'solicitor' means any person employed by a collection agency to collect or receive payment or to solicit the receiving or collecting of payment for others of any account, bill or other indebtedness outside of the office.

"(2) LICENSES REQUIRED. No person shall operate as a collection agency or as a collector or solicitor in this state without first having obtained a license as required by this section."

Since the term "collection agency" is specifically defined by the statute, that definition must control in the event there is any discrepancy between the business so defined and the business commonly understood or judicially defined to be that of a "collection agency."

For the purposes of illustration let us first consider the nature of the business of a collection agency in the full sense of the term. Such agency is an agent of the creditor governed by the ordinary laws of agency and authorized to take all necessary steps to effectuate payment of the account. These steps may be summarized: (1) Demand for payment either personally or by mail; (2) receipt of payment and remittance to the creditor; (3) employment of attorneys to enforce payment by legal action or use of other coercive means.

In the systems submitted by you one or both of the latter two steps are absent and it is for this reason that the question has arisen whether the particular businesses are engaged in collecting accounts within the meaning of the statute.

The demand for payment is an essential and useful function of the business of collecting. Its efficacy results in the psychological impact of the knowledge of the debtor that a third party has now intervened between himself and his
creditor, that the stage of negotiation and delay is past, and
that this third party is solely concerned with effecting pay-
ment by all available means. Experience shows that many
debtors respond to the demands of collection agencies after
ignoring all pleas by the creditor himself.

In receiving and remitting payment the agency is render-
ing an added service to the creditor, and since it is handling
funds other than its own a proper purpose of the collection
agency law is to insure that such funds will be safely
handled. This purpose is fulfilled by the provision in sec.
218.04 (3) (d) that the commissioner of banks may require
a bond in such sum as he deems necessary to protect the
public. As will appear below, the principal question herein is
whether or not the receipt of money by the agency is neces-
sary before the licensing statute becomes applicable.

In initiating and supervising legal action and accounting
for the proceeds thereof, the collection agency renders a
further service to the creditor. It has been held that the col-
lection agency guarantees to select a competent and reliable
attorney when suit is necessary, for whose negligence, dis-
honesty or unauthorized acts it will save the creditor harm-
less. McCarthy v. Hughes, 36 R.I. 66, 88 A. 984, 985. While
there is authority that the power to collect implies the right
to employ counsel and institute legal proceedings for collec-
tion, Krieger v. Title Insurance and Trust Company, 260 Ky.
1, 83 S.W. 2d 850, 854, it has been held that the word "col-
lect" of itself is not synonymous with commencement of a
legal process. Thompson v. Hazen, 25 Me. 104, 108. And in
the California statutes, unless a contrary intent is mani-
ifested "the word 'collect' and its cognates or derivatives are
clearly used to signify the obtainment of the money without
suit." People v. Reis, 76 Cal. 269, 18 P. 309, 313. Accord-
ingly it would appear that authority to forward an account
to an attorney for collection is not a necessary power of a
collection agency and may be negatived by the agreement
between the creditor and the agency.

Passing now to the specific statute under consideration
herein, its most striking feature is the fact that it governs
"any person engaging in the business of collecting or receiv-
ing for payment for others of any account." It is a cardinal
rule of statutory construction that effect is to be given to
every clause or word of a statute and no word is to be treated as unmeaning if a construction can be legitimately found which will preserve it and make it effectual. State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 515; Sedgwick Statutory and Constitutional Law, 200; Harrington v. Smith, 28 Wis. 43, 67; State v. Columbian National Life Insurance Company, 141 Wis. 557; Walter W. Oeflein, Inc. v. State, 177 Wis. 394, 188 N.W. 633.

In my opinion the clear import of the foregoing authorities is that a person engaged in a business of demanding payment of the debts of others is in fact collecting or engaging in collection agency business, even though he does not personally receive the payments on the accounts and forward them to the creditor. That is, any person who holds himself out to debtor and to creditor alike as able to effectuate the payment of accounts, and uses or allows his name to be used to gain the psychological advantage arising from the entry of a third person into the debtor-creditor relationship for the purpose of bringing pressure upon the debtor to pay his account, is engaged in collecting and is subject to the statute whether or not he receives remittances on behalf of the creditor and whether or not he has authority without more to employ counsel to initiate legal action.

We pass now to a consideration of the eight various systems which you have submitted. Some of these frankly refer to themselves as collection systems and one set of forms bears on its face evidence that the owner intends to apply for a license from your department. Others seem deliberately to avoid the word "collect" and refer to nonexistent audits and services. Others are designedly phrased and established to confuse and terrify, or couched in high sounding language with legally meaningless guarantees, fancy certificates, affidavits complete with notary's seal, and threats of a nonexistent secondary process. In six of the eight cases under consideration demand for payment is made in the name of the service or collection system under consideration. Two cases simply provide collection letters or advice which the creditor uses under his own name. The first six are subject to the statute and should be licensed. The latter two are not.
Applying the foregoing conclusions to the various systems, you are advised as follows:

**SYSTEM A**

Under this system a series of demand letters in the name of the service, couched in rather truculent language, is sent to the debtor and concludes with a threat that is carried out, that unless the account is paid it will be advertised for sale in the debtor's home community. This system guarantees that the service will collect at least $100 when used on 30 accounts. The system directs that payments be made directly to the creditor. It is my opinion that this system is subject to the collection agency licensing law. In the case of Judevine v. Benzies-Montanye Fuel & Whse. Co., 222 Wis. 512, a debtor who had been subjected to the humiliation of having his account so advertised for sale sued the creditor for damages. While the court ruled that no special damages had been proved, the opinion clearly indicates that if such special damages had been proved the creditor would be liable. A system which will subject the creditors using it to suits for special damages does not appear qualified to be licensed under the collection agency law.

**SYSTEM B**

This system consists of a set of forms which are sold to and used by the creditor. The first set consists of a series of courteously worded reminder slips, bearing no collection agency name, which the creditor simply attaches to his regular statements. The second set consists of two form letters containing an exhortation to pay and referring to a "National Creditors Rating Bureau," which if it has any existence at all is simply another name for Service B to whom the accounts are to be reported. These letters are signed and sent by the creditor, so-called "member." The second of these letters contains a threat to send a wholly imaginary "secondary process." This secondary process is best described in the words of the service itself.

"SECONDARY PROCESS. HOW DOES IT WORK?"

"A psychological reaction to the secondary process draft is that of FEAR of the UNKNOWN. It is human nature to
dread a hidden menace—as elementary a fear as that of a child's dread of the dark. The average person has never heard of secondary process. He does not know—therefore, he fears the effect it may have on his standing and reputation or on his job, or his property, bank account or other assets.”

The third set of forms consists of prepared sight drafts which apparently serve no other purpose than to intimidate a debtor ignorant of their legal significance. In addition, one series of forms offered by this System B contains printed sheets of so-called “quick action” claim slips which are nothing but slips by which an account is forwarded to the Service for the initiation of legal action. This system has in fact initiated legal action on accounts in the state of Wisconsin. In my opinion this entire system, whether or not the claim slips are used, is subject to the licensing law.

SYSTEM C

This system operates in the name of various trade “CREDIT PROTECTIVE BUREAUS.” It furnishes the subscriber creditor with a handsomely lithographed certificate in form like a stock certificate and containing the bare statement that the credit accounts are “supervised to protect against loss by the undersigned.” The creditor forwards all accounts to the service, which then proceeds to send out in the name of the Credit Protective Bureau various demand letters of increasingly strong language, the last of which is decorated with an affidavit stating that the account is due, and followed up by post cards and telegraphed demands for payment. In my opinion this system is subject to licensing.

SYSTEM D

This system consists of a coupon book of blank demands bearing in bold letters the name of the service, the statement that it is a 5-day special notice, and a warning that it is a 5-day notice before court procedure is instituted. The blanks are signed and sent out by the member of the service who is so designated on the blank. These blanks are accompanied by a listing sheet headed with the name of the service and the words “report to attorneys.” In my opinion this system is subject to licensing.
These systems operate under the trade name of an audit bureau or service bureau. System E is a coupon book with a series of twelve blank forms. Forms 1 and 2 are sent under the name of the creditor. Forms 3 to 12 carry the name of the service bureau, and are sent out in window envelopes, and may at the option of the creditor be mailed from Chicago when prepared for mailing and forwarded by the creditor. Forms 3 and subsequent, in addition to bearing the name of the service, have such captions as "Field Report," "Verification Notice," "Collection Department," "Partial Payment," and "Delinquent Notice." The service directs payment direct to the creditor and does not have any procedure for forwarding the accounts for legal action. In my opinion this system is subject to licensing.

System E1 similarly refers to a service. All letters are sent under the name of the service and refer to a mythical audit. This service directs that payments be sent to the creditor. The facts do not show whether this set of forms is mailed by the creditor or the service, but in my opinion that fact is immaterial. This system is subject to license.

SYSTEM F

This system refers to itself as a "Streamlined Collection Service," and bears on its cover evidence of an intention to obtain a license under your department. It consists of a series of four coupons, the first three of which bear the name of the service and are mailed by the creditor to the debtor. The third is called the final notice. The fourth coupon is a request to the agency for follow-up service and requests that the agency initiate legal action. In my opinion this system is subject to license.

SYSTEM G

This system offers a series of prepared form letters, designed to persuade payment and are sent out by the creditor over the creditor's name. The name of the system or service does not appear anywhere on the letter. There is no reference to any audit or threat of legal action under
the control of some third party. In my opinion the persons operating this system are just furnishing blanks for the use of the creditor and are not subject to license.

SYSTEM H

There are various agencies offering either by direct canvass of merchants or through local book stores detailed instruction books on methods of collecting accounts. The creditor must prepare his own forms and send them himself. In my opinion it is clear that the sale of an instruction book on how to collect accounts is not conducting a collection business so as to be subject to license as a collection agency.

RGT

Public Assistance—Old-Age Assistance—Lien for old-age assistance attaches only to property owned by the recipient at the time the lien is filed or thereafter acquired.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You have requested my opinion on the following questions: Does an old-age assistance lien attach where there has been a prior unrecorded quitclaim deed, said deed having been executed in good faith 11 months prior to application for old-age assistance and not being recorded until 5 years after the assistance was granted?

In my opinion the lien for old-age assistance does not attach for the following reasons:

Sec. 49.26 (5), Stats., in referring to the filing of the certificate of lien with the office of the register of deeds as required by sec. 49.26 (4), Stats., provides in part as follows:

"Upon such filing the lien herein imposed attaches to all real property of the beneficiary presently owned or subsequently acquired. **"
The italicized language unequivocally requires the present ownership or future acquisition of property which the statute contemplates subjecting to the old-age assistance lien.

In view of the manifest requirement for ownership of the property contemporary with or subsequent to the initial extension of pension privileges, it appears evident that in those instances where a bona fide conveyance has preceded the initial assistance, as in the present case, there can be no present interest in existence upon which the lien may properly attach.

The fact that the deed was not recorded until 5 years after the granting of assistance appears immaterial for two reasons: First, as you indicate in your statement of facts, the deed was executed in 1937 and was recorded in 1943. Sec. 49.26 (5) which states that the old-age assistance lien shall have priority over any lien subsequently acquired, made or recorded was not enacted in that form until 1945. Second, under sec. 235.49, Stats., an unrecorded deed is declared void only as against "any subsequent purchaser in good faith and for a valuable consideration * * * whose conveyance shall first be duly recorded." The declaration of purpose in sec. 49.20, Stats., indicates that the purpose of establishing old-age assistance is "for the more humane care of aged, dependent persons." Possession of property which can be subjected to a lien is no way a consideration for the grant of such assistance and accordingly there appears to be no room to claim that the state has extended old-age assistance in reliance upon the assumption that the person receiving the assistance had property which could be subjected to the lien. Hence the state is not in the position of a purchaser for good faith and for a valuable consideration under these circumstances, and the deed, although unrecorded, is a good conveyance between the parties. The situation, of course, would be entirely different if the deed were only colorable and executed for the purpose of defrauding the state and defeating the state's ultimate recovery under the lien law.

RGT
Barbers—Practice Regulations—Sec. 158.04 (5) (e), Stats., requiring that interior doors leading to a barber shop from adjacent rooms shall be securely locked and closed and shall not be used, cannot be interpreted as requiring such doors to be sealed and made unusable.

November 3, 1950.

STATE BOARD OF HEALTH.

Sec. 158.04 (5) (e), Stats., relating to the operation of barber shops, provides in part:

"* * * Interior doors leading to the barber shop from adjacent rooms shall be securely locked and closed and shall not be used. * * *"

You state that inspectors in the barber division of the state board of health have learned from experience that simply warning barber shop owners to keep a door locked and not to use it is an ineffectual means of securing compliance with this provision of the statutes.

Accordingly it has been the policy of the inspectors to require that such doors be sealed and made unusable. In this connection attention is directed to a somewhat similar provision in sec. 159.09 (3) of the cosmetology law which reads:

"* * * Interior doors leading to the beauty parlor from adjacent rooms shall be securely locked and closed and made unusable. * * *"

The question has been raised as to whether the administrative interpretation of sec. 158.04 (5) (e) by the department in requiring that doors be sealed and made unusable is proper.

There is a very obvious distinction between a statute requiring that a door be securely locked and closed and that it shall not be used and a statute on the other hand requiring that a door be securely locked and closed and be made unusable.

The difference in language implies a difference in the law, and if the legislature had intended that the doors referred to in sec. 158.04 (5) (e) should be made unusable it could
easily have done so by employing the same phraseology contained in sec. 159.09 (3).

While no doubt the problem of enforcement would be much easier if the door were made unusable there is no reason why a barber cannot fully comply with the requirement that the door be not used without at the same time making it unusable.

The state board of health has only such powers as are expressly granted to it or are necessarily implied and any power which it seeks to exercise must be found within the four corners of the statute under which it proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440. I find nothing in sec. 158.04 (5) (e) from which it may be implied that the board is authorized to borrow the words "made unusable" from another statute and import them into a statutory provision from which they are presently absent.

This can only be done by the legislature and if there are sound reasons why sec. 158.04 (5) (e) should contain the same provisions as sec. 159.09 (3) the legislature should be asked to make the change.

**WHR**

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**Intoxicating Liquor—Revocation of License—Words and Phrases—Gambling Device**—A pinball machine which does not contain any automatic pay-off is a gambling device under sec. 176.90, Stats., when its recorded scores are used to determine the winner of a prize given by the proprietor.

Harry E. White,  
District Attorney,  
Marinette County.

You have asked whether a pinball machine is a gambling device within the meaning of sec. 176.90 when it is operated under the following circumstances:

"The pinball machine in question does not contain any automatic pay-off nor does the machine itself contain any sign, notice or any indication of any kind to the effect that any prize or award will be given for any particular score."
“However, the proprietor of the tavern has a cheap cast metal mantel clock displayed on his back bar and informs anyone who asks him about it that that clock will be awarded to the person running up the highest score on that pinball machine during a three-week period * * *. Any person wanting to try for that prize, informs the bartender of the score made by him on the machine and all such scores are then written down in a notebook by the bartender.”

Sec. 176.90 covers “any slot machine, roulette wheel, other similar mechanical gambling device, or number jar or other device designed for like form of gambling.”

The Wisconsin supreme court has held that a pinball machine is not a game of skill but is a gambling device if it is so adjusted as automatically to return to the player anything of value, even though that thing be nothing more than free games on the machine. State v. Jaskie, (1944) 245 Wis. 398; Milwaukee v. Burns, (1937) 225 Wis. 296. In such cases the machines are gambling devices per se even though there is no proof of any gambling or betting by means of the machine.

The opinion has been given that such a machine is not a gambling device when it is used solely for amusement and there is no possibility of any return other than the game for which payment was made. 30 O.A.G. 300. The opinion was subject to the qualification that such a machine is not a gambling device “unless expressly so defined by statute or unless shown to have been used for gambling.”

It is possible for statutes to be so differently worded that the same contrivance may constitute a gambling device within the meaning of one and not within the meaning of another. The question to be decided in this case is whether the machine you have described falls within the phrase “other similar mechanical gambling device.” A pinball machine is similar to the other devices specifically named, i.e., slot machines and roulette wheels, to the extent that they are mechanical contrivances which may be so adjusted as to return winnings automatically and thus be gambling devices per se; but it is also possible that they may be the implements for determining what a player wins or loses without actually paying out the winnings automatically.
What is meant by the term "similar" was discussed in *In re Lee Tong*, 18 Fed. 253, 257, where the court said:

"* * * Cards and dice are in most respects very unlike—indeed they have no resemblance, except that they may both be used for gaming. But then anything which may be used for that purpose is so far a like device. The coin of the realm, when used to play the games of 'match,' 'heads or tails,' 'odd or even,' for money or anything of value; a long and short straw, when used to play the game of 'draw straws' for the same purpose; a 'wheel of fortune' or a 'grab-bag,' * * * are, each and all of them, so far, just as much gambling devices as cards or dice can be. In short, anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill, is so far a gambling device."

The court said in *Ah Poo v. Stevenson*, 163 P. 822, 824, 83 Ore. 340:

"The fact that an implement, such as a table, is susceptible of lawful use, does not make it, as a matter of law, impossible that the article should be a gambling implement. It was a matter of proof whether, as the game is usually actually carried on, the utensil is used as a material instrument in ascertaining whether the player should win or lose. * * *"

Sec. 370.01 (1), Stats., provides that all words and phrases used in the statutes shall be understood according to the common and approved usage of the language. The definition of a gambling device in Webster's New International Dictionary, Second Edition, Unabridged, is not limited to devices which are adapted to no other purpose than gambling, but includes "a device used in gambling." In *Mills v. Browning*, Texas Civil Appeals, 59 S.W. 2d 219, 220, the court said:

"* * * A gaming device may be (a) one which is made primarily and principally for gambling, e.g., a roulette wheel, and, this primary and principal purpose being established, no further proof of its actual use is required; or (b) it may be a device which is useful for service to law-abiding society, in which event the article itself must be shown to be actually used in gambling to constitute it condemnable. This, of course, does not attempt to limit the scope of the remainder of the article. These definitions are of long standing, and, since their announcement, the ingenuity of some
types of our citizens has devoted itself to an effort to make the former which would to a judge or jury appear to be the latter, and the law reports abound with the descriptions of them. * * *"

The case of State v. Pollnow, (Mo. 1928) 14 S.W. 2d 574, 574-575, dealt with a slot machine which was not set to make automatic pay-offs to the winner. The winner was paid by the proprietor of the establishment on the basis of the score recorded by the machine. The court in describing the machine commented that it was:

"* * * operated by putting a nickle in the slot and taking out mint or something of the kind. The machine itself, as reconstructed, did not pay the player when he won. The winner was paid by the man in whose place the machine was operated. * * *"

The court then held that: "The evidence sufficiently shows that it was a gambling device, cleverly constructed in an attempt to evade the law."

Where a device is adapted and used for the purpose of playing a game of chance for money or property, it falls within the definition of a gambling device and the courts have not been disposed to hold the device removed from a regulatory statute because of strategems invented to evade their application. In Milwaukee v. Johnson, (1927) 192 Wis. 585, 593, a slot machine was described as "a perfection of invention which attempts to conceal its true purpose," but was nonetheless classed as a gambling device. In Milwaukee v. Burns, (1937) 225 Wis. 296, 302, pinball games were described as: "machines which attempt to adhere to the letter of the law while violating its spirit." The same result was reached.

See also State ex rel. Manchester v. Marvin, (Iowa 1930) 238 N.W. 486, 487, in which the court said:

"* * * It leaves no field of doubt or debate as an arena for a contest of wit or ingenuity as to whether a gambling device may be so contrived as to conceal its essential character and yet so as to function successfully. Our own cases on this subject have been a successive consideration of ingenuous attachments intended by the inventor as a near approach to the prohibitive line. Of course, the distance from the inner to the outer side of a line is not great. But, in the
cases which have so far been brought before us, *no inventor has been able to contrive a nongambling device, which functions nevertheless as a gambling one.*” [Emphasis supplied.]

In accordance with the policy enunciated above, the court held in *People v. One Pinball Machine*, 44 N.E. 2d 950, 953, 955, 316 Ill. App. 161, that a pinball machine operated in a manner similar to that described in your question was a gambling device. The machine did not deliver any prize, or any slug or token evidencing the right to a prize, but an irregularly given right to free operation of the machine was evidenced by the score automatically recorded on it. The court said:

"* * * The argument that because the machine does not deliver slugs or tokens good for free games is equally fallacious. The situation of the player and of the proprietor of the machine is identical in either instance and as was said in *Alexander v. Martin*, supra, it matters little whether the right to operate the machine without having to deposit an additional coin was evidenced by tokens or by an automatic recorded score. * * *"

Any device which is operated in such a manner that it is the means of determining by chance whether the player is entitled to a prize, is a gambling device within the definitions above quoted. The rule is almost universally followed by the courts. The law in that respect is summarized in *State v. Sanders*, 111 S.W. 454, 86 Ark. 353, 19 L.R.A. (N.S.) 913, in which the court held that a pool table constituted a gambling device where it was understood by the keeper and the players that the loser should pay the tolls. The court said:

"Therefore only the inquiry remains whether the keeping of this pool table was the keeping of a gambling device within the meaning of § 1732 of Kirby's Digest. This exact question was raised in Texas, and the court held that the keeping of such a table would not be keeping a gambling device unless the keeper of the table had knowledge, or might, by reasonable diligence, have known, that the table was used by the players for gaming purposes. *Smith v. State*, 28 Tex. App. 102, 12 S.W. 412. It is apparent from the statement of facts here that it was a part of the game, understood by the proprietor as well as the players, that the loser was to pay the tolls of the participants of the game,
This made it a gambling game, and implicated all parties concerned. A gambling device is an instrumentality for the playing of a game upon which money may be lost or won; and the instrumentality is not necessarily intended solely for gambling purposes. 14 Am. & Eng. Enc. Law, pp. 684, 685; 20 Cyc. Law & Proc., pp. 882–884. Certain gambling devices cannot be used for any other purpose, and, when designed for that purpose alone, they may be destroyed under the ‘burning statutes.’ Garland Novelty Co. v. State, 71 Ark. 138, 71 S.W. 257. But there may be gambling devices that are no less such, although not always so used, but which, from their nature, may be used for other purposes. * * *”

The definition extends only to property actually concerned in implementing the gambling, and not to property having merely an indirect connection with it. In the case of Commonwealth v. Di Orio, (1946) 49 A. 2d 866, 867, 159 Pa. Super. 641, the court held that an automobile used by a person to pick up number plays was not a gambling device because it was not an apparatus employed for gambling in the sense that money was wagered, won or lost as a direct result of its operation. The court said:

“This automobile undoubtedly facilitated gambling, as a telephone may and as did the teletype machine in the American Telephone & Telegraph Company’s Appeal, supra. It is not, however, in its primary use, a gambling device or apparatus in the sense that roulette wheels, slot machines, etc., are. Nor did its use determine a winner any more than an instrument used in the transmission of messages.

“The appellant relied largely upon cases holding that money, when it forms an integral part of a gambling transaction, may be subject to forfeiture, citing Rosen v. Superintendent of Police LeStrange et al., 120 Pa. Super. 59, 181 A. 797; Fairmount Engine Co. v. Montgomery County, 135 Pa. Super. 367, 5 A. 2d 419; and Commonwealth v. Petrillo, 158 Pa. Super. 354, 45 A. 2d 404. In those cases we stated that money ordinarily is not an instrument of gambling, but it may be under certain circumstances, for instance, in betting on the toss of a coin, but usually it is a stake or profit rather than an instrumentality, device, or apparatus used for that purpose; but that money may be subject to seizure, along with contraband gambling devices, apparatus, or instruments, when it is clearly apparent it ‘formed an integral part of the illegal gambling operation. * * *’ The
automobile was not used or employed in the sense that money may be used. It was not to be staked, won or lost as the direct result of its employment or operation."

The pinball machine in the circumstances you have described is actually used to determine the winner on the basis of chance.

BL

Taxation—District Attorney—Duties—The provision of sec. 74.12 (1), Stats., requiring the district attorney to prosecute actions for collection of taxes is not limited to actions brought in the name of the county.

Kenneth L. Swanson,
District Attorney,
Pierce County.

You ask whether a district attorney has any duty to represent towns, cities and villages in proceedings for the collection of personal property taxes under sec. 74.11, Stats. You refer to sec. 74.12 (1) which provides in part:

"* * * It shall be the duty of the district attorney upon request to attend and prosecute any action or proceeding commenced under any of the provisions of this chapter for the collection of a tax."

You have suggested that the quoted provision may be construed as applicable only to actions brought by the county; and that if it is otherwise construed it is in conflict with sec. 74.11 (6) which makes specific provision for the district attorney to appear and try the action on appeal from justice court whenever requested by the treasurer so to do, which you believe impliedly negates his obligation to participate in the proceedings prior to appeal.

The provision for participation by the district attorney upon appeal from justice court, which is now contained in sec. 74.11 (6), was in the statutes prior to the enactment of the provisions now contained in sec. 74.12. See sec. 1105, Rev. Stats. of 1898. The provisions of sec. 74.12, under

November 4, 1950.
which the district attorney is required upon request to prosecute "any action or proceeding commenced under any of the provisions of this chapter," were not incorporated into the statutes until the enactment of ch. 380, Laws 1903, entitled "AN ACT for the better collection of taxes." The provisions enacted by that law have continued in the statutes in substantially the same form to the present day, except for amplification to facilitate collection by authorizing attachment proceedings as well as actions of debt. The legislative intent to provide for "better collection of taxes" by making the services of the district attorney available to collection proceedings other than those described in sec. 74.12 is indicated by its use of the phrase "any action or proceeding commenced under any of the provisions of this chapter." The terms "chapter" and "section" refer to entirely different statutory divisions. See sec. 370.02.

Generally speaking, the district attorney's primary functions are to represent the county and the state, as was stated in the opinion in 24 O.A.G. 39. It was also there recognized, however, that additional duties may be imposed by a particular statute. It was pointed out in 25 O.A.G. 549, 558, that the legislature may make it the duty of the district attorney to give service in connection with enforcement of a law which is primarily administered by city officials.

The legislature, at the time it enacted the provisions now included in sec. 74.12, apparently intended to expand the duties of the district attorney beyond actions commenced by the county, on the theory that whatever governmental subdivision was engaged in the collection of personal property taxes was acting not only in its own behalf but as a collecting agency for the other subdivisions participating in the revenues.

The legislature has made no different provision for the case in which the town, city or village is collecting the tax wholly in its own behalf, by retaining the delinquent roll under sec. 74.081 (10) and 74.19 (3) (b) instead of returning it to the county. If that is the result of oversight, such oversight can be remedied only by legislative action.

BL
Juvenile Court — Judge — Salaries and Wages — County may change salary of judge of juvenile court designated under sec. 48.01 (2) (b), Stats., under sec. 59.15 (2), Stats.

November 4, 1950.

Leary E. Peterson,
District Attorney,
Crawford County.

You inquire whether the county board of supervisors of Crawford county at its November session could appropriate an additional sum pursuant to sec. 59.08 (6), Stats., and in this way allow the county judge, by virtue of his office as juvenile judge, additional compensation.

You state the county board adopted, on November 10, 1948, the following resolution:

"Resolved by the County Board of Supervisors of Crawford County, Wisconsin, now in session that the salary of the County Judge for said Crawford County for the next ensuing term beginning in January 1950 shall be and is hereby fixed at the sum of $3800.00 Thirty-eight Hundred Dollars per year for said term, payable in twelve equal monthly installments in each year of said term.

"Be it further resolved, that the said salary is to cover the compensation for services rendered as County Judge, as Judge of the Juvenile Branch of said Court and as compensation for services rendered as the Justice Court Branch of the County Court and the Circuit Court Branch of the County Court."

You note subsec. (6) of sec. 59.08 of the statutes which provides:

"The county board may appropriate annually for the benefit of, and pay over to any judge of a juvenile court, appointed or designated in pursuance of the provisions of subsection (1) of section 48.01, a sum of money as compensation for the additional services rendered by such juvenile judge."

The revisor of statutes here concurs in my view that the reference in sec. 59.08 (6) to sec. 48.01 (1) ought to be to sec. 48.01 (2) (b); since it does not involve any question of construction, I conclude the error in the reference may be disregarded herein, secs. 35.21 and 43.08, Stats.
At subsec. (2) (b) of sec. 48.01 of the statutes, the legislature has provided the manner in which the judge of juvenile court shall be designated:

"The judges of the several courts of record in each county of this state shall at intervals of not less than one year designate one or more of their number whose duty it shall be to hear at such places and times as he or they may set apart for such purposes all such cases; and in case of the absence, sickness or other disability of such judge, he shall designate a judge of any court of record whose duty it shall be to act temporarily in his place. Such court shall be known as the juvenile court. This paragraph (b) shall not apply to counties having a population of 500,000 or more."

At subsec. (1) of sec. 59.15 of the statutes, the legislature has provided for the compensation of elective officials and at subsec. (2) of sec. 59.15 for the compensation of appointive officials.

At sec. 59.15 (2) the statute provides that the powers conferred therein shall be in addition to all other grants of power and shall be limited only by express language.

In 18 O.A.G. 621, 623, an opinion was rendered that the constitutional provision, sec. 26, art. IV, is not applicable to one whose salary is not paid out of the state treasury. In 24 O.A.G. 816, an opinion was rendered that the constitutional provision did not govern changes in the salary of a juvenile judge.

In 29 O.A.G. 139, 140, an opinion was rendered that art. IV, sec. 26 of the state constitution is not applicable to the compensation of a public officer such as county judge.

In 29 O.A.G. 464, an opinion was rendered in which Sieb v. Racine, 176 Wis. 617, was cited to the proposition that the constitutional provision applies only to public officers whose salaries are paid out of the state treasury.

I conclude that the county board may accomplish the proposed change and provide the additional compensation for the judge of juvenile court. You may wish to prepare a new resolution for the board implementing the resolution of November 10, 1948.

MLR
Public Welfare Department—Foster Homes—Under sec. 48.38, Stats., the state department of public welfare cannot require that a permit be issued to a home in which fewer than four children are received for control and care for a period of less than 24 hours a day.

November 10, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

Your letter submits the following question: Can the state department of public welfare under sec. 48.38 of the Wisconsin statutes require that a permit be issued to a home in which a child is received for control, care and maintenance for a period of less than 24 hours a day?

Sec. 48.38 (1) provides as follows:

"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, and

"(b) That the parents (natural or adoptive) or guardians of such children are not resident in the same home. No more than four children may be placed in a foster home unless all are in the relationship to each other of brother or sister."

An examination of the history of this statute reveals that this section was enacted in 1929 and it has remained in substantially its present form in those respects which are relative to your question. The portion of this statute to which your question relates has not been interpreted either by our supreme court or by this office, with the exception of an informal opinion rendered to your department on December 29, 1941, in which it was stated that this section did not apply to the type of situation about which you ask. Ever since the enactment of this statute, both before and after the rendering of this informal opinion, the practical construction of the statute has been to the effect that it did not apply to the type of situation about which you are asking, namely, a home in which a pre-school child is received for care and supervision for part of a day while the mother is
working or shopping. In such a case the person with whom the child is left would have temporary control and care of the child but would not be maintaining it.

In 1949 the legislature enacted sec. 48.50 which regulates child care centers, day nurseries and nursery schools where children are cared for and supervised for more than 2 hours but less than 24 hours per day. However, this statute explicitly excludes any such place where less than 4 children are cared for and supervised.

Considering the enactment of sec. 48.50 and considering the fact that sec. 48.38 (1) uses the phraseology "control, care and maintenance," it is my opinion that the state department of public welfare is not authorized to require a permit for a home or other place where fewer than four children are left for a period of less than 24 hours per day.

GFS

Counties—Highways and Bridges—Weight Restrictions—Secs. 59.07 (11) and 85.84, Stats., do not provide counties with authority to enact ordinance permanently restricting weight loads on highways maintained by counties below that specified in secs. 85.47 and 85.48. Sec. 85.54 grants authority to restrict weight limits on highways for a reasonable period of time.

JOHN A. MOORE,
District Attorney,
Winnebago County.

You have called my attention to the fact that the statutes pertaining to highways allow only two classifications "A" and "B" to be made. Class "B" roads are restricted to lower weight loads than "A." See secs. 85.47 and 85.48. Sec. 85.46 provides authority for the county highway committee to classify roads maintained by the county providing such highway is not a U. S. or state highway.

November 13, 1950.
You state that a certain highway in your county cannot carry loads allowed under Class "B" restrictions and that the county board proposes to restrict the weight limit on this highway below the present statutory limit. You further state that it is contemplated that this ordinance is to be a permanent and not a seasonal restriction. You desire to know whether or not the county board possesses authority to enact this ordinance.

It is my opinion that such ordinance would be invalid. Counties have only such power as is expressly conferred upon them by statutes or necessarily implied from those powers expressly given. If there be a fair and reasonable doubt as to an implied power, it is fatal to its being. Dodge County v. Kaiser (1943), 243 Wis. 551, 557. The powers of the county relating to regulation of highway weight limits are fully set forth in several sections of ch. 85 of the statutes. Although sec. 59.07 (11) empowers the county to enact ordinances regulating traffic on highways maintained at the expense of the county and state or either thereof, this must be considered with sec. 85.84 which prohibits local authority from enacting legislation inconsistent with the provisions of ch. 85 of the statutes. See State ex rel. Keefe v. Schmiege (1946), 251 Wis. 79, where such interpretation was given.

It is my opinion that by the classifications of state and county highways as "A" and "B" the legislature intended to set up minimum highway building standards. This law was originally enacted as ch. 537, Laws 1921. It represented an important step in unifying and modernizing the highway system of this state by removing a hodgepodge of confusing local rules and restrictions. What is proposed here would represent a step backward in the field of highway development.

Your county is not without adequate means to protect the present highway, which causes concern, until it can be repaired. Sec. 85.54 provides in part that highways maintained by the county may be restricted by the county highway commissioner "whenever the public interest so requires by erecting gross weight limitation signs on or along the highway upon which the gross weight is so restricted sufficient to give reasonable notice that such
restriction is in effect. All gross weight limitation signs shall be standard as prescribed by the state highway commission." Violation of the weight restrictions imposed under authority of this section are punishable by a fine of not less than $50 nor more than $100 for the first offense and by a fine of not less than $100 nor more than $200 or by imprisonment for not less than 10 days nor more than 30 days or both such fine and imprisonment. See sec. 85.91 (2a).

I do not believe that weight restrictions imposed under sec. 85.54 may be used as a permanent measure. When this law was originally enacted in 1921 it read:

"* * * The officers of any municipality charged with maintaining its highways may suspend for a period the right to haul any loads destructive to any highway in case the public interest shall at times require such suspension, by giving notice of such suspension in the public press or by posting a notice of such suspension in which notice shall be specified the total weight of vehicle and load combined allowed for the specified period upon and along the highway upon which traffic is to be so limited. * * *"

There have been a number of revisions of the law since that time but none indicates that the power to restrict below Class "A" and "B" limits is other than temporary. This is also borne out by the fact that sec. 85.54 is headed "Seasonal Restrictions," although the right to restrict load limits may be invoked "whenever the public interest so requires."

REB
Secretary of State—Corporations—Merger—Filing Fee

The fee paid by a foreign corporation on its capital employed in Wisconsin cannot be credited to another foreign corporation into which it merges.

November 14, 1950.

Fred R. Zimmerman,
Secretary of State.

You have advised that on August 20, 1948 J. Laskin & Sons Corporation was licensed in Wisconsin as a foreign corporation. At that time the corporation paid a fee of $600 based on an estimated proportion of capital in Wisconsin amounting to $600,000.

On September 19, 1949, J. H. L. Co., Inc. was licensed in Wisconsin as a foreign corporation and in connection with such licensing it paid a fee of $25.

In September 1949, the above corporations were merged under the laws of the state of Delaware and J. H. L. Co., Inc., became the surviving corporation. A certified copy of the merger was duly filed in your office on October 3, 1949.

In merging, J. H. L. Co., Inc., which was the surviving corporation changed its name to J. Laskin & Sons Corporation. This latter corporation has submitted an annual report pursuant to the provisions of sec. 226.04 which shows that the proportion of its capital stock represented in Wisconsin is in excess of the $25,000 upon which this corporation has paid a fee.

You asked for an additional fee based upon the amount of such excess but the corporation contends that it is entitled to credit for the aggregate amount of fees paid by the merging corporations.

You have requested an opinion from this office as to whether the fee paid by a foreign corporation on the proportion of its capital in Wisconsin can be credited to another foreign corporation into which it merges.

Sec. 226.04 provides:

“(1) CONTENTS, FILING FEES. Every foreign corporation transacting business in this state shall annually, between the first day of January and the first day of April, file with the secretary of state a report signed by its president, sec-
retary, treasurer or general manager as of the first day of January, which shall state:

"(e) The proportion of the capital represented in Wisconsin by its property located and business transacted therein during the preceding year. The proportion of capital employed in the state shall be computed by taking the gross business of the corporation in the state and add the same to the value of its property located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of its total gross business of said year added to the value of its entire property. The fraction so obtained shall represent the proportion of the capital within the state. ** *

"(f) The corporation shall pay a fee of two dollars for filing such report, and, in case said report shows that it employs in this state capital in excess of twenty-five thousand dollars, it shall pay an additional fee which with previous payments will amount to one dollar for each one thousand dollars of such excess.

