

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. 41

January 1, 1952, through December 31, 1952

VERNON W. THOMSON
Attorney General



MADISON, WISCONSIN
1952

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee	from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee	-- from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva	----- from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison	-- from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point	----- from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh	-- from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay	-- from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee	from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown	from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point	----- from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	----- from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	----- from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	----- from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	-- from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDE- VANT, 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

ATTORNEY GENERAL'S OFFICE

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* Resigned April 30, 1952.

OPINIONS
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VOLUME 41

Motor Vehicle Department—Appropriations and Expenditures—Secs. 85.055 (2) and 20.052 (4), Stats., are “appropriations” within the meaning of art. VIII, sec. 2, Wis. Const., providing that no money shall be paid out of the treasury except in pursuance of an appropriation by law. No particular form of words is necessary to constitute a valid appropriation, provided the legislative intent is clear and certain.

Where motor vehicle department is required by sec. 85.01 (6) (a), Stats., to “devise, secure, issue and deliver annually prepaid to each owner” of specified motor vehicles two official number plates, and a “sum sufficient to carry out the provisions of section 85.01 (6) (a)” is granted by the legislature, all costs incurred which are *additional* costs of devising, securing, issuing and delivering the number plates *annually* are chargeable to said sum sufficient appropriation. What are “additional costs” is primarily a question of fact.

January 3, 1952.

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

E. C. GIESSEL, *Director,*
Department of Budget and Accounts.

This opinion is rendered to you jointly upon the written request of Commissioner Marcus, as supplemented by a memorandum from Mr. Giessel.

You direct my attention to the enactment of chs. 80 and 706, Laws 1951, which amend sec. 85.01 (6) (a) and (11) (a), and create secs. 85.055 (2) and 20.052 (4), Stats.

You request my opinion as to whether the following quoted portions of sec. 85.055 (2), as created by ch. 706, and sec. 20.052 (4), as created by ch. 80, are appropriations within the meaning of art. VIII, sec. 2, Wis. Const., which provides in part that: "No money shall be paid out of the treasury except in pursuance of an appropriation by law."

"85.055 (2) * * * Administration costs of this section shall be chargeable to the funds collected under sections 194.48 and 194.49."

"20.052 * * * There is appropriated from the state highway fund to the motor vehicle department:

"* * *

"(4) A sum sufficient to carry out the provisions of section 85.01 (6) (a) and (11) (a)."

In specific terms, an "appropriation" may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. *State ex rel. Pyne v. La Grave*, 23 Nev. 25, 41 P. 1075; *Menefee v. Askew*, 25 Okla. 623, 107 P. 159, 27 L.R.A. (NS) 537. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. *State ex rel. Bonsteel v. Allen*, 83 Fla. 214, 91 So. 104, 26 A.L.R. 735; *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839, 26 A.L.R. 755; 42 Am. Jur. 747, § 43.

No particular form of words is necessary to constitute a valid appropriation, provided, of course, that the legislative intent is clear and certain. *Riley v. Johnson*, 219 Cal. 513, 27 P. 2d 760, 92 A.L.R. 1292; 42 Am. Jur. 749, § 45.

The statutes above quoted meet the definitive tests of the cases cited above, and in my opinion clearly constitute appropriations. The language of said statutes is such that no effect can be given to them unless they are considered as making appropriations.

Commissioner Marcus' request, answered above, was supplemented by Mr. Giessel, who asks (1) whether "any costs other than the actual purchase of license plates and postage" incurred under sec. 85.01 (6) (a) may be charged to sec. 20.052 (4); and (2) if the preceding question be answered in the affirmative, is there any limitation as to such charges? Other questions are posed which are variations of the question stated.

I do not perceive an ambiguity in the language of the statutes involved. A mere reading of these statutes demonstrates the legislative intention to supplement the specific appropriation made by sec. 20.052 (1), as amended by ch. 319, Laws 1951, with a sum sufficient appropriation under sec. 20.052 (4), created by ch. 80, Laws 1951. (See also sec. 20.77 (4), relating to construction of appropriation statutes.) It seems clear to me that the sum sufficient appropriation is intended to defray costs "other than the actual purchase of license plates and postage." Such other costs consist of the *additional* costs of devising, securing, issuing and delivering the number plates *annually*. While sec. 85.01 (6) (a) does not expressly refer to the purchase of license plates, the word "secure" is broad enough to include the purchase, and the fact that the provision was added that the plates shall be purchased from the state prison, etc., indicates that the legislature understood the word "secure" included the purchase of the plates. Likewise, the fact that this section requires the department to deliver the plates "prepaid" justifies the conclusion that the legislature intended some postage was to be paid under ch. 80. It is immaterial, however, whether the entire cost of the postage and plates is paid out under ch. 319 or ch. 80, because both are sum sufficient appropriations.

I have studied a 4-page memorandum prepared by the motor vehicle department, setting up in somewhat elaborate detail, a description of the procedures heretofore followed by the motor vehicle department in the issuance of annual year tags, and a similar comparative description of the new procedures which the department has adopted and proposes to follow under the new law. The question of what are "additional costs" is a question of fact which is capable of being determined by reference to that memorandum.

It appears without dispute that the clerical work load necessitated by the issuance of full-size plates, involving the assignment of new and different license numbers, coupled with the necessary record keeping, is greater than that required under the former practice of issuing the small yearly insert tags. This additional work was not contemplated by the motor vehicle department in the preparation of its proposed budget in the fall of 1950, nor in the hearing before the joint committee on finance upon the executive budget bill. It is clear to me that the legislature unquestionably intended that such additional work was to be paid for out of the appropriation made by ch. 80.

Your first question having been answered in the affirmative, you ask a second question as to what limitation, if any, there may be upon expenditures under the sum sufficient appropriation. It is impracticable to attempt to answer this question because any set of facts which I would have to assume as an hypothesis may never come into being. If and when you are in need of counsel respecting a specific proposed expenditure which you are required to pre-audit, I shall be pleased to consider this question in the light of the actual facts.

SGH

Licenses and Permits—Peddlers, Itinerant Merchant Truckers and Transient Merchants—Secs. 110.10, 129.01, 129.05 and 129.06, Stats., construed. Questions relative to the licensing of itinerant merchant truckers, transient merchants and peddlers discussed.

January 16, 1952.

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

Your letter asks seven questions, each of which, for purposes of convenience, will be handled separately. The first six arise under ch. 129, Stats., and the last arises under sec. 110.10, Stats.

1. You ask whether copartners are allowed to operate under a single transient merchant's license or whether they both have to be licensed.

This is covered by sec. 129.06 which reads in part as follows:

"But one person shall carry on business under the terms of any license provided for in this chapter and no person shall conduct business under the same license as copartners, agents or otherwise.* * *"

If two or more persons, whether copartners or otherwise, engage in the business of a transient merchant, each of them must obtain a license.

2. You ask, "If a transient merchant owns and operates more than one stand can he operate under a single license or is each agent who operates one of his stands required to be licensed as a transient merchant?"

The first half of this question is answered in 37 O.A.G. 39 where it is stated, at page 40:

"You are advised that a transient merchant may operate more than one stand under a single license. * * * It is apparent that the license is issued to the transient merchant as an individual person. It is not issued for each stand or outlet which he operates in the particular municipality. The statute clearly was intended to apply to the operations of a transient merchant in a specific town, village or city. Whether he has a single outlet or more than one is not material. * * *"

With respect to the second half of this question, it is assumed that you are referring to the type of agent who attends one of several stands under the supervision of the licensed transient merchant and who is an employe for wages with no profit sharing or other proprietary interest in the business of his employer. If we accept the definition of "merchant," as found in Black's Law Dictionary, as "one, who, as a business, buys and sells wares and merchandise," it is clear that the employe is not a merchant. (See also 3 Words & Phrases, 2d series, 373). It follows therefore that he is not *automatically* required by sec. 129.05 to procure a transient merchant's license.

Sec. 129.06 quoted in part above suggests that under some circumstances an employe of a transient merchant licensee might be required to obtain a license himself. Certainly the phrase "as copartners, agents or otherwise" is broad enough to include an employe. I am of the opinion that the controlling factor here is whether or not the employe "carries on" or "conducts" the business. If the employe is in fact the resident manager for an absentee licensee, he is then conducting the business and is required to be licensed. If, however, he is a sales clerk working under the supervision and at least part time in the presence of the licensee, he is not carrying on or conducting the business. Thus it would be possible for a transient merchant to have a number of stands or outlets on one ground or in one municipality and operate them through employes under his direct supervision without being required to secure a transient merchant's license for each of his employes.

The reasoning and conclusion of 12 O.A.G. 373 would not apply to this case unless the employe's activities were such as to bring him within the purview of sec. 129.01, in which case a different license would be required. Since you have not stated facts relative to this point we have omitted it from consideration here.

3. You ask, "If two men are working in one stand are they both subject to be licensed as transient merchants?"

The answer to this depends upon their status. They may be partners; one may be an employe of the other; both may be employes of a third person; each could be an independent operator. If either meets the tests of a transient merchant he must be licensed pursuant to sec. 129.05; if both do, both must be licensed. The reasons for this are discussed in other parts of this opinion.

4. You ask, "May the owner of a circus operate all stands on the circus grounds under a single transient merchant's license?"

An affirmative answer to this question follows from the reasoning in 37 O.A.G. 39, providing that your question applies only to merchandising stands which are covered by sec. 129.05, Stats. If the "stands" are such as might be classed as sideshows, wild animal shows, rides, or any other

type of show governed by sec. 129.14, Stats., this rule would not apply. See 19 O.A.G. 463.

5. You ask, "Is a party who employs several licensed peddlers required to obtain a peddler's license in his name even though he himself does no peddling?"

The answer is in the affirmative. Under a statute providing that "each person carrying on the business of a peddler must take out a separate license, both the absent principal, and the active agent must take out licenses" (12 O.A.G. 373, 374). See also, 8 O.A.G. 717, 21 O.A.G. 158, 35 O.A.G. 372 and the authorities cited therein.

6. You ask with reference to sec. 129.01 (3), "Are 4H Club fairs such as held each year at Stoughton included in this chapter?"

Sec. 129.01 (3) reads as follows:

"Subsections (1) and (2) of this section shall not apply to a person who in the conduct of his business as trucker, hawker or peddler transports at any time a net load of more than 3,000 pounds of personal property by motor truck or other vehicle, *nor to a person while lawfully engaged in such business at the state fair or at agricultural fairs held on the grounds and under the direction of an agricultural society, association or board receiving state aid under section 94.08.*"

Whether or not the type of fair to which you refer falls within the exception defined herein is a question of fact. I am informed by a representative of the state department of agriculture that the 4H Club fair held in Dane county this year was held on the Dane county fairgrounds at Madison under the direction of a society which receives state aid pursuant to sec. 94.08 and that the fair held in Stoughton this year was not a 4H Club fair. The decision relative to each and every fair must depend upon the facts of the direction of such fair.

7. You ask, "Are truckers who buy scrap iron or other so-called junk, then resell same to a junk dealer, required to be licensed under sec. 110.10? They have no junk yard but they buy, sell and deliver same to a dealer who has a junk yard."

Sec. 110.10 (1) (d) reads as follows:

“Itinerant merchant trucker” means any person who buys or offers to buy or sells or offers to sell, in this state, at wholesale or retail any personal property, and transports the same upon any highway by use of a motor truck or other vehicles, and who at any time transports in said motor truck or other vehicle a net load exceeding three thousand pounds, except as herein otherwise provided.”

Sec. 110.10 (4) reads as follows:

“No person shall engage in business or use any motor vehicle in this state as an itinerant merchant trucker, as defined in subsection (1) hereof without obtaining from the department the license required by this section.”

The type of operator you describe would require a license if all of the following additional conditions were present:

- (1) He at any time carries a vehicle net load exceeding 3,000 pounds (sec. 110.10 (1) (d)).
- (2) He has no established place of business (sec. 110.10 (2) (b)). For the definition of “established place of business” see sec. 110.10 (1) (e).
- (3) He is not licensed under secs. 129.01 to 129.04, inclusive, or sec. 78.03 (sec. 110.10 (2) (d) and (e)).

GFS

Criminal Law—Bail—Bonds—Despite the terms of sec. 354.40, Stats., in cases involving misdemeanors and felonies other than murder, a surety bond with personal sureties may be signed by persons who own real estate or personal property, or both, worth a sum which in the opinion of the court or magistrate is sufficient to secure the appearance of the defendant at the trial.

January 18, 1952.

JOHN P. KAISER,
District Attorney,
Dodge County.

The question raised is whether, in cases involving misdemeanors and felonies other than murder, a surety bond with personal sureties must be signed by persons who own

unincumbered real estate within Wisconsin, not exempt from sale on execution, worth at least double the sum at which the bail is fixed, or who own such real estate and personal property, or either, worth at least double the sum at which bail is fixed, or worth a sum equal to the bail fixed.

It is my opinion that in cases other than murder the court has discretionary authority to release a prisoner on a bail bond with sureties owning sufficient real or personal property which in the opinion of the court or magistrate will secure the appearance of the defendant for trial.

By sec. 354.15 (2), Stats., the legislature has clearly prescribed surety requirements in murder cases:

“In case of murder the bond shall be signed by the defendant and at least 2 sureties who severally swear that each owns real property in this state not exempt from execution, worth a named sum, which sums shall aggregate double the penalty in the bond. No surety shall be accepted who does not justify in at least one-third of the penalty, and when required by the district attorney or by the court, he shall describe such real property.”

In cases other than murder, the requirements as to sureties are not so clearly defined. Sec. 354.40 provides:

“The oath required of the sureties on a bail bond may be subjoined to the bond in substantially the following form:

“State of Wisconsin, }
 _____ County, }

“C. D. and E. F., the sureties above named, being severally duly sworn, each for himself says that he owns unincumbered real estate within this state, not exempt from sale on execution, worth at least ____ dollars (total amount to be double the sum at which the bail is fixed).

“(Signed) C. D.
 E. F.

“Subscribed and sworn to before me, this ____ day of _____, 19__.

 Judge, etc.”

The form contains the requisites established for murder cases. It can hardly be contended that the form regulates the amount and kind of property to be provided by personal sureties in all criminal cases, in view of the introductory

language that the oath *may* be subjoined to the bond in *substantially* the form set forth. The content of the form is not substantive; its terms may be varied to conform to the dictates of court or code in particular cases.

I cannot agree with the quotation cited from Wisconsin Practice Methods (1949), § 1707, that "Each surety on a bond must own and possess unincumbered real estate within Wisconsin, not exempt from sale on execution, worth at least double the sum at which the bail is fixed." Sec. 354.40, Stats., is cited as authority for the statement, but as pointed out above, in cases other than murder, use of the form as quoted is not mandatory.

It appears from sec. 354.15 (1) that in all but murder cases, property other than real estate may be used to assure the bail bond: "Except as provided in this section, no bail bond shall bind property. The bail bond shall be sufficient to secure the appearance of the defendant for trial." The word property as used here is not limited to real property and may be taken to include personalty.

Insight to the probable legislative intent is given by sec. 354.34, which reads "A defendant may waive a preliminary examination; and, except in murder cases, may give bond with sufficient sureties to be approved by the magistrate for his appearance at the trial court." If the legislature had intended the words "sufficient sureties" to mean sureties as required by sec. 354.15 (2), it would have been a simple matter to so state.

In 8 O.A.G. 850, 852, under similar statutory provisions, this office expressed the opinion that in cases other than murder, since no justification is specified, the court has discretionary power to release a prisoner on a bond with such sureties as in its opinion will secure the appearance of the person so released at the time of trial. See also 28 O.A.G. 450, 454. The legislature has not acted to amend the sections in question to declare a contrary intention and must be presumed to have acquiesced in the interpretation stated.

GS

Elections—Circuit Judge—Nomination Papers—Under ch. 455, Laws 1951, candidates for any office to be voted for wholly within one county file nomination papers with the county clerk.

January 18, 1952.

EDWARD A. KRENZKE,
District Attorney,
Racine County.

You inquire whether candidates for judge of the circuit court in the twenty-first circuit, which is composed of Racine county only, are required to file their nomination papers in the office of the secretary of state or in the office of the county clerk for Racine county.*

Your question in essence is whether or not sec. 5.26 (6), Stats. 1949, as amended by ch. 46, Laws 1951, which required all candidates for circuit judge, except in the second circuit, to file their nomination papers with the secretary of state, has any legal effect after it was amended by ch. 455, Laws 1951. In my opinion it does not.

In the 1949 statutes sec. 5.26 (6) read in part as follows:

“Such nomination papers shall be filed as follows: For candidates for justice of the supreme court, state superintendent of public instruction and circuit judge in the office of the secretary of state not more than 68 nor less than 60 days before the election for which the nomination is made * * *.”

Under sec. 252.06, Stats. 1949, the second circuit was the only circuit located entirely within one county, that is, Milwaukee county. Accordingly, to adapt the procedure for filing nomination papers for circuit judges in Milwaukee county to that for all other local offices as set forth in sec. 5.26 (6), the legislature deemed it desirable to adopt ch. 46, Laws 1951, which amended sec. 5.26 (6) to read in part as follows:

“Such nomination papers shall be filed as follows: For candidates for justice of the supreme court, state superin-

* This opinion supersedes 38 O.A.G. 648 as to Milwaukee county, for the reason that the statutes upon which that opinion was rendered have been amended as stated in the present opinion.

tendent of public instruction and circuit judge, except circuit judges of the second judicial circuit, in the office of the secretary of state not more than 68 days nor less than 60 days before the election for which the nomination is made
* * *”

and this bill was approved on March 27, 1951.

Thereafter, two new circuits were created, each of which was located entirely in a single county. Ch. 257, Laws 1951, approved May 23, 1951, created the twenty-second circuit to consist of Waukesha county, and ch. 402, Laws 1951, approved June 26, 1951, created the twenty-first circuit to consist of Racine county.

Thereafter there was an extensive revision of the election laws by ch. 455, Laws 1951. Sec. 35 of this law amended sec. 5.26 (6) (and renumbered it as sec. 5.19 (6)), which had previously applied to both independent and nonpartisan nominations, so that by its terms it applied only to independent nominations. It now reads as follows:

“Such nomination papers shall be filed as follows: For candidates to be voted for throughout the state or any division or district embracing more than one county, in the office of the secretary of state and for candidates to be voted for wholly within one county, in the office of the county clerk. Such nomination papers shall be filed not later than 5 p.m. central standard time on the second Tuesday after the primary.”

As will be indicated below, it appears this statute no longer governs filing for nonpartisan candidates.

Secs. 47 and 48 of ch. 455 created two new sections of the statutes to read as follows:

“5.22 NOMINATIONS FOR SPRING ELECTION. (1) Candidates for offices to be filled at the spring election shall be nominated by nomination papers or if a primary is required before the election, by nomination papers and selection at the primary. A spring primary, when required, shall be held 4 weeks before the spring election.

“(2) Except as provided in sections 5.22 to 5.27 the law relating to nomination at September primaries shall apply to the nomination of candidates at the spring primary.”

“5.23 NOMINATION PAPERS. Nomination papers for offices to be filled at the spring election shall be filed not later than 5 p.m. on the last Tuesday in January. They shall conform

to the requirements for nomination papers for independent candidates for the general election, except that the number of signers required is as follows * * *”

It is notable that these latter sections do not specifically provide for a place of filing. While under the new sec. 5.23 the papers themselves must meet the requirements of sec. 5.19 (6), Stats. 1951, that section does not appear to be a sufficient direction as to the place of filing. Hence we are relegated by sec. 5.22 (2) to the provisions of sec. 5.07 (2), Stats 1949, renumbered sec. 5.05 (8) (b), Stats 1951, by sec. 14 of ch. 455, Laws 1951. This section reads:

“For officers to be voted for wholly within one county, except representatives in congress, in the office of the county clerk of such county.”

In my opinion the last quoted section is plain on its face and furnishes the answer to your question. Ch. 46, Laws 1951, has effectively been repealed and candidates for the circuit court in all circuits located entirely within one county should file their nomination papers with the clerk of that county.

RGT

Aeronautics Commission—Airports—State and Federal Aid—Where airport manager employed by city obtains a leave of absence and thereafter renders services as resident inspector on federal aid airport lighting project as employe of an engineering firm pursuant to its contract with the city, state aeronautics commission may pay state's share of cost of such services, even though federal agency has disallowed a part thereof, since employe was not required to perform inspection services in his employment with the city and work was actually done under responsible supervision of the engineering firm.

January 22, 1952.

STATE AERONAUTICS COMMISSION.

You inquire whether the state aeronautics commission may certify for payment the state's share of the cost of certain engineering services rendered on a federal aid airport

lighting project where the civil aeronautics administration has disallowed half of said cost.

The city of Stevens Point became duly qualified to receive state and federal aid for a lighting system at its municipal airport under the provisions of the Federal Airport Act and ch. 114, Wis. Stats. Total cost of the project was \$42,386. A contract was entered into with an engineering firm at Green Bay for execution of the project which provided for payment for the services of a resident engineering staff at "actual payroll cost plus 100% for overhead and profit plus field and traveling expenses at actual cost." The contract rate for such service was in accord with accepted practice under established provisions of the Wisconsin Society of Professional Engineers.

The firm of engineers was unable to secure a qualified electrical inspector at Stevens Point to perform the necessary resident engineering services. If the firm employed an inspector from another city, by the terms of the contract Stevens Point was obligated to pay field and traveling expenses for such person. An arrangement was made whereby the airport manager, Mr. J., who had the requisite experience to qualify as resident inspector under the responsible supervision of the engineering firm, was given a leave of absence by the city of Stevens Point to enter the employment of the engineering company. His employment as airport manager did not include nor contemplate performance of engineering services in connection with any construction that would take place at the airport.

Mr. J. was employed as resident inspector from September 1 to December 31, 1948 at a salary of \$300 per month and satisfactorily performed his services for that period. During this 4-month period the Stevens Point airport committee undertook and performed his duties as airport manager. Through error, Mr. J. was not placed on the pay roll of the engineering company for about a month after he began the inspection work. The city advanced his salary, which he has since repaid. In my opinion, this circumstance in no way affects the conclusions reached herein.

The firm of engineers billed the state aeronautics commission, agent for the city of Stevens Point, in the sum of

\$2,400 for inspection service for 4 months, at the rate of \$600 per month, as provided by the portion of the contract quoted above. In making final settlement with respect to federal aid for the project, the accounting branch of the civil aeronautics administration disallowed payment of half of the resident engineering bill, stating as follows:

"The Committee was in agreement as to the reasonableness of the Resident Inspector's salary at \$300.00 per month, that rate being comparable to rates paid for similar work on projects of like construction. The committee could find no logical reason for Sponsor granting an employee a leave of absence from his position with the City of Stevens Point, Wisconsin, to be employed by engineering firm at cost plus 100%, when *the same inspection services could have been rendered while in the continuing employ of the city.* The inspection services were necessary to the project, are reasonable and allowable at the base salary rate of \$300.00 per month for four months; however, the Committee finds that overhead and profit claimed by, and for, the Sponsor's Engineering contractor was not a necessary cost and recommends the sum of \$1,200.00 be definitely disallowed on the claimed cost of \$2,400.00 for the inspection service." (Emphasis supplied.)

The reason given for disallowance of the overhead and profit claimed by the engineering firm is erroneous. Rendition of engineering services had not been part of Mr. J.'s duties as airport manager. The city could not have required Mr. J. to act as an electrical inspector for the lighting project if he had continued in its employ as airport manager. There can be no valid objection to the action of the city in granting Mr. J. a leave of absence from his position as airport manager. And while on leave of absence, Mr. J. was unquestionably free to accept employment with the engineering firm.

By the contract provisions above quoted, the firm was entitled to furnish resident inspection services at the contract rate. The determination of the federal agency does not challenge the reasonableness of the charge for services by registered professional engineers. Responsibility for satisfactory performance of Mr. J.'s inspection work rested with the engineering company and the contractual terms were in accordance with established provisions of the Wis-

consin Society of Professional Engineers. Disallowance of the charge, except for the salary paid Mr. J., deprived the firm of compensation for its services in the responsible supervision of the inspection work. Had the firm furnished one of its own engineers from Green Bay to act as inspector, there would be no question as to the propriety of the charge, plus field and traveling expenses incurred.

Under the facts stated, I perceive no reason why the state aeronautics commission may not approve for payment the state's share of the cost of the inspection services rendered by the engineering firm on the federal aid airport lighting project.

SGH

GS

Licenses and Permits—Real Estate Brokers—Business Opportunity Brokers—Refund of License Fees—Secs. 136.06 (2) and 136.23 (2), Stats., construed. An applicant for a real estate or business opportunity broker's or salesman's license is not entitled to a refund of his fees unless the withdrawal of his application takes place before *any* investigation has been made thereon. The Wisconsin real estate brokers' board is not required to allow any specified time to elapse between the receipt of an application for a license and the commencement of its investigation thereon.

January 24, 1952.

WISCONSIN REAL ESTATE BROKERS' BOARD.

You ask my interpretation of secs. 136.06 (2) and 136.23 (2), two parallel sections of the statutes governing the licensing of real estate brokers and salesmen and business opportunity brokers and salesmen respectively. In nearly identical language these sections provide that the fee which is paid by an applicant upon applying for a license as either a broker or a salesman shall not be returned unless the application is withdrawn before the board has made *any* investigation thereon.

In the past the board has followed the practice of refunding fees in those instances where the withdrawal of the application has taken place before the field investigation has been commenced. However, you state that your experience has been that since the preliminary investigation usually commences immediately after the application is received, this policy results in the board expending funds for the processing of a considerable number of applications which are subsequently withdrawn, with a consequent financial drain on the board. Your letter raises two questions in connection with this situation.

1. Does the date after which the board should not refund fees paid along with an application correspond with the commencement of the field investigation or with the commencement of the preliminary investigation?

2. Is the board required to allow any specified period of time to elapse before commencing an investigation, during which an applicant may change his mind, withdraw the application, and receive a refund of the fee which by statute must accompany the application?

While this precise question has never been passed upon, in passing upon a related question relating to the real estate brokers statute the attorney general stated as part of the reasoning in 13 O.A.G. 78 that "the return of the money to the applicant is dependent, not upon the extent of the investigation by the board, but upon the fact that any expense, however slight, has been incurred." The provision for the refunding of fees paid, then (in 1924) part of sec. 136.01 (12), was identical in wording with the comparable provision now contained in sec. 136.06 (2). It is my opinion that the interpretation there rendered as dictum is correct and is applicable to the present situation.

Sec. 136.23 was enacted in 1947 along with other sections (136.19 to 136.36 inclusive) relating to business opportunity brokers and salesmen, for the purpose of extending the type of regulation accorded to real estate brokerage to business brokerage. Its validity has been upheld in *Business Brokers' Assn. v. McCauley*, 255 Wis. 5. The use of substantially identical language in the comparable sections relating to real estate brokerage and business brokerage,—

as is the case in the last sentences of secs. 136.06 (2) and 136.23 (2) respectively—indicates that the legislative intent was to include the previously rendered interpretation of sec. 136.06 (2) in the meaning of sec. 136.23 (2). It is my opinion, therefore, that in this case also, the commencement of any investigation by the board precludes the refund of the license fee or any part thereof.

Your second question is answered in the negative. Ch. 136 contains no requirement that you hold up the processing of an application so as to permit an applicant to change his mind and recover the license fee paid.

GFS

Highway Commission—Appropriations and Expenditures
—It was proper for the state highway commission to base allocations of highway funds provided by sec. 20.49 (8) on the latest officially entered census figure even though it was a preliminary count and subject to later correction.

January 25, 1952.

STATE HIGHWAY COMMISSION.

You call my attention to the fact that sec. 20.49 (8) requires the state highway commission to make allotments of certain funds for local roads and streets. These are allotments made “annually on March 10.” The statute further provides that:

“* * * each city with a population not more than 10,000 by the last federal census shall receive for each mile of such road or street, the sum of \$130; each city with a population more than 10,000 and not more than 36,000 shall receive for each mile of such road or street, the sum of \$260; each city with a population more than 36,000 and not more than 150,000 shall receive for each mile of such road or street, the sum of \$390 * * *”

The amounts allotted are to be paid to the respective treasuries.

You state that in computing the allotments made March 10, 1951, the preliminary report of the 1950 census was used, a final report of the 1950 census not being available at that time. The 1940 census showed the city of Eau Claire to be less than 36,000 and the preliminary 1950 census was also less than that figure. The final census report issued some time later placed the population of Eau Claire at 36,058. The 1940 census of the city of Two Rivers was greater than 10,000 but the preliminary 1950 census showed it to be slightly less than that amount. The final 1950 census report showed its population to be 10,243. You state these two cities have questioned the action of the highway commission. Both of them would be entitled to a higher figure under the final 1950 census. If the 1940 census had been used it would have made no difference as to Eau Claire but with respect to the city of Two Rivers, the allotment would have been higher than that made on the basis of the preliminary 1950 census.

You desire to know whether the action which you took should be allowed to stand or whether a mistake has been made and corrective action necessary.

A federal decennial census is required by art. I, sec. 2 of the United States constitution. The laws governing the taking of the census do not provide for the issuance of an "official" figure as of a certain date. They merely provide that the "Director of the Census is authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law." (13 U.S.C.A. § 4). The only other direction as to the issue of official information by the director of the census is that "The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for * * * shall be completed within such period: *Provided*, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States" (13 U.S.C.A. § 202).

According to the records in the office of the secretary of state of Wisconsin, two reports of the 1950 census of the state were received. Both bear the caption "U. S. Department of Commerce, Bureau of the Census, 1950 Census of Population." The first one received is headed "Preliminary Counts" and is marked "Preliminary" along the margin of the first page. It is dated at Washington, D. C., September 11, 1950, and is marked PC-2, No. 38. Below this appears the caption:

"POPULATION OF WISCONSIN, BY COUNTIES

April 1, 1950

"(The figures in this report are preliminary counts of population as compiled in field offices and supersede those for the same areas which have been published in Series PC-1. Figures for some areas not published in Series PC-1 are also included in this report. Additional reports in Series PC-2 will be issued as preliminary counts for other States become available)

"The population of Wisconsin as of April 1, 1950, was 3,421,316, according to a preliminary count of the returns of the 1950 Decennial Census of Population, reported today by Roy V. Peel, Director, Bureau of the Census, Department of Commerce. This figure represents a gain of 283,729, or 9.0 percent, over the 3,137,587 inhabitants of the State enumerated in the 1940 Census.

"The preliminary population counts shown below represent the number of persons enumerated in the State, each county, and each incorporated place of 1,000 or more, but not the final verified population totals. The final population totals may differ from the preliminary counts because of the allocation to the place of usual residence of persons who were enumerated elsewhere, the inclusion of crews of vessels docked within an area but not included in the preliminary count, and because of other revisions."

The second bulletin is dated at Washington, D. C., August 17, 1951, Series PC-8, No. 48. Below the heading the following appears:

"POPULATION OF WISCONSIN: APRIL 1, 1950

"(This is one of a series of reports presenting final population figures for selected areas in each State. In this series, reports are numbered alphabetically by States. Additional reports will be issued as final figures for other States become available)

"The total population of Wisconsin on April 1, 1950, was 3,434,575, according to final figures for the State released today by Roy V. Peel, Director, Bureau of the Census, Department of Commerce. During the previous 10 years, the population of the State increased by 296,988, or 9.5 percent, over the 3,137,587 persons enumerated in 1940. Among the States, Wisconsin ranked fourteenth in population. The 1950 population of Wisconsin was more than 11 times as large as its population in 1850 when it was first enumerated as a State in a Federal census."

It is my opinion that the highway commission was justified in basing the allocation of the funds on the preliminary count in the bulletin issued September 11, 1950. This bulletin was official since it was issued pursuant to legal authority. It represented the most accurate federal census record available on March 10, 1951 and as a matter of fact it only varied from the final figure by 5 per cent for the entire state as shown above. While it is true that the later bulletin was deemed final by the director of the census, there is nothing in the law which would prevent him from issuing further bulletins which might correct possible errors in the August 17, 1951 bulletin. Apparently such corrections could be legally issued, at least during the 3-year "decennial census period."

"An authorized announcement of a federal census is official, even though not final, and expressly subject to correction." 14 C.J.S. 103. The leading case cited to sustain this position is *Holcomb v. Spikes*, (1921, Tex.) 232 S.W. 891. It was reasoned in this decision that since the federal census law did not contain any provision as to when an official census should take effect, and since the only method provided to inform the public was by publication of bulletins and reports, a bulletin legally published was an official pronouncement of which the public and all officials might take notice. All other more recently decided cases that I could find followed this same rule. *Garrett v. Anderson* (1940, Tex.) 144 S.W. 2d 971; *Excise Board of Washita County v. Lowden*, (1941) 189 Okl. 286, 116 P.2d 700. This case also cites several earlier Oklahoma cases to the same effect. In *City of Compton v. Adams*, (1949) 33 Cal. 2d 596, 203 P.2d 745, a special census taken of a city by the federal

bureau of the census was held to be "the last preceding census taken under the authority of the Congress of the United States," within the meaning of a constitutional provision. In *Varble v. Whitecotton*, (1945) 354 Mo. 570, 190 S.W. 2d 244, the rule in *Corpus Juris Secundum* above quoted was cited as an authority and the case indicated that the first or preliminary bulletin would have been acceptable as the official census. The only cases which I could find which appeared contrary to the rule were based on state census laws which had a day certain for the publication and announcement of official census figures.

In regard to the problem connected with the city of Eau Claire, I cannot see in any event that they would have any claim for a larger amount. It is immaterial in their case whether the highway commission used the 1940 census or the preliminary report for 1950, since both of these put the city into the same category. The so-called "final" census report was not issued until late in 1951 and it would have been illegal for the highway commission to delay the allocation of funds until another time. Further, the statute makes no provision for a revision of the allocation because of issuance of the revised census figure.

It is unfortunate for the city of Two Rivers that the preliminary count placed them in a lower bracket than the final figures did, but such a situation seems unavoidable because of the arbitrary population figures used in the statute.

REB

Physicians and Surgeons—Pharmacy—Dispensing of drugs by physician to patient in course of professional treatment is exempt from provisions of ch. 151, Stats., the pharmacy law, and no violation of sec. 151.04 (2) or 151.07 (3) is involved where the particular prescription is delivered to the patient by the office girl who has been directed by the physician to select certain tablets from a designated container and package the same under the general supervision of the physician.

January 29, 1952.

SYLVESTER H. DRETZKA, *Secretary,*
State Board of Pharmacy.

You have asked for our opinion as to the latitude which a physician may grant his office girl in the dispensing of drugs, and for purposes of illustration the following factual situation is presented:

“The doctor has a stock of drugs on hand. After naming a patient, he orally or in writing instructs his office girl to furnish the patient with certain drugs. The girl selects a container from among several (for example—10 or more varieties of Sulfa tablets), and counts out the number indicated. She then packages and labels the package. The exchange is also completed by her with the patient. This girl, without professional training, prepares the entire transaction which would normally be prepared by a pharmacist as required.”

We are asked whether this constitutes a violation of secs. 151.04 (2) or 151.07 (3).

Sec. 151.04 (2) provides:

“(2) No person shall sell, give away, barter, compound or dispense drugs, medicines or poisons, nor permit it, in a town, village or city with a population of 500 or more unless he be a registered pharmacist, nor institute nor conduct a place therefor without a registered pharmacist in charge, except that a registered assistant pharmacist may do so under the personal supervision of a registered pharmacist, and may have charge during the pharmacist's necessary absence, not to exceed ten days. If the population is less than 500 only a registered assistant pharmacist is required.”

So far as material here an exception to the foregoing provision is contained in sec. 151.04 (3) reading:

“(3) This shall not interfere with the dispensing of drugs, medicines or other articles by physicians * * *”

Sec. 151.07 (3) provides:

“(3) No person, except a registered pharmacist or a practitioner shall prepare, compound, dispense or prepare for delivery for a patient any dangerous drug.”

In *State v. Maas*, 246 Wis. 159, 16 N.W. 2d 406, which involved the sale of drugs in a drug store by a clerk who was neither a registered pharmacist nor a registered assistant pharmacist, the court said at p. 165:

“The drug business is intimately associated with public health. The legislature has prescribed rules and regulations to protect the public from the mistakes of the untrained. Although the statute may be confusing, and very likely can be made to carry the meaning more clearly by a redrafting, its purpose appears to be the prevention of any but registered pharmacists or assistant registered pharmacists under the personal supervision of registered pharmacists, from selling or compounding drugs.”

The court in that case had no occasion to consider the statutory exception in favor of physicians quoted above, and of course, this language should be read in the light of the factual situation as presented to the court. Nevertheless the case is significant as enunciating the principle that the drug business is intimately associated with the public health and that the purpose of ch. 151 is to protect the public from the mistakes of the untrained.

See also *Hoar v. Rasmusen*, 229 Wis. 509, 514, 282 N.W. 652, where the court said:

“The circumstances of a pharmacist's or druggist's calling demand the exercise of a high degree of care and skill, such care and skill as an ordinarily prudent person would exercise under those circumstances, the highest degree of care and prudence consistent with the reasonable conduct of the business. The effect of a mistake may be swift and disastrous. There are many cases in which druggists have been held liable for injuries resulting from negligence in filling a prescription or supplying a remedy. [Citing cases] * * *”

This same principle of solicitude for the public health in the handling of drugs has been enunciated many times by the courts. See, for instance, *Marigny v. Dejoie*, (La. 1937) 172 So. 808, holding that all persons dealing with poisons, especially druggists, are bound to use the highest degree of care known among practical men to prevent injury from use of poisons.

The hazard to the public health arising through the sale of drugs by an untrained person is equally great whether there is an absence of personal supervision by a licensed pharmacist or a physician.

In 3 O.A.G. 555 it was considered that a practicing physician is not authorized to run a drug store without complying with the pharmacy law. In other words the exemption in favor of the physician applies exclusively to the furnishing of drugs prescribed by practicing physicians in the treatment of their own patients and they are not authorized to sell drugs to the general public indiscriminately. It is true that at the time the above opinion was written the exemption read: "Nothing herein shall interfere with any practicing physician when dispensing his own medicines, or supplying his patient with such articles as may seem to him proper." However, in 16 O.A.G. 722, after the exemption had been changed to its present form the same view was expressed as in 3 O.A.G. 555 with the observation, "Since said opinion the wording of the pharmacy law has been somewhat changed on this subject, but for all practical purposes the meaning and the significance is the same." (p. 724)

It is common knowledge that a physician who furnishes medicines to his own patient does not thereby conduct a "drug store." *Medico-Dental Bldg. Co. of Los Angeles v. Horton and Converse*, (1942 Dist. Ct. of Appeal, 2nd Dist. Div. 3, Cal.) 124 P. 2d 56. Sec. 4031 of the California code relating to pharmacy reads:

"This chapter does not apply to or interfere with anyone, who holds a physician's and surgeon's certificate and who is duly registered as such by the Board of Medical Examiners or the Board of Osteopathic Examiners of this State, with supplying his own patients with such remedies as he may desire if he acts as their physician and is employed by them

as such and if he does not keep a pharmacy, open shop or drug store, advertised or otherwise, for the retailing of medicines or poisons."

There the exemption is more clearly spelled out than it is in Wisconsin, but there is no reason for believing that the legislative intent is particularly different as has been shown above in the administrative construction given our statute.

So far as responsibility for the negligent acts of their employes is concerned, the pharmacist and the physician stand on pretty much the same footing.

"In accordance with the elementary principle that the master who undertakes to perform a service is liable for the negligence of his servant who, in the scope of his employment, is performing the service undertaken, it is well settled that when a person has been injured through the negligence of a druggist's clerk, the druggist is liable." 17 Am. Jur., Drugs and Druggists, § 35.

See also 28 C.J.S., Druggists, § 9 (6) c.

Also it is the established rule that a physician must exercise due care in selecting his assistants, and on the simplest principles of the law, agency, or of master and servant, a physician may be liable for the neglect or fault of his employe or servant. 41 Am. Jur., Physicians and Surgeons, § 112.

Following the theory that the exemption in ch. 151 in favor of the physician was intended to apply exclusively to the furnishing of drugs prescribed by a physician in the treatment of his own patient, or possibly the occasional furnishing of drugs to another physician, it would seem that any carelessness in delegating any part of the dispensing to his subordinate where harm resulted to the public might entail liability on the part of the physician or helper or both. But it nevertheless appears that it was not the purpose of ch. 151 to subject the physician or his helper to the jurisdiction of the board of examiners in pharmacy or to make such individuals criminally liable for the illegal dispensing or sale of drugs incidental to the treatment of a patient.

However, where the relationship of physician and patient does not exist and a member of the general public applies either to the physician or his helper for the purchase of

drugs without a prescription, the exemption does not apply, since as above pointed out the exemption was not intended for the purpose of placing the physician in the drug store business but merely to help him to supply drugs to his own patients as an incident to their treatment. We understand, for instance, that certain complaints have been filed with the state medical grievance committee under sec. 147.195 wherein investigators have called at the offices of certain physicians and have been sold dangerous drugs such as phenobarbital by the office girl without any prescription whatsoever. In at least one case the sale was said to have been made by the office girl when the doctor was away on an extended vacation. In instances of that sort it may well be concluded that the physician is virtually operating a drug store without meeting the requirements of sec. 151.02 (9) regulating operation of such stores.

But where the relationship of physician and patient exists, many things may be done by an unlicensed assistant pursuant to direction and supervision of the physician, and we will certainly not attempt here to gaze into the crystal ball for the purpose of conjuring up all the hypothetical situations which may arise under such relationship along with the appropriate answers to the problems presented. However, to illustrate the extent of the delegation of important and even dangerous tasks to subordinates, mention might be made of the fact that nurses administer anaesthetics, make hypodermic injections and attend to medication of patients pursuant to the physician's directions, and it is immaterial whether the nurse is registered or not except that she may not hold herself out as a registered nurse unless she is registered under ch. 149. See *Nickley v. Eisenberg*, 206 Wis. 265, 239 N.W. 426; 9 O.A.G. 87; 30 O.A.G. 245.

Moreover there is authority to the effect that where a hospital nurse neglected to read the label on a bottle and inadvertently supplied formalin instead of novocaine requested by the surgeon, the surgeon was not liable unless it could be shown that by exercising ordinary care he could or should have been able to prevent injurious effects. *Hallinan v. Prindle*, 17 Cal. App. 2d 656, 62 P. 2d 1075. In this case the surgeon was permitted to introduce evidence of the

custom of surgeons to accept from the attending nurse instruments, medicine and drugs without personal examination thereof. It should be stated, however, that there was nothing in the evidence to show that the nurse in this case was the servant, employe or even the agent of the doctor, she being the employe of the hospital.

In view of the foregoing it is concluded that where a doctor has a stock of drugs on hand and in the course of treating a patient he instructs his office girl to furnish the patient with certain named tablets, which she proceeds to obtain from the container and measure out for the patient, delivering the same to the patient, there is no violation of sec. 151.04 (2) or sec. 151.07 (3) although the doctor may be liable for his own negligence or the negligence of his employe in such case. In any event the physician may not, except by complying with sec. 151.02 (9), either directly or indirectly through his employe engage in what amounts to a drug store business by the dispensing and sale of drugs to the general public where the relationship of physician and patient does not exist between him and the purchaser.

WHR

Public Health—Industrial Camps—Words and Phrases—Workers—The term “worker” as used in sec. 146.19 (1), Stats., created by ch. 640, Laws 1951, includes minors who perform services, even though their compensation is paid to their parents.

January 29, 1952.

STATE BOARD OF HEALTH.

You ask whether the term “workers” as used in sec. 146.19 (1), created by ch. 640, Laws 1951, includes children of adult workers, compensation for whose services is included in a single payment to the father.

Sec. 146.19 (1) defines an industrial camp as

“* * * the site and all structures established and maintained as living quarters by the employer or for him or

under his control and supervision for 6 or more seasonal or migrant agricultural, industrial, or construction workers, and for their dependents."

Ch. 640, Laws 1951, was enacted from Bill 597, S. The definition of an industrial camp in the bill as first introduced contained no exemption on the basis of the number of workers employed. It read as follows:

"The term 'industrial camp' as used in this section means and includes the site and all structures established and maintained as living quarters by contract or under control and supervision of the employer for seasonal or migrant agricultural or construction workers and their dependents but not to include employer's residential unit and residential units occupied by one family and operated independently of any other residential or camp units."

The section created by the enactment is a part of Title XV of the statutes entitled "Public Health." The regulation of an industrial camp in the interest of public health would normally be concerned with the total number of people inhabiting the camp rather than the number of workers. The definition of industrial camp in terms of workers is apparently in recognition that the regulation imposes a burden upon the employer and that such burden should be in some degree commensurate with the extent of the economic benefits he receives from the employment. Inclusion in the term "worker" of all persons whose services are utilized by the employer, irrespective of their age, would be consistent both with considerations of public health and with recognition of the employer's interests. Each additional worker residing in an industrial camp increases the problem from the point of view of public health. The employer receives some economic benefit from each additional worker.

A child may be included within the scope of general regulatory statutes where that is consistent with the policy and purpose of the law. See, for example: *Pruitt v. Harker*, 328 Mo. 1200, 43 S.W. 2d 769, 772; *Tulin v. Tulin* 124 Conn. 518, 200 A. 819; *Madden v. City of Springfield*, 131 Mass. 441, 442; *Kenez v. Novelty Compact Leather Co.*, 111 Conn. 229, 149 A. 679, 681; *Scherer v. Schlager*, 18 N.D. 421, 122 N.W. 1000, 1006, 24 L.R.A. (n.s.) 520; *Horn v. Planters' Products Co.*, 40 Ga. App. 787, 151 S.E. 552.

The literal meaning of the term "worker" is broad enough to include persons who, in a contractual sense, might not be classed as employes.

Webster's New International Dictionary, 2d. Ed., defines "worker" as:

"1. One who or that which works; specif. * * * b. A laborer; a toiler; performer; doer; as, a *worker* in brass; *workers* of iniquity."

As pointed out in *People v. Gassman*, (1946) 295 N. Y. 254, 66 N.E. 2d 705, 707, the term "workingman" is broader than "employe." The court said:

"* * * The word 'worker' has a wider range than the word 'employee', and 'worker' is the genus of which 'employee' is a species. Restatement of Torts, Vol. 4, par. 776. 'Workingmen' means people who perform certain tasks, rather than people in certain contractual relationships. * * *"

See, also *City of Phoenix v. Yates*, 69 Ariz. 68, 208 P. 2d 1147, 1151.
BL

Public Assistance—Legal Settlement—Statutes—Construction.—A municipality may recover for relief granted after the effective date of ch. 702, Laws 1951, on the basis of settlement in a county acquired by residence prior to the enactment of the law.

January 30, 1952.

DAVID H. SEBORA,
District Attorney,
Calumet County.

You have asked whether ch. 702, Laws 1951, which became effective August 10, 1951, can result in a legal settlement being established in any county prior to one year after the effective date of the law, so as to enable another municipality to recover from said county for relief granted between August 10, 1951 and August 10, 1952.

It is my opinion that relief granted *after* August 10, 1951 may be recovered under proper circumstances, under the provisions of ch. 702, on the basis of legal settlement in a county gained as a result of residence *prior* to August 10, 1951.

Even if such construction of the law were deemed to be retroactive, it would not be inhibited on constitutional grounds, since it involves questions of liability between political subdivisions of the state. The Wisconsin supreme court said in *Holland v. Cedar Grove*, 230 Wis. 177, 189-190:

“* * * The whole matter being purely and strictly statutory, there is no liability where a statute imposes none. *Morristown v. Hardwick* (1908), 81 Vt. 31, 69 Atl. 152. The matter of poor relief being of purely statutory origin, the legislature has very large powers with respect thereto. It may impose duties and liabilities upon its creatures, the various municipal corporations of the state, in accordance with its discretion provided no provision of the constitution is violated. Except with respect to their property rights municipal corporations have a limited protection against acts of the state legislature under the constitutional guaranties. In a well-considered case, the Connecticut supreme court of errors said:

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

“This is the general rule and it is the rule in this state. Municipal corporations have no private powers or rights as against the state. They may have lawfully entered into contracts with third persons which contracts will be protected by the constitution, but beyond that they hold their powers from the state and they can be taken away by the state at pleasure. *Richland County v. Richland Center* (1884), 59 Wis. 591, 18 N.W. 497; *Frederick v. Douglas County* (1897), 96 Wis. 411, 71 N.W. 798.

“The legislature having full power with respect to the furnishing of poor relief, it may prescribe the conditions under which it is to be furnished; the municipality to be

charged with the duty of furnishing it and what municipality shall be ultimately liable. * * *"

See, also, *State ex rel. Prahlw v. Milwaukee*, 251 Wis. 521, 527-528, in which there was involved a law changing the apportionment of liability of municipalities for tuition, which was alleged to be retroactive and therefore invalid. The court said in part:

"Petitioner argues that when a sworn statement is filed for services previously rendered and the amount of the tuition claims to be placed upon the tax roll is by statutory mandate fixed as of August 15th, the legislature cannot constitutionally either authorize an increase or a decrease in the amount of the claims, in view of sec. 12, art. I, of the Wisconsin constitution, which provides:

"Sec. 12. No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."

"It is to be noted that sec. 12, art. I, Const., does not apply to a retroactive law as the constitutions of some states do. An *ex post facto* law applies only to criminal prosecutions. *State v. Schaeffer*, 129 Wis. 459, 109 N.W. 522.

"A municipal corporation has no privileges or immunities under the federal constitution [and] the authority of the legislature over a municipal corporation is supreme, subject, however, to such limitations as may be prescribed by the state constitution.' *State ex rel. Martin v. Juneau*, 238 Wis. 564, 570, 300 N.W. 187."

See, also, *Clearwater Tp. v. Kalkaska Sup'rs.*, 187 Mich. 516, 521-522, 153 N.W. 824, in which the court said:

"It cannot be said that relator's construction and method of computation are prohibited, because involving a retrospective construction of the law. The rights and duties of these municipalities are not based on any contractual relations. They are organizations purely for public purposes, and their powers, rights, and duties may at any time be modified or abolished by legislation. A law is not retrospective, in a sense forbidding it, because a part of the requisites for its action and application is drawn from a time antedating its passage. It was within the power of the Legislature to provide, in consideration of previous expenditures for state reward roads and county road taxes paid out of proportion to benefits, that the township should under certain contingencies have, through a process of rebate, re-

lief in part from the burden of such taxation for a time thereafter. So far as that question is concerned, the proviso is open to either construction contended for; and the more serious question is: What was the legislative intent?"

In the above case the court held that the law operated to permit consideration of expenditures made before its enactment, for purposes of determining grants of aid.

The construction of the law as above indicated, however, is not retroactive. It applies only to relief granted after its enactment and cannot be classed as retroactive because it draws upon a period antedating its passage as a basis for its application. See *Mineral Point v. Davis*, 253 Wis. 270, 34 N.W. 2d 226 and *State ex rel. Prahlow v. Milwaukee*, 251 Wis. 521, 30 N.W. 2d 260, in which it was held that an amendment changing the method of apportionment of tuition charges applied to tuition for the year prior to its enactment. In the former case the court said (*loc. cit.* 253 Wis. 272-273):

"Recently in *State ex rel. Prahlow v. Milwaukee* (1947), 251 Wis. 521, 530, 30 N.W. (2d) 260, this court dealt with a later amendment to the statute in question here. It was passed on August 26, 1947, and increased the limitation and fixed August 1st of the same year as the date for the filing of the tuition claims for the 1946-1947 school term. We held that 'the mere fact that the act requires something to be done as of a prior date does not make [it] retroactive.' We adhere to that ruling; under it the act before us is not retroactive as to the facts here presented."

In *Perry v. O'Farrell*, 120 Colo. 561, 212 P. 2d 848, 852, the court held that an amendment to the civil service law providing for the addition of 5 points to the examination grades of veterans should be applied with respect to eligible lists prepared before its enactment. The court said:

"As to the matter of the contended vested rights of Hunt and McCoy, we determine their rights to have been only expectant and contingent, and such rights would only become vested by virtue of appointment to the rank desired. Prior to any such appointment, many contingencies existed that could defeat their appointment. A vacancy might not occur, and if so, the appointing officer might not make requisition during the life of the existing eligible list, and

their names might be removed for cause under the rules of the Civil Service Commission. Plaintiff O'Farrell had a continuing status under the existing facts as hereinbefore outlined even though he took the examination prior to the effective date of the constitutional amendment. This seems to be sound and just reasoning and finds support in the case of *People, ex rel. Albright v. Board of Trustees*, 103 Colo. 1, 82 P. 2d 765, 771, 118 A.L.R. 984, wherein this court stated: 'An act is not retroactive if it applies to persons who presently possess a continuing status even though a part or all of the requirements to constitute it were fulfilled prior to the passage of the act or amendments thereto.' "

I do not believe that the legislature intended the law to apply to relief paid out prior to its enactment. Few claims could be substantiated for aid paid prior to the effective date of the law even if it did, because sec. 49.11 (3) provides, as a prerequisite for recovery from another county or municipality, that notice must be given within 20 days after the person relieved becomes a public charge. Since there is no liability of one municipality to another on relief claims, except as created by statute, the statutory procedure must be strictly followed before liability can accrue.

BL

Intoxicating Liquors—Malt Beverages—Restrictions on Brewers, Bottlers and Wholesalers—What constitutes the “usual and customary commercial credits” and the “usual and ordinary commercial credits” in the meaning of secs. 66.054 (4) (a) and 176.17 (2), Stats., is a question of fact. Under federal regulations promulgated pursuant to the Federal Alcohol Administration Act, 27 U.S.C.A. § 205, 30 days from the date of delivery is established as the maximum credit which may be extended to a retailer of intoxicating liquors and malt beverages. Responsibility for official determination in Wisconsin rests with the commissioner of taxation, under sec. 176.43 (2).

February 4, 1952.

HERBERT J. MUELLER,
District Attorney,
Winnebago County.

You have requested an opinion with reference to the meaning of the following statutes.

Sec. 66.054 (4) (a) provides in part that:

“No brewer, bottler or wholesaler shall furnish, give or lend any money or other thing of value, other than consumable merchandise intended for resale, including the containers thereof * * * to any Class ‘B’ licensee, or to any person for the use, benefit or relief of any Class ‘B’ licensee, or guarantee the repayment of any loan, or the fulfillment of any financial obligation of any Class ‘B’ licensee [with certain exceptions].”

The statute also contains the following statement:

“Nothing herein contained shall affect the extension of *usual and customary commercial credits* for products of the industry actually sold and delivered.”

Sec. 176.17 (2), Stats., provides as follows:

“No manufacturer, rectifier or wholesaler shall furnish, give, or lend any money or other thing of value, directly or indirectly, or through a subsidiary or affiliate, or by any officer, director, or firm member of the industry, to any person engaged in selling products of the industry for consumption on the premises where sold, or to any person for the use, benefit, or relief of said person engaged in selling

as above; or to guarantee the repayment of any loan or the fulfillment of any financial obligation of any person engaged in selling as above. Nothing herein contained shall affect the extension of *usual and ordinary commercial credits* for the products of the industry sold and delivered. No person licensed to sell intoxicating liquors for consumption on the premises where sold shall receive, or be the beneficiary of, any of the benefits hereby prohibited."

Your question relates to the meaning of the words "usual and customary commercial credits" and the words "usual and ordinary commercial credits" in the two foregoing statutes.

It would appear that the terms are self-explanatory and that what is "usual," "customary," and "ordinary," is a question of fact to be determined by evidence. However, by reason of the federal law, it is possible to state with some assurance that credit may not be extended for more than 30 days from the date of delivery.

The Federal Alcohol Administration Act, 27 U.S.C.A. § 205, provides in part as follows:

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

"* * *

"(b) To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * *

(6) by extending to the retailer credit for a period in excess of *the credit period usual and customary to the industry*

for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; * * *.”

Under date of November 29, 1938 the following regulations were promulgated pursuant to the foregoing federal statute:

27 Code of Federal Regulations, sec. 8.1: “Pursuant to clause 6, subsection (b), section 5, Federal Alcohol Administration Act, the credit period usual and customary to the industry is hereby ascertained to be thirty days from date of delivery in the case of all sales of distilled spirits, wine, and malt beverages.”

27 Code of Federal Regulations, sec. 8.3: “For the purpose of these regulations, the period of credit shall be calculated as the time elapsing between the date of delivery of the merchandise and the date of full legal discharge of the retailer, through the payment of cash or its equivalent, from all indebtedness arising from the transaction.”

The foregoing regulations have been fully in force and effect since November 29, 1939 (one year after they were promulgated). As a result of this regulation, we are informed that the *maximum* period of credit ordinarily, usually and customarily extended to retailers of intoxicating liquors, wines, and malt beverages is as prescribed in the regulations, namely 30 days.

Sec. 176.43 (2) provides:

“The commissioner of taxation in furtherance of effective control may promulgate rules and regulations consistent with chapter 66 or chapter 139. Such rules and regulations shall be published once in the official state paper and shall become effective 5 days after such official publication.”

The responsibility for determining the maximum credit period permissible in Wisconsin “in furtherance of effective control” rests with the commissioner of taxation, as above prescribed. Rules and regulations should be promulgated under the foregoing provision to eliminate any question and to effectuate the credit provisions of secs. 66.054 (4) (a) and 176.17 (2), Wisconsin statutes.

WAP

Automobiles and Motor Vehicles—License Plates for War Disabled—The term “injuries” as used in sec. 85.01 (6) (ad), Stats., created by ch. 536, Laws 1951, includes diseases resulting from accidental injury, but does not include disease which results from idiopathic condition of the system.

The term “otherwise” as used following the enumeration “paraplegia, amputation of a member * * * or otherwise” means any injury as defined above which results in a degree of disability substantially equal to that caused by paraplegia or amputation of a member.

Whether or not a person suffering from various named ailments is eligible for special plates is a question of fact, dependent in each case on (1) whether the applicant suffered an injury within the meaning of the foregoing definition of the term, and (2) whether the difficulty with which applicant gets about is equal in degree of disability to that of person suffering from paraplegia or loss of a member.

February 11, 1952.

MOTOR VEHICLE DEPARTMENT.

Your request for my opinion discloses that sec. 85.01 (6) (ad), Stats., was created by ch. 536, Laws 1951, which reads as follows:

“Whenever any resident of this state shall register his automobile and make affidavit to the commissioner of the motor vehicle department that *by reason of injuries sustained while in the military service of the United States he is disabled by paraplegia, amputation of a member, minimum faulty vision of 20/200 or otherwise* (specifying) so as not to be able to get about without great difficulty the commissioner shall procure and issue, without charge, a triangle of the same material as the license plate measuring approximately 4 inches from its base or the top of the number plate to the apex and shall have inscribed thereon the words ‘Disabled Veteran’ in letters legible at a distance of at least 50 feet, which triangle shall be so attached to the license plate that the identification of the latter is not obliterated. An automobile bearing a special number plate and otherwise lawfully parked upon or along a public street or highway by or at the direction of the person in whose name it is registered shall not be subject to state laws and munic-

pal and county ordinances limiting the time for parking automobiles in such places or the penalties prescribed for violating the same. Parking privileges under a special number plate shall be limited to the person to whom they are issued and to qualified drivers acting under his express direction."

You have received applications in a number of instances which you suggest are border-line cases, and you ask whether, upon the facts stated, such applicants are eligible for the special identification plates. Your first question is whether applicants who list the following impairments or disabilities qualify as being disabled by "paraplegia" within the meaning of the statute:

(1) Semi-paraplegic with multiple sclerosis; (2) sciatic paralysis of right leg; (3) paralysis of left sciatic nerve requiring the wearing of a leg brace and the use of crutches at all times; (4) paralysis of right arm, head of radius removed—60 per cent loss of use; (5) stroke in 1945 while in army.

Your second question is whether the loss of use of a member due to causes other than paraplegia or amputation qualifies applicant for the special plates under the "amputation of a member" category.

You state that some applicants have applied for such plates upon the ground that they suffer from heart conditions and arthritis. But you give your own opinion that these "handicaps" * * * are apparently irrelevant to ch. 536," and the inference is that you have rejected the applications.

As in all problems of statutory construction, the dominant purpose is to carry out the legislative intent. Taking into account the character of the special privilege conferred by the statute in question, it may generally be said that the legislature's broad purpose was to grant the privilege to *some*—but clearly *not to all*—disabled veterans. A cursory reading of the statute at once suggests the application of Lord Tenterden's Rule, that where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (This rule is frequently referred to as the doctrine of *ejusdem generis*, meaning literally "of

the same kind.") Thus applied, the rule would seem at first blush to require that the word "otherwise" in the enumeration of disabilities ("paraplegia, amputation of a member, minimum faulty vision of 20/200 or *otherwise*") is limited to disabilities of the same physical or pathological condition. This is obviously the principle you applied in ruling out heart ailments and arthritis as disabilities "irrelevant to chapter 536."

However, as stated by one author, "the rule of *ejusdem generis* depending as it does on pure form provides a dangerous yardstick with which to measure the statutory coverage which the legislature intended." Sutherland, *Statutory Construction*, Vol. 2, § 4910. The author points out further that not infrequently the restrictive effect of the rule produces a result directly contrary to the legislative intent. This proposition is elaborated upon by the following statement:

"The legislative intent is to enumerate specific objects or conditions which have come to their attention, but this enumeration is not intended to limit the operation of the statute to the specific objects set forth. They provide express examples of the problem; the legislative intent is to regulate *the problem* and not the *enumeration*."

So in the present instance, taking the statute as a whole, it is my opinion that the legislature had in mind a *degree of disability* as the measuring stick for determining eligibility for the special plates. The specific mention of paraplegia and amputation of a member does not suggest to me a legislative intent of requiring applicants to be suffering from ailments or disabilities which fall within the classification as to kind, so much as they suggest that the disability, to qualify the afflicted person, must affect the veteran "so as not to be able to get about without great difficulty." It means that the degree of disability must be as severe or extensive as that which one suffering from paraplegia or amputation of a member experiences. When it is considered that other forms of injury produce the same result as the disabilities specified, it seems very unlikely that the legislature intended to discriminate between disabled veterans solely on the basis of the medical terminology employed to describe the injury.

For example: If a veteran suffers from total paralysis of one leg, so that it is rendered as useless as if it were amputated and the veteran has substantially the same difficulty in getting about as the veteran whose leg has been amputated, it is my opinion that the legislature did not intend to discriminate as between these two misfortunes by granting the privilege to the one and denying it to the other.

As to the qualification relating to visual acuity, I do not perceive any problem of interpretation there because of the concept of disability involved. The nature of the disability is such that there is but a single standard which the legislature itself has fixed and determined. Impairment of visual acuity does not lend itself to comparison with the impairment or partial loss of other senses. You do not submit facts specifically raising any problem of construction on this point which would necessitate further discussion.

However, a further ambiguity is presented: The term "injuries" as used in the phrase "injuries sustained while in the military service of the United States" is susceptible of two meanings. In Blakiston's New Gould Medical Dictionary, 1st Ed. (1949) an injury is defined as "damage or wound to the body or any body region, *traumatic* in origin." (Emphasis supplied.) If we were to follow that definition, all disabilities resulting from *disease* would necessarily be excluded in determining eligibility for the privilege conferred by the statute in question.

On the other hand, the term "injury" as used in various statutes and in insurance policies, particularly in the field of workmen's compensation, has been variously defined to embrace diseases unrelated to trauma. See 21 Words and Phrases, Perm. Ed. 415-442. For instance, in construing our workmen's compensation act, the Wisconsin supreme court has held that typhoid fever was a compensable injury when contracted from polluted drinking water consumed at the place of employment. *Vennen v. New Dells Lumber Co.*, 161 Wis. 370. At page 375 of the opinion, the court cites cases where anthrax and pneumonia were held to be compensable "injuries" under workmen's compensation laws. However, the court does delimit the classes of diseases which it believes compensable as "injuries" with this observation (pp. 375-376):

“* * * The cases wherein liability has been found distinguish between disease resulting from accidental injury and disease which results from an idiopathic condition of the system and not attributable to some accidental agency growing out of the employment. * * *”

On the other hand, persuasive argument can be made in favor of a much narrower construction of the word “injuries.” In his dissenting opinion in the *Vennen* case, *supra*, Justice Barnes said (p. 378) :

“* * * Neither do we speak of sickness as an ‘accident’ or an ‘injury.’ When we hear that someone has suffered an accident we at once conclude that he has suffered some more or less violent external bodily injury. It is in this sense, I think, that the words ‘personal injury’ and ‘injury . . . caused by accident’ are used in the statute. When our neighbor has typhoid fever, we do not think of classifying his ailment as an ‘accident,’ an ‘injury,’ or a ‘personal injury.’ It is only by an extremely far fetched and I believe illogical construction of the words referred to that they can be held to include disease not resulting from some external violence.”

I have quoted from Judge Barnes’ dissent, not for the purpose of adopting his reasoning as applicable to the question at hand, but rather to demonstrate the range of contention in the *Vennen* case, *supra*, and to illustrate that the delineation between diseases traceable to what the majority considered “accidental injury” and diseases which medical science regards as idiopathic (i. e. diseases which have no known cause) represented a most liberal construction of the workmen’s compensation act. Such construction is justified by Sutherland in his work on Statutory Construction, where, in § 5503, he says :

“In most cases the emphasis with respect to a strict or liberal construction is focused upon the type of interest and persons affected by the legislation. It may be that the rights of an individual are of such great importance that an interpretation favoring such rights will be preferred. An example is legislation imposing criminal penalties, where the courts are committed to a strict construction in favor of the citizen and against the state. On the other hand, statutes in derogation of sovereignty will be construed strictly against the individual, and liberally in favor of the state.

It may decide that persons known to be suffering hardships and disadvantages are deserving of generous consideration, and so statutes enacted with such objectives in view will be liberally construed. Illustrative are laws granting rights to laborers, debtors and the poor. But statutes granting special privileges to a group of persons who are in no particular need may be strictly construed against such beneficiaries." (Emphasis supplied.)

Since the word "injuries" has a commonly known meaning and is not a technical word and since, as indicated by Judge Barnes, it ordinarily does not embrace disease, but since the supreme court in the *Vennen* case, *supra*, has extended the term to include certain diseases traceable to accidental injury and to exclude diseases of an idiopathic character, it is my opinion that the same construction should be placed upon the term in the statute under consideration as representing the most liberal view that our supreme court has taken of a similar use of the word.

I summarize my conclusions as follows:

1. The word "otherwise" as used in the statute under consideration is not limited to disabilities of the *same class* as paraplegia and amputation of a member. The standard by which applicant's eligibility for the special privilege is to be judged is the degree of disability from which he suffers—which must be at least substantially equal to that of one suffering from paraplegia or from the loss of a member.

2. Inasmuch as a percentage of loss of visual acuity has been fixed by the legislature, that becomes the absolute standard for determining eligibility in eye injury cases. The term "otherwise" does not apply to eye injury in the sense it applies to the remainder of the enumeration of disabilities.

3. The term "injuries" means any disabilities, including diseases resulting from accidental injury. Disability resulting from an idiopathic condition of the system and not attributable to some accidental agency is not included in the term.

Answering your specific questions:

"Paraplegia" is a pathological term, and hence a technical word which must be accorded its technical meaning by reason of sec. 370.01, Stats. It is defined in the American College Dictionary as paralysis of both lower or upper limbs.

The term "semi-paraplegic" is not defined as such. It appears to be coined. "Semi" ordinarily means "half." If paraplegia means total paralysis of the lower limbs or total paralysis of the upper limbs, the applicant who claims "semi-paraplegia" may mean that he has paralysis of one limb. If he means that both lower or both upper limbs are *half paralyzed*, it would seem to be a medical question as to whether such condition can exist pathologically. But the question which you must determine is one of fact, namely, is applicant's disability of substantially the degree or extent of that of one suffering from paraplegia or amputation of a member? If so, he is eligible. If not, he is not eligible.

Respecting the remaining enumerated ailments and disabilities (multiple sclerosis, sciatic paralysis of right leg, paralysis of left sciatic nerve requiring the use of crutches at all times, stroke, etc.), you must first determine as a matter of fact whether the ailment or disease mentioned was the result of accidental injury, or whether, if a disease, it is of idiopathic character. If the latter, the applicant is not eligible. If the former, you must then make a second factual determination, namely, whether the disability resulting therefrom is as severe or extensive as that produced by paraplegia or loss of a member so as to cause him great difficulty in getting about. If that question be answered affirmatively, then the applicant is eligible.

As to the two ailments which you ruled out of consideration on the assumption they could not be included in any event, please be advised that if applicants can satisfy you that the heart ailment or arthritis is the result of accidental injury and that the requisite degree of disability exists, applicants would be eligible for the special plate.

SGH

Public Assistance—Hospital and Medical Care—Although medical and hospital care given to a person receiving old-age assistance might constitute relief under sec. 49.02, Stats., under proper circumstances, so as to be recoverable from the county of his legal settlement, that would be possible only upon strict compliance with sec. 49.02 and in a case where no other provision had been made for such medical and hospital care.

Since the enactment of ch. 702, Laws 1951, the expense of medical and hospital care given as relief may be recovered from the county of legal settlement even though the recipient has no settlement in any municipality in such county and even though the county does not operate under the county system.

February 15, 1952.

ROBERT C. JENKINS,
District Attorney,
Portage County

You have asked a number of questions respecting the following statement of facts:

“A resident of the Town of A, B County, had been receiving Old Age Assistance under Sections 49.20 to 49.41, which was paid and administered by the B County Welfare Department. The subject was ailing and was informed that arrangements had been made and prior authorization given for treatment at a hospital in C, in B County, when needed. Subject allegedly became in need of immediate treatment and was taken to a private hospital in an adjoining county, about the same distance from subject’s home as the C hospital. The hospital furnishing treatment sent a notice under Section 49.02 (5) to the B County Public Welfare Department. No notice was sent or signed by any physician. The hospital claims subject was treated by several doctors on the hospital staff, thus there was no one attending physician who could give a separate notice. B county does not operate on the county system.”

Your first question is:

1. Is a person receiving old-age assistance under secs. 49.20 to 49.41 a “person entitled to relief under this chapter” as intended in sec. 49.02 (5)?

It is conceivable that one, for whose ordinary needs provision has been made through old-age assistance, might still be entitled under proper circumstances to emergency hospital or medical relief under sec. 49.02 (5). As pointed out in *Coffeen v. Preble*, 142 Wis. 183, 185:

“* * * It is easy to see that a distinction exists between that degree of poverty and indigence which will entitle one to support from the town and that which will entitle him to temporary relief in an emergency. The distinction is recognized in *Rhine v. Sheboygan*, 82 Wis. 352, 52 N.W. 444. * * *”

Sec. 49.02 obligates municipalities to furnish relief to dependent persons, and subsec. (5) provides for hospitalization and medical care for “a person entitled to relief under this chapter.” A dependent person, i.e., one who is entitled to relief under the chapter is defined in sec. 49.01 (4) :

“‘Dependent person’ or ‘dependent’ means a person without the present available money or income or property or credit, or other means by which the same can be presently obtained, sufficient to provide the necessary commodities and services specified in subsection (1).”

Relief as defined in sec. 49.01 (1) includes not only the ordinary requirements of food, housing, clothing, fuel, light, etc., but also “medical, dental, and surgical treatment (including hospital care).”

Sec. 49.40 authorizes a county to provide medical, surgical, dental, hospital and nursing home care to recipients of old-age assistance as a supplement to such assistance. If a county fails to make such provision and an emergency arises otherwise covered by sec. 49.02 (5), the fact that the patient is receiving old-age assistance to cover other needs would not of itself render him ineligible for care under such subsection. If provision has been made under sec. 49.40, the beneficiary would not be entitled to elect to resort instead to sec. 49.02 (5). He would then not be a dependent person within the definition above quoted since he would not be without means by which the medical and hospital services could be provided.

Your second question is:

2. Is the public welfare department of a county not operating under the county system pursuant to sec. 49.03 liable for hospitalization and medical care under sec. 49.02 (5)?

The last sentence in sec. 49.02 (5) reads:

“* * * Any municipality giving care or hospitalization as provided in this section to a person who has settlement in some other municipality may recover from such other municipality as provided in section 49.11.”

You have suggested that the fact that the term “county” does not appear in the above sentence, but does appear in the opening sentence (providing that the “municipality or county” shall be liable for hospitalization) may indicate a legislative intent that a county operating under a county system should not be liable.

Sec. 49.11 (2) provides that where a person relieved claims a settlement outside the county where the relief is granted, the expenses shall be a charge against the county where the relief was granted, and that:

“* * * The charge shall be audited by the county board, and may be recovered by such county from the county of his settlement, and such county in turn, (except when operating under the county system of relief), may recover from the municipality of his settlement. * * *”

Payments for medical and hospital expenses may constitute poor relief, under proper circumstances, so as to be recoverable under the provisions of sec. 49.11 (*Milwaukee County v. Green Bay*, 249 Wis. 90, 23 N.W. 2d 487, 34 O.A.G. 108), although medical and hospital care granted under sec. 49.40 as a supplement to old-age assistance may not be so recovered (38 O.A.G. 662).

Sec. 49.11 (2) provides that relief “may be recovered * * * from the county of his settlement.” The language of sec. 49.11 (2) does not itself condition the liability of the county of legal settlement upon whether it is operating under the county or local system of relief, but provides only that when it is not operating under the county system the county of settlement may in turn recover from the

municipality of settlement. The reason why certain relief claims were not recoverable, prior to enactment of ch. 702, Laws 1951, from a county unless it was operating under the county system was because a person could not have legal settlement in any county not operating on the county system unless he had settlement within some municipality in such county. See 24 O.A.G. 416 and 20 O.A.G. 622. The rule was different where the county operated on a county system because of the definition contained in sec. 49.10 (11) to the effect that:

“When this section is applied to any county operating under the county system of administering public assistance the term ‘municipality’ as used herein shall mean and include such county unless the context clearly requires otherwise.”

The opinion was given in 36 O.A.G. 621 that the above quoted subsection could have no application except to counties in which general relief is wholly administered by the county under sec. 49.03 (1) (a).

Ch. 702, Laws 1951, was enacted for the primary purpose of changing this situation and to make it possible for a person to have a legal settlement in a county even though he might have none in a municipality of such county. See sec. 49.10 (12) of the statutes as created by ch. 702. The provision of sec. 49.11 (2) to the effect that the relief may be recovered “from the county of his settlement” is now applicable to a case where the person relieved has a legal settlement in another county under the new definition, irrespective of whether he has a legal settlement in a municipality of such county or whether the county is operating under the county system of relief.

Such legislative intent is manifested in express terms by the revision of sec. 49.11 (3) (h), which now reads in part:

“Unless the municipality (or county when on the county system *or when the dependent persons are county settled*) upon which such nonresident notice is filed shall within 20 days deny that the dependent’s settlement is as claimed, it shall be liable for his support until said denial is made.

* * *”

The words italicized above were added by ch. 702, Laws 1951. They would have been unnecessary if the legislature had not intended counties other than those operating on the county system to be liable for relief claims.

Your third question is:

3. Would the fact that treatment and care was previously authorized at a different hospital than the one chosen by the patient affect the answer to question 2?

This question was inferentially answered in the affirmative by our answer to your first question. As stated in 38 O.A.G. 662, medical and hospital care given as old-age assistance under sec. 49.40 is not subject to the provisions of sec. 49.11, relating to recovery of relief. Such care may constitute relief within the definitions of sec. 49.01 (4) only when the person to whom it is given is "without the present available money or income or property or credit, or other means by which the same can be presently obtained, sufficient to provide the necessary * * * services." Where means for obtaining the hospital and medical care have been supplied under sec. 49.40 the person for whom they have been supplied cannot be said to be without "means" by which the services can be obtained, unless circumstances arise of such a nature as to make it impossible for him to take advantage of the services authorized.

As pointed out in 40 O.A.G. 74 and 39 O.A.G. 75, a question of fact is involved in each case whether a person is entitled to relief and whether immediate and indispensable care or hospitalization is required for which prior authorization cannot be obtained without delay likely to injure the patient. An authoritative answer cannot be given with respect to any individual case until the statutory procedure for determining liability has been followed. The statute also limits liability to such care as "is reasonably required by the circumstances of the case," which involves another issue of fact. The statutory definition, however, prevents any liability from being imposed on a county for hospital and medical care when other means have been provided for such care pursuant to sec. 49.40.

Your fourth question is:

4. Was the notice given, signed by the hospital officers only and sent to the B county public welfare department,

sufficient under sec. 49.02 (5), assuming it otherwise was sufficient?

As pointed out in *Carthaus v. Ozaukee County*, 236 Wis. 438, and the opinion in 39 O.A.G. 75, no liability on the part of a county or municipality can be evoked except by strict compliance with the conditions prescribed in the statute. Sec. 49.02 (5) is applicable only when "in the reasonable opinion of a physician, immediate and indispensable care or hospitalization is required, and prior authorization therefor cannot be obtained without delay likely to injure the patient." The statute further provides expressly that "liability shall not attach unless, within 48 hours after furnishing the first care or hospitalization of the patient, written notices by the attending physician *and* by the hospital be mailed or delivered," etc. If the legislature had intended that notice by the hospital might be substituted for that of the physician, it seems unlikely that it would have used the word "and" which we have italicized in the above provision. If such a result were intended, it would have been more natural to use the term "or."

BL

Taxation—Intoxicating Liquors—Distribution of Revenue—When a new city is incorporated out of part of the territory of a town, intoxicating liquor tax revenues must continue to be apportioned by the state department of taxation to the old town, based upon its population at the last federal census, pursuant to sec. 139.28 (2), Stats. Until the next federal census, the newly incorporated city will be entitled to have the town pay it a part of such revenues pursuant to sec. 66.03, if part of such revenues have been assigned to the new city as prescribed in that section.

February 15, 1952.

DAVID H. PRICHARD, *Director,*
Division of Beverage and Cigarette Taxes,
State Department of Taxation.

You have requested an opinion with respect to the following situation:

Sec. 139.28 (2), Stats., provides that after certain deductions have been made, "one-half of the balance of all revenues derived from the occupational tax on intoxicating liquors shall be distributed to the cities, towns and villages and shall be used by them to reduce the tax on general property. Such distribution to local units of government shall be made semiannually and all cities, towns and villages shall share therein in proportion to their population in the last federal census."

The last federal census was taken in 1950. Subsequently thereto a portion of the town of Milwaukee in Milwaukee county was detached and incorporated as a city known as Glendale. You inquire whether the city of Glendale or any other municipality incorporated after the census date is entitled to participate in the distribution of intoxicating liquor taxes prior to the next federal census in 1960.

The right of the new city to participate in the distribution of these tax revenues is established by the case of *Cassian v. Nokomis*, (1948) 254 Wis. 94, 100-102. As the court stated in that case, "* * * justice requires that the taxpayers in the new [city] receive their proportionate share."

However, this fact does not affect the duty of your department to distribute the tax in accordance with sec. 139.28

(2), upon the basis of the population of the town of Milwaukee according to the last federal census. The city of Glendale will receive its proportionate share from the treasurer of the town, pursuant to a distribution of the assets of the town made under sec. 66.03, Stats., until the next federal census.

WAP

Public Assistance—Hospital and Medical Care—Wisconsin General Hospital—Where a person is eligible to be sent to Wisconsin general hospital pursuant to sec. 49.40, Stats., ch. 142, Stats., does not apply and he cannot be sent there pursuant to the provisions of that chapter.

Sec. 49.40 (1), Stats., is mandatory and requires county agencies to grant medical care to recipients of social security aids whenever the same is necessary.

February 18, 1952.

JOHN W. TRAMBURG, *Director*,
State Department of Public Welfare.

You ask whether or not the county judge retains jurisdiction under ch. 142, Stats., to certify persons to the Wisconsin general hospital in those instances where it is possible for the county agency to arrange for care in that hospital pursuant to sec. 49.40.

This question is answered in part by previous opinions rendered by this office. I refer you particularly to the last paragraph of 36 O.A.G. 438; 37 O.A.G. 60; 37 O.A.G. 576; 38 O.A.G. 662; and 40 O.A.G. 78. The reasoning of these opinions is to the effect that the social security aids—old-age assistance, aid to dependent children and blind aid—were set up by statute to replace the existing system of poor relief for those persons who were qualified to receive assistance pursuant to the new statute, and that the supplementary medical assistance given to recipients of these aids should therefore be given pursuant to this and not any other program. Sec. 49.20 expressly recites that a system of old-age assistance is being established “for the *more humane*

care of aged, dependent persons." Sec. 49.19, covering aid to dependent children, requires that aid shall be given "as the best interest of the child requires," and provides further that "aid pursuant to this section shall be the only form of public assistance granted to the family for the benefit of such child." While sec. 49.18, providing for aid to the blind, makes no specific provision in this field, it is part of the same enactment made to meet the requirements of the federal social security act. The spirit and widely publicized intent of both federal and state acts was to establish a new and supposedly more humane system of social security. Sec. 49.40 is supplementary to these sections.

It is my opinion that the inescapable result of this is that if persons receiving old-age assistance, aid to dependent children and blind aid need medical care which can properly and most advantageously be given at the Wisconsin general hospital, such care should be authorized pursuant to the provisions of sec. 49.40, and ch. 142 does not apply in such a situation. To permit a county official to select the proceeding by which a welfare recipient should be sent to the Wisconsin general hospital on the basis of which procedure shifts a greater share of the cost from the county to the state, or upon any other basis except the law and the welfare of the patient, would be to do violence to the statute and defeat its expressed purpose.

You also inquire whether medical aid provided for by sec. 49.40 (1) is mandatory. Sec. 49.40 (1) was amended to read as follows by ch. 725, sec. 23m, Laws 1951:

"49.40 (1) The county agency administering aid to the blind, aid to dependent children, and old-age assistance may * * * provide for medical * * * care * * * needed by recipients of such aids * * *. A person shall be considered to be a recipient if at the time such care is authorized aid to the blind, aid to dependent children or old-age assistance is being granted to him. The provisions of section 49.11 shall not apply to this section. *Medical care shall, as necessary, be authorized and paid for by such county agency in addition to or in lieu of money payments made within the amounts allowed by sections 49.18 (1) (a), 49.19 (5), and 49.21 (1). Medical care provided under this section includes hospitalization and nursing home care; physicians', dentists', and nurses' services; drugs, medical supplies and equipment,*

prosthetic appliances and other medical services as each is prescribed by a physician; optometrical services; transportation to obtain medical care; and prepayment of medical care."

It will be observed that the first sentence of the statute provides that the agency "may" provide for medical care, but the fourth sentence provides that such care "shall" be authorized, etc. As pointed out above, this office has stated a number of times that sec. 49.40 is the exclusive authority for granting medical care to recipients of social security aids. Persons not receiving such aids are, if indigent, entitled to medical care under other provisions of the statutes, and if sec. 49.40 is not mandatory, that means that recipients of social security aids could be denied medical care to which other indigent persons are entitled. This cannot have been the intent of the legislature. I am therefore of the opinion that notwithstanding the fact that the first sentence of sec. 49.40 (1) uses the verb "may," it was the intent of the legislature that in all proper cases of need county agencies must provide medical care for recipients of social security aids. This conclusion is strengthened by the use of the word "shall" in the fourth sentence.

In arriving at this conclusion I am mindful of the fact that amendment No. 4, S., to Bill No. 382, S. (which eventually became ch. 725, Laws 1951), proposed to change the word "may" to "shall" in the first sentence of sec. 49.40 (1), and that it was changed back to "may" by amendment No. 1, S., to amendment No. 4, S. At first glance it might appear that this indicated a legislative intent to permit county agencies to refuse medical aid under that section. However, amendment No. 1, S., to amendment No. 4, S., did not change the word "shall" in the fourth sentence, so that it left that sentence in mandatory form. It would seem that the reason for changing "shall" back to "may" in the first sentence was to authorize the county agencies to determine the question of need in the first instance. Once need has been determined to exist, the agency "shall" authorize and pay for the medical care.

GFS
WAP

Public Assistance—Old-Age Assistance—Funds recovered by payments under sec. 49.26 (8), Stats., to discharge an old-age assistance lien, are subject to the proration provisions of sec. 49.26 (7a).

When a county takes a tax deed to premises on which it has an old-age assistance lien, the surplus over the amount necessary to satisfy the tax claims is to be prorated under sec. 49.26 (7a) until liquidated public assistance claims are met in full.

February 19, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have asked two questions concerning proration of money recovered pursuant to liens for old-age assistance under sec. 49.26, Stats. Your questions arise because of subsec. (7a) which reads:

“The old-age assistance lien shall not take precedence over any claim for care or maintenance furnished by the state or its political subdivisions, but all such public claims when allowed by the court shall share pro rata.”

Your first question is:

“The beneficiary has been granted general relief in the amount of \$1,000, and in addition he has been granted old-age assistance in an amount covered by the old-age assistance lien, which is likewise \$1,000. The total value of the real property to which the lien attaches is \$4,000. If the old-age assistance lien is discharged pursuant to section 49.26 (8) upon the payment by the beneficiary of the amount covered by the lien (\$1,000) must such recovered amount be prorated pursuant to the provisions of section 49.26 (7a)?”

Your question does not indicate just how the question arises. Taken literally, it would seem that the beneficiary, during his lifetime, tenders \$1,000 cash to the proper county authorities and demands a satisfaction of the lien. He is entitled to the satisfaction, and the beneficiary is free at that point to convey the property free and clear of the lien, notwithstanding he could be sued for the second \$1,000 representing general relief. See sec. 49.26 (8), Stats.

The opinion was given in 37 O.A.G. 295 that funds recovered from proceeds of realty subject to lien for old-age assistance are governed by the provisions of sec. 49.26 (7a) even though the property is sold prior to the death of the beneficiary of the assistance. The salient difference between the situation there involved and the one you submit is that it was assumed in the former that the funds would be recovered by enforcement of the old-age assistance lien, either against the property or the proceeds; whereas in the case you submit the funds are recovered by voluntary payment to discharge the lien as permitted under sec. 49.26 (8). In either case, however, the recovery is based upon the lien.

The question is one of statutory interpretation. Since the sole question involved is the allocation of recovered funds among various governmental units, the legislature could adopt whatever policy it might choose irrespective of the legal principles which would be involved in protection of the lien rights of a private party.

The wording of subsec. (7a) might furnish basis for the contention that its provisions apply only when the lien is enforced through court proceedings, because it refers to public claims "when allowed by the court."

I do not believe, however, that the legislature intended that there should be a difference in the policy of proration of funds merely because enforcement proceedings are made unnecessary by voluntary payment to discharge the lien. That interpretation is supported by the comment of the interim committee, in connection with Bill 34, A., of the 1947 session of the legislature which became ch. 121, Laws 1947. The comments of the committee were printed on the bill submitted to the legislature. The one relating to subsec. (7a) read: "New 49.26 (7a) provides that public claims shall share prorata." That statement seems to indicate that proration was intended as the general policy under the amendment, irrespective of the method used to effect collection.

The next consideration which arises is whether the claim for \$1,000 for general relief has been liquidated by agreement or adjudicated by a court proceeding, in order to invoke the provisions of sec. 49.26 (7a) respecting proration. If the claim is liquidated by acknowledgement of the recipi-

ent of the relief, or by an adjudication in a suit instituted pursuant to sec. 49.08, then the \$1,000 cash received in satisfaction of the lien must be prorated as between the two \$1,000 claims mentioned in your statement of facts. (This answer obviously is based on the assumption that a lesser sum of money is received in hand by the county authorities than is necessary to satisfy both the claim secured by the old-age assistance lien and the unsecured general relief claim.) The plain language of the statute, sec. 49.26 (7a), calls for such proration. On the other hand, if the \$1,000 claim for general relief has not been liquidated by agreement or adjudication in an appropriate proceeding, then no part of the money tendered in satisfaction of the old-age assistance lien could be applied toward partial satisfaction of the general relief claim. The words "when allowed by the court" (sec. 49.26 (7a)), imply an adjudication, although it is my opinion that other means, such as an agreement by which the extent of the liability is authoritatively fixed, would serve the purpose of the statute. Under the language of the statute, the county authorities could not lawfully prorate moneys in payment of disputed claims.

Your second question is:

"In the situation dealt with in 35 O.A.G. 429 where a county realizes a surplus from the sale of real property on which it took a tax deed and on which it had an old-age assistance lien, must such surplus be prorated pursuant to section 49.26 (7a)? This question contemplates a situation where a person has been furnished both relief and old-age assistance."

Your second question assumes as a hypothesis the same set of facts upon which the opinion in 35 O.A.G. 429 was rendered. There a county took a tax deed to premises on which it had an old-age assistance lien. The question presented was whether the county must account for surplus over taxes to the United States and to the state under sec. 49.25, Stats. The attorney general concluded that an accounting was required. The further fact in your present question is that, in addition to the claim for old-age assistance secured by lien, the county has a claim for general relief. The only difference between your first and second ques-

tions is that in the first, the payment is voluntary, whereas in the second, the proceeds of sale of the property come into the county's hands by virtue of a sale following the taking of a tax deed. The method of receiving the money would not affect the duty of the county to obey the mandate of sec. 49.26 (7a) respecting proration of funds, and the conclusion expressed in 35 O.A.G. 429 would be applicable as well to the situation you pose where a claim for general relief lies in addition to the claim for old-age assistance.

The opinion in 35 O.A.G. 429 was given before the enactment of subsec. (7a) of sec. 49.26, and so the only provisions for disposition of the proceeds which were there considered were those in sec. 49.25.

The answer to this question is governed by the same considerations as govern the first. If a county collects a surplus on property subject to an old-age assistance lien, the existence of the lien is the reason why it is required to account for that surplus. In such cases the legislative policy enunciated in subsec. (7a) governs, to the effect that the lien shall not take precedence over other public claims.

I call your attention to the fact that no specific amounts of money are discussed in 35 O.A.G. 429, or in the facts upon which your second question is predicated. It is conceivable that a surplus might exist in the hands of the county following sale of a property for taxes, which would exceed the lien claim for old-age assistance but still be insufficient to meet the full amount of the old-age assistance claim plus the general relief claim. In such instance, the statutory requirement of proration would have to be observed until both claims were paid in full.

The answer to this second question is based on the assumption that the general relief claim has been liquidated by agreement or suit, as discussed in the answer to your first question. In the absence of such agreement or adjudication of amount, the claim would not be recognizable for the purposes of proration under sec. 49.26 (7a).

SGH

BL

Automobiles and Motor Vehicles—Minors—Suspension of Driver's License—Where a juvenile court invokes power of suspension of motor vehicle operator's license of a minor under sec. 48.07 (1a), Stats., for purpose of enforcing payment of forfeiture imposed by court, such suspension remains in effect until the forfeiture is paid.

Authority of commissioner of motor vehicle department to suspend licenses under sec. 85.08 (27) (f), Stats., is concurrent with that of juvenile court, and is to be exercised upon receipt of notice of conviction provided for by sec. 85.08 (24) (b).

February 21, 1952.

MOTOR VEHICLE DEPARTMENT.

You request my opinion upon the following two questions:

1. Where a juvenile court invokes the power of suspension vested in such court by sec. 48.07 (1a), Stats., for the purpose of enforcing payment of a forfeiture imposed by said court, is the 30-day minimum suspension period fixed by sec. 48.07 (1) applicable?

2. Where a juvenile court imposes a forfeiture, and the minor involved immediately pays the forfeiture, and the juvenile court chooses not to suspend the minor's license, may the commissioner of the motor vehicle department nevertheless exercise the power of suspension vested in him by sec. 85.08 (27) (f), Stats. 1951?

The pertinent statutes as they will be numbered and appear in the 1951 statute book read as follows:

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

"* * *

"(e) The court shall suspend for not less than 30 days nor more than one year any motor vehicle operator's license issued to any such person under 18 and more than 16 years of age when it finds that such person has violated any provision of chapter 85 regulating moving vehicles or of any county or municipal ordinance conforming thereto. But the provisions of section 85.08 (29) shall not be applicable to the first such suspension unless the court shall so order.

"* * *

"(1a) If the court shall find that the child has violated a county or municipal ordinance enacted in conformity with

section 85.84, it may decree a forfeiture in accordance with the terms of the ordinance and enforce payment thereof under subsection (1) or by suspension of the child's driver's license until the forfeiture has been paid. Such suspension shall not be stayed during the pendency of any appeal."

"85.08 (27) (f) Upon being notified that a person less than 18 and more than 16 years of age has been convicted of violating any provision of chapter 85 regulating moving vehicles or of any county or municipal ordinance conforming thereto, the commissioner shall suspend such person's operator's license not less than 30 days nor more than one year. But the provisions of subsection (29) shall not apply to the first such suspension."

In your letter of request you suggest that there is an apparent conflict in the statutes quoted between powers of suspension vested in the juvenile courts and in the motor vehicle department, and you wonder whether the later enactment supersedes the earlier enactment.

The legislature is presumed to intend to achieve a consistent body of law. *Stevens v. Biddle*, 298 F. 209 (C.C.A. 8th 1924). In accordance with this principle subsequent legislation is not presumed to effectuate a repeal of an existing law in the absence of that expressed intent, and conversely, where a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation is readily found in the terms of a later enactment. *U. S. v. Greathouse*, 166 U. S. 601, 41 L.ed. 1130, 17 S. Ct. 701. But, in order to effectuate a repeal by implication, the later statute must be irreconcilably inconsistent with and repugnant to the terms of the existing law. *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N.W. 78.

"It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest.' * * * It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provi-

sions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' * * *” *United States v. Borden Co.*, (1939) 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.ed. 181.

I do not believe there is such conflict or repugnance between these two sections of the statute as to deprive the commissioner of the motor vehicle department of the power of suspension conferred upon him by sec. 85.08 (27) (f).

Ch. 48, Stats., generally relates to child protection and reformation. In the fulfillment of these purposes, certain powers have been conferred upon juvenile court judges with respect to suspension of motor vehicle operators' licenses of persons between the ages of 16 and 18 years. Sec. 48.07 (1) makes it mandatory upon the court to suspend licenses of such minors where the offense consists of a violation of ch. 85, Stats.

Subsec. (1a) deals with violations of county and municipal ordinances enacted in conformity with state statutes. The court has the option, with respect to suspension of licenses, to proceed under subsec. (1) and suspend the minor's operator's license for a definite period of 30 days to one year, or in the alternative, to proceed under subsec. (1a) and suspend the license "until the forfeiture has been paid." In the latter instance it is an aid to collection of the forfeiture, and the objective is not the furtherance of public safety but rather the collection of money. The power of suspension and revocation of motor vehicle operators' licenses which is vested in the commissioner of the motor vehicle department relates solely to considerations of public safety. The power is concurrent in some respects with that vested in the juvenile courts. The existence of concurrent powers with reference to the same subject in two arms of government does not, without more, create a conflict of powers. No conflict is demonstrable in the present case.

Under the hypothesis of your first question, if the court deliberately intends to proceed under subsec. (1a), then its sole concern is payment of the forfeiture, and the court's suspension is lifted when the forfeiture has been paid. There is no minimum period of suspension prescribed by subsec. (1a). However, upon receipt of notice of such mi-

nor's conviction by the commissioner of the motor vehicle department, pursuant to sec. 85.08 (24) (b), he is bound to suspend the minor's license for such period of not less than 30 days nor more than one year as in his discretion he deems will fulfill the public safety purposes of the statute. Therefore, if the minor tenders payment of a forfeiture in less than 30 days from date of suspension by the commissioner, such suspension must remain in effect for the duration of the commissioner's suspension. On the other hand, if the commissioner deems a 30-day suspension adequate to meet the requirements of the situation from the standpoint of the gravity of the offense, but the minor has not paid the forfeiture within 30 days, then the suspension resulting from the action of the juvenile court under subsec. (1a) remains in effect "until the forfeiture has been paid," notwithstanding the expiration of the period of the commissioner's suspension.

The second question has in effect been answered in the affirmative by the previous discussion. Both powers of suspension, that residing in the juvenile court and that residing in the commissioner of the motor vehicle department, are latent or potential; and when the one is exercised (that by the juvenile court, which must necessarily come first), the second need not be exercised. But if the juvenile court chooses not to exercise its power of suspension, then the commissioner of the motor vehicle department is duty bound to exercise his power of suspension.

A careful reading of the statutes quoted above in the light of the principles governing the applicability of the doctrine of implied repeal persuades me to the conclusions stated.

SGH

Highways and Bridges—Counties—Highway Committee
—Appropriation by county board of specific sum for purchase of highway equipment with authorization to the county highway committee to make its choice among the three low bids taken for the purchase of equipment complies with sec. 83.015 (2), Stats., without the necessity for any further approval or authorization from the county board as to the purchase of specific items of equipment.

February 21, 1952.

MARTIN GULBRANDSEN,
District Attorney
Vernon County.

You state that the annual budget adopted by the county board of your county included an appropriation of \$65,000 for the purchase of "highway equipment." The county board did not, by resolution or otherwise, specify what particular equipment was to be purchased, but it did adopt a resolution reading as follows:

"Be it resolved that the highway committee is hereby authorized to make their choice of the three low bidders in the purchase of equipment under bids for Vernon County."

The question arises as to whether the county highway committee must have direct authority from the county board for the purchase of each piece of new equipment.

Sec. 83.015 (2), Stats., provides in part:

"The county highway committee shall purchase and sell county road machinery as authorized by the county board
* * *"

The power to purchase road machinery is vested in the county highway committee under the above statute and the problem here is one of passing upon the sufficiency of the authorization by the county board. This board has appropriated the money and has authorized the committee to choose among the three low bidders "in the purchase of equipment."

There is certainly no implication in the language used that the board intended the committee to come back to it

for any further guidance or directions in the purchase of any one particular item of equipment. In the absence of any restrictive language of any sort it would seem clear that the board must have thought that it was complying with sec. 83.015 (2) by the action which it took. In *Burgess v. Dane County*, 148 Wis. 427, it was held that in construing a resolution of the county board it will be presumed that the board acted in good faith and intended to accomplish a lawful result, and if the language employed by the board is susceptible of two meanings, only one of which will give validity to the resolution, that one will be adopted.

The action taken by the county board here would to all intents and purposes constitute but an empty gesture if the county highway committee were to be required to go back to the county board for specific authority as to each item of machinery purchased, and in line with the doctrine of the *Burgess* case, *supra*, that construction should be adopted which will give validity and effectiveness to the board's resolution.

Mention might also be made here of the case of *Kewaunee County v. Door County*, 212 Wis. 518, where in construing the powers of the county highway committee under a statute similar to sec. 83.015 (2) the court stated that the county highway committees have extensive powers and when duly authorized by the county board their powers are as extensive as those of the county board itself. The statute there under consideration among other things authorized the county highway committee to enter into such contracts in the name of the county, and to make such arrangements as may be necessary for the proper prosecution of such construction and maintenance of highways and bridges "as is provided for by the county board" and to perform such other duties as may be delegated to it by the county board.

The court said that, "The highway committee of the plaintiff county were thus empowered to determine the extent and method of the proposed improvement—to determine what was necessary to put the road 'in reasonable condition for travel.' Their determination of the matter is as forceful and entitled to the same freedom from interference by the court as the same determination would be had it been made by the county board itself." (p. 522-3)

In 37 O.A.G. 243 it was concluded that where the county budget adopted under sec. 65.90 sets aside a specified sum for county normal school repairs without specifying any particular building on which the repairs must be made, the money may be used to repair any existing building which is part of the school. See also 36 O.A.G. 512 to the effect that a county budget formulated under sec. 65.90 may appropriate a lump sum for a given department without subdividing the amount as to purpose.

It is accordingly concluded that the appropriation of \$65,000 for the purchase of highway equipment with authorization to the county highway committee to make its choice of the three low bidders in the purchase of equipment constitutes sufficient authorization under sec. 83.015 (2) for the purchase of individual items of equipment by the committee without further authorization by the county board.

WHR

Counties—Automobiles and Motor Vehicles—Weight Limitations—County employes engaged in the maintenance of the county trunk system are not bound, when carrying out that duty, by the statutes relating to weight limitations on the highways of the state.

February 21, 1952.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

It appears from your request for my opinion that Bayfield county owns and operates a number of trucks which it uses for hauling sand and gravel in the maintenance of the county trunk highway system. On occasion these trucks are loaded in excess of the actual weight limitations prescribed by sec. 85.47, Stats. In the present instance the authorization and direction to load the vehicles to the weight carried when apprehended by state traffic patrol officers, was given by the county highway commissioner. By way of extenuat-

ing circumstances, the commissioner states that the trucks were loaded and weighed in the presence of a state highway patrol officer at the time they were purchased, to establish that they were within the limits permitted by sec. 85.47, and that neither the commissioner nor the drivers wilfully or intentionally overloaded the vehicles. You point out that the highway commissioner asserted that there must have been an error in weighing the vehicles, and that he said the county authorities are very much interested in maintenance of public highways and would not wilfully and intentionally overload a county truck, because the county authorities recognize that a county's overweight truck will do just as much damage to a highway as a private contractor's overweight truck. The attorney general, of course, has no authority under the statute authorizing district attorneys to request his opinion, to make determinations of fact. The rendition of this opinion, therefore, does not indicate that the attorney general believes that the trucks were in fact overloaded. It is necessary, however, in order to give consideration to your request for opinion, to follow your assumption of facts, and accordingly it will be assumed for the purpose of this opinion that the trucks in the operations you describe were in fact overweight.

In the present instance, the state traffic patrol officers issued summonses to the drivers of the trucks in question, directing them to appear for prosecution for violation of sec. 85.47, Stats. You request my opinion upon a number of questions, all of which assume that a prosecution will lie against the truck drivers. A further question is asked as to the effect of sec. 85.53 (6), Stats., as a possible defense to such prosecutions. It is my opinion that under the circumstances described, the drivers may not lawfully be prosecuted for the reasons hereinafter stated. Accordingly, it is unnecessary to answer the several questions you have asked.

In the absence of a statutory limitation upon axle weights, it would, of course, be lawful for a cargo of any weight to be carried by any person upon any public highway. Under the facts assumed in your question, the operation of the overloaded vehicles was authorized and directed by the county through its county highway commissioner, and accordingly, such operation was an operation by the county as

principal or employer. The operation, so far as the truck drivers were concerned as agents or employes, was within the scope of their employment.

In order for a prosecution to properly lie, we must find a statute which prohibits the county, as an arm of the state in its sovereign capacity, from operating a motor vehicle in excess of the weight limitations fixed by sec. 85.47.

It is clear that the sovereign may disregard the sections of the statutes relating to weight limitations upon the highways, because of the general rule that a statute applying to individuals does not deprive the sovereign of any prerogatives, rights, or property unless it expresses its intention to do so.

In *State v. City of Milwaukee*, (1911) 145 Wis. 131, 129 N.W. 1101, the court said at page 135:

“Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and * * *.”

“* * * it is presumed that the legislature does not intend to deprive the crown of any prerogatives, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. *State v. Kinne*, 41 N. H. 238; *Bishop*, Written Laws, § 103; *State v. Garland*, 7 Ired. L. (N. C.) 48 * * *”

Sec. 85.91 (2a), Stats. 1949, makes “any person violating any provision of [the sections of the statutes relating to weight limitations upon the highways]” subject to punishment by a fine or upon second or each subsequent conviction within one year thereafter by a fine or imprisonment or both.

And sec. 85.10 (40), Stats. 1949, defines “person” for the purposes of ch. 85 to be “every natural person, firm, copartnership, association or corporation.”

Following the rule of *State v. City of Milwaukee*, *supra*, secs. 85.47 and 85.91 (2a) do not apply to the sovereign, because the legislature has not expressed its intention to include the sovereign by explicit terms or irresistible inference, but limits its application to “every natural person, firm, copartnership, association or corporation.”

The situation thus presented is squarely in point with that presented in *State ex rel. Martin v. Reis*, (1939) 230 Wis. 683, 687-688, 284 N.W. 580. That case dealt with whether sec. 103.39, Stats. 1939, a statute of general application containing no specific provision to the effect that the state is within it, applies to the state itself. The court said:

"* * * It is universally held, both in this country and in England, that such statutes do not apply to the state unless the state is explicitly included by appropriate language. * * * Sec. 103.39 relates to when wages are payable and payment of wages by others. * * *

"By subd. (4) it is provided that any person, firm, or corporation violating the provisions of the section shall be guilty of a misdemeanor and subject to punishment by a fine or imprisonment in the county jail. It would seem not to require further argument to show that it would be ridiculous to apply the provisions of this general law to the state of Wisconsin. Not only that, if it should be held that in the absence of an explicit statement in the statute to that effect, the state is subject to this regulatory statute, it would be equally subject to every other general regulatory statute, and in every general law which might affect the state it would be necessary to insert an exception. For the reasons stated in *Chicago, Milwaukee & St. Paul R. Co. v. State*, *supra*, laws of general application do not apply to the sovereign."

What is said of the state is true of counties, because:

"It is elementary that a county is a governmental arm of the state with limited powers and limited responsibilities. Unless, therefore, a county is made liable by some statute for its acts or failure to act it would seem that there can be no liability." *Crowley v. Clark County*, (1935) 219 Wis. 76, 82, 261 N.W. 221.

It is my opinion, therefore, that the provisions of secs. 85.47 and 85.91 (2a), Stats. 1949, are not applicable to the county.

If the county cannot be made to conform to the weight limitations, the problem still remains whether the employes of the county are subject personally to prosecution for violations of sec. 85.47.

It is my opinion that the employes of the county engaged in the maintenance of the county trunk system are not

bound, when carrying out that function, by the statutes relating to weight limitations on the highways of the state, because:

“* * * the general rule that a state cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of a state when the real claim is against the state itself, and it is the party vitally interested. Accordingly it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent. Apparently for this rule to apply the relief asked must involve some direct or substantial interest of the state, as a distinct entity, apart from the mere interest a state may have in the welfare of its citizens or the vindication of its laws. * * *” 59 C.J. 307, § 464.

State v. Doyle, (1876) 40 Wis. 175, 22 Am. Rep. 692, is cited as authority for the above quoted text statement. As our court says at page 216 of the opinion:

“* * * It would be a singular perversion of all judicial rule, to hold that the state could not be bound as a party, but is bound without being a party. * * *”

It is my opinion that the rule quoted from *Corpus Juris, supra*, applies to the present situation, because a substantial interest of the county as a distinct entity, apart from the mere interest the county may have in the welfare of its citizens or the vindication of its laws, is involved. Counties are made responsible by sec. 83.025 (2), Wis. Stats., for the maintenance of the county trunk system, and quoting from the *Crowley* case, *supra*, at page 82:

“It is well settled in this state that the maintenance of highways is a governmental function. *Stoehr v. Red Springs, supra*; *De Baere v. Oconto*, 208 Wis. 377, 243 N.W. 221; *Larsen v. Kewaunee County, supra*; * * *.”

“The duty of maintaining highways in sufficient repair is imposed by statute and is not discretionary * * *.”

Accordingly, if the drivers of the trucks in question, through whom the county must of necessity act, are prosecuted and convicted of violating sec. 85.47, a conviction, although nominally against the named defendants as individuals, will operate to control the action of the county in the maintenance of the highways.

It is my opinion, therefore, that the drivers of the trucks in question are immune from prosecution.

SGH

Juvenile Court—Minors—Sec. 48.07 (3), Stats., prohibits release of information from juvenile court records showing a finding of delinquency.

February 21, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You ask what information a probation officer or juvenile court is permitted to give in response to inquiries about children who have come before the court. As an example of the kind of request which occasions your inquiry, you have supplied a clearance form submitted to a probation officer by a recruiting station containing among other questions the following:

“Has applicant a police or juvenile record (other than minor traffic violation). If ‘yes’ what was the offense or charge, disposition and sentence?”

1. I do not believe it would be legal for the probation officer to release information in any case without order of the court. Sec. 48.01 (3), Stats., provides in part that the record of hearing or trial in all matters relating to dependent, neglected or delinquent children “shall not be open to the public except upon the order of the judge.”

2. The above quoted provision apparently leaves it wholly to the discretion of the judge whether records of juvenile proceedings shall be made available for use outside the

court with respect to children coming under the court's jurisdiction on the grounds that they are dependent or neglected. With respect to those who are involved in juvenile court proceedings on the basis of a finding that they are delinquent, however, there is a further provision in sec. 48.07 (3) which reads:

"No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of a crime in any court, except as provided in section 48.11. The disposition of a child or any evidence given in the juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court, nor shall such disposition or evidence disqualify a child in any future civil service examination, appointment or application. No costs shall be assessed against nor fines imposed upon any child in the juvenile court."

While the ostensible purpose for which information is requested may appear legitimate or innocuous, the use of a report cannot be effectively controlled after it has gone out of the court's possession. If a written report is made, it may fall within the scope of sec. 327.18, Stats., which provides that every official record or report made by any public officer pursuant to law is evidence of the facts therein stated which are required or permitted to be by such officer recorded. Such use of records relating to the delinquency of the child would be categorically forbidden by sec. 48.07 (3).

It has been recognized by the supreme court that proceedings in juvenile court involving a delinquent child are not criminal proceedings and that the result is not a conviction or punishment for crime but rather a statutory proceeding by which the state "reaches out its arm in a kindly way and provides for the protection of its children." On this basis, the proceedings are not subject to the guaranties applicable to criminal procedure and the jurisdiction of the court over the child is greater. *State v. Scholl*, 167 Wis. 504, 167 N.W. 830.

The definition of a delinquent child under sec. 48.01 is broad enough to cover situations in which there have been

no law violations. That such is the intent of laws such as the one effective in Wisconsin is evident from the report of the Children's Code Committee of Wisconsin, published by the Children's Code Committee, Wisconsin Conference of Social Work. In discussing the need for the broad definition of a delinquent child, the committee said:

“* * * In other communities, however, the police use their own discretion in dealing with children. This means that police officials warn, threaten and otherwise attempt to discuss misdeeds with the youngsters, and take them to the juvenile court only when they believe the case so serious that their own efforts are unavailing. This is clearly a survival in the minds of the police of the idea of the court as a place where persons are prosecuted for crimes alleged against them, which is exactly what the juvenile court is not. The juvenile court is the agency set up in each county for the protection and reformation of children who are delinquent or in danger of becoming delinquent. It is, therefore, desirable that all such children come to the attention of this court. The Committee is proposing certain amendments making the court's jurisdiction over such children clear in all instances. For after all, it is less the offense that a child may commit than the causes of the offense that are important. The police are less well equipped, in the average community, to get at these causes and do something for their correction than is the juvenile court. Healy and Bronner in 'Delinquents and Criminals' ascribe the low delinquency rate in the city of Boston in part to the practice of bringing all complaints and offenses, however seemingly trivial, to the attention of the probation office and the court. This practice prevents the mistake of waiting until a child has formed seriously delinquent habits before attempting to set him right.”

Despite the legislative policy that proceedings in juvenile court shall not be regarded as criminal proceedings, nor the child as a criminal, it is recognized that a record of delinquency in juvenile court has a natural tendency to “injure one's social standing and credit and to bring humiliation” to the one involved. See *Lueptow v. Schraeder*, 226 Wis. 437, 277 N.W. 124.

A finding of delinquency in practice might, therefore, carry implications of wrongdoing neither warranted by the facts nor the procedure. That is doubtless a part of the reason for the legislative policy laid out in sec. 48.07 (3).

It seems clear from such provision that the legislature did not intend that juvenile court records shall be so used in any case as to be detrimental to the record of the child involved. The statute involved in *Wade v. Warden of State Prison*, 73 A. 2d 128, was similar to the statute in effect in Wisconsin. With respect to the purposes of such laws, the court commented (pp. 131-132):

"The purpose of juvenile courts, and laws relating to juvenile delinquency, is to carry out a modern method of dealing with youthful offenders, so that there may be no criminal record against immature youth to cause detrimental local gossip and future handicaps because of childhood errors and indiscretions, and also that the child who is not inclined to follow legal or moral patterns, may be guided or reformed to become, in his mature years, a useful citizen.

"The work of the judge of a municipal court, sitting as the judge of a juvenile court, is vitally important to the welfare of our state. He does not pass upon the crimes and misdemeanors of childhood wholly from the legal standpoint. The basic and primary idea of the legislature is salvation, not punishment. The nature of juvenile work is more philanthropic than the work of the common law jurist. The legislature of Maine has therefore placed this authority in the hands of men who know humanity and can inspire the child with confidence and with a desire, in most instances, to become an upright citizen.

"The history of the juvenile law in Maine shows that there is now a growing tendency in legislation to enlarge the jurisdiction and authority of juvenile courts, and if possible to save every child from a criminal record. The age of the child has been increased from 15 to 17 years, and jurisdiction has been extended from misdemeanors to some felonies. The jurisdiction has been enlarged from concurrent to exclusive and original.

"The early common law treated alike the crimes of the adult and the offenses of those minors who had reached the age of criminal responsibility. The administration of the old criminal law with relation to children differed only according to the possession of paternal and benevolent attributes of the judges who presided in the courts. There are many instances, in days long past, where a humane and understanding judge has dismissed or filed the charges against a first offending minor child, or has created, without statute authority, a juvenile probation system of his own to fit the circumstances.

"In the past the fundamental idea of the law has been punishment and not reformation, but modern legislation

recognizes that the treatment of a child should be correctional and rehabilitative rather than punitive. The child of today is the adult citizen of tomorrow and should be removed from the influence of improper environments and directed into the paths of rectitude by preventative and corrective means, if the next generation is to live in a peaceful and law abiding community. The immature must be given the chance to become the good citizen, or if necessary be forced to give up an immoral or criminal life. It is the welfare of the child *and* the State, that the statute is aimed to protect, by exercising a parental control, without the scar of the so-called criminal record. Unfortunately, it will be necessary at times to inflict punishment on the vicious or depraved, and this the statute recognizes.

"Juvenile courts are courts of special and limited jurisdiction and authority. Children are to be dealt with in a different manner than are adults. The offending child is not found by the juvenile court to be a criminal but guilty of juvenile delinquency. * * *

"'Delinquency,' as the term is used in the present juvenile law, was unknown to the common law. A delinquent child is a child under the age limit who violates the criminal law or who is disobedient, or incorrigible, or unmanageable, or immoral, or growing up or likely to grow up in idleness and crime. The statute says delinquency is not crime, and a delinquent child is not a criminal. 43 C.J.S., Infants, §§ 98, 99, p. 228. 'Delinquency, as distinguished from crime, usually implies a psychological rather than a judicial attitude toward the child offender.' Webster's New International Dictionary."

Some of the terms on the form of inquiry out of which your request for an opinion arose are appropriate only to criminal proceedings; and accordingly, answers could not be supplied without violating the spirit, if not the terms, of the Wisconsin statutes. The term "sentence" for instance, is used on the form. Black's Law Dictionary, 4th ed., defines "sentence" as follows:

"The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to this meaning.
* * *"

The term "sentence" is nowhere used in juvenile code. The court is given no authority to impose a sentence. It may make a commitment, but that only in extreme cases where there is no alternative. Sec. 48.07 (4) provides:

"It is declared to be the intent of this chapter that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents."

It was recognized by the supreme court that a commitment is not a punishment, certainly not where imposed for delinquency that is not a crime or where adjudged as a result of procedure which would not comply with the safeguards applicable to criminal actions. See *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613, and *Milwaukee Industrial School v. Supervisors of Milwaukee County*, (1876) 40 Wis. 328.

As pointed out in *Marquette Law Review*, Vol. 26, pp. 178-180:

"* * * The constitutionality of juvenile court jurisdiction and procedure has been almost universally upheld. The reason objections to this court's power have failed in nearly every case is that they have assumed that the hearings were, in nature, criminal proceedings requiring all of the constitutional and statutory safeguards of a criminal trial; however, decisions upholding the juvenile court acts have repeatedly pointed out that here is not a criminal court, but an agent of the state fulfilling the state's duty to step into the shoes of the parent when the latter has failed in his duty of caring for the child; that so long as the disposition of cases is not 'punishment' but protection of the child, no lack of due process can be raised. The first principle, then, is that it is the duty of the state, as a political necessity, to pass such legislation for the care of those of its citizens who are unable to take care of themselves. This has been recognized in Wisconsin, in *Milwaukee Industrial School v. Supervisors of Milwaukee County* and *Lacher v. Venus*, as an established view not open to question. * * *"

In the report of the Children's Code Committee of Wisconsin published by Children's Code Committee, Wisconsin Conference of Social Work, it is said:

"Commitment of a juvenile is not a sentence and has been so declared by the supreme court."