"** **"

The corporation has referred to sec. 181.06 which provides in part:

"(1) PROCEDURE FOR MERGER. Any 2 or more corporations may merge into one of such corporations in the following manner: ** **"

Thereafter the statute specifies the procedure which must be followed by two or more corporations in order to accomplish a merger. Subsec. (8) of said section provides "When such merger ** has been effected:

"(a) The several corporations, parties to the plan of merger ** shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation **.

"(b) The separate existence of all corporations, parties to the plan of merger ** except the surviving ** corporation, shall cease.

** **

"(d) Such surviving ** corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, of each of the merging ** corporations; ** and all and every other interest, of or belonging to or due to each of the corporations so merged ** shall be taken and deemed
or be transferred to and vested in such single corporation without further act or deed * * *.”

The articles of merger which were filed with you specifically state that J. H. L. Co., Inc. “shall be the surviving corporation.” The present J. Laskin & Sons Corporation which survived the merger under the name of J. H. L. Co., Inc. contends that under sec. 181.06 (8) (d) it is entitled to receive credit for the $600 paid by the original J. Laskin & Sons Corporation in determining the fee which it must pay upon its capital in excess of $25,000 under sec. 226.04 (1) (f).

The benefits conferred upon a surviving corporation under sec. 181.06 (8) (d) accrue only in cases where the procedure provided by sec. 181.06 (1) to (7) is applicable and has been followed.

In the case of St. Louis Cotton Compress Company v. Arkansas, 260 U.S. 346, the United States supreme court said “It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside.” (p. 349)

Since J. Laskin & Sons Corporation and J. H. L. Co., Inc. were Delaware corporations, the merger of the former into the latter was accomplished outside of the state of Wisconsin. It does not appear whether any attempt was made to follow the procedure provided by sec. 181.06. There can be no merger of independent corporations in the absence of legislative authority. Evangelische Luth. St. Thomas Gemeinde v. Congregation German Evang. Luth. St. Matthews Church of Milwaukee, 191 Wis. 340, 210 N.W. 942, 50 A.L.R. 113. Wisconsin Electric Power Co. v. Wisconsin Department of Taxation, 251 Wis. 346, 29 N.W. (2d) 711. However, under the St. Louis Cotton Compress Company case, supra, the state of Wisconsin could not regulate the procedure which two foreign corporations must use in accomplishing a merger outside of this state or authorize such a merger.

Ch. 181 of the statutes is entitled “Domestic Corporations.” Sec. 181.06 is too long to quote in full, but an examination of that section, and particularly subsec. (9) thereof, indicates that subsecs. (1) to (8) were never intended to apply to a merger by two or more foreign corporations.
The articles of merger specifically provided that J. Laskin & Sons Corporation merged into J. H. L. Co., Inc. Although the articles of merger also provided that the name of the surviving corporation should be changed from J. H. L. Co., Inc. to J. Laskin & Sons Corporation, the surviving corporation is in fact the J. H. L. Co., Inc., which paid the $25 fee on its capital employed in Wisconsin and not the J. Laskin & Sons Corporation which paid the $600 fee on its capital employed in Wisconsin.

In *Wisconsin E.P. Co. v. Department of Taxation*, 251 Wis. 346, the supreme court decided that in the absence of "a specific and unambiguous provision" in the statutes a tax deduction privilege of a merged domestic utility corporation did not pass to the surviving corporation. While the present Wisconsin statutes controlling the procedure for and effect of mergers generally are different from the statute considered in that case, there is no provision anywhere in the statutes specifically and unambiguously authorizing a foreign corporation which is the surviving corporation in a merger carried out under the law of another state, to take credit for the fees previously paid by the merged corporation.

Since this is true, it is my opinion that the J. H. L. Co., Inc. must pay the additional fee upon its capital in excess of $25,000 which it employs in this state.

JRW
TEF

**Automobiles and Motor Vehicles—Registration—Courts**
—Owner of a truck of a gross weight in excess of that at which it is registered should be required by order of court to effect a proper registration.

Motor Vehicle Department.

You call attention to sec. 85.01 (4) (j) with specific reference to a truck with an actual gross weight in excess of that at which it is registered. You inquire as to the power of the judge to require the proper registration to be effected.
Sec. 85.01 (4) (j) is entitled "Fraudulent registration" and provides, among other things, that if the gross weight of a vehicle is greater than that at which it is registered, "the owner thereof shall be required to register the same in conformity with the actual gross weight of the vehicle and shall pay only the additional fee required for the increased carrying capacity of the vehicle." It provides that in addition the penalties provided in subsec. (12) (specified fine or jail sentence or both) may also be imposed.

This section should be read in the light of sec. 85.01 (1), which provides in part that an operator of an unregistered vehicle may be arrested and brought before any judge of a court of record or justice of the peace. "Such judge or justice shall impose the penalty provided by subsection (12), and in addition require such person to make application for registration and pay the fee therefor, and §2 in addition thereto. Such judge or justice shall forthwith forward such application and fee to the motor vehicle department."

This latter provision was considered in an opinion of the attorney general (16 O.A.G. 385). It was suggested that the court make an order requiring defendant to make the application and pay the fee into the court, and that upon failure to comply the defendant may be punished as for a contempt of court.

I call your attention to the fact that in the situation covered by sec. 85.01 (1), absence of registration, the court may require any operator of the vehicle to make the application, but in the situation covered by sec. 85.01 (4) (j), fraudulent registration, the court has the power only with respect to the owner.

Accordingly, where the owner of the vehicle is a defendant properly before the court, the court, whether or not a penalty is imposed, ought to make an order requiring such defendant to make a correct registration and pay the additional fee. Failure to comply may be punished as contempt of court. See sec. 256.03 (3) in the case of a court of record and sec. 300.08 (2) in the case of a justice of the peace.

TEF
Municipalities—Automobiles and Motor Vehicles—Speed Limits—Parks—Sec. 85.40 (3) (b), Stats., applies to roadways within municipal parks. A municipality may not establish a maximum speed limit of lower than 25 miles per hour on such roadway within a municipal park without the approval of the highway commission.

November 17, 1950.

STATE HIGHWAY COMMISSION OF WISCONSIN.

You request my opinion as to whether or not the city of Racine may, without the approval of the state highway commission, establish a speed limit lower than 25 miles per hour on certain roadways in municipal parks in view of the provisions of sec. 85.40 (3) (b). Sec. 85.40 (3) (b) reads as follows:

"Local authorities may increase speed limits as provided by this section, but may not decrease speed limits set forth in subsection (1) (a), (b), nor increase the speed limits set forth in subsection (1) (g) and (h), nor establish speed limits at any location set forth in subsection (2) without the approval of the state highway commission, nor shall signs giving notice thereof be erected before such approval."

Sec. 85.40 (1) (a) and (b) reads as follows:

"(1) Except as otherwise provided in this section, the speed of any vehicle shall not be in excess of the following:

(a) 25 miles per hour in any business or residence district.

(b) 35 miles per hour in outlying districts within any city, village or unincorporated village where on each of both sides of the highway there is an average distance of not less than 500 feet between buildings fronting thereon."

Sec. 85.40 is one of the sections of ch. 85 which are expressly subject to the definitions set forth in sec. 85.10. It is also subject to the guide as to interpretation expressed in sec. 85.86. This latter section provides as follows: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the traffic law of this state, and of all local units of government." With that
guide in mind, it is clear that the regulation of speed on municipal park roadways is subject to all the requirements of sec. 85.40 (1) (a), (1) (b) and (3) (b).

Sec. 85.10 (21) (a) defines "highway" as follows:

"A highway is every way or place of whatever nature open to the use of the public as a matter of right for the purposes of vehicular travel. The term 'highway' shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions."

It is clear that this definition covers any municipal park roadway when open to vehicular traffic either of all the public or any proper classification thereof.

The supreme court in Kernan v. Eau Claire, (1939) 232 Wis. 587, decided that a vehicular driveway which is constructed by the park authorities and not by those authorities to whom the laying out of roads and streets is delegated by statute and which has not been used as a public road, is not a highway within the meaning of the term as used in sec. 81.15, Stats. The statute dealt with by the supreme court in that case relates to liability for damage caused by defects in highways. The scope of the rules set forth in ch. 85 for the regulation of traffic was not considered by the supreme court and in my opinion the decision does not restrict their scope.

It may be helpful to reflect that a number of other traffic rules would be inapplicable to park roadways if considered not to be highways: Obedience to traffic officers and signs, intoxicated persons prohibited from operating vehicles on highways, giving information and aid after accidents, passing, turning, right-of-way, parking or stopping regulations, and many other similar and important provisions. TEF
Automobiles and Motor Vehicles—Licenses and Permits—Driver's License—Sec. 85.08 (25) (c), Stats., providing for revocation of license of an operator convicted of any felony in the commission of which a motor vehicle is used includes a conviction for statutory rape committed in an automobile while parked away from the highway.

Motor Vehicle Department.

You ask whether sec. 85.08 (25) (c) relating to mandatory revocation of operators' licenses applies where a motor vehicle was driven from a highway on to private property where a felony (statutory rape) was committed, and then back on to the highway. Sec. 85.08 (25) provides in part:

"Whenever an operator is convicted under a state law * * * the commissioner shall forthwith revoke the operator's license and the motor vehicle registration plates, registration certificate, registration plate inserts and windshield regulation stickers of such operator upon receiving the record of such operator's conviction of any of the following offenses when such conviction has become final:

"* * *

"(c) Any felony in the commission of which a motor vehicle is used;

"* * *"

The question is whether the laws are to be so interpreted as to provide for license revocation only for offenses in which motor vehicle operation is an essential factor; or whether the statute should be more broadly interpreted to require a revocation for a felony in which an automobile was involved incidentally.

Certain aspects of motor vehicle regulation are grounded, solely or primarily, upon public safety; others may take into consideration different phases of the public welfare. A provision for revocation of licenses of persons convicted of crimes unrelated to operation of vehicles would be in the latter class. The latter type of provision was discussed in Glass v. State Board of Public Roads, 44 R.I. 54, 115 A. 244, in which a license was revoked on
the basis that the licensee was a receiver of stolen goods and, consequently, unfit to hold a driver's license. The receipt of the stolen goods did not involve the operation of the motor vehicle. The action of the officials who revoked the license was held unwarranted because of lack of sufficient evidence of the offense, but the court recognized that the revocation would have been proper if the offense had been proven. The court said (p. 246):

"* * * It is conceded that, if the automobile is used in the commission of crime, the license of the operator may properly be revoked. But we do not think it was the intention of the Legislature to compel the Board to refrain from action until the licensee had actually made use of his automobile in the commission of crime. By section 13, c. 345, Gen. Laws, it is provided that the receiver of stolen goods shall be deemed guilty of larceny; in other words, he is considered a thief and is punished as such. We think that a thief should not be permitted to operate an automobile; for as long as his character remains unchanged the danger of his making unlawful use of the automobile is such that the privilege should be denied to him. * * *"

Whether the Wisconsin law is to be interpreted in a manner similar to that involved in the foregoing case must be determined from the language of the specific provision and of related provisions. The language of sec. 85.08 (25) (c) is broader than that of other provisions relating to revocation of licenses. Most of the other provisions refer expressly to "operation" of the vehicle. Para. (a), for instance, refers to homicide "resulting from the operation" of a vehicle. Para. (b) refers to "operation of a motor vehicle" while under the influence of intoxicating liquor, etc. Para. (c) uses entirely different language, by referring to any felony in the commission of which a motor vehicle is used.

Under sec. 370.01 (1) the terms used in a statute are ordinarily to be understood according to the common usage. The term "used" is sometimes employed to refer to habitual or customary use; but such meaning would not be appropriate to the terms used in paragraph (c) because they are couched in the singular and deal with "any" felony. The term "use" is defined in Webster's New International Dictionary, Unabridged, Third Edition:
"To convert to one's service; avail oneself of; to employ; as, to use a plow, a chair, a book; * * *.”

If one may be said to be using a chair by occupying it, it would seem that an automobile may be said to be in use if it is occupied, even though it is not being operated.

In Buell v. Indian Refining Co., 62 Ohio App. 108, 23 N.E. 2d 329, 331, the court referred to the comment upon the meaning of the word “use” in 66 C.J. 65, saying:

"* * * It is said that it is one of the most comprehensive words in our language and may be used in many senses. It is said that its primary meaning as a noun is ‘the act of employing anything, or the state of being employed; the act of employing anything, or of applying it to one's service.’ In Smith v. Cameron, 106 Or. 1, 210 P. 716, 27 A.L.R. 510, its secondary meaning is said to be synonymous with ‘advantage.’ * * *”

For cases holding that a vehicle is “used in” a certain activity if it is employed in relation to it: Seay v. Com., 152 Va. 982, 146 S.E. 198, 199, 61 A.L.R. 997; U.S. v. One Dodge Sedan, 28 F. 2d 44, 45; In re Ford Sedan, 26 F. Supp. 146, 148.

Similarly the other terms used in sec. 85.08 (25) (c) are comprehensive. Reference is made to “any” felony. The provision relates to a felony “in” the commission of which a vehicle is used rather than one “for” which it is used. Although the words “in” and “for” may be used to mean very nearly the same thing, the word “in” is susceptible of broader definition. Webster’s New International Dictionary includes among the definitions for “in”:

“Indicating relation to a whole which includes the part spoken of; * * * Indicating close connection by way of implication or active participation.”

It was recognized in the two following cases, involving the forfeiture of automobiles under the national prohibition act, that the term “used in” is broader than that “used for.” United States v. Vottiero, 25 F. (2d) 346, 347; United States v. Berger et al., 22 F. (2d) 867.

In the latter case, the court said:

“The language of the statute, ‘used for unlawful sale,’ might upon a strict construction be held to refer only to
sales completed in the dwelling. But the expression has also a wider signification and may mean 'used in the business of selling liquor unlawfully,' as the basement of a shop may be said to be used for selling goods, though no contracts of sale are made there. This interpretation of the statute gives to its expression 'for the sale' a meaning equivalent to 'in connection with the sale.' * * *"

The legislature has more generally used the term "for" in statutes defining crime on the basis of the use to be made of property, as, for instance, in connection with equipment used "for" gambling. See secs. 348.07, 348.08, 348.09, 348.092 and 348.11. See also the following statutory sections in which other phraseology is employed in connection with the word "use" which would seem to call for a closer relation between the property and the unlawful purpose: secs. 343.723, 346.17, 347.18, 348.271 and 348.402.

The contrast in the terminology in sec. 85.08 (25) (c) seems to indicate that the legislature had considerations involving general phases of public welfare beyond safety of operation. That is also borne out by sec. 85.08 (6) (i) in which an operator's license is not to be issued when the commissioner has good cause to believe that operation of a motor vehicle by the applicant would be inimical to the public safety or welfare.

BL

Taxation—Motor Carriers—Transportation of seed corn from a processing plant to another plant or to market held under the particular facts not to be exempt from ton mile tax under sec. 194.47 (5) (b), Stats. Whether the specially processed seed corn is an "unmanufactured agricultural product" not determined.

November 18, 1950.

Edward J. Morse,
District Attorney,
Grant County,

You request my opinion upon the question of whether the transportation of seed corn is an exempt operation by virtue of sec. 194.47 (5) (b), Stats., under the following statement of facts which I quote from your letter:
"The driver of a truck owned by Pride Hybrid Company of Glen Haven, Wisconsin, was transporting seed corn grown in Illinois to the Glen Haven, Wisconsin plant.

"The corn was consigned to the Pride Hybrid Company by the Iowwealth Company, a subsidiary of the Pride Hybrid Company located in Illinois. It had been grown from special seed provided by the company in Illinois under a grower contract which provided, among other things, that the corn was the property of the company and not the grower, and that the grower was paid merely for his services and the use of his land.

"After harvesting, the corn was taken to a drying plant operated by the Iowwealth Company where it was partially dried and was then shipped to Pride Hybrid Company at Glen Haven for further processing and additional treatment to make it drought resistant. After such treatment it would then be marketed to the farmers as hybrid seed corn.

"In some cases the corn would have some additional treatment other than drying before shipping to the Pride Hybrid Company but not in the instant case."

Your questions are (1) is the seed corn an "unmanufactured agricultural product," (2) does the phrase "immediately and directly from point of production" modify the last antecedent, "manufactured or burned clay or burnt limestone products," or does it modify the whole enumeration of "butter, dairy products, or unmanufactured agricultural or forest products, * * *" and (3) if it be concluded that the phrase modifies the whole enumeration, where is the "point of production" of the seed corn under the facts presented?

You state it to be your conclusion that the seed corn is an unmanufactured agricultural product, and that it is "produced" at the Glen Haven, Wisconsin plant. You regard the transportation operation between the Illinois plant and the Wisconsin plant and the transportation operation from the Wisconsin plant to market as being tax exempt.

I have concluded as follows: (1) The "point of production" of the seed corn is the farm where it is grown. (In this case it is in Illinois, two steps remote from the Glen Haven plant.) (2) The phrase "immediately and directly from point of production" modifies each of the items enum-
erated, and application of the rule of modification of "last antecedent" defeats rather than aids the discovery of the legislative intent.

These conclusions were reached after a careful study of secs. 76.54 (16), Stats. 1933, 76.54 (16) (d), Stats. 1935, 194.47 (5) (b), Stats. 1937, 1939, 1941, 1943, 1945, 1947 and 1949. To quote them at length would lengthen this opinion unnecessarily. I submit that tracing the development of the present exemption statute through the years mentioned will amply demonstrate that the concept of limiting the exemption to farm or agricultural products between the point of production and primary market has been preserved. It was in the statute before the exemption was extended to include manufactured or burned clay or burnt limestone products. See 38 O.A.G. 360.

The term "point of production" has been construed in the case of Wis. Truck Owners Asso. v. Public Service Comm., 207 Wis. 664, 679–680. Our supreme court in that case approved a construction adopted by the public service commission which reads:

"Point of production—The term "point of production" which is used in this exemption is not difficult of interpretation. It means the farm where the * * * agricultural products are raised * * *." (Last italics ours.)

If there was an ambiguity in the meaning of the term "point of production" as regards agricultural products, it has been wholly removed by the opinion in the Wisconsin Truck Owners Association case, supra, when the court adopted the public service commission's definition. The court's construction became as much a part of the statute as if plainly written into it originally. See Milwaukee County v. City of Milwaukee, 210 Wis. 336, 341. Nor can an ambiguity be created by attempting to stretch the statute to cover a doubtful situation. The statute in question granting the favor of an exemption, the person claiming the exemption must bring himself plainly within its terms. Bowman Dairy Co. v. Tax Comm., 240 Wis. 1, 5.

Since the Glen Haven plant is not deemed to be the "point of production," it is unnecessary to determine whether the processing of the corn constitutes a manufac-
Automobiles and Motor Vehicles—Safety Responsibility Law—Upon claim for refund of deposit of security under sec. 85.09 (10) (c), Stats., claimant must satisfy commissioner of motor vehicle department that no action was instituted within the one-year limitation referred to in secs. 85.09 (7) (b) and (10) (c), Stats., to which claimant was made a party within the one-year period of limitation.

Motor Vehicle Department.

In the administration of the so-called "safety responsibility law" contained within secs. 85.09 (5) through 85.09 (16), Stats., you are required to interpret the language which has been italicized in the following quoted subsections:

"(7) The license and registration and nonresident’s operating privilege suspended as provided in subsection (5) shall remain so suspended and shall not be renewed nor shall any such license or registration be issued to such person until:

"(b) One year shall have elapsed following the date of such accident and evidence satisfactory to the commissioner has been filed with him that during such period no action for damages arising out of such accident has been instituted; or

"(10) CUSTODY, DISPOSITION AND RETURN OF SECURITY.

"(c) Such deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the commissioner has been filed with him that there has been a release from liability, or a final adjudication of nonliability, or a warrant for confession of judgment or a duly acknowledged agreement, in accordance with subsection (6) (d) or whenever, after the
expiration of one year from the date of the accident, or within one year after the date of deposit of any security under subsection (7) (c), the commissioner shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid."

You have interpreted the emphasized language to include (1) a counterclaim, or (2) a cross-complaint filed subsequent to the expiration of the one-year limitation in each situation referred to in the above statutes. You request my opinion as to the correctness of your interpretation.

For the sake of clarity I suggest the following hypothetical statement of facts:

A and B become involved in an accident under circumstances requiring each to deposit security under sec. 85.09, Stats. If neither A nor B commences an action within one year next following the date of accident, the statute provides for refund of the deposited security to each person involved. (See sec. 85.09 (10) (c).) If A commences an action against B within the year, you retain custody of B's deposit pending the final disposition of the action on the merits. Now, assuming A commences his action against B on the last day of the year following the accident, and B counterclaims within the 20 days allowed for his responsive pleading, or within such additional time that the court may, by order, allow, but after the expiration of the year, the question arises: Is A entitled to a refund of the security which he deposited on the ground that no action has been instituted against him within one year? The statute does not condition the return of the deposit upon a showing that no action has been commenced against the person claiming the refund. It merely refers to the objective fact of an action being "instituted," without reference to who is plaintiff or defendant.

Our supreme court in State ex rel. Meyer v. Park, 174 Wis. 452, held that a counterclaim is not the commencement of a new action, but is merely a pleading in the original proceeding. Upon the authority of this decision, considered in the light of the context of the clauses in the statute in question, it is my opinion that the security deposited by the plaintiff in the hypothetical case suggested must be held by you for the benefit of the defendant should he
prevail upon his counterclaim, notwithstanding the counterclaim is interposed after the expiration of the year.

Further difficulty in administration is likely to be encountered in the situation where A sues B within the year, and thereafter a substantial time passes and no counterclaim is asserted in the action. A demands the return of his security after the expiration of the year. Should the commissioner refuse to return it because a counterclaim may be filed at some future time, by leave of court? Suppose A recovers judgment, and B appeals. Is the action still pending?

It is my opinion that the test of A's right to refund is whether, at the time A applies for a refund he is a party to a pending action in which his liability is at that time an issue. If it is an issue, it would seem immaterial that it became an issue after the year was up, by the filing of a counterclaim or a cross-complaint. If it is not an issue, it is immaterial that it could be made one at some time in the future.

Your question is also addressed to the matter of a cross-complaint being "filed" after the expiration of the year following the accident. This requires a careful consideration of the nature of a cross-complaint and whether it is against a person who was made a party to the suit prior to the expiration of the year or subsequent thereto.

It appears to have been the original idea of the code commissioners that any relief that could have been obtained under the ancient practice by one defendant against a co-defendant by means of a "cross bill" should be sought under the code by use of a counterclaim. The language of the statutes, however, was for a long time not clear in this regard, and our supreme court held that a counterclaim was not available for such purposes, and, later, declared that a cross-complaint was not a pleading known to the code. To clarify this situation secs. 260.19 and 260.20 of the statutes were enacted. The pertinent portions of these provisions read as follows:

"260.19 (1) When a complete determination of the controversy in court cannot be had without the presence of other parties, or when persons not parties have such interests in the subject matter of the controversy as require
them to be parties for their protection, the court shall order them brought in; and when in an action for the recovery of property a person not a party has an interest therein and makes application to the court to be made a party it may order him brought in.

"(2) * * *

"(3) A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may apply for an order making such person a party defendant and the court may so order.

"260.20 Whenever any party shall cause it to appear by his affidavit or answer, duly verified, that additional parties ought to be brought in according to section 260.19 the court shall make an order that the summons and complaint be amended as shall be necessary, and that the same, with a copy of such order, shall, if such additional parties be defendants, be served on them within a prescribed time according to law; and the action shall be continued as may be necessary and further proceedings had therein as if such additional parties had been originally proceeded against."

By these provisions a new pleading known as a cross-complaint was authorized, designed to fill the place of the old cross-bill in equity, and use thereof is now the recognized and proper mode of seeking relief against a co-defendant and of clearing up all controversies in relation to the subject matter upon the conditions and subject to the limitations expressed in the statute. (See sec. 332, p. 110, Boesel and Henderson's Edition of Bryant's Wisconsin Pleading and Practice, Second Edition.)

In view of the foregoing, it would seem clear that if two persons are named co-defendants in a suit instituted within the year following the accident out of which the suit arose, the serving of a cross-complaint by one defendant against the other would be a pleading within the same action, and there would be no reasonable basis for regarding it in any different light than the court regarded a counterclaim in the case of State ex rel. Meyer v. Park, supra. The same conclusion with respect to the effect of serving and filing a cross-complaint after the expiration of the year upon the sections in question, sec. 85.09 (7) (b) and (10) (c) would be applicable here. However, that question is in a sense moot, for the reason that if the action is commenced within
the year against two persons named as defendants and each of said persons has posted security to protect the claim of the plaintiff asserted against each of them, neither would be eligible for a refund under the pertinent statutes quoted above because of the pendency of the plaintiff's case regardless of whether either asserted a cross-complaint against the other. Under such circumstances I do not see how your question could arise.

In contrast to the situation where the cross-complaint is made against a co-defendant joined as a party prior to the expiration of the year, there is the situation where a proposed defendant is proceeded against by interpleader after the expiration of the year. A hypothetical example of the latter situation would be this: Three drivers, A, B and C become involved in a three-way motor collision. A suit is commenced by A against B on the last day of the year next following the occurrence of the accident. A does not choose to directly sue C. Each has deposited security pursuant to the requirement of the statute. Within the 20-day period provided by statute for serving and filing his responsive pleading, B proceeds under the interpleader statute (sec. 260.19) against C. The usual procedure in such instances is for the defendant to set up his answer to the plaintiff's complaint and to append thereto an affidavit and a proposed cross-complaint and cause it to be served upon C with an order requiring him to show cause why he should not be made a party defendant, and why the proposed cross-complaint should not stand as and for the cross-complaint against him. Being satisfied that the impleading of the proposed defendant is proper and that the cross-complaint states a valid cause of action against C, the court makes an order impleading said proposed defendant, and he is then made a party to the suit. If this procedure is followed after the expiration of the year following the occurrence of the accident, it is my opinion C is entitled to a refund of security deposited by him on the ground that an action has not been instituted in which he was involved as a party within the year limited by statute. This situation is clearly distinguishable from the cross-complaint in the action where C is a party upon the plaintiff's complaint prior to the expiration of the year, and is also distinguishable from
the first discussed situation involving a counterclaim. It may be stated as a general rule, therefore, that in any event, where a party who has deposited security under sec. 85.09, Stats., claims a refund, he is not eligible therefor if he is a party to a pending action which arose out of the accident for which the deposit was made, and provided that his liability to respond in damages is an issue at the time the claim for refund is asserted. Where, after the expiration of a year, such claimant is not a party to such an action, or where his liability to respond in damages is not an issue and he otherwise satisfies the conditions of the statute, he is eligible for such refund.

SGH

Constitutional Law—Justice of the Peace—Public Officers—Vacancy—Statute authorizing the filling of a vacancy in the office of justice of the peace by appointment is valid and does not conflict with art. VII, sec. 15, Wis. Const.

Clarence G. Traeger,
District Attorney,
Dodge County.

You have requested our opinion on the following question: May the mayor of a city, or any other public officer or agency so empowered by statute, lawfully effectuate an appointment to a vacancy in the office of justice of the peace consistent with the provisions of art. VII, sec. 15, Wisconsin constitution?

The applicable constitutional provisions provide:

Art. VII, Sec. 15: "The electors of the several towns at their annual town meeting, and the electors of cities and villages at their charter elections except in cities of the first class, shall, in such maner as the legislature may direct, elect justices of the peace, whose term of office shall be for 2 years and until their successors in office shall be elected and qualified. In case of an election to fill a vacancy occurring [sic] before the expiration of a full term, the justice elected shall hold for the residue of the unexpired
term. Their number and classification shall be regulated by law. And the tenure of 2 years shall in no wise interfere with the classification in the first instance. The justices thus elected shall have such civil and criminal jurisdiction as shall be prescribed by law.”

Art. XIII, Sec. 10: “The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution.”

Sec. 17.23 (1), Stats., by its terms authorizes the mayor of a city to fill the vacancy in a city office by appointment. This section reads:

“17.23 (1) GENERAL AND SPECIAL CHARTER CITIES. Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

“(a) * * * 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).”

In an early opinion of this office, 7 O.A.G. 464 at 468-469, the constitutionality of the statute, construed to authorize the mayor to appoint a justice of the peace, was upheld in the following language:
It may be argued that because sec. 15, art. VII of the constitution uses the term 'election' in regard to the filling of vacancies, it militates against the constitutionality of that portion of the statutes which provides for temporary appointments, until an election can be held. I do not think that this argument can be successfully sustained. In the first place, the statute does provide for the filling of the office by election as soon as it can conveniently be done; the appointent is merely temporary to bridge over an unavoidable emergency. In the second place, the courts are inclined to give this word 'election,' when used in similar context, a broad construction, interpreting it as equivalent to selection, and thus as including an appointment to office. State ex rel. Schommer v. Vandenberg, 164 Wis. 628; State v. Harrison, 113 Ind. 434.

"I am of the opinion that the ordinary statutory method of filling the vacancy should be followed."

In 11 O.A.G. 837 it was indicated that a justice of the peace for a town may be appointed. In 18 O.A.G. 46 it was considered that a justice of the peace in a village may be appointed. See also, 18 O.A.G. 536.

It is my opinion that these prior statements embody a sound construction of the constitutional provisions above quoted. Further, the fact that the construction in those opinions has been acquiesced in by the legislature over a long period of time, in the absence of other evidence of legislative intent, is entitled to great respect and indicates that the statute has been properly construed. Your question is answered in the affirmative.

RGT
Public Welfare Department—Minors—Wisconsin Child Center—Parents are liable for care of children in the Wisconsin child center only if made so by some express statutory provision, or by judgment or agreement entered pursuant to statute.

The collection and deportation counsel may be authorized by the department of public welfare under sec. 46.106 (1), Stats., to receive and distribute moneys received for the care of children housed in the Wisconsin child center or placed in foster homes by the staff of such institution.

November 20, 1950.

DEPARTMENT OF PUBLIC WELFARE.

You have asked three questions with respect to payment by parents for care of children admitted to the Wisconsin child center or placed in foster homes by the department of public welfare. The questions will be repeated separately in connection with the discussion of each:

1. Are parents liable for care of their children actually housed in the Wisconsin child center (as distinguished from foster homes)?

The general common law principle was set out in Hoard v. Gilbert, 205 Wis. 557, that a parent may be held liable for the support of his children in the absence of an express promise to pay, if the child has been forced out into the world by neglect or improper conduct of the parent, or if a parent has permitted someone else to maintain and support the child without objection. Many cases on the subject are cited in the above opinion, most of which, however, do not deal with liability of a parent to the government in connection with the support of a child whose custody has been transferred to a public institution by application of some statutory provision. For such cases resort must be had to statutory provisions to determine questions of liability under the doctrine announced in State Department of Public Welfare v. Shirley, 243 Wis. 276, 289–291. It was there held that the liability of relatives for maintenance of poor persons receiving public assistance must "be rested upon the statutes and not upon the common law." The court said:
"* * * The question here is whether the state or its subdivisions furnishing maintenance pursuant to statute can maintain an action against relatives otherwise than authorized under the statute. * * *

"In the absence of a statute authorizing a municipality to recover for relief furnished to a poor person, there is respectable authority to the effect that such recovery cannot be had. These cases go upon the ground that the relief furnished is a charity and that in the absence of a statute there is no basis for recovery."

The foregoing case dealt with liability for support of an adult who was maintained at public expense because of mental disability and is not necessarily conclusive with respect to the situation which you present. The children involved in your question, however, are public charges on the basis of statutes under which they have been found to be dependent or neglected. See sec. 48.20, Ch. 48 of the statutes, together with certain other sections, has made such extensive provision for care of dependent and neglected children as to indicate a legislative intent to supplant provisions of the common law which might otherwise be applicable.

The question of liability of parents for the care of children housed in the Wisconsin child center pursuant to statute, depends primarily if not entirely, upon statutory provisions.

The statutes have been revised since the decision of the Shirley case. The provisions which replaced those of sec. 46.10 (7), discussed there, are now contained in sec. 46.10. Sec. 46.10 now provides in part:

"(1) Liability for the maintenance of patients in the institutions specified in this section and the collection and enforcement of such liability is governed exclusively by this section.

"(2) Any patient in any charitable or curative institution of the state including the Wisconsin general hospital or of any county or municipality, in which the state is chargeable with all or a part of the patient's maintenance, except tuberculosis patients mentioned in chapter 50 and sections 51.27 and 58.06 (2), or heretofore or hereafter committed or admitted to any such institution, and his property and estate, or the husband or wife of such patient, and their property or estates, and in the case of a minor
child the father or mother of the patient, and their property and estates, shall be liable for such patient's maintenance not exceeding the actual per capita cost thereof, and the department may bring action for the enforcement of such liability. * * *"

The procedure for the enforcement of the liability is set out in later subsections.

Prior to the enactment of ch. 268, Laws 1947, the statutory sections comparable with those now contained in sec. 46.10, being the old secs. 46.10 (7) to (11), covered all persons committed to charitable, curative, reformatory or penal institutions. The provisions of sec. 46.10 now relate only to a "patient" in such an institution. The balance of the former sec. 46.10, relating to adjustment between the state and counties for maintenance of inmates of state and county institutions, does not use the term "patient," but the broader term "person." Sec. 46.106, which now incorporates the provisions formerly contained in old sec. 46.10 (1) to (6), relates to any "person * * * committed or admitted to a charitable, curative, reformatory or penal institution of the state or of a county," with certain exceptions. It seems clear that the legislature intended that the provisions of sec. 46.10 relating to "patients" should have a different application from sec. 46.106, relating to "persons"; else it would have used the same terms in both sections.

Sec. 370.01 (1) provides that words used in the statutes shall ordinarily be understood according to the common and approved usage. The term "patient" is defined in Webster's New International Dictionary, 2d ed., as "a sick person, now commonly, one under treatment or care, as by a physician or surgeon, or in a hospital." Without endeavoring to define the exact extent of the scope of the term "patient" as used in sec. 46.10 of the 1949 statutes, an examination of the provisions of ch. 48 of the statutes indicates that the legislature had no intent of classifying all children placed in the child center as "patients." The purpose of ch. 48 is stated in sec. 48.07 (4), to secure a child "care and discipline as nearly as possible equivalent to that which should have been given by his parents." The legislative intent that maintenance of children in foster
homes and in the child center should be subject to sec. 46.106, but not to sec. 46.10, is further borne out by the fact that sec. 48.18 refers to sec. 46.106 but not sec. 46.10.

The legislature has made a number of provisions, not only in ch. 48 but elsewhere, with respect to the chargeability of parents for maintenance of children in the custody of others. It has provided by sec. 48.07 (6) (a), for example, that whenever a child is committed by the court to custody other than that of his parents, and no provision is otherwise made by law for his support, compensation for the care of the child shall be a charge upon the county. This section further provides that the court may, under certain circumstances, adjudge that the parent shall pay in whole or in part for the support of the child. Secs. 166.07 and 166.11 make provision by which the father of an illegitimate child may be required to pay for its support in the custody of an agency or institution. Other provisions by which a parent may be charged for the support of a child are set out in secs. 247.095, 247.23, and 247.24. Your question deals only with cases involving support paid pursuant to the provisions of secs. 48.07 (6) (a), 166.07 and 166.11.

Even if sec. 46.10 be so construed as not to impose liability for the care of a child in the Wisconsin child center, that section does not preclude the acceptance by the department of payment for support when liability is imposed upon the parent pursuant to some other provision of law. The provisions of sec. 46.106 relate to any "person" committed or admitted to a charitable institution of the state. The opinion was given in 30 O.A.G. 329 that the child center is such an institution. See, also, sec. 46.03 (1). The legislature has further evidenced its intent that support of children committed to the state department of public welfare and placed in the child center or a boarding home, shall be subject to the provisions of sec. 46.106. Sec. 48.18, relating to adjustments between the state and counties, provides that charges shall be adjusted "in accordance with the provisions of section 46.106." One of the provisions of sec. 46.106 (1) thus made applicable reads:

"** Nothing shall prevent a recovery of the actual per capita cost of such maintenance by the department ** "
or prohibit the acceptance by the department of payment of the cost of maintenance, or a part thereof, by such person or anyone in his behalf."

The above provision is, in part at least, definitive of the common law rule that it is not contrary to public policy for one receiving public support to reimburse the public for such support. See 48 C.J. 520. Under the quoted provision, the department has authority to accept payments for the support of a child in its custody, irrespective of whether it could maintain an action to enforce liability. In literal response to your first question, parents are not liable for care of their children actually housed in the Wisconsin child center unless made so by some specific provision of statute or a judgment entered pursuant to statute. Since the department has authority to accept payments, however, irrespective of legal liability, it need not question the underlying liability with respect to payments made pursuant to an agreement or a judgment.

2. Does the collection and deportation counsel have any authority to receive and distribute (prorate between county and state) any moneys received for the care of children housed in the Wisconsin child center?