For the foregoing reasons, it is my opinion that it would be contrary to the policy of the Wisconsin statute to supply information regarding a juvenile delinquent on any form such as attached to your inquiry, since there can be no guaranty that it would not be used to the detriment of the person involved or in a manner contrary to the express provisions of sec. 48.07 (3), Stats.

BL

Motor Carriers—Taxation—Exemption—The term "farm machinery and parts of farm machinery" as used in sec. 194.47 (5) (b), Stats., does not include hog feeders, stepladders, twine, binding wire, drinking cups or stanchions, and accordingly the transportation of such items is not exempt from weight taxes. This opinion does not purport to construe the preceding phrase "or transportation to farms of materials, supplies or equipment for use thereon."

February 26, 1952.

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

You request my opinion as to what is meant by the term "farm machinery" as used in sec. 194.47 (5) (b), Stats., which exempts certain operations of motor carriers from assessment of weight taxes. You enumerate the following specific items as being in controversy between your department and the dealers in farm supplies and machinery who claim them to be within the purview of the exemption statute: Hog feeders, stepladders, twine, binding wire, drinking cups, and stanchions. So far as pertinent here, the statute reads:

"194.47 The following operations are exempt from assessment of taxes provided by sections 194.48 and 194.49, and each vehicle permitted under common carrier certificates or contract carrier licenses shall claim exemption for the number of quarters for which registration fee is paid under chapter 85.

"* * *

"(5) Operations of motor vehicles which, except in respect to operations performed under special permit issued under section 194.49 and tax-exempt operations under subsection (2) of this section, are engaged exclusively in any or all of the following operations:

"* * *

"(b) * * * and the transportation by private motor carriers of farm machinery and parts of farm machinery."

The term "farm machinery" is not defined in the statute. It is one of ordinary usage and would seem to fall within the scope of sec. 370.01 (1), Stats., which requires that all words and phrases shall be construed and understood according to the common and approved usage of the language.

The American College Dictionary defines "machinery" as "1. machines or mechanical apparatus. 2. the parts of a machine, collectively: *the machinery of a watch.*" The same work defines "machine" as "an apparatus consisting of interrelated parts with separate functions, which is used in the performance of some kind of work: *a sewing machine.*" In 26 Words and Phrases, at page 7 *et seq.*, the terms "machine" and "machinery" are discussed as they appear in a wide variety of cases. The definition which the courts in those cases seem most frequently to ascribe to the term "machine" is this: "Term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." In *Blankenship v. Cox*, 204 Ark. 4, 162 S.W. 2d 918, 923, the court said a "machine" is any device consisting of two or more resistant, relatively constrained parts, which, by a certain predetermined intermotion, may serve to transmit and modify force and motion so as to produce some given effect or to do some desired kind of work. According to the strict definition, a crowbar abutting against a fulcrum, a pair of pliers in use, or a simple pulley block with its fall, would be a machine, but ordinary use would hardly

include such as these; while an implement or tool whose parts have no relative movement, as a hammer, saw, chisel, plane, or the like, would not, of itself, in any case be a machine. Popularly and in the wider mechanical sense, a machine is a more or less complex combination of mechanical parts, as levers, gears, sprocket wheels, pulleys, shafts and spindles, ropes, chains, and bands, cams and other turning and sliding pieces, springs, confined fluids, etc., together with the framework and fastenings supporting and connecting them, as when it is designed to operate upon material to change it in some preconceived and definite manner, lift or transport loads, etc.

Farm machinery, of course, would embrace any machines included in the above definitions which are used on a farm or for farming purposes.

I am of the opinion that none of the items enumerated (hog feeders, stepladders, twine, binding wire, drinking cups or stanchions) are "farm machinery" or "parts of farm machinery" within the meaning of those terms in the statute as quoted above. None qualifies as such under the definitions given. This opinion does not purport to construe the preceding phrase "or transportation to farms of materials, supplies or equipment for use thereon."

SGH

Taxation—Motor Fuel Tax—Confidential Records—Provisions of sec. 78.13 (3), Stats., according confidential status to records of the department of taxation, extend to all records relative to administration of the motor fuel tax under ch. 78, Stats.

February 27, 1952.

CLIFFORD L. LORD, *Chairman,*
Committee on Public Records.

You have requested an opinion as to whether the provisions in sec. 78.13 (3), Stats., accord confidential status to all of the records of the motor fuel tax division of the de-

partment of taxation pertaining to matters in ch. 78, Stats., or just to those specific records which result from the activities set out in sec. 78.13.

Sec. 78.13 (3) reads, so far as here material:

“(3) Any information obtained by the department as a result of the reports, investigations, examinations or verifications herein required to be made, shall be confidential, except when required to be disclosed in a court of law * * *; and provided that the gallonage reported by [and] both the amount assessed against and the amount paid by any wholesaler, jobber or any other person of motor fuel license taxes shall be and remain records open to the inspection of the public, and may be published by the department * * *.”

(The word in brackets appears to have been omitted erroneously in the drafting of ch. 687, Laws 1951, which made an addition at the end of the subsection not here material.)

This language makes confidential not only information obtained by investigations, examinations and verifications but also information obtained by reports. Nothing in sec. 78.13 requires or provides for any reports to be made to the department. It is in secs. 78.04, 78.07, 78.08 and 78.10 that provisions are found which require reports to be made to the department. Thus, the information which is made confidential by the subsection is more than just information obtained through activities of the department authorized by sec. 78.13. In addition, the language of the proviso that is quoted bears this out. It specifically excepts from the confidential ban, “gallonage reported by” and also both the amount of motor fuel tax assessed against and the amount paid by “any wholesaler, jobber or any other person.” Clearly if the gallonage as reported were not included in language imposing the confidential status there would be no occasion to except it.

It is therefore our opinion that the provisions of sec. 78.13 (3), imposing confidential status are not limited just to records relative to matters coming within sec. 78.13, but extend to all records pertaining to ch. 78.

HHP

Automobiles and Motor Vehicles—Safety Responsibility Law—Secs. 85.141 (6) (a) and 85.09 (5) (a), Stats. 1951, are not in direct conflict. Both are enforceable if security is required in all cases of apparent damage over \$50 which come to commissioner's knowledge.

February 27, 1952.

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

You ask what your department should do in regard to the alleged inconsistency in the law by which an accident report is not required under sec. 85.141 (6) (a) unless there is apparent total property damage of \$100, while under sec. 85.09 (5) (a) your department must require security in all cases in which the apparent damage is more than \$50.

If these two provisions are considered to be in direct conflict, sec. 85.141 (6) (a) will prevail under sec. 370.02 (3) which states that: "If conflicting provisions be found in different sections of the same chapter the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter."

However, the sections in question are not in conflict in the sense referred to in the above statute. Both can be enforced if you require security in all cases of apparent damage over \$50 *which come to your knowledge*. It is obvious that you cannot enforce the requirement of posting security with respect to cases which are not reported to your department, and hence the suggested "conflict" is purely theoretical.

SGH

Automobiles and Motor Vehicles—Finance Companies—Dealers' Plates—Sales finance companies licensed under sec. 218.01, Stats., are entitled to purchase and use dealers' license plates under sec. 85.02 (6) in connection with the sale of repossessed and foreclosed automobiles or automobiles taken in trade on such sales. The use of dealers' plates does not extend to automobiles purchased by such companies for use by its officers, managers or employees.

February 27, 1952.

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

You request my opinion as to whether sales finance companies licensed under sec. 218.01, Stats., are entitled to purchase and use dealers' plates under sec. 85.02 (6).

The answer to your question is, "Yes," subject to the qualification that the use of same is to be confined to repossessed or foreclosed vehicles which the finance company offers for sale to liquidate the indebtedness which the repossessed or foreclosed vehicles were pledged to secure, and to vehicles taken in trade on sale of such repossessed or foreclosed vehicles. Sec. 85.02 (6) reads as follows:

"(6) PLATES. Number plates shall be furnished by the motor vehicle department at \$25 for the first set of 2 plates and \$1 for each additional set to manufacturers, distributors and dealers whose vehicles are registered in accordance with the provisions of this section. Such plates shall have upon them the registration number assigned to the registered manufacturer, distributor or dealer but with a different symbol upon each set of number plates as a special distinguishing mark and such plates shall be used in lieu of regular plates for private or business purposes only on those vehicles actually offered for sale by dealers, distributors or manufacturers or on vehicles while in transit from the factory to a dealer or distributor or while being used for trial tests by manufacturers."

"Motor vehicle dealer" is defined in sec. 218.01 (1) (a) and (b). Subsec. (b) states in part that the term "motor vehicle dealer" does *not* include sales finance companies or other loan agencies who sell or offer for sale motor vehicles

repossessed or foreclosed by them under terms of an installment contract, or motor vehicles taken in trade on such repossessions.

Sales finance companies are licensed as such under sec. 218.01 and are authorized to sell repossessed or foreclosed vehicles without a dealer's license by virtue of the foregoing exclusion from the definition of "dealer."

Sec. 218.01 (2) (i) provides as follows:

*"Application for dealers' licenses shall be submitted to the department in duplicate and contain such information as the licensors may require. Application for sales finance company licenses shall contain such information as the commissioner may require. No motor vehicle dealer or sales finance company, unless so licensed, shall be permitted to register or receive or use license plates under section 85.02. Sales finance companies licensed hereunder shall have all the rights accorded to and be liable to all the penalties imposed on motor vehicle dealers under section 85.02. * * *"*

Obviously, the phrase "unless so licensed" refers to the antecedents "motor vehicle dealer" and "sales finance company." If the "rights accorded to" dealers were not intended to extend to sales finance companies, the sentence which reads, "Sales finance companies licensed hereunder shall have all the rights accorded to and be liable to all the penalties imposed on motor vehicle dealers under section 85.02," would be wholly meaningless. It clearly expresses a legislative intent. One of the "rights" conferred upon dealers by sec. 85.02 is the right to purchase and use dealers' plates.

It should be borne in mind, however, that sales finance companies are primarily in the money lending business, and that the sale of repossessed and foreclosed automobiles is incidental to its principal business. If a sales finance company owns an automobile, for example, that is used by the management or its employes for company business or for their personal use, and such automobile is not for sale, I do not believe it was the intent of the legislature to permit the use of dealers' plates for such purposes. The rights and benefits enjoyed by motor vehicle dealers which have been extended to sales finance companies by virtue of sec. 218.01 (2) (i) are those which would enable said companies to

liquidate their stock of repossessed or foreclosed automobiles, and not automobiles purchased by such companies for use by its officers, managers or employees.
SGH

State Board of Health—Hospitals—Survey and Construction Plan—Nonprofit hospital whose articles of association provide for a board of directors of 19, all of whom must be Protestant and 10 of whom must be Lutheran, is not a hospital conducted by a religious organization within the meaning of state plan for hospital construction adopted pursuant to sec. 140.12 (2), Stats., where there is no assistance furnished or control exercised by any church or affiliated organization.

February 27, 1952.

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

You state that sec. 140.12 (2), Stats., authorizes the state board of health to develop and administer a state plan for the construction of public and other nonprofit hospitals specified in secs. 140.17 to 140.22, and that sec. 140.13 (5) authorizes the board to accept on behalf of the state and to deposit with the state treasurer any grant, gift or contribution made to assist in meeting the cost of carrying out the purposes of the hospital construction act, and to expend the same for such purposes.

The state plan (Methods of Administration—5, b Construction Payment) provides that the state is authorized to make payments of federal funds to all types of applicants except hospitals conducted by religious organizations, in which case the certification to the federal agency provides for payment direct to the applicant.

The question has been raised as to whether St. Luke's Hospital of Milwaukee is conducted by a religious organization.

The American Medical Association directory of hospitals lists St. Luke's as church controlled.

The articles of organization for St. Luke's Hospital Association, Inc., were filed in the office of the secretary of state on May 29, 1935. The stated business and purpose was to establish and maintain a hospital and dispensaries for the care and treatment of the sick and physically injured people and the education and training of nurses, and in connection therewith, to carry on such educational, philanthropic and scientific activities as are a part of efficient, modern hospital service. The articles provide that there is to be no capital stock and that the association is to be organized and to be conducted solely for benevolent, charitable and educational purposes and that no dividends or pecuniary profits are to be declared to the members.

Article IV provides in part:

"* * * There shall be nineteen directors of the corporation, all of whom shall be of the protestant faith and ten of whom shall be Lutherans."

It is provided in Article VIII that:

"The Directors may select and appoint the hospital staff, the chief of staff, the superintendent of hospital, the superintendent of nurses and such other officers and agents as the Board of Directors may deem advisable, and the Board of Directors may fix the powers, duties and compensation of all such officers and agents, subject to the by-laws adopted by the members. The Directors may appoint one or more committees, chosen from among their number, and fix their powers and duties, subject to the by-laws."

You inform us further that the 10 Lutheran directors are not from any one synodical group and that the hospital receives no moneys from national, state or local synods or individual churches.

It would appear from the foregoing that this hospital "is not conducted by a religious organization." The mere fact that all 19 directors are required to be Protestants does not constitute such board a religious organization nor does the fact that 10 of the 19 directors are required to be Lutherans. This may give the controlling voice in the management of the hospital to persons of the Lutheran faith but it does not

subject the hospital to the control of any organized Lutheran church or organized Lutheran agency.

The question of what is a religious organization was given some consideration by our supreme court in the case of *Madison Particular Council of St. Vincent De Paul Society v. Dane County, et al.*, 246 Wis. 208. The question there was as to the taxability of the society's real estate in the light of the exemption provided by sec. 70.11 (4) to property of religious associations. The society received gifts of clothing, furniture, and discarded articles of all sorts which it distributed to the poor so far as there was a demand therefor. So far as not so required the articles contributed were sold and the proceeds were used to buy other commodities for the poor. No person was required to pay for articles unless able to do so.

The court pointed out that the respondent society was affiliated with the St. Vincent de Paul Society which was organized in Paris in 1833 as a purely religious and charitable association. Its members were members of the Roman Catholic churches of the city of Madison. In bringing out the religious features of the society the court stated that the society has a "superior council" in New York City. This has jurisdiction over "metropolitan councils" in metropolitan areas. One of these is in Milwaukee and covers the Milwaukee archdiocese of the Roman Catholic church. It has jurisdiction over local "particular councils," one of which is in Madison. It consists of "conferences" made up of five Roman Catholic parishes in the city of Madison. The conferences have a pastor of some parish assigned to them as a spiritual adviser. Under these circumstances the court concluded that the society was definitely a religious organization.

No such organization is involved here. No Lutheran church or pastor is affiliated with the hospital in any way and substantial representation on the board of directors is accorded to members of other Protestant churches. The control is clearly by individuals rather than by any religious organization and the specifications as to the faith of the directors in no way vests or was intended to vest the control of the hospital in any church or subsidiary organization thereof. See *Chesed Shel Emeth Society v. Unemployment*

Compensation Commission, 356 Mo. 726, 203 S.W. 2d 454, holding that a nonprofit cemetery corporation, though it operated a synagogue used primarily in connection with the operation of the cemetery, was not exclusively a "religious organization" within the provision exempting such organizations from the unemployment compensation act.

From the facts related it is therefore concluded that the hospital in question is not conducted or controlled by a religious organization.

WHR

Motor Carriers—Secs. 85.05 (2) (a), Stats. 1949, and 85.055, Stats. 1951, are not inconsistent and both may be given effect. Motor vehicle department has correctly interpreted sec. 85.05 (2) (a) by granting privilege of making single trip into Wisconsin per license year to private, contract and common carriers without necessity of registering the motor vehicles involved in Wisconsin.

February 29, 1952.

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

You ask (1) whether the one-trip exemption provided under sec. 85.05 (2) (a), Stats. 1949, is still in effect in the light of the enactment of ch. 706, Laws 1951, creating sec. 85.055, Stats., which requires the securing of reciprocity permits from your department by interstate motor carriers; and (2) if the first question be answered in the affirmative, whether the one trip allowed without Wisconsin registration plates applies to all types of carriers, i.e., private, contract and common.

Sec. 85.05 (2) (a) provides as follows:

"No motor vehicle, trailer or semitrailer engaged in commercial transportation over regular routes or between fixed termini, or making more than one trip into Wisconsin during any year, whether for direct or indirect hire, and no motor vehicle, trailer or semitrailer used regularly for the delivery or distribution of merchandise within this state or for interstate hauling, shall be operated on the public highways of Wisconsin, unless said motor vehicle shall have paid the full registration fee provided in section 85.01 of the

statutes, and shall display Wisconsin number plates. The penalty applying to violations of section 85.01 shall apply to this subsection."

Sec. 85.055 (1) provides as follows:

"Operators or owners of motor vehicles which have a gross weight of 8,000 pounds or more or which are operated in conjunction with other vehicles as a unit having an aggregate combined gross weight of 8,000 pounds or more, as a condition precedent to being granted the reciprocity privileges under section 85.05, shall first file with the motor vehicle department in this state an instrument in writing, subscribed by him and duly acknowledged before a notary public or other officer with like authority, setting forth the name and address of the owner and such information as the motor vehicle department shall require. A motor vehicle within the meaning of this section shall be deemed to be a motor vehicle, trailer or semitrailer as defined in section 85.05 (1)."

You state that sec. 85.05 (2) (a), Stats. 1949, has been enforced by your department in the following manner for a period of several years, through successive sessions of the legislature, and that this "enforcement procedure has never been questioned by any motor vehicle operator." Quoting from your letter of February 6, 1952:

"Any motor vehicle, properly registered in a state with which no reciprocal agreement is in effect, operated in contract, common or private motor carriage, is allowed to perform one round trip in interstate transportation into or through Wisconsin each fiscal license year, exempt from vehicle license, permit fee and tax requirements. Contract and common carriers must comply with the authority and insurance requirements of Chapter 194, as the free trip only extends to vehicle registration requirements. The exempt trip has been allowed on a fiscal year rather than a calendar year basis, as all the records covering the registration of trucks are kept in this manner and therefore it is less confusing and more practicable to allow the exempt trip to foreign operators during the normal truck registration period, namely July 1 through June 30 of the following year."

Your first question in effect asks whether the new procedure for evidencing reciprocity privileges by procuring of a permit under sec. 85.055 created by ch. 706, Laws 1951, has

the effect of repealing and superseding sec. 85.05 (2) (a), Stats. 1949. In my opinion there is no inconsistency between these two statutes, and each can be given effect without impairing the other. Ch. 706, Laws 1951, concerns itself with reciprocity during the entire license year. It is concerned with repeated operations by an out-of-state carrier. Sec. 85.05 (2) (a), Stats. 1949, on the other hand, deals with the isolated situation where an operator makes a single trip into the state, not intending to return within the license year. The rule is well established that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The legislature's intent to repeal must be clear and manifest. It is insufficient to establish that subsequent laws cover some or even all of the cases provided for by a prior act. There must be a positive repugnancy between the provisions of a new law and those of an old law. See *United States v. Borden Co.*, (1939) 308 U.S. 188, 60 S.Ct. 182, 84 L.ed. 181. In the present instance it is clear that reciprocity by permit for repeat trips is a formula or plan which has been superimposed upon the "single trip" privilege. There is no inconsistency or repugnancy between the statutes under consideration, and both may be given effect.

Proceeding to the second question, it appears that insofar as the classes of carriers are concerned, your department has accorded the single trip privilege to common, contract and private carriers. It is my opinion that a careful reading of the statute in question discloses that you have correctly interpreted the same. The sentence structure and grammar are somewhat complex, but I am satisfied you have reached the correct answer. If, on the other hand, it be conceded *arguendo* that there is ambiguity and need for interpretation or construction, then your interpretation is fortified as having remained unchallenged over a period of years through successive legislative sessions. The rule is well settled that the practical construction of an ambiguous law by state officers in administering it is entitled to weight in determining its meaning proportionate to the length of time such construction has been adhered to. *State ex rel. Time Ins. Co. v. Smith*, (1924) 184 Wis. 455, 200 N.W. 65.

SGH

*Automobiles and Motor Vehicles—Safety Responsibility Law—Statutes—Retroactivity—*Ch. 658, Laws 1951, does not violate constitutional inhibitions against interference with vested rights. Its provisions may be applied to restoration of motor vehicle operators' licenses forthwith regardless of the fact that accident resulting in suspension of license occurred prior to effective date of act. Party to accident does not have a "vested right" in the suspension of his adversary's license. For same reasons, deposits may be refunded after 13 months if no notice of suit is given to commissioner, notwithstanding accident occurred prior to effective date of ch. 658.

March 6, 1952.

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

You address my attention to two administrative problems which confront you by reason of the enactment of ch. 658, Laws 1951, and request my opinion as to whether said chapter is "retroactive."

A resume of the effect of the pertinent provisions of the chapter in question will suffice for the purposes of this opinion without quoting the same.

Sec. 85.09 (7) (b), Stats. 1949, laid down the requirement that a motor vehicle operator's license, suspended for failure to post security for damages in accordance with subsec. (5) of said section, remain suspended for one year from date of accident and until the operator shall furnish evidence satisfactory to the commissioner that no action for damages arising out of the subject accident has been commenced within said year. By an amendment to said section, ch. 658, Laws 1951, relieved the suspended licensee from such requirement and shifted the burden of notice of pendency of action to the claimant against such suspended licensee.

Sec. 85.09 (10) (c), Stats. 1949, laid down the requirements for refunding deposits of security made under sec. 85.09 (7) (c). One of these requirements was that if no action had been commenced within the year following the date of accident for which the deposit had been made, "the

commissioner shall be given reasonable evidence that there is no such action pending." By an amendment thereto, ch. 658, Laws 1951 authorized the return of the deposit unless within 13 months from the date of the accident any claimant for whose benefit the deposit was made, has filed notice in the prescribed form with the commissioner that an action was commenced within the year next following the date of accident in question. This, as in the previously stated instance, relieved the suspended licensee of the burden of satisfying the commissioner that no action had been commenced, and shifted the burden of notice of pendency of action to the claimant for whose benefit the deposit was made.

You state that "the departmental interpretation of this act is that it would apply to all accidents occurring after the effective date of passage and publication of the law," and that "it is *not* retroactive." (It became effective August 7, 1951.)

You point out, however, that some files have been held open wherein deposits have been made and wherein suspended licensees have neither applied for refund nor for reinstatement of their licenses. You suggest that notwithstanding the enactment of ch. 658, Laws 1951, these files may have to be kept open "into perpetuity unless ch. 658 would apply to this type of case also after the running of 13 months from the date of passage of the act in this type of case."

With respect to that portion of ch. 658, Laws 1951, which authorizes reinstatement of motor vehicle operators' licenses upon the occurrence of a contingency (i.e., the expiration of 13 months without notice to the commissioner of pendency of action), it is clear that no question of "retroactivity" is involved. Secs. 2201-2205 of Sutherland on Statutory Construction, 3rd Ed., Horack, discuss the general problem of retroactivity, the meaning of the terms "retroactive" and "retrospective," the basis of court decisions, and constitutional limitations on retrospective laws. It would unduly lengthen this opinion to quote extensively from Sutherland. In summary, he points out that it is fundamental that there are no limitations on retroactive

laws other than the constitutional limitations which affect all legislation. The term "retroactive" describes acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act. The concept is more positively expressed in these words: "A retroactive statute cannot interfere with or divest vested rights" (§ 2205). However, the author says it is impossible to assign precise meaning to the term, for "any attempt at definition results only in conflict in the decisions." He continues, "By 'vested right' can be meant no more than those rights which under particular circumstances will be protected from legislative interference. * * * A vested right is 'property' and is protected from arbitrary interference." It need be no more than the right to enforce a legal demand or exemption.

And, as is the case with any legislative enactment, a person *not affected by an act* cannot attack the act as unconstitutional even though the basis of the attack be that the statute operates retrospectively.

The party whose rights or interests may be adverse to or in controversy with a licensee whose operating privileges have been suspended cannot be said to have a "property right" or a "vested" right *in the suspension of his adversary's operating privileges*. The only persons concerned are (a) the suspended licensee, and (b) the general public. If as a matter of public policy the legislature chooses, as it has in the present instance, to authorize an *earlier* restoration of a suspended operator's license than it had authorized in a previous statute, no vested rights are impaired by the later enactment. The suspended licensee receives a benefit and would not be aggrieved. The public interest is adequately protected by the legislature itself in determining the public policy. The adverse party personally remains unaffected.

You should therefore modify your administrative interpretation of this act so as to make it applicable to accidents which occurred prior to the effective date of the statute under discussion, so far as restoration of licenses is concerned.

The second part of your request deals with the question of whether the provision for what you denominate "automatic return of deposits at the end of 13 months" may be made applicable to the large backlog of open cases where the proof required under the old law has not been made and there is doubt whether it will ever be made. You ask whether these cases must remain open indefinitely, or whether you can apply the new law after 13 months have elapsed following the effective date of ch. 658.

It is my opinion that ch. 658, Laws 1951, can be followed in making refunds in all cases where the accident for which the deposit was required occurred at least 13 months prior to the date of refund, notwithstanding that the accident occurred and the deposit was made prior to the effective date of ch. 658.

This statute is basically procedural. It defines the procedure for refunding deposits to persons entitled thereto. It does *not* change the basic protection which the law originally provided for claimants against the deposit, namely, retention thereof until final adjudication of any litigation commenced within one year of the accident which made the deposit necessary in the first instance. A law which merely changes procedure and affects no substantial right may be applied retroactively. *State ex rel. Sheldon v. Dahl*, 150 Wis. 73, 135 N. W. 474. It is true that under the 1949 statute the presumption was that an action had been commenced and the burden of showing the contrary to be true rested upon the depositor. There was some practical advantage for claimants against the deposit in that situation. But the concept of "vested rights" does not apply to procedures or remedies. The allowance by the legislature of an extra month (following the expiration of the year) within which claimant may inform the commissioner of the motor vehicle department of the pendency of an action satisfies all procedural due process requirements in my opinion. The cases with which you state you are primarily concerned are old cases where considerably more than a year has elapsed and proof has not been furnished by depositor that no action was commenced within the prescribed year. By your administrative construction of this statute, you have allowed the

additional period of 7 months since the effective date of ch. 658, Laws 1951, to pass. This lapse of time, as a practical proposition, has given all claimants against the deposits in the old cases more than sufficient time to take steps to protect whatever rights they may have.

SGH

Automobiles and Motor Vehicles—Farm Trucks—Operators of mink ranches and nurseries are not entitled to register their trucks as “farm trucks” under sec. 85.01 (4) (cm), Stats.

March 11, 1952.

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

You request my opinion upon the following two questions:

1. Are operators of mink ranches or so-called farms entitled to register vehicles as farm trucks under sec. 85.01 (4) (cm), Stats.?

2. Are operators of nurseries entitled to register their vehicles as farm trucks under sec. 85.01 (4) (cm)?

Sec. 85.01 (4) (c) prescribes the fees for truck licenses. Subsec. (cm) prescribes the fees for farm trucks. The latter are substantially less than the fees for commercial trucks of comparable weight. Sec. 85.01 (4) (cm) reads as follows:

“Farm Trucks. For the registration of farm trucks having a gross weight of 10,000 pounds or less a fee of \$5, and for the registration of farm trucks having a gross weight in excess of 10,000 pounds, one-quarter of the fee specified in paragraph (c) for a truck of the same gross weight.”

This statute falls in the category of an exemption statute so far as application of rules of statutory interpretation and construction are concerned. Persons claiming the benefit of an exemption law must show that they come clearly

within its terms. Tax exemptions will not be extended by implication. See *Bowman Dairy Co. v. Tax Comm.*, 240 Wis. 1, 5.

Questions 1 and 2 are both answered in the negative upon the authority of the decision of our supreme court in *Eberlein v. Ind. Comm.*, 237 Wis. 555, 297 N. W. 429. In that decision the operation of a so-called "fox farm" was held not to constitute "farming" within the ordinary meaning of the term. The growing of ginseng under the facts of that case was likened to the operation of a hothouse. The latter, in effect, was held not to constitute a farming operation. See also *Dye v. McIntyre Floral Co.*, (1940) 176 Tenn. 527, 144 S. W. (2d) 752, 754, where the question of whether a nursery operator was a farmer was involved, and the court said:

"The distinction drawn by the Pennsylvania Court [*Hein v. Ludwig*, 118 Pa. Super. 152, 179 A. 917] is a very real one. Farming implies that the operator is dealing with the natural products of the soil in a natural manner. The operation of a *nursery* and greenhouse, on the other hand, implies, as the Courts said, the artificial care of commodities under artificial conditions.'" (Emphasis supplied.)
SGH

Schools and School Districts—County School Committee
—County school committee has power under sec. 40.303, Stats., to enter a single order consolidating several common school districts by creating a new common school district comprising the territories thereof and creating a high school district composed of all of the territory thereof. Referendum on such order should provide for submission of the two matters separately.

March 13, 1952.

DAVID L. DANCEY,
District Attorney,
Waukesha County.

The county school committee of your county has been petitioned to issue an order that dissolves certain contiguous common school districts and creates a single common

school district comprising all of the territory of such districts and at the same time creates a single high school district comprising the same territory. None of the territory in said existing common school districts is in a high school district.

You ask whether the committee has power to dissolve said common school districts, create a single common school district comprising all of the territory thereof, and create a high school district comprising the same territory, all in one order?

The duties and powers of a county school committee are set out in sec. 40.303 (4), Stats., and so far as here material, as follows:

“(4) DUTIES OF COMMITTEE. The county school committee shall:

“* * *

“(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. * * *”

This language gives the county school committee very broad power. It can act in respect to a single school district or to less than a school district to the extent that it is physically possible to do so. For instance, if any territory is not part of a school district the committee has the power to attach it to or make it part of an existing district. Such a situation could arise particularly in reference to a high school district, for there is considerable territory throughout the state that is not the part of any high school district or of a common school district which operates a high school. Such action would constitute an *alteration* of the existing high school district.

It is equally clear that under this language a county school committee has the power to take action relative to one or more districts at the same time and by the same order. Obviously any order *consolidating* several districts into one single district would affect all of the constituent

districts so consolidated. The committee could *create* a new school district out of parts of two or more pre-existing districts, leaving the residue as still constituting the pre-existing districts. It could split up an existing district or existing districts into parts, attach them to another existing district or other existing districts, and then *dissolve* the old districts which it split up and attached to the other districts. It could carve up several existing districts, rearrange the territories into several newly created districts and then *dissolve* the old districts.

The very language of this statute shows that it is contemplated that a county school committee may take action by a single order which affects and relates to more than one district. After referring to such orders as "providing for the reorganization of school districts," it then says that orders of the committee "shall not be effective until the end of the school year except those involving one or less school districts." Obviously if a single order could not relate to and provide as respects more than one district there would be no occasion for this exception.

Not only is there nothing in the language of this statute that suggests an order of the county school committee cannot create more than one district, but practicalities would dictate that it would be necessary to do so in many situations. In the case of a complete rearranging of all the districts in the county or in a given area, in order to accomplish an over-all end result, it would not only be practicable to do it by a single order creating new resulting districts and dissolving the old ones, but in order to effect the over-all plan that is the only feasible means of accomplishing the purpose. As there is nothing in the statutory language precluding it, a county school committee in putting into effect a plan for either the whole county or for a portion of it which might include several school districts, by a single order could create one or more resulting common school districts and one or more high school districts. That being true there is no reason why the committee could not in the same order consolidate several existing common school districts and create a new single common school district out of their territories, and in the same order create a high school district comprised of all of that territory.

It is therefore our opinion that the answer to your question is in the affirmative.

You then ask that if such an order were entered and the committee upon its own motion provides for a referendum thereon, or a proper petition for a referendum is filed under sec. 40.303 (8), may such referendum and the question presented to the voters at the election be limited or so worded that the vote will be upon the order in its entirety or must it be so framed that the electors vote on the creation of the common school district and the creation of the high school district as separate matters?

Clearly the county school committee could dissolve the old pre-existing common school districts and create the new single consolidated common school district by one order and then by a separate order set up and create the high school district comprising the same territory. As stated above, we see nothing to preclude the committee from doing it all in one order. However, the consolidation of the pre-existing common school districts into one single newly created common school district and the creation of a high school district comprising the same territory are two separate and distinct matters. Neither one of them is a necessary prerequisite for the other. The pre-existing common school districts could be consolidated into one common school district regardless of whether or not the territory or any part thereof which makes up the new single common school district is in a high school district. Conversely the high school district could be created to comprise the territory in the several common school districts regardless of whether those districts continue to exist or not or whether they are consolidated into a single common school district.

In our opinion, where separate and distinct matters that could be handled by separate orders are included in a single order, this statute contemplates that the voters shall be given the right to express themselves as to each. It could be that some voters are in favor of having the high school district created and leaving the common school districts as they are. Conversely some voters may not favor the creation of the high school district but would vote in favor of consolidation of the old common school districts into one new common school district.

We see nothing in this statute which indicates that by the tying together in one order of matters that are neither dependent one upon the other, interrelated, nor so intertwined as to be inseparable, such as the consolidation of the several common school districts into one common school district and the creation of a high school district covering the same territory, the electors interested therein are to be precluded or denied the right to express their wishes in respect to each matter without regard to the other.

It is held in *State ex rel. Hubbell v. Bettman*, (1931) 124 Ohio St. 24, 176 N. E. 664, that an initiative petition may propose several separate and distinct proposals provided the ballots thereon are so framed that the individual voters might vote separately on each proposal. In *State ex rel. McClurg v. Powell*, (1900) 77 Miss. 543, 27 So. 927, in discussing the question of whether several changes in the state constitution could be made by a single amendment, the court said at page 930:

“* * * Whether an amendment is one or many clearly must depend upon the nature of the subject-matter covered by the amendment. If the propositions are separate, one in no manner dependent on the other, so that a voter may intelligently vote for one and against the other,—one being able to stand alone, disconnected wholly from the others,—then such amendments are many and not one, are severable and not a unit, are complete each in itself and not each a part of an interdependent scheme; * * *”

It might appear that two Wisconsin cases are contrary to our conclusion herein. In *Wisconsin Gas & Elec. Co. v. Ft. Atkinson*, (1927) 193 Wis. 232, 213 N. W. 873, the question submitted was whether the city should sell both its gas and its electric utilities. The court held that since the city was not required to sell them separately the referendum did not present a double question which would render the proceedings invalid. The court noted that the two properties could constitute an operating unit and that it was within the power of the common council to determine whether the city should sell them separately or as an operating unit. In *Wisconsin Power & Light Co. v. Pub. Serv. Comm.*, (1937) 224 Wis. 286, 272 N. W. 50, the referendum

question was whether the city should purchase the utility company's electrical distribution system in the city and construct and operate a generating plant. The court held that this was not objectionable as a double question.

In these two cases the questions put to the voters each involved two matters which, while they could have been handled separately, nevertheless were so closely related that they were capable of being treated as one single proposition. In other words, the situations there were like that in *State ex rel. Hudd v. Timme*, (1882) 54 Wis. 318, where the court said that the legislature has a discretion as to whether to submit several distinct propositions for change in the constitution as one amendment if the propositions relate to the same subject and are all designed to accomplish one purpose.

In the instant case that is not the situation, for the consolidation of the common school districts into and the creation of one single common school district is one subject and the creation of a high school district entirely separate therefrom, covering the same territory, is a wholly separate subject. In our opinion it cannot be said that the committee has a discretion to submit both of these questions as a single proposition because they do not relate to the same subject and are not designed to accomplish a single purpose.

It is therefore our opinion that any referendum in respect to such an order should be so worded as to allow separate voting on the two separate matters.

HHP

Schools and School Districts—County School Committee
 —Plan filed by county school committee providing for separate elementary school districts and separate high school districts did not meet the requirements of sec. 40.303 (4) (a), Stats., that such plan provide only for integrated districts, namely, administrative districts covering grades from kindergarten or first through twelfth.

March 14, 1952.

ARTHUR C. SNYDER,
District Attorney,
 Washington County.

The county school committee of your county, prior to July 1, 1951, filed with the state superintendent of public instruction what purports to be a plan for the development of the educational system of your county, as required by sec. 40.303 (4) (a), Stats. This plan set up 14 proposed elementary school districts and 4 high school districts, the elementary and high school districts not being coterminous. You request an opinion as to whether or not such plan so filed complies with the requirement of sec. 40.303 (4) (a).

Sec. 40.303 (4) (a), so far as here material, provides:

“(4) DUTIES OF COMMITTEE. The county school committee shall:

“(a) In counties in which a city of the first class is located, on or before July 1, 1953, and in all other counties on or before July 1, 1951, file with the superintendent of public instruction a plan for the development of the educational system of the county. The plan shall provide a comprehensive program of improved educational opportunity for the school children of the county and shall provide for the establishment of substantial administrative districts covering grades from kindergarten or first through twelfth which may be the pattern for the future development of the educational system of the county. * * *”

The question is whether the language of the second sentence quoted requires the master plan filed to provide only for integrated districts, that is, districts which include grades from kindergarten or first through the twelfth. Ever since the enactment of sec. 40.303 by ch. 501, Laws 1949,

the language of subsec. (4) (a) has been consistently construed and applied by the state department of public instruction as requiring that the master plans filed thereunder must and may contain only integrated districts.

The language used, in our opinion, quite clearly says exactly that, and any plan which does not so provide does not constitute a plan which satisfies the requirements of sec. 40.303 (4) (a).

The legislative history of the provision supports such application. Sec. 40.303 (4) was created by sec. 4 of ch. 501, Laws 1949. It originated as Bill 284, A., which was drafted on instructions of the commission on improvement of the educational system. The tentative report of this committee published in September, 1948, in sec. IV, County Committee, pp. 8-9, stated:

"The powers and duties of the county school committees should be refined to provide that they must file a master plan with the State Department of Public Instruction before January 1, 1951, which plan should provide for a comprehensive program of improved educational opportunity involving substantial administrative districts covering grades from kindergarten through 12th, which can be the pattern for future development."

In explanation of the concept just expressed, the same report in sec. V, Organization of the Basic Unit, p. 10, says:

"We therefore recommend that all territory in the state be continuously within an operating administrative district for both elementary and high school purposes. * * *

"The Commission is of the opinion that the youth of Wisconsin can best be served if the schools of the state are organized into integrated administrative districts. An integrated administrative district is one which is organized either as a common school district or a city school system, operates at least one high school and one or more elementary schools, includes the territory served by the schools, and provides a modern educational program as defined in current literature on the subject."

Then the final report of the commission, part I, General Recommendations, County Committee, pp. 6-7, contains the same statement as the tentative report above quoted and on page 8 makes the same statement regarding the nature

of such a district. The proposal relative to the nature of the master plans remained the same throughout the several drafts of Bill 284, A., and followed the above proposal of the commission.

Substitute amendment 1, A., to Bill 284, A., proposed elimination of the requirement that the plans contain administrative districts which operate an educational program from kindergarten or grade 1 through grade 12, but it failed of adoption.

That the legislature recognized and approved the application of the language of sec. 40.303 (4) (a) as requiring that the filed plans provide for integrated districts is shown by the refusal of the 1951 legislature to adopt two proposals to the contrary. Bill No. 63, A., proposed to change the wording of that portion dealing with the nature of the plan by inserting at the end of the second sentence, “; if the committee deems it advisable it may submit a plan which will not bring all of the area into districts operating 12 grades and such a plan may also provide for reorganization which will provide for reorganization of districts involving grades 1 to 8, kindergarten to 8, and 9 to 12 or either of them or it may provide for districts involving grades 1 to 6, 7 to 9 and 10 to 12 or either of them. * * *”

Substitute amendment 1, S., to Bill 63, A., proposed to insert at that point in the statute a new sentence as follows: “In addition the committee may submit such other plan or plans as it deems worthy of consideration and not incompatible with the objectives of reorganization for improvement of the educational system.”

From the foregoing it seems quite clear that the legislative intent in the initial enactment was that the master plans should provide for integrated districts and that the 1951 legislature adhered to and approved the continuation thereof. It is therefore our opinion that the plan filed by your county school committee did not comply with the requirements of sec. 40.303 (4) (a), and therefore no plan as required by the section was filed on or before July 1, 1951.

VWT
HHP

Civil Defense—Liability for Injury or Damage—Authority and liability of civil defense workers under secs. 21.024, 20.035 and 270.58, Stats., discussed.

March 14, 1952.

RALPH J. OLSON, *Director,*
Office of Civil Defense.

You have requested my opinion as to the following questions concerning civil defense legislation:

1. During test alerts, do auxiliary police, wardens, and other civil defense personnel have the right to control traffic, to direct the public to air raid shelter areas, and to apprehend persons not complying with orders of civil defense personnel during tests?

2. Are civil defense personnel, both paid and volunteer, subject to suit by members of the general public who are directed by them during test alerts?

The civil defense statutes, all of which were passed during the last session of the legislature, are silent as to the authority of civil defense workers either while engaged in training or other operations. Therefore, I conclude that during a practice or test alert the individual civil defense worker, whether paid or working on a voluntary basis, has no more power or authority than that of any other private citizen, provided of course, he has not been sworn in as a special police officer or deputy sheriff. During a test alert or practice, he can only ask voluntary co-operation from the public. Should the order of a civil defense worker be ignored, he has no recourse to arrest since there has been no crime committed. The fact that under the above circumstances the civil defense worker has no police powers would not prevent the holding of such tests. Ch. 443, Laws 1951 (which created sec. 21.024), and ch. 527 (which created sec. 20.035) indicate unmistakably that the legislature intended and contemplated that practice work in civil defense would be carried out.

It would, in my opinion, be possible for municipalities to pass valid ordinances making it a civil offense to violate orders of civil defense officers. These officers could be sworn in as police officers. This would provide civil defense per-

sonnel with means by which they could make valid arrests during test alerts.

In reply to your second question, I note that sec. 21.024 (7) (d), Stats., reads as follows:

"Indemnification of employe. Civil defense employes shall be indemnified by their sponsor against any tort liability to third persons incurred in the scope of civil defense employment."

This section appears to protect civil defense workers from tort liability while they are acting in the scope of their employment.

In addition to this statute, sec. 270.58 also appears to be applicable.

"Where the defendant in any action, writ or special proceeding, except in actions for false arrest, is a public officer and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer shall be paid by the state or political subdivision of which he is an officer."

Our supreme court in the case of *Larson v. Lester*, (1951) 259 Wis. 440, discussed this statute and stated that the legislative history of this enactment discloses that it was the intention of the legislation to make its scope as broad as possible and that, "The exception immediately following, 'except in actions for false arrest,' can leave no doubt that the public officers meant to be protected included police officers, marshals, constables, and the like." Although there is no case law on the subject, it is my opinion that civil defense workers would probably be held within the protection of this law.

There are unlimited factual situations which could arise, and in the absence of an actual incident it would be of no avail to attempt to state just what acts might create personal liability on the part of a civil defense worker. If, however, the workers act in a reasonable manner and within the scope of their authority, I believe that the two statutes above cited would adequately protect them from personal liability.

REB

Civil Service—Counties—Deputy Register of Deeds—

Where a county civil service system established pursuant to sec. 59.074, Stats., includes deputy register of deeds and a tenure provision thereof conflicts with the apparent right which sec. 59.50 grants to the register of deeds to dismiss such deputy at pleasure, the tenure provision of said system would supersede the provisions of said statute which conflict therewith.

March 19, 1952.

RICHARD W. BARDWELL,
District Attorney,
 Dane County.

Sec. 59.50, Wis. Stats., provides in part:

“Every register of deeds shall appoint one or more deputies, who shall hold their office during his pleasure.
 * * *”

Sec. 59.074 (as renumbered by ch. 524, Laws 1951) provides in part:

“Any county may proceed * * * 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.
 * * *”

You advise that Dane county has enacted a civil service ordinance as authorized by sec. 59.074 and that said ordinance clearly includes the deputy register of deeds. Since certain provisions of the civil service ordinance relating to tenure appear to conflict with sec. 59.50 which would seem to authorize the register of deeds to dismiss a deputy at his pleasure, you inquire which of these conflicting provisions controls.

35 O.A.G. 69 held that a county veterans' service officer is eligible to come within a county civil service system created pursuant to sec. 59.074. In speaking of that statute the opinion said:

"It appears that the legislature intended the term personnel to include all county officers or employes not enumerated in the exceptions. If it had not intended that officers should be included, it would not have been necessary to except specifically members of the governing body, elective constitutional officers and the like."

In 38 O.A.G. 21 it was held that sec. 59.074 authorizes the inclusion of the position of deputy county treasurer within a county civil service system and that in the event that such a system which gives civil service status to the deputy county treasurer conflicts with the power given the county treasurer to appoint a deputy under sec. 59.19 (1), the civil service system supersedes sec. 59.19 (1).

You have suggested that a different result might be reached in the present instance because of the fact that sec. 59.19 (1) provides that the county treasurer "may" appoint a deputy but sec. 59.50 provides that the register of deeds "shall" appoint one or more deputies, while sec. 59.074 provides that a civil service system may be made applicable to county personnel "authorized" by statute to be appointed. Sec. 370.01 (1), Stats. 1949, provides:

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

"(1) All words and phrases shall be construed and understood according to the common and approved usage of the language; * * *"

The word "authorized" means "possessed of, or endowed with, authority" and "authority" means "legal or rightful power; a right * * * to act; power exercised by a person in virtue of his office * * *; * * * jurisdiction * * *." Webster's New International Dictionary, Second Edition.

It appears from sec. 59.50 that the register of deeds has power and jurisdiction to appoint a deputy and that a deputy register of deeds so appointed would be included among the "personnel authorized by statute to be appointed by officers" under sec. 59.074. Therefore, it is my opinion that the conclusion reached in 38 O.A.G. 21 would be equally applicable in the present case, and that if a provision of

the civil service ordinance enacted by the county board of Dane county includes the deputy register of deeds and a tenure provision thereof conflicts with sec. 59.50 which appears to authorize the register of deeds to dismiss the deputy at pleasure, the provisions of the civil service ordinance would supersede such conflicting provisions of said statute.

JRW

Highways and Bridges—Navigable Waters—Obstruction Caused by Highway Fill—Application of secs. 30.02 (1) (b) and 31.23 (1), Stats., to instance where an island rises in a lake due to pressure caused by weight of highway fill, discussed.

March 21, 1952.

PUBLIC SERVICE COMMISSION.

You advise me that at the time state trunk highway 102 was relocated along the shore of Rib lake, an island some 200 feet by 100 feet arose 60 feet from the shore line. This island extends about one foot above the water and the water between the island and the shore reaches a depth of 10 feet. You state that it is the conclusion of your engineering department that this island was directly caused by the pressure of the fill used in the highway construction above mentioned.

You are concerned with the applicability of two statutes. Sec. 30.02 (1) (b) :

“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, or reduce the effective flood flow capacity of the

stream or is not detrimental to the public interest. 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, or reduces the effective flood flow capacity of the stream or is detrimental to the public interest."

Sec. 31.23 (1) :

"Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such floating or movement or the cutting of weeds in such waters with the consent of the conservation commission shall not incur such forfeiture."

Specifically, you ask the following questions:

"1. Does Section 31.23 (1) apply in cases where in the course of constructing a state trunk highway under contract with the State Highway Commission materials are placed alongside a lake, the weight of which is sufficient to force a portion of the bed of the lake to protrude from the water so as to form an island, when the material has been so placed in order to comply with the plans of the State Highway Commission for the construction of such road?

"2. Is the highway contractor who carries out the contract with the State Highway Commission in accordance with the plans and specifications as prepared by said Commission, and in so doing deposits material alongside the bed of a lake with the result above mentioned, guilty of a violation of such subsection?

"3. Are we correct in our assumption that under the factual situation above mentioned Section 30.02 (1) (b) has no application?"

Assuming by your first question that you desire to know whether or not a forfeiture can be enforced against the state highway commission, it is my conclusion that this cannot be done. The state highway commission is a part of the state government and it is hardly reasonable to suppose that the legislature ever intended the state to enforce a forfeiture against itself.

The reply to your second question would depend upon the existence or nonexistence of certain facts that I will point out below. There is no law that exempts a state employe or contractor from the penalty for an illegal act. If such act is committed, he is acting outside the scope of his authority and he may be subject to an action as an individual. See *Apfelbacher v. State*, (1915) 160 Wis. 565.

The extent to which a contractor with a public body enjoys the immunity which the law gives to the latter is the topic of an extensive discussion found in 69 A.L.R. 489. The following conclusion was reached:

“Where the act or failure to act which causes an injury is one which the contractor was employed to do, and the injury results not from the negligent manner of doing the work, but from the performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys. But the contractor is not entitled to the immunity of the public body from liability, where the injury arises from the negligent manner of performing the work.”

The question we are here concerned with is whether the contractor may be subject to a forfeiture statute and not for damages caused by ordinary negligence. You will find a very complete discussion of this subject by our court in the case of *Chrome Plating Co. v. Wisconsin Electric Power Co.*, (1942) 241 Wis. 554. This case confirms an earlier decision of *Krom v. Antigo Gas Co.*, (1913) 154 Wis. 528, and concludes that statutes which are highly drastic and penal in their nature do not cover acts or omissions resulting from mere inadvertence or excusable neglect. This appears to be a well-established rule in this state.

It is not indicated in your request that the contractor was negligent in any way or, in other words, that he should

have reasonably known that the pressure of the highway fill would cause the island to rise in the lake. If this result could have been reasonably foreseen and the contractor failed to take necessary action to apply safeguards to prevent this occurrence, it is my opinion that the statute would then be applicable.

On the other hand, assuming that the creation of the island could not have been foreseen and that its advent was a natural phenomenon unpredictable through modern engineering practice, it is my opinion that the obstructing of the navigable waters which occurred can be classed as "mere inadvertence or excusable neglect" and that therefore the statute is not applicable.

The final determination hinges upon a question of fact and therefore it is not possible for me to give you a definite affirmative or negative answer in this opinion.

I could not discover any helpful legal authority in point on your third question. However, I do not believe that sec. 30.02 (1) (b) is applicable here. This statute contemplates the deliberate act of placing fill or some structure on the bottom of a lake or stream and this did not take place.

REB

*Criminal Law — Lotteries — Gambling — Marketing and Trade Practices—Trading Stamps—*Scheme whereby players of a game of skill, similar to bowling but played with a disc similar to shuffleboard, are given coupons bearing various stated point values dependent upon the size of the score made by the player, which coupons are redeemable in merchandise, does not violate sec. 100.15, 176.90, 348.01, 348.07, 348.085, or 348.09, Stats., the game being assumed to be one of skill but not a "contest" and the coupons not being given in connection with the sale of any goods, wares or merchandise.

March 21, 1952

ALLAN M. STRANZ,
District Attorney,
Forest County.

You have requested an opinion with reference to the validity of a plan to give point coupons for achieving certain scores on a shuffleboard. I take it that you refer to the type of shuffleboard which resembles ordinary ten-pin bowling and is scored the same. The coupons, of which you have submitted a sample, are worth 1, 5, 10 or 25 points. The manner in which they are distributed and redeemed is described as follows:

"The player receives 1 point coupon for every game played, the skill scores are set up; for example, 180 to 239 receives 5 points, 240 to 275 receives 10 points, 276 to 300 receives 25 points. Merchandise deal set up with each item in point coupon. For example, if player has 300 point coupons in his possession, he is entitled to the merchandise marked 300 points."

The game in question somewhat resembles ordinary shuffleboard. It is a game in which, assuming that the mechanism is in perfect working order, the skill of the player is not subject to being thwarted by chance. Two identical passes of the disc will always produce identical results. The points awarded are graduated according to the score made (except the 1 point coupon which everyone receives) and the score, in turn, is dependent upon the skill of the player.

Since the element of chance is missing, again assuming perfect working order of the mechanism, the awarding of the prize does not bring the scheme into conflict with sec. 348.01, Stats., which prohibits lotteries, nor sec. 348.07 or 348.09 relating to the use of gaming devices. For the same reason, it is not within the provisions of sec. 176.90, relating to revocation of licenses for permitting use of certain gambling devices. See 38 O.A.G. 340.

Sec. 348.085 (1), Stats., provides in part as follows:

“All devices or things whatever, whereby any person shall or may be induced to believe that he will or may receive any money, thing or consideration whatever as the result, in whole or part, of any *contest* of skill, speed or power of endurance of man or beast, are hereby declared to be gambling devices and to be public nuisances. * * *”

Since the player's skill is not in competition with the skill of another player or players but is directed solely towards overcoming a hazard in the device itself without reference to scores made by other players, there is no “contest” within the meaning of the foregoing statute, and the section is not violated by giving prizes for high scores. 29 O.A.G. 206.

Trading stamps which are redeemable in merchandise and/or which contain no stated cash value are prohibited by sec. 100.15 (1), Stats., when given “in connection with the sale of any goods, wares or merchandise.” The coupons in question would clearly violate the foregoing statute if given in connection with merchandise sales, but since they are given in connection with the playing of an amusement device they do not come within the prohibition of that statute either.

WAP

Public Assistance—Legal Settlement—A man is not precluded from acquiring a new legal settlement, under sec. 49.10 (4), Stats., by public assistance given to children of his wife by a former marriage, if he has not assumed liability for their support.

March 26, 1952.

WILLIAM J. GLEISS,
District Attorney,
Monroe County.

You have asked whether a stepfather may gain a legal settlement in county A if his stepchildren have been receiving relief throughout the period of his residence there. You state the facts in detail as follows:

“Mrs. N was residing in A county, a divorced woman with four minor children of whom she had custody. Mr. N was ordered by the A county court to pay support money of \$45.00 per month. Mrs. N received Aid to Dependent Children from A county to supplement the support payments. At this time Mrs. N had legal settlement in A county. She then became illegitimately pregnant and later married the alleged father, Mr. K. At the time of the marriage Mr. K had legal settlement in B county which was on January 25, 1947.

“* * *

“After Mrs. N married Mr. K the children were no longer eligible for Aid to Dependent Children and since Mr. K was not liable for their support, A county granted relief to these children and filed a non-resident notice against B county. B county has since been paying for the relief granted to these minor children.

“Mr. and Mrs. K and family have continued to reside in A county. During this period of time Mr. K has not received any form of aid. The only aid that has been granted is direct relief to the minor children of Mrs. K by her previous marriage.

“The question which we would like answered is: Has Mr. K now gained a legal settlement in A county since he has not received aid during the past four years?”

Sec. 49.10 (4) prevents a person from gaining a new legal settlement in any municipality if he is supported as a dependent person during his residence there, and sec.

49.10 (12) as created by ch. 702, Laws 1951, provides that circumstances which interrupt residence toward gaining a legal settlement in a municipality likewise interrupt residence toward gaining a county settlement.

The supreme court has held that receipt of aid for the support of children is deemed aid to the person legally responsible for their support, so as to prevent acquisition of a new legal settlement by such person during the period for which assistance is given to the children. See *Milwaukee County v. Waukesha County*, 236 Wis. 233; *Jefferson County v. Dodge County*, 236 Wis. 238; *Dane County v. Barron County*, 249 Wis. 618; and *La Crosse County v. Vernon County*, 233 Wis. 664.

According to the authorities cited in 40 O.A.G. 385, a stepfather is not legally responsible for the support of his stepchildren unless he assumes such liability.

Under sec. 49.10 (1), a wife has the settlement of the husband; and under sec. 49.10 (2) the children have the settlement of the mother, since she has their legal custody. Under those provisions, the entire family automatically acquired legal settlement in B county upon the marriage. 23 O.A.G. 113.

Thereafter, Mr. K. resided in county A under circumstances which would result in his acquisition of legal settlement in that county unless the aid granted the children of his wife by her former marriage prevents that result. (We are assuming that he did not undertake responsibility for the support of the children.) The situation is similar to that under consideration in 29 O.A.G. 293. The opinion was there given that a father is under no obligation to support the wife of a minor son, so that public assistance given to such wife will not prevent the father's acquisition of a new legal settlement. The same result would follow here. Since a husband is not under obligation to support his wife's children by a former marriage, public assistance given to those children would not prevent his acquisition of a new settlement under sec. 49.10 (4).

BL

Intoxicating Liquors—Licenses and Permits—Where territory of town, containing no “Class B” liquor taverns, is annexed to a city, this affects the quota of neither municipality as determined by sec. 176.05 (21), Stats.

March 27, 1952.

D. H. PRICHARD, *Director,*
Division of Beverage and Cigarette Taxes,
State Department of Taxation.

You have asked two questions relating to the interpretation of sec. 176.05 (21) (a), Stats., which as amended by the 1951 legislature provides in part as follows:

“No governing body of any town, village or city shall issue more than one retail ‘Class B’ liquor license for each 500 * * * population or fraction thereof, as determined by the last federal census, except that if a greater number of such licenses have been granted, issued, or in force, in such town, village or city * * * on August 27, 1939, than would be permissible under said limitation, such town board, village board or common council may grant and issue such licenses equal in number to those granted, issued and in force on * * * August 27, 1939, but no such town or village board, or common council shall grant and issue any additional retail ‘Class B’ license above the number in force upon the taking effect of this subsection until the number of such licenses shall correspond to the limitation provided herein. * * *”

In your letter you state the following facts and ask the following questions:

“The Town of Neenah, as of August 27, 1939, had 3 class ‘B’ liquor licenses in effect and a population of 776; the official 1950 federal census for this town is listed as 2,045; the City of Neenah, as of August 27, 1939, had 21 class ‘B’ liquor licenses in effect and a population of 9,151. The official 1950 federal census for this city is listed at 12,437.

“The City of Neenah at this time is in the process of annexing a certain area of land from the Town of Neenah—the population of the land to be annexed is estimated as 200 and does not contain a class ‘B’ liquor license. The Town of Neenah has submitted the following questions to this office:

"1—In the event the area now a part of the Town of Neenah is detached, what will be the class 'B' liquor license quota for the Town of Neenah?

"2—In the event the area referred to is detached, what will be the quota of class 'B' liquor licenses for the City of Neenah?"

The answer to the foregoing questions depends in part upon a consideration of sec. 176.05 (21) (c) and (e), Stats., which provides as follows:

"(c) No premises licensed under a retail 'Class B' license shall be deprived of such license nor shall the occupant of the premises be refused a renewal of such license because the area in which the premises are located has been annexed to, or consolidated with a city, village or town which prior to such annexation or consolidation granted or issued a greater number of retail 'Class B' licenses than are authorized in paragraph (a)."