Because of the limitation of sec. 46.10 to “patients,” I do not believe the collection and deportation counsel has authority to bring action for the support of a child housed in the Wisconsin child center. The department is authorized, however, under the general law and sec. 46.106 (1), to accept payment of the cost of maintenance or any part thereof made by any person on behalf of the child. The duty to receive and distribute such payments may be placed by the department on the collection and deportation counsel under the provisions of sec. 46.10 (7) to the effect that “the department may delegate to such counsel such other powers and duties as it deems advisable.”

3. Does the collection and deportation counsel have any authority to receive and distribute (prorate between county and state) any moneys received for the care of children placed in foster homes by the staff of the Wisconsin child center, and if so, on what basis should the receipts be distributed (prorated)?
The answer to the third question is the same as the answer to the second insofar as it deals with the authority to receive moneys for the care of children placed in foster homes by the staff of the Wisconsin child center.

The only statutory requirement imposed upon the department under the provisions of sec. 46.106 with respect to distribution of such receipts is contained in subsec. (3) to the effect that "the department shall credit the county with the amount due the county for any recovery of maintenance."

It is difficult to make a categorical answer exactly what proportion of the receipts should be credited to a county because that may vary in given cases on the basis of differences in circumstances. If a payment is received to cover a child's care for a given period in a foster home, nothing in the statutes limits the acceptance to the per capita cost instead of the actual cost. If a payment is received for the support of a child for a given period which is insufficient to cover the actual cost, it should generally be prorated between the state and the county according to the contributions made for such period, unless some different provision has been made by judgment, agreement, or by direction of the payor if it is voluntary.

BL

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Licenses and Permits—Business Opportunity Brokers—
One who is licensed only as a business opportunity broker is not authorized to act as broker in connection with the sale of real estate as part of a business.

November 22, 1950.

ELLiot N. Walstead, Secretary-Attorney,
Wisconsin Real Estate Brokers' Board.

You have asked the following two questions:
1. May a licensed business opportunity broker, who engages for the owner of a business to sell that business, include in the sale real estate belonging to the business?
2. If so, may he base his commission on the sale price, including the value of the real estate, or must the value of the real estate be deducted therefrom?

No person, firm or corporation shall engage in or follow the business or occupation of or act temporarily or otherwise as a real estate broker or real estate salesman without a license therefor. Sec. 136.02, Stats.

Sec. 136.01 (2) defines "real estate broker" as any person, firm or corporation who:

"(a) For another, and for commission money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate; or,

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

"(c) Negotiates, or offers or attempts to negotiate a loan, secured, or to be secured, by mortgage or other transfer of or incumbrance on real estate."

In any transaction where real estate is sold, anyone (unless exempted by sec. 136.01 (3)) acting for another in effecting the transaction for commission money or other thing of value is acting, at least temporarily, as a real estate broker. Unless licensed as such, he is violating sec. 136.02. In my opinion the fact that he is licensed as a business opportunity broker, engaged to sell an entire business, and that the particular real estate is a part of the business, is immaterial.

It is clear that the functions of a real estate broker do overlap, occasionally, those of a business opportunity broker. The sale of a piece of real estate may involve the sale of a business. A licensed real estate broker who makes such a sale is expressly relieved from any requirement of being licensed as a business opportunity broker. Sec. 136.19 (3) (c) expressly excepts licensed real estate brokers from the definition of business opportunity broker. In Business Brokers Asso. v. McCauley, (1949) 255 Wis. 5, the supreme court said that this exception does not permit the real estate broker to invade the territory set apart as that of a business opportunity broker. The court indicated that it did mean that a real estate broker selling real estate which
includes a store building is acting as a real estate broker and need not be licensed as a business opportunity broker also merely because a business is incidentally involved.

It is noteworthy that the real estate broker licensing statute does not provide any correlative exception for the business opportunity broker who sells real estate as a part of a sale of a business. This difference in statutory treatment alone is a basis for answering your first question in the negative.

There is a conflict of authority in the decisions of the courts of other states, and none is exactly in point because of statutory differences. The leading decision supporting the view that a broker selling real estate as part of a business is nevertheless a real estate broker is *Kenney v. Paterson Milk & Cream Co.*, (1933) 110 N.J.L. 141, 164 A. 274. See, also, *Owens v. Capri*, (1949) 65 Wyo. 325, 202 P. 2d 174; *Hazlehurst v. Southern Fruit Distributors*, (1933) 46 Ga. App. 453, 167 S.E. 898; *Knight v. Watson*, (1930) 221 Ala. 69, 127 So. 841; and *Nittler v. Continental Casualty Co.*, (1928) 94 Cal. App. 498, 271 P. 555.

One case, *Ruiz v. Mendez*, (1949) 86 F. Supp. 29, held that under the particular circumstances surrounding the contract it was clear that the real estate purchased was purely incidental, the record being silent as to the value of the land. The court there held that the broker was not acting in the capacity of a real estate broker.

A leading New York case, *Weingast v. Rialto Pastry Shop, Inc.*, (1926) 243 N.Y. 113, 152 N.E. 693, decided that a broker was not required to be licensed as a real estate broker in order to sell a going concern, including a lease of the business location, with 6 years unexpired. It is significant that the Wisconsin statutes require a business opportunity broker to have "a fair understanding of the general purposes and general legal effects of * * * leases" (sec. 136.22 (2)). They require a real estate broker, on the other hand, to have "a fair understanding of * * * deeds, mortgages, land contracts of sale, and leases" (sec. 136.05 (2)). Accordingly it is my opinion that while one who is licensed only as a business opportunity broker may not negotiate a sale of real estate as part of a business, he may
negotiate the sale of a business which includes an unexpired lease as an integral part of the business.

Your second question suggests that a business opportunity broker who negotiates the sale of a business including real estate might avoid violation of sec. 136.02 by measuring his commission only by the value of the business other than the real estate. But it seems clear that however the commission is measured, it is received by the broker as compensation for negotiating the entire transaction, and an agreement between the parties that no part of the commission be considered as compensation for negotiating the sale of the real estate could not change the true situation.

TEF

Automobiles and Motor Vehicles — Dealers — Trailers designed to be hauled by automobiles are not “motor driven vehicles” within the meaning of sec. 218.01 (1) (k), Stats., and accordingly persons engaged in the sale of such trailers are not required to be licensed as motor vehicle dealers under sec. 218.01 (1).

November 24, 1950.

Motor Vehicle Department.

You request my opinion as to whether a trailer sales company may be licensed under ch. 218 as a motor vehicle dealer.

Excluding the portions of the definition which are not applicable to the present situation, sec. 218.01 (1) (a) defines a motor vehicle dealer as any person who “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.” Para. (k) of said definition section defines a motor vehicle as “any motor driven vehicle required to be registered under section 85.01.” Sec. 85.01 prescribes the classes of vehicles and the registration fees for vehicles other than motor driven. Trailers are referred to in sec. 85.01 (4) (e). The statute
refers to trailers or semitrailers "designed to be hauled by a motor vehicle."

A trailer is defined in Merriam's Second Edition of Webster's New International Dictionary as "a nonautomotive highway vehicle designed to be hauled, as by a tractor, a motor truck, or a passenger automobile."

The term "motor driven vehicle" as used in sec. 218.01 (1) (k) is not specifically defined by statute. Giving the phrase the construction required by sec. 370.01 (1), Stats., that all words and phrases shall be construed and understood according to the common and approved usage of the language, I conclude that a trailer is not a motor driven vehicle within the meaning of ch. 218, Stats., and accordingly persons dealing in the sale of same are not required to be licensed under said chapter.

SGH

Taxation—Public Assistance—Liens—The priority of "tax liens" provided in sec. 49.26 (5), Stats., covers a "special tax" assessed by a city under sec. 144.06.

November 24, 1950.

JOHN S. COLEMAN,
District Attorney,
La Crosse County.

You inquire respecting the priority of a "special tax" levied by the city under sec. 144.06 against property subject to an old-age assistance lien.

By sec. 49.26 (5) it is provided that an old-age assistance lien shall take priority over any lien "except tax liens" and certain other allowances. By sec. 49.26 (7a) public claims for care and maintenance share pro rata with sums advanced under the old-age assistance lien upon distribution.

It is my opinion that the priority of "tax liens" provided in sec. 49.26 (5) covers a "special tax" assessed by a city under sec. 144.06. In the case of Bankers Farm Mortgage
it was held that a special assessment is a tax, and that the lien of a special assessment is a tax lien. The court said in State ex rel. Dorst v. Sommers, (1940) 234 Wis. 302, 291 N.W. 523, at page 310:

"Whether the lien is a tax lien or a special-assessment lien, the authorities have in each case visited a levy upon the property. The property is to be held for the payment thereof, and so far as the lien resulting from the special assessment is concerned, it has all the essentials of a tax lien. * * *"

MLR

State Board of Health—Corpses—The transportation across the state boundary of a corpse of one whose death occurred in Wisconsin, without a burial or removal permit from the proper Wisconsin authority, constitutes a violation of lawful regulations of the state board of health.

November 24, 1950.

Hugh F. Gwin,
District Attorney,
St. Croix County.

You ask in your letter whether the following are in violation of Wisconsin laws:

"1. The removal by Minnesota undertakers just across the state boundary of a body at the scene of death upon request of relatives or others without a burial or transport permit from the proper Wisconsin authority, and

"2. The removal of a body by a Wisconsin undertaker at the scene of death and removing it to a city in Minnesota just across the state boundary for embalming without a burial or transport permit from the proper Wisconsin authority."

The removal of the dead body as described in both paragraphs 1 and 2 of your request is unlawful.

Rule 28 of the state board of health rules relating to funeral directors, embalmers and apprentices, 1948 Red Book 171, provides as follows:
“The funeral director or other person in charge of removing a body from a hospital or other institution or from any other place where death occurs shall file the death certificate with any local registrar, any deputy registrar or a subregistrar but in no case shall the remains be removed from the registration district in which death occurred until a burial or removal permit has been obtained.”

In the case of a death occurring in a village or town, the registration district is the county. In the case of a death occurring in a city, the city is the registration district. Sec. 69.09. In either case removal of the dead body across the state line would violate the rule.

Ch. 69, Stats., covers the collection of vital statistics generally.

Sec. 69.44 reads as follows:

“(1) The body of any person whose death occurs in this state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, until a permit for burial or removal is issued, and no burial or removal permit shall be issued until a complete and satisfactory certificate of the death has been filed as herein provided.”

Sec. 69.45 reads as follows:

“(1) The funeral director, or person acting as funeral director, shall be responsible for obtaining and filing the certificate of death with the registrar and securing from him a burial or removal permit prior to any disposition of the body.

“(2) He shall obtain the personal and statistical particulars required from the person best qualified to supply them over the signature and address of his informant. He shall then present the certificate to the attending physician or other person authorized by law to fill out the medical certificate of the cause of death and other particulars necessary to complete the record, as specified in sections 69.35 to 69.41. He shall then state the facts required relative to the date and place of burial over his signature and his address, and present the completed certificate to the registrar who shall then issue a burial or removal permit.

“(3) The undertaker shall deliver the burial permit to the sexton or person in charge of the place of burial before interring the body, or attach the removal permit to the box containing the corpse, when shipped by any transportation company, to accompany the same to destination.”
Sec. 69.03 authorizes the state board of health to make rules and regulations to carry out the provisions of the chapter. Penalties for violations of the chapter are prescribed by sec. 69.55.

Sec. 143.02 (4) authorizes the state board of health to adopt rules and regulations for the preparation, transportation or burial of corpses, and sec. 143.02 (6) prescribes the penalties for infraction.

Sec. 156.03 (2) authorizes the state board of health to make and enforce rules and regulations covering sanitary and health regulations in the preparation, transportation and disposition of dead bodies, and sec. 156.15 prescribes penalties for infraction.

In view of the fact that the rules which specifically answer your question were adopted by the board of health pursuant to sec. 156.03 (2), the penalties prescribed by sec. 156.15 would be applicable.

Your first paragraph refers to “Minnesota undertakers.” I assume you refer to undertakers whose establishments are located in Minnesota, but who are also licensed in Wisconsin. One engaging in the business of funeral director in Wisconsin must be licensed to do so. Sec. 156.04 (2).

State—Civil Service—Question answered by 39 O.A.G. 106.

Conservation Department.

You request my opinion upon two questions upon the following statement of facts:

The conservation commission maintains general offices in the state office building at Madison. Due to crowded conditions, it has been necessary for the commission to secure additional office space and, in this connection, it has established part of its general office in temporary buildings located on the Nevin fish hatchery lands which are located several miles outside of the city limits of Madison. Per-
sonnel employed in the general offices in Madison are, of necessity, assigned to duties in the branch office at the Nevin hatchery. That office is not served by any public transportation company or common carrier.

You state it has been impossible to obtain clerical personnel to serve at the Nevin hatchery branch office without furnishing transportation. This you state you have done by picking up employes at appointed places and delivering them at the branch office to reach there at 8:00 o'clock, which is your opening hour.

Subsequent to March 15, the date of an opinion addressed by this office to the bureau of personnel, you state that the employes have reported at your main office at 8:00 o'clock a.m. and that you have transported them to the branch office and returned within their regular working hours.

You ask the following questions:

1. Under the foregoing statement of facts, is it permissible for the conservation commission to transport regularly employed personnel from some appointed place or places in the city of Madison to the branch office at the Nevin hatchery on a schedule whereby the employes arrive there at 8:00 a.m., your regular starting time, and under which schedule you return them at the close of regular office hours?

2. Is it permissible to transport such personnel, if they are required to report at the main office at the regular opening hour of 8:00 o'clock a.m., when transportation is furnished thereafter, and to return them to the main office by regular closing time?

These questions are controlled by an opinion dated March 15, 1950, addressed to the bureau of personnel. It was there stated that under our statutes it is the exclusive province of the bureau of personnel to establish salary ranges for each position in the classified service. The furnishing of transportation constitutes compensation. Your department may not furnish transportation to and from places of employment outside the city limits. It is clear from your statement that the place of employment of the employes involved is the Nevin fish hatchery.

TEF
Taxation—Motor Carriers—Privately owned and operated motor vehicles used exclusively to transport the United States mail are subject to the weight or mileage tax.

November 27, 1950.

MOTOR VEHICLE DEPARTMENT.

You state that for several years your department has considered that vehicles transporting United States mail exclusively are exempt from the payment of weight or mileage taxes imposed by secs. 194.48 or 194.49, Stats.

You direct attention to sec. 194.05 (2), providing as follows:

"The provisions of this chapter shall not authorize the fixing of any rates, charges or regulations respecting the transportation of United States mails."

I assume your question is limited to vehicles not owned by the United States. Vehicles owned by the United States would, of course, be exempt from all provisions of ch. 194 by virtue of sec. 194.05 (1).

One engaged in the transportation of mail by motor vehicle for hire clearly falls within the term "motor carrier" as used in secs. 194.48 and 194.49. As to a vehicle exclusively used for transportation of mail under contract, he is a contract motor carrier as defined in sec. 194.01 (11). None of the exemptions specified in sec. 194.47 is based on transportation of mail.

Ch. 194 contains several provisions which "authorize the fixing of * * * rates, charges or regulations" respecting the transportation of property. Sec. 194.18, among others, grants broad authority to the public service commission over the operations of common motor carriers. Secs. 194.34 and 194.36 grant broad authority over contract carriers.

The language used in sec. 194.05 (2) clearly reaches the authority granted by ch. 194 to fix rates, charges and regulations respecting the transportation of property and limits it by exempting the transportation of United States mail. It contains no suggestion, however, of any exception from the imposition of a tax which is imposed by the legislature itself and not by administrative authority. Since
there are provisions of the chapter on which sec. 194.05 (2) clearly does have an effect, there is no basis for extending its effect to other provisions by interpretation.

There is no principle of constitutional law which compels the exemption from the tax of privately operated vehicles even though the operator is performing a service under contract with the United States. See 33 O.A.G. 15 and the decision in State v. Wiles, 116 Wash. 387, 199 P. 749, 18 A.L.R.-1163, discussed in that opinion.

TEF

Marriage—Authority to Solemnize—Certificate of minister's authority entitled to be filed and recorded under sec. 245.08, Stats.

November 27, 1950.

ROBERT C. ALTMAN,
District Attorney,
Marathon County.

You have submitted a photostatic copy of a certificate, the original of which was presented to the clerk of circuit court for filing and recording under sec. 245.08, Stats. You ask whether the certificate is sufficient under that section.

The certificate is signed by a Lutheran pastor and certifies that on a specified date, "in pursuance of an order of the President of the North Wisconsin District of the Lutheran Church—Missouri Synod I solemnly installed in the ministry" in a specified congregation the minister who presented the same for filing. The certificate also certifies that "he is authorized under the rules of the Church, to perform all the functions of the ministerial office."

Sec. 245.08, Stats., provides as follows:

"Ministers or priests, before they shall be authorized to solemnize a marriage, shall file a copy of their credentials of ordination or other proof of such official character with the clerk of the circuit court of some county in this state, who shall record the same and give a certificate thereof;
and the place where such credentials are recorded shall be indorsed upon each certificate of marriage granted by any minister or priest and recorded with the same.”

The certificate purports to be evidence that the minister named has full and unlimited authority as a minister. In view of the fact, appearing below, that a “diploma of ordination” is normally issued to a newly ordained pastor by a district president, this certificate does not appear to be “credentials of ordination.” On its face, however, it is “other proof of such official character.” Presumptively, therefore, it fulfills the requirements of sec. 245.08.

You do not indicate that there is any reason to doubt the minister’s status as an ordained minister of his faith. Such additional information as I have obtained supports the proposition that this certificate could only have been issued to an ordained minister.

Two pastors of the same denomination have stated upon inquiry that under the rules of their church, no one may be installed in the ministry of a congregation unless either simultaneously or previously ordained, nor unless such installation be approved by the appropriate district president (as recited in the certificate at hand).

Following are three provisions appearing in the “Handbook of the Lutheran Church—Missouri Synod” relating to ordinations and installations:

“4.15 Ordination of Candidates. A candidate for the ministry may be ordained only when he has received a legitimate call from and to a certain congregation and after previous examination has been found to be sound in doctrine, apt to teach, blameless in life, and has made application for membership in Synod to the respective District President.”

“4.17 District Presidents Responsible. The District President shall be responsible for the ordination of candidates for the ministry and the installation of pastors and teachers in congregations within his District. If the President is unable to perform these duties in person, he may delegate the same to another pastor who is a member in good standing of an orthodox Lutheran body. If possible, the pastor officiating at such ordination or installation shall be assisted by one or more pastors.”
“4.19 Place and Manner. The ordination or installation shall take place in the presence of the congregation which has called the candidate or pastor. The pastor shall be ordained or installed in accordance with the accepted Lutheran forms for that purpose and shall be solemnly pledged to the Scriptures as the inspired and inerrant Word of God and to the Symbolical Books of the Lutheran Church as a true exposition of the Scriptures. The District President shall issue a diploma of ordination."

The foregoing rules are consistent with the proposition that only an ordained minister would receive a certificate such as the one presented.

It is my opinion that the clerk of circuit court should accept the certificate for filing, record it and give a certificate thereof, all as provided in sec. 245.08, Stats.

TEF

Public Service Commission—Public Utilities—Interstate Commerce—Pipeline company transporting natural gas into state and selling it for resale is subject to regulation by federal power commission and is not subject to regulation by public service commission as to such transactions.

November 27, 1950.

EDWARD T. KAVENY, Secretary,
Public Service Commission of Wisconsin.

The following quotation is from your request for opinion:

“The Michigan-Wisconsin Pipeline Company is a foreign corporation which is engaged in laying pipe in this state through which natural gas will be carried by it across the state line from Illinois into Wisconsin, which gas will be sold by the company at wholesale to public utilities such as the Madison Gas & Electric Company who will in turn sell and distribute the gas to the consuming public.

“Questions on which your opinion is requested are:

“(1) In the light of the facts stated in the first paragraph, is the Michigan-Wisconsin Pipeline Company a 'public utility' as defined in the last sentence of sec. 196.01, Stats.?
“(2) If the answer to question 1 is ‘yes,’ to what extent can Wisconsin constitutionally regulate the activities of said company, in view of the interstate nature of its business?”

Sec. 196.01 (1) provides in part:

“As used in chapters 196 and 197, unless the context requires otherwise, ‘public utility’ means and embraces every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or any plant or equipment or any part of a plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. * * * The term ‘public utility’ as herein defined includes any person, firm, or corporation engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains.”

The last sentence was enacted by ch. 420, Laws 1947. Had the only intention been to make it clear that plant and equipment for the transmission and delivery of natural gas stands upon the same basis as that for transmission and delivery of heat, light, water or power, it would have sufficed simply to add natural gas to that list. Therefore, it is logical to conclude that the legislature intended that the sentence added by ch. 420 have a broader effect.

Accordingly, the only departure from the complete and literal meaning of the last sentence should be such as is clearly made necessary by established principles of law.

You have called attention to decisions of the supreme court of Wisconsin dealing with specific operations which were held not to be public utility operations. These decisions do not go so far as to say that a company supplying energy for resale can in no case be a public utility with respect to such operations. Accordingly, these decisions do not of themselves provide a sufficient basis for concluding that Michigan-Wisconsin Pipeline Company is not a public utility. The cases referred to are: Chippewa Power Co. v. Railroad Comm., (1925) 188 Wis. 246; Union Falls Power Co. v. Oconto Falls, (1936) 221 Wis. 457; Cf. Central Wis. P. Co. v. Wis. T., L, H. & P. Co., (1926) 190 Wis. 557.
You disclose that the company is carrying natural gas from Illinois into Wisconsin and selling it at wholesale. The federal natural gas act applies to these operations. 15 U.S.C.A. § 717. That act imposes certain standards as to rates and charges, gives the federal power commission jurisdiction to review rates, charges and classifications, gives it jurisdiction over the extent of the facilities of companies, establishes record-keeping and accounting requirements, and gives the commission certain other powers. While the act contains no provisions expressly requiring approval by the federal power commission of securities issuances, it has been decided that the commission may attach reasonable conditions as to proposed financing to the issuance of a certificate of convenience and necessity. Panhandle Eastern Pipe Line Co. v. Federal Power Com’n., 169 F. 2d 881; cert. den. 335 U.S. 854; 93 L.ed. 402.

15 U.S.C.A. § 717p authorizes the federal power commission to perform certain acts in cooperation with a state commission.

The United States supreme court has decided that the federal natural gas act preempts regulatory powers over the transportation and sale of natural gas in interstate commerce (Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456, 87 L.ed. 396), although it does not preclude state regulation of rates for natural gas sold by interstate pipeline to local consumers (Panhandle E. Pipe Line Co. v. Public Serv. Com., 332 U.S. 507, 92 L.ed. 128).

The federal natural gas act was enacted in 1938 and accordingly was in existence in 1947 when ch. 420 was passed.

Accordingly, it is my opinion that except for such joint or other cooperative action as you and the federal power commission may carry out, Michigan-Wisconsin Pipeline Company is not subject to regulation by you with respect to its interstate carriage and sale for resale of natural gas.

With respect to your jurisdiction over security issuances by public service corporations, your attention is called to the fact that a public service corporation is defined in sec. 184.01 (1), Stats. It is defined in part by incorporating
Automobiles and Motor Vehicles—Safety Responsibility Law—Running of statute of limitations upon damage suit judgment based upon finding of negligent operation of motor vehicle does not constitute payment and satisfaction of judgment within the meaning of those terms as used in sec. 85.135, Stats. 1943 (sec. 85.09 (13), (14), (15), and (16), Stats. 1947). There must be literal compliance with the statute, i.e., the judgment must be “fully paid and satisfied” as a condition precedent to restoration of driving privileges to one whose operator’s license has been suspended for nonpayment of such a judgment.

November 28, 1950.

MOTOR VEHICLE DEPARTMENT.

You state that on July 30, 1943, you suspended the driving privileges of a person upon receiving a certified copy of a damage judgment in which he was found negligent in the operation of his motor vehicle. Such suspension was entered in accordance with the provisions of secs. 85.08 (27k) and 85.135 of the Wisconsin revised statutes for 1943. Sec. 85.135, Stats. 1943, provided as follows:

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

You state that it has been your interpretation that the judgment must be satisfied before you can reinstate the driving privileges of an operator whose right to drive had been suspended following entry of a damage judgment.
against him. You state that you have interpreted the above quoted statute in such manner that "the running of the statute of limitations or a discharge of the judgment through bankruptcy does not relieve the judgment debtor of his obligation to pay the judgment as a condition precedent to restoration of his driving privileges."

You state that the original statute requiring payment of the judgment as a condition precedent to such restoration of driving privileges was enacted in 1935, and that applications for restoration of operators' licenses will be received from time to time as a result of the revocations made pursuant thereto. You accordingly request my opinion as to whether the "running of a period of statute of limitations" in itself constitutes a satisfaction of the judgment within the meaning of the statute.

It is to be noted that sec. 85.135, Stats. 1943, was repealed by ch. 528, Laws 1947. Substantially the same provisions, however, were reenacted as a part of the safety responsibility law in sec. 85.09 (13), (14), (15) and (16), Stats. 1947.

In 32 O.A.G. 309, the attorney general gave it as his opinion that a discharge in bankruptcy does not relieve a judgment debtor from fulfilling the requirements of sec. 85.135, Stats., as conditions precedent to restoration of driving privileges. In that opinion the case of Reitz v. Mealey, 314 U.S. 33, 86 L.ed. 21, 62 S.C. 24, was relied upon. It was pointed out that in that case a New York statute provided that one against whom a judgment was rendered for injury resulting from the operation of a motor vehicle and who failed to pay the judgment within a time designated, should have his license and registration suspended for 3 years unless in the meantime the judgment was satisfied or discharged, except by a discharge in bankruptcy. Speaking through Mr. Justice Roberts, the United States supreme court said (pp. 36-37):

"The purpose of the statute is clear. * * *
"The statute, * * * is not obnoxious to the due process clause of the Fourteenth Amendment. The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership
of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process. * * * As the court below has held, the effect of the statute * * * was to make the license privilege a form of protection against damage to the public inflicted through the licensee's carelessness.

"* * * we are clear that it [the statute] would constitute a valid exercise of the state's police power not inconsistent with § 17 of the bankruptcy act. The penalty which § 94-1 imposes for injury due to careless driving is not for the protection of the creditor merely but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety."

In the present case the requirement that the judgment shall be fully paid and satisfied as a condition precedent to restoration of driving privileges is clear and unequivocal. The state's right to enact such stringent legislation is amply sustained in the Reitz case, supra.

It is my opinion that literal compliance must be had with the language of the statute before the driving privileges of a judgment debtor may be restored.

SGH
Automobiles and Motor Vehicles—Registration—Motor vehicles used part time on projects other than the special uses enumerated in sec. 85.01 (4) (fm), Stats., are required to be registered in accordance with sec. 85.01 (4) (c). In order to entitle the owner of such special equipment to operate said equipment upon Wisconsin highways for a flat annual fee of $10, said equipment must be used exclusively during such license year upon work enumerated in said para. (fm).

November 28, 1950.

Motor Vehicle Department.

You request my opinion as to whether a motor vehicle equipped with a crane with a lifting capacity of 10 tons or more, which is used at times for digging sewers with a clam bucket attachment, is entitled to be registered for the $10 flat annual fee provided for in sec. 85.01 (4) (fm), Stats.

Sec. 85.01 (4) (fm) provides as follows:

"Any motor vehicle, trailer or semitrailer, if operated empty, or transporting the equipment of the owner to or from a certain location over the public highways, when such operation at the location is the performance of work on a contract for the construction or maintenance of highways or airports for the United States, state or any political subdivision thereof; or the production of agricultural lime; or clearing land, dike building, terracing and ditching for the purpose of soil erosion control or farm drainage, or mobile cranes of lifting capacity of 10 tons or more used for bridges and building construction, heavy machinery installation and loading of heavy articles, shall be registered under this section by the motor vehicle department for a flat annual fee of $10. The motor vehicle department shall issue a distinguishing license plate for each such vehicle."

There is nothing in the above enumerated uses authorizing the digging of sewers with the use of a clam bucket attachment. Motor vehicles which do not qualify for the flat annual fee of $10 are required to be registered under sec. 85.01 (4) (c), Stats. As you point out in your letter of request, the owners of some similar equipment used for
ditching by sewer contractors, but which is smaller and lighter in weight, are required to pay a fee of as much as $260 per year, in contrast to the $10 prescribed by para. (fm) in question. In effect said paragraph constitutes an exemption from or exception to sec. 85.01 (4) (c). The rule is well established in taxation matters that he who claims an exemption from tax must point to some provision of the statute granting the same and then bring himself clearly within its terms, any doubt being resolved against him. This rule is equally applicable here, as the foundation of it is that, taxation being the rule and exemption the exception, if the legislature intends to grant special privilege of escape from an imposition it will do so in clear and unequivocal language, and one who claims the benefits thereof must show beyond doubt that he is within the intent of the legislature in granting such escape by bringing himself clearly within its terms. See Armory Realty Co. v. Olsen, (1933) 210 Wis. 281, 246 N.W. 513; Ritchie v. City of Green Bay, (1934) 215 Wis. 433, 254 N.W. 113.

It is apparent that when the piece of equipment herein involved is operating on the highways toward a destination where it is to be used for digging ditches with the clam bucket attachment, it does not fall within any of the special uses enumerated in para. (fm) of the above quoted subsection. In order for the owner of such equipment to escape the liability which would otherwise attach under subsec. (4) (c), the piece of equipment involved would have to be exclusively devoted to one of the special uses enumerated in para. (fm) during an entire license period. Any departure from such special use into the general uses which characterize motor vehicle equipment which is subject to the general fees prescribed by sec. 85.01 (4) (c), renders the owner liable for the fee prescribed by such last mentioned provision.

SGH
Stout Institute—Trust Funds and Student Fees—Proceeds of Stout institute trust funds and student fees collected by the college must be deposited with the state treasurer.

November 28, 1950.

THE STOUT INSTITUTE.

You have asked as to the proper administration of certain funds which have in the past been collected and disbursed by the business office of Stout institute.

I.

The Eichelberger fund (named for its donor) consists of securities. Dividends are received quarterly and the money is used for scholarships and certain other items. Some time ago, money from the Eichelberger fund was transferred to a student loan fund. Income consists of earnings from investments and interest on student loans. The fund and its income are used for loans and certain other items.

Your attention is directed to the following statutes:

Sec. 41.22 provides that the board of trustees of Stout institute "shall appoint a suitable person to receive fees or other moneys that may be due such board, to account therefor, and to pay such moneys, within one week of their receipt, to the state treasurer."

Sec. 41.23 provides in part that the board of trustees of Stout institute is "also authorized to accept such other property or moneys as it may deem advisable to be accepted which can profitably be used by it in promoting the interests intrusted to it."

Sec. 20.78 provides that "all appropriations made by law from state revenues for any department, board, commission, or institution of the state, or for the state historical society, are made on the express conditions that such department, board, commission, institution or society pays all moneys received by it into the state treasury within one week of receipt."

Sec. 20.80 provides that "all moneys received by any state institution or the state historical society as income
on the principal of funds received by such institutions, or society as gifts, legacies, and devises and from membership fees and sale of publications and duplicates shall be expended under the direction of the proper authorities and the audit of the director of budget and accounts shall be for the sole purpose of ascertaining that such expenditures are lawfully made and authorized by the proper authorities of such institution or society."

Sec. 14.68 (1) provides that "unless otherwise provided by law, all moneys collected or received by each and every officer, board, commission, society, or association for or in behalf of the state, or which is required by law to be turned into the state treasury, shall be deposited in or transmitted to the state treasury at least once a week."

It is my opinion that all money received in connection with both the Eichelberger fund and the student loan fund, including income and repayment of principal, must be deposited in the state treasury pursuant to the statutes above cited.

Sec. 41.23 authorizes Stout institute to accept gifts. The wording of that section with reference to the use of the funds accepted, considered together with sec. 20.80, sufficiently implies an appropriation of this money to the uses deemed advisable by the board. For the sake of clarity and consistency, however, it would be advisable to seek a specific appropriation similar to sec. 20.41 (15) for the university and sec. 20.38 (7) for the teachers colleges.

II.

A fee of $11.50 is collected from each student at the time of registration. You have explained that originally fees for a number of purposes were collected by student organizations, but as time went on the process proved unwieldy. Accordingly there has evolved the practice of collection from every student by the business office of the college. The fee is distributed as follows:

Lectures, concerts and incidental expense $2.00
Expense of athletic department 2.50
Expense of operating Union 1.50
Expense of producing yearbook 2.00
Stout student association 3.50
The proceeds of each of the first four items are deposited in a separate bank account and records of expenditure are maintained by the business office. The proceeds of the last item are paid to the treasurer of the student association. He makes a further distribution for class dues, student association activities, dramatic club expenses, expenses of symphonic singers, band expenses, orchestra expenses, expenses of the weekly Stoutonia, and the student association reserve. The wishes of the student association are observed in making these distributions.

In addition to the statutes referred to under I above, your attention is directed to the following:

Sec. 20.34 (4) provides that "all moneys collected or received by each and every person for or on account of the dormitories, commons, dining halls and laundry at the Stout institute, shall be paid within one week of receipt into the general fund, and are appropriated to be used as a revolving appropriation."

Sec. 20.34 (5) provides that "all fees collected from students at Stout institute for supplies and materials needed for individual and class use in the work of the institute, and for library fees, and all money received from the sale of products made by students from such supplies and materials in shops and laboratories, shall be paid within one week of receipt into the general fund and are appropriated to the board of trustees of Stout institute."

It may be that when these funds were collected by the various student groups on a voluntary basis some of these items were subject to student ownership and control and did not belong to the college nor to the state. As pointed out to the university in 38 O.A.G. 421, the auditing of student activity funds by a university representative and the use of university facilities do not of themselves render such funds state funds. The essential question to be decided as to each such organization is: Do its receipts arise out of operations carried on by the university?

In your present situation, however, the $11.50 collected from each student is a condition of his registration at Stout institute. It is therefore a fee and must be remitted to the state treasurer. This is true even though the authority to
charge such a fee under present statutes be open to some doubt.

Were the compulsory feature removed, so that the fee would *in fact* be a voluntary student association membership fee, receipt of it by the business office from those who desired to join would not of itself make the funds state funds. As to each part of the fee, of course, there would still remain the question of whether the activity is *in fact* carried on by the college or by a student group. The titles of some of these items suggest that they are operations carried on by the college.

Except insofar as these items fall within the types of fees described in sec. 20.34 (4) or (5), they are not appropriated to the college and would remain in the general fund of the state. You indicate that you believe that the fee of $1.50 used for operation of the Union may be subject to subsec. (4). You may be correct if this is money received "for or on account of the dormitories, commons, dining halls." Otherwise, on the basis of the facts supplied, it is not clear that any part of the fee of $11.50 is subject to sec. 20.34 (4) or (5).

### III.

A fee of $5 is charged at graduation for expense of diploma, cap and gown and other items. This fee must be deposited in the state treasury, but is reappropriated by sec. 20.34 (5).

Library fines and ink sales provide money with which to defray some library costs. This money must be deposited in the state treasury, but is reappropriated by sec. 20.34 (5).

A fee of $3 is collected from each summer session student. The money is used for "summer session activities, entertainment, lectures and special events." This fee must be deposited in the state treasury, but is not appropriated to the college by any present statute.

Other money is received from "rent of pool tables, sale of candy, etc." in connection with the Stout men's club room. This money must be deposited in the state treasury. The information at hand suggests that this money may be received "for or on account of the dormitories, commons,
dining halls” and if so it is appropriated to the college by sec. 20.34 (4).

Is this a fair statement of the situation with respect to the summer session fee and most of the items discussed under II? There are certain activities which the college deems it desirable to make available to its students, but which it cannot finance out of its regular appropriation. A practice has grown up by which, in effect, the college supplements its appropriation by fees collected from students. These fees are used to defray the cost of the activities referred to. The difficulty with the practice is that present statutes require fees to be deposited in the state treasury, but, with limited exceptions, do not appropriate them to the college. Thus the fees cannot perform their intended purpose of supplementing the specific appropriation made by the legislature. Obviously one possible solution would be a change in the statutes so that fees of this type would be appropriated to the college.

TEF
GFS

Cities—Public Health—The authority of a city to protect the public health, whether under sec. 62.11 (5) or sec. 144.06, Stats., is not limited to the construction of a sewer pipe to the basement of a residence, but extends to the installation at the owner’s expense of such facilities as are necessary to permit the drainage of household sewage into the public sewer system.

Edward A. Krenzke,
District Attorney,
Racine County.

You have asked whether the authority of a city to make connections between the city sewer system and the home of an old-age assistance beneficiary is limited by sec. 144.06, Stats., to carrying sewer pipes to the basement, or whether it may also install inside plumbing facilities, such as bath,
toilet or water facilities, in the event of the owner's failure to do so.