"(e) When a portion of any town, city or village has been detached therefrom, such town, city or village shall thereafter only be permitted to grant retail 'Class B' licenses in a number equal to the difference between the number of 'Class B' licenses in effect in such town, city or village on August 27, 1939, and the number of 'Class B' licenses held by licensees within the detached area on the date of detachment, unless the population in the remaining portion of such town, city or village warrants the granting of a greater number of licenses as specified in paragraph (a)."

According to your statement of facts, the town of Neenah had an excess quota of 3 on August 27, 1939, since the population at that time would have justified only 2 taverns. However, the 1950 census for the town gives it a quota of 5 taverns.

Since there are no taverns located in the portion of the town which is to be annexed to the city, under sec. 176.05 (21) (e) the annexation will not result in any decrease in the tavern quota of the town. On the basis of its 1950 federal census it will have a quota of 5 taverns.

In the case of the city of Neenah, the 1950 federal census count of 12,437 results in a quota of 25 taverns. Since this is more than the number in effect on August 27, 1939, no question of excess quota is involved and the quota as deter-

mined by the population figure is final. The annexation does not affect the quota in view of the fact that subsec. (21) (c) does not apply since there were no taverns in the area to be annexed.

WAP

Counties—Appropriations in Lieu of Taxes—Words and Phrases—Each Year—The words “each year” used in sec. 59.07 (20), Stats., relating to discretionary appropriations to local municipalities by the county board of an equivalent for taxes on certain county-owned property, mean annually, and but one appropriation may be made in any one calendar year. Secs. 70.114, 70.115, 70.116 and 70.117 compared.

March 31, 1952.

HERBERT J. MUELLER,
District Attorney,
Winnebago County.

You state that the county board, pursuant to sec. 59.07 (20), Stats., has followed the practice of appropriating annually to each town a certain amount of money equivalent to the school tax which would normally be payable on county-owned property of the type described in the statute if such lands were privately owned. At the annual fall session of the board in 1951, the town chairman of a particular town neglected to put in the usual resolution for his town, as a result of which the county board failed to make the appropriation. However, the town chairman did present a resolution to the county board at its March 1952 session. This, of course, is after the tax has been levied and collected. The school tax was determined by including the expected appropriation from the county so that the town is now short in its levy.

We are asked whether it is legal for the county board to make the requested appropriation at this late date in view of the fact that the taxes have already been collected.

Sec. 59.07 (20) reads:

“May, in its discretion, appropriate each year to any town, city or village in which a county farm, asylum, hospital, or home for the aged or charitable institution or state hospital or charitable or penal institution or county or municipally-owned airport is located, and which would be subject to tax if privately owned, an amount of money equal to the amount which would have been paid in town, city, village and school tax upon the lands without buildings, if such land were privately owned. The valuation of such lands (without buildings) and computation of the tax shall be made by the county board. In making such computation county-owned lands, on which courthouse or jail are located, and unimproved county lands shall not be included.”

The county board has only such powers as are expressly granted or necessarily implied from the statutes, and if there is a reasonable doubt as to any implied power, it is fatal to its being. *Dodge County v. Kaiser*, 243 Wis. 551, 557.

Whether the county board makes any appropriation whatsoever to the town in the first instance is discretionary under the wording of the statute, but there is a limitation clearly expressed in the words “appropriate *each* year.” This negatives the power in any one year to make more than one year’s appropriation, and if an appropriation of a year’s tax equivalent were to be made to the town in question in March of 1952, the county board would be without statutory authority to make a second appropriation of a year’s tax equivalent in the fall of 1952 as it will undoubtedly be asked to do.

We must assume either that the time has now gone past for making the appropriation which would normally have been applicable in making up the 1951 tax levy, or that if an appropriation is to be made now applicable to 1951 taxes, the county board will have exhausted its power as to making an appropriation to the town in question this year and it may not later on in the year make a second appropriation to the same town even though the second appropriation would be applicable to 1952 taxes. In other words, it can only appropriate once “each year.” In *Allen v. Clark*, 21 N.Y.S. 338, it was held that a statute providing corporations shall within 20 days after the first of January

in "each year" make a report stating the amount of capital, the portion actually paid in, etc., means annually.

It is therefore considered that the words "each year" as used in sec. 59.07 (20) mean annually and not semiannually as would be the case if the board were asked to make an appropriation in the spring and again in the fall of the same year.

Secondly, you inquire whether the state makes annual appropriations to towns in lieu of taxes on state-owned lands and if so how long this provision has been in effect.

Generally speaking, property owned by the state is exempt from taxes as provided in sec. 70.11 (1).

There are certain exceptions, however. Sec. 70.115, created by ch. 307, Laws 1933, provides for the taxation of all real estate owned or held by any of the funds invested by the state of Wisconsin investment board (other than the constitutional trust funds) in the same manner as privately owned real estate.

Sec. 70.116, created by ch. 433, Laws 1939, provides for the taxation of all agricultural lands owned or held by the regents of the university of Wisconsin except those used for experimental purposes. This provision applies only to the tax levied for school purposes. Sec. 70.117, created by ch. 398, Laws 1945, makes a similar provision with respect to all agricultural lands owned by the state and operated by the state department of public welfare or the state board of health in connection with state curative, penal and correctional institutions.

These three provisions, it will be observed, make certain state-owned lands taxable in whole or in part but do not provide for the payment of any money by the state in lieu of taxes or as a tax equivalent as does sec. 59.07 (20), nor is there anything discretionary in the payment of such taxes.

Sec. 70.114, created by ch. 571, Laws 1949, does provide for payments in lieu of school taxes on state forest lands. These payments are likewise not discretionary but are in such amount as the department of taxation in its judgment shall determine would be payable as school taxes.

It was your suggestion that the answer to the second question discussed above might have some bearing on how

the county board would elect to exercise its discretionary power under sec. 59.07 (20), but in view of the dissimilarity of the statutes involved, very little guidance, if any, can be derived from the comparison.

WHR

Sheriffs—Deputies—Civil Service—Deputy sheriff who became sheriff in 1945 and served as such until 1949 when he became undersheriff, and served as undersheriff until some time in February, 1952, is not entitled to reinstatement as deputy sheriff under sec. 59.21 (1), Stats., as amended by ch. 15, Laws 1951.

April 7, 1952.

URBAN J. ZIEVERS,
District Attorney,
Kenosha County.

Your office has requested an opinion with reference to the following stated facts:

“On the first Monday in January, 1945, a member of the Sheriff’s Department who had at that time a Civil Service status took office as Sheriff after having been duly elected, in which position he continued to serve until the first Monday in January, 1949, at which time he was then appointed undersheriff by the newly elected Sheriff, and he continued to serve in that position until Sheriff Leonard J. Jensen was removed from office by his conviction on February 9, 1952. Within ten days thereafter the present Sheriff, who was appointed by the Governor, appointed a new undersheriff, and the question now raised is whether or not under the provisions of Chapter 15 of the Laws of 1951 the former undersheriff retained his Civil Service standing as of the date he took over the position of Sheriff in January, 1945.”

By ch. 15, Laws 1951, the introductory paragraph of sec. 59.21 (1), Stats., was amended to read as follows:

“Within 10 days after entering upon the duties of his office the sheriff shall appoint some proper person, resident

of his county, undersheriff, *provided that in selecting such undersheriff, in counties where the sheriff's department is under civil service the sheriff, in conformity with county ordinance, may grant a leave of absence to a deputy sheriff, and appoint him undersheriff, or to any other position in the sheriff's department, on request of such appointee, and upon acceptance of such new appointment and duties, and after completion thereof, such appointee shall immediately be returned to his deputy sheriff position and continue therein without loss of any rights under the civil service law; and any person who in the past has changed or in the future changes his status from that of deputy sheriff to any other status in the same department, and who is performing those duties at the time this amendment becomes effective (1951), or thereafter may return to his position as deputy sheriff, on the completion of his new duties, without loss in his civil service standings obtaining at the time of transferring to his new duties, provided that in counties with a population of 500,000 or more the appointment of an undersheriff shall be optional; and within such time the sheriff shall appoint deputy sheriffs for his county as follows:*"

The question is whether the office in question comes within the following language of the statute, "any person who in the past has changed * * * his status from that of deputy sheriff to any other status in the same department, and who is performing those duties at the time this amendment becomes effective (1951), or thereafter."

Prior to the enactment of the foregoing amendment it was clear that when a civil service deputy sheriff was elected or appointed and took office as sheriff, he vacated his office as deputy sheriff. 29 O.A.G. 247. Therefore when this officer became sheriff in 1945, under the law then in force he lost his civil service status. The 1951 amendment was designed to restore civil service status retroactively to persons who had lost it in the past in the manner that this officer did. If he had been serving as sheriff on the effective date of ch. 15 (March 11, 1951) and he thereafter left the office of sheriff, he would unquestionably be returned to his status as a deputy sheriff by virtue of that enactment.

But that was not the situation. He had "changed his status from that of deputy sheriff to" that of *sheriff* and had *again changed his status from that of sheriff to that*

of undersheriff. On the effective date of the act he was not performing the duties of sheriff (which was the status to which he had changed from deputy sheriff) but was performing the duties of undersheriff (which was the status to which he had changed from that of sheriff). Therefore, he does not come within the language of the proviso, which must of course be strictly construed.

I am therefore of the opinion that the officer in question is not entitled to be returned to his status as deputy sheriff.
WAP

Industrial Commission — Outdoor Theaters — Width of Private Roadway—Under secs. 101.09 and 101.10, Stats., the industrial commission has power to regulate the maximum width of private roadways leading to outdoor theater entrance gates where such roadways are structures or places of employment as defined by sec. 101.01 (1) and (12). The commission may not establish zoning regulations governing the location of outdoor theaters.

April 10, 1952.

INDUSTRIAL COMMISSION.

You inquire whether the industrial commission is empowered to issue regulations (1) fixing the maximum width of a private roadway leading from a public highway to the box office or entrance gate of an outdoor theater, (2) prohibiting construction of outdoor theaters bordering upon certain types of highways or limiting their location to secondary highways, (3) prohibiting construction of outdoor theaters within the corporate limits of any city or village.

Authority is vested in the industrial commission by secs. 101.09 and 101.10, Stats., to fix and enforce such reasonable regulations for the construction, repair and maintenance of places of employment and public buildings as shall render them safe. It is assumed, for the purposes of this opin-

ion, that the regulations in question are necessary for protection of the life, health, safety, or welfare of employes, the public, or frequenters of such outdoor theaters.

(1) Generally, the number and width of private entrances from public highways is subject to the control of the state highway commission and units of local government. Regulation of the construction, repair and maintenance of roadways on private property used or held out to be used by the public is authorized under ch. 101, Stats., only if such roadway constitutes a public building or place of employment.

Sec. 101.01 (12) reads as follows:

“The term ‘public building’ as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants.”

It is clear that a private roadway leading to an outdoor theater is a place held out for use by the public. If built or constructed, it is a structure. Any artificial creation is a structure. *Kosidowski v. Milwaukee*, (1913) 152 Wis. 223, 226-227. Thus, our supreme court has defined “public building” to include a ladder or stairway, *Washburn v. Skogg*, (1931) 204 Wis. 29, a wooden bleacher, *Bent v. Jonet*, (1934) 213 Wis. 635, 639, and a swimming pier, *Feirn v. Shorewood Hills*, (1948) 253 Wis. 418, 421. In 26 O.A.G. 397, this office gave the opinion that a rough stone stairway in a private park to which the public was invited constituted a structure within the orbit of the statute. It has been held that certain types of roadways are structures. *State v. Coda*, (1927) 103 W. Va. 676, 138 S. E. 324, 328; *State v. Royal Indemnity Co.*, (1925) 99 W. Va. 277, 128 S. E. 439, 442, 43 A.L.R. 552; *McCormack v. Bertschinger*, (1925) 115 Ore. 250, 237 P. 363, 365; *City of Rock Island v. Industrial Commission*, (1919) 287 Ill. 76, 122 N. E. 82, 83; *McLaughlin v. Industrial Board*, (1917) 281 Ill. 100, 117 N. E. 819, 821. Whether a particular road or driveway is a structure is, of course, a question of fact.

It is also apparent that a roadway leading to the box office or gate of an outdoor theater may be subject to regu-

lation by the industrial commission as a place of employment under the broad definition of that phrase set forth in sec. 101.01 (1):

“The phrase ‘place of employment’ shall mean and include every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit * * *.”

Accordingly, it is my opinion that the industrial commission has authority to fix the maximum width of a private roadway between a public highway and an outdoor theater box office or entrance gate by promulgating appropriate regulations.

With respect to questions (2) and (3) above, in my opinion the commission has no power to so regulate the location of outdoor theaters. No statutory authority has been given the industrial commission to establish zoning regulations. As stated in *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 448:

“* * * No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *Monroe v. Railroad Comm.* (1919) 170 Wis. 180, 174 N. W. 450; *Wisconsin Telephone Co. v. Public Service Comm.* (1939) 232 Wis. 274, 287 N. W. 122, 287 N. W. 593.”
GS

*Malt Beverages—Election Day—Closing by Class “A” Licensee—*Sec. 66.054 (10), Stats., relating to closing of premises covered by Class “B” fermented malt beverage licenses has no application to premises covered by Class “A” fermented malt beverage licenses. There is no statute prohibiting such Class “A” licensees from remaining open and selling fermented malt beverages on election days or during hours when Class “B” licensees are required to be closed. 38 O.A.G. 349 distinguished.

April 10, 1952.

JOHN G. BUCHEN,
District Attorney,
Sheboygan County.

You inquire whether grocery stores and other places of business holding Class “A” retailers’ licenses for the sale of fermented malt beverages under sec. 66.054, Stats., may sell such beverages on election days. You call attention to the opinion in 38 O.A.G. 349, which contains general language which might be construed as requiring Class “A” retailers of fermented malt beverages to close on election days, but you express disagreement with that conclusion.

The principal point involved in that opinion was whether the laws requiring closing of taverns on election days applied to the final election for justice of the supreme court and state superintendent of public instruction on May 3, 1949. In connection with that opinion attention was called to the fact that there was a hiatus in the closing law so far as relates to Class “B” fermented malt beverage licenses in Milwaukee county. Inadvertently the opinion was written in general language which on its face might be thought to include Class “A” retailers of fermented malt beverages in the closing requirement, but that was not intended.

As you point out, the closing laws in ch. 176 relating to intoxicating liquor licenses do not apply to fermented malt beverages, which are not “intoxicating liquors” as defined in that chapter. (A slight exception is sec. 176.06 (6) (e) relating to hotels and restaurants in Milwaukee county holding Class “B” retail liquor licenses, which are expressly prohibited from selling either intoxicating liquors or malt

beverages during closing hours.) Outside of Milwaukee county, and except for local ordinances, the closing of places licensed for the sale of fermented malt beverages is regulated exclusively by sec. 66.054 (10) (a) and (b), which provides as follows:

“(10) (a) In any county having a population of less than 500,000 no premises for which a *retail Class ‘B’* license has been issued shall be permitted to remain open between 1 a.m. and 8 a.m. or on any election day until after the polls of such election are closed.

“(b) Hotels and restaurants whose principal business is the furnishing of food or lodging to patrons shall be permitted to remain open for the conduct of their regular business but shall not be permitted to sell fermented malt beverages during the hours mentioned in paragraph (a).”

The foregoing subsection applies only to Class “B” licensees and there is no equivalent provision covering Class “A” licensees. Neither is there any provision prohibiting Class “A” licensees from selling fermented malt beverages on election days or during the hours when Class “B” licensees are required to be closed. It is therefore apparent that grocery stores and other Class “A” fermented malt beverage licensees are not required to close, nor are they prohibited from selling fermented malt beverages for consumption off the premises, on election days and during the hours when Class “B” licensees are required to be closed.
WAP

Public Assistance—Medical and Hospital Care—The provisions of sec. 49.40, Stats., relating to medical care, do not apply to persons receiving aid under sec. 49.61.

April 11, 1952.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked several questions about medical care for totally and permanently disabled persons. Your first question is:

1. Can payments for medical care be made under sec. 49.40, Stats., in behalf of recipients of aid to totally and permanently disabled persons, and do such expenditures qualify for reimbursement from state funds as provided in sec. 49.40?

Sec. 49.40 (1) reads in part:

"The county agency administering aid to the blind, aid to dependent children, and old-age assistance may provide for medical care needed by recipients of such aids. * * * Medical care shall, as necessary, be authorized and paid for by such county agency in addition to or in lieu of money payments made within the amounts allowed by sections 49.18 (1) (a), 49.19 (5), and 49.21 (1). * * *"

Sec. 49.40 does not refer either to sec. 49.61 of the statutes or to aid for totally and permanently disabled persons. Bill 303, S., was offered during the 1951 session of the legislature to amend sec. 49.40 so as to include medical aid for totally and permanently disabled persons, but the legislature failed to enact the bill into law. Such failure is significant of the legislative intent not to include medical aid for totally and permanently disabled persons within the purview of sec. 49.40.

The supreme court of this state has regularly held that public assistance may be furnished only in the manner, and under the circumstances, provided by statute, irrespective of individual opinions as to the equities involved. *Ashland County v. Bayfield County*, 246 Wis. 315; *Carthaus v. Ozaukee County*, 236 Wis. 438; *Holland v. Cedar Grove*, 230 Wis. 177. Since the legislature has made no provision for medical aid under sec. 49.40, except for recipients of aid to the blind, aid to dependent children, or old-age assistance, its provisions cannot be extended to medical care for totally and permanently disabled persons who are not within any of the categories first named.

It has been suggested that the reference to sec. 49.40 made in the definition set out in subsec. (1m) of sec. 49.61 might have the effect of transplanting the provisions of the former section into the latter. The language used in the reference, however, is not susceptible of such a construction, particularly in view of the specific action of the leg-

islature in declining to pass Bill 303, S. The definition of "aid to the totally and permanently disabled" in sec. 49.61 (1m) includes medical care "or any type of remedial care recognized under this section or section 49.40." The reference is descriptive of the type of care which may be included. It is effective to include within the definition all types of care included in the definition in sec. 49.40 which reads:

"* * * Medical care provided under this section includes hospitalization and nursing home care; physicians', dentists', and nurses' services; drugs, medical supplies and equipment, prosthetic appliances and other medical services as each is prescribed by a physician; optometrical services; transportation to obtain medical care; and prepayment of medical care."

The language used in sec. 49.61 (1m) does not indicate an intent to incorporate any of the other provisions of sec. 49.40 than those definitive of the type of care which may be given.

Your second question is:

2. Can medical care in behalf of recipients of aid to totally and permanently disabled persons be paid pursuant to sec. 49.61?

The answer to this question is "Yes." The definition of "aid to the totally and permanently disabled" under subsec. (1m) of sec. 49.61 includes "money payments to, or medical care in behalf of, or any type of remedial care recognized under this section or section 49.40 in behalf of, needy individuals more than 18 and less than 65 years of age who are totally and permanently disabled," with certain exceptions.

Your third question is:

3. If medical care can be paid for in behalf of recipients of aid to totally and permanently disabled persons under sec. 49.61, does the \$80 monthly maximum specified in sec. 49.61 (6) apply to the total of the aid furnished as money payment to, and as medical care in behalf of, a person, or does said \$80 monthly maximum apply only to the money payment made to the person?

Sec. 49.61 (6) reads in part;

"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. * * *"

Since "aid" under sec. 49.61 is defined to include not only money payments but also medical care, the above quoted limitation applies to medical aid as well as to money payments. If the legislature had intended to limit only the money payments, it could have used that term instead of the term "aid," which it has defined to include also medical care.

You are no doubt familiar with the opinions in 31 O.A.G. 400 and 26 O.A.G. 306, to the effect that, prior to the inclusion of medical care for old-age assistance beneficiaries in sec. 49.40, persons receiving old-age assistance could also receive medical and surgical care through regular relief channels. The same result would seem applicable in the case of aid to totally and permanently disabled persons, since they are not included in sec. 49.40, and since the only specific restriction against the receipt of other aid which is contained in sec. 49.61 is in the last sentence of subsec. (6) which reads: "Any person receiving aid under this section shall not be eligible for old-age assistance, aid to the blind or aid to dependent children."

The enumeration of the types of aid for which a beneficiary under sec. 49.61 should not be eligible inferentially negates a legislative intent to make him ineligible for forms of assistance not enumerated.

BL

Architects and Professional Engineers—Reciprocity—
The state board of architects and engineers is not required to look behind a national reciprocal registration certificate in granting state registration pursuant to sec. 101.31 (11) (b), Stats., to ascertain what requirements the applicant met in obtaining such national certificate.

Where an applicant for a certificate of registration as an architect or engineer bases his application upon a valid certificate from another jurisdiction, it is incumbent upon the board to ascertain whether or not the requirements for obtaining a certificate from that other jurisdiction are—as of the time of the application and decision—at least as high as those of Wisconsin. Whether or not the applicant could have met the Wisconsin requirements at the time of his initial registration in the other jurisdiction is immaterial.

April 16, 1952.

WISCONSIN REGISTRATION BOARD OF
ARCHITECTS AND PROFESSIONAL ENGINEERS.

Your letter requests my interpretation of secs. 101.31 (11) (a) and (b), Stats., relative to the granting of registration certificates to architects and engineers who hold similar certificates from other states or who hold unrevoked cards of national reciprocal registration. These sections provide as follows:

“(a) The board may, upon application therefor, and the payment of the required fee, issue a certificate of registration as an architect, or as a professional engineer to any person who holds an unexpired certificate of similar registration issued to him by the proper authority in any state or territory or possession of the United States or in any country in which the requirements for the registration of architects, or of professional engineers are of a standard not lower than specified in this section.

“(b) The board may, upon application therefor and payment of the required fee, issue a certificate of registration as an architect, or as a professional engineer to any person who holds an unrevoked card or certificate of national reciprocal registration, issued by any state, province or country in conformity with the regulations of the national coun-

cil of state board of architectural, or engineering examiners, and who complies with the regulations of this board, except as to qualifications and registration fee."

Specifically you wish to know (1) whether under (b) above it is incumbent upon your board to ascertain whether the applicant in securing such national reciprocal registration certificate was required to meet minimum registration requirements which at least equal those of Wisconsin, and (2) whether under (a) above you must ascertain that the applicant at the time of his initial registration in a foreign jurisdiction could have met the requirements for registration then existing in Wisconsin.

A careful search discloses no previous interpretations of these sections. Nor is there a sufficient similarity between the wording of these and sections providing for interstate reciprocity in the admission of other types of professional men to provide a valid precedent from another field. You have informed me, however, that there is a fairly well-established practical interpretation placed upon similar statutes in states whose registration boards are, like Wisconsin, affiliated with the national council of state boards of architectural and engineering examiners, and which grant certificates of registration to Wisconsin architects and engineers on the basis thereof. Since the purposes of these statutes are to grant registration to holders of certificates from foreign jurisdiction on a basis of justice and reciprocation, the practical interpretation thus used in other states should be given some weight in interpreting the Wisconsin statute.

The wording of sec. 101.31 (11) (b) does not require you to check into the requirements met by the applicant in obtaining the national reciprocal registration card. So long as the card is valid and unrevoked you may, in your discretion, use it as a basis for the granting of a certificate in Wisconsin. This is in accordance with the practical interpretation which has been given to the possession of these cards here and in other states.

The wording of sec. 101.31 (11) (a) quoted above provides the answer to your second question. You do not have to ascertain whether the applicant could have been regis-

tered in Wisconsin at the time he was registered in a foreign jurisdiction. The only points requiring investigation are (1) whether the applicant holds a valid registration certificate from another jurisdiction, and (2) whether the requirements for the registration of architects and engineers are (as of the time you receive and act on the application) as high or higher than those of Wisconsin.

There might be a sound argument for the adoption of a rule which would automatically exclude some applicants who meet this requirement, but without a declaration in the statute you have no authority to do so.

"No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448.

GFS

Soldiers, Sailors and Marines—Public Assistance—Benefits for needy veterans under sec. 45.20, Stats., are available to those meeting the definition contained in sec. 45.35 (5a).

April 17, 1952.

HERBERT J. MUELLER,
District Attorney,
Oshkosh, Wisconsin.

You ask whether veterans of the present conflict in Korea are entitled to relief under sec. 45.20 of the Wisconsin statutes.

Sec. 45.20 reads:

"Temporary aid shall be given, granted, furnished and provided, according to the provisions of chapter 49, to and for any honorably discharged indigent soldier, sailor, or marine of any war of the United States and the indigent wife, widow or minor child of any such, without requiring the removal of any such person to any county home, but

such temporary aid shall not continue longer than three months at any one time or in any one year unless the authorities charged with the relief of the poor shall determine otherwise."

Before discussing your question we call your attention to the opinion in 37 O.A.G. 384 suggesting that for practical purposes sec. 45.20 has little meaning because similar benefits are generally available to all individuals under ch. 49, Stats., irrespective of whether they are veterans. We will endeavor, however, to answer your question on the assumption that there may be circumstances under which some benefits might accrue to a veteran under sec. 45.20 which would not be available to others. Such benefits, if any, are limited to "any honorably discharged indigent soldier, sailor, or marine of any war of the United States and the indigent wife, widow or minor child of any such."

There has been no political act declaring the conflict in Korea to be a war of the United States. The United States supreme court, in *Ludecke v. Watkins*, 335 U. S. 160, 68 S. Ct. 1429, 92 L.ed. 1881, held that a war of the United States may be commenced and terminated only by political act. It is stated in 56 Am. Jur. 136-137:

"The normal state of nations is one of peace, benevolence, and friendship, and this must always be presumed to subsist among nations. One who founds a claim upon the rights of war must prove that the peace was broken by some national hostility, and war commenced; mere conjecture, supposition, and possibility can render no competent evidence of the fact. Whether war exists in its legal sense at any given time is a matter to be determined solely by the political department of the government."

It is possible, however, in a particular contract or statute to use the term "war" not only in the restricted legal sense, but in a broader sense. See *Hamilton v. McClaughry*, 136 Fed. 445, 449, in which the definition was adopted from *Prize Cases*, 67 U. S. (2 Black) 666, 17 L.ed 459. See, also, *Darnall v. Day*, 240 Ia. 665, 37 N. W. 2d 277, 281, *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. 2d 687, 689, and *New York Life Ins. Co. v. Durham*, 166 F. 2d 874, 876.

Where a legislature confers a benefit it may prescribe its own conditions; and the definition of the terms used should be determined in accord with the legislative purpose.

Statutes prescribing benefits for war veterans have ordinarily been liberally construed. See *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L.ed. 1230, 167 A.L.R. 110, and *Le Maistre v. Leffers*, 333 U. S. 1, 68 S. Ct. 371, 92 L.ed. 429.

The opinion was given in 24 O.A.G. 101 that sec. 45.10, authorizing counties to levy a tax for aid to needy veterans who performed honorable service "for the United States in time of war," did not apply to a soldier serving in the so-called Nicaraguan insurrection, since the latter was a mere policing expedition and not a war of the United States. The language involved in that opinion is similar to that contained in sec. 45.20, so that the opinion would be applicable to your question unless there has been some indication of a different legislative intent as applied to the Korean conflict. I believe that ch. 684, Laws 1951, provides that indication. Ch. 684, Laws 1951, amended the definition of a veteran entitled to benefits under sec. 45.35, to include persons who were in the active navy or military service of the United States either between August 27, 1940 and July 25, 1947, or who served for 90 days or more overseas or were disabled while in the service between July 25, 1947 and July 1, 1953. The purpose of the amendment was unquestionably to include persons who had seen active service in Korea. Ch. 684, Laws 1951, did not purport to amend other sections of ch. 45, Stats. It is not necessary, however, that sec. 45.20 be actually amended in order to seek for an extrinsic aid to determine legislative intent, provided the terminology of sec. 45.20 is susceptible of more than one interpretation. Sec. 45.20 does not specify that the war referred to must be an officially declared war of the United States. In view of the fact that the term "war" is sometimes used in a broad sense rather than its restricted legal sense, I believe the word is flexible enough to warrant resort to legislative manifestations of intent in its interpretation. I believe that the enactment of ch. 684, Laws 1951, established that the legislature regarded service for 90 days or

more overseas between July 25, 1947 and July 1, 1953, as service in a war of the United States. It is my opinion that one who meets the conditions of sec. 45.35 (5a) as amended by ch. 684, Laws 1951, falls within the category covered by sec. 45.20.

BL

*Department of Agriculture—Dairy, Food and Drugs—
Iced Milk Product, Dairy Queen*—Discussion of opinions of
supreme court in *Dairy Queen of Wisconsin, Inc. v. Mc-
Dowell*, (1952) 260 Wis. 471, as they affect enforcement
of sections 97.02 (5) (o), 97.025, and 97.25, Stats.

April 23, 1952.

D. N. MCDOWELL, *Director*,
State Department of Agriculture.

You have requested my opinion as to what advice you may properly give to the ice cream industry as to the enforcement policy of the department of agriculture relative to the sale of frozen dairy foods. This question has arisen due to the decisions of the state supreme court in the case of *Dairy Queen of Wisconsin, Inc. v. McDowell*, (1952) 260 Wis. 471, and the further recent decision on rehearing on the same case handed down April 8, 1952. This case holds that sec. 97.025, Stats., does not prohibit the sale of a frozen dairy product containing the same ingredients as ice cream, although in different proportions and containing less butterfat than ice cream, providing there is no fraud or deception in selling the same.

You ask specific questions as to the manner of sale and permissible ingredients, but before taking up these problems individually, I wish to point out that the answers to your questions concerning the intermediate product, which you now present or which may confront you in the future, must be found in two assumptions made by the court which appear to me to be the basis for the decision: First, that the product be pure and wholesome and not deleterious to

health; it must contain only the ingredients used in making legal ice cream though they may be in different proportions; second, that the product be sold under circumstances which would not mislead the public. It is my opinion that these qualifications must be met in order that there be compliance with the law.

Actually you have very little discretion in what you may or may not legally do in the enforcement of the pure food laws. The legislature prescribes these laws and you are bound to enforce the statutes as they are written. You have no power to make exceptions or modifications in enforcement.

While the duty of the enforcement of the pure food laws is primarily that of the department of agriculture, these laws are not different from any other penal statutes of the state. You have no power to prevent any other proper law enforcement agency from enforcing these laws. Any interpretation which you make is still accepted by the manufacturer or seller of the food at his peril, since whether a prosecution is to take place is not your sole responsibility. It is therefore my advice that any interpretation you place upon the ice cream laws or any other pure food laws be made with this understanding

Your questions and my answers to them are as follows:

1. May the low-fat frozen dessert be sold anywhere in consumer-sized packages, labeled to fully advise the purchaser that the content is not ice cream?

In the *Dairy Queen* case the court made the following statement (p. 478):

“We do not agree with respondent’s contention that products such as Dairy Queen are difficult to label. It seems to us that the proposed method of selling Dairy Queen—in a store of its own, where no other product is sold; with a posted sign that the product is not ice cream and the containers are so labeled—and where it will not be sold outside its containers, such as in restaurants and the like—will not perpetrate a fraud upon the public. * * *”

It seems to me that the court would not have decided as it did had it been the plan of the Dairy Queen Company to sell its product in conjunction with the sale of ice cream.

It is obvious that there is a much greater chance of fraud in such cases. The supreme court did not base its decision on package markings alone, and for this reason I do not believe that you should indicate to the ice cream industry that it is now free to market the intermediate product in package form indiscriminately. It should be advised that the intermediate product can only be sold under the conditions outlined in the *Dairy Queen* case or under other conditions which afford the same or greater protection to the public.

2. May the product be sold chocolate coated in bars in form similar to "Eskimo Pie" if the wrapper is truthfully labeled to declare that the principal ingredient is a low-fat frozen dessert and is not ice cream?

I can see no objection to the sale of this product chocolate coated in bars similar to "Eskimo Pie" provided that the product is sold from a place where no ice cream is sold, and as indicated in the opinion, a sign in or at the place of sale clearly advises the public that the product sold is not ice cream. However, the sale of this product under other circumstances where ice cream is sold and the public is not fully advised that the product they are buying is not ice cream, would lead to misunderstanding and deception of the consumer. There is perhaps an even higher fraud potential in selling the product in small quantities, as in the bar form. There would be a greater difficulty in conveying to the consumer through labeling that the product is not ice cream because the wrapper is necessarily smaller and much less likely to be read by the purchaser.

3. May the product be used as an ingredient for "malted" and "shake" beverages which are dispensed under some descriptive name other than malted milk or milk shake?

Sec. 97.02 (5) (o) defines malted milk beverages and milk shakes. It reads as follows:

"Malted milk beverage is a pure, clean product served on the premises where prepared, and is made with whole milk, ice cream and standard dry malted milk with or without flavoring, and shall contain not less than five per cent by weight of standard dry malted milk. Milk shake, dairy shake and other similar beverages, without limitation, are sweetened or unsweetened, flavored, chilled, agi-

tated beverages prepared with whole milk and may contain ice cream, eggs, fruit, fruit syrup, fruit juice or other natural flavor."

Neither of these definitions allows the use of a frozen dairy product as a substitute for the ice cream and I feel that it would be most difficult for anyone to sell a beverage under the name of malted milk beverage, milk shake, dairy shake or other similar name using the low-fat product without running risk of violation of the pure food laws. In your position, I would certainly not advise anyone so to do.

4. May the product be dispensed on cones and in sodas and sundaes at retail establishments which also dispense ice cream?

My advice is that your answer to this question should be "No." The decision in the *Dairy Queen* case should leave no doubt in this regard. The cheaper intermediate product could readily be mixed with ice cream or sold to the unsuspecting customer in its original form. Here the consumer would not be protected by any labeling whatsoever.

5. May the product contain emulsifiers and artificial flavoring?

You state that the court decision refers to the similarity of the ingredients in Dairy Queen and ice cream; that the use of artificial flavoring and emulsifiers in unstandardized products is not an issue in that action and the use of such ingredients in ice cream is prohibited by the statutory standards. You point out that since there are no standards for a low-fat frozen dessert you cannot see how you can prevent the use of such ingredients in such products. By emulsifier, as I understand it, you mean the synthetic materials which are used to keep fat globules in suspension. Our ice cream standards law does not allow the use of synthetic emulsifiers. It is my understanding of the decisions in the *Dairy Queen* case that a decisive factor was the fact that the product proposed to be sold would have the same natural ingredients used in true ice cream. The court said:

"* * * There is no artificiality employed in producing Dairy Queen. Its ingredients are the same natural ingre-

dients contained in ice cream, but in different proportions. We can see where imitation and adulteration may be present and fraud perpetrated upon the public where, as in *Carolene Products Co. v. United States* (1944), 323 U.S. 18, 65 Sup. Ct. 1, 89 L. Ed. 15, abstracted butterfat is replaced with vegetable oil; and where, as in *Day-Bergwall Co. v. State* (1926), 190 Wis. 8, 207 N. W. 959, the product was admittedly an *artificial* vanilla."

Also in the statement of facts at the outset of the decision there is a table indicating the approximate amounts of various ingredients in Dairy Queen as compared to ice cream. Nowhere, either in the trial of the case in circuit court or in the briefs of the plaintiff in the supreme court, is it indicated that anything other than the usual legal products used in the manufacture of ice cream would be employed in the manufacture of Dairy Queen. It was on this basis that the court made its decision. I cannot conceive that the same result would have been reached by the court had the plaintiff proposed to sell a product made with inferior or substitute ingredients, excessive amounts of stabilizers, fillers or the like. Had the plaintiff attempted to do so, the obvious fraud which would result to the public would be apparent.

I might also add at this time that, I believe, the same thing would apply to an excessive amount of air or "overrun" whipped into the product. Our ice cream and sherbet standards laws provide that the volume of the product after being melted shall not be less than one-half of the volume of the ice cream as manufactured and sold. As I understand it, "overrun" is a term used by the industry to indicate the amount of air in the product. Our law then allows the amount of air in the products defined by statute to be no more than 50 per cent or in the terms of the industry 100 per cent "overrun."

I doubt that the public at large understands this fact. However, because of this law the people of this state have been accustomed to buying a product of at least 50 per cent liquids and solids. It is my view that anyone purchasing a frozen dairy product has the right to expect that such product will be at least that quality. Any manufacturer making a product containing a higher "overrun" than 100

per cent seems to me to be attempting to deceive the public by selling air in place of food.

You raised the question as to the advisability of holding hearings and issuing regulations governing the sale of the intermediate frozen dairy product under the provisions of the fair trade practice statutes. Each case of the sale of the intermediate product must stand upon its own merits; either the sale is in violation of existing law or it is not. I cannot see that you could set a regulation which would supersede existing statutory limitations.

REB

VWT

Towns—Elections—Opening and Closing of Polls—Sec. 6.35 (3), Stats., interpreted. It is not legal to close the polls in a town election at any time between 9:00 a. m. and 5:30 p. m. for the purpose of conducting a town meeting.

May 6, 1952.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

Your letter states that certain towns have made a practice of closing the polls during that part of the election day for the spring election during which the statutory town meeting is being held. It is presumed that this is during the usual voting hours. You ask whether this is legal.

In my opinion this is governed by sec. 6.35 (3), Stats., which reads as follows:

“In towns, the polls shall be opened at nine o'clock in the morning and closed at five-thirty o'clock in the evening, except that the town board may extend the time during which said polls shall remain open to an hour not earlier than six o'clock in the morning, nor later than eight o'clock in the evening. Notice of such change shall be given as provided in subsection (2).”

Since an election is a strictly statutory procedure we must be governed by the statute and its literal meaning. I fail to find either in this statute or elsewhere any authority for closing the polls at any time between 9:00 a. m. and 5:30 p. m. on the election day. The authority which the statute gives to the town board to extend the period when the polls may be open cannot be used to contract it (21 O. A. G. 835). Although other factors were involved and the statute involved has been revised many times since the case of *State ex rel. Smith v. Drake and others* (1892), 83 Wis. 257, 53 N. W. 496, the principle there followed supports this position.

GFS

*Public Assistance—Legal Settlement — Statutes — Construction—*Sec. 49.10 (12), Stats., created by ch. 702, Laws 1951, does not operate to render any county liable for relief granted prior to its enactment.

May 6, 1952.

EUGENE F. MCESEY,
District Attorney,
Fond du Lac County.

You have inquired whether a person had a legal settlement in county F on June 12, 1951, by reason of circumstances which would have resulted in legal settlement if ch. 702, Laws 1951, were applicable. Ch. 702, Laws 1951 (sec. 49.10 (12)), which made new provisions for legal settlement in a county, did not become effective until August 10, 1951.

The situation you describe does not fall within the opinion given in 41 O. A. G. 30 to the effect that a municipality may recover for relief granted *after* the effective date of ch. 702, Laws 1951, on the basis of settlement in a county acquired by residence prior to the enactment of the law. Your question involves not only consideration of residence at a time prior to passage of ch. 702, Laws 1951, but of an actual change in the status of legal settlement as of a date prior to its passage. The situation you present is more nearly analogous to that involved in *Milwaukee County v. State Department of Public Welfare*, 258 Wis. 113, 116, where the court held that a statute could not operate retroactively "upon those cases in which a legal settlement had been previously acquired."

Irrespective of the fact that no constitutional questions are involved in allocation of relief costs between municipalities, as pointed out in 41 O. A. G. 30, the following rule recited in the *Milwaukee County* case, *supra*, is nevertheless applicable when a question of statutory construction arises:

"A statute will not be construed to operate retroactively unless the legislative intent to have it so operate clearly appears. *Bell v. Bayfield County*, 206 Wis. 297, 239 N. W. 503; *Estate of Pelishek*, 216 Wis. 176, 256 N. W. 700."

The question of what constitutes a retroactive application of law is sometimes a close one. The opinion in 41 O. A. G. 30 reached the conclusion that to apply ch. 702, Laws 1951, to any relief granted before its passage would be an improper retroactive application in the absence of legislative direction. The case above cited indicated that it would constitute a retroactive construction to apply a law so as to alter a legal status already fully acquired and a liability correspondingly fixed. Where there are no fixed rights and obligations, but at most inchoate ones, a different hypothesis is presented.

The definition of a retroactive law in 50 Am. Jur. 492-493 is in part:

“A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. * * * However, a statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation. * * *”

It was said in *Peters v. District of Columbia*, 84 A. 2d 115, 117:

“We recognize the established rule that ordinarily statutes operate prospectively only and that there is an ‘almost conclusive presumption against power to take retrospective action unless Congress plainly specifies such power.’ * * * But it is also the rule that ‘A statute is not retroactive merely because it draws upon antecedent facts for its operation.’”

In *State v. Brown Service Funeral Co.*, 236 Ala. 249, 182 So. 18, 20, it was recognized that a retrospective law is one affecting rights, obligations, acts, transactions and conditions performed or existing prior to its adoption, but the court said:

“* * * The Act then would only look to the future in making its requirements for future operation, and to the past only for information on which a computation is to be made to ascertain an amount to be effective for such future operation. A law is not retroactive merely because it looks to the past for such purpose. License fees are often so set up.”

In *Dumesnil v. Reeves*, 283 Ky. 563, 567, 142 S. W. 2d 132, the following appears:

“* * * It is true that statutes are not to be given a retroactive effect, even where the Legislature has power to enact such a statute, unless such an intention clearly appears from the statute itself * * * but a retroactive effect is obtained only when a statute is applied to rights acquired prior to its enactment. * * *”

In *Savorgnan v. U. S.*, 171 F. 2d 155, 158, it was held that an act providing for expatriation on certain conditions applied to cases where such conditions arose prior to its enactment and the status continued afterward. An excerpt from the case reads:

“* * * The status of becoming a naturalized citizen is the same whether its existence began before or after the enactment of the 1940 Act. * * * Moreover, it cannot be contended successfully that this renders the statute retroactive, since it is well settled that a statute is not retroactive merely because it depends upon antecedent facts for its operation. * * *”

The rule was stated in *Johnston v. United States*, 17 Ct. Cl. 157, 171, that:

“A statute does not operate retrospectively when it is made to apply to future transactions, merely because those transactions have relation to and are founded upon antecedent events; or, as was said by Denman, Ch. J., in *Reg. v. Whitechapel*, 12 Q. B., 127, ‘because a part of the requisites for its action is drawn from time antecedent to its passing.’”

See, also, *Savings Bank v. Weeks*, 110 Md. 78, 72 A. 475, 22 L. R. A. (n. s.) 221; *Burger v. Unemployment Compensation Board of Review*, 168 Pa. Super. 89, 77 A. 2d 737; *Neild v. District of Columbia*, 110 F. 2d 246, and *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. 2d 264.

Many laws involve the consideration of circumstances which may have existed prior to their enactment. A law relating to adults would not necessarily be considered retroactive because it is applied to persons who attained the age

of 21 less than 21 years after its passage; nor would it likely be argued that 65 years would have to elapse after enactment of an old-age assistance statute before eligibility could be acquired. When ch. 578, Laws 1945, was enacted providing for aid to totally disabled persons, it probably never occurred to anyone to suggest that no applications could be accepted until one year after its effective date, on the ground that the year's residence required to establish eligibility must elapse after the law became effective.

Many cases in which time prior to the enactment of a law is taken into consideration in relation to the circumstances on which its applicability depends, are not even included in the category of cases involving retrospective statutory construction, because the propriety of the construction is taken for granted rather than expressly considered. An example is the case of *State v. Marshall & Ilsley Bank*, 234 Wis. 375, involving sec. 220.25, Stats., created by ch. 294, Laws 1935. The law provided in part that "any person who shall have on deposit * * * with any banking institution any fund * * * and shall not deal therewith for a period of 20 years * * * shall be presumed * * * to have died intestate, without heirs, or to have abandoned such fund," and that the fund should escheat to the state treasury. The law was applied in *State v. Marshall & Ilsley Bank*, *supra*, to funds which had been in banks' possession for 20 years, although all or most of that period elapsed prior to the enactment of the law. It was not even suggested that a prospective construction would postpone the escheat until 20 years after enactment of the law.

Similarly, it is my opinion that to consider the residence of a person prior to enactment of ch. 702, Laws 1951, does not involve retroactive construction. To construe the law to apply to relief granted prior to its enactment, however, or to alter a legal settlement previously acquired, would render it retroactive, because that would affect rights, obligations, transactions, and conditions performed or existing prior to its adoption. The law is so worded, anyway, that it could not operate to change a legal settlement previously established, because it applies only when a person is "without legal settlement" in a municipality.

BL

Automobiles and Motor Vehicles—Registration—Farm Trucks—A truck tractor may not be registered as a farm truck under sec. 85.01 (4) (cm), Stats., where such truck tractor is used in combination with a trailer.

May 9, 1952.

MOTOR VEHICLE DEPARTMENT.

You state that a farmer has made application to register a truck tractor as a farm truck for a fee of \$5 under sec. 85.01 (4) (cm), Stats. He proposes to operate same in combination with a trailer having a gross weight in excess of 3,000 pounds. The combination will be used to transport to market the owner's farm products, produced on his farm.

You ask whether the truck tractor, under the facts stated, may be lawfully registered for the \$5 fee.

The registration fees applicable to trucks and truck tractors generally are prescribed in para. (c) of subsec. (4), sec. 85.01. The fees range from a minimum of \$10 for a truck having a gross weight not in excess of 3,000 pounds, to \$60 for a truck having a gross weight of 10,000 pounds, with additional fees for trucks weighing more than 10,000 pounds. The legislature has therefore granted to farmers a favor by way of substantial reduction in registration fees for farm trucks which varies from 50% of the fee in the case of the lightest class of farm trucks (under 3,000 pounds) to slightly more than 91% of the fee in the case of the heaviest class of farm trucks (10,000 pounds).

The various kinds of vehicles for which registration fees are prescribed in sec. 85.01 are defined in sec. 85.10. A farm truck is defined in sec. 85.10 (5a) as "every motor truck owned and operated by a farmer * * * for the transportation of farm products from the licensee's farm to market." This definition uses the term "motor truck," which is defined in subsec. (5) of sec. 85.10, so far as pertinent here, as "every motor vehicle used for commercial purposes carrying its load as a single unit with a nondetachable propelling power." A truck tractor is defined in subsec. (6) as "every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry

a load other than a part of the weight of the vehicle and load so drawn." There is no ambiguity in the statutes involved. It is clear from merely reading the same that motor trucks and truck tractors are different types of vehicles. The legislature embraced the one, motor trucks, within the definition of farm trucks. But it did not include the other, truck tractors. There is no lawful basis for extending the definition of farm trucks to include a type of vehicle which the legislature omitted. Para. (cm) of subsec. (4), sec. 85.01, is in the nature of an exemption of farm trucks from the substantially higher fees required by para. (c). Exemption statutes of this character are controlled by the principles stated in *Methodist Episcopal Church Baraca Club v. City of Madison*, 167 Wis. 207, *In re Estate of Price*, 192 Wis. 580, and *State ex rel. Wisconsin Compensation Rating and Inspection Bureau v. City of Milwaukee*, 249 Wis. 71, to the general effect that exemptions from taxation to be valid must be clear and express, and all presumptions are against them and should not be extended by implication. Applicant is not entitled to register the truck tractor as a farm truck for the \$5 fee.

SGH

Public Health—City-County Health Department—Powers—City-county board of health has the power under sec. 140.09 (6), Stats., of a local board of health under sec. 141.01 (5) to make reasonable rules effectual for the preservation of public health. Whether a rule of such an agency requiring the use of three-compartment sinks in public eating places not having mechanical dishwashing machines would be a proper one presents a factual problem as to the reasonable necessity of the rule under all of the circumstances.

May 19, 1952.

DR. CARL N. NEUPERT,
State Health Officer.

You have inquired whether a city-county board of health under sec. 140.09, Stats., has the power to pass a county-wide ordinance requiring three-compartment sinks in pub-

lic eating establishments where mechanical dishwashing machines are not provided.

In presenting this question you call attention to the fact that a city-county board of health has all of the powers and authority formerly vested in local boards of health, but that an ordinance or rule or regulation such as that suggested above would need to have specific penalties attached and you question whether the city-county board of health would have any authority to provide for penalties.

The question raised is well taken. The state as sovereign alone can create a crime, which includes misdemeanors. See *State ex rel. Keefe v. Schmiede*, 251 Wis. 79.

As was also stated in that case the legislature may confer on municipalities the power to create civil actions to recover fines or forfeitures, but we find no such grant of authority in sec. 140.09, Stats., and it must be remembered that administrative agencies 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.

It is significant to note that the legislature, in conferring upon the state board of health in sec. 140.05 (3), Stats., the power to make and enforce rules, regulations and orders as to any subject matter under its supervision, provided that violations should be punished by fines of not less than \$10 nor more than \$100 for each offense in the absence of a specific penalty otherwise provided for the offense. If the legislature felt it necessary to set up the fines to be imposed for violations of the rules of the state board of health, there is no basis for assuming that city-county boards of health have any implied powers to provide for fines to be imposed in the case of violations of the rules of such local agencies. Rather it is reasonable to assume that if the legislature had intended that there should be fines for violations of rules of city-county boards of health, it would have so provided.

However, it does not follow that a city-county board of health is wholly powerless to enforce its rules and regulations. In an opinion to your department under date of

June 25, 1947, 36 O. A. G. 292, it was stated that the power to enforce a rule may be implied in the grant of power to establish it. 42 Am. Jur., Public Administrative Law, § 53. Reference was also made in the above opinion to *State ex rel. Martin v. Juneau*, 238 Wis. 564, where the attorney general secured compliance with a state board of health order by civil suit in an injunction case.

Sec. 140.09 (1) (a), Stats., among other things defines a "county board of health" so as to include a city-county health department or board of health, and sec. 140.09 (6) provides in part:

"BOARD'S POWERS. The county board of health when established in any county shall have all the powers and authority now vested in local boards of health and local health officers and shall have authority to enforce such rules and regulations as may be adopted by the state board of health under the laws of the state. It may adopt such rules for its own guidance and for the government of the health department as may be deemed necessary to protect and improve public health, not inconsistent with state law nor with rules and regulations of the state board of health.
* * *"

One of the difficulties as we see it lies in the restrictive language of sec. 140.09 (6) quoted above. If this language restricts a city-county board of health from adopting rules which are inconsistent with the rules of the state board of health, a county-wide regulation requiring three-compartment sinks would be improper because we are informed that the regulations of the state board of health under ch. 160, the hotel and restaurant law, presently require only two-compartment sinks although three-compartment sinks are recommended.

The language of sec. 140.09 (6) is somewhat confusing, if not ambiguous. The first sentence grants to county boards of health all the power and authority now vested in local boards of health and local health officers. Sec. 141.01 (5), Stats., provides that local boards of health shall take such measures and make such rules and regulations as shall be most effectual for the preservation of the public health. This is a broad grant of power and presumably would authorize a three-compartment sink regulation if that be reasonably

necessary for the preservation of public health. Going on with the remainder of the first sentence in sec. 140.09 (6), there is an additional grant of power in the words "and shall have authority to enforce such rules and regulations as may be adopted by the state board of health under the laws of this state." Thus this sentence really grants a county board of health authority to do two things—first, to exercise the powers of a local board of health, and second, to enforce state board of health rules—and as we have pointed out, the first of these powers may be sufficient to justify a three-compartment sink regulation although the second one would not be because the state board of health requirement is for a two-compartment sink.

In the second sentence of sec. 140.09 (6) quoted above, the county board of health is empowered to adopt rules "for its own guidance and for the government of the health department." These rules are restricted by the language "as may be deemed necessary to protect and improve public health" and by the further restriction that such rules must be "not inconsistent with state law nor with rules and regulations of the state board of health." While perhaps not entirely clear, it would seem that the rule-making power here discussed relates only to rules for the board's "own guidance and for the government of the health department." This would not include a rule intended not for the guidance of the board or government of the health department but for the guidance rather of public eating establishments. Thus it cannot be said that the two-compartment sink rule of the state board of health would in and of itself preclude a city-county board of health from requiring three-compartment sinks under the powers conferred upon such boards by sec. 140.09 (6).

Upon the basis of the foregoing discussion we conclude that a city-county board of health does have the authority under sec. 140.09 (6) to adopt the suggested three-compartment sink rule for public eating places. We do, however, raise the question without attempting to answer it here of whether such a rule meets the test of being one "effectual for the preservation of the public health" within the meaning of sec. 141.01 (5), in view of the fact that the state board of health once had such a requirement and later

abandoned it as we are informed. The question is largely one of fact, and while the state board of health's action may be significant, it would not necessarily be controlling in the event that the city-county board of health were to adopt the proposed rule and someone affected thereby should challenge the rule in court.

It is important to keep in mind that the character of the precautions that may be reasonably necessary to preserve public health depends upon the circumstances, and much must be left to the discretion of the agency having the statutory authority to impose the regulation; also that statutes authorizing municipal authorities to make regulations to prevent spreading of infectious diseases and to protect the public health are to be liberally construed to effectuate the purpose of the legislation. See 62 C. J. S. 279.

WHR

Barbers—Licenses and Permits—Provision of sec. 158.10 (4), Stats., relating to qualifications for a journeyman barber's license upon the basis of having a license from another state does not extend to applicants from foreign countries but is limited to applicants having barbering license issued by other states of the United States.

May 19, 1952.

DR. CARL N. NEUPERT,
State Health Officer.

You have inquired whether the word "state" as used in sec. 158.10 (4), Stats., relating to the licensing of journeyman barbers, applies to a foreign state as well as one of the United States.

Sec. 158.10 (4), so far as material here, reads:

"(4) Any barber from out of the state who is at least 20 years of age and of good moral character and temperate habits and has completed the eighth grade as shown by certificate or affidavit, or has an equivalent education as determined by the state board of vocational and adult edu-

cation, and has an active license or certificate as a practicing barber with 4 years' experience from another state which has substantially the same requirements as this state may be granted a journeyman license upon passing an examination in both practical demonstration and a written and oral test in subjects required to be taught in schools or colleges teaching barbering. * * *

The question arises by virtue of the fact that in recent months an increasing number of displaced persons have applied for licenses as journeymen barbers. These persons have licenses to practice barbering in the countries from which they came, and if they do not qualify for licenses as journeymen barbers under sec. 158.10 (4) it will be necessary for them to start over as apprentices under sec. 158.09, Stats.

In the construction of the Wisconsin statutes all words and phrases are to be construed according to the common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. Sec. 370.01 (1). Sec. 370.01 (40) provides that the word "state" when applied to states of the United States, includes the District of Columbia and the several territories organized by congress. This statutory guide, however, is of no help here, as the question we have to determine is whether the legislature intended the word to be applied to states of the United States or whether it was thinking also of foreign states.

Under certain circumstances the courts have determined that the word "state" as used in a statute may apply to a foreign state as well as to one of the United States. See 40 Words and Phrases, page 13 and following. So far as considering the word generally is concerned, it has been held that it has a definite, fixed, certain legal meaning in this country, and under our form of government it means one of the commonwealths or political bodies of the American Union. *Twin Falls County v. Hulbert*, 66 Idaho 128, 156 P. 2d 319, 325.

No great help is to be found in the decided cases construing the word "state" as used in various statutes, since these turn pretty largely on the context of the language used and the particular subject covered.

There is no reason to assume that the legislature in sec. 158.10 (4) used the word "state" in its broadest sense so as to include foreign governments, but rather it would appear that the legislature had in mind only the states of the United States. The controlling language is to be found in the phrase "and has an active license or certificate as a practicing barber with 4 years' experience from *another state* which has substantially the same requirements as *this state*." It is a fair inference that in using the words "another state" in juxtaposition with the words "this state" the legislature had in mind another state of the same type or character as this state, that is, another state of the United States rather than some foreign state or nation.

In support of this conclusion it might be said further that sec. 158.10 (4) sets up an exemption which excuses the out-of-state barber from completing the 3-year apprenticeship under the supervision of the state board of health otherwise required of Wisconsin applicants. It is true that sec. 158.10 (4) imposes the requirement that the training exacted by the other state must be substantially equivalent to that of Wisconsin, but this does allow for some discretion in relaxing the requirements slightly as long as they are substantially the same. To the extent that sec. 158.10 (4) provides an exemption, however slight, for the out-of-state applicant, the rule is that such exemption is not to be extended by implication but is to be strictly construed against the applicant, and that the exemption will not be deduced from language of doubtful import or which gives rise to just controversy as to the legislative intent. See 53 C. J. S. 603.

Hence, if there be any doubt in sec. 158.10 (4) as to whether the legislature intended to give the word "state" a broad and liberal construction so as to include foreign states or on the other hand the word is to be restricted so as to apply only to one of the United States, the doubt is to be resolved in favor of the stricter and narrower construction under the rule as above stated.

You are therefore advised that the words "another state" as used in sec. 158.10 (4) relate to another state of the United States and not to a foreign country.

WHR

Highways and Bridges—Automobiles and Motor Vehicles—Weight Limitations—Where a county highway committee has availed itself of the power conferred by sec. 85.54, Stats., to further restrict the gross weight of vehicles traversing a certain highway, such weight limitation as may be fixed and promulgated by said highway committee applies uniformly to all users of the subject highway and exceptions may not lawfully be made in favor of individuals as against the general public.

May 21, 1952.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire County.

You state that the county highway committee of Eau Claire county, pursuant to the provisions of sec. 85.54 of the Wisconsin statutes, restricted the gross weight of vehicles upon certain highways in Eau Claire county at 10,500 pounds, and that proper gross weight limitation signs were posted upon the highways affected. You state further that two of the highways upon which the seasonal restriction was established led to and from two creameries located in Eau Claire county. It appears that the committee granted what you describe as "special permission" to two individual milk-hauling companies, exempting them from the gross weight limitation of 10,500 pounds, and that a similar exemption by way of "special permission" was granted to a local transportation company transporting school children to and from school.

You ask whether permission can be granted to individual operators of motor vehicles to exceed the 10,500 pound weight limitation where such permission is not generally granted to the public.

The authority conferred by sec. 85.54, Stats., upon local authorities to further restrict the gross weight limitations upon highways within their jurisdiction is grounded upon the necessity, during certain seasons of the year, to protect the highway from damage which might be caused by operation of vehicles in excess of the general weight limitation which the local authorities determine would protect the

highway. There is nothing in the statute empowering the local authorities to grant special permission to individuals or groups of individuals to violate such seasonal restrictions. Such action is without warrant of law, and in my opinion such permission would not constitute a defense to a prosecution for violation of the seasonal restrictions. Nor would such special permission constitute a defense to a civil action for damages brought under the language of the last sentence of sec. 85.54 (1), which reads: "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."

In my opinion, seasonal restrictions must be of uniform application as to all users of the highway. This is apparent from the clear language of the statute in question.

SGH

Public Assistance—Old-Age Assistance—Administrator's fees paid into the county treasury pursuant to sec. 49.26 (3) (b), Stats., are to be computed as a reduction in the expenditures incurred in administration of old-age assistance, in determining the state and federal aid to be paid under sec. 49.51 (3).

May 23, 1952.

DONALD E. REILAND,
District Attorney,
Wood County.

ROBERT C. JENKINS,
District Attorney,
Portage County.

You have inquired whether any sums paid to a county employe, as administration fees pursuant to sec. 49.26 (3) (b), Stats., should inure solely to the benefit of the county without being shared by the state and federal governments.

The answer to your question is "No." The state and federal governments indirectly are benefited by the reduction in costs from the administration fees for the following reasons. Sec. 49.26 (3) (b) reads:

"If no qualified person shall apply for administration of the estate of a beneficiary of old-age assistance within 60 days after death, the county agency shall so apply. Any fee allowed a full-time or part-time employe of the county welfare department as administrator of such estate shall be paid by him into the county treasury to be credited to the agency's appropriation as a reduction in cost. The agency shall report to the county board at the November meeting concerning collections so made, fees allowed employes and pending probate proceedings."

Sec. 49.25, Stats., provides in part:

"* * * The net amount recovered pursuant to this section or section 49.26 shall be paid to the United States, the state and its political subdivisions, in the proportion in which they respectively contributed to such old-age assistance. * * *"

In view of the fact that sec. 49.26 (3) (b) expressly provides for the payment of the administrator's fees to the county treasury "to be credited to the agency's appropriation as a reduction in cost," the specific provision would prevail over sec. 49.25 if the two conflict, even though the fees are recovered "pursuant to" sec. 49.26.

Sec. 49.25 deals primarily with recoveries of old-age assistance. The administrator's fee does not represent recovery for old-age assistance but rather compensation for services performed in connection with the recovery.

Presumably the services are performed by the administrator during time for which he is compensated by the county as an employe; else provision would not be made for payment of the fee into the county treasury. The receipt of the fees, accordingly, operates to reduce the cost of administration borne by the county.

Sec. 49.51 (3) (a) and (b), Stats., provides for reimbursement of the counties "for expenditures incurred in the administration of old-age assistance." Subsec. (3) (b) relating to state aid provides in part:

“* * * In no event shall reimbursement to any county under this subsection exceed its total expenditures for administration * * *.”

Sec. 49.51 (3) (c) provides that state aid for administration under that section “shall be paid monthly on certification of the state department of public welfare, at the same time and in the same manner as state and federal aid for old-age assistance.” State and federal aid for old-age assistance is paid pursuant to sec. 49.38 of the statutes. The provision in sec. 49.51 (3) (c) to the effect that aid for administration shall be paid “in the same manner” as aid for assistance is apparently intended to make applicable the provisions of sec. 49.38 (1) relating to the time and manner of payment. The last sentence of sec. 49.38 (1) reads:

“To facilitate prompt reimbursement the certification of the department may be based upon the certified statements of the county officers, provided that any necessary audit adjustments for any month of current or prior fiscal years may be included in subsequent certifications.”

Opinions were given in 31 O. A. G. 40, 51, and 30 O. A. G. 71, 79, that the right to make necessary audit adjustments includes the right to take credit for earlier overpayments. Strictly speaking, however, it is probably not necessary to refer either to the quoted provision from sec. 49.38 (1) or to look for any provision similar to that quoted from sec. 49.25 directing payment of amounts recovered to the state, United States and political subdivisions. The aid to be paid under sec. 49.51 (3) is to be based on “expenditures incurred in the administration” of old-age assistance, and is in no case to exceed the total expenditures for administration. The specific requirements of sec. 49.26 (3) (b) are to the effect that the administrator’s fee is to be credited to the agency’s appropriation “as a reduction in cost.” It was pointed out in *Hauger v. Earl*, 90 N. Y. S. 2d 637, that in the case of a self-liquidating venture, no expenditure is made or incurred. If a county is reimbursed in the amount of \$50 for sums paid to an employe in connection with the administration of old-age assistance, the expenditures on

the basis of which it is reimbursed under sec. 49.51 (3) are reduced by that amount. In other words, it is my opinion that the legislature did not intend that a county should be reimbursed twice for the same expenditure.

In practice, an administrator's fee should be credited at the time it is received in the county treasury against the expenditures incurred for administration, thus reducing the total on the basis of which federal and state aid is to be computed for the next payment. When so handled, no question of recoupment or later audit adjustment is involved.

BL

Public Assistance—Medical and Hospital Care—Medical care under sec. 49.40, Stats., may be supplied to recipients of aid to the blind and of old-age assistance who are outside the state, under the same circumstances under which the statutes authorize aids in the form of cash payments to be made, since the definitions under secs. 49.18 (1) (b) and 49.20 (2) include not only money payments but medical care.

May 26, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have asked:

1. Does a county agency have the authority to authorize and pay for medical care, under sec. 49.40, on behalf of a recipient of a social security aid who is in another state?

It is my opinion that a county agency has authority under such section to authorize and pay for medical care for a recipient of an aid who is in another state in any case where it has authority to make cash payments to such recipients.

The only statutes which would appear by their terms to authorize cash payments to persons outside the state are sec. 49.22 (2) relating to old-age assistance, which reads in part:

“* * * and provided, further, that old-age assistance may be continued when a recipient removes his residence to another state until he satisfies the residence requirements for eligibility for old-age assistance in such state.”

and sec. 49.18 (2) (a) relating to aid to the blind which includes the proviso, “provided that aid to the blind may not be continued to exceed one year to any recipient who removes his residence to another state.” The old-age provision is clear authorization to continue payments to a person outside the state; the aid to the blind provision inferentially authorizes the continuation of such payments to a person who has established eligibility.

Sec. 49.40 provides in part:

“(1) The county agency administering aid to the blind, aid to dependent children, and old-age assistance may provide for medical care needed by recipients of such aids. A person shall be considered to be a recipient if at the time such care is authorized aid to the blind, aid to dependent children or old-age assistance is being granted to him. * * * Medical care shall, as necessary, be authorized and paid for by such county agency in addition to or in lieu of money payments made within the amounts allowed by sections 49.18 (1) (a), 49.19 (5), and 49.21 (1). * * *”

One who is actually being granted aid is within the definition of a recipient under the second sentence above quoted even though he may be outside the state.

Further, the definition of aid to the blind under sec. 49.18 (1) (b) covers not only “money payments to” but also “medical care in behalf of or any type of remedial care recognized under this section or section 49.40 in behalf of blind individuals who are needy.” Similarly, old-age assistance under the definition contained in sec. 49.20 (2) covers not only “money payments to” but also “medical care in behalf of or any type of remedial care recognized under sections 49.20 to 49.38 or section 49.40 in behalf of needy individuals who are 65 years of age or older.” Medical care given as blind aid or old-age assistance falls within the foregoing definitions and may be authorized and paid under any circumstances under which the statutes authorize cash payments to be made.

You have also asked:

2. Does the department of public welfare have the authority, pursuant to sec. 49.50 (8) and 49.40, to order payment for medical care which has been furnished to a recipient of a social security aid (covered by sec. 49.40) who is in another state, when such care has not been authorized expressly or impliedly by a county agency in this state?

The same principles apply here as were discussed in connection with the first question. Since medical care under sec. 49.40 is included within the definitions of aid to the blind and old-age assistance, the department has the same authority with respect to such medical care as it has with respect to cash payments. It may order payment for medical care for a person outside the state only in the same circumstances as it could do with respect to cash payments.
BL

Counties — Officers — Money Receipts and Accounts —
County board may authorize county clerk and register of deeds to account once a month or oftener for moneys received, but may not authorize such officers to maintain separate bank accounts.

May 26, 1952.

LOUIS I. DRECKTRAH,
District Attorney,
Jackson County.

You ask whether the county board may authorize the county clerk and register of deeds to set up bank accounts in their official names. The daily fees collected by these officers would be deposited in these accounts and periodically transferred to the county treasurers.

Both of these officers are elective officials (sec. 59.12, Stats. 1951). It is assumed that both of these officers are compensated either entirely by salary or by a combination of salary and fees. In that event, the duties of such officers

in regard to the fees collected are set out in sec. 59.15 as follows:

“59.15 (1) ELECTIVE OFFICIALS. * * *

“* * *

“(b) * * * Any officer on a salary basis or part fees and part salary shall collect all fees authorized by law appertaining to his office and shall remit all such fees not specifically reserved to him by enumeration in the compensation established by the county board pursuant to paragraph (a) to the county treasurer at the end of each month unless a shorter period for remittance is otherwise provided by law.

“* * *

“(4). In the event of any conflict between the provisions of this section and any other provisions of the statutes the provisions of this section to the extent of such conflict shall prevail.”

In addition, sec. 59.73, Stats., provides:

“Every county officer and employe and every board, commission or other body that collects or receives moneys for or in behalf of the county, shall:

“* * *

“(3) Pay all such moneys into the county treasury at such time as is prescribed by law, or if not so prescribed daily or at such intervals as are prescribed by the county board.”

As said provisions in sec. 59.15 are controlling, any authority the county boards might have under sec. 59.73 to fix the interval between the time of receipt and the surrender of funds by county officers to the county treasury would be limited to requiring an accounting once a month or oftener. So limited, the board might authorize monthly settlements.

The officers may retain the moneys collected in any manner they see fit, commensurate with their fiduciary capacity, including depositing the fees in a special bank account between the dates of receipt and turning over to the county treasury. However, Wisconsin has adopted the rule of strict liability for officers handling public money. If for any reason, including failure of the bank, the officer is unable to turn the money over to the treasurer at the appointed time,

he shall be held as an insurer, with the possible exceptions of an act of God or the common enemy. 14 O. A. G. 420. No action of the county board may relieve these officers of this responsibility because the depositing statute, sec. 59.75, specifically protects only a county treasurer. A county board may not enlarge this authority on its own motion. *Reichert v. Milwaukee County*, (1914) 159 Wis. 25.

It is therefore our conclusion that the county board may authorize the county clerk and register of deeds to account for and surrender the daily fees collected by them to the county treasury at specified intervals up to one month, but may not authorize them to maintain separate bank accounts in their official names. Said clerk and register of deeds are held to the liability of an insurer while the funds are under their control and the way for them to relieve themselves therefrom is to pay the monies into the county treasury, which they can do at any time. They do not need to wait to do so until the prescribed accounting date.

HHP

Counties—Charitable and Penal Institutions—County Farm—A county has no authority, under existing statutes, to maintain a county farm as a separate enterprise.

If a farm is maintained in connection with a county hospital under secs. 46.18 and 46.19, Stats., the county board may not remove the farm from the jurisdiction of the superintendent of the hospital or from the application of statutory provisions governing operation of the hospital.

May 27, 1952.

JOHN W. TRAMBURG, *Director*
State Department of Public Welfare.

You report a situation in which a county has, for a period of years, maintained a county hospital administered according to the provisions of secs. 46.18 and 46.19 of the statutes, and in connection therewith has maintained a farm. You state that the county board recently adopted a resolution separating the farm operation from the hospital operation

and directing that the farm be conducted separately under a farm manager who will be directly responsible to the board of trustees of the county hospital. The resolution declares that the purpose of the separation is to permit the superintendent of the hospital to devote all his time to the welfare of the residents of the county hospital and home, and to enable the county board to ascertain more accurately the cost of operation of the farm and the cost of operation of the hospital.

You ask the general question: Can a county board by resolution or ordinance provide for the operation of a county farm separate in finance and management from a county home and hospital?

Among the operational details involved in your query is whether the farm operations may be removed from the mandatory uniform cost record-keeping requirements of sec. 51.08, Stats., as amended by ch. 688, Laws 1951.

Questions relating to authority of a county board are to be considered in the light of the often-repeated principles laid down in the following cases:

"It is conceded that the county has only such authority as is conferred upon it by statute. Counties are purely auxiliaries of the state and can exercise only such powers as are conferred upon them by statute, or such as are necessarily implied therefrom. 1 Dillon, Mun. Corp. (6th ed.), § 37; *Frederick v. Douglas County*, 96 Wis. 411, 417, 71 N. W. 798." *Spaulding v. Wood County*, 218 Wis. 224, 228.

"* * * They [counties] are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence have been frequently termed "quasi corporations".' 1 Dillon, Mun. Corp. § § 23, 25; 1 Beach, Pub. Corp. § 8; *Beal v. St. Croix Co.* 13 Wis. 500; *Hoffman v. Chippewa Co.* 77 Wis. 214. * * *" *Frederick v. Douglas County*, 96 Wis. 411, 417.

"A county is a governmental agency with limited powers, all of which are prescribed by the statute. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. It will hardly be

claimed that *Rock County* had power to go into the abstract business for profit, without legislative authority * * *." *Rock County v. Weirick*, 143 Wis. 500, 506.

The supreme court held in *Vaudreuil Lumber Co. v. Eau Claire County*, 239 Wis. 538, that a county might, in the performance of its authorized governmental functions, engage in incidental operations which might be beyond its authority if carried on as independent functions. It was held recently in *Heimerl v. Ozaukee County*, 256 Wis. 151, that a statute endeavoring to authorize a county to carry on an independent competitive business would be invalid unless such business involves a public function or is concerned with some element of public utility.

We need not here concern ourselves with considerations relating to the validity of a statute authorizing a county to operate a farm as an independent commercial enterprise, because we find no such statute. The only reference to a county farm which we find in secs. 59.07 and 59.08, Stats., relating to the powers of the county board, is contained in sec. 59.07 (20) which authorizes the board to appropriate money in lieu of taxes to a town in which "a county farm, asylum, hospital, or home for the aged or charitable institution or state hospital or charitable or penal institution or county or municipally-owned airport is located." The provision does not purport to authorize counties to maintain such institutions, but only to make appropriations in respect to institutions, the maintenance of which is authorized in other statutory provisions.

The term "county farm" as used in sec. 59.07 (20) would probably be interpreted with the aid of the rule of *ejusdem generis*, to refer to a farm maintained in connection with institutions of a charitable, penal or civic nature such as there enumerated. The separate reference to a county farm is explainable from the fact that such a farm—even though a part of a county home or hospital—might be located in a different town from the main part of the institution, so as to make its enumeration desirable in order to clarify the meaning of the legislature as to what towns might receive the benefit of the appropriation. At the time sec. 59.07 (20) was enacted by ch. 377, Laws 1933, there

appeared in sec. 46.18, relating to the government of a "county home, asylum for the chronic insane, tuberculosis hospital or sanatorium, house of correction, or workhouse," subsec. (7) (b), reading in part:

"The state board of control shall formulate a uniform system of keeping all the books, accounts and records, and shall prescribe and furnish blanks for a uniform system of the reports of said institutions, which shall definitely and accurately show, with respect to each institution: * * * a classified summary of all products of the farm sold, consumed, and on hand * * *."

The inclusion of the detail respecting the report of products of the farm indicates that the legislature contemplated that such farms might be maintained in connection with the institutions first enumerated, and so the reference in sec. 59.07 (20) must have been with respect to a farm so maintained, since there was no other authorization in the statutes to maintain a county farm.

Although the reference to financial reports respecting sale of products from the farm is no longer contained in sec. 46.18, it was apparently omitted as an unnecessary detail when ch. 46, Stats., was revised by ch. 268, Laws 1947.

There being no authority in the county to maintain and operate a farm as a separate enterprise, the operation of a farm could be carried on only in connection with, and as an incident to, an authorized institution. In such case its management and operation is governed by secs. 46.18 and 46.19, Stats. Under sec. 46.18 (1) the institution as a whole is to be managed by trustees. Under sec. 46.19 (2) it is for the trustees to prescribe the duties of the superintendent. Under sec. 46.19 (3) it is for the superintendent, subject to the approval of the trustees, to appoint and prescribe the duties of necessary additional officers. The entire institution is subject to the requirement of sec. 46.19 (8) relating to bookkeeping; and in the case of a county hospital, it is subject to the provisions of sec. 51.08.

The opinion was given in 40 O. A. G. 374 that an audit of records of county hospitals for the mentally infirm under sec. 51.08 (2), Stats., created by ch. 688, Laws 1951, is

mandatory. The opinion in 38 O. A. G. 487, to the effect that computations must be based on costs of the institution as a whole and not separated according to component parts, seems also to be applicable by analogy, although it related to a state institution.

For the reasons outlined, I am of the opinion that a county board may not remove a farm operated in connection with a county hospital from the jurisdiction of the superintendent of the hospital, or from the application of any statutory provision governing the operation of the institution.

BL

Criminal Law—Municipalities—Municipal Ordinances—Bail—Bail forfeited in a criminal case under sec. 354.42, Stats., belongs to the county. Secs. 288.13 and 288.17 do not apply to such forfeitures. The failure of the accused to appear does not authorize imposing a fine *in absentia* and collecting it out of the bail money. The foregoing does not apply to deposits by persons accused of speeding in violation of sec. 85.40, as authorized by sec. 85.40 (4) (a) and (b). Bail forfeited and fines imposed for violation of municipal and county ordinances belong to the municipality or the county whose ordinance was allegedly violated.

May 27, 1952.

J. JAY KELIHER,
State Auditor.

You have requested an opinion on the following questions:

“Wisconsin statutes authorize the giving of bail by a person charged with a violation of state law to guarantee his appearance in court to answer such charges. The bail may be in cash or other authorized forms. If the person so bailed fails to appear as required, the bond is forfeited and the amount thereof is ‘paid into the county treasury.’ (Sec. 354.42.)

“Question 1. What is the final disposition of such forfeited bail? Does the county retain it, or does it pay a part or all of it to the state?”

The final disposition of the forfeited bail is retention by the county. The Wisconsin supreme court in *State v. Miles*, (1881) 52 Wis. 488, 491, 9 N. W. 403, held that moneys collected on forfeited recognizances in criminal cases belong to the county. The above ruling was affirmed and quoted in *State v. Wettstein and others*, (1885) 64 Wis. 234, 25 N. W. 34.

There is one exception to the foregoing, in the case of a charge of speeding in violation of sec. 85.40. Subsec. (4) (a) authorizes the sheriff, chief of police, or clerk of the court to receive at his office from any person accused of violating that section or any county, city or village ordinance enacted under ch. 85, a deposit in money not exceeding the maximum amount of the penalty, and to release such person from arrest until the opening of court on the next succeeding day, or until a time which may be fixed for hearing the case. Subsec. (b) provides that in case the person accused fails to appear personally or by an authorized agent at the time fixed, "then the money deposited with the sheriff or clerk shall be retained and used for the payment of the penalty, which may be imposed after an ex parte hearing * * * together with the costs," the surplus if any to be returned to the person making the deposit, and in case of an acquittal the whole amount deposited shall be refunded. In speeding cases, therefore, the deposit may be applied upon a fine imposed *in absentia* and disposed of in the same manner as though the defendant had appeared for trial and been convicted.

"Question 2. In case the person admitted to bail fails to appear and answer as required, is there any way by which the forfeited bail may be applied to the payment of the fine and costs which would have resulted if the party bailed had appeared and been adjudged guilty, so as to dispose of the bail as fine and costs?"

Except as provided in sec. 85.40 (4) (a) and (b) referred to above, failure to appear and answer does *not* give rise to the right to adjudge the defendant guilty *in absentia* of the crime charged. Sec. 357.07, Stats. Consequently a person may not be fined and have costs taxed against him upon the criminal charge for failure to appear as required on his

bail bond. The forfeiting of bail does not in any way atone for or dispose of the criminal charge against a defendant and, therefore, he may be brought into court and subsequently tried on the criminal charge and if found guilty as charged, may be fined, said fine having no connection with the amount already forfeited on the bail bond.

“Question 3. What is the disposition of money deposited by a person to guarantee his appearance to answer charges of violating a county or other local ordinance (traffic, etc.) in cases where the party so charged fails to appear?”

The county board may provide for what purposes forfeitures of defendants violating county traffic ordinances shall be used. Sec. 59.07 (11), Stats. Bail money forfeited belongs to the county or municipality whose ordinance was alleged to have been violated. *Cf.* sec. 85.84, Stats.

“Question 4. Does the answer to question 2 also apply to local ordinances?”

The answer to question 4 is “No.” See the answer to question 3. In the case of city and village ordinances, an ex parte hearing is expressly authorized by sec. 66.114 (2) (a), Stats.

“Question 5. Are the provisions of sections 288.13 and 288.17 regarding state forfeitures in any way applicable to the bond forfeitures referred to in section 354.42?”

The provisions of secs. 288.13 and 288.17 regarding state forfeitures are not applicable to bail forfeitures referred to in sec. 354.42. See *State v. Miles*, (1881) 52 Wis. 488, 491, 9 N. W. 403, cited in the answer to question 1.

WAP

Municipalities — Annexation of Territory — Statutes — Construction—Thirty-day period under sec. 66.03 (2), Stats., as amended by ch. 285, Laws 1951, for clerk of municipality to which territory is transferred to certify descriptions of land involved to clerk of municipality from which territory was transferred is directory and does not defeat jurisdiction to make certification later, and the municipalities involved are not barred thereafter from proceeding with division of assets and liabilities as provided by law.

May 27, 1952.

WILLIAM J. McCAULEY,
District Attorney,
Milwaukee County.

An official opinion has been requested by your office on the proper interpretation to be given sec. 66.03 (2), Stats., relating to the basis for adjustment of assets and liabilities on division of territory, and which was amended by ch. 285, Laws 1951, to read as follows:

“Except as otherwise provided in this section when territory is transferred, in any manner provided by law, from one municipality to another, there shall be assigned to such other municipality such proportion of the assets and liabilities of the first municipality as the assessed valuation of all taxable property in the territory transferred bears to the assessed valuation of all the taxable property of the entire municipality from which said territory is taken according to the last assessment roll of such municipality. *The clerk of any municipality to which territory is transferred as aforesaid, within 30 days of the effective date of such transfer, shall certify to the clerk of the municipality from which such territory was transferred a metes and bounds description of the land area involved and upon receipt of such description the clerk of the municipality from which such territory was transferred shall certify to the supervisor of assessments of the Wisconsin department of taxation having jurisdiction over the land area involved, the latest assessed value of the real and personal property located within said area, and shall make such further reports as may be needed by such supervisor of assessments in the performance of duties required by law.*”

You state that the city of Glendale annexed a portion of the territory of the town of Milwaukee, which annexation was consummated on January 9, 1952, and that on April 11, 1951 the city of Glendale for the first time served notice on the town of Milwaukee that it would meet with the town board of the town of Milwaukee to negotiate for a division of assets between the two municipalities. This has given rise to the following questions:

1. Does the 30-day requirement in sec. 66.03 (2) operate as a statute of limitations?

2. In that respect is the statute mandatory rather than directory?

3. In the particular circumstances would it operate to forever bar a division of assets in the particular annexation?

It is your conclusion, based in part upon participation in the drafting and guidance of the bill through the legislature, that the amendment is mandatory rather than directory, that it is not a statute of limitations, and that it does not forever bar a division of assets in a case such as the one arising here.

The amendment clearly relates back to the subject matter discussed in sec. 66.03 (2) as it existed prior to the amendment, namely the assignment of assets and liabilities upon the basis of the assessed valuation of the taxable property in the territory transferred.

It is apparent from the reading of sec. 66.03 (2) prior to the amendment that while it set up the basis or principle to be followed on dividing assets and liabilities in the case of the transfer of territory from one municipality to another, it failed, however, to provide the necessary machinery or procedure for the municipal authorities to follow in applying the rule or at least in initiating the appropriate proceedings.

The amendment attempts to fill that gap by stating who is to act and when the action is to be taken. The files in the legislative reference library indicate that the amendment was requested by Milwaukee county and that Bill No. 471, S., was brought in by C. Stanley Perry, assistant corporation counsel of Milwaukee county, who also drew amendments 1, S., and 2, S. The subject of the request for bill drafting was "valuation for tax purposes" but there is

no information in the bill drafting files which throws any particular light on the specific questions raised here.

Ch. 285, Laws 1951, is entitled "An Act to amend 66.03 (2) and 73.05 (4) and to repeal and recreate 70.61 of the statutes, relating to the determination by the county board of the valuation of municipalities for taxation purposes."

There is nothing whatsoever in the stated purpose or the language of the statute to indicate that if the clerk fails to carry out the duty imposed upon him by the amendment within the time therein specified he is not to act at all or that the municipalities involved are to be forever barred from making the division of assets and liabilities contemplated by the statute.

As to whether a statute is mandatory or directory, the rule seems to be that one must look to the subject matter, consider the importance of the provisions, and the relation of the provisions to the general object intended to be secured by the act. Sutherland, *Statutory Construction*, 3d. Ed., § 2802. However, where the time or manner of performing the action directed by statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only. Sutherland § 2804.

Our supreme court has stated the rule more precisely in the following language in *Appleton v. Outagamie County*, 197 Wis. 4, at pp. 9 and 10:

"* * * When there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be so done it may work an injury or wrong; nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all,—the courts will deem the statute directory merely. *State ex rel. Cothran v. Lean*, 9 Wis. 279. *Vide Mills v. Johnson*, 17 Wis. 598; *Burlingame v. Burlingame*, 18 Wis. 285; *Application of Clark*, 135 Wis. 437, 115 N. W. 387."

In the above case it was held that sec. 70.62, Stats., which provides that the county board "shall" at its November session levy taxes for county purposes, is considered to be

directory and not a mandatory statute, and that a levy made by a county board at a special meeting held in December was timely and within the statutory power of the board.

No good reason suggests itself why the same principle should not apply here. While the clerk neglected to comply with the direction of the statute both as to time and procedure it is a case of "better late than never" and to rule that he is now without authority to make a tardy compliance with the law would defeat its purpose and perhaps result in the grossest injustice to many taxpayers.

It is therefore our conclusion that the 30-day provision in sec. 66.03 (2) was not intended to operate as a statute of limitations; that the statute is directory as to time although mandatory in the sense that it is to be complied with tardily rather than not at all; and that the failure to comply with the statute within the time specified is not fatal to the jurisdiction of the authorities concerned to proceed with the division of assets and liabilities as provided by the statute.

WHR

Automobiles and Motor Vehicles—Registration—Where sole operation of a motor vehicle consists of crossing a public highway, such crossing constitutes operation "upon" a public highway within meaning of sec. 85.01, Stats., requiring registration and payment of license fee and compliance with all applicable statutes relating to the law of the road, including weight limitations.

May 28, 1952.

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

You request my opinion upon two questions:

1. Is a vehicle which uses a public highway only to cross it, subject to registration requirements?
2. Would a vehicle performing this operation be subject to the highway weight limitations as well as other motor vehicle laws?

In each instance I assume you refer to a motor vehicle as defined in sec. 85.10, Stats., which you concede would otherwise be required to be registered under the provisions of sec. 85.01 if operated generally upon the public highways.

Sec. 85.01 provides in substance that no motor vehicle or trailer or semitrailer used in connection therewith shall be operated upon any highway unless the same shall have been registered in the office of the motor vehicle department and the registration fee paid. Subsequent subsections of the statute grant the favor of exemption to certain types of vehicles and certain types of operations but there is no exemption in favor of motor vehicles which use a public highway only to cross it, and in the absence of any express exemption, it is my opinion that crossing a highway by motor vehicle constitutes operation "upon" a highway within the meaning of sec. 85.01, which requires registration.

Nor, on the basis of the limited facts which you state in your request, do I perceive any reason for excusing the operator of said vehicle from complying with all other applicable motor vehicle laws, including highway weight limitations.

SGH

Adoption—Consent Required—Under sec. 322.04 (5), Stats., a valid adoption order cannot be made with respect to a child under the guardianship of the state department of public welfare without the consent of such department.

June 3, 1952.

HERBERT J. MUELLER,
District Attorney,
Winnebago County.

You inquire whether a court may enter a valid order of adoption without the consent of the state department of public welfare in a case where the children to be adopted have been committed to the permanent custody, control and guardianship of such department. You point out that sec.

322.04 (5) provides that adoption shall not be granted in such a case "until a detailed report and recommendation and consent by such guardian are filed with the court," but you indicate that the question has been raised whether the quoted provision takes away from the court its judicial right to grant an adoption without consent of a state administrative department.

Since adoption was unknown to the common law and exists only by force of statute, there are no inherent judicial powers involved. While the legislature may provide for adoption through judicial proceedings, it could, if it chose, provide for adoption proceedings without any court action at all. See 1 Am. Jur. 622, 633, and 635 which reads in part as follows:

"The right of adoption * * * was unknown to the common law of England, and exists in this country in those jurisdictions having that law as the basis of their jurisprudence, only by virtue of statute. * * *" (p. 622)

"Since adoption proceedings are wholly statutory, the statutes on this subject must be looked to as to the proceedings by which the adoption is to be effected. In the statutes of the different states these proceedings vary from the mere consent of the parties properly evidenced to the more formal judicial proceedings. * * *" (p. 633)

"The most common method for effecting an adoption is by a judicial proceeding. The action of the court is invoked by an application or petition, and the adoption is effected by the decree of the court. While the power of a court or judge under such a statute calls for the exercise of judgment, and is in that sense judicial, and the judge, in the performance of his duties under such a statute, exercises judicial functions, yet the proceeding is not a judicial proceeding in the full sense of that term. The power vested in the court or judge is no part of the judicial power mentioned in the Constitution and by it vested in the courts, as distinguished from an individual judge thereof. * * *" (p. 635)

The supreme court of this state has regularly held that statutory conditions prescribed for adoption proceedings are absolute prerequisites to a valid order of adoption. One of the most recent decisions was in *Adoption of Morrison*, 260 Wis. 50, 66-67, in which the supreme court invalidated

an order of adoption issued without the concurrence of the guardian ad litem of a minor mother. The court quoted some earlier decisions as follows:

"In *Adoption of Bearby* (1924), 185 Wis. 33, 34, 200 N. W. 686, this court stated:

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

"This statement was cited with approval in *Will of Bresnehan* (1936), 221 Wis. 51, 65, 265 N. W. 93. In *Will of Mathews* (1929), 198 Wis. 128, 132, 223 N. W. 434, it was also stated that adoption proceedings in this state are statutory and that the statute must be strictly followed.

"The trial court was of the opinion that by reason of the fact that the mother of the child had the advice of her own mother and her attorney at the time she signed the consent, and that the consent was signed before Judge Sullivan who had fully explained to her the contents and its effect, the minor had received all the advice, counsel, and protection that a guardian *ad litem* could have supplied, and therefore there had been substantial compliance with the requirements of the adoption statutes without the guardian *ad litem* having concurred in such consent. With this we cannot concur, because the statute must be strictly construed and the concurrence in the consent of the guardian *ad litem* is a jurisdictional requirement which cannot be waived by the court."

BL

Elections—Nomination Papers—Party Committeeman—
Secs. 5.05 and 5.35, Stats., construed. The last day for filing nomination papers for the office of party committeeman is the second Tuesday in July before the primary.

June 4, 1952.

FRED R. ZIMMERMAN,
Secretary of State.

You ask in your letter whether the last day for filing of nomination papers for the office of precinct committeemen is the last Tuesday in July before the primary or the second Tuesday of that same month.

The pertinent part of sec. 5.35 (2), Stats., referring to party committeemen, reads as follows:

“* * * Nomination papers shall be in substantially the same form as provided in section 5.05 of the statutes and shall be filed with the county clerk not later than the last Tuesday of July before the primary. * * *”

The pertinent part of sec. 5.05 (1), Stats., referring to nominations, reads as follows:

“No candidate’s name may be printed upon an official ballot used at any September primary unless not later than 5 p. m. central standard time on the second Tuesday of July of the year in which such primary is to be held a nomination paper has been filed in his behalf * * *.”

Were these two sections of the statutes to stand alone it would be clear that the filing date for all other offices covered thereby would be the second Tuesday while the date for the office of party committeemen would be the last Tuesday. However, such a result would produce a three-week delay in the printing of the ballots and a corresponding delay in sending them to servicemen to permit absentee voting pursuant to sec. 11.70, Stats. You state that this delay would make it impossible to get ballots to servicemen in distant places in time for the primary (the date for which was advanced one week) and would defeat the purposes of sec. 11.70.

We are not bound to accept the literal reading of a statute where the result would be contrary to the intent. See

Fass v. Gray, Court of Appeals, D. C., May 15, 1952, 20 U. S. Law Week 2542. It is a well-settled principle of statutory construction that a statute must be interpreted as a whole. *In re Nagler*, 194 Wis. 437, 216 N. W. 493. Statutes are construed in such a manner as to make every part effective, harmonious and sensible. If two provisions as literally written are irreconcilable, they are so construed as to give effect to the intent of the legislature. See Crawford on Statutory Construction, pp. 261, 263.

We are not unmindful that there is a line of decisions which holds that a court is "bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the legislature which enacted it." (Dissenting opinion of Justice Sutherland in *Boston Sand & Gravel Co. v. U. S.*, 278 U. S. 41, 55, 73 L. Ed. 170, 49 S. Ct. 52.) However, the more persuasive authority supports the court's opinion in that case, written by Justice Holmes, who said:

"It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." (p. 48)

In this case the court held that while a statute appeared to make the United States liable for interest on damages, such was not the *intention* of the congress.

The extent to which a court can go in giving effect to legislative intent which might be contrary to the wording of a statute was stated in *Kitchen v. Southern Ry.*, 68 S. C. 554, 48 S. E. 4, wherein the court stated (p. 7):

"* * * when the intention can be ascertained with reasonable certainty, words may be altered or supplied in the statute, so as to give it effect. * * *"

and again on p. 8:

"* * * To this end, [giving effect to the entire statute] words have been supplied and rejected, their collocation altered, and wrong dates and figures corrected. * * *"

In this case the court held that the word "of" in the statute should be replaced by the word "or" in order to carry out the over-all intent of the statute.

A review of the history of secs. 5.05, 5.35 and 11.70, Stats., reveals that as they now exist they were all created as part of ch. 455, Laws 1951, which was a fairly extensive revision of the general election laws and which also advanced the date of the September primary.

Specifically, sec. 5.05 formerly read that nomination papers were to be filed by the *last* Tuesday of July (before the general election) and was changed, *inter alia*, to make the date the *second* Tuesday for the specific purpose of providing for the execution of sec. 11.70 which was newly created by the same chapter. This change of sec. 5.05 was effected by sec. 8 of ch. 455, and the enactment of sec. 11.70 by sec. 83.

Prior to this amendment, the law in respect to filing nomination papers for the office of committeeman corresponded exactly with that for filing for other offices. It was then numbered sec. 5.19. Sec. 34 of ch. 455 renumbered this section 5.35 but did not change it in any other respect. The renumbering was for purposes of improving the organization of the chapter. The failure to change this section indicates an intention to have it continue to operate as it had, that is in conformity with sec. 5.05 and the rest of the statute. Examination of the surrounding circumstances shows good reasons to have the provisions relative to the nomination of party committeemen conform to the provisions relative to other nominations and no reason to make them different. They also indicate that conformity represents the actual legislative intent. To carry out this intention it is necessary to treat the continuation of the "last Tuesday of July" provision in this subsection as an oversight and to construe this to mean the "second Tuesday of July." No other construction is consistent with the over-all aim of the revision of the election laws by ch. 455, Laws 1951.

It would be possible to interpret this statute so as to permit nomination papers for party committeemen to be filed after the second Tuesday and before the last Tuesday but to keep such names off the printed ballot. Such an inter-

pretation, while literally satisfying the clauses which we have discussed, would do violence to the statute as a whole. The statute serves the purpose of determining what names shall be printed on the ballot. It could not have been intended to be so construed.

For these reasons I am of the opinion that the last day for the filing of nomination papers for the office of party committeeman is the second Tuesday in July preceding the primary.

GFS

Intoxicating Liquors—Minors—Operator's License — A minor who is a member of the immediate family of the licensee is deemed to hold an operator's license under sec. 66.054 (11), Stats., notwithstanding the amendment of that subsection by ch. 104, Laws 1951, which prohibits issuance of an operator's license to any person under the age of 21.

June 4, 1952.

RONALD J. CAREY,
District Attorney,
Dunn County.

You inquire whether or not a minor son of an owner and operator of a "Class A" retail fermented malt beverage and intoxicating liquor establishment may act as a clerk in the store in the absence of his father who is the licensee.

The answer is "Yes." Sec. 176.05 (11), Stats., provides as follows:

"There shall be upon premises operated under a retail 'Class A' or 'Class B' liquor license, at all times, the licensee or some person who shall have an operator's license under section 66.054 and who shall be responsible for the acts of all persons serving as waiters, or in any other manner, any fermented malt beverages or intoxicating liquor to customers. No person other than the licensee shall serve fermented malt beverages or intoxicating liquor in any place operated under a retail 'Class A' or 'Class B' liquor license unless he shall possess such operator's license, or unless he

shall be under the immediate supervision of the licensee or a person holding an operator's license who shall be at the time of such service upon said premises."

Sec. 66.054 (11) (a), Stats., provides as follows:

"Every city council, village or town board may issue a license known as an 'Operator's' license, which shall be granted only upon application in writing. *Said operator's license shall be issued only to persons 21 years of age or over of good moral character, who shall have been citizens of the United States and residents of this state continuously for not less than one year prior to the date of the filing of the application. Such licenses shall be operative only within the limits of the city, village or town in which issued. For the purpose of this subsection any member of the immediate family of the licensee shall be considered as holding an operator's license.*"

Sec. 176.32 (1), Stats., provides in part as follows:

"Every keeper of any place, of any nature or character, whatsoever, for the sale of any intoxicating liquor, who shall either directly or indirectly suffer or permit any person of either sex under the age of 21 years, unaccompanied by his or her parent or guardian, or suffer or permit any person to whom the sale of any such liquors has been forbidden in the manner provided by law, *who is not a resident, employe, or a bona fide lodger or boarder on the premises* of such licensed person, to enter or be on such licensed premises for any purpose, excepting the transaction of bona fide business other than amusement or the purchase, receiving or consumption of edibles or beverages, shall, for every such offense, be liable to a penalty not exceeding \$250, besides costs, or imprisonment in the county jail or house of correction not exceeding 60 days; and any such person so remaining as aforesaid, *who is not a resident, employe, or a bona fide lodger or boarder on the premises, or who is not accompanied by his or her parent or guardian,* shall also be liable to a penalty of not more than \$20, besides costs, or imprisonment not exceeding 30 days in the county jail or house of correction. [There follow certain exceptions not material here.]"

It is clear that the minor son, being a member of the immediate family of the licensee, is "considered as holding an operator's license," by virtue of sec. 66.054 (11) (a) above quoted. Although that statute, as amended by ch. 104,

Laws 1951, now provides that an operator's license can be issued only to persons 21 years of age or over, that provision was not inserted in the last sentence relating to members of the immediate family. A great many tavern keepers and liquor store owners employ their minor children in their businesses, often leaving them in charge of the licensed premises, and if the 1951 amendment had been intended to prohibit this the legislature would undoubtedly have inserted the 21-year limitation in the last sentence of sec. 66.054 (11) (a) as well as in the second sentence.

Since the son is an employe of the licensee, his presence in the licensed premises in the absence of his parent or guardian is not prohibited by sec. 176.32 (1) above quoted.
WAP

Criminal Law—Felony—Public Officers—Vacancy—Elections—Elector—Member of village board convicted of embezzlement of funds of a business of which he was employe and manager, in violation of sec. 343.20, Stats., is thereby deprived of his right to vote until restored to civil rights, pursuant to art. III, sec. 2, Wis. Const. His office is thereby vacated and he is thereafter ineligible for public office in this state by virtue of sec. 17.03 (5), Stats., and art. XIII, sec. 3, Wis. Const.

June 4, 1952.

RONALD J. CAREY,
District Attorney,
Dunn County.

You state that a member of the village board of a village in your county was convicted in the circuit court of Dunn county of embezzlement of funds of a business of which he was an employe and manager, in violation of sec. 343.20, Stats. You request an opinion on two questions:

1. Does the conviction of embezzlement deprive the defendant of his right to vote under art. III, sec. 2, of the Wisconsin constitution?

2. Does such conviction create a vacancy in his office on the village board under art. XIII, sec. 3, of the Wisconsin constitution?

The answer to both questions is "Yes."

Art. III, sec. 2, of the constitution provides in part: "nor shall any person convicted of treason or *felony* be qualified to vote at any election unless restored to civil rights."

The term "felony" as used in the foregoing section means such offenses as were felonies at the time the constitution was adopted. 13 O. A. G. 141; 22 O. A. G. 252.

R. S. 1839, pages 353-354, § 23, which was in force when the constitution was adopted, provided as follows:

"That if any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person or of any co-partnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any money or property of another, which shall have come to his possession or shall be under his care by virtue of such employment, he shall be deemed by so doing to *have committed the crime of larceny.*"

Although embezzlement was not a felony at common law, the foregoing statute had the effect of making a person who embezzled money or property of a corporation, partnership, or private person, guilty of larceny. Larceny was a felony at common law. 52 C. J. S. 779—Larceny, § 1, a. Therefore such embezzlement was a felony at the time the constitution was adopted and was a felony within the meaning of art. III, sec. 2 of the constitution.

Art. XIII, sec. 3 of the constitution provides in part as follows: "no person convicted of any *infamous crime* in any court within the United States * * * shall be eligible to any office of trust, profit or honor in this state."

Sec. 17.03 (5), Stats., provides in part as follows:

"17.03 Any public office, including offices of cities, villages and school districts, however organized, shall become vacant upon the happening of either of the following events:

"* * *

“(5) His conviction by a state or United States court of and sentence for treason, *felony* or other crime of whatsoever nature punishable by imprisonment in any jail or prison for one year or more, or his conviction by any such court of and sentence for any offense involving a violation of his official oath, in either case whether or not sentenced to imprisonment. * * *”

Sec. 353.31, Stats., provides as follows:

“A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor.”

Under sec. 343.20, Stats., embezzlement of more than \$20 is punishable by imprisonment in the state prison and is therefore a “felony” within the meaning of secs. 17.03 (5) and 353.31 quoted above. Moreover, it is an “infamous crime” within the meaning of art. XIII, sec. 3, Wis. Const. In *Becker v. Green County*, (1922) 176 Wis. 120, 124, it was held that conviction of violation of the federal espionage act of June 15, 1917 caused a vacancy in the office of county judge. In that case the supreme court stated in part as follows:

“* * * We have no doubt that the crime of which he was convicted was infamous within the meaning of that term as used in the constitution as well as the statute. While there has been much debate as to what constitutes an infamous crime, we think, by the great consensus of authority upon the subject, it is now deemed to mean as here used—a crime punishable by imprisonment in the state prison. 12 Cyc. 135; Words & Phrases, 3573 *et seq.* * * *”

Since the defendant was convicted in circuit court, I assume that the amount embezzled exceeded \$20.

WAP

Public Assistance—Medical and Hospital Care—Since enactment of ch. 725, Laws 1951, creating subsecs. 49.18 (1) (b), 49.19 (1) (c) and 49.20 (2), Stats., medical care may be furnished “in behalf of” beneficiaries of aid to the blind, aid to dependent children, and old-age assistance.

The limitations in amount of aid which may be paid as blind and old-age assistance under secs. 49.18 (1) (a) and 49.21, Stats., apply to medical care as well as cash payments made to recipients under those sections; but medical care under sec. 49.40, Stats., may be furnished “in addition,” even though it exceeds such fixed maximum.

Reimbursement under secs. 49.18 (10) and 49.38 (1), Stats., of “30 per cent of any amount paid to an eligible recipient” can be made only with respect to aid furnished in the form of cash payments to the primary beneficiaries of aid to the blind and old-age assistance.

June 17, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You ask three questions respecting payment of medical care in behalf of recipients of social security aids:

1. Can medical care be furnished “in behalf of” recipients of aid to the blind, aid to dependent children and old-age assistance under secs. 49.18, 49.19, and 49.20 to 49.38, Stats., respectively?

The answer is “Yes.”

Ch. 725, Laws 1951, created secs. 49.18 (1) (b), 49.19 (1) (c) and 49.20 (2) of the statutes, defining aid to the blind, aid to dependent children, and old-age assistance. The definitions are:

49.19 (1) (c) “The term ‘aid to dependent children’ means money payments with respect to, or medical care in behalf of or any type of remedial care recognized under subsections (1) to (9) or section 49.40 in behalf of, a dependent child or dependent children, and includes money payments or medical care or any type of remedial care recognized under said subsections * * *.”

49.18 (1) (b) “For the purposes of this section, the term ‘aid to the blind’ means money payments to, or medical care

in behalf of or any type of remedial care recognized under this section or section 49.40 in behalf of blind individuals who are needy * * *."

49.20 (2) "The term 'old-age assistance' means money payments to, or medical care in behalf of or any type of remedial care recognized under sections 49.20 to 49.38 or section 49.40 in behalf of needy individuals who are 65 years of age or older. * * *"

Ch. 725, Laws 1951, was enacted from Bill 382, S., which was presented to the legislature with explanatory notes. It contained the following notes explaining the purpose of the definitions of aid to dependent children and old-age assistance respectively:

"NOTE: Defines aid to dependent children to include payments for medical care as permitted under P. L. 734 (H. R. 6000)."

"NOTE: Defines old-age assistance in terms of new federal matching for payments to residents of certain public medical care institutions, private institutions and direct payments for medical care."

Since the definition of aid to the blind also includes "medical care in behalf of" needy blind individuals, as well as money payments to them, the legislative purpose is apparent to authorize payment for medical care under proper conditions.

2. If medical care can be furnished in behalf of recipients of aid to the blind and old-age assistance under secs. 49.18 and 49.20 to 49.38 respectively, does the \$75 monthly maximum specified in secs. 49.18 (1) (ch. 432, Laws 1951) and in 49.18 (10) for aid to the blind, and in secs 49.21 (1) and 49.38 (1) for old-age assistance, apply to the total of such aid furnished or does such \$75 monthly maximum apply only to the money payments made to such recipients?

Secs. 49.18 (1) (a) and 49.21, Stats., contain limitations on the amount of aid which may be granted under those sections. The limitation is applicable to all payments made under those sections; but sec. 49.40, Stats., authorizes medical care "in addition to or in lieu of money payments made within the amounts allowed by sections 49.18 (1) (a), 49.19 (5) and 49.21 (1)."

Sec. 49.40 was amended by ch. 725, Laws 1951, to include the quoted provision. The following printed explanation was included on the bill by which the amendment was proposed:

"Note: This amendment is intended to take care of 2 situations as follows:

- (a) to permit payments for medical care in addition to aid paid to eligible persons under the sections enumerated and the limitations as to amounts shall not apply to such payments for medical care.
- (b) to permit making payments for medical care directly to the vendor thereof on behalf of any person who though eligible for aid or assistance under any one of the sections enumerated is actually not receiving a money payment."

Under sec. 49.40 medical care may be given in addition to the maximum payments permissible under secs. 49.18 and 49.21, to recipients of aid to the blind and of old-age assistance.

3. Does the language in secs. 49.38 (1) and 49.18 (10) reading "plus 30 per cent of any amount paid to an eligible recipient" mean that the 30 per cent reimbursement referred to in that language can be made only when aid to the blind and old-age assistance furnished under sections 49.18 and 49.20 to 49.38 are furnished as money payments to the recipients of those aids, rather than as medical care in behalf of such recipients?

As you have pointed out: "The above quoted language was enacted as Chapter 432 Laws of 1951 and published on June 30, 1951. (This same language in 49.38 (1) was re-enacted as Chapter 718 Laws of 1951, published on August 11, 1951.) Chapter 725, Laws of 1951, containing the new definitions of aid to the blind and old-age assistance (sections 49.18 (1) (b) and 49.20 (2) respectively) was not published until August 16, 1951."

Although the term "eligible recipient" is not expressly defined, both the terms "eligible" and "recipient" are used throughout the provisions relating to aid to the blind and old-age assistance with reference to the primary beneficiaries of the aid and to no others. See, for example, secs.

49.18 (1a), (2) (a), (5), (6) (a), 49.22 (2), 49.27 (2), Stats.

It is my opinion, therefore, that the phrases "amount paid to an eligible recipient" as used in secs. 49.18 (10) and 49.38 (1), relating to reimbursement of counties, include only direct payments to the primary beneficiaries.

Sec. 49.40 (2), Stats., contains reimbursement provisions with respect to medical expenditures "in addition to or in lieu of money payments."

BL

Public Assistance—Soldiers, Sailors and Marines—The term "authorities charged with the relief of the poor" used in sec. 45.20, Stats., refers to such authorities of the county or municipality as are charged with responsibility for administering relief under secs. 49.02 and 49.03, Stats. Sec. 45.20 does not apply to, or limit, aid which a county may provide under secs. 45.10 and 45.14.

June 17, 1952.

JOHN BOSSHARD,
District Attorney,
La Crosse County.

You have asked my opinion as to the meaning of the phrase "the authorities charged with the relief of the poor," as used in sec. 45.20 of the Wisconsin statutes, which reads in its entirety:

"Temporary aid shall be given, granted, furnished and provided, according to the provisions of chapter 49, to and for any honorably discharged indigent soldier, sailor or marine of any war of the United States and the indigent wife, widow or minor child of any such, without requiring the removal of any such person to any county home, but such temporary aid shall not continue longer than three months at any one time or in any one year unless the authorities charged with the relief of the poor shall determine otherwise."

It is my opinion that the phrase above quoted refers to the officials or the department administering relief on behalf of the county or municipality, whichever has the responsibility, pursuant to secs. 49.02 and 49.03 of the statutes.

Your county veterans' service commission has no function whatever to perform under sec. 45.20. If your county is operating under sec. 49.03, it would appear that the agency which you designate as your outdoor relief department is the proper agency to act under sec. 45.20.

The opinion was given in 38 O. A. G. 145, that ch. 45, Stats., establishes two separate and distinct systems under which needy veterans may obtain assistance. The opinion reads in part:

“* * * The first system, under secs. 45.10–45.19, is under the jurisdiction of the county veterans' service commission. It would appear that aid under this system is available to all persons of the classes mentioned residing in the county. * * *

“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. As pointed out in XXXVII Op. Atty. Gen. 384, this statute was originally adopted at a time when the poorhouse and the poor farms were the customary method of administering general relief, and the statute was intended to spare the indigent soldier or sailor from the indignity of going to the county home; that is its sole present effect. Aid given under this section is identical with any other aid given under ch. 49. * * *”

It was indicated in 37 O. A. G. 384 that sec. 45.20, Stats., is no longer of any substantial significance. Whatever significance or applicability it has, however, is limited to aid given to veterans under ch. 49 of the statutes as a form of general relief.

If a county has not made provision by tax levy, under sec. 45.10, for funds to administer relief under sec. 45.14, so that the only funds available for relief of veterans are those provided for general relief under ch. 49, then of course the limitations of sec. 45.20 apply and the authorities charged with administering relief in the locality

involved must determine whether the applicant is entitled to aid as a dependent person.

The opinion was given in 39 O. A. G. 26 and in 21 O. A. G. 522 that it is for the county board to determine whether it desires to maintain a complete system of relief for veterans, over and above that maintained for the administration of relief generally. It was said at 39 O. A. G. 30:

"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."

BL

State—Officers and Employes—Salaries and Wages— Officials and employes referred to in secs. 140.01, 140.14 (3), 145.03 (1), 146.30 (8) (c), 156.02 (1), 158.05 (3) and 159.04 (4), Stats., are entitled to per diems for days spent in traveling to and from official meetings and for days when actually and necessarily engaged in official duties whether in official meetings or otherwise. Under sec. 159.05 (1) compensation is limited to days in attendance at official meetings only.

June 23, 1952.

DR. CARL N. NEUPERT,
State Health Officer.

You have called attention to the fact that under various provisions of the statutes relating to the state board of health and its advisory committees and committees of examiners appointed by the board, per diems are set up for the services performed and the board has had difficulty in determining, in some instances at least, whether the per diem is applicable only for the day or days actually spent in attending meetings or whether the fee is payable for the day preceding or following the meeting when travel time only is involved.

By way of illustration, in one specific instance a member of the advisory hospital council travels from the northern part of the state so that the travel time involves approximately 9 hours each way by car, and in another instance barber examiners take examination books back to their homes for correction.

This gives rise to the questions of whether or not it is proper to pay a per diem for the day or days spent in travel to and from an official meeting, and whether or not it is proper to pay a per diem for work other than attendance at an official meeting such as that involved in correcting examination papers at home.

Inasmuch as the subject matter involved here is purely statutory, reference must be made to the particular statutes in question, bearing in mind that no money may be paid out of the state treasury except in pursuance of an appropriation by law, art. VIII, sec. 2, Wis. Const., and that statutes relating to the fees and compensation of public

officers must be strictly construed in favor of the government. 46 C. J. 1019.

The sections applicable to the state board of health advisory committees and examining committees to which you have referred us are secs. 140.01, 140.14 (3), 145.03 (1), 146.30 (8) (c), 156.02 (1), 158.05 (3), 159.04 (4) and 159.05 (1).

Sec. 140.01 relating to the state board of health provides, among other things, that "each member of the board, except the secretary, shall be paid \$10 per day when actually and necessarily engaged in his duties, but no member shall receive more than \$600 in any fiscal year."

The question presented by this section is whether a board member can be said to be actually and necessarily engaged in his duties when he is traveling to and from meetings and whether when not sitting with the board he is so engaged, as for instance when he is studying the transcript of some hearing where, after reading the testimony, the board must make its findings of fact, conclusions of law, and order. The same would apply if board members are called upon individually to correct examination papers, although normally there would be little if any of this type of work for members of the state board of health as distinguished from examiners appointed by them in various fields.

The question of whether members of various boards who are compensated on a per diem basis may be paid for days traveling to and from board meetings has caused the courts some trouble and the decisions are not uniform, as appears from an annotation on the subject of per diem compensation of public officers appearing in 1 A. L. R. 276-297.

In *Weston Co. v. Blakely*, 20 Wyo. 259, 123 P. 72, the court wrote an extensive opinion and concluded that under a statute providing an annual salary of \$200 and an additional \$5 for each day actually employed in the discharge of their duties, county commissioners were entitled to the per diem for the time actually and necessarily employed in going to and from regular and special meetings of the board.

After reviewing a number of cases the Wyoming court pointed out that the statute was strictly construed in those cases where a per diem was allowed when "actually engaged in transacting county business" so as to apply only when

the commissioners were assembled at a meeting at which time only, county business could be transacted, but that when the statute does not by its terms restrict the compensation to the time covered by meetings of the board, the courts do not seem to regard the inability of a single member of the board to bind the county, or the necessity of action by the board as such to transact county business, as controlling upon the question of the right to per diem compensation.

The court said at p. 77:

“* * * When a public officer is required by law to travel away from his home or the place of his official residence to perform an official act, such travel and also in returning is on public business, though more time may be necessarily occupied in such travel than in the actual transaction of the business which has required it. And we do not regard it as a misuse of language to say that all the time so occupied is employed in performing the duty imposed. * * *”

Also at p. 77 the court said:

“We believe it to be a rule of the federal government that, unless the statute or terms of employment expressly or by clear implication provide otherwise as to compensation, an officer or employe who is paid by the day is during his term of office, or the period of his employment, entitled to the daily pay while traveling in the performance of his duty. See *Wertz v. U. S.*, 40 Ct. Cl. 397. * * *”

The North Dakota court in *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026, reached a conclusion contrary to that arrived at by the Wyoming court but made little effort or no effort to analyze the case law on the subject and apparently overlooked the earlier case of *State ex rel. Van Horn v. Briggs*, 5 N. D. 69, 63 N. W. 206, where the same court held that the trustees of public institutions were entitled to per diems for the necessary time spent in traveling to and from board meetings under a similar statute.

It is to be noted that sec. 140.01 which we are considering at this point does not restrict board of health members to compensation only when the board is in session but provides for a per diem for each member of the board “when actually and necessarily engaged in his duties.” In

the absence of such restriction it has been held that board members are not limited to compensation for services actually performed while attending a regular meeting of the board. *State v. Ferrin*, 158 Kan. 568, 148 P. 2d 742.

In view of the foregoing it is our conclusion that a member of the state board of health under sec. 140.01 is entitled to compensation for days spent in traveling to and from official meetings and also for days spent when he is actually and necessarily engaged in his duties, whether in attendance at official board meetings or otherwise.

Sec. 140.14 (3) relating to advisory hospital council provides that council members "while serving on business of the council, shall receive compensation at the rate of \$10 per day and shall also be entitled to receive actual and necessary travel and subsistence expenses while so serving away from their places of residence."

We reach the same conclusion here. Not infrequently in a board of this size, 13 members, it becomes necessary to appoint subcommittees which may be assigned various duties requiring individual effort on days other than those when the council is meeting in regular session, and when so engaged the individual member is "serving on business of the council" within the meaning of the statute, and what has already been said with respect to travel likewise applies here.

Sec. 145.03 (1) relates to the committee of plumbing examiners appointed by the state board of health and provides among other things that "each member of the committee of examiners who is not an employe of the board shall be paid a per diem of ten dollars per day for the actual number of days served by such member in the performance of his duties, and in addition thereto shall be reimbursed his actual expenses necessarily incurred in the performance of his duties."

This statute is subject to the same interpretation. No doubt these examiners are called upon to prepare examination questions in advance of examinations and they may also find it convenient to correct papers at home after the examination has been given. The statute certainly does not by express language or by implication contemplate that these services are to be rendered free or that time spent

in traveling to and from examinations is to be excluded in computing per diems.

Sec. 146.30 (8) (c) relating to the advisory committee on nursing homes provides:

“(c) Committee members, with the exception of the state health officer and the director of the department of public welfare, or their designated representatives, while serving on business of the committee, shall receive compensation at the rate of \$10 per day, plus actual and necessary travel and subsistence expenses while so serving away from their places of residence.”

We reach the same conclusion here without repeating the reasoning.

Sec. 156.02 (1) relates to examiners of funeral directors and embalmers and provides that “each member shall receive a per diem of \$10 and be reimbursed his necessary expenses for each day of actual service rendered.”

This again calls for the same interpretation.

Sec. 158.05 (3) relates to barber examiners and provides that each member of the committee shall receive a per diem of not to exceed \$15 for the actual number of days he is engaged in the performance of his duties, and in addition thereto his actual and necessary expenses.