Sec. 144.06 reads in part:

"Any city or incorporated village having systems of waterworks and sewerage may by ordinance require buildings used for human habitation and located adjacent to a sewer and water main, * * * to be connected therewith in manner prescribed by the board of health or by the board of public works where such board exists. If any person fails to comply for more than ten days after notice in writing the municipality may cause connection to be made, and the expense thereof shall be assessed as a special tax against the property. * * *"

You have not submitted a copy of the ordinance involved. We will assume that its provisions are broad enough to cover installation of inside plumbing and that your question is whether such an ordinance is valid. There are various statutory provisions in addition to the one above cited under which cities may enact ordinances pertaining to the public health. Sec. 62.11 (5) authorizes cities "to act * * * for the health * * * of the public," and to carry out its powers by "regulation, suppression, * * * tax levy, * * * fine, imprisonment, confiscation, and other necessary or convenient means." Sec. 62.11 (5) further states that the powers thereby conferred "shall be in addition to all other grants, and shall be limited only by express language."

The removal of health nuisances and assessment of the cost against the owner was recognized in State v. Laabs, 171 Wis. 557, as a governmental function within the police power. A cesspool on private property was referred to in Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 12, as one type of health nuisance which might be eliminated by public authorities at the cost of the property owner. The court said:

"* * * A defective sidewalk is a menace to the public safety, and its presence in a public street is quite analogous to the presence of a disease-breeding cesspool upon private property, which under well-established principles may be removed by the public authorities and the expense thereof charged to the property if the statute so authorize. The decisions are quite unanimous upon this question * * *."
"** The preservation of public health from danger resulting from the accumulation of sewage upon private property in cities is fully as persuasive a justification for the exercise of the police power as the preservation of life and limb from the dangers resulting from defective or snow-covered sidewalks. **"

It was pointed out in *Nourse v. City of Russellville*, 257 Ky. 525, 534, 78 S.W. 2d 761, that a municipality has implied power to pass ordinances for the abatement and prevention of health nuisances even in the absence of express statutory authorization, and to that end may enact an ordinance making all surface toilets, privy vaults, and cesspools unlawful, and requiring drainage of all sewage into the city sewer system. The court said (p. 765):

"The science of sanitation has developed and taught much in recent years. It has demonstrated that nothing contributes more to secure the preservation of public health than a sanitary system of sewerage disposal, whether it be the modern sewers or septic closets. The benefits of such system are largely lost, unless the inhabitants can be compelled to abandon the menacing structures and to connect their facilities with the system. The community is to be considered as a whole in the matter of preservation of the health of all inhabitants, for a failure by a few to conform to sanitary measures may inflict ill health and death upon many. A spark of contamination may become a conflagration of disease. So the courts pretty generally hold that a legislative body may declare privy vaults and such unsanitary facilities in thickly settled communities to be nuisances and require their abatement without challenging each one or giving the owner notice and an opportunity to show that it is not in fact a nuisance. Owners are not heard to say that these things are not injurious to health and comfort and that they only become so when not properly cared for, or that their abuse or carelessness alone make them subject to police regulation and repression, for the same might be said of the storage of gunpowder, fire traps, and many other activities and conditions recognized as per se inimical or dangerous in thickly settled communities. Sections 959, 971, McQuillin; 12 R.C.L. 1274, 1280; 20 R.C.L. 425, 427; Gault v. Ft. Collins, 57 Colo. 324, 142 P. 171, Ann. Cas. 1916B, 718; Monroe v. Gerspach, 33 La. Ann. 1011; Thillan v. Porter, 14 Lea (Tenn.) 622, 52 Am. Rep. 173; City of St. Louis v. Nash (Mo. Sup.) 260 S.W. 985."
"A leading case directly in point is Harrington v. Providence, 20 R.I. 238, 38 A. 1, 38 L.R.A. 305. Upon reason and a review of many authorities, it was held that municipal legislative bodies may treat or declare privy vaults in thickly settled communities to be nuisances per se and require their abatement without giving to the owners notice or any opportunity to show in each particular case whether their structure is or is not in fact a nuisance; it being sufficient that the Legislature has so treated them for the public good. And it was further held in connection with the abatement that property owners may be required by ordinance to install and connect water closets with the city sewer system."

In addition to the authorities cited in the foregoing excerpt, see Spear v. Ward, 199 Ala. 105, 74 So. 27, 29, and St. Louis v. Hoevel Real Estate & Bldg. Co., (Mo.) 59 S.W. 2d 617.

The validity of a city ordinance relating to sewer connections may be supported by the foregoing legal principles and statutory provisions, as well as by sec. 144.06. That section should be construed in the light of such considerations, as well as in the light of the purpose sought to be attained.

Sec. 144.06 is contained in a chapter of the statutes entitled "Water, Ice, Sewage and Refuse," the purpose of which is to protect and promote public health. A requirement that a sewer pipe be extended to a house and sealed off, so that the household sewage could not be carried by means of it into the sewer system, would do little to serve the public health. Furthermore, such an installation would not fall within the terms of the statute unless it were given an artificially restricted interpretation. Sec. 144.06 provides that the ordinance may require buildings "used for human habitation" to be "connected" with the sewer system.

The term "connect" is defined in Webster's New International Dictionary as:

"To join, or fasten together, as by something intervening, whether physically or logically; as, to connect towns by a railroad; to unite or link together, as in an electrical circuit."
The term as applied to railroads has been held to mean that they must be joined in such a manner as to allow passage from one to the other.

The limitation of sec. 144.06 to buildings used "for human habitation" indicates that the legislature intended that such connection should be made with the sewer system as to permit the passage of sewage incidental to such human habitation into the sewer system.

The extent of the facilities to be installed by the city in reliance upon sec. 144.06 is limited to those which are reasonably necessary to accomplish the purpose, namely, to insure the discharge into public sewers of such waste as might otherwise be permitted to remain in cesspools or surface toilets to the menace of the public health. It is not my opinion that the installation of bath facilities, for example, could be performed by the city in reliance upon sec. 144.06.
Motor Vehicle Department—Reciprocity Agreements—
Sec. 85.05 (2) (d), Stats., authorizes commissioner of
motor vehicle department of Wisconsin, with approval of
governor, to enter into reciprocal agreement with state of
Illinois, exempting Illinois licensed vehicles operating in
interstate commerce between points in Wisconsin and Min-
nesota from liability for Wisconsin registration fees, per-
mit fees, ton mile or flat taxes. Whether or not present
Illinois-Wisconsin agreement embraces such agreement is
dependent upon two factors: (1) Construction of the Illi-
nois statute with respect to the powers of the Illinois
authorities to enter into such an agreement; and (2)
whether the Illinois authorities intended to and do in fact
accord exemption to Wisconsin citizens from liability for
the equivalent Illinois taxes and fees when operating Wis-
consin registered vehicles in interstate commerce between
points in Illinois and states other than Wisconsin.

Motor Vehicle Department.

You state the following facts as the basis for a request
for an opinion interpreting sec. 85.05 (2) (d), Stats.: “A
trucking company incorporated in Illinois holds authority
to operate both intrastate in Wisconsin and interstate
between points in Illinois and Wisconsin and between points
in Wisconsin and Minnesota. The company picks up inter-
state freight at Milwaukee, consigned to points in the state
of Minnesota. An Illinois licensed vehicle is used to perform
the transportation between Milwaukee and points in Min-
nesota.” You request my opinion as to whether, under these
facts, “Wisconsin’s obligation to recognize the Illinois recip-
rocal agreement goes any further than permitting the
transportation of freight with Illinois licensed vehicles in
interstate commerce between Illinois and Wisconsin.”

Sec. 85.05 (2) (d), Stats., provides as follows:

“Notwithstanding any contrary provision of this section,
the commissioner of the motor vehicle department, with the
approval of the governor, shall have authority to enter into
reciprocal agreements with the responsible officers of other
states as to licenses, permit fees, mileage and flat taxes
under which motor vehicles, trailers or semitrailers prop-
erly licensed or registered in other states may be operated in interstate commerce in this state without a Wisconsin registration or the payment of permit fees or mileage or flat taxes, provided like privileges are accorded to vehicles owned by Wisconsin citizens when operated in such other states."

The reciprocity agreement entered into with the responsible officials of the state of Illinois in April 1943, which is on file in the office of the secretary of state of Wisconsin, embraces the statutory language above quoted. The answer to your question is dependent upon the answers to two further questions which are not within the authority of the attorney general of Wisconsin to decide: (1) Whether the statute which empowers the Illinois authorities to enter into reciprocal agreements is broad enough to authorize similar operations in Illinois by Wisconsin citizens operating vehicles registered in Wisconsin in interstate commerce between Illinois and a state other than Wisconsin; and (2) whether the Illinois authorities in fact exempt Wisconsin citizens from registration (license), permit fees, ton mile or flat taxes in Illinois under such circumstances.

The first question is a question of law which can be determined with finality only by the courts of Illinois. While the opinion of the attorney general of Illinois would be much more authoritative on this subject, I can advise you that sec. 22, ch. 951/2, Ill. Rev. Stats., (1949) (Bar. ed.), appears to be broad enough to contain such authority, and as long as the second question is answered in the affirmative and there is no opinion of the attorney general of Illinois or decision of an Illinois court to the contrary you should proceed on the assumption that it does give such authority.

The second question is a question of fact, the solution to which may be reached by an exchange of correspondence between yourself and the Illinois authorities who administer the reciprocity agreement.

So far as the Wisconsin statute is concerned, it is clear that it is broad enough to authorize an agreement which would permit such operations. There is no ambiguity in the Wisconsin statute in that respect.

SGH
Schools and School Districts — Tuition — Handicapped Children—The town of residence of a 5-year old handicapped child, which maintains no special schools or classes for such children, is liable under sec. 41.01 (5) and (6), Stats., for the tuition of such child in the special school provided by any other municipality which may be selected by his parents and to which he is duly admitted.

November 29, 1950.

DEPARTMENT OF PUBLIC INSTRUCTION.

You have requested an opinion on a question raised by a certain town with respect to its liability for tuition of a 5-year-old child residing in the town, for attendance at a school for deaf children in another municipality. Apparently the question arises in part because of the age of the child and the provisions of sec. 40.02 (1), Stats., under which a child may not be admitted to the first grade unless he has attained the age of 6 years on or before December 1 of the year in which he proposes to enter such grade. The foregoing provision relates to grading of schools and admission to a particular grade rather than to school admission generally, and does not prohibit the admission of children under 6 to school facilities other than those so graded.

Art. X, sec. 3 of the Wisconsin constitution provides in part:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years ** **."

It was pointed out in Manitowoc v. Manitowoc Rapids, 231 Wis. 94, that the constitutional provisions do not limit the power of the legislature to provide facilities additional to those made mandatory by the constitution. The legislative control of public education is plenary, subject to constitutional limitations. Even if there were a question of constitutional rights involved, the general principle was enunciated in Holland v. Cedar Grove, 230 Wis. 177, 189, that:

"** ** Municipal corporations have no private powers or rights as against the state. They may have lawfully entered
into contracts with third persons which contracts will be protected by the constitution, but beyond that they hold their powers from the state and they can be taken away by the state at pleasure. * * *"

The question involved in Manitowoc v. Manitowoc Rapids, 231 Wis. 94, was the liability of a town for tuition of one of its residents who was over 20 years of age, attending a vocational school in another municipality. The court said (loc. cit. 231 Wis. 99-100):

"The next question is whether the statutes in question deprive municipalities of property without due process. The basis for this contention is that unless municipalities who do not maintain vocational schools are to be permitted to pass upon the qualifications of applicants who propose to go to such a school in another town and to grant or withhold their approval in their discretion, there is a deprivation of the property of the municipality or its taxpayers without due process. The contention cannot be sustained. The legislature proposes to make vocational education available without tuition to all persons described in the statute. Municipalities of less than five thousand population must either maintain vocational schools or pay tuition in such schools maintained by other municipalities for the attendance there of its qualified residents. * * *"

Sec. 41.01 of the statutes provides for special schools for handicapped children, which term includes those who are deaf or hard of hearing. Subsec. (5) of that section provides in part:

"Handicapped children residing within the district or outside the district may be admitted to special classes or schools according to standards of eligibility which are determined by the bureau for handicapped children and according to available facilities in each such class or school. In case a disabled child who does not reside in a school district maintaining special classes or schools for children with such disabilities is eligible for special class attendance, he may be admitted as a nonresident pupil. Tuition on the same basis as tuition charges to regular schools shall be chargeable to the town, city or village of which such pupil is a resident. * * *"

The statutory provisions are similar to those involved in Manitowoc v. Manitowoc Rapids, 231 Wis. 94, 96, and it
is true here as it was there, that: "In substance, the statute imposes liability for tuition upon the municipality of residence."

The statutes do not limit the choice of the pupil with respect to the school which he shall attend, if there is none available in the municipality of his residence and if he is otherwise eligible. The town of residence is given no authority to restrict the choice.

BL


Words and Phrases—Insurance—A contract whereby a company, for an annual fee, furnishes a check or money order protection plan, and as a part thereof agrees to purchase at the face amount, but not to exceed $50, all dishonored checks and money orders cashed by a merchant during a year, is a contract of insurance. A similar contract whereby the company instead agrees to pursue collection of such dishonored checks or money orders without charge, is likewise a contract of insurance.

December 1, 1950.

JOHN R. LANGE,
Commissioner of Insurance.

You submit two forms of proposed contracts and ask whether they would constitute insurance.

Both are in the form of a subscription by a businessman to a “Check and Money Order Plan and Service,” called the “Plan,” for the period of one year, at an annual fee. The subscription becomes an operative agreement only upon approval and acceptance by the company. The company agrees to deliver all “materials” necessary for the operation of the “Plan” in servicing not less than 500 “registrants.” The fee is payable when the “materials” are delivered and the one year starts at that time. The company may cancel the agreement without notice upon return of 75 per cent of the unearned portion of the annual fee. The subscriber agrees to notify the company immediately when a check or money order “cashed under the Plan” is dishonored by his bank.

In Form No. 1 the company agrees that it “will pursue collection of such dishonored check or money order, provided it and its related * * * registration card are promptly delivered” to the company. Such collection service shall be without cost to the subscriber, provided such delivery is made within 24 hours after the receipt of the dishonored check or money order back from the bank and a registration card under the “Plan” was filled out when it was cashed. If the dishonored check or money order and the related registration card are not so delivered within the 24 hours or if the registration card was not filled out, a
charge of not to exceed 50 per cent of the amount collected shall be made for such collection service.

In Form No. 2 the company agrees to "purchase from subscriber each such dishonored check or money order for the amount for which it was drawn, but not to exceed the sum of Fifty Dollars ($50.00) for any one such check or money order; provided subscriber delivers such dishonored check or money order together with an assignment thereof and with the related * * * registration card to the" company "within twenty-four hours after subscriber's receipt of notice of dishonor, and provided, also, that registration card was filled out at the time said dishonored check or money order was cashed according to directions furnished by the" company.

These contract forms are used in the selling of a check or money order protection service called the "Plan." In general this type of "Plan" consists of furnishing the businessman with "registration cards" and the necessary materials for entering thereon certain identifying data, such as the name, address, auto license number, age, height, weight, color of eyes, color of hair, etc., and in some systems a fingerprint or thumbprint, of the person cashing a check. The merit ascribed to such "Plan" by those selling and furnishing it is that the use thereof will prevent, or at least materially cut down, losses through the cashing of bad checks, because it discourages the passing of them and also furnishes information for tracing and recovering on those that may be returned unpaid. In the case where contract Form No. 2 is used, if the subscriber uses and follows the "Plan" and limits checks to not over $50 each, he will suffer no loss at all. Any loss by noncollection of any of the checks will fall on the company.

Obviously the amount of the annual fee charged each subscriber is intended to be sufficient to pay the cost to the company of selling and servicing the "Plan," which in addition to its overhead, general operating expense and sales expense will include, in the case of contract Form No. 1 the cost of following up and making collection on all the bad checks turned over to it by all subscribers, and in the case of contract Form No. 2 the difference between the total payments made to all subscribers in taking up bad
checks plus the expense of following up and collecting thereon less the total amount collected on the bad checks taken over. As the annual fee charged is a standard amount that is the same for all subscribers, it is apparent that the annual amount paid by each businessman subscriber is not calculated as respects just his particular business alone but is established by the company on the assumption of selling the service to, and its use by, a sufficiently large number of business places to give the "Plan" an operative effect and spread its worth to all of them.

There is no definition of insurance in the Wisconsin statutes. It is very difficult to frame a definition that would be sufficiently comprehensive to cover every case. State ex rel. Martin v. Dane County Mut. Ben. Assoc., (1945) 247 Wis. 220, 231, 19 N.W. 2d 303; Northwestern Mut. Life Ins. Co. v. Murphy, (1937) 223 Iowa 333, 336, 271 N.W. 899. Although not intended to be exhaustive, the courts have stated definitions in general terms which have come to be well accepted and are satisfactory for present purposes in considering the contracts at hand. The instances thereof are numerous and it is enough to give only a few illustrations.

One of the most generally accepted definitions is that given by the Massachusetts supreme court in Com. v. Wetherbee, (1870) 105 Mass. 149. It was there said that a contract of insurance is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction of, or injury to, something in which the other party has an interest. This definition was later adopted by the Massachusetts statutes. Claflin v. U. S. Credit System Co., (1896) 165 Mass. 501, 43 N.E. 293.

In Ollendorff Watch Co. v. Pink, (1938) 279 N.Y. 32, 17 N.E. 2d 676, the court said that an insurance contract is an agreement by which a party, for a consideration, promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the insured has an interest.

In State ex rel. Duffy v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E. 2d 256, insurance was said to be a contract by which one party, for a compensation called the "premium," assumes particular risks of the other party
and promises to pay him or his nominee a certain or ascertainable sum of money on a specified contingency.

In Draper v. Del. St. Grange Mut. Fire Ins. Co., 5 Boyce (Del.) 143, 91 A. 206, 207, the court said that a

"** contract of insurance against loss or damage to property is a contract of indemnity. It is an undertaking on the part of the insurer, based upon sufficient consideration to pay the insured a certain sum of money upon the happening of a certain contingency."

Our own supreme court in Shakman v. U.S. Credit System Co., (1896) 92 Wis. 366, 374, 66 N.W. 528, said:

"** An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril.

**"

The following definition of insurance is given in In re O'Neill, (1932) 143 Misc. 69, 255 N.Y.S. 767:

"A policy of insurance is merely a simple contract whereby the insurer, in return for certain periodic payments to be made to it, engages, upon the happening of a designated event, to pay a named sum either to a specified individual or to a person falling within a certain description."

This last exceedingly general definition is commented upon in Home Title Ins. Co. v. U.S., (1931 CCA 2) 50 F. 2d 107, 109, where it is said that such definition

"** is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss ** or that the insured must first salvage what he can and then look to the insurer only for the difference."

Running through all the definitions there is the inherent concept that an insurance contract is a contract of indemnity. There is also a feature of insurance that is characteristic which is the spreading of the risk of loss either over a wide area geographically or through the coverage of a number of cases, or both. Home Title Ins. Co. v, U.S.,
It is said that insurance involves the distribution of risk and contractual security against anticipated loss. *Jordan v. Group Health Ass'n.*, (1939) 107 F. 2d 239, 245.

Whether a contract is one of insurance is determined from its contents and not from its terminology. *Ollendorff Watch Co. v. Pink*, 300 N.Y.S. 1175; *State v. Beardsley*, (1902) 88 Minn. 20, 92 N.W. 472. It is stated in *State v. Spalding*, (1926) 166 Minn. 167, 207 N.W. 317, that it is immaterial whether or not the contract on its face purports to be one of insurance. In *State v. Beardsley*, *supra*, is a recital to this same effect, with a specific statement that it is immaterial that the word "insurance" nowhere appears in the contract. The court there said that the real character of the promise or of the act to be performed cannot be concealed or changed by the use or absence of words in the contract itself, but that its nature is to be determined by an examination of its contents and not by the terms used. To the same effect is *Ollendorff Watch Co. v. Pink*, *supra*. In the latter case it is said:

"**The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the insured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified.""

The case of *National Colored Aid Soc. v. State ex rel. Wilson*, 208 Ind. 380, 196 N.E. 240, is very explicit upon this point. The court there said that neither the times and amounts of payments by the insured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer affect the question of whether the agreement between them is a contract of insurance. It said that all that is requisite to constitute a contract of insurance is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subjects by a contingency contemplated in the contract.

It seems very clear that Form No. 2 comes within the definitions and concepts above noted. The subscribing busi-
nessman pays an annual fee of $100 for the period of one year. This constitutes the premium. The company agrees in substance that it will pay to the subscribing businessman the amount, but not to exceed $50, of any dishonored check or money order which he cashes, if certain registration cards contemplated by the plan were filled out when it was cashed and the dishonored check and related filled out registration card, together with an assignment of the check, are delivered to the company within 24 hours after the subscriber receives notice of the dishonor of the check or money order. The risk is the contingency of nonpayment and return upon presentation through banking channels, of a check or money order cashed by the subscriber under the plan. The indemnity is the amount for which the check was drawn, but not to exceed $50, which the company agrees to pay to the subscriber for the loss or damage that he suffered in cashing such check or money order and then not receiving in due course of business the amount for which the same is drawn, but a return of it unpaid.

Shakman v. U.S. Credit System Co., (1896) 92 Wis. 366, 66 N.W. 528, held that a contract to indemnify a merchant against loss by insolvency of customers is one of insurance. In that case the company for the sum of $125 agreed that if the plaintiff, a manufacturer of clothing, suffered loss in excess of 1\% per cent on its total sales during the one-year period covered by the agreement, by reason of insolvency of any debtors who owed debts for merchandise sold and delivered during the year, it would pay such excess loss not exceeding $5,000. The court said at page 374:

"** The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. ***

In Claflin v. U.S. Credit System Co., (1896) 165 Mass. 101, 43 N.E. 293, it was held that a contract whereby a corporation agreed, in consideration of a sum paid, to purchase at a fixed price, accounts which during one year a
certain business firm should have against insolvent debtors or judgment debtors against whom execution should be returned unsatisfied, is a contract of insurance. In essence the agreement there considered is the same as Form No. 2 with which we are here concerned. The only difference is that the accounts or obligations for which the company agreed to make payment were uncollectible, whereas here the dishonored checks or money orders which the company agrees to purchase represent obligations which may still be collectible. Nevertheless, the subscribing merchant has suffered a present loss, although later he may recoup therefor, in not receiving cash or its equivalent at the time expected and involved in the acceptance of the checks or money orders.

As noted in Home Title Ins. Co. v. U.S., supra, for the contract to be one of indemnity it is not necessary that the insured be paid only for his actual loss—that is, that he must first salvage what he can from the contingency covered by the contract and recover only the difference, namely, the actual final loss which he ultimately suffers. Here in Form No. 2 the merchant suffers a loss upon the happening of the contingency of having a check or money order which he cashes returned dishonored in that thereby he does not receive the cash or its equivalent which was contemplated by the transaction. Such shortage in cash is a very real loss to a merchant for it ties up his capital and deprives him of using it in the operation of his business. Regardless of whether he ultimately recovers on the dishonored check or money order, the merchant does have a present loss at the time of the dishonor of the check or money order. This is the very essence of the contract under consideration and furnishes the incentive for a merchant to enter into the same and to pay the annual fee specified therein.

The situation is quite different from the case where as a part of the contract of sale of merchandise the seller warrants the quality thereof and agrees to replace the same or pay damage resulting from its insufficiency. Evans v. Premier Ref. Co. (1923) 31 Ga. App. 303, 120 S.E. 553 is that type of case. In State ex rel. Herbert v. Standard Oil Co., 138 Ohio St. 376, 35 N.E. 2d 437, it was said that a
warranty or guaranty issued to a purchaser in connection with the sale of goods containing an agreement to indemnify against loss or damage from perils outside of and unrelated to inherent weaknesses in the goods themselves constitutes insurance.

Here the very essence of the sale and operation of the check or money order protection "Plan" is directed towards the cutting down of the possibilities of the subscriber suffering loss through the cashing of bad checks, and the whole idea back of the agreement to pay the subscriber the amount of any bad checks is to assure him that he will have no loss at all. This clearly is an indemnity arrangement. Furthermore, as previously noted, the charging of a standard annual charge is based upon the acceptance of a number of risks and spreading the losses over all the risks so that the company can charge less for each contract than the possibility of liability under it. There is also another feature which is characteristic of insurance in that the company may cancel the contract at any time by returning 75 per cent of the "unearned portion of the annual subscription fee." This shows that the annual payment is geared to spreading of the losses over a number of risks for otherwise the company would make no return of any portion of the annual fee upon cancellation if the losses it had already paid the particular subscriber exceeded the annual fee.

In general what has been said respecting Form No. 2 likewise applies to Form No. 1 and it therefore also comes within the above mentioned definitions and concepts of insurance. Especially is this true when it is considered that the agreement to undertake collection without charge is a part of the check or money protection plan which is aimed at reduction of losses arising out of the cashing of checks. While consideration of this agreement standing alone might make it appear to be nothing more than one to furnish services at a flat annual charge, actually it is, like Form No. 2, an agreement of indemnity in that the company agrees to furnish without charge the collection service required upon a contingency, namely, the cashing of bad checks. Here again the flat standard annual charge is calculated upon a spreading of the risk of the necessity for such
services over a number of cases and at a figure sufficiently high to make the furnishing and operation of the check or money order protection plan commercially profitable to the company.

It is thus my opinion upon the foregoing considerations that both of the contract forms constitute insurance.

HHP

Automobiles and Motor Vehicles—Safety Responsibility Law—Under safety responsibility law order or judgment of court dismissing action upon the merits should be treated as adjudication that defendant is not liable, even though entered on stipulation.

December 2, 1950.

Motor Vehicle Department.

You have asked what effect you are to give, under sec. 85.09 (6) (d), (7) (c) and (10) (c), Stats., to stipulations compromising and dismissing actions for damages arising out of automobile accidents where they have been entered into by the attorneys for the parties.

The three provisions referred to relate to situations under the safety responsibility law. In each case a person’s position under the law is changed if he can show that he “has been released from liability or been finally adjudicated not to be liable.”

You have not submitted any specific papers for examination. Accordingly only a general comment can be made.

Where a judgment or order of a court dismisses an action or a complaint and it plainly appears that it does so on the merits, it is a final adjudication that the defendant is not liable. The fact that the adjudication is based upon a stipulation does not alter its finality. Your duty is determined by the character of the adjudication and you are not concerned with the sufficiency of the proceedings on which the order or judgment is based.
You indicate that you may have presented to you a stipulation signed only by the attorneys and not by the parties, and not acted upon by the court. No categorical answer can be given as to what additional proof must be given in order to show that the party has been released from liability. In these circumstances you should be satisfied that the attorney had authority to give a release on behalf of his client or that the client has ratified the attorney's act.

You have pointed out decisions of the supreme court of Wisconsin as authority for the proposition that when one retains an attorney to appear for him in an action, such retainer does not of itself give the attorney authority to compromise and settle the action. None of these decisions, however, go so far as to say that an adjudication by a court on the merits may be collaterally attacked because based on a stipulation by an attorney, his express authority not appearing of record.

In Seymour State Bank v. Rettler, 164 Wis. 619, an action was brought on a note. The defendant proved that a previous action on the same note had been dismissed upon stipulation. The court decided that the previous dismissal was not an adjudication on the merits and that without proof of the attorney's authority to make the settlement nor of the client's ratification of the settlement, an agreement by the attorney settling the first action on the merits was not a defense in the second. Nowhere did the court suggest that if the court had entered a judgment on the merits in the first action such judgment would have been open to collateral attack in the second.

Fosha v. O'Donnell, 120 Wis. 336, involved a similar situation.

In Illinois Steel Co. v. Warras, 141 Wis. 119, the decision reviewed an order relieving a party from a stipulation signed by his attorneys in the same action.

If there are just grounds under sec. 269.46 for relieving a party from a stipulation, the party may apply for and the court may grant relief. In the absence of notice that such relief is being sought, you should treat an order or judgment of dismissal on the merits (or "with prejudice") as a final adjudication of nonliability.

TEF
Counties—Salaries and Wages—Civil Service—County Clerk—Compensation of county highway committee employees subject to civil service plan is to be determined under such plan and not by independent action of the highway committee, in absence of specific authority delegated by board.

Liability of clerk who signs orders for unauthorized payments discussed.

Francis L. Evrard,
Corporation Counsel,
Brown County.

You inquire: 1. Whether or not the Brown county highway committee had authority to order overtime pay to employees in that department working under the civil service plan without sanction of the county board.

You state that under the civil service plan adopted by Brown county, only the following appears with reference to employment and overtime work of an employee:

"7. (a) Additional compensation: The monthly rate established herein for a grade or class represents full payment for full-time employment for the regularly established work-week for the job in the employing unit.

(b) Compensatory time off: Appointing authorities may allow employees compensatory time off in lieu of additional compensation for occasional overtime requested by the department."

In your letter you state that recently the county highway committee, without requesting board action, commenced paying three highway employes in the courthouse monthly overtime pay in the sum of $20, $35 and $55 respectively. In two instances, the overtime pay is charged to "shop maintenance" and in the other to "highway administration."

The function and duties of the county highway committee have been considered in 27 O.A.G. 30, at p. 31, as follows:

"The county highway committee is the executive committee of the county board in the expenditure of county
funds used in the construction and maintenance of any roads or bridges within the county. Sec. 82.05 (1) [now sec. 83.015 (1)], Stats. All work of the county board in that respect must be executed through it and the county highway commissioner. X Op. Atty. Gen. 1115, 1116. It has certain powers given by statute and others delegated to it by the county board. Sec. 82.06 [now sec. 83.015 (2)], Stats. If the power sought to be exercised is not expressly or impliedly within those granted the committee by statute, it must be found within those properly delegated to it by the county board. * * *

"Specifically, the board has authority to provide the county highway commissioner with assistants for the discharge of his duties. Sec. 82.03, subsec. (6) [now sec. 83.01 (4)], Stats. The statutes are silent as to the manner in which these assistants are to be provided. Consequently, that is discretionary with the board and it may hire them directly or authorize the highway committee or the commissioner to do so. XX Op. Atty. Gen. 57. This power includes fixing of wages and terms of employment which may also be delegated. XXI Op. Atty. Gen. 327, 330, 331. When duly delegated the committee's powers respecting details of road improvement are as extensive as those of the county board itself. Kewaunee County v. Door County, 212 Wis. 518, 250 N.W. 438. * * *"


Sec. 59.074 provides as follows:

"(1) Any county may proceed, under section 59.07, to establish a civil service system of selection, tenure and status, and said system may be made applicable to all county personnel, including personnel authorized by statute to be appointed by officers, boards, committees or commissions, except the members of the governing body, elective constitutional officers, members of boards and commissions and members of the judiciary. Such system may also include uniform provisions in respect to attendance, leave regulations, compensation and pay rolls for all personnel included thereunder."

However, if as your letter suggests the civil service plan adopted by the county under sec. 59.074 of the statutes purports to establish a system of selection, tenure and status, including uniform provisions in respect to compensation and pay rolls for all personnel included thereunder, it is clear, from the references to the county plan
cited, that the Brown county highway committee has no authority, without sanction of the county board, to order overtime pay to employees in that department working under the civil service plan.

As to the second question in your inquiry: 2. Whether or not the county clerk is liable to the taxpayers of Brown county when he signs checks for overtime authorized by the Brown county highway committee.

It follows from what has been said in respect to the first question above that the payment being unauthorized, the clerk would be liable if he signs checks for such payments. His duties in connection with signing orders are provided in sec. 59.17 (3). It was said in an opinion of this office, 22 O.A.G. 393, at p. 394:

"It was held in Reichert v. Milwaukee County, 159 Wis. 25, at pp. 35–36:

"** * * The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. For illustration: Although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial (State ex rel. Treat v. Richter, 37 Wis. 275), the clerk may refuse to sign and deliver an order not legally authorized (State ex rel. Mulholland v. County Clerk, 48 Wis. 112, 4 N.W. 121). * * *.

"Every ministerial officer in the performance of purely ministerial acts is required, at his peril, to interpret the statute, or the order made in pursuance thereof, imposing a duty upon him and calling for action on his part. His decision if erroneous does not exempt him from liability in an action, but his decision if correct is sufficient to defeat an action against him. * * *"

MR
Taxation—Foreclosure of Tax Liens—Procedure under sec. 75.521, Stats., action in rem:

List of tax liens should set forth as to each parcel all those tax certificates then held by the county and then eligible for tax deeds.

The year to be inserted in the caption is the calendar year in which the list is filed.

The description of a platted parcel must include the section number as well as the lot and block number.

The separate index of lists of tax liens to be kept by the clerk of circuit court is to contain the names of owners and mortgagees, alphabetically.

December 5, 1950.

WARD WINTON,
District Attorney,
Washburn County.

You ask a number of questions relative to sec. 75.521, Stats., which provides a procedure in rem for foreclosure of tax certificates.

1. The first is whether a “List of Tax Liens” filed as the commencement of a proceeding under this section should set forth all the tax certificates held by the county against the respective parcels of land included therein, or only the “first resulting tax sales certificates” held by the county which are eligible for tax deeds, or only all the tax certificates which are held by the county on such lands that are then eligible for tax deeds.

Attention is directed to the designation of such list in subsec. (3) as a “List of Tax Liens,” the further designation in the form for the caption as “List of Tax Liens for 19...,” and the definition in para. (b) of subsec. (1) of a “tax lien” as a “county owned or held tax sale certificate upon which a tax deed may be applied for as provided by law,” and the suggestion is made that these indicate “only the tax sale certificates for a single year are to be included in any particular tax list.” It is unclear whether by this it is meant that in each calendar year the county proceeding under this statute files a single list in that year which will include all the property upon which the county holds tax
sale certificates that are eligible for tax deed regardless of
the year of tax sale, or that in each calendar year the
county may file separate lists but each list shall include only
those properties upon which the county holds tax sale cer-
tificates of one single year's tax sales, so that where the
county has tax certificates eligible for tax deeds which are
of different tax sale years each list must be limited to and
set forth only the properties upon which the county holds
a tax sale certificate for the same year. The last alternative
would mean that if a county had several tax sale certifi-
cates of different years upon a parcel of land it would be
necessary to file as many lists as the number of separate
years of tax sale certificates. On the other hand attention
is directed to other provisions of sec. 75.521 as indicating
that all tax certificates held by the county against a par-
ticular parcel of land are to be included in one list of tax
liens being foreclosed. There is the provision in subsec. (8)
that the judgment is based on the latest dated tax lien ap-
pearing in the "List of Tax Liens," which would appear
to negative any idea that where there are several tax liens
upon a piece of property, which obviously would be of dif-
f erent years, they are to be set forth in separate lists, each
of which includes only the tax liens of a single year's sale.
Also there is the provision in subsec. (5) that redemption
is made "by paying all of the sums mentioned in such list
of tax liens together with interest thereon," but this is not
determinative because the use of the plural "sums" under
the rule set forth in sec. 370.01 (2), Stats., extends to and
may be applied to the singular and vice versa. In view of
the specific definition in subsec. (1) (b), wherever the
phrase "tax liens" is used in this statute it must be read as
meaning only the tax sale certificates held by the county
which are eligible for tax deed. Accordingly the require-
ment in subdiv. 3 of subsec. (3) (a) means merely that the
list shall set forth all of the tax certificates that are held
by the county upon the lands included in the lists that are
or could be at that time the basis for a tax deed to each
particular parcel of land listed.

There is nothing in the language of this statute that lim-
its a county to filing a single list in any year or that pro-
vides that if it does file more than one list in a year each
list must be limited only to the properties covered by a single year’s tax sale certificates. Nor is the language in subsec. (3) to be read as requiring that as soon as a county has tax sale certificates for 3 consecutive years on a piece of property it must proceed under this section immediately upon the first one becoming ripe for tax deed. Were the language to be so construed it would conflict with the requirements that the list must state the amount due on each tax lien in the hands of the county treasurer, and also with the provision in subsec. (5) for redemption by payment of “all of the sums mentioned in such list.” The intention of this section is that there must be filed a list of tax delinquent properties upon which the county desires to obtain title through this in rem proceeding and that each such list must contain a statement of the tax sale certificates the county holds upon such properties that are ripe for the taking of the tax deed at the time of the filing of the list. The designation or setting forth of a year of reference is for the purpose of identification of the particular list and means the calendar year in which the list is filed. Clearly the giving of a number to each list filed in each calendar year does not necessitate inclusion of all of the property upon which the county has tax certificates that are eligible for tax deed. It contemplates a splitting up of the properties into as many lists each year as is found convenient, with a designation by number so as to identify them in the filing in the office of the clerk and for pleading purposes. Were it intended that only one list should be filed each calendar year there would then be no point in providing that the list should bear both a designation of the year and also a number. Likewise if it were contemplated that the year should be the year of the tax sale then likewise there would be no reason for having a separate number designation for then the county would be required to proceed just as soon as it had 3 consecutive tax sale certificates and in that instance there would be no point in the provision that the judgment when entered should be deemed to be upon the latest dated tax certificate that was eligible for tax deed. There would be only one tax certificate which would be eligible for tax deed under that application of the statute.
Construction of the provisions of this statute as requiring the setting forth in the list of not only the tax certificates then eligible for tax deeds but also all subsequent tax certificates held by the county would by virtue of the impact of the language in subsec. (5) respecting redemption effect a result contrary to the redemption concept in sec. 75.01 that redemption of property from a tax sale certificate that is ripe for tax deed does not require payment of amounts due on subsequent tax certificates. 30 O.A.G. 184. While a county could effect that result under the last sentence in sec. 75.01 (3), in the absence of so doing the county would be in the same position as a private holder of the certificates. For this general policy of the tax redemption statute to be set aside in in rem proceedings it would require compelling language, and the provisions in sec. 75.521 as set forth in subsec. (5) that one redeeming shall pay all the sums mentioned in the list falls far short of such language. The provisions of sec. 75.521 and those in the other parts of ch. 75, Stats., are in pari materia and should be construed together with the result that this language in subsec. (5) is to be construed as requiring only that payment be made on the amount due on the tax sale certificates that are eligible for tax deeds.

2. The next question is whether all the tax certificates held by the county against a parcel of land must be included in the list or may the county include only one tax certificate on the property each year. This would appear to be answered by the discussion on the previous question. In the illustration which you give the county in the year 1948 would have tax certificates for the sale of 1942, which being more than 5 years old would then be eligible for tax deed, and would also have tax sale certificates for the sales of 1943 and 1944 which would not be eligible for tax deed because not 5 years old. As we interpret the application of this statute to such illustration the county would have tax sale certificates for 3 consecutive years so that in 1948 it could proceed under this section by including the property in one of the lists filed thereunder in the year 1948. As to the property upon which it held only such certificates the list would set forth only the 1942 tax certificate as “a tax lien” upon which foreclosure could be had. The county
could not ask for foreclosure on the 1943 and 1944 certificates because they are not as yet eligible for tax deeds.

Should the property be redeemed from the lien of the 1942 tax certificate when so included in such list, then if the county treasurer so desires the same property could be included in a subsequent list filed in 1948 after the date upon which the 1943 certificate would be of sufficient age to be the basis of a tax deed. In such later list the 1944 tax certificate not yet being one upon which a tax deed could be sought would not be a “tax lien” that would have to be included in the statement in such list. Obviously the county treasurer could not file such subsequent list in 1948 unless the county also had the 1945 tax sale certificate.

The county treasurer however is not required to so proceed in 1948 and could wait until all of these 1942, 1943 and 1944 tax sale certificates of the property would be eligible for tax deed before including the property in a list of tax liens filed under this section. It would not seem justifiable for him to do so solely motivated by a desire to make redemption more difficult because of the large or accumulated amount of money that would necessarily have to be paid to redeem the property. The purpose of all tax deed procedure, including that in sec. 75.521, is to promote the payment and collection of taxes and the returning of the property to the tax roll. If inclusion of the property in a list filed in the first year that a county has a tax sale certificate of sufficient age to be made the basis for a tax deed effects collection of the taxes and the charges in the tax sale certificate so eligible for tax deed, the purpose of the statutes is accomplished, even though the party redeeming them does not have to also redeem other subsequent tax sale certificates which are held by the county but are not as yet eligible for tax deed. It is desirable for the county treasurer in proceeding under this section to include property in a list of the first calendar year in which the county has 3 consecutive tax certificates and one of them is of sufficient age to be made the basis for tax deed. There is, however, nothing in this statute which requires him to do so. All that it does is to require that when property is included in a list of tax liens filed under this section there
must be stated all of the tax sale certificates held by the county which are eligible at that time for the tax deed.

If the county treasurer includes a parcel in a list of the year in which a county-held certificate first becomes eligible for tax deed, obviously when judgment is entered the title thereby vested in the county is based solely upon that tax certificate as it is the latest dated tax sale certificate that is eligible for tax deed. If more than one tax certificate that is eligible for tax deed is set forth in the list then the title is based upon the one latest in date. Once the county acquires title by the entry of judgment in proceedings under this section all tax sale certificates held by the county on such lands which are of subsequent date to the certificate that is the latest dated one eligible for tax deed become merged in the superior absolute title of the county and then there is no further occasion for proceeding under this section in respect to any subsequently dated tax sale certificate. The title acquired by the county is absolute for subsec. (13) (b) provides that the judgment bars all former owners and quiets the title of the property in the county. Any rights of an owner that are unjustly cut off or lost by the entry of judgment in such proceedings are protected by the remedy given by subsec. (14a) as created by ch. 177, Laws 1949.

3. The next question is as to what year is to be inserted in the designation of the list and in the caption of the proceedings. As previously indicated it seems compatible with the basic pattern of a proceeding under this statute that the year is the same both in the designation of the list and in the caption and that it is to be the calendar year in which the list is filed. The requirement that the year and number be put in is merely for identification purposes.

4. Your next question is whether the provisions in subdiv. 1 in subsec. (3) (a) that the description of each parcel shall state "the lot, block and section number of any parcel upon any tract, the plat or map of which is filed in the office of the register of deeds of such county," requires that the section number be given in addition to the lot and block number of platted lands. You state that to give the section number in addition to the lot and block number involves considerable work and is unnecessary for the purpose of
identification as merely the lot and block number is the usual practice as to platted lands because the plat being of record it shows in what particular section the particular lot is located. This statutory language cannot be viewed as merely directory for it is stated in positive terms and the last sentence of the same subdivision says that if the land is unplatted then "an engineer's metes and bounds description shall be a sufficient description." Such engineer's metes and bounds description will necessarily include the section number. Where the statute says that the section number shall be included for platted lands it must be taken to mean just what it says.

5. The final question is as to what is required of the clerk of the circuit court by the provisions in subsec. (4) that when a list of tax liens is filed he shall index it in a separate book kept for that purpose. Records in the office of the clerk of circuit court are kept by name of the parties involved and all indexing is on that basis. By this provision it would seem that what is meant is that the clerk shall have a separate book designated as "Lists of Tax Liens Foreclosed by Action in Rem" or some similar title, in which the lists of tax liens filed shall be entered on an alphabetized basis in the name of each party whose name appears as an owner or mortgagee in each list. After each name of an owner or mortgagee so indexed, there should appear the volume and page of the regular record in the clerk's office where such proceeding is entered as an action commenced in such court.

In view of the purpose that appears to be served, the clerk of the circuit court upon the filing of a list under this section would enter the same as an action commenced in the same way that any other actions would be entered in his regular books and then make entries in this separate book for the name of each of the parties involved upon an alphabetical basis. As the proceedings go along then he would make the usual subsequent entries in his regular records in the same way as would be done in respect to any other action of a similar character. Subsec. (4) thus provides for an extra and separate indexing of the lists of taxable liens filed under this section which is in addition to the
regular entries that the clerk of the circuit court would otherwise keep in respect to such proceedings as the commencement of an action.

HHP

Counties—Salaries and Wages—County Superintendent—Ch. 561, Laws 1949, authorizes county board to grant additional compensation to county school superintendent, effective during the current term.

December 5, 1950.

ERWIN C. ZASTROW,
District Attorney,
Walworth County.

You have asked whether a county board may during the current term allow additional compensation to the county superintendent of schools for his work as secretary of the county school committee over and above his present salary.

The essential problem is the relationship between sec. 59.15 (1) relating to salaries of elective county officials generally, and sec. 39.01 (3) relating specifically to salary of county superintendents, in the light of ch. 561, Laws 1949.

Clearly, sec. 59.15 (1) would, without the enactment of ch. 561, have required a negative answer to your question. Sec. 59.15 (4) provides that in the event of conflict between the provisions of sec. 59.15 and any other provisions of the statutes the provisions of sec. 59.15 to the extent of such conflict shall prevail. Ch. 561, Laws 1949, however, was enacted after sec. 59.15 (4).

Sec. 59.15 (1) provides that "the county board shall prior to the earliest time for filing nomination papers * * * establish the total annual compensation * * *. 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."
Sec. 39.01 (3), Stats. 1947, provided in part that "The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his annual salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. The salary of county superintendents as fixed by the county boards shall not be less than $2,000 a year."

Clearly when secs. 59.15 and 39.01 (3) were in the form above referred to, there was no question but that the superintendent's salary must be fixed before the earliest time for filing nomination papers and no change could become effective before the end of the term.

Ch. 561, Laws 1949, became effective August 2, 1949 and amended sec. 39.01 (3) adding some new provisions with reference to the salary of the county superintendent. It provided: "Such salary schedule shall apply to salaries paid to the county superintendents after July 3, 1949." The current regular 4-year term for county superintendents began July 4, 1949. The reference to July 3, 1949 first appeared in an amendment (Substitute Amendment No. 1, S.) offered May 18, which was after the election of superintendents for the term beginning July 4. The reference to the date July 3, 1949 quite clearly indicates that the change made by ch. 561 was to take effect during the current term. If sec. 59.15 (1) were to continue to control, the change could not be effective until the term beginning in July, 1953.

The legislative history of ch. 561 supports the view that it was intended that the change take effect during the current term. Bill No. 133, S., 1949 legislature, was introduced at the request of the commission on the improvement of the educational system. It provided, among other things, that a county superintendent was to be appointed by the county school committee. It provided that the salary be fixed by the county board at not less than the amount provided under a "state-wide minimum salary schedule" to be issued by the state superintendent and range from $3,000 to $6,600 per year, "varying with length of service, professional training and professional responsibilities." It specified that additional compensation may be provided for work as secretary of the county school committee.
Substitute Amendment No. 1, S., offered May 18, eliminated the proposal that the superintendent be appointed, but preserved the "state-wide salary schedule," with an upper limit of $7,500. It altered the reference to additional compensation and added a further sentence so that the material portion of sec. 39.01 (3) would have read as follows:

"The county board shall fix the annual salary of the county superintendent which shall not be less than the amount to which he would be entitled under a state-wide salary schedule for county superintendents which shall be promulgated by the state superintendent of public instruction and which shall provide a salary range from $3,000 to $7,500 per year, varying with length of service, professional training and professional responsibilities. Additional compensation may be provided the county superintendent by the county board both for the performance of his regular duties and for his work as secretary of the county school committee. Such salary schedule shall apply to salaries paid to the county superintendents after July 3, 1949."

As noted above the insertion of the last sentence made it plain that the new provisions were to be effective for the new term, notwithstanding sec. 59.15 (1).

Amendment No. 1, S., to Substitute Amendment No. 1, S., offered May 31, struck out all the provision for a "state-wide salary schedule" issued by the state superintendent, provided a minimum of $3,000 per year, but preserved the last two sentences quoted above. This amendment was adopted by the senate as was also Substitute Amendment No. 1, S.

Substitute Amendment No. 1, A., was finally enacted as ch. 561, but it differed from the bill originally passed by the senate only in restoring the introductory portion of sec. 39.01 (3)

The material portion of that subsection now reads as follows:

"The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. The salary of county superintendents as fixed by the county boards shall not be less than $3,000 a year,"
varying with length of service, professional training and professional responsibilities. Additional compensation may be provided the county superintendent by the county board both for the performance of his regular duties and for his work as secretary of the county school committee. Such salary schedule shall apply to salaries paid to the county superintendents after July 3, 1949."

It is true that when the term "such salary schedule" was first inserted in the bill, it might have referred solely to the antecedent "state-wide salary schedule" to be issued by the state superintendent. But it is the rule that meaning is to be given to every portion of a statute if that can reasonably be done. The term "such salary schedule" as applying to salaries after July 3, 1949 was retained when the term "state-wide salary schedule" to be issued by the state superintendent was deleted. The antecedent for the term "such salary schedule" must therefore be the additional compensation for regular duties and for work as secretary of the county school committee as provided by the county board.

It is therefore my opinion that the board may grant additional compensation in reliance upon ch. 561, Laws 1949, which shall be effective during the balance of the current term.

TEF

_Dairy, Food and Drugs—Food Standards—Validity of food standards statutes, secs. 97.02 (14), 97.02 (13) and 97.275, discussed._

December 5, 1950.

**STATE DEPARTMENT OF AGRICULTURE.**

By virtue of sec. 93.07 (23) your department is charged with the enforcement of state food laws. You have asked whether three specific provisions of ch. 97, Stats., are valid.

You suggest that the food standards in two of those provisions are in conflict with federal standards and that the
third provision is also invalid. In connection with your request for opinion, counsel for your department has submitted a very helpful memorandum.

I. Section 97.02 (14).

The introductory paragraph of sec. 97.02 provides:

"In all prosecutions arising under the provisions of these statutes relating to the manufacture or sale of an adulterated, misbranded or otherwise unlawful article of food, the following definitions and standards for food products shall be the legal definitions and standards, to wit:"

The third paragraph of sec. 97.02 (14) provides:

"Canned vegetables are sound, properly matured and prepared fresh vegetables, with or without salt, sterilized by heat, with or without previous cooking in vessels from which they take up no metallic substance, kept in suitable, clean, hermetically sealed containers, are sound and conform in name to the vegetables used in their preparation."

The federal regulations prescribing standards of identity, of quality and of fill of container for the various canned vegetables cover eight pages in the pamphlet issued by the federal security agency in January, 1949. It is known as "Service and Regulatory Announcements, Food, Drug and Cosmetic No. 2, Rev. 1."

A brief examination of the federal standards discloses that they permit without label declaration the use of water in some vegetables, starch in canned corn, and sugar and dextrose in all canned vegetables. The federal standards also permit as ingredients in certain vegetables, and with proper label declaration, the following: Vegetable oil, vinegar, spices, artificial color and flavoring.

These federal regulations have been promulgated pursuant to the federal food, drug and cosmetic act, 21 U.S.C.A. §301 et seq. Under that act a food is deemed misbranded if it purports to be a food for which a definition and standard of identity have been prescribed unless it conforms to such definition and standard and is properly labeled (§ 343). The act prohibits introduction into interstate commerce of a misbranded food, the misbranding of any food in inter-
state commerce, the receipt in interstate commerce of any misbranded food and the delivery thereof (§ 331).

It should be first pointed out that most of the Wisconsin food standards were written into the statutes promptly following the adoption of the first federal law in 1906. These state standards were patterned after the interpretations and advisory definitions of the federal food and drug administration under the federal law. There has been but little attempt to keep them in accord with amendments adopted by the food and drug administration.

The federal law was amended in 1938 and it now specifically provides that the food and drug administration may establish standards of identity and may promulgate standards of quality and of fill of container. Machinery is thus provided for revision of the federal standards. The state standards, however, have remained in the statutes, subject to change only by the legislature. Conflicts and inconsistencies have thus developed.

The federal act is interstate commerce regulation designed to protect the health of the citizens of the several states and to protect them against fraud and deception. The 1938 act authorizes the administrator to promulgate new standards when he finds "such action will promote honesty and fair dealing in the interest of consumers." Since 1938 about 20 states have adopted the language of the federal statute. Most of the states accept or have the power to accept the federal definitions and standards.

The federal act and the standards promulgated under it are not acts of police power. They are rather acts exercised under the federal constitutional powers over interstate commerce. The state controls in the same field, on the other hand, are efforts of the state, in the exercise of its police power, to protect the health and welfare of its citizens. In each instance we must, therefore, determine whether the state act impairs the effect of the federal act, destroys rights existing under the federal statute, or discredits and burdens the legitimate federal regulation of interstate commerce.

There are many cases in which the supreme court has held that a state, in the exercise of its police power, may enact legislation relating to the health, life and safety of

There are also some older federal cases which hold that the state is not precluded from the exercise of its police power in this field because "the fact that a food or drug might be condemned by congress if it passed from state to state, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn." *Weigle v. Curtice Bros.*, 248 U.S. 285, 288; *Eckman’s Alternative v. United States*, 239 U.S. 510; *Hipolite Egg Co. v. United States*, 220 U.S. 45.

The supreme court has said, however, that such state regulations must not conflict with the acts of congress; that they may not impose upon or discriminate against inter-state commerce; that to the extent such acts do interfere with or frustrate the operation of the acts of congress, such provisions in the state law are invalid. *Savage v. Jones*, 225 U.S. 501; *T. & P. Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426; *Southern Railway Co. v. Reid*, 222 U.S. 424.

At one time there existed a clear line of demarcation where the federal power ceased and where the state power could be validly asserted, i.e., where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts. *Leisy v. Hardin*, 135 U.S. 100; *Savage v. Jones*, 225 U.S. 501; *Purity Extract Co. v. Lynch*, 226 U.S. 192.

This "original package" concept had its origin in the opinion of Justice Marshall in the case of *Brown v. Maryland*, 12 Wheat. 419. This doctrine was first abandoned in the case of *McDermott v. Wisconsin*, 228 U.S. 115, in which Mr. Justice Day said (pp. 131–132, 133–134):

"** the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the
operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution."

And again:

"* * * Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

Since the McDermott decision the federal concept of interstate commerce has been much broadened and the doctrine of that case has been followed in United States v. Walsh, 331 U.S. 432; Wickard v. Filburn, 317 U.S. 111; United States v. Wrightwood Dairy, 315 U.S. 110; United States v. Darby, 312 U.S. 100; and United States v. Olsen, 161 F. 2d 669.

One of the most recent cases to follow the reasoning of the McDermott decision is United States v. Sullivan, 332 U.S. 689, in which the court said that the federal act was intended "to insure federal protection until the very moment the articles passed into the hands of the consumer" by way of an intrastate transaction.

To assure federal control over adulterated and misbranded food and drugs until the ultimate commercial transaction has been completed and to provide consumer protection even after the interstate transportation has been completed, the congress in June 1948 adopted the Miller amendment to § 304 (a) of the food, drug and cosmetic act (21 U.S.C.A. § 334 (a)) authorizing seizure of adulterated and misbranded products "while held for sale (whether or not the first sale) after shipment in interstate commerce."

Our own court has said, in the case of John F. Jelke Co. v. Emery, 193 Wis. 311, that a statute which attempts to prohibit the sale of a healthful, nutritious food is invalid as an unlawful exercise of the police power in all cases
where the prohibition is not necessary to protect the public health, morals or safety, or to prevent fraud or to promote the public welfare.

There are many other cases, state and federal, which similarly outline the limitation on the exercise of police power in this field. See 22 Am. Jur. 810, Food, § 8.

To return to specific consideration of sec. 97.02 (14), you point out that many canned vegetables are specifically defined in the federal standards and some of them may by law contain, among other things, one or more of the following optional ingredients, none of which are provided for in the state standards: Water, sugar (sucrose), corn sugar (dextrose), vinegar, spices, starch, and vegetable oil. Generally speaking, the federal regulations require that the presence of such optional ingredients be declared on the label. You ask whether or not the Wisconsin statute may be enforced as a valid prohibition against the sale of all canned vegetables conforming to the federal standards but containing optional ingredients not recognized in the state standards.

You stated in your letter that it may be fairly assumed that foods conforming to the federal standard are not deleterious and that it would be difficult, if not impossible, to justify certain of our laws on the grounds that they are necessary to prevent fraud and deceit. Accepting the assumption that the materials added to the vegetables permitted by the federal law do not make the product deleterious to health and that the public is not misled to its hurt, it is my opinion that the Wisconsin law would be invalid and unenforceable since it would be in direct conflict with federal regulation on the subject and must therefore yield to the superior power of congress. McDermott v. Wisconsin, supra.

II. Section 97.02 (13).

You ask a question pertaining to sec. 97.02 (13) of the Wisconsin statutes, which defines canned fruits, jams, jellies, preserves and fruit butters. These definitions describe the several products as classes of foods. The federal standards specifically define the individual fruits, such as canned peaches, canned pears, and the like. Under the federal stan-
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dards, some of these products may contain various optional ingredients, such as water, corn sugar, honey, corn syrup, added flavorings, artificial coloring, added fruit acids and added pectin. Under the Wisconsin standards, jams, preserves and fruit butters must be prepared from fresh fruit. Under the federal standards, they may be prepared from frozen or canned fruit, and fruit butter may be prepared from frozen, canned or dried fruit. Generally speaking, the federal regulations require that the presence of the optional ingredients be declared on the label. There is no requirement, however, that the state or condition of the fruit used in manufacture of the product be so declared.

You ask whether the Wisconsin statutory standards can be enforced as valid prohibitions against the sale of all such fruit products conforming to the federal standards but containing ingredients not recognized in the state standards.

As in the first question, if we assume that the added materials and the frozen or dried condition of the fruit is not deleterious to health and the public is not misled to its hurt, it is my opinion that the Wisconsin law would be invalid and unenforceable under the rule of McDermott v. Wisconsin, supra.

I wish to make it clear that in answering the above questions, I am not attempting to make any finding of fact or to pass judgment on whether or not the Wisconsin law actually does afford protection to the public against fraud or deceit. I am basing my judgment of the invalidity of the statutes in question solely upon your assumption that it would not be possible to prove that the Wisconsin standard actually protects the public from fraud and deceit while the federal standard does not do so.

III. Section 97.275.

Your other question presents a different problem. It concerns sec. 97.275, which reads as follows:

"It shall be unlawful for any person, firm or corporation to sell, advertise, or solicit orders for shipment or consignment, or offer or expose for sale, or have in possession
with intent to sell or market, rosefish under the name of sea perch. Such fish may be sold upon proper designation, solicitation or advertisement as rosefish."

Summarizing the information you have furnished to me, rosefish or redfish is a general and widely used term for a rather small salt water rock fish classified technically as *sebastes marinus*. There are some 250 different types of this species and there are a number of different names in common usage all referring to the species in general. You state that the names “rosefish,” “sea perch,” “ocean perch” and “red perch” are specifically permitted by the federal trade commission, and that the product labeled with any of the names above given moves freely in interstate commerce.

A letter which your department received in 1937 from the commissioner of the bureau of fisheries, department of commerce, reads in part:

"The product appearing in the market as ‘sea perch’ is a fillet produced from the fish shown as rosefish in our published statistics. Until a few years ago this fish was discarded by fishermen and it was not until two or three years ago that fishermen began saving them for the market in any quantity. * * * After being landed the fish are filleted and sold as sea perch."

The United States department of interior has published “Fishery Leaflet 320” entitled “Rosefish Cookery” (1948). In part, this reads:

"This fish has been known to fishermen as redfish for years but was not made available for general consumption until 1935 when the industry began filleting and freezing it for shipment to inland cities and towns. It is now marketed under several names such as rosefish, ocean perch, sea perch and red perch. * * *

"Many people still are not familiar with rosefish while others only use it occasionally."

Some of the other names under which this fish is known are snapper, Norwegian haddock, hemdorgen, breem and John Dory.

It is obvious that great confusion prevails concerning the identity of this fish but the federal food and drug ad-
ministration has not as yet promulgated a definition and standard of identity.

The Wisconsin statute was passed to prevent confusion and fraud in the sale of the ocean fish and fresh water perch or yellow perch (flavescens) which are native to this region and considered by many to be the most delectable of all fresh water fish. The purpose of the statute is commendable and the state of Wisconsin unquestionably has the power to protect its people from the sale of the less desirable sebastes marinus as fresh water perch.

The potential of confusion, mistake and fraud are apparent. Our law does not prevent the movement into the state of sebastes marinus under its various trade names, but merely prevents the sale within this state under any name but one. This name, “rosefish,” fairly designates the fish by what is probably its most common and best known name, both within the trade and without. I cannot see that the regulation is unreasonable or arbitrary, or that it places any undue burden upon interstate commerce.

While it is probably true that the wording of the statute could be improved, I think that it is clear that the legislature intended to prevent the sale of sebastes marinus under any name other than “rosefish,” even though common names of the fish other than ocean perch are not mentioned.

While food statutes to be valid must be sufficiently definite and certain as to leave no reasonable doubt as to what was intended, the statute is sufficiently certain if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited. 22 Am. Jur. 811, Food, § 9.

“Pure food acts are enacted as a means of protecting the people against the fraud and imposition of manufacturers and vendors of inferior and unwholesome food and medicinal products and are to be interpreted, if possible, within sound canons of construction in such way as to secure to the public the benefit intended by the legislature. The primary rule of construction and interpretation of food laws is to ascertain, and give effect to, the legislative intention in adopting such laws. To ascertain such intention, each part or section of the law in question is to be considered in connection with every other part or section, as well as in connection with the evils intended to be remedied thereby.
If the purpose of a pure food statute is plainly expressed and the act is within the power of the legislature, the only duty of the courts is to give the statute effect according to its terms; consequently, no room is left for construction. If the statute is susceptible to more than one construction, it should be given the construction that will effect its purpose, rather than one that will defeat it.

"The legislature may expressly state the meaning which is to be given to a word or term used in a pure food act. And, where it has done so, it is the duty of the courts to give it such meaning and, thus, carry out the evident intent of the legislature." (22 Am. Jur. 819–820, Food, § 18.)

The case of Lewis & Fox Co. v. Sherman, (1924) 266 U.S. 497, 503, involved a situation in which the company, located in Massachusetts, shipped meat into New York. New York required that meat be marked as kosher or non-kosher. The company claimed the commerce clause was violated. The court said:

"* * * It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

It is my opinion that sec. 97.275 meets all requirements and is a valid and enforceable regulation.

TEF

REB
You have supplied us with the following facts: The city of Kewaunee grade school is operated by joint school district No. 1. This school district is comprised of territory which includes the entire city of Kewaunee, and about 80 acres outside the city limits in the adjoining town of Pierce and less than one section in the adjoining town of West Kewaunee. The city of Kewaunee has never organized a city school system under secs. 40.50 through 40.60, Stats. This school is in charge of "a supervising principal who is locally called a superintendent." He happens also to be principal of the union free high school district, which district is larger in area than the grade school district. The high school and grade school are housed in one building in the city of Kewaunee.

As I understand your question, it is whether property in these school districts is exempt from that part of the county tax which is levied for the compensation and allowances of the county superintendent of schools.

The material statutes are as follows:

"40.43 In all school districts which embrace all of the territory of any city, however organized, and including joint districts the district board, board of education or other board in charge may employ for a period not longer than 3 years at a time, a superintendent to supervise and manage the schools under the direction of such employing board."

"39.01 (5) CITIES WITH SCHOOL SUPERINTENDENT. 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."
Your attention is also directed to sec. 70.62 (1) providing for the allocation by the county board of the tax to be levied for this purpose.

It is clear that either the joint district you describe, or the union free high school district you describe, meets the requirements of sec. 40.43 and each is authorized to employ a superintendent. If either does in fact employ a superintendent to supervise and manage the school under the direction of the employing board, then the property therein is not to be taxed for the compensation and allowances of the county superintendent of schools. Property outside the city, but within the school district should, for this purpose, enjoy the same status as property within the city. A different construction would raise a constitutional question.

You have not submitted any resolution of the board of the school district or any contract. Accordingly I express no opinion as to whether a city superintendent has in fact been employed.

TEF

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Public Officers—Compatibility—Sheriff—Superintendent of County Home—Under art. VI, sec. 4, Wis. Const., sheriff cannot hold any other office. This precludes him from serving as superintendent of the county home under sec. 46.19, Stats.

December 8, 1950.

FULTON COLLIPP,
District Attorney,
Adams County.

You state that the superintendent of the Adams county home was elected sheriff of the county for the term commencing January 1, 1951, and that his contract as superintendent will expire March 1, 1951. Also it appears that the county board and the trustees of the county home may want to rehire him as superintendent since it is considered that he could actually perform the duties of both offices,
This raises the question of whether or not the offices of sheriff and superintendent of the home are incompatible, and if so, whether it will be necessary for the superintendent to resign as superintendent before assuming the office of sheriff.

Art. VI, sec. 4, Wis. Const., provides in part: "Sheriffs shall hold no other office."

Sec. 46.19, Stats., provides:

"(1) The trustees shall appoint a superintendent of each institution and may remove him at pleasure.

"(2) The trustees shall prescribe the duties of the superintendent. He shall execute and file an official bond with sureties approved by the trustees.

"(3) Subject to the approval of the trustees, the superintendent shall appoint and prescribe the duties of necessary additional officers and employes of the institution, and may remove them at his discretion, subject to the county civil service law.

"(4) The salaries of the superintendent, visiting physician and all necessary additional officers and employes shall be fixed by the county board."

Without going into any detailed analysis of the various legal tests that are applied in distinguishing between an "officer" and an "employe," it is quite apparent from the wording of sec. 46.19 that the legislature intended the superintendent of the county home to be an officer.

Therefore, since the sheriff cannot serve as such officer, he should resign as superintendent before assuming the office of sheriff.

WHR
Guardian ad Litem—Illegitimacy Matters—Amount of fees allowed guardian ad litem under sec. 328.39 (1), Stats., is not limited by sec. 357.26 (1).

Francis L. Evrard,  
Corporation Counsel,  
Brown County.

You have asked for an interpretation of sec. 328.39 (1), Stats. That section provides in part:

"* * * In divorce and separation actions, in which the question of illegitimacy is raised, and in illegitimacy proceedings, the court being satisfied that the parties to the action are unable to adequately compensate the guardian ad litem for his services and expenses, the court shall then make an order specifying the guardian's fee and expenses, which fee and expenses shall be paid as provided in section 357.26."

Sec. 357.26 (1) provides:

"Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding $25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions, and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment."

You ask whether the amounts of the fee and expenses ordered by the court to be paid under sec. 328.39 (1) are limited by the schedule set forth in sec. 357.26 (1).

Sec. 328.39 (1) literally authorizes the court to specify the fee and expenses. Reference is made to sec. 357.26 for method of payment. Sec. 357.26 makes provision for (1) payment by the county, and (2) acceptance by the county treasurer of the certificate of the clerk of court as sufficient warrant.
Nothing in the terms of sec. 328.39 (1) suggests that the setting of the amount of compensation is subject to sec. 357.26 (1). There is no ambiguity calling for the application of a rule of construction. It is therefore my opinion that the fee and expenses specified by the court under sec. 328.39 (1) are not limited by the schedule set forth in sec. 357.26 (1).

In view of the specific provision made by sec. 357.26 (1) for the sufficiency of the certificate of the clerk of court as a warrant, the treasurer must pay the amount ordered even though the chairman and clerk fail to sign an order. See sec. 59.20 (2).

Criminal Law—Gambling Device—Intoxicating Liquors—Revocation of License—Baseball tally card described in the opinion, is a device designed for a similar form of gambling to that for which a number jar is used and is within the terms of sec. 176.90 (1), Stats.

December 8, 1950.

John S. Coleman,
District Attorney,
La Crosse County.

You have requested an opinion as to whether a device which you have submitted is a gambling device covered by sec. 176.90, Stats. This statute provides among other things for revocation of tavern licenses if the licensee suffers or permits certain gambling devices to be set up, kept, managed or used on his premises. Subsec. (1) provides in part as follows:

“A license or permit issued under the provisions of this chapter or section 66.054 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. * * *

The device which you have submitted consists of a cardboard cover folded at the top and labeled "Series or Weekly Base Ball Tally Card." On the front cover there is printed a tabulation of the teams in the National and American leagues with spaces after each for the insertion of the score made by that team on each day of the week and further spaces for the weekly totals to be entered.

On the inside of the card there are attached 120 slips of paper, the ends of which are folded over and sealed. Each of these slips contains the names of two baseball teams. The player pays a certain consideration for the right to pull one or more of these 120 tabs from the inside of the card. The winner is determined in some manner by the results of the major league ball games for the week.

This appears to be somewhat the same type of device which was held to be a lottery ticket in State v. Mier, (1948) 252 Wis. 221, 225.

The question is whether this is a device "designed for like form of gambling" to that for which number jars are used.

A number jar is a glass jar containing a large number of tabs folded and sealed. They are loose in the jar and are not attached to any card as in the case of the baseball tally card here under consideration. The player pays a consideration for which he may draw one or more tabs from the number jar. He breaks the seal and if a winning number is contained in the tab selected by him he is immediately paid a cash prize by the operator of the game. The form of gambling played by means of a number jar is identical with that played by means of a punchboard.

The principal difference between the baseball tally card on the one hand and a number jar or punchboard on the other is that the winner is not immediately known but is determined by the result of the week's baseball games. In all other respects they are the same.

It was indicated in State v. Coubal, (1946) 248 Wis. 247, 264, that the word "similar" in sec. 176.90 should receive a liberal construction:
“In Commonwealth v. Nance, 158 Ky. 444, 447, 165 S.W. 423, the statute there involved applied to ‘the owner or controller of the tables called “pigeonhole tables,” or any table similar thereto.’ The court, overruling the lower court, held that the word ‘similar’ should receive a liberal interpretation and that it was in the mind of the legislature ‘to embrace within the act any table resembling in its general characteristics a pigeonhole table upon which was played a game somewhat similar to or alike in a general way to the game played upon a pigeonhole table.’ A directed verdict of acquittal was reversed and the case remanded for a new trial.” (Italics supplied.)

The same construction would naturally be given to the word “like” in the clause here under consideration.

The form of gambling for which the baseball tally card is used being substantially like that for which a number jar is used, it is my opinion that the baseball tally card is a gambling device which is covered by sec. 176.90 (1), Stats.

WAP

Motor Carriers — Taxation — Truck transporting dry grain sprouts from breweries to mill, from which they are delivered to farms and sold to farmers calling for them, is not exempt from taxes under sec. 194.48 or 194.49 (weight or mileage).

December 8, 1950.

Ben R. Runkel,
District Attorney,
Ozaukee County.

You present the following facts:

The owner of a motor truck uses it to transport dry grain sprouts from breweries to his mill. The sprouts are not processed at the mill but are sold to farmers for feed for livestock. The owner transports some of them to farms of his customers, some almost immediately on receipt and some from time to time as required to fill orders. Some customers call for sprouts at the mill.
You call attention to the weight and mileage taxes imposed by secs. 194.48 and 194.49, Stats., and to exemptions provided in sec. 194.47. In particular you refer to the operation described as "transportation to farms of materials, supplies or equipment for use thereon." You correctly suggest that transportation of the sprouts to farms, either directly from the breweries or directly from the mill falls within the description. It follows that a truck exclusively used in that operation would be exempt.

You ask, however, whether a truck which performs transportation from the breweries to the mill is exempt.

In my opinion the transportation from the breweries to the mill does not fall within the statutory terms quoted above, and a truck performing this operation is therefore not exempt. It is a well established rule that the person claiming the favor of an exemption from a tax must bring himself plainly within its terms. *Bowman Dairy Co. v. Tax Comm.*, 240 Wis. 1.

You have cited an opinion of the attorney general that transportation of supplies to country cheese factories for use therein is a basis for exemption. 32 O.A.G. 267. That opinion is based, however, upon the proposition that the legislature had for many years acquiesced in the interpretation that country cheese factories were intended to be the equivalent of farms for this particular purpose. After discussing the previous interpretation of the statute by the public service commission and the supreme court, the attorney general said:

"We therefore deem the legislature has accepted the public service commission's pronouncement that 'the present general method of producing * * * cheese is but an extended farm operation, so considered by agricultural authorities,' and that such interpretation, having been adopted by the Wisconsin supreme court, accordingly becomes a part of the statute itself."

There is no similar basis for interpretation of the statute favorably to the truck owner in the situation you describe.
Elections—Justice of the Peace—A village justice of the peace can be elected for a full term only in odd-numbered years.

December 8, 1950.

JAMES L. McMONIGAL,
District Attorney,
Green Lake County.

You state that a justice of the peace has regularly been elected in a village at the spring election in the even-numbered years. You ask several questions arising because of amendments of sec. 61.19, Stats., in 1943 and 1945.

Sec. 61.19, Stats. 1941, provided that a justice of the peace shall be chosen at the annual election in each village. Because the term of a justice is for 2 years (sec. 15, art. VII, Wis. Const.) there were always two offices of justice of the peace for each village.

Ch. 173, Laws 1943, amended sec. 61.19 to provide that a justice of the peace (as well as other officers) shall be chosen at the annual spring election in each village in odd-numbered years. This reduced the number of justices to one for each village.

Several problems which arose because of this change were discussed in an opinion of the attorney general, 32 O.A.G. 398. By virtue of ch. 575, Laws 1943, ch. 173 became effective January 1, 1945. Ch. 86, Laws 1945, amended sec. 61.19 so as to read as at present. Sec. 7 of ch. 86 provided as follows:

"No justice of the peace whose office will cease to exist by reason of this act or chapter 173, laws of 1943 shall after the expiration of the term to which he was elected have or perform any of the functions of a justice of the peace."

Accordingly the justice elected in the spring of 1944 held office for his full term of 2 years, but did not hold over thereafter. There could be no election for a full term in the even-numbered years thereafter, although an election could be held in an even-numbered year for the unexpired term in a vacant office. See 39 O.A.G. 322.

With respect to the propriety of appointment to fill a vacancy, I call your attention to an opinion dated Nov. 18,
1950,* in which it was stated that sec. 17.23 (1), Stats., authorizing the filling of a vacancy in the office of justice of the peace by appointment is valid and does not conflict with art. VII, sec. 15, Wis. Const.

The village has no power, by charter ordinance under sec. 66.01, to provide for the election of a justice each year. Sec. 61.195 permits changes in tenure of certain officers other than justices of the peace. The term of a justice is fixed by the constitution. Sec. 3 of ch. 575, Laws 1943, purporting to save charter ordinances doubtless refers to changes made under sec. 61.195 with respect to other officers.

TEF

Banks and Banking—National Banks—Securities Law—Sec. 189.28, Stats., as amended by ch. 291, Laws 1949, is applicable to sale of securities by national banks in Wisconsin.