This is interpreted the same as the other statutory provisions hereinbefore discussed.

Sec. 159.04 (4) relates to examiners in cosmetology and provides that each examiner shall receive a per diem of not to exceed \$15 for each day actually engaged in the performance of his duty and his actual and necessary expenses incurred.

The same answer is reached here.

Sec. 159.05 (1) relates to the cosmetology advisory committee and provides that the members “shall be entitled to receive a per diem of \$10 for each day in attendance at official meetings of the committee plus actual and necessary travel and subsistence expense while so serving away from their places of residence.”

Here the difference in language leads to a different result.

The compensation is limited to “each day in attendance at official meetings.” This necessarily excludes days spent in

traveling to and from official meetings as well as days which may possibly be spent on official work other than that involved in attendance at official meetings.

While the legislature's reason for making the distinction may not be apparent, a public officer takes his office *cum onere* and receives only such compensation as the law provides, however inadequate it may seem.

Moreover, the fact that the legislature has seen fit in this one particular statute to limit compensation to days in attendance at official meetings only, fortifies the conclusions hereinbefore reached respecting statutes wherein compensation is not so restricted, under the doctrine of statutory construction that the expression of the one results in the implied exclusion of others—*expressio unius est exclusio alterius*.

While the point is not specifically raised in your request for an opinion, attention is called to the fact that no particular length of time of occupation on a day is necessary to entitle an officer to his per diem. 1 A. L. R. 277. This should be kept in mind as being applicable throughout the foregoing discussion of the questions raised.

WHR

Constitutional Law — Legislature — Courts — Under the existing provisions of art. VII of the Wisconsin constitution relating to the judiciary, the legislature lacks authority to create an ambulatory court to hear administrative appeals and to assist in the work of courts where the calendar has become congested.

July 8, 1952.

EARL SACHSE, *Executive Secretary,*
Legislative Council.

You state that the legislative council has adopted the following resolution:

“RESOLVED, That the Attorney General be requested to provide the legislative council with an opinion as to whether, within the framework of our constitution, the legislature could create an ambulatory court to hear administrative appeals and assist with and expedite court work in districts where the calendar has become congested.”

Art. VII, sec. 2, Wis. Const., provides:

“The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.”

The foregoing provision would seem to preclude the creation of any state court of an ambulatory character.

The circuit courts, probate courts, justice courts, municipal courts and other inferior courts are not subject to statewide elections.

Art. VII, sec. 5, made provision for five judicial circuits until otherwise provided by the legislature, and sec. 7 pro-

vides for the election of circuit judges within the circuit. The judge must reside within the circuit, and the clerk of the circuit court of each county is elected by the people of the county.

In *Kentzler v. Chicago, Milwaukee & St. Paul Railway Co.*, 47 Wis. 641, it was pointed out that art. VII, sec. 8, of the constitution declares that the jurisdiction of the circuit courts shall extend to all matters civil and criminal within the state, but that this broad language should be construed in the light of other provisions of the constitution, and that all the clauses of the constitution taken together clearly limit the territorial jurisdiction of the circuit court to the county in which it is held, subject to a general and perhaps unlimited power of the legislature to extend its civil jurisdiction throughout the state. It is true, also, that sec. 11 provides that the judges of the circuit court may hold court for each other and shall do so when required by law.

Administrative appeals generally are now heard by the circuit court for Dane county under ch. 227 or otherwise, and while it might be possible to provide that the judges of this court could hear such appeals on an ambulatory basis in other circuits of the state, it would still not be possible to have the judges of that court chosen except through election by the qualified electors of the circuit as provided in sec. 7.

Art. VII, sec. 14, provides that a judge of probate shall be chosen in each county by the qualified electors, although the legislature has the power to abolish the office of judge of probate in any county and to confer probate powers upon such courts as may be established in such county.

Justices of the peace, under sec. 15, art. VII, are chosen by the electors of the several towns, cities and villages except in cities of the first class.

Under sec. 2 of art. VII, quoted above, the jurisdiction vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits and the legislature shall provide as well for the election of judges of the municipal courts as of the judges of superior courts, by the qualified electors of the respective jurisdictions. However, inferior courts may exercise jurisdiction in territory beyond the limits of the municipality in

which they are located. *State ex rel. Stark v. McArthur*, 13 Wis. 383. Also it has been held that an act of the legislature creating a court and naming it a municipal court, but giving it jurisdiction to send its process beyond the county, created an inferior court and not a municipal court. *French v. L. Starks Co.*, 183 Wis. 345. See, also, *Jones v. State*, 211 Wis. 9, and *State ex rel. Schneider v. Midland I. & F. Corp.*, 219 Wis. 161.

There is another type of judicial tribunal mentioned in art. VII, sec. 16, tribunals of conciliation, which section reads as follows:

“The legislature shall pass laws for the regulation of tribunals of conciliation, defining their powers and duties. Such tribunals may be established in and for any township, and shall have power to render judgment to be obligatory on the parties when they shall voluntarily submit their matter in difference to arbitration, and agree to abide the judgment or assent thereto in writing.”

This type of tribunal would obviously not be fitted to hear administrative appeals and again they are set up on a local basis, to-wit, the township.

Court commissioners are mentioned in sec. 23, art. VII, but their powers are limited to those of a judge of a circuit court at chambers.

While we are not advised as to just what the legislative council has in mind as to the type of ambulatory court it would propose, it is obvious from the provisions of the constitution discussed above that no such court could be set up as a state court with the judge to be selected by the electors of the state at large or to be appointed by the governor or otherwise, without amending the constitution. The courts that may be set up by the legislature, such as circuit courts, municipal courts and inferior courts, are all courts relating to territorial areas of less than statewide extent and the judges thereof are elected locally, so that any court set up for the hearing of administrative appeals would have to be a court fitting into such constitutional framework unless the constitution itself is to be amended.
WHR

Prisons and Prisoners—Salaries and Wages—The sum of 25 cents per day specified in sec. 56.01 (1), Stats., represents the minimum to be paid to prisoners for the work there described. The department of public welfare may provide for larger payments under the standards prescribed in sec. 53.12 (2).

July 8, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You ask whether the following provision of sec. 56.01 (1), Stats., limits to 25 cents per day the wage rate to be credited prisoners employed in making license plates, highway signs, and markers, as distinguished from those employed in other forms of prison industry:

“* * * In fixing the price of motor vehicle license plates and highway signs and markers to this state or any division thereof the value of labor of each prisoner employed at such work shall be calculated at the rate of \$1.75 per day, of which 25 cents shall be allowed as pay to the prisoner or as a benefit to his dependents. * * *”

You point out:

“If the wage rate is limited to 25 cents per day in one large prison industry, it becomes in practical effect a ceiling on earnings of all inmates. Inmate savings have been found to be a major rehabilitative factor, indeed a necessity, upon release either by discharge or parole, since the \$10 ‘gate money’ granted under sec. 53.13, Stats., is insufficient to provide support while the released prisoner is getting settled on a job. Referral to local poor relief is uncertain as well as an obstacle to placement, unfavorable to both the person and the community.”

You suggest that the quoted provision of sec. 56.01 (1) raises a question which must be resolved either by statutory construction or legislative amendment. Although it is my opinion that the quoted provision of sec. 56.01 (1) fixes a minimum, rather than a maximum, on the wage to be credited or paid to prisoners, it is my suggestion that the matter be called to the attention of the next session of the legislature for clarification. There are several statutes dealing

with compensation for prison labor which might result in differences of opinion as to legislative meaning, and it cannot be forecast with certainty what result would be reached if the question were submitted to a court.

The subject of compensation to be paid inmates of the prison is dealt with generally in sec. 53.12 (2), which reads:

"The department may provide by rules for the payment of wages to inmates. The rate of such wages may vary for different prisoners in accordance with the pecuniary value of the work performed, willingness, and good behavior."

The foregoing provision, which fixes neither a minimum nor a maximum, but leaves the question for determination according to the rules of the department, has been in effect for many years.

Sec. 4942 of the revised statutes of 1898 (among the provisions relating to leasing of convict labor) authorized the state board of control to compensate a convict whenever "by continued good behavior, diligence in labor or study or otherwise" he should surpass the general average, "by the allowance of a sum of money out of his earnings or otherwise," and to adopt rules for payment to deserving convicts on their discharge or while in prison "of such sum as it may see fit."

Ch. 353 of the Laws of 1913 added sec. 4942*a* authorizing and empowering the state board of control "to provide for the payment to prisoners confined in the state prison or in the state reformatory of such pecuniary earnings * * * as it may deem proper * * *," such earnings to be paid "out of the fund provided for the carrying on of the work in which the prisoner is engaged when employed on state account, and by the contractor when the prisoner is employed under contract."

In the same session the legislature passed ch. 716, Laws 1913, authorizing the state board of control to establish various industries for employment of prisoners and to manufacture articles for use by the state and its political subdivisions. The latter law also contained authorization for compensation of prisoners in approximately the same terms now set out in sec. 53.12 (2).

When the laws relating to the state prison were consolidated and revised by ch. 348, Laws 1919, all provisions for payment of compensation for prison labor were incorporated in sec. 53.12 (2). Ch. 519, Laws 1947, again consolidated, renumbered, and revised the statutes relating to state prisons. Sec. 53.12 was restated without substantial change. The comment of the interim committee in presenting the revision on that section was:

"53.12 is restated and is intended to cover all three prisons. Variations in the rate of wages is made optional. The provision as to contracts is omitted because prison contracts have been abolished."

After the enactment of ch. 716, Laws 1913, authorizing the state board of control to establish prison industries, a more specific enactment was adopted by ch. 386, Laws 1925, relating to manufacture of motor vehicle license plates and highway markers and signs, and adding the express provision that the value of labor of each prisoner employed at such work should be calculated at the rate of \$1.75 per day, of which 25 cents "may be allowed" as pay to the prisoner or as a benefit to his dependents. The term "may" was changed to "shall" by ch. 501, Laws 1939.

If sec. 56.01 were the sole source of the department's authority to allow compensation for prison labor, there would be no alternative but to regard the limit as 25 cents per day. At the time the provision was adopted, however, there was already in existence a statute authorizing the department to provide by rules for payment of wages which might vary in accordance with the pecuniary value of the work and other considerations. The two provisions are *in pari materia* and should be read to harmonize rather than to conflict if their terms will permit. The phrase "of which 25 cents shall be allowed as pay to the prisoner or as a benefit to his dependents" in sec. 56.01 (1) is susceptible of several different meanings without doing violence to the language. It could be interpreted to mean that no less than 25 cents shall be allowed, no more than 25 cents shall be allowed, or neither more nor less than 25 cents shall be allowed. In order to ascertain which was intended by the legislature it is permissible to consider which best har-

monizes with other statutes on the subject. Either of the latter two interpretations would conflict with the apparent purpose of the legislature in sec. 53.12 (2) to leave the question of the rate to be determined by rules of the department under the standards fixed by sec. 53.12 (2). To regard the 25 cents per day as a minimum would, to a certain extent, likewise curtail the general authority of the department under sec. 53.12 (2) but in a manner more consistent with the terms of the latter. Sec. 53.12 (2) is in permissive rather than mandatory language, which would indicate that the department is authorized by it, but not obligated, to provide for payment of wages. The provision quoted from sec. 56.01 (1) uses the term "shall" (since its amendment by ch. 501, Laws 1939) which is more generally construed as mandatory. This difference in language furnishes a basis of harmonizing the two provisions by construing sec. 53.12 (2) as leaving to the department, generally speaking, the questions whether compensation shall be allowed and how much; and construing sec. 56.01 (1) to impose upon it the duty to allow at least 25 cents per day for the kind of labor there specified.

There are two other sections of the statutes under which compensation for prisoners is authorized, but they do not limit pay under the circumstances covered by sec. 56.01. Under sec. 46.064, created by ch. 451, Laws 1951, the department may allow pay to inmates of its institutions from an appropriation made specifically for that purpose. That section expressly provides that it shall not act as a limitation on wages to be paid inmates at the Wisconsin state prison. Sec. 46.065 authorizes the department to provide for assistance of prisoners by the allowance of "moderate" wages to be paid from the appropriation for operation of the institution in which they are confined. Compensation under that section would be for labor performed in the operation and maintenance of the institution, under a different appropriation from that from which compensation for work on motor vehicle license plates, highway signs, and markers is paid.

Reference to these other sections, however, is permissible on the ground that they are statutes *in pari materia*. They

indicate a general legislative purpose to leave the maximum of wages to be paid to prisoners for work on self-supporting industries for determination under the rules of the department.

BL

Fish and Game—Private Fish Hatcheries—Conservation commission has no statutory authority to issue a private fish hatchery license for a natural lake.

The term "substantial public interest" as used in sec. 29.52 (3) (a), Stats., the private fish hatchery law, may properly be interpreted to refer to actual public user.

In doubtful cases, the conservation commission must find as a fact, on the basis of proper scientific evidence, whether a particular body of water is a natural lake or a natural pond.

July 8, 1952.

ERNEST SWIFT,

Conservation Director.

You have asked my opinion of the proper interpretation of sec. 29.52, Stats., relating to private fish hatcheries and in particular of subsec. (3) (a) which reads:

"The water areas included in the license shall not include the bed of any navigable stream and shall be limited to artificially constructed ponds and lakes, and springs or natural landlocked ponds wholly surrounded by the lands of the applicant and where no substantial public interest in such ponds or springs exists. Such public interest shall be determined by the commission through public hearing."

While not directly stated, the following questions are implicit in your inquiry.

1. Under the statute quoted, does the department have authority to issue a license for a natural landlocked lake?
2. What is the meaning of the term "public interest" as used in the statute?
3. If licenses may not be issued for natural landlocked lakes, but may be issued for natural landlocked ponds, what is the legal distinction between a lake and a pond?

In particular, you desire to know whether a license may properly be issued for a body of water in Washington county, locally known as Leinberger lake, which has the following characteristics: Area, 2 acres; depth, 20 feet; current, none; conformation, roughly oval; inlet, from an adjoining artificial pond; outlet, surface outlet to Milwaukee river in time of high water; vegetation, confined to shore waters.

In my opinion you have no authority whatsoever to issue any license for any body of water properly described as a natural lake. This conclusion clearly follows from the language of the statute which specifically authorizes the licensing of "*artificially constructed ponds and lakes*" but, when speaking of natural waters, refers only to "natural landlocked ponds" and specifically fails to repeat the word "lakes." The enumeration of subjects which may be licensed by clear rule of law excludes those which are not mentioned. *Chain Belt Co. v. City of Milwaukee*, 151 Wis. 188, 138 N.W. 621, 42 L.R.A. (N.S.) 899. The application of this rule is emphasized in the present case because of the fact that when the legislature was speaking of artificial bodies of water it specifically included lakes as bodies subject to license.

In answer to your second question, the term "substantial public interest" is so ambiguous, vague, and indefinite that there is a serious question whether it can be applied at all. If there is any public interest in the true sense of the term, meaning the right of the public to use our navigable waters for all proper public purposes as enumerated in *Nekoosa-Edwards Paper Co. v. Railroad Commission*, (1930) 201 Wis. 40, 46, 228 N.W. 144, 229 N.W. 631, then the legislature has no power to authorize you to issue any license which would invade those rights. If it was in the contemplation of the legislature to authorize a special treatment of navigable pond waters to which the public could not lawfully obtain access, then the legislation is probably valid, but should be interpreted as conferring a privilege subject to public right if access is ever lawfully obtained. Finally, if the legislature intended that the general public interest, based on the state ownership of all wild animals *ferae*

naturae living in any navigable water, should be considered, it did not use apt words to say so.

While no definite answer can be given on this question, it is my opinion that if your commission should find as a fact that there is no "substantial public interest" on the basis of evidence that the public can rarely, or never, lawfully obtain access to the body of water involved, that finding could not successfully be attacked in the courts.

In answer to your third question, the statute by its terms does authorize the issue of licenses for natural landlocked ponds in which there is no substantial public interest. Whether the particular body of water which you describe is a lake or a pond is again a question of fact which must be resolved by your commission on the basis of evidence presented to you. There are no decided cases in Wisconsin which would furnish any guide in making such a decision, and there do not appear to be any satisfactory authorities in other states which have specifically attempted to establish a legal definition of a lake as opposed to a pond. Accordingly, in my opinion, it would be proper for you to consider the definition of the terms "lake" and "pond" as set forth in the various standard dictionaries, encyclopedias, and scientific texts; further, if it is available, expert testimony from qualified limnologists may properly be considered and might prove decisive. On this point, I can only advise you that the ultimate decision must be made by your commission on the basis of the evidence which is presented to it. I further point out that before a license can issue your commission must find that the pond is landlocked.

RGT

Governor—Conservation Commission Orders—Governor does not have power, acting under sec. 29.174 (5), Stats., to approve in part and reject in part conservation commission orders.

The governor's function under said statute is to approve the order as a whole or to reject the entire order and return it to the commission for reconsideration.

July 8, 1952.

ERNEST F. SWIFT, *Director,*
State Conservation Department.

You have inquired whether the governor, or the lieutenant governor acting in his place, has the power to approve in part and reject in part a state conservation commission order under the power given him to approve or disapprove orders of the state conservation commission contained in sec. 29.174 (5), Stats.

In our opinion such power does not exist. Sec. 29.174 (5) provides that:

"All orders promulgated, under the authority of this section, shall take effect, upon approval of the governor and after publication * * *."

Said provision does not provide for partial approval of orders promulgated, but provides that "orders * * * shall take effect, upon approval of the governor." The governor's function under this statute is to approve the order as a whole or to reject the entire order and return it to the commission for revision with a statement as to the provision to which he objects.

While no cases appear to exist which consider executive vetoes of administrative orders, a wealth of authority exists with regard to executive vetoes of proposed laws. The reasoning of these opinions, when applied to the present situation, substantiates the above interpretation of sec. 29.174 (5).

The general rule with regard to veto by the executive is that:

"Except as otherwise provided by the constitution, the governor has no power to modify or change the effect of a

proposed law, or to do anything concerning it except to approve or disapprove it as a whole * * *." 59 C.J. 583, §113.

Under art. V, sec. 10, of the Wisconsin constitution, the governor has authority to veto parts of appropriation bills but only of appropriation bills. The applicable portion of art. V, sec. 10, reads as follows:

"* * * if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall * * * proceed to reconsider it. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. * * *"

The Wisconsin supreme court has ruled in *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 149, 264 N.W. 622, that the partial veto of a proposed bill other than an appropriation bill is invalid:

"* * * the attempted veto was ineffective because the subject matter of the bill did not fall within the constitutional provision authorizing a partial veto."

The court further ruled that the partial veto showed the governor's disapproval of the bill, and since the final adjournment of the legislature only one day after submission of the bill to the governor had the effect of preventing its becoming law without his approval, the bill never became a law.

Applying the same reasoning to the provisions of sec. 29.174 (5), it is my opinion that since this section does not authorize a partial approval or disapproval of a conservation commission order, that power does not exist. The attempted partial veto clearly indicates that the order has not been approved by the governor, and hence it should be returned to the conservation commission for further action.

RGT

Counties—Public Assistance—Charitable and Penal Institutions—Rates for Voluntary Patients—The charge which may be made against a person residing at his own expense in a county home, established and operated pursuant to secs. 46.18 through 46.21 of the statutes, is not limited to actual cost of maintenance. The board of trustees may establish a scale of fees under which such person who requires medical care may be charged a higher rate reasonably related to the additional expense of his maintenance.

The rate to be charged for maintenance of persons in county infirmaries, established pursuant to secs. 49.171 to 49.173, is in all cases limited to actual per capita cost of treatment, care and maintenance.

July 9, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You ask two questions respecting the rates for (1) voluntary residents in county homes established and operated pursuant to ch. 46 of the statutes and (2) voluntary patients in county infirmaries established and operated pursuant to sec. 49.171, Stats.

Your first question with respect to county homes is:

1. Is there any limitation (such as the per capita cost) on the terms that the board of trustees may prescribe for voluntary paying patients in county homes?

With respect to county homes generally, sec. 49.15 (2) provides that any person upon application to the board of trustees may be admitted "upon such terms as may be prescribed by the board." The section goes on to provide that when the maintenance is to be charged against another municipality, it is to be limited to the "actual cost." The provision of such express limitation for maintenance furnished at public cost, and the failure to make a similar limitation for other cases, implies that there is no statutory limitation with respect to the latter. In the absence of a statutory limitation, the fixing of a rate to be charged a person voluntarily residing in a county home and paying his own maintenance is subject only to the limitations appli-

cable to the actions of all public officials, that is, that it may not be arbitrary and unreasonable.

Sec. 46.21, applicable only to Milwaukee county, contains in subsec. (5) the following similar provision:

"Any resident of this state, not indigent, may be received into the infirmary, to be treated, cared for, and maintained upon such terms and conditions and at such rate of pay as may be established by the board * * *."

Although the above provision refers to an "infirmary," it was apparently intended to refer to the Milwaukee county institution comparable to what is designated a county home in other counties, rather than the kind of institution authorized by sec. 49.171 as created by ch. 724, Laws 1951. Provisions comparable to those now contained in sec. 46.21 (5) were contained in sec. 46.21 (4) (a) prior to the enactment of ch. 177, Laws 1939. The earlier provision referred to the "almshouse and county farm" instead of to an "infirmary." When the law was revised by ch. 177, Laws 1939, the term "infirmary" was used to coincide with the nomenclature adopted in Milwaukee county to refer to an institution established and operated under the procedure outlined in ch. 46, Stats. It could not have referred to the type of institution now described in sec. 49.171 because the latter section was not in existence at the time.

The fact that the legislature did not intend that there should be absolute coincidence of charges for maintenance in a county home and the cost of care, is indicated by the fact that sec. 46.20 (7), relating to joint county institutions including joint county homes, refers to the "net profit" which may arise from the operation of such institution.

Your second question respecting county homes is:

2. May such board prescribe different charges for care for residents of a county home who have (a) patient status in a public medical institution, and (b) who are recipients of old-age assistance (not in patient status) voluntarily residing in such home pursuant to section 49.20 (2)?

I assume that when you refer to "patient status" in a public medical institution you refer to patients requiring medical attention which would justify their acceptance in a hospital or infirmary, but who are nonetheless received

and cared for as residents in a county home. The basic character of the institution is not altered by the fact that it may be recognized, for purposes of determining eligibility of residents for old-age assistance, as a medical institution. So far as the management of the institution itself is concerned, it is governed by the appropriate enabling statutes of the state.

As pointed out in response to the preceding question, persons residing voluntarily in county homes and paying their own maintenance are subject to "such terms as may be prescribed by the board." While the terms prescribed may not be arbitrary or discriminatory, it would not be unreasonable for a board to prescribe a scale of fees which may differ for classes of residents, if the difference is based upon a recognition of a physical condition which requires greater care. Your second question is answered in the affirmative, subject to the qualification that the difference in charge must be based upon a reasonable classification.

Your first question with respect to county infirmaries established pursuant to sec. 49.171 is:

1. Is there any limitation (such as the per capita cost) on the charge for care that may be made to voluntary paying patients?

Sec. 49.173 (1) provides in part:

"In the first instance the county or counties operating an infirmary shall defray the actual per capita cost of treatment, care and maintenance. * * *"

There follow several provisions as to how counties shall be reimbursed for the cost. With respect to patients who are not a public charge, it is provided:

"(2) To the extent that a patient is not a public charge, such cost shall be charged and paid in advance for each calendar month, and payment may be enforced by the board of trustees."

The use of the term "such cost" in the foregoing provision refers back to the cost described in subsec. (1), being "the actual per capita cost of treatment, care and maintenance."

The amount which a county may collect, therefore, is limited to "the actual per capita cost."

Your second question with respect to infirmaries is:

2. Can the charge made to voluntary paying patients be different from the charge for care made pursuant to section 49.173 (1) (a) and (b)?

It follows from the provisions discussed in connection with your first question that the answer is "No," since the charge must in all cases be limited to the actual per capita cost.

BL

State Treasurer—Powers—Delegation to Assistant—
State treasurer has power to appoint assistant state treasurer who can act in his stead to transfer securities registered in the name of the state of Wisconsin.

July 15, 1952.

WARREN R. SMITH,
State Treasurer.

You have inquired whether under the existing statutes you have authority to delegate to a subordinate in your department your authority to endorse and convey registered securities of the state.

In my opinion you would have such authority under the provisions of sec. 14.41, Stats., which reads in part:

"The treasurer may appoint, in writing, an assistant state treasurer who may perform and execute any of the duties of the treasurer, except as commissioner of the public lands. The assistant treasurer shall take and subscribe the oath of office prescribed by the constitution and shall give bond to the treasurer, in such sum and with such conditions as the treasurer prescribes, conditioned for the faithful discharge of his duties. * * *"

Under the provisions of sec. 20.73 (1), item 8, Stats., the assistant state treasurer is entitled to a salary of \$5,000 a year.

It is my opinion that any person whom you appoint and who qualifies as assistant state treasurer would have the power to transfer securities registered in the name of the state of Wisconsin.

In view of the fact that there is a specific statutory authority for an assistant state treasurer to act in your behalf, it is my further opinion that no other person can so act.

When the legislature intended that checks could be signed by persons other than the state treasurer or his assistant, it specifically so provided in paragraphs (c) and (d) of sec. 14.42 (1). In view of the fact that no similar provision is made for the transfer of securities, it is my opinion that only yourself or a duly appointed and qualified assistant state treasurer could so transfer securities. The expression of certain powers by the legislature by implication excludes the existence of all other powers.

RGT

Elections—Ballots—The requirement expressed in sec. 5.11 (5), Stats., that the official ballot form be printed in “substantially” the form of the sample which is annexed to the statute is merely directory as to the form. Where considerations created by an abnormally large number of candidates for county office render the sample form impracticable, the responsible election officials may rearrange such form, provided the ballot contains all the essentials as to substance which are prescribed by the statute.

July 22, 1952.

OLIVER L. O’BOYLE, *Corporation Counsel*,
Milwaukee County.

You request my opinion as to whether the arrangement of offices on the sample form of ballot annexed to sec. 5.11 (5), Stats. (which is made up of one sheet with two columns, the state offices to be voted on in the left column, the county offices in the right), may be revised to consist of one sheet with four columns, the state offices to be voted on in the first or left hand column, congressional and legislative in the second column, the first four county offices on the present sample ballot in the third column, and the remaining four county offices on the sample in the fourth column.

It appears that the number of announced candidates for certain county offices is abnormally large. For example, at this writing the number of candidates for sheriff exceeds 70. Under these circumstances, if a two-column ballot were used, it would be expensive to print and package and impractical and inconvenient for the voter to use.

It is my opinion that you may rearrange the ballot in question to conform to the description set out in the first paragraph above.

The Wisconsin supreme court has not considered the precise question, but the courts of other states, when considering similar situations, have held that where the official in charge of preparing the ballots has some discretion in the matter and it would be impractical to follow literally the sample form annexed to the statute, the official may adopt another form which would be more practicable and intelligible to the voter. *Nuetzel v. Will*, 210 Ky. 453, 276 S.W. 137; *Cobb v. Board of Com'rs. of Orange County*, 155 Fla. 60, 19 So. 2d 505.

Sec. 5.11 (5) provides that the county clerk have the official and sample ballots "printed in *substantially* the annexed form." The clerk, or in this case the Milwaukee county election commission, has, therefore, been vested with discretion in the matter. There are no specifications contained in the statutes as to width or length of the columns, or whether they may be broken. It is clear, however, from the language of the statute that the sample ballot is directory only as to form, though mandatory as to substance.

What was said by the Kentucky court in the *Nuetzel* case, *supra*, when considering a proposed change of a ballot made impractical and confusing by the multiplicity of candidates, appears to me to be well-reasoned authority for resolving the question involved here. The court said:

"* * * the Legislature was mindful of the fact that the circumstances might be such that the printing of the ballot as illustrated in the section could not in every case be literally followed, and it therefore said that the printing of the ballot should, in general, conform to its illustration 'as nearly as practicable' [the Wisconsin statute similarly provides that the ballot be "in substantially the annexed form"]; clearly indicating that in cases like the one before

us wherein it would be impractical to literally follow that form or plan, another one might be adopted, which was more practical, * * *.”

The discretion of the clerk is limited by the rule that if any irregularity in the form of ballot is material, because some mandatory provision of the statute has been disregarded, the election may be invalidated; but any irregularity which is not material will not invalidate an election.

25 O.A.G. 639.

SGH

Constitutional Law—Automobiles and Motor Vehicles—Safety and Financial Responsibility—Impoundment—Priority of Accident Claims—An enactment authorizing the impoundment of a motor vehicle to be held as security for the satisfaction of such judgment as may be recovered where the operator of said vehicle is unable to show that there is insurance coverage for the vehicle and financial responsibility on the part of the operator, would be constitutional in principle.

An enactment giving priority prospectively to claims arising out of such accident notwithstanding the existence of prior liens against the vehicle, would be constitutional.

July 24, 1952.

LEGISLATIVE COUNCIL.

You request my opinion upon the questions posed in the following resolution adopted by your honorable council:

“BE IT RESOLVED, that the legislative council request the Honorable Vernon Thomson, attorney general, for an opinion on the following question:

“Is there any constitutional objection to the enactment of a statute requiring impoundment of a motor vehicle involved in an accident, regardless of the fault of the operator, where the operator is unable to show that there is insurance coverage for the vehicle and financial responsibility on the part of the operator, and

“Further, is there any constitutional objection to a provision in such statute giving priority to claims arising out

of such accident notwithstanding the existence of prior liens against the vehicle? It is understood, of course, that the priority would apply only to such liens as were filed after the effective date of the statute and would in no way affect liens that were in existence at an earlier date."

It is not practicable to undertake to answer your first question categorically "Yes" or "No." The use of the device of impoundment of property for various legal objectives has been sustained as against challenges on constitutional grounds. The validity of impoundment of motor vehicles to vindicate certain public rights has been sustained by appellate courts in various jurisdictions. In *Price v. Haney*, 176 Miss. 471, 169 So. 832, the impoundment of a truck which was being used to haul a load exceeding that allowed by a privilege tax, pending necessary proceedings to enforce payment of additional license taxes was upheld. As a legal device to abate a public nuisance the impoundment of illegally parked automobiles has been upheld in a number of jurisdictions. See *McLaurine v. City of Birmingham*, 247 Ala. 414, 24 So. 2d 755, 163 A.L.R. 962, and collection of cases in annotation at page 966 of the same volume. (For further examples of the variety of legal problems reached by the device of impoundment, see index title "Impounding," vol. 51, pp. 550-551, Descriptive Word Index, Fifth Decennial Digest.)

It is my opinion that a valid statute can be enacted to achieve the purposes indicated in your question. But since the constitutionality of any statute depends upon its phraseology and upon the manner of administration, it would be necessary for me to see an actual draft and to be informed as to the proposed manner of execution or administration before I could give you the desired assurance that it could be successfully defended against attack upon constitutional grounds.

As to your second question, it is my opinion that there can be no valid constitutional objection to giving priority to claims arising out of an accident over prior liens, provided the priority applies only to such liens as are filed after the effective date of the statute.

It is a familiar principle that "vested liens, [cannot] be modified without depriving the prior lien holder of his

property without due process," 12 Am. Jur. 354, Constitutional Law §671; or rendering such a statute unconstitutional as changing and impairing the obligation of contract. *Hanauer v. Republic Bldg. Co.*, 216 Wis. 49, 255 N.W. 136, 256 N.W. 784.

A situation embracing the problem posed in the present case was involved in *Jesse A. Smith Auto Co. v. Kaestner*, 164 Wis. 205, 159 N.W. 738. There the question was asked whether the mechanic's lien given by sec. 3343, Stats. 1915, now sec. 289.41, for repairs to motor vehicles at the request of the owner or legal possessor of the property was superior to the lien of a duly filed prior mortgage on the chattel repaired. The court said, "The clause [creating the lien] * * * contains no exception in favor of prior lien claimants, and the court can make none." The court reached the same decision (with the exception that the lien had been limited by the legislature in the meantime to \$75) in *West Allis Industrial Loan Co. v. Stark*, 197 Wis. 363, 222 N.W. 310.

It is my opinion, therefore, that the enactment of a statute giving priority, prospectively, to claims arising out of the situation described in your question would be valid as against constitutional objections, notwithstanding the existence of prior liens against the vehicle.

SGH

Employer and Employe—Salaries and Wages—Faulty Workmanship—Sec. 103.455, Stats., restrains discipline for faulty workmanship only when such discipline takes the form of deduction from wages covering services already performed.

July 25, 1952.

VOYTA WRABETZ, *Chairman,*
Industrial Commission.

You have asked whether sec. 103.455 of the statutes, which is hereinafter set forth, prohibits an employer from laying off an employe as a penalty for faulty workmanship,

provided the employer makes no deduction from the wages of the employee up to the date of the layoff.

“No employer shall make any deduction from the wages due or earned by any employe, who is not an independent contractor, for defective or faulty workmanship, lost or stolen property or damage to property, unless the employe authorizes the employer in writing to make such deduction or unless the employer and a representative designated by the employe shall determine that such defective or faulty work, loss or theft, or damage is due to worker’s negligence, carelessness, or wilful and intentional conduct on the part of such employe, or unless the employe is found guilty or held liable in a court of competent jurisdiction by reason thereof. If any such deduction is made or credit taken by any employer, that is not in accordance with this section, the employer shall be liable for twice the amount of the deduction or credit taken in a civil action brought by said employe. Any agreement entered into between employer and employe contrary to this section shall be void and of no force and effect. In case of a disagreement between the two parties, the industrial commission shall be the third determining party subject to any appeal to the court.”

The supreme court of this state recognized, in *Zarnott v. Timken-Detroit Axle Co.*, 244 Wis. 596, 13 N.W. 2d 53, the principle that a statute imposing a penalty is to be construed strictly; but it held that sec. 103.455 is to be construed with sufficient liberality to preserve the intention of the legislature by taking the common-sense view of the statute as a whole, and by giving effect to the object of the legislature “if a reasonable construction of the words permits it.” As is indicated by the quoted qualification, interpretation is permissible to ascertain the legislative intent only within the area that the language of the statute will permit. As pointed out in *Moorman Mfg. Co. v. Industrial Comm.*, 241 Wis. 200, 5 N.W. 2d 743, the meaning must be drawn “from the language used.”

The only prohibition contained in sec. 103.455 is that no employer shall make any “deduction from the wages due or earned by any employe” except under certain conditions. The statute cannot be extended by implication to prohibit anything which does not constitute a deduction from wages “due or earned.” The term “due” has been construed variously under different statutes, sometimes in a strict sense

(see *Foster v. Singer*, 69 Wis. 392, 34 N.W. 395, 2 Am. St. Rep. 745), and sometimes liberally. This variation of meaning is discussed in *In re B. H. Gladding Co.*, 120 Fed. 709, 710, as follows:

“* * * The term ‘due’ is one of double meaning. At times it means a sum now payable; at times it signifies a simple indebtedness, without reference to the time of payment. In *U. S. v. Bank of North Carolina*, 6 Pet. 36, 8 L.Ed. 308, the court said, ‘Here, the word “due” is plainly used as synonymous with owing.’ * * *”

The meaning of the term “earned” is discussed in *The Talus*, (C.C.A. 5, 1918) 248 Fed. 670, 673:

“The word ‘earned’ is used in the sense of owing. Congress avoided the use of the word ‘due,’ as there might, by the terms of the contract between the ship and the seaman, be no wages due till the end of the voyage. The use of the word ‘earned’ was to describe wages, for which the seaman had done the work, whether then due or not, and not to fix the amount of what was owing and half of which was to be paid, regardless of previous lawful payments. * * *”

See, also, *Seidenberg v. Duboff & Davies*, 256 N.Y.S. 17, 19, 143 Misc. Rep. 167, where it is said:

“I am constrained to hold that the word ‘earned’ as used in this statute, has reference only to the complete performance of the work contracted to be done, and cannot be construed to mean ‘due’ or ‘payable’ as under the provisions of a contract postponing payment so as to avoid the implications of the statute. The word ‘earn’ or ‘earned,’ as it is used in this and other statutes in pari materia, seems to me to fall closely within the accepted definition as referring to a just return or recompense for labor, service, or performance, so that, the moment the labor is done, the wages are ‘earned.’ * * *”

Even under the most liberal construction, a prohibition against deduction from wages “due or earned” could not be construed as a guaranty of wages which might become due in the future for labor not yet performed.

The foregoing cases represent the liberal use of the terms contained in sec. 103.455. Even the most liberal interpretation, however, would not permit the extension of the statute to a situation beyond the scope of the language used.

BL

Prisons and Prisoners—Labor—Escape—Prisoners committed to county jail at actual confinement may not be assigned duties connected with the jail business outside the jail enclosure, at least unless under guard, since their employment is not authorized by sec. 56.08, Stats. Such prisoners may be required to do housekeeping tasks about the jail but no labor which would ordinarily require a paid employe.

Such prisoner who is unlawfully permitted to go outside the jail enclosure to work without a guard and escapes without force does not break prison and cannot be prosecuted under sec. 346.45 (1) or (2). Officer who permitted him to leave the jail enclosure is guilty of at least a negligent escape under sec. 346.36, but query whether he is guilty of a voluntary escape under sec. 346.35.

Prisoner sentenced to hard labor under sec. 56.08, who escapes while working outside the jail, may be prosecuted under sec. 346.45 (2).

July 25, 1952.

A. LUCARELI,
Assistant District Attorney,
Racine County.

You have requested an opinion relative to the following assumed state of facts: "P" is committed to the county jail at *actual confinement*. Outside of the county jail, while "P" is not under guard of a deputy or jailer, "P" is assigned to operate the service elevator on visiting days, to assist in the kitchen located on the eighth floor of the courthouse, and to deliver food to the prisoners from the eighth to the ninth floors. While performing these duties, "P" escapes from confinement.

Your first question is whether an inmate committed to the county jail at actual confinement may be assigned to perform duties connected with the jail business but outside of the jail and while not under guard of a deputy or jailer.

Sec. 56.08, Stats., the so-called "Huber Law," provides for the employment of county jail prisoners sentenced to hard labor, in work outside of the jail. This may include work for the county at a reasonable wage, including employment inside the jail. 37 O.A.G. 452, 454. Under sec.

56.08 (1), "any person sentenced to the county jail is committed at hard labor unless the court specifies otherwise." In the case stated above, the court has specified otherwise by sentencing the defendant to "actual confinement." By specifying that the sentence should be served in actual confinement, the court has expressly indicated that the prisoner is not subject to the Huber Law and is not to be employed outside of the jail, at least without a guard.

It is the almost universal rule that "express statutory authority is necessary to the imposition of hard labor as a punishment for crime." 41 Am. Jur. 902—Prisons and Prisoners §26; 72 C.J.S. 873—Prisons §18 d.

Sec. 56.08, the Huber Law, is now the only statutory authority for requiring prisoners in county jails to work at hard labor. Since the prisoner to whom you refer is not subject to the Huber Law, there is no authority to require him to do work and to go outside the prison enclosure for that purpose.

While I have found no authority on this point, it is my opinion that the sheriff, although he may not require such prisoners to do work which would ordinarily be done by paid employes, may nevertheless require that they perform housekeeping tasks in the jail, such as sweeping and cleaning the cells and corridors and possibly doing occasional kitchen police. This practice has always been followed and is considered to be part of the institution discipline which the sheriff is authorized to enforce. But for reasons which will appear later, such work by prisoners sentenced to actual confinement must be limited to the jail enclosure, at least unless under the control of a guard or jailer.

Your second question is whether "P" is chargeable with escape under sec. 346.45 (1) or (2), Stats., which provides as follows:

"(1) Any person who may be imprisoned, pursuant to a sentence, in the county jail or county workhouse, or who shall have been committed for the purpose of detaining him for trial for any offense not punishable by imprisonment for life, and who shall *break prison and escape* shall be punished by imprisonment in the county jail not more than six months.

"(2) Any such prisoner under sentence who shall escape or attempt to escape while employed in prison labor outside

of the prison inclosure *as authorized by law* shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison or county jail not more than one year."

Subsec. (1) requires as an element of the offense that the actor "shall break prison." It is well established that although force is not an element of the crime of escape, it is an element of the crime of prison breach. 19 Am. Jur. 363—Escape, etc. §6; 10 A.L.R. 150; 50 A.L.R. 989; 30 C.J.S. 1142, 1148—Escape §§2 b, 13; 2 Wharton Criminal Law (12th Ed. 1932) §§2022, 2025; *United States v. Zimmerman*, (E.D. Pa. 1947) 71 F. Supp. 534, 537; *State v. Sutton*, (1908) 170 Ind. 473, 84 N.E. 824, 826; *State v. Hoffman*, (1948) 30 Wash. 2d 475, 191 P. 2d 865, 869. An actual rather than a constructive breaking is required. *Randall v. State*, (1891) 53 N.J.L. 488, 22 A. 46, 47. In the latter case the court said: "The object of the law * * * is not to preserve the buildings from damage, but to prevent * * * the escape of the prisoner * * * *when proper, material safeguards are interposed.*" (Italics supplied.)

It follows that "P" is not subject to prosecution under sec. 346.45 (1).

Sec. 346.45 (2) covers one who escapes or attempts to escape while employed in prison labor outside of the jail enclosure, but contains the important requirement that the employment outside of the jail enclosure must be "as authorized by law." As pointed out in the answer to your first question, employment of "P" outside the jail enclosure without a guard is not authorized by law and for that reason is not within the provisions of subsec. (2).

Your third question is whether the jailer who allowed "P" to be outside of the county jail performing the duties stated above and while not under guard, at which time "P" escaped, is subject to prosecution under sec. 346.35, Stats., which provides as follows:

"Any jailer or other officer who shall voluntarily suffer any prisoner in his custody upon conviction of any criminal charge or so held to answer any criminal charge to escape, he shall suffer the like punishment and penalties as the prisoner so suffered to escape was sentenced to or would be liable to suffer upon conviction for the crime or offense

wherewith he stood charged, unless such prisoner was convicted of or charged with an offense punishable by imprisonment for life, in which case he shall be punished by imprisonment in the state prison not more than twenty-five years nor less than five years."

Sec. 346.36 should also be considered in connection with this question. It provides as follows:

"Any jailer or other officer who shall, through negligence, suffer any prisoner in his custody upon conviction or upon any criminal charge to escape, or shall wilfully refuse to receive into his custody any prisoner lawfully committed thereto on any criminal charge or conviction, or any lawful process whatever shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars."

The jailer is clearly guilty of at least *negligently* permitting "P" to escape, and the law will presume negligence without any proof thereof on the part of the state. 19 Am. Jur. 371, 372—Escape, etc. §§32, 34.

"A voluntary escape" is said to be "made when a person in custody gains his liberty by the assent, permission, or connivance of his lawful custodian." 19 Am. Jur. 371—Escape, etc. §31. It might be argued in behalf of the jailer that he did not intend that "P" should escape, or give him permission to do so, or connive with him, and therefore is not guilty of a voluntary escape in violation of sec. 346.35, Stats. However, there is authority that a constructive escape takes place when the prisoner obtains more liberty than the law allows, even though he remains in custody. 19 Am. Jur. 362—Escape, etc. §5; 30 C.J.S. 1143—Escape §4a. Upon this theory, the jailer was guilty of a voluntary escape every time he permitted "P" to go outside of the prison enclosure without authority of law. However, it may be doubted that sec. 346.35 was intended to apply to merely constructive escapes and it is therefore recommended that any such prosecution be brought under sec. 346.36 for a negligent escape.

Your fourth question is, assuming that "P" had been sentenced to the county jail at hard labor under the Huber Law, sec. 56.08, would he then be chargeable for the escape under sec. 346.45 (2) above quoted. Since under those cir-

cumstances his employment outside the jail would be authorized, it is my opinion that he could be charged under sec. 346.45 (2) and that it would make no difference whether the sheriff had performed his duty to see that "P" received a reasonable wage from the county for such services.

WAP

Automobiles and Motor Vehicles—Safety and Financial Responsibility—Seizure of License Plates—Upon the occurrence of the contingencies mentioned in the statute, peace officers have the right, under sec. 85.09 (31), to remove registration plates from automobiles parked on public streets or on private parking lots when requested to "secure possession" of such plates by the commissioner of the motor vehicle department for the purpose of returning them to the custody of the motor vehicle department.

July 25, 1952.

MOTOR VEHICLE DEPARTMENT.

You request my opinion upon the following question:

Where an automobile registration has been suspended or the owner's right to retain the registration plates has been otherwise terminated by reason of the contingencies set forth in sec. 85.09 (31), Stats., and he has refused to surrender the plates pursuant to his obligation to do so under said statute, and the commissioner of the motor vehicle department directs a peace officer "to secure possession thereof and to return the same to the commissioner," may such peace officer remove the plates from the registrant's automobile if the same be found on the public street or on a privately owned parking lot?

The answer is, "Yes."

Sec. 85.09 (31) reads as follows:

"SURRENDER OF LICENSE AND REGISTRATION. Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this section, shall have been canceled or terminated, or who shall neglect to furnish other proof upon

request of the commissioner shall immediately return his license and registration to the commissioner. If any person shall fail to return to the commissioner the license or registration as provided herein, the commissioner shall forthwith direct any peace officer to secure possession thereof and to return the same to the commissioner."

The automobile owner's continued possession of the plates is unlawful from and after notice of suspension, or from and after knowledge of the facts which create the obligation to surrender same on demand for the statutory reasons set forth in said subsection.

The registration plates, under the facts of your question, constitute property held contrary to law. Immediately the contingency occurred which gave rise to the right of the commissioner to demand their surrender, there was no further lawful use to which the plates could be put. When lawfully exhibited, the plates are evidence that the vehicle has been lawfully registered and is being operated on the public highways pursuant to law. When that privilege has been terminated by one or more of the contingencies mentioned in sec. 85.09 (31), they are no longer lawful evidence. The duty imposed upon peace officers to prevent crime generally, and the specific statute, sec. 85.09 (31), constitute complete authority to take possession of the plates. Police officers may be invested with power to make seizures of property for the purpose of preventing crime without violating the constitutional provision against seizing property without due process of law. *Board of Police Commissioners of Baltimore City, et al. v. Henry Wagner*, 93 Md. 182, 48 A. 455, 52 L.R.A. 775, 86 Am. St. Rep. 423; 47 Am. Jur. 512, §15. The only purpose for which the registrant could use the plates would be to mislead law enforcement officers generally who might see the plates on the automobile for which they were issued, to assume erroneously that they evidence lawful operation. Continued exhibition of same after suspension would therefore be deceptive, as a cloak for illegal operation.

Under the statute it is not only the right, but the duty of police officers, in the exercise of that preventive justice which is essential to the maintenance of the public peace and morals of the community, to seize all such instrumen-

talities of crime as may come within their view. The power of the legislature to confer this authority under the police power cannot be questioned. *Board of Police Commissioners of Baltimore City, et al. v. Henry Wagner, supra.*

There is no essential difference, so far as the question of the officer's right to seize the plates is concerned, between the case of a car parked on the public street or parked on a private parking lot. As a practical proposition, the proprietor of any parking lot would without doubt authorize a law enforcement officer with proper credentials to enter upon his lot. And even if an officer entered upon a parking lot without the lot owner's permission, the question of trespass and accountability to the lot owner for such trespass would not militate against the officer's right to seize the plates. This should not be construed as advising that officers should commit trespass, but the form of your question necessitates its consideration in discussing the effect of same on the right to seize the plates.

SGH

Athletic Commission—Powers—The state athletic commission has no power under the statute defining its powers and duties to require amateur or professional boxing clubs to carry insurance to cover boxers who may be injured in a boxing contest.

July 25, 1952.

STATE ATHLETIC COMMISSION.

You request my opinion as to whether the state athletic commission may compel amateur and professional boxing clubs in Wisconsin to carry insurance to cover boxers who may be injured in a boxing contest.

I have examined ch. 169, Stats., which delineates your powers and duties, and I find nothing which expressly or by implication authorizes you to require amateur or professional boxing clubs to insure boxers against injury. You are therefore advised that you may not lawfully require such clubs to carry such insurance.

SGH

Athletic Commission—Tax on Gross Receipts—Television Theaters—Taxes imposed by sec. 169.08, Stats., are not collectible from movie theaters which exhibit televised reproductions of boxing contests “piped” into the theater from locations outside the state where the live contests or exhibitions are actually conducted.

July 28, 1952.

STATE ATHLETIC COMMISSION.

You state that in some of the larger cities in the country important boxing matches are being “piped” by television into theaters which are charging admission. These matches are not televised into private homes. You request my opinion as to whether your commission is empowered to collect the 5 per cent tax on receipts imposed by sec. 169.08, Stats., upon such performances in theaters in Wisconsin.

It is my opinion that your commission may not collect a tax on theater box office receipts for television broadcasts of the kind described by you. The statute in question, which is the sole authority for the tax, reads as follows:

“169.08 Every club which exercises any of the privileges conferred by this chapter shall, within 24 hours after the determination of every exhibition, furnish to the said commission a written report, verified by one of its officers, showing the number of tickets sold for such exhibition and the amount of gross proceeds thereof, and such other matters as the commission prescribes; and shall within said time pay to the commission a tax of 5 per cent of its total gross receipts from the sale of tickets of admission to the exhibition.”

The statute clearly limits the tax to the stated per cent of total gross receipts from the sale of tickets of admission to the exhibition by a duly licensed boxing club. This statute was enacted by ch. 632, Laws 1913. It is in substantially the same form now as it was then. It is clear that the legislature’s intention as of the date of enactment of the statute in question was merely to tax box office receipts from ticket sales for live contests or exhibitions conducted by clubs licensed under sec. 169.07, Stats. There is nothing in the language of the statute which could, even by implication, be extended to embrace theater box office receipts for a

mechanical reproduction of a boxing contest conducted outside the state. The jurisdiction of your commission is limited to clubs which actually conduct boxing exhibitions, and not to theaters where in essence a televised boxing match is no different than a movie.

SGH

Schools and School Districts—Automobiles and Motor Vehicles—School Buses—A bus transporting school groups engaged in extracurricular activities to or from a school or school district, not under written contract with said school, school district, or municipality, must comply with school bus regulations prescribed by the motor vehicle department.

In order to qualify for the special license fee rate accorded school buses by sec. 85.01 (4) (cr), Stats., a bus transporting school groups on educational or recreational tours in conjunction with a school activity is required to be operated under written contract.

August 4, 1952.

MOTOR VEHICLE DEPARTMENT.

You ask the following questions:

1. Must a bus transporting school groups engaged in extracurricular activities to or from a school or school district, not under written contract, comply with school bus regulations?

2. Does a bus transporting school groups on educational or recreational tours in conjunction with a school activity have to be operated under written contract in order to be registered under sec. 85.01 (4) (cr)?

The supreme court considered the first question in *Verbeten v. Huettl*, (1948) 253 Wis. 510, 34 N.W. 2d 803, and concluded:

“Under sec. 194.02, Stats., vesting the motor vehicle department with power to regulate the transportation of persons by motor vehicle in the interests of safety, the department has jurisdiction to regulate school buses in the interests of public safety. p. 517.” (headnote)

"The power of the motor vehicle department under sec. 194.02, Stats., to regulate school buses in the interests of public safety is not limited to the regulation of school buses operated under contract with school districts, either by sec. 40.34 (3), providing that the rules and regulations of the department shall be made a part of 'any' contract for the transportation of school children, and requiring that school districts enter into written contracts for such transportation where they assume to furnish it, or by sec. 110.035, vesting the department with certain additional powers and duties and defining 'school bus' as any motor vehicle 'transporting, under written contract with any school or school district, children to and from school.' pp. 516-518." (head-note)

"* * * We do not consider that the requirement [contained in sec. 40.34 (3) and sec. 110.035, Stats.] that school districts enter into written contracts for such transportation, where they assume to furnish it, restrains the power of the motor vehicle department under sec. 194.02, Stats." (p. 517)

In answer to your first question it is my opinion, therefore, that a bus transporting school groups engaged in extracurricular activities to or from a school or school district, not under written contract with said school, school district, or municipality, must, nevertheless, comply with school bus regulations promulgated by the motor vehicle department.

With respect to your second question, it is my opinion that in order to qualify for the reduced license fee accorded to school buses by sec. 85.01 (4) (cr), Stats., the owner of the vehicle must have a written contract with the school, school district, or municipality whose pupils he transports. This result may seem paradoxical at first blush in view of the *Verbeten* case cited above. However, the licensing of vehicles is a matter wholly separate and distinct from the question of liability of operators of vehicles purporting to operate as school buses to third persons for common law or statutory negligence. It is clear from all of the statutes referred to above, dealing with vehicles operated as school buses, that it is the intention of the legislature that contracts for operation of such vehicles be in writing. Sec. 85.01 (4) (cr), Stats., which fixes the special license fee for school buses defines such vehicles as follows:

“* * * A ‘school bus’ is any motor vehicle transporting, under written contract with any school, school district or municipality, children to or from school, or used in transporting school groups on educational or recreational tours in conjunction with a school activity.”

There is no ambiguity in the requirement that the contract be in writing. The fact that the supreme court in the *Verbeten* case held that the operation of the vehicle in that case as a school bus without a written contract did not relieve the owner from complying with the safety standards promulgated by the motor vehicle department, can in no wise be deemed authority for excusing the owners of such vehicles from covering their operations if they wish to avail themselves of the benefit of the reduced rate for license fees. By presuming to operate their vehicles as school buses, the owners assume all the burdens imposed by law upon such operations. Statutes conferring the favor of exemption or reduction in fees must be strictly construed in favor of the state and against claimants of the favor. The statute with which we are dealing is such a statute and must be complied with literally.

SGH

Highways and Bridges—Condemnation—Schools and School Districts—Public Utilities—The state highway commission has power to condemn property owned by school districts and to condemn property of public utilities engaged in interstate commerce subject to the rights of such utilities under secs. 86.16 and 182.017 (1), Stats. Previous opinions of the attorney general (29 O.A.G. 458 and 30 O.A.G. 266) to the contrary are no longer applicable because of statutory changes.

August 4, 1952.

STATE HIGHWAY COMMISSION.

You have requested my opinion on two questions of law concerning the condemnation authority of the state highway commission. The first of these you state as follows:

"1. In several instances we are negotiating with school districts for the condemnation of a part of their property. We have been unsuccessful so far in negotiating with them because we feel that the amount asked for the property is excessive. It is the contention of the school districts that the state has no power to condemn their property in view of the restrictions contained in section 32.03 (1). However, section 84.09 (1) provides that the highway commission may acquire private or public lands or interests therein."

The pertinent portion of sec. 32.03 (1) reads:

"The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board or commission, nor to the condemnation by a railroad, public utility or electric co-operative of the property of either a railroad, public utility or electric co-operative unless such power is specifically conferred by law * * *."

This problem has been presented to the attorney general on two different occasions and opinions have been rendered that the section above quoted does not allow the condemnation of school district property. See 29 O.A.G. 458 (1940) and 30 O.A.G. 266 (1941). These opinions pointed out that the state highway condemnation statutes, then secs. 83.07 and 83.08, were procedural and had not been intended to change the substantive law of condemnation contained in ch. 32 of the statutes.

At the time these opinions were written our present state highway commission condemnation statute, sec. 84.09, did not exist and a system of the acquisition of lands for state highways was quite different from what it is today. At that time the counties in effect furnished the necessary right of way upon order of the state highway commission, while now in most cases the land is taken by the state itself, although the county highway committee acts as its agent.

Because of the problems arising in the field of state highway construction and maintenance caused by the increasing need for highways, the legislature passed ch. 334, Laws 1943, which was a general revision of the highway statutes. At that time, sec. 84.09 was created which, with minor exceptions, separated the state highway condemnation laws from the old county laws. The condemnation authority of

the highway commission was enlarged in a number of respects and such changes were not limited to procedure.

Ch. 341, Laws 1945, was a further enlargement of the condemnation powers of the commission. It delegated to it the authority of the state set forth in art. XI, sec. 3a, of our constitution, pertaining to the establishment of parkways and similar development and the right to make restrictions to protect the same. There were other changes and among them the following sentence was added to sec. 84.09 (1), which contains the general condemnation authority of the state highway commission: "For the purposes of this section the commission may acquire private or public lands or interests therein."

In the case of *Kilbourn City v. Southern Wis. Power Co.*, (1912) 149 Wis. 168, our court held that the right to condemn property devoted to one public use for a different use exists where the right is given expressly by statute or arises by necessary implication. It is my opinion that the power to condemn lands of school districts has now been conferred upon the highway commission by sec. 84.09 (1) as indicated above, and that therefore the two prior opinions of the attorney general cited herein are no longer applicable.

Your second question reads as follows:

"2. It is the claim of a utility owning a gas pipe line within this state that the state has no power to condemn because of the provision of section 32.03 (1) and also because a condemnation on the part of the state would be an undue interference with interstate commerce since the pipe line runs through a number of states."

The provisions of sec. 32.03 (1), quoted above, do not prohibit the condemnation of public utility property by the state highway commission. The provision of sec. 84.09 (1) allowing the state highway commission to condemn "any lands" and the specific grant of authority to acquire both private and public lands above referred to, do, in my opinion, grant sufficient authority to the state highway commission to condemn utility easements.

The question of whether or not condemnation of a utility in interstate commerce would constitute an illegal interference depends upon the rights and powers granted by our laws to the parties involved and turns upon the question of

their reasonableness. It is obvious that it would be an unreasonable law that would grant to the state highway commission the arbitrary authority to condemn an easement of a public utility and allow the utility no recourse to relocate its line elsewhere across or on the highway without interference with the use of the highway. Oklahoma once had a statute enacted for the purpose of confining the petroleum products of that state locally. This act forbade the crossing of state highways with any pipe line. It was declared unconstitutional in *Haskell v. Cowham*, (1911) 187 Fed. 403. The court said (p. 408) :

“* * * No state may by means of its police power, or its proprietary power, over highways or by means of any of its other powers, erect and maintain impassable barriers against interstate commerce along its borders or through its body in the face of the grant to the nation of the power to regulate that commerce; for all the powers of the state are subordinate to this power of the nation and to its will that such commerce shall be free. * * *”

The laws of Wisconsin were not designed to, and do not prevent the use of highways by public utilities. On the contrary, sec. 182.017 (1), Stats., provides:

“RIGHT OF WAY FOR. Any domestic corporation organized to furnish telegraph, telephone, service or transmit heat, power or electric current to the public or for public purposes, and any co-operative association organized under chapter 185 to furnish telegraph, telephone or transmit heat, power or electric current to its members, may, subject to reasonable regulations made by any city or village through which its transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge or any stream or body of water, or upon any lands of any owner consenting thereto, and for such purpose may acquire lands or the necessary easements; and may connect and operate its lines or system with other lines or systems devoted to like business, within or without this state, and charge reasonable rates for the transmission and delivery of messages or the furnishing of heat, power or electric light.”