Edward J. Samp, Director,
Department of Securities.

You have called our attention to ch. 291, Laws 1949, which amends certain sections of the securities law, ch. 189 of the statutes. Reference is made to 28 O.A.G. 600, wherein it was concluded that national banks were exempt from the licensing requirements of ch. 153, Laws 1939, and you inquire whether national banks are now subject to the provisions of sec. 189.28 in view of the amendment of this section by ch. 291, Laws of 1949.

Among other things, ch. 153, Laws 1939, created sec. 189.145 to read:

“(1) Any bank or trust company exercising banking powers and qualifying under subsection (2) of section 189.02 shall first obtain a license therefor. The application for such license shall be filed in the office of the commission and shall contain a statement, verified by an officer

* Page 467 of this volume.
of such bank or trust company, setting forth the facts relating to qualification under subsection (2) of section 189.02.

“(2) The commission shall examine the application and may make a detailed investigation into the business affairs of the applicant. Such bank or trust company shall not be required to report to the commission the sales and purchases of securities, but must keep a permanent record thereof, available for inspection by the commission.”

Sec. 189.145 was later repealed by ch. 327, Laws 1941, by which chapter the entire securities law was substantially rewritten.

Sec. 189.28 (1) and (2), as created by ch. 327, Laws 1941, read:

“(1) Any state bank, mutual savings bank, trust company bank or national bank, which is not a licensed dealer, may upon applying for and obtaining a license under this section, execute orders for the purchase or sale of securities as agent of the purchaser or seller, provided it has no direct interest in the sale or distribution of the securities purchased or sold, receives no commission, profit, or other compensation from any source other than the purchaser or seller, delivers to the purchaser or seller written confirmation of the order which clearly itemizes its commission, profit or other compensation, and purchases from or sells such securities to a licensed dealer.

“(2) Said application shall be verified and filed with the department and shall be in such form and set forth such information as the department may require to determine the nature and scope of the applicant's securities business. The department may make a detailed investigation into the business and affairs of the applicant, and shall issue a license authorizing the applicant to engage in the transactions specified in subsection (1) upon payment of the prescribed fee and of the expense attributable to the examination of the application and any investigation made by the department, if it shall find that it is appropriate in the public interest that such license be issued; otherwise the department shall by order deny such application. All licenses issued pursuant to this section shall terminate on December 31 following the date thereof.”

By sec. 4 of ch. 291, Laws 1949, sec. 189.28 (2) was amended to read:
“Said application shall be verified and filed with the department and shall be in such form and set forth such information as the department may require to determine the nature and scope of the applicant’s securities business. The department * * * shall issue a license authorizing the applicant to engage in the transactions specified in subsection (1) upon payment of the prescribed fee * * *. The department may periodically examine the records of any licensee hereunder but such examination shall be limited to the securities transactions executed pursuant to such license. All licenses issued pursuant to this section shall terminate on December 31 following the date thereof unless sooner suspended or revoked as provided in subsection (5) and (6) hereof.”

It will be noted that sec. 189.28 (2) as amended meets one of the objections made in 28 O.A.G. 600, at 602–3, to the effect that there was a point of actual conflict between sec. 189.145 (2) as created by ch. 153, Laws 1939, and the federal statute, 12 U.S.C.A. §484, concerning the exercise of visitorial powers over national banks. Under sec. 189.28 (2), as amended by ch. 291, Laws of 1949, no examination of the bank is required as a condition precedent to issuance of a license. Nevertheless an examination may be made subsequent to the issuance of a license, although it is limited to security transactions executed pursuant to the license, whereas under the statute which met with disapproval of this office in 28 O.A.G. 600 the bank, making application for a security license, was subject to detailed investigation without any limitations whatsoever as to all of its business affairs.

By “visitorial powers” as used in 12 U.S.C.A. § 484 is meant the power to control and correct abuses and to enforce a due observance of the statutes. State v. Portland First National Bank, 61 Ore. 551, 123 P. 712. It was held in this case that such terms should also be interpreted in the light of the visitorial powers enumerated in the national banking act, which provides for the appointment of bank examiners authorized to make a thorough examination of each bank’s affairs, examine its officers and agents under oath, and make a report of its condition to the comptroller.
In 36 O.A.G. 93, First National Bank v. Missouri, 263 U.S. 640, was quoted to the effect that the extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations and this office concluded that since 12 U.S.C.A. § 36 authorized a national bank to establish a paying and receiving station it was unnecessary for a national bank to obtain authority from a state banking review board before establishing paying and receiving stations in Wisconsin. In First National Bank v. Missouri, supra, it was held that a state statute prohibiting branch banking applied to national banks as well as state banks. But this was on the theory that the federal statute (since amended) did not authorize a national bank to engage in branch banking. Thus, there was no conflict between the state statute and federal law.

With reference to the powers of national banks to deal in securities, 12 U.S.C.A. § 24 provides in part:

"* * * The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: * * *"


In Farmers' and Mechanics' National Bank v. Dearing, 91 U.S. 29, it was held that congress may confer on national banks such powers and immunities as it sees fit, and the states can in no manner interfere except as permitted by congress. In commenting upon one of the statutory powers of national banks in this case, the court stated that the power to supplement it by state legislation is conferred neither expressly nor by implication.

No doubt there are limits upon the doctrine which appears to be stated too broadly in the foregoing case. Obviously congress could not confer a power on national banks which it had no constitutional authority to grant, e.g., the power to practice medicine, to take an extreme example,
and thus thwart the states in the exercise of a well recognized police power exclusively under state jurisdiction.

We will assume, however, that the federal statute relating to security transactions by national banks is presumptively valid as being within the powers of congress.

In *Davis v. Elmira Savings Bank*, 161 U.S. 275, it was held that an attempt by the state to define powers and duties of national banks or to control the conduct of their affairs, is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. This doctrine has been adhered to in numerous decisions cited in footnote 32 to 12 U.S.C.A. § 24, and may be taken as a correct statement of the rule.

The statement of the rule, however, does not answer the factual question which must be considered in each instance, —that is, does the state legislation either conflict with the federal statute or frustrate its purpose or impair the efficiency of the bank as an agency of the federal government to discharge the duties for the performance of which national banks were created?

Some assistance has been furnished in answering this question by the work which has been done by others in approaching the same problem. For instance, my attention is directed to correspondence which your office has had with the division of corporations of the state of California in which reference is made to an opinion of the attorney general of California No. 1–9114, dated January 5, 1934, and addressed to Hon. Edwin M. Dougherty, commissioner of corporations. In that opinion the view is expressed that although the effect of the 1933 amendment of the national banking act referred to above may have been to give the national banks the power to deal in securities, they would nevertheless in so dealing be subject to whatever regulations the individual states might impose. It was conceded, however, that in the event the United States utilized national banks to distribute securities of the United States
they might be agencies of the United States in so distributing such securities so as to be exempt from state control.

Apparently the comptroller of the currency has acquiesced in this opinion of the attorney general of California, and the commissioner of the division of corporations for California advises that it is the practice of national banks in California to apply for and obtain security brokers' licenses from the state for the general business of buying and selling outstanding securities of private business corporations on behalf of bank customers.

Similarly the Florida securities commission advises that two of the largest national banks there, with various branches over the state of Florida, have registered with the Florida commission as dealers. The biennial report of the attorney general of Florida for 1933-1934 at pp. 594-5 contains an opinion dated March 30, 1934, on a national bank qualifying as a securities dealer, wherein the attorney general said:

"Further consideration of this matter leads me to believe that a State has power to require a national bank to comply with certain reasonable and nondiscriminatory regulations, when, in virtue of a power granted by Congress to the national bank, such bank attempts to exercise such power within a State, provided that such regulation does not impair its efficiency or frustrate the purpose for which it was created by Congress."

Thus in at least two states it has been considered that the type of regulation here discussed does not conflict with the federal statute or frustrate its purpose or impair the efficiency of the bank as an agency of the federal government to discharge the duties for the performance of which national banks are created, and the national banks as well as the comptroller of the currency have acquiesced in such interpretation.

You are therefore advised that sec. 189.28, Stats., is applicable to national banks in Wisconsin.

WHR
Community Currency Exchange—Retail Stores—Under the circumstances described retail department stores cashing checks for a fee are probably not community currency exchanges under sec. 218.05, Stats.

December 8, 1950.

G. M. MATTHEWS,
Commissioner of Banks,
State Banking Department.

You call attention to the practice of four department stores of cashing checks, money orders and the like, and charging a fee for the service. You ask whether these stores, because of this practice, are community currency exchanges, subject to regulation under sec. 218.05, Stats. You have submitted statements of fact presented to you on behalf of the stores.

All four regularly accept checks for payment for merchandise purchased or for accrued obligations due the store. No fee is charged as to any of these checks, including at least some instances where the amount of the check exceeds the amount due the store. Each store also makes a practice of "cashing" checks where no payment to the store is involved. In each of the latter cases, a fee is charged, amounting to 10 or 15 cents per check.

Each store asserts that no profit is made out of the fees charged and that the direct cost is greater than the fee. These stores have cashed checks for a long time but have only recently commenced charging a fee. After starting to charge a fee, the number of checks cashed was substantially reduced, a reduction of 65 and 75 per cent having occurred in the cases of the two stores which submitted figures on the point.

Two of the stores give a coupon to each person who pays a service charge. The coupons can be applied on a purchase at the store and a portion of them are so used. The stores assert they do not advertise or promote the check cashing service. The number cashed on a fee basis is a minor fraction of all the checks received. As to the stores which gave figures on this point, the percentages were 12.8, 17 and 21.
Sec. 218.05 (1) (b) defines a community currency exchange. Insofar as here material it is a person, firm, corporation, etc., "engaged in the business of and providing facilities for cashing checks ** for a fee or service charge, or other consideration **. Nothing in this section shall be held to apply to any person ** engaged in the business of selling tangible personal property at retail ** who, in the course of such business ** and, as an incident thereto, cashes checks, drafts, money orders or other evidences of money."

Clearly the legislature intended that one who is in a retail business may perform check cashing operations to some degree without thereby becoming a community currency exchange. It may have considered that where check cashing operations are clearly of minor importance and are subordinate to the operations of retail merchandising, the evils which the legislature was attempting to correct by regulation were not so likely to exist.

It is also true that the exact line beyond which check cashing operations could not expand and remain merely an incident to the principal business is one which could be established only by a series of judicial determinations. The attorney general cannot advise you as to any exact criterion to apply. It is my opinion, however, that the facts submitted are relevant to the question whether the check cashing operations described are an incident to the principal business of these stores, and would probably persuade a court that these operations are only an incident. It would then follow that these stores are not community currency exchanges.

TEF
Criminal Law—Execution for Fine and Costs—Where one has been sentenced to pay a fine or be committed to jail upon nonpayment and has served the jail term, an execution against defendant's property may nevertheless issue within the time limited by sec. 272.04, Stats., in view of sec. 353.25 (1). Interest runs from the date of sentence, pursuant to sec. 272.05 (8).

Robert C. Altman,
District Attorney,
Marathon County.

You ask the following question:

"When there is a judgment in a criminal matter, that the defendant shall pay the fine and costs or upon such failure to pay such fine and costs to be committed to the County Jail for a period not exceeding six months and the defendant does in fact serve the full time as stated by the Court, does a judgment immediately attach and require an entry in the judgment docket of the Clerk of Circuit Court and if so, when does such judgment become effective? For example—K is found guilty of negligent homicide and his sentence is sixty days and to pay the fine of $300.00 and costs or upon failure to pay such fine and costs, to be confined in the County Jail for an additional period not to exceed thirty days. If the defendant actually serves ninety days, is there any judgment against him and if so, when may that judgment be entered and when does interest start to accumulate on that judgment?"

Ch. 270, Stats., which contains several provisions as to judgments, is a part of Title XXV, designated "Procedure in Civil Actions." It relates primarily to civil actions, although portions are expressly made applicable to criminal proceedings, e.g., sec. 357.14. Provisions for docketing judgments (270.74) and for judgments constituting liens on real estate (270.79) appear to relate exclusively to judgments in civil actions. Accordingly they are not a basis for concluding that a sentence to pay a fine constitutes a lien on real estate.

Similarly ch. 272 is a part of Title XXV. Sec. 353.25 (1), however, expressly authorizes issuance of an execution
against the property of the defendant, but provides no procedure. A previous opinion of the attorney general stated:

"In any case, however, the court may issue an execution against the property of the defendant for the fine and costs under sec. 353.25, Stats. Since that section is silent as to the time and manner of issuing and enforcing the execution, it must be inferred that an execution under ch. 272, Stats., is meant (see VI Op. Atty. Gen. 47) and this being true, it would seem that sec. 272.04 is applicable, under which the execution may issue at any time within five years after rendition of judgment." (32 O.A.G. 228, 230)

In 1921 the attorney general stated in an opinion that the serving of the commitment made in default of payment of a fine will not relieve defendant from payment and that execution may issue to collect it. 10 O.A.G. 1133.

Sec. 272.05 (8) provides that an execution may direct collection of interest on the amount recovered from the date of rendition of the judgment.

Accordingly in the example you suggest, it is my opinion that interest runs from the date of sentencing and an execution against property may issue within the time limited by sec. 272.04.

TEF

Conservation Wardens—Defense in Civil Action—District Attorney—A game warden who is sued for damages arising out of his acts in connection with an arrest is entitled to representation by the district attorney.

December 11, 1950.

STATE CONSERVATION DEPARTMENT.

You call attention to the power of a conservation warden to arrest persons for violations of game laws. You state that occasionally the person arrested makes some claim of rough treatment or the like and sues the warden for damages allegedly caused by the warden in connection with the arrest.
You ask whether the attorney general may participate in the defense of the warden in this civil action.

Sec. 29.05 (9) provides as follows:

"Each commissioner and each deputy conservation warden, in the performance of his official duties, shall be exempt from any and all liability to any person for acts done or permitted or property destroyed by authority of law. In any action brought against the commissioner or warden involving any official action it shall be the duty of the district attorney of the county in which the action is commenced to represent such commissioner or warden. No taxable costs or attorney fees shall be allowed to either party in said action."

Accordingly in a case such as you describe, a warden is entitled to representation by the district attorney. In Muska v. Apel, 203 Wis. 389, 395, the action had been brought for damages arising out of acts of the wardens in making an arrest. The plaintiff claimed these acts constituted assault and battery and false imprisonment. In explaining the reason for the provision of sec. 29.05 (9) relating to costs, the court said:

"* * * The provision was apparently made because the amount of judgments for damages rendered against state officers for acts done pursuant to their official duties, when paid by the officers, are quite commonly reimbursed to them pursuant to act of the legislature. The state is therefore indirectly interested in such judgments."

See sec. 270.58, Stats.

The attorney general appeared for the wardens in the supreme court.

Sec. 14.53 (12) provides as follows:

"The attorney-general shall, at the request of the head of any department of state government approved by the governor, appear for and defend, in any court of the state where an action may have been brought, or may be tried, any agent, inspector or employe of such department charged with the enforcement of law, or the custody of inmates of state institutions or prosecution for violation of law, in any tort action except malpractice against him, based upon any act done or incurred in, or arising out of the lawful discharge of the duties of such agent, inspector or employe.
Witness fees incurred in the defense of any case under this section shall be paid as provided for in section 325.07.”

Under the section quoted, a duty to appear for the warden in the trial court would devolve upon the attorney general only where an appropriate request was made by the commission and approved by the governor.

The commission has no statutory authority to retain counsel for the warden or to pay any of the expenses of the litigation.

Savings and Loan Associations—Mortgage Loans—Savings and loan associations may not make a loan on security of a single parcel of real estate which is used both for eligible purposes and for purposes declared ineligible under sec. 215.22 (8), Stats.

When a savings and loan association has properly made a loan on eligible security any other type of real estate or personal property may properly be accepted as additional collateral security.

Savings and Loan Department.

You have requested my opinion on the following question: Can a savings and loan association accept as security for a mortgage loan any of the types of properties enumerated in sec. 215.22 (8), Stats., provided a part of the building or buildings is occupied as a home or for business purposes; or provided eligible and ineligible property is included in the same mortgage?

You state that an order issued by the commissioner of savings and loan associations and approved by the savings and loan advisory committee effective September 1, 1949, provides among other things that the loan approved shall not exceed 80 per cent of the appraised value of the real estate offered as security.

The material statutes controlling the types of loans and security which may be made by a savings and loan association read as follows:
Sec. 215.21 (2):

"(2) Any association may accept, as additional collateral to its mortgage bond, any other real estate, personal property or a policy of insurance on the life of any person who is a party to or responsible for the payment of the mortgage bond. The association may be named beneficiary as well as absolute assignee of such life insurance, and, to protect its interests therein, advance premiums thereon."

Sec. 215.22 (8):

"(8) No association shall make loans on:
(a) Vacant lands or vacant lots (unless such lots are included with improved real estate);
(b) Properties used for manufacturing purposes;
(c) Theaters;
(d) Public halls;
(e) Public garages;
(f) Churches;
(g) School buildings;
(h) Hotels."

In my opinion these statutes are clear and unambiguous and not subject to construction. By the express terms of sec. 215.22 (8) the enumerated properties may in no case be any part of the basic security for a loan from the savings and loan association, subject to the one proviso that vacant lots may be part of the security when included with otherwise eligible real estate. However, the clear intent of sec. 215.21 (2) is that after a loan has been properly made on eligible securities, any other property, real or personal, of any nature whatsoever may be accepted as added collateral security.

As a necessary result of the foregoing, loans may not be made on a single property which is used for both eligible and ineligible purposes. However, when a loan has been properly made on eligible property that is used for either residential or commercial purposes and the loan complies with your order in that it does not exceed 80 per cent of the appraised value of the eligible property, any of the otherwise ineligible properties named in sec. 215.22 (8) may be accepted as additional collateral security.

RGT
Public Service Commission—Navigable Waters—Diversi-
on for Irrigation—Applications to the public service com-
mission for permission to divert water from a navigable
stream for irrigation purposes are controlled by sec. 31.14,
Stats.

A reduction in the volume of stream flow is not per se an
injury to public rights or to riparian owners.

Riparians whose consent to a diversion must be obtained
under sec. 31.14 are those owning land between the point
of diversion and the point where the stream flows into a
larger stream and loses its identity.

The commission can in no case authorize a diversion if
public rights are injured.

The commission has continuing jurisdiction over the
amount of water which may be diverted.

The commission may not issue a permit for diversion to
a nonriparian owner.

The common law governing the use of water by riparian
owners continues in force subject to the control of the com-
mission under sec. 31.14.

Diversion of water from a lake which reduces the flow
in the outlet stream is a diversion from that stream.

Public Service Commission.

You state that the public service commission receives re-
quests for permits to use water from streams for agricul-
tural irrigation. You ask the following questions regarding
the processing of such request:

1. Must such application be considered and disposed of
under sec. 31.14 of the statutes?

2. If sec. 31.14 is applicable, does a reduction of the nat-
ural stream flow past a riparian owner constitute an in-
jury to public rights in the stream or to any riparian on
the stream as specified in sec. 31.14 (1)?

3. What riparians are involved: (a) Those downstream
from the diversion to the junction with the next stream; or
(b) those to the end of the stream or streams to which the
stream in question is tributary; or (c) those to some other
stopping point?
4. In sec. 31.14 (1) it is specified that no water shall be diverted to the injury of public rights in the stream or to the injury of any riparians on the stream unless the riparians consent, but in subsec. (8) there is no mention of any injury to public rights in the stream. If the commission should find public rights in the stream are injured by the proposed diversion, does a permit issue in case of (a) surplus water and (b) non-surplus water?

5. Subsec. (8) requires the commission to fix the quantity of water and the time or times that it may be diverted. If the commission does this for one or more permits should it go back and revise the allocation of water when another permit is granted on the same stream?

6. Can the commission give a permit to a non-riparian owner?

7. In view of the provisions of sec. 30.01 (4) (c) is the common law still applicable with respect to the use of water from streams for irrigation?

8. Does the pumping of water from a lake, which pumping results in reducing the flow in the outlet stream of the lake, constitute diversion from the outlet stream?

Your questions will be answered in order.

1. Sec. 31.14, insofar as material on this point, provides:

"(1) It shall be lawful to temporarily divert the surplus water of any stream for the purpose of bringing back or maintaining the normal level of any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable lake or stream is located within the water shed of the stream from which the surplus water is diverted, and water other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparians located on the stream, unless such riparians shall consent thereto.

"* * *

"(4) Before any water may be diverted for the purposes set forth in subsection (1), the applicant shall file an application with the public service commission * * * ."

These statutes clearly require that applications for the diversion of water for agricultural irrigation should be considered and disposed of under sec. 31.14.
2. Whether the reduction of the natural stream flow past a riparian owner constitutes an injury to the public rights in the stream or to any riparian on the stream as specified in sec. 31.14 (1) depends on the circumstances of the particular case. The common law rule is that a riparian owner is entitled to the flow of a stream in its natural course and in its natural condition in respect of both volume and purity except as affected by reasonable use of other proprietors. Thus no riparian owner has an absolute right to the flow of all the water in its natural state but instead his right is limited by the right of the upper owner to make a reasonable use. 56 Am. Jur. 726. It would seem then that any use which the public service commission might authorize to upper riparian owners must be reasonable in relation to the needs of the lower owner. No rule can be laid down as to what is a reasonable use. In reaching a decision on this issue courts have held it proper to consider the use intended, its extent, duration, necessity and application, the size of the stream and its velocity of current, the nature of the banks and the type of the soil, the importance and necessity of the use claimed by one party and extent of injury caused by it to another, climatic conditions, uses and customs of the locality, convenience in doing business and the public necessity. 56 Am. Jur. 779.

By the same token it is impossible to state what is an injury to the public interest or rights in the stream. Factors which might need to be considered in determining the presence of a public right and an injury to it would include, among others, the necessity for the protection of the public water supply in the interests of public health, to protect highways and bridges, to protect shorelines, to protect agricultural land, to aid navigation, to protect and conserve hunting, fishing and spawning grounds, to equalize the outflow for the watering of stock, and numerous other factors depending on the situation.

It is to be noted that this determination of injury to public rights on the stream is necessary in all cases. Regardless of the manner in which the statute is framed, it would appear that the public service commission could not properly determine that water was surplus if its diversion would injure public rights.
3. The riparians involved are "any riparians located on the stream" who are damaged. This would appear to mean those along the entire length of the stream below the proposed diversion and to such a point where the stream flows into a larger stream and loses its identity.

4. Although subsec. (8) does not repeat the prohibition in subsec. (1) against diversion to the injury of public rights in the stream, the two sections must be read in conjunction with each other, and the context of sec. 31.14 as a whole shows a clear intent to prohibit any diversion to the injury of public rights in the stream in the case of nonsurplus water. This prohibition is not expressed in relation to surplus water. However, it would seem that the public service commission would be acting beyond its powers as stated in sec. 31.02 and in abuse of discretion if it were to authorize a diversion even of surplus waters which would injure the public rights in the stream.

5. Nothing in the statute requires the commission to revise its allocation of water under prior permits when another permit is granted on the same stream. Such a procedure is unnecessary where there is still sufficient surplus of water in the stream or where the necessary consents are obtained. The desirability of making reallocation on prior permits where there is insufficient water for all who apply is a matter for the decision of the commission in the exercise of its informed judgment. Such a permit may be withdrawn or amended by the commission at any time, as no rights are vested in an applicant by its issue, the matter being one of privilege under the continuing control of the commission.

6. Since the statute says nothing in respect to the issuance of permits to nonriparian owners it must be assumed that the common law applies. Previous decisions in other states have held that a riparian owner could make any reasonable use of the water even on nonriparian land providing there was no unreasonable diminishment of the current and no actual injury to the present or potential enjoyment of the property of the lower riparian owner. 56 Am. Jur. 785. In Wisconsin in the recent case of Munninghoff v. Conservation Comm., 255 Wis. 252, the court specifically
ruled that nonriparians did not have a right to the use of water other than for navigation and its incidents.

7. Since there is nothing in sec. 31.14 to the contrary, it would appear that the common law still is applicable in respect to the rights of the state and individuals in all waters within the state as provided for in sec. 30.01 (4) (c) and this would be equally true as to waters used for irrigation except insofar as sec. 31.14 changes the common law.

8. The pumping of water from a lake which results in reducing the flow in its outlet streams does constitute a diversion from the outlet stream. Such artificial draining of the lake deprives the owners along the stream of their rights to the flow of the water and its diminution in flow is unreasonable and improper as if the diversion were a direct one. Mohr v. Gault, 10 Wis.* 513.

Adjutant General—National Guard—Adjutant general has authority to investigate and report on claims for damages to persons or property arising from the operation of aircraft by the air national guard.

Adjutant general has no authority to execute an agreement to hold the federal government harmless for damage claims arising out of the operation of aircraft by the air national guard.

December 12, 1950.

ADJUTANT GENERAL.

You state that the national guard bureau proposes to request the headquarters of the United States air force to negotiate for the acquisition of the Sheboygan air-to-air gunnery ranges for use by units of the Wisconsin air national guard. You state further that as a necessary preliminary to such acquisition the national guard bureau has requested the state to agree to the following:

(a) The processing of any claims for liability to cover damages to property or personnel that result from opera-
tion of aircraft by air national guard personnel is a re-
responsibility of the state.

(b) The federal government is not liable for damages as
a result of claims filed against the state where the operator
of the aircraft is a member of the national guard.

You inquire whether you have the authority on behalf of
the state to make the commitments outlined in paragraphs
(a) and (b).

The administrative officers of the state, including the
adjutant general, have the powers and only such powers as
are outlined in the statutes regulating their respective
offices. Sec. 21.19 (1), which outlines the powers and duties
of the adjutant general, insofar as material, provides in
part:

"The adjutant general shall be chief of staff, inspector
general and quartermaster-general. He shall have an office
in the capitol and keep it open during the usual business
hours. He shall have the custody of all military records,
correspondence and other documents relating to the volun-
teers of this state, at any time in the service of the United
States, and of the national guard heretofore or hereafter or-
ganized, except such as are required to be filed with the gov-
ernor. He shall be the medium of military correspondence
with the governor and perform all other duties pertaining
to his office or prescribed by law. * * *"

Insofar as the term "processing" in paragraph (a) refers
to the investigation of claims and the preparation of neces-
sary forms and reports, it would appear that this is a
proper function of your office and that you may properly so
inform the national guard bureau. We are informed that
such investigations are now commonly carried out under
your direction in the case of claims arising as a result of
national guard activity.

There is nothing in the statute quoted or in any other
statute governing the adjutant general or the national
 guard which would authorize you to agree that the state
will hold the federal government harmless for any claims
for damages arising out of the operation of aircraft by a
member of the national guard. Neither is there any appro-
 priation out of which such claims could be paid. Further
you have no power to make any agreement which would
affect any right that claimants might have under the Federal Tort Claims Act.

It is true that sec. 21.63 does authorize the governor to withhold allowances for encampments and use such allowances for the payment of damage claims to property which may be caused by the fault or neglect of any officer or enlisted man in camp or en route to or from the same. However, there is no appropriation in sec. 20.03 for the payment of the expenses of encampments other than the provision in sec. 20.03 (1) (b) for $1,500 for the expenses of the annual national rifle competition. The expenses of the annual encampments are paid by the federal government. Hence, sec. 21.63 is presently inoperative since there is no appropriation out of which claims for damages could be paid.

Accordingly, it is my opinion that you may properly notify the national guard bureau that your office can undertake the responsibility specified in paragraph (a) but that you have no authority to make the commitment requested in paragraph (b).

RGT

Public Assistance—Legal Settlement—The receipt of public assistance outside of this state by a nonresident who had settlement in Wisconsin does not toll the running of the one-year period of absence necessary to lose settlement. Settlement in a municipality in this state is lost by one year’s residence in a foreign state even though the person involved is continuously supported as a dependent person.

December 12, 1950.

State Department of Public Welfare.

You recite the following fact situation and request my opinion as to whether or not the party therein involved may properly be categorized as a state dependent under the provisions of sec. 49.04, Wis. Stats. 1949: A resided in X county most of his lifetime and had legal settlement and residence there, ultimately receiving old-age assistance
from said X county. Subsequently A moved to Y county where his status as an old-age assistance recipient continued. A then moved to the state of Illinois with the express intention of making his home in Illinois. Y county continued his grant of old-age assistance for a period of one year following his intendedly permanent removal to Illinois. Pension privileges were then extended by Illinois for a period of 6 months, following which latter period A again returned to the state of Wisconsin, namely, X county. X county has since furnished relief to A.

Had A, no matter how often he moved, continued to reside in Wisconsin, the operation of sec. 49.10 (4) would have prevented him from losing his settlement in X county so long as he continued to be supported as a dependent person. However, since public assistance is purely statutory and since our statutes have no extraterritorial effect, it would not necessarily follow that sec. 49.10 (4) would apply to or govern this situation. The basic question is therefore reduced to the effect upon legal settlement of the receipt of assistance from a Wisconsin county while residing in another state and the receipt of assistance for a period of less than one year from that other state.

Legal settlement for the purposes hereunder consideration is determined by the provisions of sec. 49.10 (7), Stats., providing as follows:

"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; and upon acquiring a new settlement or upon residing for one whole year elsewhere than the municipality of settlement all former settlements are lost."

In the case you present, A's removal to Illinois was characterized by the two essential elements, of themselves ordinarily divesting one of residence within a particular jurisdiction, namely (1) physical presence elsewhere, and (2) intention to move. See 34 O.A.G. 341. The statutory period of one year declared necessary to loss of settlement by sec. 49.10 (7), has in this instance likewise elapsed without the jurisdiction.
While our supreme court has never passed on this question, the circuit court for Eau Claire county, Hon. Arold F. Murphy presiding, in a well reasoned decision, ruled under almost identical circumstances (1) that the receipt of public assistance without the state did not operate pursuant to sec. 49.10 (4) to toll the running of the year's period of absence necessary to lose settlement, and (2) that, pursuant to sec. 49.10 (7), one year's residence without the state resulted in the loss of any settlement within this state. See Eau Claire Co. v. Dunn Co. et al., Circuit Court of Eau Claire Co., decided April 20, 1944.

It is my opinion therefore that under the facts as stated A has no legal settlement within the state of Wisconsin; more particularly, A has legal settlement neither in X county nor in Y county, and he is therefore a public charge whose case is governed by the provisions of sec. 49.04, Stats., relating to state dependents.

GFS

Counties—Powers—County may not buy tires for resale to employes.

W. R. Davis,

District Attorney,

Sawyer County.

You have asked: May county highway employes purchase automobile tires through the county highway commissioner's office?

You say that the employes use their cars going to and from work and that they can obtain tires more cheaply through the commissioner.

You do not say just what is involved in the proposal. I assume, however, that there are involved purchases by the county of automobile tires for resale to employes and such ultimate resales.

There is no statutory authority for the county to engage in transactions of this type. Hence the familiar rule of
Dodge County v. Kaiser, 243 Wis. 551, 557, is applicable. "The county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given."

In Heimerl v. Ozaukee County, 256 Wis. 151, the supreme court decided that a statute was unconstitutional because it authorized a county to carry on a competitive business not involving a public function nor concerning some element of public utility. I understand that it is not proposed that the public generally may buy tires from the county, but there is doubt as to any governmental purpose being served, even if sales are made only to employes. Hence the theory of the Heimerl decision raises an additional doubt as to the propriety of the proposal.

TEF

Counties—Fish and Game—Bounties—County bounty on fox kit is limited to $1 on kits killed between March 1 and September 1.

December 13, 1950.

RODNEY O. KITTELSSEN,
District Attorney,
Green County.

You have submitted a copy of a county ordinance, adopted in 1947, providing as follows:

“Be it resolved that any person that shall kill any gray or red fox in Green county and is a resident thereof, shall be entitled to a reward of bounty of $2.00, to be paid out of the treasury of the county of Green.”

You call attention to sec. 29.60, Stats., and inquire whether the county may lawfully pay the sum of $2 as bounty for any red or gray fox, regardless of age.

The material parts of sec. 29.60, Stats., are as follows:

“(1) ** any person who shall kill any red or gray fox kit between March 1 and September 1 next following shall be entitled to a reward of $1, or any mature red or gray
fox at any time $2.50, to be paid out of the state treasury under the provisions of section 20.205 (1). * * *

"(6) The county board may authorize the payment of an additional bounty for the killing of any animal for which the state pays a bounty under this section, not to exceed such state bounty, and may authorize the payment of a bounty by the county or its designated agents for the destruction of any fox, skunk, weasel and other animal or animals when, after careful investigation by competent authorities, they are found to be destructive in any manner * * * ."

Under subsec. (6) it is lawful for the county to pay an additional bounty of $2 for a mature gray or red fox. It is not lawful for the county to pay that sum for a gray or red fox kit, since it exceeds the state bounty.

The ordinance does not describe the animal for which the $2 county bounty is to be paid as a mature gray or red fox. It may be assumed, however, that the county board intended to do what it had power to do, and that the ordinance should be so interpreted. Accordingly, it is my opinion that no county bounty may be paid for kits in reliance upon the ordinance.

The specific reference to "fox" in subsec. (6) was there prior to the enactment of ch. 5, Laws 1945. There was then no state bounty on fox and therefore no limitation on the amount of county bounty. The limitation results from the provision for a state bounty on fox inserted in subsec. (1) by ch. 5, Laws 1945. See 37 O.A.G. 106.

TEF
Insane—Legal Settlement—An adult person who becomes mentally incompetent retains the legal settlement which he had at the time when he became incompetent.

December 13, 1950.

WILLIAM J. GLEISS,
District Attorney,
Monroe County.

You have requested further consideration of my opinion in 39 O.A.G. 227 dated July 7, 1950 on the basis of the added fact that the parents of the incompetent under consideration did not reside in Washington, D.C., during the period January 25, 1945 through July 15, 1946. You further confirm that the parents of the incompetent had resided at Camp Douglas, Juneau county, Wisconsin for the period February 10, 1949 to the present without receiving public aid of any kind or nature. You state that in your opinion the parents have gained a legal settlement in Juneau county since February 10, 1949 by residing in the county for one year without receiving public aid, and inquire why the legal settlement of this adult incompetent does not follow that of her parents.

There is no statute in this state which declares that the legal settlement of an adult incompetent follows that of the parents. The rule under the common law is well stated in 28 C.J.S. 27, § 12e as follows:

"* * * However, an adult person who has become a mental imbecile, or who has been judicially declared insane, is incapable of a voluntary change of domicile, and therefore retains the domicile which he had when he became insane, unless it is changed by some competent or authorized person or tribunal, or until the restoration of his sanity. A minor who becomes insane, being incapable of a voluntary change, like other infants, follows his father's domicile, or settlement, even after majority."

See also Chew v. Nicholson, 281 Fed. 400.

Accordingly on the facts as given there is nothing to show that the incompetent has acquired a legal settlement in Juneau county.
In the event that this matter becomes a subject of litigation and different facts are adduced at the hearing, it would appear that the foregoing authorities are sufficient for your guidance. You understand of course that it is the established policy of this office to decline to render opinions on matters which have become the subject of litigation.

RGT

Public Assistance—Old-Age Assistance—Where person receiving old-age assistance moved to fraternal home in another county, and thereby became ineligible for further aid under sec. 49.23 (1), Stats. 1947, county paying the same at time recipient moved is not responsible, under sec. 49.27, for continuing benefits after change in sec. 49.23 (1) in 1949 permitted him again to become eligible.

December 13, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask my interpretation of secs. 49.27 and 49.23 (1), Stats., as amended by ch. 479, Laws 1949, with respect to responsibility for payment of old-age assistance under the following two circumstances.

1. A person receiving old-age assistance in X county after the effective date of ch. 479, Laws 1949, goes to reside in a fraternal home for the aged in Y county and is required to pay for room and board. This person does not have legal settlement in Y county.

You inquire whether you are correct in considering that X county continues to be responsible for granting old-age assistance benefits.

The plain language of sec. 49.27 impels an affirmative reply:

"An applicant for old-age assistance shall file his sworn application in writing with the county in which he resides, in such manner and form as shall be prescribed by the department. If a person receiving old-age assistance goes to another county to reside in a private tax-exempt, charitable, benevolent or fraternal institution or home for the aged and continues to be eligible for old-age assistance under
section 49.23 (1) while therein residing, he shall continue to receive his assistance from the county paying the same at the time he moved unless he has a settlement in the county in which the institution or home is located."

It is equally evident that the aged person "continues to be eligible for old-age assistance under section 49.23 (1)," which, as amended by ch. 479, Laws 1949, provides that such assistance shall not be granted or paid

"While or during the time he is an inmate and receives the necessities of life from any public institution maintained by the state or any of its political subdivisions for the care of the mentally ill, for the care of persons suffering from tuberculosis, or for the incarceration of any person convicted of a crime or misdemeanor."

2. A person receiving old-age assistance in X county prior to the effective date of ch. 479, Laws 1949, goes to reside in a fraternal home for the aged in Y county. The person is supported free by the home and X county discontinues assistance under sec. 49.23 (1), Stats. 1943-1947. After the 1949 amendment of that section, the fraternal home institutes a charge for board and room, and the person reappplies to X county for old-age assistance. County X disallows the reapplication on the ground that the person is a resident of Y county and not eligible for such benefits from X county under sec. 49.27, because of the lapse in continuity of assistance.