In construing this section, then sec. 180.17 (1), our court held in *Wisconsin Telephone Co. v. Milwaukee*, (1936) 223 Wis. 251, that the authority of the utility to use a highway

is derived from the state and under such conditions regulations by municipalities must be in conformity with a just and reasonable administration of the police power. This case held that the city could not exact a fee obviously imposed as a revenue measure and could not barter with the police power or exact financial benefits as a condition for its exercise. See, also, *State ex rel. Wisconsin Telephone Co. v. Sheboygan*, (1901) 111 Wis. 23.

Sec. 86.16 is also pertinent to this problem. It reads:

“Electric lines on highways; place of poles; penalty. (1) Any person, firm or corporation including any corporation licensed under chapter 226 may, with the written consent of the town board, but subject to the approval of the state highway commission, construct and operate telegraph, telephone or electric lines, or pipes or pipe lines for the purpose of transmitting messages, heat, light or power along, across or within the limits of any highway.

“(2) All poles used in the construction of such lines shall be set in such manner as not to interfere with the use of such highway by the public, nor with the use of the adjoining land by the owner thereof; and all pole lines shall hereafter be constructed so as to meet the requirements of the Wisconsin state electrical code.

“(3) No tree shall be cut, trimmed or the branches thereof cut or broken in the construction or maintenance of any such line without the consent of the owner of the tree.

“(4) Any person erecting any telephone, telegraph, electric light or other pole or stringing any telephone, telegraph, electric light or other wire, or constructing any pipes or pipe lines in violation of the provisions of this section shall forfeit a sum not less than \$10 nor more than \$50.

“(5) Any person, firm or corporation whose written application for permission to construct such lines within the limits of any highway of any town has been refused, or when such application shall have been on file with the town clerk for 20 days and no action shall have been taken thereon, such applicant may file with such town clerk a notice of appeal to the state highway commission. The town clerk shall thereupon make return of all the papers and action of the board to the state highway commission, and such commission shall proceed to hear and try and determine such appeal on 10 days' notice to the town board, and the applicant. The order entered by the commission shall be final.”

The question of the relationship of this section with sec. 182.017 (1) is discussed in 19 O.A.G. 378 (1930). This

opinion points out that the statutes are *in pari materia* and that the grant of authority to the highway commission contained in sec. 86.16 is not a grant of legislative power, that is, to decide whether or not a franchise is to be issued, but is merely a grant of police power to reasonably regulate structures within the limits of the highway in the interest of public travel. The franchise for the utility to use the highway is granted by sec. 182.017, then sec. 180.17.

I am in accord with this view which conforms to the police power theory in the two Wisconsin telephone company cases cited above. This leads to the conclusion that the Wisconsin highway commission has full power to condemn the easement of a public utility engaged in interstate commerce, and that such condemnation would not be an illegal interference since the utility possesses full power to cross or otherwise use the highway subject only to reasonable police interferences.

REB

Dentistry—X-Rays—Advertising—Unlicensed persons may take dental x-ray pictures provided they make no attempt to diagnose or treat dental disorders by the use of x-ray or otherwise.

Sec. 152.06 (6) (d), Stats., prohibits the display of any portion of the human head in dental advertising, whether by television or otherwise.

The use of a picture of a dental office or part thereof in dental advertising is not prohibited.

August 11, 1952.

DR. S. F. DONOVAN, *Secretary,*
Wisconsin State Board of Dental Examiners.

You have requested our opinion on the following three questions:

1. May a dental assistant and dental hygienist take x-ray pictures?
2. Is a dentist permitted to use a picture of himself or any part of his office when sending out an announcement informing the public of opening an office for practice?

3. May a dentist appear on television, have a picture of his office, showing the performance of dental work and explaining dental office technique?

1. The mere taking of x-ray pictures apart from attempts to diagnose or prescribe treatment upon the basis of such x-rays may apparently be done by any unlicensed person and frequently is so done in the offices of dentists and physicians.

In 15 O.A.G. 155, it was concluded that a person giving x-ray treatments is required to be licensed by the Wisconsin state board of medical examiners and must secure a certificate of registration in the basic sciences, and in 16 O.A.G. 560, it was ruled that a person operating an x-ray machine for the purpose of diagnosing disease and treating the same must be duly licensed.

The definition of the practice of dentistry contained in sec. 152.02 (1), Stats., is sufficiently comprehensive to cover the use of x-ray equipment in the diagnosis, treatment, or prescribing for dental lesions, disorders, or deficiencies. However, sec. 152.07 (1) which provides that a dental hygienist may remove calcareous deposits, accretions and stains from the surfaces of teeth and apply ordinary washes of a soothing character, but may not operate otherwise on the teeth or other tissues of the oral cavity, would fall short of authorizing the use of x-ray equipment for diagnostic or treatment purposes.

By a dental assistant we assume you mean an unlicensed person who assists in the work of a dental office. Obviously such a person would have no authority to diagnose or treat dental ailments by the use of x-ray or otherwise, but she would not be precluded from the mere taking of x-ray pictures.

The mere taking of x-ray pictures is being done more and more by especially trained technicians but so far the legislature has not seen fit to set up any licensing requirements in this field, although, as above pointed out, diagnosis and treatment based upon such pictures may not be done by unlicensed persons nor may x-ray equipment itself be used for treatment purposes except by persons licensed to practice dentistry or medicine.

2. Under sec. 152.06, Stats., licenses to practice dentistry may be revoked for immoral or unprofessional conduct which is defined to include unprofessional advertising. Sec. 152.06 (6) (d) defines unprofessional advertising to include among other things:

“Advertising by means of large display, glaring, illuminated or flickering light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or *any portion of the human head.*”

Technically the use of a dentist's picture of himself in announcing the opening of an office constitutes a violation of the above provision prohibiting advertising which contains any portion of the human head, but there is nothing in the provisions of sec. 152.06 relating to dental advertising which precludes the use of an office picture. Sec. 152.06 (6) (h) limits the content of printed advertisements to the name of the licensed dentist, his titles, office hours, location, telephone number “and purely educational matter not in conflict with law.”

It is unnecessary to decide whether or not a picture of a dental office is a “printed advertisement” since if it is, there is no prohibition as to its use if it be considered educational matter not in conflict with law, and it can reasonably be contended that a picture of a dental office tends to educate the public as to the appearance of dental offices, equipment therein, etc.

3. The use of television in dental advertising presents some new problems, but it would appear that the dentist who attempts to feature himself in such advertising runs into the prohibition of sec. 152.06 (6) (d) directed against advertising which contains “any portion of the human head.” Also he would be subject to all of the other prohibitions in sec. 152.06 relating to advertising statements of a character tending to deceive or mislead the public, advertising professional superiority, advertising definite fixed prices, etc. We do not mean to indicate that a dentist may not appear on a television program under any circumstances, but if he has selected television as a means of advertising his professional services he would be subject to

all of the limitations of sec. 152.06 relating to unprofessional advertising so far as applicable.

Perhaps it should be made clear in closing that this office is not qualified or authorized to render any opinion relating to professional ethics in dental advertising, and that advertising which may be legally permissible under sec. 152.06 may or may not be ethical under the canons of ethics of the dental profession.

WHR

Sheriffs—Public Records—Law Enforcement Activities
—Notwithstanding secs. 18.01, 59.14 (1) and 59.23, Stats., the public enjoys no right of inspection of telephone and radio logs, criminal complaint reports, criminal investigation reports, automobile accident reports, or other papers, documents, and physical evidence relating to law enforcement activities in the office of the sheriff or of a city police department. "Sheriff's docket" as used in sec. 59.23 (8) means a book in which are listed civil writs, processes, and other papers delivered to the sheriff for service.

August 12, 1952.

DAVID L. DANCEY,
District Attorney,
Waukesha County.

You have requested an opinion on the following situation:

"In the sheriff's office of this county there is kept a log in which are recorded incoming phone calls showing the date of the receipt of such call and the general substance of the message delivered to the sheriff's office by such call. There is also kept a log of incoming and outgoing radio communications had over the sheriff's radio system to and from the various sheriff's squad cars in operation, and also to and from connecting radio networks of other departments and enforcement agencies. The time of the call and the substance of the message are recorded in this log.

"Whenever a matter calling for investigation is brought to the attention of the sheriff's office a criminal complaint report is filled out showing the date and time the report is made to the sheriff's office, to what officer it is reported,

and the general substance of the complaint made. These criminal complaint reports are filled out both for complaints made to the sheriff's office by telephone or in person at the sheriff's office. These complaints are then assigned to an officer or officers of the department for investigation. The officers then make a written report of their investigation to the sheriff, which investigation report is attached to a criminal complaint report sheet.

"The sheriff further maintains a file of automobile accident reports which contain reports made to the sheriff on forms compiled for that purpose showing the nature of the accident, parties involved, descriptive diagrams, and information as to whether or not laws of the road have apparently been violated, and information as to the condition of the drivers and vehicles at the time of the accident, names of persons arrested, persons injured or killed in the accident, and names of witnesses. These accident reports are made to the sheriff by the particular deputy sheriff or deputy sheriffs investigating the accident, and are not made by the parties involved in the accident.

"All of the logs and reports mentioned above have, for many years, been kept by the then sheriff of Waukesha County as a convenient and appropriate method of discharging the duties of his office, and upon the expiration of his term have been delivered to his successor, together with all other public property of the sheriff's department.

"A controversy has arisen between the sheriff and the Waukesha Daily Freeman, the local newspaper, as to the right of the latter's reporters to examine the logs and reports mentioned above. The sheriff takes the position that such reporters, along with the public in general, are entitled to examine only the jail register, and that he will give to the reporters orally only such information as in his opinion is newsworthy. Using such method of dissemination, in the past the sheriff has for one reason or another not furnished the newspaper with some reported incidents of criminal offenses, such as breaking and entering, for periods of one day to a week after the incidents have been reported to the sheriff's office. The newspaper alleges that on occasion he has flatly refused to give any information concerning such human interest stories as deputies rounding up herds of stray cattle.

"The newspaper takes the position that its reporters are entitled by law to examine, with proper care, all of the accident reports mentioned above, the log of all incoming calls, the criminal complaint reports and investigation reports except as information concerning the latter may seriously obstruct the apprehension and prosecution of criminals.

"It is the sheriff's position that such records are by their very nature confidential and that he alone must judge what portion, if any, of their contents can be safely revealed without detriment to his duty to apprehend and prosecute law violators, and that newspaper reporters have no more right to examine such records than one accused of a crime might have. He feels that he is not required to release to the press the fact that a crime has been committed immediately upon receiving information concerning its commission.

"I would appreciate your opinion as to whether the newspaper's reporters are entitled to inspect (a) the sheriff's telephone log above referred to, (b) the sheriff's radio log above referred to, (c) criminal complaint reports, (d) investigational reports usually attached to the criminal complaint reports, and (e) the automobile accident reports above referred to, and if so, what if any limitations may properly be placed upon such inspection."

Before entering upon a specific discussion of the questions you have raised, it may not be amiss to point out that the problem is one in which the law has had to make a choice between two conflicting public policies. On the one hand, there is the right of the public to be informed through the press of all matters concerning the administration of government and the execution of the law. This right should be respected by all public officers to the fullest extent that they can do so consistent with the proper performance of their duties. On the other hand, there is the right of the public to be protected against crime and to have the criminal law vigorously enforced. Long experience has shown that criminal investigation must be conducted in secrecy, and both the legislature and the courts have given effect to this principle.

Moreover, persons accused of crime are entitled to a fair trial by an unbiased jury, and a too complete coverage of criminal news by the press may tend to defeat this right. In the case of *State v. Babich*, (1951) 258 Wis. 290, 307, the supreme court said: "There is no justification for law enforcement officers feeding evidence to the press for release in advance of trial."

The legislature has recognized the need for secrecy in at least three instances. Sec. 165.04 (1), Stats., relating to the state crime laboratory, provides in part as follows:

"Evidence, information, and analyses of evidence obtained from law enforcement officers by the superintendent or employes of the laboratory shall be privileged and not available to persons other than law enforcement officers * * *."

Sec. 200.21 (2), Stats., provides as follows:

"All investigations held by or under the direction of the state fire marshal, or his subordinates, may, in his discretion, be private, and persons other than those required to be present may be excluded from the place where such investigation is held, and witnesses may be kept apart from each other, and not allowed to communicate with each other until they have been examined."

This statute has been held by the supreme court to create a privilege in the state fire marshal not to disclose the results of his investigation, even though ordered to do so by a court. *Gilbertson v. State*, (1931) 205 Wis. 168; *State ex rel. Spencer v. Freedy*, (1929) 198 Wis. 388.

The supreme court has also held, independent of statute, that "one accused of crime enjoys no right to an inspection of the evidence relied upon by the public authorities for his conviction." *State v. Herman*, (1935) 219 Wis. 267, 274, and cases cited. Because disclosure to the press or to persons other than the accused of the evidence and information held by law enforcement authorities might result indirectly in disclosing it to the accused, it follows that the authorities are entitled to withhold such information not only from the accused himself but from publication in the press or inspection by other persons not connected with law enforcement activities.

For the same reason, the legislature has provided that the records and testimony taken at John Doe proceedings shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the trial of the accused and then only to the extent that it is so used. Sec. 354.025, Stats. Grand jury sessions and records have always been secret. Secs. 255.18 (2), 255.25, and 255.26, Stats.; *Havenor v. State*, (1905) 125 Wis. 444, 449.

And for another reason, the legislature has provided that automobile accident reports made by the parties are confidential. Sec. 85.141 (10), Stats., quoted below.

In his work on *Legal Control of the Press* (2nd ed. 1950), p. 141, Prof. Frank Thayer of the university of Wisconsin school of journalism, states as follows:

“Neither the individual citizen as such nor a newspaper reporter possesses an unqualified right to demand access to papers, documents and books of a public office, despite the fact that such records may be the property of the public and held and filed for the benefit of the government.”

After discussing a number of types of records, some of which are open to inspection and others not, Prof. Thayer states as follows at p. 149:

“The theory of the public policy making police records not open to the public was well stated in *Worthington v. Scribner*, [109 Mass. 487, 488, 12 Am. Rep. 736 (1872)] as follows:

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised, according to its views of what the interests of the public require.”

The rule protecting informers against disclosure of their identity prevails generally in this country, although no Wisconsin case has been found. 8 *Wigmore, Evidence* (3rd ed. 1940) §§2374-2376. Concerning this rule it is stated as follows in 1945 *Wis. L. Rev.* 244-245:

“The reasons of policy for such a rule as this are extremely cogent. Those who inform against persons suspected of crime frequently do so with extreme reluctance because of well-grounded fears of personal vengeance by the suspect. So it is necessary for police officers, district attorneys and other persons charged with enforcing law or investigating alleged violations to be able to promise informers that their identity will under no circumstances be revealed.”

We turn now to a consideration of the statutes which have a specific bearing upon the right of the reporters to inspect the records referred to in your letter.

Sec. 59.14 (1), Stats., requires the sheriff and other county officers to keep their offices at the county seat and to keep them open during the usual business hours of each secular day "and with proper care shall open to the examination of any person all books and papers *required to be kept in his office* and permit any person so examining to take notes and copies of such books, records or papers or minutes therefrom." Subsec. (2) provides a forfeiture against any officer failing to comply with the statute. It will be observed that the right of inspection applies only to books and papers "required to be kept in his office."

The question is, what books and papers are so "required to be kept" by the sheriff.

Sec. 59.23, Stats., relating to the duties of the sheriff, provides in part as follows:

"The sheriff shall:

"* * *

"(2) Keep a true and exact register of all prisoners committed to any jail under his charge, in a book therefor, which shall contain the names of all persons who are committed to any such jail, their residence, the time when and cause of commitment, and the authority by which they were committed; and if for a criminal offense, a description of his person; and when any prisoner is liberated, state the time when and the authority by which he was liberated; and if any person escapes, state the particulars of the time and manner of such escape.

"* * *

"(8) The sheriff is authorized to destroy all sheriff's dockets, daily jail records and cash books dated prior to 1901. It shall be the duty of the sheriff to hereafter retain and safely keep all such records for a period of 30 years, after which the same may be destroyed."

Subsec. (8) just quoted, as originally enacted by Laws 1931, ch. 200, applied only to counties of 500,000 or more population. By ch. 304, Laws 1947, it was amended to apply generally throughout the state. The foregoing are the only statutes which we have found which specifically require the sheriff to keep any records which would be open to public inspection by virtue of sec. 59.14 (1), above quoted.

Your inquiry does not relate to the daily jail record or register nor to the cash book, so those items will not be further discussed here. But the question arises whether the

telephone log, radio log, criminal complaint reports, investigational reports attached to criminal complaint reports, and automobile accident reports are included within the words "sheriff's dockets" as used in sec. 59.23 (8), above quoted. Aside from the fact that it would be very surprising to find that the legislature had made such records—which are intimately connected with the investigation of crime and the enforcement of the criminal law—open to the public, it is very clear that the term "sheriff's dockets" was never intended to include them. It is, rather, a book in which the sheriff lists *civil* writs, processes, and other papers which are delivered to him for service. See *e.g.*, *Thomas v. Wright*, (Pa. 1822) 9 S. & R. 87, 91. We have investigated and found that such is the only type of book known as a "sheriff's docket" in the office of the Milwaukee county sheriff, for whose benefit sec. 59.23 (8) was originally enacted in 1931 as stated above.

With reference to automobile accident reports, made by the parties, their confidential character is absolutely assured by sec. 85.141 (10), Stats., which reads as follows:

"All required written accident reports including those required by county and municipal authorities and reports supplemental thereto shall be without prejudice to the individual so reporting and shall be for the *confidential use* of such department or authority except that the department or authority may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have, made such a report or, upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department."

There remains to be considered the effect of sec. 18.01, Stats., which provides in part as follows:

"(1) 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.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).”

Subsec. (3) requires such property and things to be turned over to the successors of such officers and subsec. (4) prescribes a civil forfeiture for violation of the statute.

The supreme court construed the foregoing statute in the case of *International Union v. Gooding*, (1947) 251 Wis. 362, 371, 372. That it applies to records other than those specifically required by law to be kept by the officer appears from the following statement in the opinion:

“* * * It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office. * * *”

Nevertheless, it was held, not all such records are open to public inspection under the statute. The court pointed out that the statute was enacted by a revisor's bill in 1917 and that revisor's bills are presumed not intended to change the law, and concluded “that the common-law right of the public to examine records and papers in the hands of an officer has not been extended.” The court then recognized the existence of common-law limitations upon the right of the public to inspect public records in the following words:

“We shall not go into the scope of the common-law right exhaustively or attempt to document our observations upon it. It is enough to say that there are numerous limitations under the common law upon the right of the public to examine papers that are in the hands of an officer as such officer. *Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical.* The list could be expanded but the foregoing is enough to illustrate that

in certain situations a paper may in the public interest be withheld from public inspection. * * *” (Emphasis supplied.)

It is apparent from the discussion at the beginning of this opinion, and from the court's illustrative reference to “documentary evidence in the hands of a district attorney,” that the common-law right of inspection does not extend to the papers and documents referred to in your letter. You are therefore advised that the sheriff is within his rights in withholding from inspection by the press or other members of the public of the radio and telephone logs, criminal complaints and investigation reports including automobile accident reports, and any other papers, documents, memoranda, records, exhibits, and physical evidence relating to his activities in the enforcement of the criminal law, except the jail register.

You also request an opinion “concerning these same questions so far as they affect the right to inspect similar records kept by the police department of the city of Waukesha.” For the foregoing reasons, and because there is no statute to the contrary, the police department has a similar right to withhold such records from public inspection.

WAP

Employer and Employee—Human Rights Commission—Fair Employment Act—General responsibilities of advisory committee, under sec. 111.34, Stats., and of governor's commission on human rights under sec. 15.85, in the field of fair employment, discussed.

August 12, 1952.

VOYTA WRABETZ, *Chairman,*
Industrial Commission.

You request an opinion on the following questions:

1. What are the responsibilities of the advisory committee appointed under the provisions of sec. 111.34, and of the governor's commission on human rights, appointed under the provisions of sec. 15.85, in regard to discrimination

based on race, creed or national origin, in the field of employment?

2. What are the statutory limitations on such responsibilities so far as fair employment is concerned?

It would be well-nigh impossible to foresee all of the activities in which either or both of these committees might engage and to lay down in advance any ironclad rules or principles for delimiting the respective duties of the two committees. We can do little more than quote the pertinent portions of the statutes.

Sec. 111.34, pertaining to the advisory committee, provides:

“* * * The [industrial] commission may refer to such committee for study and advice on any matter relating to fair employment. Such committee shall give consideration to the practical operation and application of this subchapter and may report to the proper legislative committee its view on any pending bill relating to the subject matter of this subchapter. * * *”

As regards the governor's commission, sec. 15.85, so far as here material, provides:

“* * * They shall receive no compensation for their services. It shall be the duty of the commission to disseminate information and to attempt by means of discussion as well as other proper means to educate the people of the state to a greater understanding, appreciation and practice of tolerance, to the end that Wisconsin will be a better place in which to live.”

Generally speaking, of course, the governor's commission has the function of education and dissemination of information with the aim of eliminating the enumerated types of prejudice, and that commission is not prohibited from extending its activities to encompass matters of fair employment. The advisory committee is restricted to matters of fair employment and, further, to advising the industrial commission upon problems referred by it and to presenting to the appropriate legislative committees the advisory committee's views on bills relating to the subject of fair employment. The work of the two committees may overlap at times, although each is operating within its proper sphere.

We will be glad to answer your questions on this matter, as specific problems may arise, but we cannot give a detailed opinion in the absence of a specific problem.

EWV

Public Assistance—Insane—State hospital patients maintained in boarding homes under sec. 51.18, Stats., are patients in an institution for mental diseases within the meaning of the definitions of aid to the blind in sec. 49.18, of old-age assistance in sec. 49.20 (2), and of aid to the totally and permanently disabled in sec. 49.61 (1m).

August 14, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have asked whether a state hospital patient, placed in a boarding home pursuant to sec. 51.18, Stats., is eligible to receive old-age assistance, aid to the blind, or aid to the totally and permanently disabled.

Sec. 49.18, which authorizes payment of aid to the blind, defines such aid to exclude aid to an individual who is a patient in an institution for mental diseases. A similar exclusion is contained in the definition of old-age assistance under sec. 49.20 (2) and of aid to totally and permanently disabled persons under sec. 49.61 (1m).

Sec. 51.18 applies to a patient at "any state hospital." In view of the position of the section in ch. 51, Stats., relating to mentally ill, infirm, and deficient, the term "any state hospital" as used in sec. 51.18 apparently refers to those operated for treatment of mental diseases. Aid to patients in such institutions may not be given under the statutes relating to aid to the blind, old-age assistance, and aid to totally and permanently disabled persons.

The gist of your question is whether persons placed in boarding homes under sec. 51.18 cease to be patients of the hospital.

Sec. 51.18 expressly provides that placement in a boarding home shall not be considered a conditional release. The

section further provides that the bills for board of patients placed in homes "shall be payable monthly out of the operating funds of such state hospital and shall be audited as are other bills." The section also refers to the cost to the state of "supervision" of a patient so boarded.

These provisions appear to contemplate that the patient shall still be subject to observation and treatment by the institution to which he was originally admitted.

It seems significant that the definitions of secs. 49.18 (1) (b), 49.20 (2) and 49.61 (1m) refer to "an inmate" of a public medical institution; but in connection with institutions for mental diseases refer to "a patient in" such an institution. Webster's New International Dictionary, 3rd ed., defines a patient:

"2. A sick person, now commonly, one under treatment or care, as by a physician or surgeon, or in a hospital; hence, a client of a physician, hospital, or the like."

In *Wright v. Mary Galloway Home for Aged Women*, 187 So. 752, 755, 186 Miss. 197, *Seibert v. Ferguson*, 205 P. 2d 484, 489, 167 Kan. 128, and *In re Seidel*, 204 Minn. 357, 283 N.W. 742, 744, it was held that even the term "inmate" may include persons who are not actually physically present in the place specified. If the term "inmate" does not require continued physical presence in an institution, the term "patient" would seem to be even less restrictive.

In view of the various provisions of sec. 51.18 above referred to, it seems clear that the legislature contemplated that the status of persons placed in boarding homes, where they are supported out of the institutional appropriation, shall be that of patients in the institution.

BL

Prisons and Prisoners—Transportation Upon Discharge
—Warden of state prison is not required by sec. 53.13, Stats., to furnish transportation or the means to procure transportation when the convict upon discharge or parole is met by a peace officer or by friends or relatives with an automobile, since it was the legislative intent that transportation be furnished only when necessary.

August 14, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have requested an opinion with reference to sec. 53.13, Stats., which provides as follows:

“The money and effects (except the clothes) in possession of an inmate when admitted to the prison shall be preserved and shall be restored to him when discharged. When released on discharge or parole he shall be given adequate clothing and \$10 in money, in addition to transportation or the means to procure transportation from the prison to any place in this state.”

Your question is whether it is required that any amount be given for transportation when the prisoner upon discharge or parole is met at the prison gate by a relative, friend, or employer, with an automobile.

The statute is a revision of old sec. 53.15, Stats. 1945. This revision was accomplished by a bill prepared by an interim committee and enacted by the 1947 legislature as ch. 519, Laws 1947. So far as material to this discussion the old statute provided in part as follows:

“53.15 (2) Every convict, when discharged, shall be provided with a decent suit of clothes and a sum of money, not to exceed \$5, in addition to transportation, or the means to procure the same, from Waupun to any place within this state, which the warden may, at his discretion and as necessity may seem to require, furnish * * *.”

The comment of the interim committee which prepared the revision bill reads as follows so far as material to this discussion:

“New 53.13 is from old 53.15. The committee recommends \$10 in place of \$5 on discharge or parole and makes the donation absolute; likewise the transportation.”

All statutes providing for the payment of money from the public treasury must be strictly construed. Bearing this rule in mind, it is my opinion that the intent of the legislature was to abolish the discretion of the warden as to whether he would or would not provide gate money and transportation. However, there is no reason to suppose that the legislature intended that transportation should be furnished in a case where the convict is being supplied with a ride from outside sources.

For example, where a detainer has been filed against the convict and upon his release he is met at the gate by a sheriff or other peace officer and immediately placed under arrest by the latter, there is no necessity for the warden to furnish transportation. The sheriff or other peace officer will furnish transportation to the county jail of the appropriate county and it may be that thereafter transportation will be furnished by an extradition agent of some other state. The convict would have no use whatever for a bus or railroad ticket furnished him by the warden and money sufficient to pay for such transportation would under the circumstances be nothing but so much extra gate money.

It is therefore my opinion that the warden has no discretion in the matter of furnishing transportation when it is needed by the convict upon his discharge or parole, and that it may be given either in the form of cash or of a ticket upon a common carrier. But when the convict is furnished transportation by an outside source, whether by a sheriff or a friend or relative, there is no necessity for the state to furnish it. In refusing to furnish transportation under those circumstances the warden would not be exercising any discretion but would simply be following the intent of the statute.

You suggest the possibility of the person calling for the prisoner being without funds, gasoline, or necessities for the trip. Such a case is unlikely to arise, but if it did I would suggest that the warden satisfy himself whether the person calling for the prisoner is actually indigent, and if he determines that that is the case he may advance sufficient money

for gasoline to the place of the prisoner's destination in the state or to the state line if the prisoner is to be taken outside the state.

WAP

Circuit Court—Reporter—Travel Expenses—19 O.A.G. 78, relating to allowance of travel expenses of circuit court reporter residing outside the circuit, reconsidered and reaffirmed.

August 14, 1952.

E. C. GIESSEL, *Director,*
Department of Budget and Accounts.

You have called attention to the fact that ch. 402, Laws 1951, created the 21st judicial circuit consisting of Racine county which formerly was included in the 1st circuit along with Kenosha and Walworth counties. Honorable Alfred L. Drury, Judge of the 1st circuit, resides in Kenosha, while his reporter, Mr. J. E. Belden, has always resided in Racine where he desires to continue his residence.

The question now arises whether Mr. Belden may be paid his traveling expenses from his home, which is now outside the 1st circuit, to the county seats of the 1st circuit. Mr. Belden in a letter accompanying your request for an opinion points out a number of practical reasons why it is difficult for him to rent or buy a home in Kenosha or Elkhorn, and that it is a great convenience to the judge for him to bring to the judge supreme court briefs and cases which are available at the Racine county court house but which are not available in the 1st circuit, thus making it unnecessary for the judge to take the time to travel to Racine when he desires to make use of this library material. Mr. Belden also states that his predecessor, Mr. Charles Welch, who was the court reporter for the 1st circuit for nearly 50 years, always resided in Milwaukee and had his expenses paid from there to the county seats in the 1st circuit, such payment having met with implied approval in 19 O.A.G. 78, in an opinion to the auditor in the secretary of state's office under date of

February 20, 1930, which opinion related to travel expense of the court reporter of the 5th circuit who also resided outside the circuit.

Sec. 252.18 relating to the appointment of the court reporter and providing for his traveling expenses reads:

"252.18 (1) Every circuit judge may, in his discretion, appoint a competent phonographic reporter for the circuit or the branch of a circuit, as the case may be, for which he was elected or appointed; and when he shall deem it necessary he may appoint one or more competent assistant reporters. The appointing judge or his successor may remove any such reporter or assistant reporter at pleasure and appoint a successor. Every person so appointed as reporter or assistant reporter is an officer of the court and shall take and file the official oath. When so qualified every reporter and every assistant reporter shall be authorized to act in any circuit court in the state. Every reporter shall attend upon the terms of court in the circuit or branch for which he is appointed and, when requested by the judge appointing him, upon the sessions of court presided over in other counties by such judge, and shall discharge such other duties as the court or judge thereof requires; and every assistant reporter shall attend upon the court for which he is appointed, whenever requested so to do by the circuit judge.

"(2) A reporter attending a term of court or attending by the direction of the court the trial of a compulsory reference, outside the county in which he resides, or attending the sessions of court presided over in other circuits by the judge appointing him, at the request of such judge, shall be reimbursed his necessary traveling expenses and hotel bills. Assistant reporters shall be paid nothing out of any public treasury except for services performed in a county forming a part only of a circuit when 2 judges are holding court therein at the same time; and for such services each assistant reporter shall be compensated out of this appropriation at the rate of \$10 per day. For other services he shall be compensated by the reporter."

The controlling language of subsec. (2) was to be found in sec. 20.66 (2) of the appropriation statutes in 1930 when the former opinion was written, but otherwise and so far as material here the statutory language is essentially the same.

In the former opinion it was pointed out that art. VII, sec. 7, of the Wisconsin constitution requires a circuit judge

to reside in the circuit from which he is elected but that there is no similar provision in the constitution or the statutes for the court reporter.

It is to be noted that under subsec. (2) the reporter is to be reimbursed for necessary traveling expenses and hotel bills when "attending a term of court or attending by the direction of the court the trial of a compulsory reference, *outside the county in which he resides*, or attending the sessions of court presided over in other circuits by the judge appointing him." We do not understand that any expense vouchers have been presented for travel to other circuits where the judge of the 1st circuit has been called in to try a case and as a matter of fact the judicial load of the 1st circuit has been so heavy that the judge has not been available generally to help out in other circuits. So we are here concerned primarily with the travel of the reporter in attending terms of court in the circuit but "outside the county in which he resides," although it might be noted in passing that the problem does not appear to be materially different where travel to other circuits is involved.

It can be assumed that in the majority of the circuits the reporter will reside within the circuit for the purposes of the convenience of the reporter as well as the court, and there may be some political advantage to the judge in making the appointment from his own circuit if a qualified reporter can be found within the circuit. However, the legislature has placed no restriction either on the making of the appointment or in the matter of travel allowance so far as residence within the circuit is concerned. This may or may not have been done advisedly on the theory that the work of the court must go on and that the judge should therefore be free to go outside the circuit in selecting a reporter if he deems it necessary or desirable to do so, and that such reporter's expenses for travel "outside the county in which he resides" should accordingly be paid.

The attorney general in construing a statute is not free to legislate by writing restrictions onto the provisions which the legislature has made. He may not therefore by implication rule that the words "outside the county in which he resides" mean "outside the county in which he resides, provided such county is not outside the circuit."

At any rate many sessions of the legislature have been held since the opinion in 19 O.A.G. 78 was published and no steps have been taken to amend the controlling language of the statute involved, which in all probability would have been done had the legislature deemed the opinion of the attorney general to be unsound. See *Union Free High School District v. Union Free High School District*, 216 Wis. 102, 106. This principle is significant although not controlling, but in the absence of any factors indicating that the former opinion was clearly wrong we conclude that it should not be reversed at this late date, and if the situation is one calling for correction, it should be directed to the attention of the legislature.

WHR

Constitutional Law—Conservation Commission—Powers
—Legislature has delegated power to the conservation commission, in accordance with an expressed standard, to issue rules and regulations which modify statutes concerning the conditions governing the taking of fish and game.

Such delegation of power is valid and constitutional.

August 14, 1952.

HERBERT W. JOHNSON,
District Attorney,
Door County.

You ask our opinion as to the legality of conservation commission orders G-781, section 11, and AGB-783, section 8. Both orders read:

“IT IS FURTHER ORDERED that section 29.22 of the Wisconsin statutes be and the same is hereby modified to read as follows:

“29.22 *General restrictions on hunting.* (1) Prohibited methods. (a) * * * No person shall carry with him in or on any vehicle or automobile, any firearm or bow, unless such firearm is unloaded and enclosed within a carrying case * * *.”

Your inquiry in effect raises two questions :

1. Has the legislature delegated power to the conservation commission to modify existing statutes?

2. Is such delegation of power constitutional?

The powers of the conservation commission in the premises are established by the following sections of the statutes.

Sec. 23.09 (7) :

"The commission is hereby authorized to make such rules and regulations, inaugurate such studies, investigations and surveys, and establish such services as they may deem necessary to carry out the provisions and purposes of this act, and any violation of any provisions of this act, or of any rules or regulation promulgated by the commission, shall constitute a misdemeanor and be punished as hereinafter provided. * * *"

Sec. 29.174 (2) :

"It shall be the duty of the conservation commission and it shall have power and authority to establish open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game, in accordance with the public policy declared in subsection (1). Such authority may be exercised either with reference to the state as a whole, or for any specified county or part of a county, or for any lake or stream or part thereof."

Sec. 29.174 (9) :

"The present statutes regulating open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game shall continue in full force and effect until modified by orders of the conservation commission, as provided in this section, or by subsequent acts of the legislature."

The answer to both of your questions is "Yes."

It is clear from their express terminology that the foregoing statutes delegate power to the commission to establish rules and regulations for the protection, development, and use of fish and game, and sec. 29.174 (9) by its terms authorizes the commission to modify existing statutes.

The validity of sec. 23.09 (7) was upheld in *State v. Sorenson*, (1935) 218 Wis. 295, 260 N.W. 662. This case was cited with approval in *Olson v. Conservation Commission*, (1940) 235 Wis. 473, *State v. Winkler*, (1949) 255 Wis.

352, and *Le Clair v. Swift et al.* (Dist. Ct., E. D. Wis.), (1948) 76 Fed. Supp. 729.

Sec. 29.174, Stats., was considered in 27 O.A.G. 87 (1938) and its validity upheld on the authority of *State v. Sorenson, supra.*

The conservation commission has continued to operate in accordance with that opinion throughout the 14 years since it was issued, and during that time the legislature has never taken any action to withdraw the authority set forth in express terms in sec. 29.174. Such legislative acquiescence in the exercise of administrative authority is presumptive that the authority has been properly exercised in accordance with the original legislative intent. *The Woman's Home C. R. Club v. Industrial Commission*, (1939) 231 Wis. 371, 285 N.W. 745; *United States v. G. Falk and Brother*, (1907) 204 U.S. 143.

Accordingly, it is our opinion that the legislature has expressly delegated power to the conservation commission to adopt the order you question, and that such delegation of power is constitutional.

RGT

Constitution—Amendment—Secretary of State—Election Notice—Suggestion for statement required by sec. 6.10 (1), Stats., in notice submitting question to the vote of the people for an advisory referendum under sec. 3, ch. 728, Laws 1951.

August 15, 1952.

FRED R. ZIMMERMAN,
Secretary of State.

You have asked us in a letter dated August 8, 1952, to prepare a brief statement of the change that will be made in existing laws if a majority of the electors vote "yes" on the question in the referendum provided for in sec. 3, ch. 728, Laws 1951, which provides:

"There shall be submitted to the vote of the people at the general election in November 1952 an advisory referendum on the question:

“Shall the Constitution be amended to provide for the establishment of either senate or assembly districts on an area as well as population basis?”

“If the above question is rejected by a majority of the electors voting on such referendum, Sections 1 and 2 of this act shall take effect January 1, 1954, otherwise said Sections 1 and 2 of this act shall not be effective.”

You have requested our opinion in order to comply with the provisions of sec. 6.10 (1), Stats. 1951, which provides:

“* * * The secretary of state shall append to each * * * question to be submitted to the people a brief statement of the change that will be made in the * * * existing laws if such * * * question so submitted shall be ratified or approved by the people at such election. Such statement shall contain no argument for or against any such * * * question so submitted. * * *”

In my opinion, the following form of statement would be in compliance with sec. 6.10 (1) :

“If a majority of the electors answer the above question ‘yes,’ then the new apportionment of senate and assembly districts on a population basis as provided for by ch. 728, Laws 1951, will not go into effect and the existing apportionment as enacted in 1931 will continue in effect.

“If a majority of the electors answer the above question ‘no,’ then the new apportionment of senate and assembly districts on a population basis as provided by said ch. 728 will go into effect on January 1, 1954.”

SGH

Taxation—Tax Deed—Recording of a mortgage subsequent to the service of notice of application for tax deed given in full accordance with sec. 75.12, Stats., does not invalidate a tax deed taken thereon.

August 18, 1952.

GEORGE F. MILLER,
District Attorney,
Kewaunee County.

You request an opinion on whether a tax deed is valid under the following circumstances.

The county took a tax deed on certain land, following the procedure required by sec. 75.12, Stats. After the issuance of the tax deed but before the recording thereof, it was discovered that a second mortgage upon the premises given by the owner shortly before the expiration of the three months' notice of application for tax deed had been recorded. The second mortgagee was not served with notice of application for tax deed because his mortgage was recorded after the search had been made to determine what persons were entitled to receive notice and after service of the notice upon the record owner and the first mortgagee.

Sec. 75.12 (1) provides that no tax deed shall be issued unless a written notice of application for tax deed shall have been served upon the owner and:

“* * * If the records of the office of register of deeds in the county where such land is situated show that such lot or tract of land is incumbered by an unsatisfied mortgage or mortgages, such notice of application for tax deed shall be served upon at least one of the mortgagees in each such mortgage, or upon the last assignee or one of the last assignees of each such mortgage, if the assignment is recorded.

“(2) Such notice shall state the name of the owner and holder of the tax sale certificate, and the date thereof, the description of the lands involved, the amount for which the lands were sold and that such amount will bear interest as provided by law, and shall give notice that after the expiration of 3 months from the date of service of such notice a tax deed will be applied for. * * * A notice of application for a tax deed shall not be served earlier than 88 days prior to the earliest date on which the holder of a tax certificate is by its terms entitled to a deed. * * *”

In the situation you present, the statute was followed exactly. Notice of application for tax deed was served upon the owner and the holders of all unsatisfied mortgages that were recorded at the time of such service. Certainly the holder of the tax certificate could do no more. If the recording of an additional mortgage within and shortly before the expiration of the 3-months period of notice were to invalidate a tax deed issued pursuant to such notice, the owner of a tax delinquent parcel could defeat the issuance of a valid tax deed under the provisions of sec. 75.12, by repeatedly giving a new mortgage each time a notice of application for tax deed was served. In this connection it is to be noted that sec. 75.12 (2) expressly prohibits the giving of the notice earlier than 88 days prior to the date specified in the tax certificate that it is ripe for the issuance of a tax deed.

Where there is a tax certificate outstanding, then anyone purchasing or taking a mortgage on the property during said 88 days and subsequent thereto is on notice that a notice of application for tax deed already may have been served. Such a second mortgagee has adequate means to protect himself by redeeming the lands at any time prior to the recording of the tax deed, which is the expiration of the redemption period as specified in sec. 75.01, Stats. In such circumstances the equities clearly are with the holder of the tax certificate.

Furthermore, as you point out, sec. 75.12 (1) provides that if the tract is improved by a dwelling or by a building used for business or agricultural purposes and such dwelling or building has been occupied and so used for 30 days immediately prior to the date of service of notice of application for tax deed, then such notice also must be served upon the occupant. This indicates very strongly that the intent of the legislature was that the parties entitled to receive notice of application for tax deed should be determined as of the date of service of such notice and that occurrences after the date of service would not necessitate any further service of the notice.

We conclude that in the absence of any express provision in the statutes or any direct precedent in the decided cases, of which we find none, and under the principle as above dis-

cussed, the tax deed to which you refer is valid. However, the county has a ready means of obtaining a judicial settlement of your question by bringing an action to bar former owners, under the provisions of sec. 75.39, Stats.

HHP

EWV

Taxation—Exemption—Foster Homes—“Foster homes” are not exempt from taxation by sec. 70.11 (19), Stats. 1951.

August 18, 1952.

THORPE MERRIMAN,
District Attorney,
Jefferson County.

You submitted a request for an interpretation of the new tax exemption provision created by ch. 123, Laws 1951, and amended by ch. 734, Laws 1951. The new provision is in sec. 70.11 (19) of the 1951 Wis. Stats. and reads as follows:

“INSTITUTIONS FOR DEPENDENT CHILDREN. All the real and personal property of any children’s institution licensed for the care of dependent, neglected, or delinquent children under sections 48.35 to 48.42 while the same is actually used for such purpose. This amendment (1951) shall apply retroactively to the current year’s assessment.”

You suggest in your request that foster homes may be exempt from taxation under this new provision because the amendment made by ch. 734, Laws 1951, to this new provision created by ch. 123, Laws 1951, extended the children’s institutions covered by the exemption from those licensed under secs. 48.35 to 48.37 to those licensed under secs. 48.35 to 48.42, and foster homes are dealt with primarily in sec. 48.38 and the succeeding sections up until and including 48.42. At first glance, that foster homes are thereby clearly meant to be included seems tenable. However, upon further perusal, such an easy assumption appears unwarranted.

First, secs. 48.35 to 48.42 comprise a sort of coherent unit within ch. 48 dealing with child welfare agencies and foster

homes. True, sec. 48.35 deals primarily with child welfare agencies and sec. 48.38 deals primarily with foster homes, but secs. 48.39 to 48.42 deal with both. In fact, the latter sections contain much more material regarding child welfare agencies than material regarding foster homes. Therefore, the legislature's intent, in extending the coverage of this new tax exemption to include children's institutions licensed under secs. 48.38 to 48.42, was not to include foster homes within the exemption but rather to be sure to include all types of child welfare agencies by retaining secs. 48.35 to 48.42 as a natural homogeneous unit dealing with all aspects of child welfare agencies.

Secondly, the legislative intent in distinguishing between child welfare agencies and foster homes is apparent when the key words of the new tax exemption statute are carefully considered. The new statute exempts from taxation the property of any children's "institution" licensed under secs. 48.35 to 48.42. In Webster's New International Dictionary (2d ed. 1935) the word "institution" is defined as follows:

"4. An established society or corporation; an establishment, esp. one of a public character; a foundation; as, a literary or charitable *institution*; the Smithsonian *Institution*."

Likewise, in Funk and Wagnalls New Standard Dictionary (1941) it is defined as follows:

"2. A corporate body or establishment instituted and organized for public use, or the building occupied by such a corporate body; as, the Smithsonian *Institution*."

Both of these definitions concur with the common, ordinary, everyday meaning of the word "institution." The word most commonly means an established organization, group, or place having a definite public flavor as distinguished especially from a private individual person or persons. Looking at the legislative definitions of child welfare agencies and foster homes in ch. 48, one can readily see the legislative distinction drawn.

"Child welfare agency" is defined in sec. 48.35 (1) as follows: "* * * any person, firm, association or corporation, and any private institution * * *."

"Foster home" is defined in sec. 48.38 (1) as follows:
"* * * place of residence of any person or persons * * *."

Although the word "person" is included in the definition of a "child welfare agency," the other words following it show the public flavor of the term "child welfare agency," while the definition of a "foster home" clearly indicates that it is nothing more than a private home or residence. Further bearing out this point is the essential difference between a child welfare agency and a foster home, which is that within the latter there are never more than four children taken care of or maintained at any one time, except when the children are brothers and sisters or in rare exceptions made by the state department of public welfare, whereas a child welfare agency, to be so designated, must take care of more than four children. Thus again the less extensive, more private nature of the foster home is shown. Furthermore, several cases from other jurisdictions have similarly construed the word "institution." *In re Peabody's Estate*, 21 Cal. App. 2d 690, 70 Pac. 2d 249; *Engstad v. Grand Forks County*, 10 N.D. 54, 84 N.W. 577; *Samuelson v. Horn*, 221 Iowa 208, 265 N.W. 168.

Thirdly, the tax exemption extends to any children's institutions "licensed" under secs. 48.35 to 48.42. Throughout ch. 48 the language is that a "license" is granted to a child welfare agency, but a "permit" is granted to a foster home. This distinction appears most markedly in sec. 48.39, where provisions are made for revocation of "licenses" to child welfare agencies and of "permits" to foster homes. By specifying "licensed" under secs. 48.35 to 48.42, the legislature undoubtedly intended to restrict the exemption to child welfare agencies.

Fourthly, tax exemption statutes are to be strictly construed and all doubts are resolved in favor of taxability. An exemption to be valid must be clear and express. *State ex rel. Wis. C. R. & I. Bur. v. Milwaukee*, (1946) 249 Wis. 71, 23 N.W. 2d 501; *Armory Realty Co. v. Olsen*, (1933) 210 Wis. 281, 246 N.W. 513. From the foregoing discussion it is obvious that exemption of foster homes is not express and clear beyond a reasonable doubt.

Fifthly, it does not seem logical and reasonable that the legislature intended to exempt entirely from property taxa-

tion the large expensive mansion of some wealthy person who might take a child into his home for care and maintenance. Admittedly, this is an extreme example, but it serves to illustrate the unreasonableness of such a construction. Providing a home for a dependent, neglected, or delinquent child is a virtuous and worthy act deserving of public gratitude, but it does not seem reasonable to construe the legislative intent in such a way that this worthy act becomes a means for wholesale escape from taxation. Those best able to bear the burden of furnishing a foster home for some unfortunate child are also those best able to bear the burden of property taxation. To allow them to escape their share of the burden would unjustly shift the burden of taxation.

It is therefore our opinion that foster homes are not within the language "children's institution licensed for the care of dependent, neglected, or delinquent children under sections 48.35 to 48.42" in sec. 70.11 (19), Stats. 1951, and accordingly are not exempt thereunder from taxation.

HHP

Dairy, Food and Drugs—Bakeries and Confectionaries— Secs. 97.10 to 97.24, Stats., pertaining to licenses and sanitary regulations of bakeries and confectionaries are applicable to transient operators as well as to those in permanent locations. Portable structures meeting license requirements do not need separate licenses for each location. Transient operators using different structures in each move must be licensed for each geographical location.

August 25, 1952.

D. N. MCDOWELL, *Director,*
State Department of Agriculture.

You have requested my opinion as to whether or not the sanitary regulations contained in the statutes pertaining to bakeries and confectionaries are applicable to transient establishments that manufacture and sell bakery and confectionary products in trailers or similar portable struc-

tures at various fairs, carnivals, and other temporary locations.

You point out that these structures do not meet the room height requirements of at least 7 feet 9 inches as required by sec. 97.19, and fail to have the floors required by sec. 97.12 or the plumbing or toilet facilities as required by secs. 97.12 and 97.14.

Sec. 97.10 provides that no building, room or apartment shall be used as a bakery or confectionary without a license. Sec. 97.21 (1) defines a bakery "to be any room or place where bread, crackers, cakes, pies, macaroni, spaghetti, or any other food product of which flour or meal is the principal ingredient are baked, cooked, or dried, or prepared or mixed for baking, cooking, or drying for sale as food." Sec. 97.21 (3) defines confectionary and confectionary establishment "to be any room or place where candy, sweetmeats, or any other food products, of which sugar, molasses, chocolate, or nutmeats are the principal ingredients, are prepared, mixed, cooked, dried, formed, coated, or cooled to be sold as food and any room used for any process incidental thereto."

The statutes relating to the sanitary regulation of bakeries and confectionaries appear to be reasonable measures intended for the protection of the health of the people of this state, and such laws are obviously within the police power of the state. The bakery statutes were considered by the supreme court in the case of *Wisconsin Association of Master Bakers v. Milwaukee*, (1926) 191 Wis. 302, and although their reasonableness was not in issue, the court unmistakably indicated that the statutes were valid.

A number of years ago the attorney general in 11 O.A.G. 792 (1922) considered a problem relating to bakeries. The bakery in question did not have a ceiling high enough to conform to the law as it then existed. The opinion in question contained the following statement, with which I am in accord:

"* * * The legislature has established eight feet as the minimum height of the ceiling of a bakery and it has given neither yourself nor any other officer discretion to change it. To grant a license for the operation of this bakery when you know that the height of the ceiling fails to comply with

the law would be a violation of your official duty as to this particular matter. On this point the law as it stands is absolutely rigid, and if it is to be made flexible, that must be done by the legislature and not by any administrative officer."

The statutes in question are unequivocal and do not expressly nor impliedly exempt transient operators. It is therefore my opinion that all bakeries and confectionaries, both transient and permanent, must fully comply with the sanitary regulations contained in the statutes. Any operation by a transient without a license from your department would be in violation of the law.

You further inquired as to whether transients would need a license in each separate location. If the activity which is subject to license is conducted in a portable structure and it meets the requirements of the licensing law for any given licensing period, the operator would not need a separate license each time he changed the location of his business by moving the structure about, so long as it continued to meet the statutory requirements which were passed upon at the time the license was initially issued. It is the facility in which the activity is conducted which must meet the requirements of the law. It follows that if the operation is one where the proprietor moves his equipment from place to place, using different structures for the location of his business in each locality, each *different* structure must meet the requirements and he is required to secure a license for each different geographical location.

REB

Highways and Bridges—Counties—Sec. 80.39, Stats.,
allows counties to lay out roads wholly within a single town.

August 25, 1952.

EDMUND H. DRAGER,
District Attorney,
Vilas County.

You have asked my opinion as to whether or not sec. 80.39 of the Wisconsin statutes confers authority upon the county board to act upon a petition to lay out a road entirely within one town. Sec. 80.39 (1) (a) reads as follows:

“The county board may lay out highways in the county, and may widen, alter or discontinue any highway or part thereof laid out by it (but may not discontinue any part of a state trunk highway) upon the petition of not less than 10 resident freeholders of each town in which the highway or any part thereof is proposed to be laid out, widened, altered or discontinued. All the powers herein granted may be exercised by a committee of not less than 3 members of the board. Whenever the supervisors of adjoining towns in different counties cannot agree in laying out a highway extending from one town into the other and the supervisors of one town lay out a highway up to the line of the adjoining town, the county board of the county in which such latter town lies may, upon like petition, lay out such highway in continuation as the public interests may require.”

The balance of the statute is very lengthy and it is not necessary to quote it in full for the purposes of this opinion. In substance, it provides the administrative procedure necessary and allows damages to be paid to property owners through whose land the highway is laid out and provides that these damages are to be paid by the town. It limits awards of damages to \$1,500 for the laying out of the highway. If the costs of the highway exceed that amount, it may not be opened until a majority of the electors of the town consent.

This law has been in existence in the state since 1869, having been enacted by ch. 152 of the laws of that year. It originally provided that “the county board of supervisors of each county shall be commissioned to lay out, survey and establish highways extending through or into two or more

towns, or along and near the town line between two or more towns in such county." This provision remained a part of the statute until 1919. Ch. 343 of that year revised it to eliminate the words "extending through or into two or more towns or along or near the town line between two or more towns." This left the statute in almost the same language that exists today. There is no doubt that highway legislation, from the period 1911 when the highway commission was created to the present time, has broadened in scope to the end that this state would have a more complete and unified network than the original town highway system afforded.

It is my opinion that by the elimination of the words in the statute above indicated, the legislature intended to extend the powers of the county to allow it to lay out town roads within a single town. The act eliminating the words was not a revisor's bill and I cannot see any other interpretation that can be given under the circumstances.

In your letter you stated that this problem arose because a town board refused to lay out a road to landlocked property. It would not have been necessary for the county to intervene. I call your attention to the fact that the legislature has provided an effective means by which owners of landlocked parcels may proceed in order to secure a connection to public highways. See secs. 80.13 through 80.22, Stats.
REB

Schools and School Districts—National Forest Income—
National forest income allotted to school districts under sec. 59.07 (22), Stats., may not be used in substitution for the required minimum applicable 3 or 5 mill tax levy for county school aid under sec. 59.075 or for state aid under sec. 40.372.

National forest income allotted to a school district under sec. 59.07 (22) is not deductible in tax collection distributions to a school district for its school tax levy.

Town board may allot national forest income to only those school districts having national forest acreage if it determines that is an equitable manner of distribution.

August 28, 1952.

GEORGE E. WATSON,

State Superintendent of Public Instruction.

You have requested an opinion on several questions involving the use of funds received from the federal government as distribution of moneys received from national forests.

"1. May the municipal boards use national forest crop income receipts under section 59.07 (22) in lieu of certified school district tax levies and maintain the school district's eligibility for receipt of aids under the provisions of section 59.075 and section 40.373 and section 40.374 on the same basis as would pertain if the tax as certified had been levied?"

The moneys received by the federal government from national forests are distributed to the states pursuant to 16 U.S.C.A. §500, reading as follows:

"Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein."

When such funds are received by the state they are distributed to the counties pursuant to the provisions of sec. 20.07 (10), Wis. Stats., which reads as follows:

“(10) All sums of money heretofore received or which may hereafter be received from the United States government for allotment to counties containing national forest lands and designated for the benefit of public schools and public roads in such counties, shall be distributed in proportion to the national forest acreage in each as certified by the United States Forest Service. Such distribution shall be made annually within 60 days after receipt of the money from the federal government.”

Then sec. 59.07 (22), Stats., provides for the distribution by the counties to the towns and in turn the disposition of such income by the towns. It reads:

“(22) The treasurer of each county receiving national forest income shall make distribution thereof to the towns in the county wherein national forest lands are situated, each town to receive such proportion thereof as the area of national forest lands therein bears to the area of such lands in the entire county. Fifty per cent of the amount received by it shall be expended by the town exclusively for the benefit of roads therein and the remaining 50 per cent thereof shall be allotted by the town treasurer, in such equitable manner as the town board shall determine, to school districts in the town for school purposes.”

The levy of a county tax for and the payment of county elementary school aid to school districts is provided for in sec. 59.075, Stats., which so far as here material, reads:

“(1) The county board of each county is empowered at or before the November meeting each year to order the levying of a tax upon the aggregate equalized valuation of the county for the aid of the elementary schools of each school district of the county *which has levied and placed on the tax rolls of the district for the previous year for the operation and maintenance of schools a tax of not less than 3 mills on the equalized valuation of the district for the year previous to the year of levy for elementary school purposes except where the district operates both elementary and secondary schools the minimum levy shall be 5 mills for both elementary and high school purposes. * * **”

The following are the parts of sec. 40.372, Stats., providing for state aid to schools, that are pertinent here:

"40.372. State aid shall be paid annually to the school districts of the state for the support of education as follows:

"(1) (a) There shall be paid to basic districts in which the costs of education for the previous school year required that the districts levy and the districts did levy a tax of 3 mills or more in the year prior to that in which the aids are granted on the equalized valuation of the district for the year prior to the levy of such tax, elementary aid as follows:

"* * *

"(2) (a) * * * Aids under this subsection shall be payable only to such integrated districts in which the cost of education required that the districts levy, and the districts did levy, a tax of 5 mills or more in the year prior to that in which the aid is granted on the equalized valuation of the districts for the year prior to the levy of such tax."

As we interpret your question it is whether a school district which received a distribution of national forest income in the prior year pursuant to sec. 59.07 (22), Stats., but which did not levy the required minimum tax, nevertheless qualifies for county school aid under sec. 59.075, Stats., and for state aid under sec. 40.372, Stats., if the total of such national forest income and the tax that was levied for said previous year, or if where no tax was levied then the national forest income received standing alone, equals or exceeds the required 3 or 5 mill tax, as the case may be.

Quite obviously, whether a school district is eligible to such aids depends upon what the statute according the particular aid provides. Sec. 59.075 authorizes a county to levy a tax for the payment of elementary school aid to each of the school districts in the county which "has levied and placed on the tax roll" for the previous year, a 3 or 5 mill tax, as the case may be, for operation and maintenance of the schools of the district. This language is clear and unambiguous. It authorizes the county to levy the tax for payment of said county aid to the districts which have done what the statutes say they must have done. A county is thus limited in paying such aid to only those school districts which meet the specified requirement. The requirement is that the school district must have made a levy of the stated minimum. There is no qualification of the requirement. The levy of a tax in the specified applicable amount is a condition precedent to the receipt of county aid. If a school dis-

trict has not made that levy then it clearly does not meet the requirements of the statute, regardless of the reason why it did not make the levy.

In a previous opinion in 38 O.A.G. 280, relative to the application of a former state school aid provision in sec. 40.87 (1), Stats. 1947, the wording of which was almost identical with that in present sec. 59.075, it was ruled that state aid was not payable to a school district which in the previous year had voted the minimum required tax levy and had certified the same to the town clerk but which, without fault of the school district, never was put in the tax roll or collected, notwithstanding that the school district would otherwise be entitled to such aid. This illustrates the preciseness with which the applicable statutory language must be followed and complied with in order that the district may be entitled to aid.