You inquire whether X county or Y county is responsible for granting old-age assistance.

Old-age assistance is granted on the basis of residence, not legal settlement. 24 O.A.G. 624 and 711; 25 O.A.G. 485; 39 O.A.G. 295. I assume X county correctly determined that the aged person is a resident of Y county. If the person here referred to never lost legal residence in X county, the latter, of course, is now obligated to pay old-age assistance.

Prior to the effective date of ch. 479, Laws 1949, sec. 49.23 (1) read as follows:

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

"(1) 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,
or is an inmate of a private charitable, benevolent or fraternal institution or home for the aged to which no admission charge as a life tenant has been made * * * *

The purpose of this section was to prevent a person who is cared for without charge from becoming an expense to the public. Therefore, when the old-age assistance recipient was supported free by the Y county fraternal home, X county properly discontinued its aid.

Neither amendment of sec. 49.23 (1), nor the change in policy of the Y county home in charging for room and board, could restore to X county the obligation to grant old-age benefits. The last sentence of sec. 49.27 is not applicable to this case. That section speaks of continued eligibility for old-age assistance and continuing receipt of assistance payments from the county of former residence. In this instance, there is no continuity of eligibility and of aid payments.

By settled rule of statutory construction, the words of a clear and unambiguous statute must be taken literally unless this leads to an absurd result. Sutherland Statutory Construction, Horack (3rd Ed.) § 4702. Effect must be given, where possible, to every part of a statute. State ex rel. Milwaukee v. Mil. E.R. & L. Co., (1919) 169 Wis. 183, 190. It must be presumed that the words "continues to be eligible" and "shall continue to receive" were used by the legislature advisedly.

Examination of the legislative history of sec. 49.27 reveals that an important purpose of this section was to prevent counties with large private homes for the aged from bearing an unjust responsibility for payment of old-age assistance by reason of the fact that such homes attract old-age assistance recipients from counties lacking such institutions.

The last sentence of this statute creates an exception to the general rule that the county of residence is responsible for granting old-age assistance. Where an express exception is thus made, the legal presumption is that the legislature thereby excludes all other exceptions or the enlargement of the exception made. 50 Am. Jur., Statutes, § 434.

I conclude that X county is not responsible for granting further old-age assistance in the situation presented.

GS
Fish and Game—Licenses and Permits—Hunting licenses may be issued only by county clerks and their deputies; fishing licenses may be issued by county clerks, deputy county clerks and agents appointed by the conservation commission.

County clerks may properly appoint deputies for the purpose of sale of hunting and fishing licenses only.

The county board has power to fix the number of deputies that a county clerk shall employ.

County may properly pay bond premiums for deputy county clerks appointed for the sale of hunting and fishing licenses.

County clerk is personally responsible to make all proper remittances to the conservation department for hunting and fishing licenses sold by himself or his deputies.

December 13, 1950.

JOHN M. POTTER,
District Attorney,
Wood County.

You have asked several questions regarding the issuance and sale of hunting and fishing licenses and the bonding of persons responsible therefor. Your questions will be stated and each question will be followed by the answer.

1. Who may sell hunting licenses?
Under the provisions of sec. 29.10, Stats., only county clerks and deputy county clerks may issue hunting licenses. Deer tags which are necessary in order to exercise the privilege of hunting deer may be issued by county clerks, deputy county clerks or any agent appointed by the conservation commission.

2. Who may issue fishing licenses?
Under the provisions of sec. 29.145 (2), Stats., county clerks, deputy county clerks or any agent of the conservation commission duly appointed may issue and sell fishing licenses.

3. Do county clerks have the authority to appoint deputies throughout the county for the sole purpose of issuing hunting and fishing licenses?
Under the provisions of sec. 59.16 (1), Stats., the county clerk has the authority, unless limited by the county board under the provisions of sec. 59.15 (2) (c), to appoint as many deputies as he deems necessary to carry out his duties. In my opinion there is nothing in the statute to prevent the county clerk from specifying the exact duty to be carried out by any one of his deputies, or from specifying that a particular deputy shall engage only in the sale of hunting and fishing licenses.

4. Can the county board by resolution require that the county clerk appoint such additional deputies whose sole function is the issuance of such licenses?

Sec. 59.15 (2) (c) provides in part:

"The county board at any regular or special meeting may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employee or deputies to elective officers without regard to the tenure of the incumbent (except as provided in paragraph (d)) and also establish the number of employees in any department or office including deputies to elective officers * * * ."

Under the quoted statute it would appear that the county board has authority to direct the county clerk to employ a specified number as deputies.

5. If deputy clerks are appointed, should they be required to furnish bond, and if they are required to furnish bond who pays the bond premium? If the county decides to pay the bond premium on these deputies, does it have the authority so to do?

Whether or not the deputy clerks are required to furnish bond is a policy question which may be resolved by the county board and if the county board does not require bond the county clerk himself may properly require a bond to protect himself.

The matter of payment is also a policy question, and payment may be assumed by a county if it so desires. In 39 O.A.G. 258, at 264, it is stated:

"These provisions in sec. 59.15 (2) (c) also furnish authority to the county board to determine the number of employees in the various county departments and offices generally, fix their salaries, and provide for the giving of bonds
thereby. They would be a sufficient basis for appropriate county board action requiring that a bond in a prescribed amount and by a corporate surety with the cost thereof to be paid by the county as its own expense, be given by deputy county clerk * * * ."

The authority for payment by the county is found in the first sentence of sec. 19.01 (8).

If the county does not require a bond the county clerk could properly require a bond to protect himself. In that case payment of the premium on a surety bond would be a matter of agreement between the county clerk and his deputy.

6. Is the county clerk personally responsible for any possible shortages of money or licenses under these statutes, and is he also responsible for shortages of monies and licenses which are handled by the various deputy county clerks?

The county clerk is a statutory agent charged with responsibility of issuance of hunting and fishing licenses and is the person responsible to make the proper remittances to the conservation department. The deputies are only his agents and he is responsible for their acts. It is for this reason that he may properly insist that he be protected by a bond for the proper performance of their duties.

RGT
Vocational and Adult Education—Nonresident Tuition—
A board of vocational and adult education cannot adopt a policy of refusing to pay tuition for residents of its municipality under age 21 to attend a school of vocational and adult education elsewhere. A board may withhold approval in individual cases where vocational training equivalent to that which is desired is available at home.

December 14, 1950.
STATE BOARD OF VOCATIONAL AND ADULT EDUCATION.

You state that a local board of vocational and adult education which conducts only an evening program has recently notified boards which conduct day as well as evening programs that the first mentioned board will not be responsible for payment of tuition of residents of their municipality to attend such other schools.

You ask:

"In your opinion do the provisions of section 41.18 and section 41.19 of the statutes absolve local boards of vocational and adult education which conduct evening school programs only from paying tuition for residents less than 21 years of age who desire to attend other schools of vocational and adult education where offerings which would meet their employment training objectives are available, if courses of equivalent character are not available in the community of residence."

Sec. 41.18 provides for the admission of nonresidents, who are 14 years of age or over, to schools of vocational and adult education. This may occur in three situations:

(1) The applicant is employed in the municipality where he seeks admission. He is a resident of another municipality which maintains a school of vocational and adult education. If he is 14, he must not be required by law to attend other schools.

(2) The applicant resides in a municipality which maintains a school of vocational and adult education, but in which the specific courses desired are not given. The courses must be given in the municipality where the applicant seeks admission and the board of that municipality must agree to admit him.
(3) The applicant resides in a municipality which does not have a school of vocational and adult education and is otherwise qualified to pursue the course of study.

In each of situations (1) and (2) the applicant must present the written approval of the board of vocational and adult education in the municipality where the applicant resides.

Sec. 41.19 authorizes a board to charge tuition for non-resident pupils and provides procedure for filing a claim with the board, if any, in the municipality where the pupil resides. If none, the claim is filed with the clerk of the municipality.

Subsec. (1b) of sec. 41.19 provides:

“No local board of vocational and adult education, nor any city, village or town not having a school of vocational and adult education, shall be liable without its consent to pay such tuition for any pupil who has reached the age of 21 years, nor for any course eligible for credit at the university of Wisconsin or at any state teachers college. Non-resident students over 21 years of age may pay such non-resident tuition charge. Neither shall any board of vocational and adult education, city, village or town be liable to pay such tuition for any student unless such board of vocational and adult education or the governing body of the city, village or town is notified in writing within 30 days after enrollment that the student is attending the school of vocational and adult education.”

The only control which the board in the home municipality has over the admission of an applicant to a school in another municipality is exercised by granting or withholding the written approval referred to in sec. 41.18. In giving its approval, the board may pass upon the age of the applicant, his residence in its municipality, whether in situation (1) he is employed in the municipality where he seeks admission, and whether in situation (2) the courses desired are not given at home. The supreme court has said: “Municipalities which do maintain vocational schools are naturally permitted some power to withhold approval of students going to another town to get vocational training which may be available at home.” Manitowoc v. Manitowoc Rapids, 231 Wis. 94, 100. It seems clear that this power must be exercised in individual cases after consideration
of all the circumstances, including whether the training offered at home is the equivalent of that which is offered elsewhere.

It is clear from subsec. (1b) that tuition may be charged against the home municipality without its consent where the student is under 21 and where proper notice of enrollment is given, except for the types of courses mentioned in (1b). It is therefore clear that a board may not withhold written approval under sec. 41.18 merely because of a policy of not paying tuition to any other school.

It is true that an opinion of the attorney general, issued in 1933, stated that the board of the home municipality has power to withhold approval in order to avoid payment of tuition. 22 O.A.G. 891. Subsec. (1b), however, was not part of the statutes at that time. It first was added to sec. 41.19 by ch. 421, Laws 1939. Hence the 1933 opinion no longer applies to pupils younger than 21.

Accordingly it is my opinion that the action of the local board described by you is ineffective as to pupils younger than 21. The board must still consider whether to grant or withhold approval in the individual case and base its action on the proper considerations discussed above.

TEF

Taxation—Notice of Application for Tax Deed—Where two or more persons own a parcel of land as a partnership, as tenants in common, or in joint tenancy, notice of application for tax deed need be served only on one of them.

December 15, 1950.

FULTON COLLIPP,
District Attorney,
Adams County.

You call attention to the first sentence of sec. 75.12 (1), Stats., which reads:

“No tax deed shall be issued on any lot or tract of land which has been or shall hereafter be sold for the nonpayment of taxes, unless a written notice of application for
tax deed shall have been served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated."

You state that in instances where two or more persons own of record a parcel of land as a partnership or as tenants in common or in joint tenancy, the county clerk has customarily served written notice of application for tax deed upon one of the partners, one of the tenants in common or one of the joint tenants, respectively, and has considered it unnecessary to serve notice on the others.

You have advised him that his view is correct and ask for confirmation of your opinion.

You have, in my opinion, correctly advised the clerk. The statute requires that notice be served on "one of the owners of record." It is also true as to a partnership that notice to a partner of any matter relating to partnership affairs operates as notice to the partnership. Sec. 123.09, Stats.

TEF

Justice of the Peace—Fees—Under sec. 307.01, Stats., justice of peace is entitled to 12 cents per folio for transcript of testimony whether transcribed by him or some other person. He is not entitled under this section to make a flat charge to cover the time spent in listening to testimony.

December 15, 1950.

JOHN M. POTTER,
District Attorney,
Wood County.

You have quoted that portion of sec. 307.01, Stats., relating to the fees of justices reading as follows:

"Justices are entitled to the following fees and may tax the same as costs in all actions when applicable.
"

"Taking deposition, examination, testimony or for any writing done in an action, 12 cents per folio whether transcribed by the justice at request of party or done by some other person."
In this connection you inquire whether the examination or testimony before the justice of the peace must be written by the justice or some other person in order for the justice to be entitled to the 12 cents per folio provided, and state that some of the justices in your county have been making a flat charge under this section to cover the time which they spend in listening to the testimony of the parties.

It is quite apparent from the wording of the quoted statute that it in no way authorizes a time charge for listening to testimony. A charge of 12 cents per folio can be made only if there are "folios." The word "folio" wherever it occurs in the statutes is construed to mean 100 words or figures. Sec. 370.01 (14). It is used as a unit in computing the length of a document and can relate only to matters that are in writing.

However, the statute is perfectly clear that it is immaterial whether the justice does the writing himself or has some other person do it. In the 1950 Wisconsin Annotations under sec. 307.01 there is printed a portion of the comment of the supreme court advisory committee on rules of pleading, practice and procedure. This committee drafted and presented to the 1945 legislature a revision of the justice court practice statutes which revision became ch. 441, Laws 1945. The comment of the committee to the legislature on sec. 307.01 stated among other things:

"* * * The fee for depositions, etc., is made 12 cents per folio, however transcribed, instead of 12 cents if done by the justice and 5 cents if done by someone else."

Sec. 307.01 was changed by the 1945 legislature. Formerly, this statute read in part:

"For taking an examination, testimony or for any writing done in a cause, twelve cents per folio if transcribed at the request of either party, otherwise five cents whether done by a stenographer, shorthand reporter or otherwise."

There was also another provision in sec. 307.01 prior to 1945 reading:

"For taking deposition, twelve cents per folio; and for copy of proceedings or of any paper or examination in any
case, when demanded, per folio, ten cents whether taken by
a shorthand reporter or in shorthand by a stenographer or
otherwise."

Thus it will be seen that prior to the 1945 revision there
was considerable confusion and variety as to rates as well
as unnecessary verbiage. The revision simplified and
"streamlined" the provision so as to make a uniform charge
regardless of whether the transcript is prepared by the
justice or someone else.

WHR

Appropriations and Expenditures—Water Pollution—
Money appropriated to water pollution committee by sec.
20.505 (1), Stats., may be used in carrying out the duties
of the committee under sec. 144.53 (3) relating to con-
ducting experiments for the purpose of suppressing algae,
including projects to determine the effect of copper sul-
phate on fish and bottom organisms.

December 16, 1950.

COMMITTEE ON WATER POLLUTION.

You have asked whether the committee on water pollu-
tion has the authority to expend funds appropriated by
sec. 20.505 (1), Stats., for the purpose of conducting a
special project to determine the effect of copper sulphate
applied to control algae, on other aquatic life such as fish
and bottom organisms. Activities of the aquatic nuisance
control program under which copper sulphate is applied to
lakes to control algae are financed through the revolving
appropriation made under sec. 20.505 (2).

The appropriation to the committee on water pollution
made by sec. 20.505 (1) is "for the execution of its func-
tions under sections 144.51 to 144.57."

Sec. 144.53 provides in part:

"It shall be the duty of the committee on water pollution
and it shall have power, jurisdiction and authority:

"* * *"
“(3) * * * To supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmer's itch and other nuisance-producing plants and organisms. To this end the committee may conduct experiments for the purpose of ascertaining the best methods for such control * * *.”

The italicized language in sec. 144.53 (3) is comprehensive enough to justify expenditure of funds to determine the effect of copper sulphate on aquatic life such as fish and bottom organisms in connection with suppression of algae. Obviously the “best method of control” of algae would not be one which while destroying the algae would at the same time have a deleterious effect on fish or aquatic life needed for fish food. Experience has shown that the use of copper sulphate is one way to control algae, but apparently no exhaustive experiments have been conducted as to the effect thereof on fish or other aquatic life. Until this has been satisfactorily determined the committee would seem to have a continuing duty under sec. 144.53 (3) to experiment until it has some assurance of having developed the “best method” of control.

WHR

Central State Hospital — Insane — Parole — Under sec. 51.21 (6), Stats., superintendent of central or Winnebago state hospital may change parole supervisor of paroled patient without first obtaining approval of committing court.

December 18, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You request an opinion “whether under sec. 51.21 (6), Stats., the committing court may grant blanket authority to the superintendent of central state hospital to change parole supervisors of an individual paroled thereunder.”

Sec. 51.21 (6) provides as follows:

“If in the judgment of the superintendent of the central or Winnebago state hospital any person committed under section 357.11 or 357.13 is not in such condition as warrants
his return to the court but is in a condition to be paroled under supervision, the superintendent shall report to the department and the committing court his reasons for his judgment. If the court does not file objection to the parole within 60 days of the date of the report, the superintendent may, with the approval of the department, parole him to a legal guardian or other person, subject to the rules and regulations of the department."

I am unable to find anything in the foregoing statute or in sec. 51.234, Stats. 1945, from which it is derived, which requires that the committing court approve (or fail to object to) the person appointed as parole supervisor. The court has power to veto the granting of any parole whatever, but the selection of the supervisor is up to the superintendent and the department after it has been determined that the patient may be paroled.

Since the court's approval of the change of supervisors is unnecessary, there is no occasion to obtain blanket authority. Therefore, we need not consider whether a court could thus delegate its powers to an administrative officer.

WAP

Counties—Public Assistance—Homestead—Homestead is not exempt from execution of judgment in favor of county for relief advanced by county when judgment provides that the homestead shall not be exempt.

December 19, 1950.

BOYD A. CLARK,
District Attorney,
Waushara County.

You have submitted a copy of a judgment of the circuit court dated September 19, 1940. It is in the amount of $1,061.60, in favor of the county and against a husband and wife. It provides that certain described real estate is not exempt from the payment of the judgment.
The findings of fact disclose that the defendants were poor and indigent persons to whom the county had advanced money for relief, support, maintenance, attendance and medical aid and that the defendants owned the real estate described, which was their homestead.

You state that old-age assistance has been granted to defendants and a lien filed for the same. I assume these things occurred after the entry of the judgment. Later the husband died, but the property is still the homestead of the widow.

You ask whether the homestead may be sold upon execution.

The judgment says that the homestead is not exempt. If the court had jurisdiction to enter a judgment as to which the homestead exemption provided by sec. 272.20 is ineffective, then the homestead may be sold upon execution.

Sec. 49.10, Stats. 1939 (the forerunner of sec. 49.08, Stats. 1949) provided in part:

"If any person at the time of receiving any relief, support or maintenance at public charge, under this chapter or at any time thereafter, is the owner of property, the authorities charged with the care of the poor may sue for and collect the value of the same against such person and against his estate. The court may, in its discretion, refuse to render judgment or allow the claim in favor of the claimant in any case where a parent, wife or child is dependent on such property for future support."

Does this section authorize a court merely to give judgment for recovery of the amount claimed, or does it also authorize the court to provide that recovery may be had out of property which is exempt from execution of other judgments?

A decision of the supreme court and two opinions of the attorney general support the proposition that a proceeding under sec. 49.10 (now 49.08) is essentially against the property, that no distinction is made between a homestead and other property for the purposes of this section, and that such proceeding may result in collection out of a homestead unless the court exercises the discretionary power
given by this section where a parent, wife or child is dependent on the property.

It is true that the exact situations considered have involved collection from the estate of an insane or a deceased person, but the reasoning employed would necessarily produce the same result in an action brought against a competent dependent during his lifetime.

In Johnson v. Door County, 158 Wis. 10, the supreme court decided that the claim of a county for maintenance of an insane person was a claim against his property and that there is no operative exemption except the discretionary power of the judge.

In 20 O.A.G. 638, the attorney general said that the homestead and proceeds of homestead of an insane person may be subjected to the claim of the county for support and care. With reference to the Johnson case and a prior opinion of the attorney general, it was said:

"The opinion was based upon the premise that the court in Johnson v. Door Co., 158 Wis. 10, relied for its conclusion upon that provision of the then sec. 604q, that the court could 'compel' the guardian of an insane person to sell the homestead to pay for his ward's support. A careful reading of the opinion in Johnson v. Door Co., 158 Wis. 10, however, will show that the decision rested not on this provision, although the court mentions it, but 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.

"The opinion, X Op. Atty. Gen. 141, 144, says:

"** There is now no language specifically making the support of an insane person a charge against his property as was provided in secs. 600 and 604q. The present form of the language rather indicates a personal liability of the insane person, or a liability of his estate, enforcible by the filing of a claim against it in the county court."

"I think this is erroneous, and 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."

In 36 O.A.G. 143, 146-7, the attorney general said that a claim for direct relief could be collected from the estate of the deceased recipient out of the proceeds of his homestead. It was said:

"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."

The legislature has never seen fit to make any material change in this section since the interpretations above mentioned were made. Accordingly, based on the reasoning used in reaching those interpretations, it is my opinion that the court had the power to render the judgment you have submitted and that the property described is not exempt from execution.

Since more than 10 years have elapsed since judgment was rendered, and there have been no proceedings which would extend the 10-year period under sec. 270.79, the judgment is no longer a lien. Therefore title conveyed upon execution sale would be subject to the lien for old-age assistance.

You have not stated the exact situation as to title of the real estate and the changes that occurred therein by rea-
son of the death of the husband. Please note also, sec. 272.04 with respect to the issuance of execution more than 5 years after rendition of judgment and sec. 272.14 with respect to the issuance of execution after death of judgment debtor.

Because of the small value of the property ($1,000 as found by the court in 1940) the right to levy execution subject to the lien for old-age assistance is probably of little practical value. As you point out, when the old-age assistance lien is ultimately enforced, the claim represented by the judgment will share pro rata with the other public claims mentioned in sec. 49.26 (7a).

TEF

Schools and School Districts—Taxation—Property not in a district operating a high school, annexed to a high school district, is not exempt from tuition tax under sec. 40.47 (6), Stats., until after it has been part of the high school district for a full school year and is not to be subjected to operating tax of the high school district until in that tax year in which it is a part of the high school district prior to the start of the school year.

December 19, 1950.

ARThUR C. SNyDER,
District Attorney,
Washington County.

You state that property located in the town of Hartford, Washington county, and comprising school district No. 7, was not included in any school district which operated a high school prior to November 8, 1950, when it became a part of the Hartford high school district which is presently operating and has for some time operated a high school.

You ask whether this property is to be included in the territory over which the aggregate of high school tuition claims for the school year 1949–1950 are to be apportioned, and subjected to tax for a pro rata share thereof, under sec. 40.47 (6), Stats. Upon the basis of the opinion in 37
O.A.G. 110 it would be so included and taxed as it is not exempt therefrom because it was not located in a district which operated a high school for the school year 1949–1950 (the year to which the tuition claims relate) until after the end of that school year.

The question then arises whether such property will be subject to this same treatment in respect to high school tuition claims for the school year 1950–1951. The rationale of the above mentioned opinion is that it is not until property has been a part of a district all during a school year in which such district operates a high school that it is exempted from inclusion in the property over which the high school tuition tax is to be spread. Any other division point would result in gross inequities and be impractical of application. Thus, this property would not be exempted from the tax under sec. 40.47 (6) until the apportionment of the high school tuition claims from the school year 1951–1952, which would be the 1952 tax payable in 1953.

But, there is also the question of when such territory is to be included in the property subjected to the tax imposed by the high school district for the operation of its high school. The controlling consideration in 37 O.A.G. 110 is it was not intended by the legislature that under these circumstances property should be subjected to taxation twice for the payment of the cost of high school operation of the same school year. It is on that rationale that the property is not considered exempt until it has been in a school district which operates a high school district, for a full school year. Conversely the property should not be subjected to the operating tax of the school district for operating the high school unless it was a part of that district at or prior to the start of the school year. Otherwise the property would in 2 succeeding years pay both a tax for an apportioned part of the high school tuition claims of the prior school year and a tax for the operating of the high school by the high school district for the current year. To become current as respects bearing the cost of high school operation it is necessary and proper for the property to be so taxed in one year but in one only. When it thereby has caught up and become current it thereafter should be subjected only to the operating tax levied by the high school
district. Any other method would result in an imposition that would be taxing twice for the same purpose, as to which, in addition to being contrary to what it is deemed was intended, there would be serious questions of validity.

It is thus my opinion that the property is not to be included in the property subjected to the direct tax of the school district for operation until in that tax year in which the property was a part of the high school district on or prior to the beginning of the school year starting in that tax year and during which the school district operates a high school. In this instance it would be subject to the district operating tax in the 1951 tax roll for the 1951 taxes payable on or after January 1, 1952.

HHP

Taxation—Notice of Application for Tax Deed—Where land is owned of record by two persons as tenants in common, reserved timber and pasture rights thereon are owned of record in joint tenancy, and the land is subject to a recorded easement, service of notice of application for tax deed on one of the owners of the fee is sufficient compliance with requirement that it be served "upon the owner, or one of the owners of record."

December 19, 1950.

Robert C. Altman,  
District Attorney,  
Marathon County.

You describe the present ownership as disclosed by the records in the office of register of deeds, of interests in the three parcels of real estate as to which notice of application for tax deed was served and tax deed subsequently issued to the county.

They are all owned in fee by two tenants in common. A prior owner of the fee had reserved timber and pasture rights for 99 years and these rights are now held in joint
tenancy. Two parcels are subject to an easement, the nature of which you do not describe.

A written notice of application for a tax deed was served on one of the owners of the fee.

You cite the first sentence of sec. 75.12 (1), Stats., which reads:

"No tax deed shall be issued on any lot or tract of land which has been or shall hereafter be sold for the nonpayment of taxes, unless a written notice of application for tax deed shall have been served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated."

You ask whether it was necessary to serve on one of the joint owners of pasture and timber rights and on the owner of the easement.

In my opinion the service on one of the owners of the fee was sufficient (assuming, of course, that the facts were not such as to require service also on an occupant or mortgagee). Even if the owners of the other classes of interests mentioned be also considered "owners of record" for the purpose of sec. 75.12, it is still true that a notice was served on one of the owners of record. This is all that the statute requires.

The requirement of service of notice upon the owner or one of the owners of record formerly applied only in Milwaukee county and only where lands were unoccupied. Sec. 75.12, Stats. 1937. As a result of ch. 284, Laws 1939, the same provision was applied to all cases in the state where the lands were unoccupied. Ch. 250, Laws 1943, rewrote sec. 75.12 so as to require service upon the owner, or one of the owners of record, whether the land is occupied or not. As so altered, sec. 75.12 (1) contained this sentence, "The term 'owner' shall include, without restriction because of enumeration, ownership of easements, party wall rights or mineral rights in such lands recorded in like manner and in the event that such ownership exists, one of the owners of such class shall be served with notice in addition to the owner or one of the owners of the fee." This sentence was inconsistent with judicial decisions hereafter referred to and was stricken out of sec. 75.12 (1) by sec. 17a, ch. 552, Laws 1943.
Since notice was served in the matter you discuss on one of the owners of the fee, it is unnecessary to discuss the sufficiency of service if it had been made only on one of the owners of the other interests.

It is my opinion however, that the term "owners of record" is limited to owners of record of interests which would be cut off by the issuance of the tax deed. I call your attention to the principle that the value of an easement should be included in the assessment of the dominant estate and therefore does not pass upon tax sale of the servient estate. *Union Falls Power Co. v. Marinette County*, 238 Wis. 134, 142. "By the weight of authority a tax deed passes the title of the deeded land subject to all easements to which it is subjected." *Doherty v. Rice*, 240 Wis. 389, 400.

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**Counties—Highways and Bridges—Eminent Domain—**
Sec. 83.015 (2), Stats., authorizing the county highway committee to enter lands to cut weeds and brush and to erect snow fences for the protection of highways is an exercise of power of eminent domain, and sec. 83.18 provides procedure for determining damages, if any, to owners of lands entered and used.

December 19, 1950.

**ALLAN M. STRANZ,**

*District Attorney,*

Forest County.

You have requested my opinion relative to sec. 83.015 (2), Stats., which provides in part that:

"The county highway committee shall * * * enter private lands with their employes to remove weeds and brush and erect or remove fences that are necessary to keep highways open for travel during the winter * * *." "

You ask whether or not the county highway committee has the right to enter on private land and cut weeds and brush and erect snow fences where necessary without the
owner's consent and without paying damages for injury to, or use of, the land.

The exercise of the authority indicated above was intended by the legislature to be a taking of property under the state's power of eminent domain. Sec. 83.18 (2) reads:

"The owner or occupant of lands entered upon or used by the county for any of the purposes mentioned in section 81.06 or 83.015 (2) may apply to the county highway committee to appraise the resulting damages and such damages may be determined by agreement. If they are unable to agree upon the same, the committee shall make an award of damages and file it with the county clerk as provided for towns in section 80.09, and the owner or occupant may appeal from such award within the time and in the manner provided by section 80.24, and the proceedings on such appeal shall be governed and shall conform in all things to the provisions of section 80.24 except that service shall be made on 2 members of the county highway committee."

In case damages are sought by the property owner, the benefits he receives from the snow fence must, of course, be calculated as an offset to his damages. For this reason, I believe damages would only have to be paid in rare cases, since it is of considerable value to the property owner to have an adjoining highway kept free of snow.

You will find an opinion of the attorney general written in 1929, in 18 O. A. G. 634, which states that a peace bond can be demanded from a person making threat to remove a snow fence, and that the power provided to erect the fences is a valid exercise of the police power of the state. When this opinion was written, the provision for allowance of damages (then sec. 81.07, Stats. 1929) was overlooked and it is, therefore, my opinion that sec. 83.015 (2) was never intended to be an exercise of the police power.

Sec. 81.01 (10) similarly authorizes town boards to erect snow fences and provisions for compensation are found in sec. 81.07.

REB
State Treasurer—Public Records—Destruction—Where state treasurer desires to destroy old records he must apply to committee on public records for permission to do so under sec. 44.08, Stats. He may safely rely on such committee's permission without incurring any liability in consequence of acting within the limits of the committee's permission.

December 20, 1950.

Warren R. Smith,
State Treasurer.

In the administration of the affairs of your office, a change-over was effected in 1948 from the use of paper checks to the IBM card type of check. The paper stock for the latter type of check is considerably thicker than the stock formerly used, with the result that the bulk of cancelled checks which are preserved as public records under the duty imposed by sec. 18.01, Stats., is substantially larger than it was when thin paper stock checks were used. It has been the practice of the state treasurer to retain cancelled checks and receipt forms for a period of 15 years before seeking authority to destroy same. Lack of adequate filing space now necessitates that you seek authority to destroy such cancelled checks and receipts prior to 10 years from date. You request my opinion as to whether “any liability would be incurred by the state or the state treasurer if the period of retention was reduced to 10 years for checks and receipts issued by the state treasurer.”

The papers you describe are public records, and in the absence of specific authority to destroy or otherwise dispose of them, you are required by sec. 18.01 to preserve same indefinitely and hand them over to your successors in office.

However, sec. 44.08, Stats., was enacted to provide “an orderly method for the disposition of * * * state records” through the so-called “committee on public records.” Sub-sec. (3) of that section provides:

“To secure the destruction or other disposition of non-current public records, the head of any department or agency or his designated representative shall forward to
the committee an inventory of the records involved, certifying that in so far as his department or agency is concerned the records may be destroyed immediately or at some specified future date. Such records shall be open at all times to inspection by the members of the committee or their designated representatives. The committee shall pass on all such requests and may order such destruction or other disposition as may be dictated by the historical, financial and legal value of the records involved. No public records may be destroyed without the written approval of the originating office or its legal successor and the written approval of the committee on public records, any and all contrary provisions of law notwithstanding."

A state officer such as yourself is a "state agency" within the meaning of the above quoted subsection. See sec. 44.08 (2) (b).

The power and authority to grant permission to dispose of public records has been thus delegated by the legislature to the aforesaid committee. Adequate standards to guide the committee's action have been prescribed by the legislature. That this is a valid delegation and that the committee's permission may be relied upon is so obvious from a reading thereof as to need no further discussion.

If you make application to the committee on public records for authority to dispose of such checks and receipts for the period prior to 10 years from date of application and the committee grants such authority, you may safely act pursuant to the committee's authorization without incurring any liability to the state or to anyone else as a consequence of such destruction or disposition of records. Nor is it possible for the state in its sovereign capacity to incur liability to anyone by reason of your act in lawfully disposing of public records pursuant to committee authorization. Any risk to the state that some check or receipt so disposed of may some day be needed as evidence in litigation involving the state is a matter for the consideration of the committee in authorizing disposal.

SGH
Banks and Banking — Destruction of Records — Sec. 220.28, Stats., which regulates the destruction of old records of state banks and credit unions does not apply to national banks.

All records in the hands of the commissioner of banks as statutory receiver of a state bank in liquidation are subject to the provisions of sec. 44.08, Stats.

Bank liquidation records which have been made a part of the court file under sec. 220.08 (17), Stats., may not thereafter be destroyed.

December 21, 1950.

STATE BANKING DEPARTMENT.

You state that you have, under the provisions of sec. 220.28, Stats., issued a schedule for preservation of bank records to state banks under your supervision. The schedule is accompanied by a consent to the destruction of records after termination of the minimum holding period covered by the schedule. This schedule and consent does not by its terms apply to national banks. You state further that you are informed there are no federal statutory provisions covering destruction of records of national banks and that the comptroller of the currency has expressed the opinion that national banks should be governed in this respect by existing state law. You inquire whether the schedule and consent issued under the provisions of sec. 220.28 applies to records of state banks acquired by national banks through consolidation with, or absorption of, state banks.

Sec. 220.28 reads:

"Any state bank or credit union may destroy or dispose of such of its records as may have become obsolete after first obtaining the written consent of the state commissioner of banks."

Regardless of the powers which the state has in proper cases to affect the operations of national banks either by express consent of congress or because the state laws or regulations do not tend to impair the efficiency of national banks as instrumentalities of the government, 9 C. J. S.
It is clear that the quoted statute by its terms applies only to state banking corporations. Since national banks are entirely creatures of federal statute enacted under the congressional powers found in art. I, sec. 8 of the United States constitution, it is my opinion that the quoted statute does not apply to national banks, either to those which have been chartered *ab initio* by the federal government or which have arisen as the result of reorganization or consolidation of previously existing state banks.

You further inquire as to the proper disposition of bank liquidation records under the provisions of sec. 220.08 (17) at the termination of bank liquidation.

When you take charge of a state bank under sec. 220.08 for purposes of liquidation you become in effect the statutory receiver of that bank and operate as an officer of the court in conducting the liquidation. All records in your hands are records in the hands of a "state agency" as defined in sec. 44.08 (2) (b), Stats., and cannot be destroyed except with the consent of the committee on public records under sec. 44.08. Such of the liquidation records as are necessary to complete the court record should be ordered preserved by the circuit court and then become part of the court file.

While sec. 220.08 (17) does state that such records are to be held until further order of the court, there is no statutory provision whatsoever at present for the destruction of any court files and hence liquidation papers included in such files cannot thereafter be destroyed.

RGT
Opinions of the Attorney General 603

State Department of Nurses—Public Records—Destruction—Applications filed with the department of nurses pursuant to secs. 149.04, Stats., and 149.08, Stats. 1943, are public records within the meaning of sec. 18.01 (1) and must be preserved unless disposal is authorized in manner provided by sec. 44.08.

December 22, 1950.

State Department of Nurses.

You request my opinion on the following questions:

1. Is it necessary for the department of nurses to retain the applications and proof of professional qualifications of Wisconsin registered nurses who are known to be deceased?

2. Is it essential for the department to retain the applications of out-of-state registered nurses who were granted emergency permits to practice in Wisconsin, as provided by sec. 149.08, Stats. 1943?

Since both questions concern the retention of noncurrent records by your department and, in my opinion, are governed by the same legal principles, I will consider them together.

Applications for registration as a registered nurse are filed with the department in accordance with sec. 149.04, Stats.

The material portion of sec. 149.08, Stats. 1943, provided:

"* * * For the duration of the war and for 6 months following the cessation of hostilities a temporary permit may be issued to any nurse who has graduated from an accredited school of nursing, who holds a license or certificate as registered nurse in any state outside of Wisconsin and who is a citizen of the United States or has filed first citizenship papers, who desires to engage in nursing in Wisconsin for the period of the emergency. Temporary permits shall be renewed annually in January. The fee for a temporary emergency permit shall be $2."

The only statutory delineation of records required to be kept by the department of nurses is contained in sec. 149.11, Stats., which states that the department

"* * * shall keep a register of the names and addresses of registered nurses and licensed trained practical nurses,
which shall be open to the public at reasonable times; also
a record of applications, and a detailed account of money
received. * * *"

Although this section does not expressly demand that the
applications themselves be retained, it is clear that they
may not be destroyed summarily if they constitute public
records within the meaning of sec. 18.01 (1), Stats. See
14 O. A. G. 476.

Sec. 18.01 (1) provides that:

"Each and every officer of the state, or of any county,
town, city, village, school district, or other municipality or
district, is the legal custodian of and shall safely keep and
preserve all property and things received from his prede-
cessor or other persons and required by law to be filed,
deposited, or kept in his office, or which are in the lawful
possession or control of himself or his deputies, or to the
possession or control of which he or they may be lawfully
entitled, as such officers."

Under this statute, as an officer of the state, you must
preserve all books, papers, records, etc., (1) which are
required by law to be filed, deposited, or kept in your office,
(2) which are in your possession as such officer, and (3)
which you are entitled to possession of as such officer. *nternational Union v. Gooding, (1947) 251 Wis. 362, 369.

The records in question were filed pursuant to law and
have a direct relation to the functions of the department.
Patently, they are such papers as are required by law to
be filed with the department and which are in its lawful
possession and control. They can be destroyed only as
authorized by law.

Disposal of public records is controlled by sec. 44.08,
Stats., which provides:

"(1) For the purpose of the permanent preservation of
important state records and to provide an orderly method
for the disposition of other state records, there shall be
established under the state historical society of Wisconsin
a permanent committee on public records, to consist of the
director of the said state historical society, the attorney-
general, and the state auditor, or their designated repre-
sentatives. This committee shall pass upon the requests
of the state departments or other agencies for the repro-
duction by microfilm or other process or for the destruction or other disposition of such records, and shall have power to order the destruction, reproduction, temporary or permanent retention, and disposition of the public records of any department or agency of the state, and shall be specifically required to safeguard the legal, financial and historical interests of the state in such records.

"(2) (a) Public records for the purposes of this section are defined as all records, documents, correspondence, original papers, files, manuscripts or other materials bearing upon the activities and functions of the department or agency or its officers or employees.

"(b) 'State agency' means any officer, commission, board, department or bureau of state government.

"(3) To secure the destruction or other disposition of noncurrent public records, the head of any department or agency or his designated representative shall forward to the committee an inventory of the records involved, certifying that in so far as his department or agency is concerned the records may be destroyed immediately or at some specified future date. Such records shall be open at all times to inspection by the members of the committee or their designated representatives. The committee shall pass on all such requests and may order such destruction or other disposition as may be dictated by the historical, financial and legal value of the records involved. No public records may be destroyed without the written approval of the originating office or its legal successor and the written approval of the committee on public records, any and all contrary provisions of law notwithstanding.

"* * *"

By virtue of this section, you may submit an inventory of the records described to the committee on public records which will determine the manner of their disposition.

Therefore, it is my opinion that the applications referred to and the proofs accompanying them, are public records within the meaning of sec. 18.01 (1), and must be preserved unless authorization for their disposal is given in the manner set forth in sec. 44.08.

GS
Courts—Jurors—The express provisions of ch. 488, Laws 1949, require jury commissioners to exclude from jury lists persons listed as exempt in sec. 255.02, Stats.

James H. Levi,
District Attorney,
Portage County.

You call attention to the change in sec. 255.04, Stats., relating to jury lists, made by ch. 488, Laws 1949. You ask whether the law now requires the jury commissioners to exclude from the jury list those persons who are exempt from jury service under sec. 255.02, including persons more than 60 years of age.

You indicate that in your opinion it is mandatory that people in these groups be excluded. I agree.

Sec. 255.02 provides that: "The following persons shall be exempt from serving as jurors." Then follows a list of nine categories. The first seven were clearly originally intended as exemptions. The first specifies certain officials, the second, members of certain professions, the third, professors and teachers, the fourth, fifth and sixth provide exemption also on occupational grounds, the seventh, "all persons more than sixty years of age." The eighth category is "all persons who have been convicted of any infamous crime." This appears to be in substance a disqualification rather than an exemption. The ninth category is expressly a disqualification for a specified period after having served on a jury.

Under the 1947 statutes the jury commissioners were not expressly required to consider the list of exemptions in preparing the jury list. Sec. 255.01 set forth the qualifications of jurors and the pertinent provision of sec. 255.04 (1) was that the commissioners "in making such lists, shall put thereon only the names of such persons as they believe to be possessed of the qualifications prescribed in section 255.01."

Ordinarily an exemption from jury service is a personal privilege which may be waived. State v. Stunkle, 41 Kan.
456, 21 P. 675, 676. See, also, other cases cited in 15A Words and Phrases, Permanent Edition, p. 346. When an exempt person was summoned for jury service he could, but need not, claim his exemption.

Ch. 488, Laws 1949, however, repealed and recreated sec. 255.04. It now provides that the commissioners "shall not place the name of any person on such list who is exempted or disqualified under section 255.02, nor unless such person is determined to have the qualifications specified in section 255.01 upon the knowledge of the commissioners or upon the receipt by them of reliable information indicating that the person is so qualified. The commissioners may, from time to time, revise said list by striking from it the names of persons found by them to be exempt or ineligible for jury service, and to add thereto the names of additional persons as provided in section 255.05. Such list shall be subscribed and sworn to by the commissioners as having been prepared in strict conformity with the statutes thereto appertaining." (Sec. 255.04 (2) (a))

The new provisions appear to have been carefully drafted and are clear. Substitute amendment No. 1, S. to Bill No. 532, S. which contained these provisions and was enacted as ch. 488, was introduced by the committee on judiciary in the senate. Very clearly the exemptions have been transformed into exclusions.

In Norris v. Alabama, (1935) 294 U. S. 587, exclusion of the members of one race was decided by the United States supreme court to be a violation of the federal constitution. It has been suggested in this state that there might be facts under which a defendant could complain of the unlawful exclusion of women from a grand jury. Petition of Salen, (1939) 231 Wis. 489. It is less clear that the exclusion of persons over 60 and of persons in the other exempt categories could ever prejudice the rights of a litigant or be an invasion of a right to a jury trial. In view of the presumption of validity in favor of legislative acts, I am unable to conclude that these exclusions are invalid.

TEF
Administrative Procedure—Public Service Commission—Navigable Waters—Orders of the public service commission which regulate water levels are in the nature of administrative decisions and need not be filed in the office of the secretary of state or published in the Red Book.

December 23, 1950.

PUBLIC SERVICE COMMISSION.

You state that your commission has issued many orders under sec. 31.02, Stats., which orders fix the level of navigable water.

You inquire whether these orders are of the type which should (1) be filed with the secretary of state under secs. 227.01 (2) and 227.03, and (2) be published in the Red Book under sec. 35.93.

Sec. 31.02 (1) reads as follows:

"The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained and which will affect the level and flow of navigable waters; and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters."

Your powers under this section may be exercised in three principal types of cases.

(1) The level of a flowage which has been created by damming a natural stream;
(2) The level of a natural lake, the level of which is artificially raised and controlled by a dam at the outlet;
(3) The determination of the level of a lake which does not have any control structure.
Your question in substance is whether your decision in each of these cases is a “rule” as defined in sec. 227.01 (2) or whether it is a decision in a “contested case” defined in sec. 227.01 (3), or some other administrative determination not subject to review.

Sec. 227.01 (2) and (3) reads:

“227.01 For the purposes of this chapter:

“* * *

“(2) ‘Rule’ means a rule, regulation, standard, or statement of policy of general application, including the amendment or repeal thereof, issued by an agency to implement, interpret or make specific the legislation enforced or administered by it, or governing its organization and procedure, but it does not include regulations concerning internal management of the agency not affecting private rights or interests.

“(3) ‘Contested case’ means a proceeding in which, after hearing required by law, the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding.”

The proceedings by which an order and permit to construct, operate and maintain a dam is obtained are outlined in secs. 31.03 to 31.06. The statutes indicate that these proceedings are in the nature of a contested case and the resulting order and permit, which practically always includes a determination of the water level to be maintained, is an administrative decision rather than a “rule” as defined in sec. 227.01 (2).

A hearing is held upon application, and notice by mail and an opportunity to appear must be given to all persons whose lands will be affected by the proposal. The resulting order can be reviewed by any person aggrieved under the provisions of ch. 227. In the case of Chippewa and Flambeau Improvement Co. v. R. Comm., 164 Wis. 105, 119, our court clearly stated that the powers of regulating water levels were neither legislative nor judicial but were analogous to the powers of a jury to fix the reasonable height of a dam under the general mill dam law. Furthermore, the powers of regulation of the public service commission are
continuing, and may be exercised from time to time on new applications as the need may arise. 27 O. A. G. 424, 29 O. A. G. 472.

While it is true the public has an interest in the maintenance of the proper water levels, the persons primarily affected are the riparian owners, since it is their land which may be flowed by increased levels and access to the navigable waters in their natural and usable condition is an element of value of their lands. Furthermore, no one may withdraw water for use except a riparian owner and that withdrawal must be reasonable.

The foregoing considerations apply with equal force in case (3). It is true that the statute does not specify the procedure for establishing the level of a natural lake, but for more than 20 years your commission has followed the practice of holding a hearing and taking evidence from interested property owners. Even the orders issued take the form of the orders under cases (1) and (2) in that they regulate by regulating the minimum levels at the outlets. It would appear that in any case where riparian owners are affected by a raising or a lowering of the natural level, due process requires that they be afforded a hearing and opportunity for judicial review.

In my opinion orders determining water levels are more nearly analogous to the orders which you issue in valuing hydroelectric plants or other utilities for rate purposes or in issuing permits to common carriers over a named route, than they are to the “rules” defined in sec. 227.01 (2) or to the “standing orders and regulations which have the force of law” described in sec. 35.93. Hence they need neither be filed with the secretary of state nor published in the Red Book.

All nonriparians are charged with knowledge of the law that they have no right of withdrawal or diversion, and riparians are equally chargeable with knowledge of the law that their reasonable rights of withdrawal and user are subject to the co-equal rights of other riparians and to the paramount power of regulation and protection vested in your commission under sec. 31.02.

RGT
Opinions of the Attorney General

Counties—Sheriffs—Deputy Sheriffs—The sheriff has control over the jail and over his deputies. A committee of the county board cannot hire radio operators and compel the sheriff to deputize them and use them as jailers. The county board may at any time by appropriate resolution reduce the number of authorized employes in the sheriff's department, but it cannot take away from the sheriff complete control over their selection without enacting a civil service ordinance.

December 23, 1950.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire County.

You state that the county board has by resolution created a police radio committee to have control of the police radio system and the police radio operators of the sheriff's department. You raise the following four questions:

1. Is the incoming sheriff required by law to deputize the radio operators designated by a committee of the county board?
2. Is the sheriff required to share his office in the county jail premises with persons selected by a committee of the county board and over whom he has no control?
3. May a committee of the county board select, employ, discharge and control employes of the sheriff's department without the adoption of a civil service ordinance?
4. Can a resolution reducing the persons appointed and employed by the sheriff from six to three be adopted by the county board of supervisors and become effective insofar as the incoming sheriff is concerned, in view of the fact that the change was made after the incoming sheriff, who will take office January 1, was elected?

In answering these questions it is necessary to consider the meaning of sec. 59.15 (2), Stats., when read along with secs. 59.21, 59.22 and 59.23.

Your basic problems are sufficiently similar to those discussed in 18 O. A. G. 335, 35 O. A. G. 474, 36 O. A. G. 174 and 38 O. A. G. 245 to warrant my not repeating the rea-
soning and authorities there cited. (See also 25 O. A. G. 747, 26 Wis. 412 and 245 Wis. 111.)

In my opinion, it is settled law in this state that:

1. In the absence of a civil service ordinance, the sheriff alone decides who is or is not to be deputized. He is not required by law to deputize radio operators designated by a committee of the county board.

2. The sheriff has the control of and responsibility for the county jail. The county board cannot compel him to make jailers out of radio operators selected by it nor can it compel him to give them keys or otherwise admit them or provide office space for them within the jail on any basis that would affect his operation of the jail or maintaining its security.

3. A committee of the county board may not select, employ, discharge or control employes of the sheriff's department except as may be provided for in a proper civil service ordinance.

4. Providing that the number of deputies is not reduced below the number required by sec. 59.21 (1), the county board can, at any time, by appropriate resolution reduce the number of deputies in the sheriff's office who will be paid out of the funds appropriated in the county budget. The sheriff may appoint as many deputies as he deems proper, but at least in the absence of exceptional circumstances not necessary for discussion in this opinion, such deputies not authorized by the county board cannot recover compensation from the county.

GFS
Courts—Clerk of Court—When case is removed from justice court to county court of Dodge county pursuant to sec. 301.245, Stats., the clerk of circuit court must collect the suit tax and clerk's $2 advance fee upon filing the papers.

December 27, 1950.

CLARENCE G. TRAEGER,
District Attorney,
Dodge County.

You state that the clerk of courts of your county refuses to file papers transferred from the justice court to the county court pursuant to sec. 301.245, Stats., unless accompanied by $2 clerk's fee and $1 state tax. You inquire whether such fees must be collected at the time of filing, and if so, whether the defendant requesting the transfer or the plaintiff must pay them.

Sec. 301.245, Stats., reads as follows:

"In counties having a population of less than 500,000, and in which a small claims court or a civil, municipal, superior or county court empowered to exercise civil jurisdiction has been established, the defendant in any action brought in justice court may, on the return day of the process, transfer the cause to the small claims court or to such civil, municipal, superior or county court of said county. Upon receipt of such a request, accompanied by a fee of 75 cents, the justice shall forthwith transmit all the papers in such cause to the clerk of said court of said county."

The county court of Dodge county is vested with jurisdiction concurrent with and equal to the jurisdiction of the circuit court of that county in all civil actions where the claims or property involved do not exceed $25,000, except for certain express limitations not material here. See ch. 86, Laws 1872, and subsequent acts relating to the county court for Dodge county.

Art. VII, sec. 18, Const., requires the legislature to impose a tax on all civil suits commenced or prosecuted in the municipal, inferior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges.
Sec. 271.21 provides that in each action in a court of record having civil jurisdiction there shall be levied a tax of $1 which shall be paid to the clerk at the time of the commencement thereof.

Sec. 2472 of ch. 115, Ann. Stats. 1889, provides with respect to the county courts of named counties, including Dodge:

"The clerks of the circuit courts of said counties shall be the clerks of the county courts in the same counties *** and they and their deputies shall perform all the duties of clerks of said courts, so far as concerns their civil jurisdiction, in the same manner as they are required to perform the duties of clerks of the circuit courts, so far as applicable, and may demand and receive the same fees and compensation therefor."

Sec. 59.42 (40) requires the clerk of circuit court to collect:

"At the time of the commencement of every action or special proceeding or upon the filing of the original papers therein upon appeal from inferior courts or officers or upon a change of venue except in criminal cases, the sum of two dollars in addition to the state tax ***."

While the last quoted statute does not specifically refer to a removal from a justice of the peace, unless that be embraced within the term "change of venue," it is my opinion that a reading of the foregoing constitutional and statutory provisions makes it clear that the clerk is required to collect the fee and suit tax upon removal.

Sec. 301.245 does not require the defendant to pay the clerk's fee and tax in order to procure removal. Thus as a practical matter the burden of doing so is upon the plaintiff, since he is normally the party who desires the action to proceed.

TEF
GS
Taxation — Buildings on Leased Land — Buildings on leased land, if taxed as real estate are to be included in the assessment with the lands as a unit, and may not be assessed separately as real estate.

December 30, 1950.

ALLEN R. SOLIE,
District Attorney,
Outagamie County.

You state that the real estate tax roll for the city of Appleton for 1941 contains the following entry:

<table>
<thead>
<tr>
<th>Description of Real Tax Returned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land</td>
</tr>
<tr>
<td>----------------------------------</td>
</tr>
<tr>
<td>Clark's 1st Addition 5th Ward.</td>
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<tr>
<td>Building on leased land— N. 96.3' of Lots 1 &amp; 2 Block 4</td>
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The land exclusive of the building was owned by a railroad, and the building was owned by the lessee. Presumably the land exclusive of the building had been assessed under ch. 76 as property of a railroad company. In any event, it is assumed that it does not appear in any other item on the real estate tax roll of the city.

The building has now been removed from the land and you ask whether the tax appearing on the city tax roll constitutes a lien on the land.

Nothing is stated as to the name in which this property was entered on the rolls and it is assumed no question is raised in this regard. But even if not entered in the name of the owner, occupant or "unknown" as provided in sec. 70.17, Stats., that would not render the tax invalid. Wis. Cent. R. Co. v. Price County, (1885) 64 Wis. 579, 26 N. W. 93.

Sec. 70.17, Stats., provides in part: "** Improvements on leased lands may be assessed either as real property or personal property." It is clear that here the endeavor is to assess and tax the buildings on leased land as an item of real estate separate from the land itself. If that be proper
under our statutes then the question would arise whether the tax so levied on the buildings is a lien as well on the land on which the buildings were located.

Sec. 1085, Stats. 1917, the forerunner of present sec. 70.08, provided in part as follows:

"The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself, but all buildings, fixtures, improvements, rights and privileges appertaining thereto. When one person shall own the land and another shall own the buildings, fixtures, improvements, rights or privileges on the land, the tax shall constitute a lien on the entire property and the owner of the land shall have a lien from the time as of which such assessment was made. * * *

Under this statute it would appear that buildings on leased lands were to be assessed as part of the real estate, there being only one assessment which included both the land and the buildings as a unit, and the tax was on the entire property. The provision that the owner of the land should have a lien from the time of making of the assessment apparently was to protect him, as regards his payment of the entire tax in order to save his land, against removal of the buildings, even if the lease so provided, until the lessee discharged his share of the tax.

Ch. 244, Laws 1919, amended both sec. 1035, the forerunner of sec. 70.03, and sec. 1043, the forerunner of sec. 70.17. Thereafter these sections read as follows:

"Section 1035, subsection 3 of section 1040 and section 1043 of the statutes are amended to read: (Section 1035) The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself but all buildings, including buildings on leased land and all fixtures, improvements thereon, rights and privileges appertaining thereto, and also private railroads and bridges. * * *

"(Section 1043) Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased
person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Real property held under lease from any religious, scientific, literary or benevolent association, but otherwise exempt, shall be assessed to the lessee. All buildings on lands under lease or permit, including buildings located on railroad right of way or on other lands not subject to local assessment, shall be assessed as real estate to the owners of such buildings, if known, otherwise as above provided. The tax thereon may be enforced in the same manner as other real estate taxes or by action of debt as prescribed by section 1107a for the collection of taxes on personal property."

Here there was introduced for the first time the possibility of buildings on leased lands being assessed as a separate real estate interest. While still taxable as real estate, no longer was there a unit assessment and the land and the buildings thereon could be assessed and taxed as separate items of real estate. It seems clear that when so taxed separately the tax so placed against the buildings as a separate item could not be collected from or constitute a lien on the separately taxed land. Such assessment of the buildings was to be made in the name of the owner if known. It would only be where assessed to the owner by name that any collection by personal liability, as provided in respect to personal property taxes, would be possible. The buildings could be sold in the same way other real estate was sold for taxes. But in that case, the ultimate result was a tax deed to the buildings.

This presented many problems to the tax collectors and particularly in respect to cottages at lakes and other more or less movable buildings which were assessed as real estate. By the time of tax sale, the buildings would be gone. Because of the inability of the assessors to ascertain who owned them, many were assessed to "unknown" or erroneously named owners. The remedy of personal liability for the tax was of no value in such instances. See 21 O. A. G. 102, 103. The situation became very badly confused. It essentially arose from the splitting up of the lands and buildings into separate items of real estate taxation.
On March 5, 1929 the supreme court in *Aberg v. Moe*, 198 Wis. 349, 358–359, 224 N. W. 132, in dealing with a tax levied against land owned by the university upon which were located buildings that it had leased back for a period of years to the parties who had conveyed the property to it, said:

"Under the provisions of these statutes [secs. 70.08, and 70.17] throughout the history of the state lands have been assessed to the owner. No doubt the legislature might empower the assessor to assess the leasehold interest against the lessees and so divide up the property for the purposes of taxation. That, however, has never been the policy of our law so far as we know except for a brief period when the state undertook to tax the respective interests of the mortgagor and mortgagee separately. The entire property, including all interests in it, is assessed to the owner of the property as defined in the statute, and the right of every person claiming any interest in the property subordinate to the fee, whether under lease, contract, or otherwise, is extinguished if the property be sold in the exercising of the taxing power. If we were now to hold that the interest of a lessee under a lease should be separately assessed, how could it be held in other cases that where assessed to the owner the interest of the lessee could be cut off. If a lease creates a separable taxable interest in the lessee in one case it does in all cases. * * * A holding to that effect would involve a complete reversal of the public policy of this state throughout its history, and if a change of that kind is to be brought about it should be done by legislative action, not by a judicial holding made to fit a particular case.

"The property in this case, if assessable at all, was assessable to the Board of Regents of Wisconsin because exclusively owned by the board. The board was the owner; all interests in the property are subordinate to its title. * * *"

This holding of the court pointed the way and to solve the difficulties that had arisen, ch. 444, Laws 1933, was enacted. It deleted from the definition of real property in sec. 70.08 (now 70.03, Stats. 1949) the language specifically mentioning buildings on leased lands as such language was not necessary to an inclusion of them in an assessment of the land and all buildings thereon as a single unit of real property. It also took out of sec. 70.17 the language that previously dealt with buildings on leased lands and pro-
vided they should be assessed separately as real estate, and substituted therefor the following: "Improvements on leased lands may be assessed either as real property or personal property."

The history of the above statutory changes is found at page 80 of the opinion in *Milwaukee v. C., M., St. P. & P. R. Co.*, (1936) 223 Wis. 73, 269 N. W. 688, where an assessment of both the land and the buildings thereon as a unit was held proper.

From the foregoing, in my opinion, buildings on leased lands may be assessed either as real estate, in which case they are to be included as part and parcel of the land and assessed with it as a unit, or as personal property, in which case alone it is assessed separately from the land. There is no place in the statutes as I view them for a separate assessment of buildings on leased lands alone as real estate. It was to get away from such handling of them that the amendment in 1933 was framed as it was.

Accordingly, the assessment and tax in the instant case is incorrect. If it were an assessment of the real estate, then, as required by sec. 70.32 (2), Stats., both the land and the improvements are given a separate valuation. See *Milwaukee v. C., M., St. P. & P. R. Co.*, supra at page 82. It is obvious here that this is not what was done and therefore it is merely an attempt at taxing the buildings as real estate separate from the land. As such it is an illegal assessment and should be returned to the local unit as such.

TEF

HHP
Insane—Commitment—It is not a jurisdictional fact, required to be recited in a commitment by a court commissioner made under sec. 51.01 (1), Stats., that the county and district judges and all judges of courts of record of the county are unavailable.

December 30, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have requested an opinion concerning sec. 51.01 (1), Stats., which provides as follows:

“(1) APPLICATION TO JUDGE. (a) Written application for the mental examination of any person (herein called ‘patient’) believed to be mentally ill, mentally infirm or mentally deficient or epileptic, and for his commitment, may be made to the county or district judge of the county in which the patient is found, by at least 3 adult residents of the state, one of whom must be a person with whom the patient resides or at whose home he may be or a parent, child, spouse, brother, sister or friend of the patient, or the sheriff or a police officer or public welfare or health officer. However, if the patient is under 18 years of age, the application shall be made to the judge of the juvenile court of the county in which such minor is found.

“(b) If the county judge or the district judge is not available, the judge of any court of record of the county may act on the application. If no such judge is available, any court commissioner of the county may act.”

You refer to the opinion reported in 37 O. A. G. 139 in which this office pointed out that all jurisdictional facts should be recited in the commitment of a person to a mental institution, and you inquire: Under sec. 51.01 (1) (b), Stats., if a commitment is signed by a court commissioner, should or must the writ state that the judge is unavailable?

The question is whether the unavailability of the judge is a jurisdictional fact in the absence of which a court commissioner may not act. If so, it must appear in the commitment.

We are unable to discover any precedent dealing with such a statute as sec. 51.01 (1) (b). Normally when several officers or courts have jurisdiction over or authority to act in a matter, the jurisdiction or authority to act is concurrent and the first to act obtains the exclusive right to
continue. See, e.g., *Oak Park School Dist. v. Callahan*, (1944) 246 Wis. 144.

In the case of courts having concurrent jurisdiction, if proceedings are started in one court which is competent to render adequate relief, it is reversible error for another court to assume jurisdiction of the same matter. But this is treated as "error within jurisdiction" rather than as "jurisdictional error"—that is, the second court's judgment will be reversed on appeal but until so reversed, or if no appeal is taken, it is binding. *Cawker v. Dreutzer*, (1928) 197 Wis. 98, 129.

Sec. 51.01 (1) (b) vests concurrent authority in various judges and the court commissioners, and creates a system of priorities among them. In my opinion the situation is analogous to that discussed in the preceding paragraph. In the *Cawker* case the first court obtained priority of jurisdiction by reason of the parties having first invoked its jurisdiction. Yet the second court was not thereby wholly deprived of jurisdiction, and in the interests of justice its judgment was affirmed (though the court held that in future cases it would be held to be reversible error for the second court to assume jurisdiction).

Here priority of jurisdiction is provided by the statute rather than by any act of the parties, but the same rule ought to apply. It may well be that a court commissioner commits error if he acts without proof of the unavailability of any of the judges who have prior jurisdiction of mental proceedings, but it is not such error as renders his action void. Accordingly, the fact of unavailability of the judges is not a jurisdictional fact which must be recited in the commitment.

WAP
Public Assistance—Old-Age Assistance—Persons living in private institutions may, under proper circumstances, qualify for old-age assistance, former restriction provided in sec. 49.23 (1), Stats., having been eliminated. Inmates of county homes may be eligible for old-age assistance grants whether "committed" or "admitted" under sec. 49.15.

December 30, 1950.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have called my attention to the provisions of ch. 479, Laws 1949, which amends sec. 49.23 (1). This section now reads:

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

(1) While or during the time he is an inmate and receives the necessities of life from any public institution maintained by the state or any of its political subdivisions for the care of the mentally ill, for the care of persons suffering from tuberculosis, or for the incarceration of any person convicted of a crime or misdemeanor."

You state that you anticipate that certain problems will arise in connection with this law and ask my opinion on two questions:

"1. It is our view that county grants of old-age assistance to persons residing in private institutions can qualify for state and federal reimbursement, except where such persons have a contract for life care, or the institution by its rules provides care without charge, which should be regarded as a resource under sec. 49.21 (1), Wis. Stats., and Title I, sec. 2 (a) (7), U. S. Social Security Act. Are we correct in this? See 25 Ops. Atty. Gen. 165 and 15 Ops. Atty. Gen. 340."

Prior to the 1949 amendment, sec. 49.23 (1) prohibited the granting of old-age assistance to:

"* * * an inmate of a private charitable, benevolent or fraternal institution or home for the aged to which no admission charge as a life tenant has been made * * * ."

Since the provisions pertaining to persons in private institutions have been eliminated by the 1949 legislature, any
such person who meets the other statutory qualifications might be able to qualify for old-age assistance provided his circumstances were such that a grant would be warranted, as in the case of a person receiving insufficient care which failed to supply all the necessities of life. The attorney general's opinions referred to were written in the light of the former language of the statute and are now obsolete. The question of whether or not the grant would qualify for federal reimbursement would depend upon the provision of the federal social security act at the time of the grant. At the present time the pertinent section of the act, 303, reads:

“(a) Section 6 of the Social Security Act is amended to read as follows:
“Sec. 6. For the purposes of this title, the term 'old-age assistance' means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof.
“(b) The amendment made by subsection (a) shall take effect October 1, 1950, except that the exclusion of money payments to needy individuals described in clause (a) or (b) of section 6 of the Social Security Act as so amended shall, in the case of any of such individuals who are not patients in a public institution, be effective July 1, 1952.”

Your second question:

“As to public institutions, is there any distinction as to eligibility for old-age assistance between persons committed and persons admitted? For example, see sec. 49.15, Wis. Stats., and Chap. 142, Stats. We anticipate problems arising from want of coordination between the administrative and fiscal provisions of the assistance and various institutional programs.”

Sec. 49.15 provides for involuntary commitment of a person who is “without a home or necessary care or is living in a state of filth and squalor likely to induce disease”
by the judge of the court of record. This section also provides for admission upon voluntary application to the board of trustees. The statutes relative to persons in county homes were not written in contemplation of their receiving old-age assistance and were not changed by the legislature after the restriction against their receiving old-age assistance had been abandoned. However, since the legislature has now evidenced its intent that inmates of county homes be eligible for old-age assistance and has not created any distinction between persons "admitted" or "committed," it is my opinion that none exists.

You refer to ch. 142 of the Wisconsin statutes. This chapter pertains to the Wisconsin general hospital and contains no restriction as to the receipt of old-age assistance.

REB

_Tuberculosis Sanatoriums — Outpatients — Sec. 50.08, Stats., as amended by ch. 201, Laws 1949, construed and held to require that outpatient treatments be considered in determining per capita costs under sec. 50.07 (3)._

December 30, 1950.

_STATE BOARD OF HEALTH._

You state that passage of ch. 201, Laws 1949, amending sec. 50.08, Stats., to provide state aid to counties giving tuberculosis outpatient treatments has raised certain questions concerning the duties of the state board of health under sec. 50.11 to calculate the per capita costs of maintaining patients in the various county tuberculosis sanatoria. Specifically, you ask:

1. (a) Can patients who do not have a court order be admitted to an outpatient department of a tuberculosis sanatorium without being charged the established per capita for each day of treatment? (b) If patients can be so admitted, can whatever charge is made by the tuberculosis sanatorium for outpatient care be accepted as being full pay?
2. In computing the per capita cost of the tuberculosis sanatorium must treatments received by pay patients in the outpatient clinic be considered?

You state that it has been the practice, prior to the passage of ch. 201, Laws 1949, to answer both parts of the first question affirmatively and to answer the second question in the negative.

Ch. 201, Laws 1949, amended sec. 50.08 by adding:

"** Any county which provides outpatient treatment in a county institution to a person who presents the certificate mentioned in section 50.07 (1) shall be credited by the state, to be adjusted as provided in section 50.11 for each patient cared for at public charge, as follows:

"(1) For each treatment given to a patient whose care is chargeable against said county, one-seventh of the amount paid by the state per week to the county under section 50.07 (3) (a) and (b).

"(2) For each treatment given to a patient whose care is chargeable against some other county, one-seventh of the amount paid by the state per week to the county, or one-seventh of the cost of his care as determined by the institution and the state board of health, whichever is greater; the state shall charge over to such other county any excess over the amount as provided in section 50.07 (3) (a) and (b)."

The only possible construction of subsec. (1) is that when a county gives an outpatient tuberculosis treatment to a person whose care is chargeable to that county, the state is to credit the county with one-seventh of the amount allowed as state aid per patient per week for inpatients under sec. 50.07 (3) (a).

Subsec. (2) is more difficult to construe, though it forms an integral part of ch. 201, Laws 1949. The general purpose of subsec. (2) is to reimburse a county for each outpatient tuberculosis treatment given to a patient whose care is chargeable to another county, but the amounts of the credit and of the charge over to the county of legal settlement are far from clear. The amount of the credit is to be "one-seventh of the amount paid by the state per week to the county [probably this is meant to be one-seventh of the amount paid by the state per patient per week to the county under sec. 50.07 (3) (a)], which would be one-seventh of
$15, or $2.14], or one-seventh of the cost of his care ***, whichever is greater.** The alternative would be a determinable amount, though the determination would present difficult problems of cost accounting since the outpatient clinic normally is a part of the county's tuberculosis sanatorium and may also be used for the correction of physical defects of school children and child welfare work, but it is highly improbable that the legislature meant one-seventh of the actual cost of the treatment given.

If county A provides an outpatient treatment costing $10 to one whose care is chargeable to county A and another identical treatment to one whose care is chargeable to county B, sec. 50.08 (1) would require the state to credit county A $2.14 as state aid for treating its own resident, leaving county A to pay the $7.86 balance of the actual cost. This would conform to the pattern established for the payment of state aid for inpatient treatment. But the literal meaning of sec. 50.08 (2) would require the state to credit county A, for treating the patient from county B, $2.14 (one-seventh of the $15 state aid per inpatient week provided in sec. 50.07 (3) (a)), since $15 exceeds the cost of the treatment. Since $2.14 is less than the cost of the treatment, county A would have to pay the $7.86 balance of the cost of treating the patient from county B. The last portion of subsec. (2), providing for a charge over of the excess to the county to which the patient's care is chargeable, would not be operative unless one-seventh of the cost of the treatment exceeded "the amount as provided in section 50.07 (3) (a) and (b)." Sec. 50.07 (3) provides:

"(3) Each county maintaining in whole or in part such an institution [a tuberculosis sanatorium] shall be credited by the state, to be adjusted as provided in section 50.11, for each patient cared for therein at public charge, as follows:

"(a) For each patient whose support is chargeable against said county, $15 per week.

"(b) For each such patient whose support is chargeable against some other county, the total cost of his maintenance as determined by the board of trustees of the institution and the state board of health; and the state shall charge over to such other county the difference between such total cost and $15 per week provided through state aid."
Paragraphs (a) and (b) provide for different amounts to be credited to the county giving the care, and only paragraph (b) provides for an amount to be charged over to the county of legal settlement. In any event the minimum amount provided in either (a) or (b) is $15, since the per capita weekly costs of maintaining patients at the various county tuberculosis sanatoria range from about $37 to $63. It is inconceivable that the cost of a single outpatient treatment would exceed seven times the $15 state aid provided in paragraph (a), much less that it would exceed seven times a per capita cost of, say, $45 provided in paragraph (b), so the charge-over provision of sec. 50.08 (2) is meaningless if the plain language of the statute is followed.

If the plain meaning of a statute leads to an absurdity, resort may be had to rules of statutory construction, *In re Reeseville Drainage District*, (1914) 156 Wis. 238, 240, 145 N. W. 671, and the intent of the legislature, if discoverable, must control in the interpretation. *Will of Schilling*, (1931) 205 Wis. 259, 273, 237 N. W. 122.

If what was meant in the last clause of sec. 50.08 (2) was one-seventh of the amount provided in sec. 50.07 (3) (a), the net result would be to charge over to the county of legal settlement any excess over the $2.14 state aid. This would be perfectly reasonable and in conformity with the general scheme of credits and charges in the case of in-patients, except for the fact that the first part of sec. 50.08 (2) specifies that the county giving the treatment shall be credited with only $2.14 or one-seventh of the cost of the treatment, whichever is greater. That particular provision could be brought into harmony with the construction suggested above for the last clause by interpreting the provision as though it read: “or one-seventh of the per capita cost provided in section 50.07 (3) (b), whichever is greater.” There is a long standing administrative practice which supports the construction here suggested.

For many years it has been a common practice to give pneumothorax treatments to former tuberculosis sanatorium patients. In order to bring these treatments under the state aid provisions of sec. 50.07, a patient returning to the institution for such a treatment was considered to
have been admitted to the institution as an inpatient for one day. In computing the per capita cost for a county tuberculosis sanatorium, the total costs of the institution were taken as the dividend and the total inpatient weeks (counting each pneumothorax treatment as one-seventh of an inpatient week) were taken as the divisor. Thus there is administrative practice from which has grown the concept of an outpatient treatment being the equivalent of an inpatient day. This concept was extended by the board of health in 1947 when the board allowed state aid for patients receiving gastric analyses, although the patients may not be maintained at the institutions as regular inpatients.

Ch. 201, Laws 1949, contains language indicating that the legislature had this same concept in mind. Subsec. (1) clearly places an outpatient treatment given by a county to a patient having legal settlement in such county upon the same footing as one-seventh of an inpatient week for purposes of state aid. Subsec. (2) apparently attempts to follow the same concept in the determination of credits and charges in cases of outpatient treatments provided to patients whose care is chargeable to other counties, although the language used is unfortunate. Also, in subsec. (2) the legislature apparently intended to follow the procedure established in sec. 50.07 (3) (b) of setting up a state credit for the full cost of care provided by one county to a patient from another and then charging to the county of legal settlement any excess of such cost over the amount of the state aid.

It would naturally follow from the construction here suggested that outpatient treatments given to any patients in a county tuberculosis outpatient clinic must be considered in computing the per capita cost under sec. 50.07 (3) (b), and each such treatment should be considered as one inpatient day as has been the practice with the pneumothorax treatments. If this procedure were not followed, sec. 50.08 (2) would be inapplicable to any county which maintains a tuberculosis outpatient clinic but not a tuberculosis sanatorium. Therefore, your second question is answered in the affirmative.
Your question (1) (a) also is answered in the affirmative in the case of any county whose institution is governed pursuant to sec. 46.21, since that section grants to the county board of public welfare broad discretionary powers, subject to the rules of the state board of health relating to the administration of the county hospitals and clinics. In the case of any county having a population of less than 250,000, sec. 50.08 requires that the county dispensary must be administered pursuant to secs. 46.18 and 46.19, and those sections do not contain the broad delegation of authority found in sec. 46.21.

As pointed out in 39 O. A. G. 222 (1950), the provisions of secs. 50.02 and 50.07 relating to the admission and determination of legal settlement of inpatients are applicable to outpatients. Sec. 50.07 (1) provides that any person suffering from tuberculosis may be cared for at a county institution "upon payment of a rate which shall not exceed the actual cost of maintenance therein." The obvious and, I believe, proper inference from this language is that a county may charge less than the established per capita for each day of treatment, so that no county is required to charge the established per capita for each day of outpatient treatment.

Your question (1) (b) likewise is answered affirmatively insofar as the computation of per capita costs and the establishment by the state board of health of credits and charges under secs. 50.07 and 50.08 is concerned. That is, the amount paid by a patient, either an inpatient or an outpatient, would not enter into the computation of per capita costs in light of the construction placed upon sec. 50.08. This is not to say that a county dispensary may offer care at less than cost to all tuberculosis patients regardless of legal settlement, a question not here considered. Such care is in the nature of a charity and the statutory procedures must be followed closely, as noted in 31 O. A. G. 124 (1942).
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