Therefore, if a school district's receipts, including national forest income, are sufficient to pay the expenses of operating and maintaining its schools without the levying of a tax of the minimum amount required by this statute, and such minimum tax is not levied, that district is not entitled to county aid under sec. 59.075 or state aid under sec. 40.372. It should also be pointed out that the wording in sec. 40.372 imposes an additional factor in that state aid is accorded not only to those school districts which did make such minimum levy but is further limited to those "in which the costs of education for the previous school year required that the districts levy" such specified applicable minimum tax. Thus, in order for a school district to be entitled to state aid under sec. 40.372 it must not only have levied and placed on the tax roll for the previous year the applicable required minimum tax but such tax in such minimum amount must have been "required" to meet the cost of education of the prior year.

"2. Is 50% of the national forest crop income received by municipalities payable to the school district or school districts over and above the tax levies certified to the municipal clerks by the school district clerks?"

We interpret this as inquiring whether a town treasurer in accounting under sec. 74.03, Stats., to a school district

for school taxes may deduct from the amount of school taxes otherwise payable to the school district under its levy as certified under sec. 40.11 (9), the amount of national forest income allotted to said school district by the town board pursuant to sec. 59.07 (22).

The levy of a school tax by the district; the certification thereof to the clerk of each city, town or village within which the district's territory lies, for insertion in the tax roll; and the collection and accounting by the municipal treasurers to the school district under sec. 74.03 for the proceeds of tax collections is wholly independent from and in no way related to or tied up with the distribution of national forest income to such a school district by a town. The levy, collection and distribution of the proceeds of the tax is one matter and the distribution of national forest income is another. They are two completely independent and separate sources of revenue of school districts. Neither is dependent upon the other.

If a town were permitted to reduce its remittances to a school district for the school tax, as levied, certified to the town, inserted in the tax roll and collected, by deducting therefrom the amount of national forest income allotted to the district, the effect would be a retention by the town of the portion of the national forest income allotted to such school district. This would be in direct violation of the provision in sec. 59.07 (22) that 50 per cent of the national forest income received by the town shall be allotted to school districts in the town for school purposes. In our opinion a town has no right or authority to do this and the answer to your question is in the negative.

"3. May the municipal boards apportion the national forest crop income to only those school districts which have national forest crop acreage within their boundaries?"

The language of sec. 59.07 (22) is silent as to the basis for the distribution or allotment at the town level, other than to provide that 50 per cent of the national forest income received by a town shall be allotted to the school districts in that town for school purposes "in such equitable manner as the town board shall determine." But, the entire distribution of such funds from the federal government to

the state, the state to the counties, and the counties to the towns, is on an apportionment basis in proportion to the national forest acreage in the receiving governmental unit. While the failure to use similar language in the last sentence of sec. 59.07 (22) in prescribing the allotment to the school districts would indicate a legislative intent that the town board is not restricted to a distribution to the school districts on a similar proportional acreage basis, the underlying thread running throughout the other distribution statutes is that this income is to be expended for roads and schools in the area from which it was derived. Accordingly it would seem that an allotment by the town board to the school districts upon such a proportionate acreage basis would be equitable.

The fact that the language as to the allotment to school districts does not restrict it to an acreage basis must be given some effect. Had the legislature intended to restrict it solely to an acreage basis then it would have used that language rather than the general language of "equitable manner." Apparently the legislature felt that under some circumstances distribution on an acreage basis would be deemed unfair and therefore used language permitting a departure therefrom in such cases.

In our opinion normally a town board may apportion national forest income to only those school districts having national forest acreage within their boundaries if the town board in its discretion determines that that is an equitable manner in which to distribute such income. But such town board is not required to do so if in its judgment some other distribution is equitable under all the circumstances. In our view the town board has a discretion and its determination would be upheld unless the allotment is so arbitrary and unreasonable under all the circumstances as to constitute an abuse of discretion.

HHP

Soldiers, Sailors and Marines—Grand Army Home—If a veteran died residing in this state, and the period from the commencement of his Wisconsin residence to the date of his widow's application for admission to the Grand Army Home equals the time specified in sec. 45.37 (2) (a) 5 and 6, Stats., she is eligible for admission if other requirements of the section are met.

August 28, 1952.

COL. G. H. STORDOCK, *Commandant,*
Grand Army Home for Veterans.

You have asked a question involving the interpretation of the requirements of sec. 45.37, Stats., respecting the eligibility of the widow of a veteran for admission to the Grand Army Home.

Sec. 45.37 (2) (c) provides in part:

"The widows of those veterans who, if living, would be qualified under paragraph (a) who were married to and living with their veteran husbands not less than 10 years immediately prior to death * * *."

Paragraph (a) referred to in the above provision includes the following requirements with respect to veterans' eligibility for admission:

"(2) Within the limitations of the facilities of the home, the department may admit to membership the following:

"(a) Those men and women of Wisconsin who served at least 90 days of active duty in the armed forces of the United States during a war period or under conditions comparable thereto as may be determined by department, and who meet the following requirements:

"* * *

"5. Who were bona fide residents of Wisconsin at the time of entering service with the armed forces and who have resided in Wisconsin continuously for the 10 years next preceding the date of application for membership;

"6. * * * Veterans whose services are not credited to Wisconsin but who are otherwise qualified for membership may be admitted if they have resided continuously in Wisconsin, for the 15 years next preceding the date of application. * * *"

You submit the case of a widow who meets all the requirements of personal eligibility listed in subsec. (c), and

whose husband at the time of his death met all the requirements relating to veterans except for the 10 or 15 years of residence in Wisconsin. You ask if the widow is barred from admission to the home if her husband had resided in Wisconsin less than 10 years prior to his death, even though she has continued to reside in Wisconsin since his death for the prescribed period.

The eligibility of the veteran in such a case is necessarily based partially on presumption rather than fact. That is, it cannot be known that he would be eligible "if living" without presuming he would "lack adequate means of support." (Sec. 45.37 (2) (a) 2, Stats.) Since the legislature has made determination of eligibility dependent upon the supposition that a deceased veteran continued to live, it makes necessary the indulgence of other suppositions as to the conditions under which he would have lived. If he had lived, he might have moved to another state so as not to meet the requirements with respect to continuous residence in Wisconsin prior to application for admission. I believe, however, that in prescribing the condition "if living" the legislature intended the further supposition that the place of residence would have continued as it was at the time of death.

If a veteran was a resident of Wisconsin at the time of his death, the length of his residence for purposes of sec. 45.37 (2) (a) 5 and 6, Stats., should be computed from the date when his residence in this state began, to the date when the widow's application is made, even though he may have been dead the greater part of that period. If the period exceeds the 10 or 15 years specified in sec. 45.37 (2) (a) 5 and 6, and the other conditions are met, I believe the widow is eligible for admission.

BL

Pensions—Wisconsin Retirement Fund—Deputy Sheriffs
 —“Deputy sheriffs” in sec. 66.903 (2) (a) 1, Stats., include only persons performing the duties usually associated with the office of deputy sheriff, and that includes court bailiffs regardless of their civil service classification, but does not include other employes of the county, whether employed in the sheriff’s office or in other county departments, who have been deputized by the sheriff in order that they may have police powers if necessary in emergency situations.

August 29, 1952.

RICHARD W. BARDWELL,
District Attorney,
 Dane County.

Secs. 66.90 to 66.918, Wis. Stats., relate to the Wisconsin retirement fund. Sec. 66.903 (2) (a) 1, Stats. 1949, provides in part:

“* * * Any county which shall be or become a participating municipality may require that after a date specified by it * * * the normal contribution rate for such of its participating employes as then are or may become deputy sheriffs * * * shall be 7 per cent * * *.”

On November 14, 1950, the county board of supervisors of Dane county adopted Resolution No. 74 which reads as follows:

“Resolved that pursuant to Sec. 66.903 (2) (a) 1. of the Wisconsin Statutes, after January 1, 1951, Dane County requires that the normal contribution rate under Wisconsin Retirement Fund for such of its participating employes as then are or may become Deputy Sheriffs * * * be 7%.”

The question has been raised as to who are “deputy sheriffs” within the meaning of the aforesaid statute. Specifically, you inquire:

“(a) Does it include all those in county service who have in fact been deputized as deputy sheriffs or special deputy sheriffs by the sheriff?

“(b) Or does it include only those who have in fact been deputized by the sheriff within the sheriff’s department?

“(c) Or does it include only those within the sheriff’s department who are carried in the Dane County Budget for

1951 under the job description 'deputy sheriff,' and who are qualified for the job description of 'Deputy sheriff' under the Civil Service Ordinance of Dane County?"

According to the 1951 budget for Dane county, the sheriff's department personnel consists of the sheriff, undersheriff, chief deputy, 10 deputy sheriffs, an accountant, stenographer, 4 jailers, 2 matrons and an assistant matron.

Sec. 59.21 (1) (a), (b), (2), (5) and (6), Stats. 1949, provides:

"(1) Within ten days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff, provided that in counties with a population of five hundred thousand or more the appointment of an undersheriff shall be optional; and within such time the sheriff shall appoint deputy sheriffs for his county as follows:

"(a) One for each city and village therein having one thousand or more inhabitants.

"(b) One for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than one thousand inhabitants and does not contain a city or incorporated village having more than one thousand inhabitants.

"* * *

"(2) He may appoint as many other deputies as he may deem proper.

"* * *

"(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts.

"(6) Every appointment of an undersheriff or deputy, except deputations to do a particular act, and every revocation of such appointment shall be in writing and be filed and recorded in the office of the clerk of the circuit court."

Pursuant to the provisions of sec. 59.21 (2), the sheriff has in fact deputized all employes of his staff, including the accountant, jailers, stenographer, and matrons. He has also deputized others outside of his staff, including a female stenographer in the traffic department, bailiffs of the superior and circuit courts, caretakers at various county parks, the county veterans' service officer, and a member of the staff at Lake View Sanatorium. While these persons have not been deputized to do particular acts, several of them are expected to function only in specified areas or under certain

circumstances. In every case, however, the appointment was made in writing and was filed and recorded in the office of the clerk of the circuit court for Dane county as required by sec. 59.21 (6).

Secs. 59.15 (2) (a) and (c), 59.21 (8) (a) and (d) and 59.074, Stats. 1949, provide:

Sec. 59.15 (2) (a) and (c) :

“(a) Notwithstanding the provisions of any general or special law to the contrary the county board shall have the powers set forth in section 59.15 (2) and (3) as to any office, board, commission, committee, position, or employe in county service (other than elective offices included under section 59.15 (1), county board members and circuit judges) created by or pursuant to any special or general provisions of the statutes, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

“* * *

“(c) The county board at any regular or special meeting may * * * establish the number of employes in any department or office including deputies to elective officers * * *.”

Sec. 59.21 (8) (a) and (d) :

“(a) In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by subsection (1) (a) and (b), and fix the salary of such deputies; * * *”

“* * *

“(d) * * * Notwithstanding the provisions of this subsection the county board may enact a civil service ordinance for county employes under section 59.074 which civil service ordinance may include deputy sheriffs or traffic patrolmen, or both.”

Sec. 59.074 :

“(1) Any county may proceed * * * 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."

It is my understanding that the county board has not taken any action pursuant to sec. 59.15 (2) which attempted to limit the number of deputies which could be appointed by the sheriff.

The sheriff's department has been included within the general civil service ordinance adopted by the county board of Dane county as authorized by sec. 59.074. The only reference which that ordinance makes to the number of deputy sheriffs is found in sec. VIII which reads in part:

"The County Board shall not, however, reduce the number of deputy sheriffs in full time county employment to a number less than that required by 59.21 (1) (a) (b), Wisconsin Statutes."

Thus it is unnecessary to discuss the effect of any attempted action by the county board to limit or reduce the number of deputy sheriffs under either sec. 59.15 (2) or the civil service ordinance adopted pursuant to sec. 59.074.

It is true that the purpose of the 7 per cent contribution to the Wisconsin retirement fund by deputy sheriffs was to permit persons actively engaged in law enforcement work to retire at an early age so that older persons would not be subjected to the excessive physical strain which such work sometimes entails. However, a considerable amount of the work of most deputy sheriffs is not particularly hazardous nor does it require excessive physical strain. Sec. 66.903 (2) (a) 1 of the 1949 statutes did not distinguish between deputy sheriffs whose occupation was hazardous and those whose occupation was not. Such a distinction was not made until the amendment to this statute was enacted by ch. 518, Laws 1951.

In the light of all the foregoing it is my opinion that the legislative intent was to permit counties to require a 7 per cent contribution rate only from persons whose principal duties are those characteristically associated with the office of deputy sheriff, and that in the case of Dane county this

means the chief deputy, the 10 other deputies, and the court bailiffs, but does not include the accountant, stenographer, jailers, matrons, and assistant matrons, even though the sheriff has deputized the latter.

It will be observed that sec. 59.23 (1) and (5), Stats., distinguishes between jailers and deputy sheriffs, and that sec. 53.41, Stats., provides for the appointment of matrons to be responsible for the custody, cleanliness, food, and care of female prisoners. It is therefore clear that neither jailers nor matrons are deputy sheriffs in the contemplation of the statutes.

On the other hand, court bailiffs are required to be deputy sheriffs. See sec. 59.23 (3), Stats. Accordingly it is immaterial whether they are given a civil service classification of "deputy sheriff" or "bailiff." In either case they are in fact deputy sheriffs and are subject to the 7 per cent rate of contribution under sec. 66.903 (2) (a) 1, Stats., and Resolution No. 74 of the Dane county board of supervisors:

JRW

WAP

Counties—County Board—Meeting Place—Annual April meeting of county board under sec. 59.04 (1) (b), Stats., and any adjourned sessions thereof, may be held only at the county seat.

August 29, 1952.

EDWARD P. HERALD,
District Attorney,
Oconto County.

You ask whether an adjourned session of the annual April meeting of a county board can legally be held at some place in the county other than at the county seat. Sec. 59.04 (1), Stats., so far as here material, provides as follows:

"59.04 (1) (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 has been held that adjourned sessions of an annual meeting of a county board are parts of that annual meeting. *Dandoy v. Milwaukee Co.*, (1934) 214 Wis. 586, 254 N.W. 98. Were this an adjourned meeting of the November annual meeting provided for in sec. 59.04 (1) (a), Stats., it is clear that such adjourned session could only be held at the county seat because that statute specifically provides that such meeting is at the county seat. However, since the proposed adjourned session is a part of the April annual meeting, any limitation as to the place thereof is governed by and is subject to the same place limitations as apply to said April meeting. It clearly is not a special meeting because under sec. 59.04 (2), Stats., a special meeting can be called only in strict accordance with the provisions thereof. Therefore this opinion in no way gives any consideration to what might be the situation were it a special meeting, and the provisions of sec. 59.04 (2) are entirely beside the point.

We find no court cases or opinions of this office that are of any assistance upon your question. While the court in *Douglas Co. v. Sommer*, (1904) 120 Wis. 424, 98 N.W. 249, said at p. 429:

“* * * We are led to the conclusion that county boards have the power to adjourn their annual meetings, for any reasonable and sufficient grounds, both as to time and place of adjournment, attended with no diminution of power and such business as can be taken up at the initial session can properly be transacted at the adjourned session. * * *”

it did not have before it and was not considering anything as to place of holding a board meeting. The statement thus is no authority one way or the other upon that question.

While subsec. (a) of sec. 59.04 (1), relating to the annual November meeting, is specific as to the *place* of the meeting, subsec. (b) covering the April meeting is entirely

silent on the subject. There is nothing in the language in respect to place at all. It would seem that the same considerations which would call for the annual November meeting to be only at the county seat would be equally applicable to the annual April meeting. Had the legislature contemplated that the April annual meeting might be held at some place other than the place where the annual November meeting is to be held, we would expect it to have provided something in subsec. (b) to cover that subject. That it did not do so, when at the same time providing specifically in this regard for the November meeting, is explainable only on the basis that it was assumed the April meeting would follow the November meeting in this regard.

As there is nothing in the express language of said subsec. (b) as to the intention of the legislature as to the place of holding the annual April meeting, its intent in that regard is only determinable by such inferences as can be drawn from the entire statute. Upon the basis of the foregoing discussion we infer that the April meeting is subject to the same place limitation as the November meeting and that therefore it may be held only at the county seat.

The situation which gives rise to your inquiry, as we understand it, is that the last adjourned session of the April meeting of the county board was specifically adjourned to a particular time and to be held at a specified place not at the county seat. Attention is directed to the opinion in 1 O.A.G. 385 where it was concluded that where an annual meeting of a county board was adjourned subject to the call of the chairman, such adjournment was not within the power of the county board and therefore the effect was that the meeting was adjourned *sine die*. There the attempt at adjournment was unauthorized because it was not to a time certain. In the instant situation the attempted adjournment is unauthorized because it was to an improper place. It would seem that by the same reasoning applied in the cited opinion an adjournment which is unauthorized and therefore beyond the power of the county board would be in effect a *sine die* adjournment, whether because of impropriety as to time or as to place.

HHP

EWV

Schools and School Districts—National Forest Income—
Where the only school district in a town is an integrated district composed of all the area of the town and of the territory of adjoining towns, 50 per cent of the national forest income distributed to said town under sec. 59.07 (22), Stats., is distributable by said town to such school district.

September 8, 1952.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

You state that town C, which formerly had several school districts within its boundaries, is now a part of a large integrated district which is composed of five towns in addition to the entire area of town C. You request an opinion as to whether the town board of town C is duty bound under the provisions of sec. 59.07 (22), Stats., to turn over 50 per cent of the national forest crop income to this six-town consolidated school district.

Sec. 59.07 (22), Stats. 1951, reads:

“(22) NATIONAL FOREST CROP INCOME; ROADS AND SCHOOLS. The treasurer of each county receiving national forest income shall make distribution thereof to the towns in the county wherein national forest lands are situated, each town to receive such proportion thereof as the area of national forest lands therein bears to the area of such lands in the entire county. Fifty per cent of the amount received by it shall be expended by the town exclusively for the benefit of roads therein and the remaining 50 per cent thereof shall be allotted by the town treasurer, in such equitable manner as the town board shall determine, to school districts in the town for school purposes.”

It is suggested that this section must have been written into the statutes at a time when most towns had several school districts within their territorial boundaries and that such a situation as exists in the present instance was not contemplated by the legislature at the time of the enactment of this statute. Such argument, in substance, is that this provision came into the statutes prior to the time when large consolidated school districts of this type were existent

and therefore the legislature did not have them in contemplation when it enacted this statute.

The legislative history of the present provision does not support this. Sec. 59.07 (22) was created by ch. 400, Laws 1935, and then provided for the use by the county of the national forest income towards payment of county school aid to school districts under the old county school aid law. It was repealed and recreated in its present form by ch. 158, Laws 1949. Consolidated school districts were provided for by the statutes long before 1935. While it may be that in 1935 the existence of large consolidated districts of the type giving rise to your question was not too commonplace, certainly by 1949, when the present sec. 59.07 (22) came into being, the trend towards consolidation of school districts into large districts was existent and there were a substantial number of large districts of this type in existence and in contemplation. Therefore it must be presumed that the legislature contemplated their existence when it created sec. 59.07 (22) in 1949 and enacted such provision with them in mind.

But, aside from the above, the over-all purpose of sec. 59.07 (22), Stats. 1951, is clear. It is that the counties must distribute the national forest income receipts to the towns in which national forest lands are situated upon a proportional acreage basis and that the town is then to distribute 50 per cent of the amount it receives to the school districts in that town for expenditure "for school purposes." The language of the statute is clear and unambiguous. It specifies that said 50 per cent is to be allotted by the town treasurer to school districts in the town for school purposes and that the allotment is to be in that equitable manner which the town board determines. As there is only one school district in town C, which is the six-town consolidated district of which town C is only a part, there is no occasion for any determination of an equitable manner of distribution and the entire 50 per cent of the national forest income must be paid to that district as it is a school district in that town.

The mere fact that the statute uses the words "school districts," a plural form, does not mean that it applies only when there is more than one district in the town. Sec.

370.001 (1), Stats., says that words importing the singular may include the plural, and words importing the plural, the singular.

This statute directs the town treasurer to allot the funds to the school districts in the town "for school purposes." If the statute were applied only where there is more than one district in the town then the over-all purpose of distributing a portion of the forest crop income back to the area of derivation for use by the school districts thereof "for school purposes" would not be carried out where there is only one school district in a town or the town is a part of a large integrated district. Furthermore, any such construction would present the town with the difficulty of how to dispose of such funds because they must be disposed of by it for use for school purposes by a school district. The town itself cannot expend these funds "for school purposes." Yet it would have funds which had been received for such purposes, pursuant to the federal statute, 16 U. S. C. A. §500, which provides for distribution of national forest income to the states in which the national forests are situated "to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated." If town C in the instant situation were not to distribute to said consolidated six-town school district the 50 per cent of the forest income it receives under the subsection in question, then such funds would not be devoted to school purposes in the area from which the income had its derivation, which is the express over-all purpose of the federal statute and the express legislative application thereof set out in sec. 59.07 (22), Stats.

In view of the foregoing it is our opinion that the treasurer of town C must distribute the 50 per cent of the national forest crop income under sec. 59.07 (22) to the six-town integrated school district of which town C is a part.

HHP

Insane—County Hospitals—Computation of Maintenance Expense—Computation for expense of maintenance, care and treatment of patients in county mental hospitals under secs. 51.08 (1) and 51.24 (2), Stats., is to be made by totaling the entire operating costs of all the county mental hospitals and then dividing by the total number of patient weeks of all county mental hospitals.

September 12, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have asked for our opinion as to the proper method to be used in computing the average per capita costs under secs. 51.08 (1) and 51.24 (2), Stats., and have suggested the following alternative formulas:

Formula 1: "Total the entire operating costs of all the county mental hospitals, and divide by the total number of patient weeks of all the county mental hospitals."

Formula 2: "Compute the per capita costs of all the county mental hospitals separately, then total the separate per capita costs of all the county mental hospitals, then divide by the number of hospitals."

So far as material here the relevant portions of sec. 51.08 (1) and sec. 51.24 (2) read:

"51.08 (1) The expense of maintenance, care and treatment of each patient in any state hospital shall be at the rate of \$5 per week, and in any county hospital or facility for the mentally infirm at the rate of \$10 per week for the year beginning July 1, 1950 and annually thereafter equal in amount to the actual average per capita cost of maintenance, care and treatment of such patients therein as determined from annual individual hospital reports filed with the state department of public welfare under the mandatory uniform cost record-keeping requirement of section 46.18 (8), (9) and (10). * * *"

"51.24 * * *

"(2) The state shall compensate the county for the care and maintenance of patients in the hospital mentioned in subsection (1) who are maintained at public expense, at the rate of \$5 per week for each chronic case for the year beginning July 1, 1950 and annually thereafter at a rate determined in accordance with the provisions of section 51.08 (1). * * *"

We gather from the context of your request that you are interested only in the county hospital per capita costs and if we condense the language in sec. 51.08 (1) quoted above to the portion applicable to county hospitals, it would read something like this:

“The expense of maintenance, care and treatment of *each patient * * ** in *any county hospital* or facility for the mentally infirm [shall be] at the rate of \$10 per week for the year beginning July 1, 1950 and annually thereafter equal in amount to the actual average per capita cost of maintenance, care and treatment of *such patients therein* as determined from annual *individual* hospital reports filed with the state department of public welfare * * *.”

Nothing whatsoever is said about either totaling the entire operating costs of all the county mental hospitals and dividing by the total number of patient weeks of all county mental hospitals or of computing the per capita costs of all county mental hospitals separately and then totaling the separate per capita costs of all the county mental hospitals divided by the number of hospitals.

In other words if the language of the statute were to be taken literally the county hospitals are not to be lumped together but each one stands on its own figures. The statute speaks of “each patient,” “any county hospital,” and of the “patients therein” and provides that the computation is to be made from the “individual” hospital reports, thus excluding by implication any consideration of the figures from other hospitals.

This would lead to the conclusion that neither of the suggested formulas can be spelled out of the wording of the statute and that costs would have to be computed on an individual hospital basis, except for the fact that Bill No. 45, A., as it was originally introduced in the 1951 legislature, specifically provided for such a method of computation and was amended into its present form. Originally the rate was to be “equal in amount to the actual per capita cost of the maintenance, care and treatment of such patients therein.” By substitute amendment No. 1, A., this language was changed to read: “equal in amount to the actual per capita cost of maintenance, care and treatment of such patients therein as determined from annual individual hos-

pital reports filed with the state department of public welfare under the mandatory uniform cost record-keeping requirement of section 46.18 (8), (9), (10)." By amendment No. 1, S., the word "average" was inserted after "actual" which is the way it is worded in the bill as it became law.

Furthermore, we are informed that prior to the 1951 amendment and when the statute called for a flat rate, the figure inserted in the statute as a flat rate was arrived at by totaling the entire operating costs of all the county mental hospitals and dividing this cost by the total number of patient weeks of all the county mental hospitals, or in other words by using Formula 1.

Bill No. 45, A., had a long and tortuous history in the 1951 legislature, and we are informed that the entire battle hinged pretty largely over the proposition of whether the costs were to be computed upon the basis of individual county hospitals or whether the average of all county hospitals was to be used, and that all those interested in the bill were satisfied that as finally enacted it contemplated the use of Formula 1.

We are further advised that Formula 2 was at no time advanced in the discussions incident to the legislative history of Bill No. 45, A., but that it arose purely as an afterthought and is predicated upon the theory that its use will result in savings to the state as against the counties. We can find no sanction for applying a formula resting on such a slender reed and therefore reject it as untenable.

It has been said that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. *Board of School Directors Town of Pelican v. Board of School Directors Town of Rock Falls*, 81 Wis. 428, 51 N. W. 871.

While the language here used by the legislature is most inartistic, we should not try to defeat the legislative intent despite the fact that the legislature did not clearly say what it meant. The controlling words are "actual average per capita cost" and effect should be given to each of these words if possible. If the word "average" had not been inserted, the phrase would have read "actual per capita cost." It can be argued that this would in itself imply the

striking of an average within any given institution since "per capita" implies the proportionate share of each individual. *Eastern Band of Cherokee Indians v. U. S.*, 117 U. S. 288. Hence when the word "average" was added the legislature may have had in mind an "average" arrived at by recourse to something else, and that probably meant the "average" arrived at by taking the figures from all county hospitals as had been done administratively in prior years in attempting to arrive at a flat rate to be inserted in the statute. With mounting costs any flat rate set up by statute tends very rapidly to become both obsolete and inadequate. That was doubtless why a sliding scale formula was intended to be substituted by the 1951 legislature.

While we are well aware that the result reached here comes dangerously close to reaching the limits of permissible statutory interpretation, we are satisfied that any other construction would result in thwarting the plain will of the legislature, however poorly it has been expressed.

WHR

Public Assistance — Indians — Work Relief Projects — Workmen's Compensation—In the absence of extraordinary circumstances, benefits are recoverable under the workmen's compensation law by one injured on work relief projects carried out under sec. 49.05, Stats., although such person would otherwise be entitled to relief under sec. 49.046, Stats.

A local agency administering aid to needy Indians under sec. 49.046 is directly liable for workmen's compensation benefits if it elects to grant them work relief under sec. 49.05, unless it contracts so as to transfer the liability to another agency under sec. 49.05 (4).

September 17, 1952.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked two questions relative to the right of recipients of relief to recover workmen's compensation when they are injured while employed on work relief projects. Your first question is:

1. When a municipality establishes a work relief project for recipients of relief under sec. 49.046, are benefits recoverable under the workmen's compensation law by workers on such project?

Workmen's compensation is payable only if there is an employer-employee relationship within the meaning of secs. 102.04 and 102.07, Stats. To determine whether such status exists under given circumstances has occasioned a good deal of litigation. The fact that different methods of handling work relief projects may leave room for different results seems apparent from the fact that there have been a half dozen cases before the supreme court of Wisconsin in which the result turned upon the specific circumstances involved.

See *Lincoln County v. Industrial Comm.*, 228 Wis. 126; *Marathon County v. Industrial Comm.*, 225 Wis. 514; *Sauk County v. Industrial Comm.*, 225 Wis. 179; *Salvation Army v. Industrial Comm.*, 219 Wis. 343; *Marathon County v. Industrial Comm.*, 218 Wis. 275; and *West Milwaukee v. Industrial Comm.*, 216 Wis. 29, for examples of some of the situations and questions which may be presented.

In *West Milwaukee v. Industrial Comm.*, *supra*, it was held that one receiving poor relief from a county, and voluntarily performing "made-work" for a city without compensation other than the relief paid by the county, was not entitled to workmen's compensation, because:

"Under those provisions there is clearly no basis whatsoever, in so far as Milwaukee county is concerned, for holding that Yunker was an employee of the county or in its service. His relationship with the county was solely that of a dependent person who was receiving relief and support which the county was obliged to provide for him under ch. 49, Stats., and he was in no manner or respect in its service. He did nothing whatsoever for Milwaukee county or at its request. The 'made-work' which he voluntarily performed was solely for the benefit of West Milwaukee, and without any legal obligation, contractual or otherwise, on his part to work for either of the municipalities, or, on the part of either, to compensate him therefor. Neither was the performance of his work or his continuance therein under the direction, supervision, or control of the county in any respect. So far as the county is concerned, Yunker was merely one of the recipients of its public charity and,

under those circumstances, liability to be paid by the county is wholly foreign to the spirit, as well as the letter of the compensation act. * * *” (216 Wis. 33)

That case was distinguished, and different results reached, in the cases of *Lincoln County v. Industrial Commission* and *Marathon County v. Industrial Commission, supra*.

The distinction made by the court in the latter case was in the following words:

“(1) While it may be that the work the deceased was doing was ‘made work’ similar to that involved in the *West Milwaukee Case, supra*, the deceased was working for a ‘wage’ and under an express ‘contract of hire.’ Neither of these facts existed in that case. It is immaterial that the ‘wage’ for which the deceased was working had been prepaid, and that the prepayment had been made by another than the county. It is also immaterial that the contract was made by another than the county. It was made for the benefit and accrued to the benefit of the county. If the county highway commissioner had power to set the deceased to work, the relation of employer and employee existed. * * *” (218 Wis. 279)

In the former the court said:

“The decision in the *West Milwaukee Case* is not in point. True, Yunker (for whose death an award was sought under the Compensation Act) was injured while doing ‘made-work’ for West Milwaukee, of which he was a resident; and, because he volunteered to do that work, relief, which he had been receiving from Milwaukee county in the form of monthly supplies, valued at \$27.16, was changed to \$3.16 in supplies and \$24 in cash, if he worked forty-eight hours monthly. But our conclusion that Yunker was not an employee (within the meaning of the Compensation Act) of either Milwaukee county or the village of West Milwaukee was not based on the ground that he was a relief worker entitled to and dependent upon support by the county, or that he was working on a relief project open only to relief workers at a wage sufficient only to supply his necessities. On the contrary, we held that he was not an employee of either the county or the village, within the meaning of the act, because on the one hand he was not performing any work for the county; and on the other hand he was not working under any appointment by, or

contract of hire, express or implied, with the village. Thus, in respect to the first of those grounds, we said (p. 33),—

“His relationship with the county was solely that of a dependent person who was receiving relief and support which the county was obliged to provide for him under ch. 49, Stats., and he was in no manner or respect in its service. He did nothing whatsoever for Milwaukee county or at its request. The “made-work” which he voluntarily performed was solely for the benefit of West Milwaukee, and without any legal obligation, contractual or otherwise, on his part to work for either of the municipalities, or, on the part of either, to compensate him therefor.’

“And in respect to the second ground, we said (p. 33),—
“ . . . he was not in its [West Milwaukee’s] service “under any appointment, or contract of hire, express or implied,” as is necessary to constitute him an employee under sec. 102.07 (1), Stats. He had voluntarily entered upon and was performing that work, without any appointment or contract with the village. He was not obliged to enter upon or continue with the work. The village was under no obligation to accept or keep him at work, or to compensate him therefor; and no such compensation was either received or expected by him. As there existed between them no express or implied obligation whatever on the part of either, there was no such relationship as is essential to constitute the status of employee and employer in order to render the latter liable for compensation within the meaning of the compensation act.’

“In the case at bar Nelson had not been indigent or receiving relief because of incapacity on his part to work. On the contrary, his application to the county, upon the termination of his private employment and his inability to obtain such employment, was for work. Although the county might have been obliged to give him relief under sec. 49.01, Stats., if he had applied therefor, that was not what the county chose to do. * * *” (228 Wis. 129–130)

In the case of *Marathon County v. Industrial Comm.*, 218 Wis. 275, it was held that one working by agreement on a drought-relief “made-work” project, in repayment for drought relief furnished his father, would be entitled to workmen’s compensation if the project were duly authorized by the proper county authorities, but not otherwise. In *Marathon County v. Industrial Comm.*, 225 Wis. 514, it was held, on the basis of further evidence in the same case, that the project was duly authorized and the employe entitled to compensation.

From the foregoing cases it is apparent that there must be at least two prerequisites before a person engaged upon work relief may recover benefits under the workmen's compensation law: (1) The project must be duly authorized; and (2) there must be either an express contract of hire, or circumstances from which such a contract may be implied.

Sec. 49.046, Stats., provides for relief to needy Indians residing on tax-free lands, by the state department of public welfare or by the welfare agency in the county or municipality in which the Indians reside, if appointed by the department.

Sec. 49.05 (1), Stats., provides that any municipality or county required by law to administer relief "may require persons entitled to relief to labor on any work relief project authorized and sponsored by the municipality or county." Subsec. (3) provides that municipalities or counties may authorize work relief projects for performance of any work not prohibited by law, subject to certain conditions, and assign persons entitled to work relief to work on projects operated by the state or by other municipalities or counties.

Work relief is defined by sec. 49.01 (2) as "any moneys paid to dependent persons entitled to relief who have been required by any municipality or county to work on any work relief project."

Work relief project is defined by sec. 49.01 (3) as "any undertaking performed in whole or in part by persons receiving work relief."

When the department designates a local agency to administer relief to needy Indians under sec. 49.046, it is to adopt "suitable rules and regulations governing eligibility for the amount of and the furnishing and paying of relief." Sec. 49.046 does not specify that administration of relief under that section shall be subject to the other provisions of ch. 49, Stats. Such omission may have been to enable the department to establish different rules than apply generally, for the purpose of meeting federal requirements or problems peculiar to the subject. The degree of control by the department over the local welfare agency was undoubtedly intended to be greater with respect to relief under sec. 49.046

than with respect to general relief, because relief under sec. 49.046 is furnished by the state and merely administered by local agencies. Assuming, however, that the department does not adopt any rules to the contrary, I believe the provisions of sec. 49.05, Stats., would apply to administration of relief to needy Indians by municipalities or counties designated for that purpose. Sec. 49.05 applies to any municipality or county required by law to "administer" relief. Sec. 49.02, Stats., deals with the obligation of counties and municipalities to "furnish" relief. The use of the former term in sec. 49.05 appears to contemplate that it shall include situations covered by the preceding section.

In view of the fact that sec. 49.05 was enacted since the decisions above cited (ch. 282, Laws 1943, and ch. 585, Laws 1945), the question whether there is an employer-employee relationship may be affected by the statute so as to modify, to some extent, the rules laid down in the cases. Some of the provisions which may have a bearing on the question, in addition to the definitions above quoted, are:

"49.05 * * *

"(2) The basis of payment of persons granted work relief shall be determined by the unit of government responsible for the person's relief.

"(3) * * * Municipalities or counties may, by mutual agreement, assign persons entitled to work relief to work on work relief projects operated by the state or by other municipalities, counties, school districts, drainage districts, utility districts, metropolitan sewerage areas or other governmental units. Such agreements may or may not provide for full or partial work relief reimbursement to the municipality or county loaning such persons by the municipality or county or unit to which such persons are loaned.

"(4) Municipalities or counties granting work relief shall be directly liable to persons granted work relief for any benefits legally recoverable under the workmen's compensation law of Wisconsin, but may contract with another governmental unit, for whose benefit such work relief project is primarily designed, to share such liability or wholly assume the same, and such other governmental unit is hereby authorized to make such contracts of sharing or total assumption of liability.

"* * *

"(7) The value of work relief labor shall be deemed to offset the payments made therefor and such payments shall not be recoverable under section 49.11."

Sec. 49.05 (2) contemplates that persons on work relief shall receive "payment"; and the definition in sec. 49.01 (2) contemplates that the payment is to be in "moneys." Sec. 49.05 (7) indicates that the value of the labor performed shall be deemed to offset the payments so that the recipient of work relief payments is under no obligation, as one may be who has received general relief for which he has performed no labor.

These provisions indicate that the legislature contemplates that work relief supplied under sec. 49.05 should have a status similar to that described in *Lincoln County v. Industrial Comm.*, 228 Wis. 126, 130, where the court held that the relation of employer and employe existed.

You have also asked:

2. If benefits are recoverable, what unit of government (state, unit or agency thereof administering the aid, or the unit sponsoring the project) is liable for the payment of such benefits?

Sec. 49.05 (4) makes municipalities or counties "granting" work relief directly liable for workmen's compensation if any is recoverable. Liability for workmen's compensation does not arise out of the mere furnishing of relief, but out of the relationship which ensues upon the election of an agency to grant work relief instead of general relief. Where the state department appoints a local agency to administer aid under sec. 49.046, the latter is the agency which grants work relief under sec. 49.05 (4). It is the agency made by statute directly liable for the workmen's compensation. Sec. 49.05 (4), however, permits the agency to contract so as to transfer the obligation to another municipality in cases where it assigns persons to work on projects for the benefit of the latter.

BL

State—Employes—Statutes—Construction—The phrase “notwithstanding any provisions of law to the contrary no employe of the state employed on the prevailing hourly rate of pay basis shall be entitled to or be granted leave of absence with pay for sickness or vacation” was repealed by ch. 678, Laws 1951, and was not reenacted by ch. 727, Laws 1951. It is, therefore, no part of the law. Sec. 16.275 (5), Stats., accordingly does not prohibit the granting of leave of absence with pay for sickness or vacation to hourly employes.

September 17, 1952.

BUREAU OF PERSONNEL.

You request my opinion upon the question: “Are prevailing rate employes now entitled to vacation and sick leave?”

The pertinent section is 16.275 (5). This section, as it stood in Wis. Stats. 1949, was twice amended in 1951 by chs. 678 and 727, Laws 1951.

The specific point involved is whether the following phrase is still in force:

“Notwithstanding any provisions of law to the contrary no employe of the state employed on the prevailing hourly rate of pay basis shall be entitled to or be granted leave of absence with pay for sickness or vacation.”

Ch. 678, in effect, repealed this phrase. Was it reinstated by ch. 727? -

Ch. 678 which repealed and recreated sec. 16.275 (5), Stats. 1949, was introduced by the committee on state and local government by request of the Wisconsin Federation of Labor on March 8, 1951, concurred in June 13, and became effective on August 8, 1951. Ch. 727, sec. 7 of which amended sec. 16.275 (5), Wis. Stats. 1949, was a revisor's correction bill, introduced on March 15, concurred in June 14, and became effective August 17.

Sec. 7 of ch. 727 was introduced and enacted solely to remove an obsolete phrase in sec. 16.275 (5), Stats. 1949. This is shown clearly by the stricken material in the bill and the note which follows, namely: “NOTE: An obsolete provision.”

While it is true as a general proposition that a later enactment in the same session supersedes an earlier one, *Schwenker v. Bekkedal*, (1931) 204 Wis. 546, 236 N. W. 581, that rule will not prevail if a contrary legislative intent is clearly manifested, *Nordean v. Minneapolis, St. P. & S. S. M. R. Co.*, (1912) 148 Wis. 627, 135 N. W. 150, and *State ex rel. Little Yellow Drain Dist. v. Juneau County*, (1929) 199 Wis. 476, 227 N. W. 12.

In considering the effect of plural amendments of a statutory provision, it is helpful to analyze the effect of the various amendments on the clauses of the original provision. Sec. 16.275 (5), Stats. 1949, had three clauses:

- A. No paid leave for prevailing rate employes.
- B. Except that accrued rights to paid vacation leave earned before July 1, 1947 may be used in 1947.
- C. Except that accumulated sick leave earned before July 1, 1947 may be used under bureau rules.

The effect of ch. 678 was to repeal A and B above, and to reenact C. Ch. 678 read:

"16.275 (5) of the statutes is repealed and recreated to read:

"16.275 (5) Any sick leave accumulated by state employes employed on the prevailing hourly rate of pay basis, through June 1947, and unused, may be used by them at any time subject to the rules and regulations of the bureau of personnel."

Ch. 727, sec. 7, repealed B only. The section read:

"16.275 (5) of the statutes is amended to read:

"16.275 (5) Notwithstanding any provisions of law to the contrary no employe of the state employed on the prevailing hourly rate of pay basis shall be entitled to or be granted leave of absence with pay for sickness or vacation; but * * * accumulated sick leave earned by such employes through June 1947, which remains unused at the close of that month, may be used by them any time subject to the rules and regulations of the bureau of personnel."

Each act can be related only to those parts of a statutory provision which the act shows an intent to amend. A situation similar to the one here involved was before the court

in *Svennes v. Village of West Salem*, (1902) 114 Wis. 650, 91 N. W. 121. The statute there involved was amended by striking certain words. The court said (pp. 652-653):

“* * * Two years afterwards that section was again ‘amended by striking out the words “or town board,” in the third line of said section, and by inserting the word “or” before the words “village board” next preceding, so that said section when amended shall read as follows.’ Ch. 121, Laws of 1901. Such recital was in compliance with Joint Rule No. 12 of the senate and assembly, which required that ‘every bill shall recite at length every section which it proposes to amend, as such section will read if amended as proposed.’

“The question recurs whether such mere recital had the effect to re-enact the four words so expressly stricken out two years before. Such amendment by its terms was expressly limited to the third line of the section, whereas the sentence in question commenced in the sixteenth line of the section. There was manifestly no intention of changing the last sentence of the section in any manner. By inadvertence, there was a failure to recognize the fact that the four words mentioned had been stricken out two years before. This court has repeatedly held that such ‘a mistake or omission in such recital will not defeat the intention of the legislature.’ *Custin v. Viroqua*, 67 Wis. 314, 30 N. W. 515; *State v. Stillman*, 81 Wis. 124, 51 N. W. 260. Such clerical error in the recital of the section as amended must therefore ‘be disregarded, and effect given only to the amendment specified.’ * * *”

In that case, mere recital of the phrase in question in the second amendment did not affect the intent of the legislature to amend the phrase by its specific change of that phrase in the first amendment. See also 40 O. A. G. 390.

So, in the present case, mere recital does not reinstate the clause in question. If the legislature, at the time it was considering ch. 727, knew that A had been repealed and wished to reinstate it, it would have to show A as new matter (*italicized*). Since it was not so shown, and since in ch. 727 it was not amended in any way, the conclusion is inescapable that in ch. 727 the legislature had no intent as to A, and therefore its action in ch. 678 prevails.

SGH

Public Assistance—Liability of Relatives for Support—
An only child is liable for the support of a parent under sec. 49.07, Stats., if of sufficient ability.

One of several children is liable for the support of a parent under sec. 49.07 if he is of sufficient ability and the other children are not.

September 30, 1952.

THORPE MERRIMAN,
District Attorney,
Jefferson County.

You ask the following questions respecting the enforcement of the liability of children to support a dependent parent under sec. 49.07, Stats.:

1. Where an only child is able to entirely support his dependent parent or contribute to that support, can he be compelled under sec. 49.07 to do so?

2. Where only one of several children is able to entirely support his dependent parent or contribute to such support, can he be compelled to do so?

The interpretation of sec. 49.07, Stats., is subject to the following provisions of sec. 370.001 (1), Stats., which reads in part: “* * * words importing the plural number extend and may be applied to one person or thing.”

The above quoted provision was applied by the supreme court in *Hogan v. The State*, 36 Wis. 226, 247, to the interpretation of a criminal statute. It was held that, in the statutory definition of murder in the second degree, the words “any act imminently dangerous to others” must be held to mean any act dangerous to any person or persons other than the one committing it. The court said in part:

“* * * Again, it has been said that the words, ‘to others,’ imply that the act must be dangerous to several. We cannot think that the words were so intended. * * * We are not only at liberty, we are bound, to hold the phrase in the singular, as well as in the plural, if necessary to the true construction and application of the statute. R. S., ch. 5, sec. 1. * * *”

The legislative use of the term “children” instead of child was apparently intended to extend the liability to all per-

sons falling within the class, rather than to relieve one of liability because he might happen to be the only member of the class.

Although the question was not expressly raised in *Merrill v. Merrill*, 134 Wis. 395, the court there stated that, under sec. 1502, Stats. 1898 (now sec. 49.07), the petitioner, who was the only child, "would be legally bound to relieve and support his father," should the latter dissipate his property so as to be unable to maintain himself.

BL

Public Assistance—Old-Age Assistance—Enforcement of Lien—Where the personal property of a decedent who was a beneficiary of old-age assistance is insufficient to pay debts and costs of administration, the lien of a county for old-age assistance must be enforced through filing a claim in administration proceedings pursuant to secs. 49.25 and 49.26 (5), Stats., if such proceedings are undertaken.

September 30, 1952.

EDMUND H. DRAGER,
District Attorney,
Vilas County.

You ask whether old-age assistance liens existing under sec. 49.26 (4), Stats., can be enforced through foreclosure, upon death of the beneficiary of the assistance, or whether they are enforceable only in administration proceedings in county court.

Sec. 49.26 (7), Stats., provides that such liens shall be enforceable in the manner provided for the enforcement of mechanics' liens upon real property, after transfer of title to the property by conveyance, sale, succession or will. Transfer by succession includes a transfer upon the death of the first owner, under laws relating to descent and distribution. See *Boutlier v. Malden*, 226 Mass. 479, 116 N. E. 251, 254 Ann. Cas. 1918C, 910.

Sec. 289.09, Stats., provides for foreclosure of mechanics' liens pursuant to the provisions of ch. 278, Stats., relating to foreclosure of real estate mortgages.

Generally, the methods providing for enforcement of a mortgage are held to be cumulative, so that the mortgagee has his election of what remedy to pursue. See 36 Am. Jur. 149; 37 Am. Jur. 22-23; *Byron v. May*, 2 Chand. 103, 2 Pin. 443; *Walton v. Cody*, 1 Wis. 420. In this state it has been uniformly held that where there is a lien to secure a debt, the creditor may either follow proceedings to foreclose the lien or take personal action on the debt, or both, unless there is some statutory provision to the contrary. See *Wenzel v. Conrad Schmitt Studios*, 244 Wis. 160, 11 N. W. 2d 503; *Donovan v. Theo. Otjen Co.*, 238 Wis. 47, 298 N. W. 168; *White Eagle Building & Loan Assn. v. Freyer*, 231 Wis. 563, 286 N. W. 32; *Marshall & Ilsley Bank v. Stepke*, 228 Wis. 39, 279 N. W. 625. Under such rule, a mortgagee might, after the death of a mortgagor, elect to follow foreclosure proceedings or to file his claim in the administration proceedings, or to do both. See the remarks in *Crow v. Day*, 69 Wis. 637.

It would seem that the same principle would follow with respect to enforcement of an old-age assistance lien, unless there is a statute to the contrary. The supreme court pointed out in *Goff v. Yauman*, 237 Wis. 643, 650, 298 N. W. 179, that the lien under sec. 49.26 (4), Stats., "is comparable to the lien under a mortgage in that it likewise is a lien upon property as security for the repayment of money, and rests upon the consent of the person upon whose interest in the property the lien attaches." The court also commented that the lien there under discussion could be "enforced by the foreclosure thereof upon,—but not before,—the death of the recipient and the consequent transfer of title to his joint-tenancy interest by virtue of the succession thereto of surviving joint tenants."

In addition to the method of foreclosure, sec. 49.25, Stats., provides that the assistance paid shall be a claim against the estate of the beneficiary.

There have been statutory changes since the decision in *Goff v. Yauman*, *supra*. I do not believe any of the changes made in sec. 49.26 were intended to restrict the election

of remedy in the case of solvent estates. The provision in sec. 49.26 (3) that "out of the amount collected on any claim for old-age assistance, the county court in which the estate is probated may authorize the payment of a collection fee of 10 per cent but not in excess of \$50 for the services of the district attorney" does not prohibit proceedings under other provisions of the section but merely provides a collection fee where a "claim" is filed.

In the case of insolvent estates, there are other statutory provisions to be considered. In view of the nature of the subject matter, it is probable that the majority of cases in which an old-age assistance lien is involved will pertain to estates which are not large enough to pay the county's lien in addition to all other claims against the decedent. For practical purposes, those may be the only cases in which you are interested.

Even in the case of insolvent estates, the rule of the common law and of this state is that the lands of a decedent are not a part of his estate and do not pass to the administrator unless so provided by statute. *Riedi v. Heinzl*, 240 Wis. 297, 3 N. W. 2d 366; *Curtis v. Gillie*, 239 Wis. 207, 300 N. W. 911.

Sec. 316.01 (1), Stats., however, provides:

"When the available personal estate of any deceased person shall be insufficient to pay the expenses of administering his estate, and of his funeral, and all his debts, or if the sale of the personal property would be inimical to the interests of the estate, or if the sale of the real estate would be for the best interests of the estate, or his heirs, his executor or administrator may mortgage, lease or sell his real estate, in the manner and as provided in this chapter."

It is generally held that a statute such as above includes mortgaged realty. See 21 Am. Jur. 481-482. The fact that it was intended to cover mortgaged realty is apparent from the provisions of sec. 316.24, Stats. That realty subject to old-age assistance liens is included among assets of the decedent for purposes of administration is apparent by the following provision of sec. 49.26 (5), Stats.:

"* * * The county court may order sale of such realty free and clear of the lien and the lien shall attach to the

net proceeds of such sale after taxes, prior incumbrances and the costs of the sale have been deducted. * * *”

The last quoted provision is not couched in mandatory language, and I do not believe it was intended to prevent an election to foreclose in a case where the personalty of a decedent is sufficient to satisfy all claims other than the lien. In a case where the personal property of a recipient of old-age assistance is insufficient to pay debts and costs of administration, the realty is subject to administration; and if administration is sought, a county holding a lien for old-age assistance may not elect to pursue its remedy by foreclosure.

BL

Historical Societies—Local—Negligence—Public Liability Insurance—County or local historical societies incorporated as auxiliaries of the state historical society under sec. 44.03 (1), Stats., do not enjoy the state's sovereign immunity from suit in tort actions. Whether they qualify for insurance in the state insurance fund under ch. 210, Stats., is a question to be determined initially by the commissioner of insurance.

October 2, 1952.

CLIFFORD L. LORD, *Director,*
State Historical Society.

You have directed our attention to sec. 44.03, Stats., which establishes procedures whereby county or local historical societies without capital stock may be incorporated as auxiliaries of the state historical society. The secretary of state under sec. 44.03 (1) may not accept articles of incorporation under that section unless the same shall first have been approved by the board of curators of the state historical society. Sec. 44.03 (2) provides that state-wide, county or other patriotic or historical organizations, or chapters thereof in this state may be incorporated as affili-

ates of the state historical society under sec. 44.03 (1) if their purposes and programs are similar to and consonant with those of the state historical society and its auxiliaries. Any auxiliary or affiliated society shall be a member and entitled to one vote in any general meeting of the state historical society. Sec. 44.03 (2) also provides that the board of curators may terminate the affiliation as an auxiliary or affiliate of the state historical society by formal resolution, a copy of which shall be deposited with the secretary of state.

Sec. 44.03 (3) requires auxiliaries and affiliates to make annual reports to the state historical society. Sec. 44.03 (4) authorizes the state society to prepare and furnish uniform articles of organization and by-laws to any auxiliary although it may adopt additional by-laws. Sec. 44.03 (5) authorizes the state society to provide for annual or other meetings of officers or representatives of auxiliaries at times and places to be fixed by its director or by such officers or representatives. Sec. 44.03 (6) provides that custody of public records of county, village, town, school district, or other governmental units may be accepted by an auxiliary under sec. 44.02 (9), but title to such records remains in the state historical society, and in the event of the dissolution or incapacity of any auxiliary the director of the state historical society is to be notified and its records are to be delivered to such depository as may be designated by the state historical society.

In view of the foregoing statutes you have raised the questions of whether county and local societies enjoy the same status as does the state historical society so far as public liability is concerned and should cease to carry public liability insurance, and whether such societies are equally eligible with the state historical society to place their insurance on buildings, collections, etc., with the state insurance fund.

I

The status of the state historical society as an agency of the state has heretofore been given careful consideration by this office in 36 O. A. G. 285 and particularly in 39 O. A. G. 110, wherein it was concluded that the state his-

torical society under sec. 44.01, Stats., is an official agency and trustee of the state and that it has no liability for negligent operation or maintenance of elevators which could properly be made the subject of public liability insurance.

Among the determining factors in answering the question of whether or not the state historical society partakes of the state's immunity from suit for the negligence of its officers and agents were the following as discussed in 39 O. A. G. 110:

1. The governor, secretary of state, and state treasurer are *ex officio* curators under the society's articles.

2. Sec. 44.01, Stats., provides that the society shall be an official agency and trustee of the state and shall hold all its present and future collections and property for the state.

3. All moneys received by it are deposited in the state treasury and reappropriated to the society. Secs. 20.78 and 20.785, Stats.

4. The committee for disposition of state records, which committee is composed of the director of the society, the attorney general, and the state auditor, is established under the state historical society. Sec. 44.08 (1), Stats.

5. The society as trustee for the state is the ultimate depository of the archives of the state. Sec. 44.08 (6), Stats.

6. The employes of the society are state employes under civil service.

7. Its printing is done by the state printer.

8. The society is supported in part by state appropriations and it can expend no funds except pursuant to legislative appropriation.

No attempt was made in 39 O. A. G. 110 to evaluate the importance of any one of the above factors in answering the question there considered and none will be made here. Suffice it to say that taken in the aggregate these factors left no doubt in the mind of the attorney general as to the status of the society as a state agency.

None of these factors are present, however, in the case of county and local historical societies incorporated as auxiliaries of the state society under sec. 44.03. While they are private corporations organized for a public purpose and are subject to some degree of approval and control by the state society, they have not been designated by statute as

agencies of the state, they receive no state aid, their funds are not deposited in the state treasury, and they are not subject to audit by the state auditor. No state officer is designated as a member of their governing board and their employes are not state employes or subject to the state civil service law, nor are they subject to the provisions of law relating to state printing. Although they may act as custodians of public records, their property is otherwise their own and is not held in trust for the state.

It is therefore concluded that such societies enjoy none of the state's sovereign immunity from suit in tort and that they have the same liabilities for the negligence of their officers, agents, and employes as do private corporations generally, and that so far as carrying public liability insurance is concerned, they should be guided by the same considerations as might be deemed controlling by other corporations.

II

Whether these county and local historical societies incorporated as auxiliaries of the state society are entitled to avail themselves of the provisions of ch. 210, Stats., relating to state insurance, is a question that ought not to be determined, in the first instance at least, by this department. The commissioner of insurance has charge of such insurance and is entitled to make his own administrative interpretation of the statute as to whether a particular applicant qualifies for insurance in the fund, without any pre-determination of the question by the attorney general in the form of an opinion that the commissioner has not requested and may never request but which has been requested for the benefit of organizations that are here determined not to be state agencies so as to be entitled to any official advice from the attorney general. Due deference to these facts requires us, therefore, to refrain at this time from attempting to answer your second question.

WHR

Schools and School Districts—Creation, Alteration and Dissolution—Referendum—Order of county school committee denying petition to dissolve a school district is not subject to referendum under sec. 40.303 (8) (a), Stats.

An order of county school committee dissolving a school district, but making no disposition of the territory thereof, would not effect a reversion of the territory to the old districts out of which the district was previously created.

October 10, 1952.

JOHN C. QUINN,
District Attorney,
Trempealeau County.

By an order of the county school committees of your county and of an adjoining county, acting as a joint committee, a new school district was created out of the territory of several common school districts in both counties. The order was effective June 30, 1949 and the new district has been operating ever since. Recently a petition was filed with such joint committee requesting that this new district be dissolved. You ask whether, if the joint committee, after public hearing and compliance with the other requirements of sec. 40.303, Stats., should deny such petition, the electors of the territory included in this district are entitled to a referendum thereon under sec. 40.303 (8), Stats. ,

The language of sec. 40.303 (8) (a) provides for a referendum only as to an order "creating, altering, consolidating or dissolving" a school district or school districts. The absence of any language in the provisions thereof relative to a referendum that could be applicable to such an order is particularly significant in view of the fact that in subsec. (9) providing for court review, language is used specifically covering the situation where the county school committee refuses or neglects to make a positive order effecting a change.

We agree with your conclusion that this language is clear and does not therefore provide for a referendum as to an order, negative in form, denying such a petition. Such an order would not constitute one that creates, alters, consolidates or dissolves a district. As the statute provides for a referen-

dum only as to a positive order, namely, one that makes some change, none is provided as to an order that does not do so.

You also ask whether, if the joint committee should enter an order dissolving this district but containing nothing attaching its territory to some other district or districts or creating one or more districts out of it, the territory in the district so dissolved would revert to the individual common school districts which existed prior to the creation of this new district.

If the creation of this new district, which took effect June 30, 1949, was a consolidation of pre-existing common school districts, then the resultant effect thereof was that the old districts went out of existence and thereafter no longer constituted legal entities. In that case, before such old districts could again have legal entity there would have to be a positive formal act of some kind creating them. Obviously an order merely dissolving the new district would not constitute any such action. Unless the order of dissolution of the new district also recreates such pre-existing common school districts the mere dissolution would not revive them.

If this new district was created out of territories detached from the several pre-existing districts, then to attach such territories back to the districts from which they were detached, likewise some positive formal action to that effect would be necessary. An order of dissolution of the new district, with nothing more, would not constitute such action.

There is nothing in the provisions of sec. 40.303, Stats., expressly prohibiting a county school committee from making an order that merely dissolves a school district and provides nothing as to the disposition of the territory thereof, such as attaching it to other districts or creating new districts or both. Although art. X, sec. 3 of the constitution provides only that the legislature shall provide by law for the establishment of school districts, and there is no express provision in the statutes that all territory in the state must be in some common school district, there are indications in the statutes that the legislative concept is that all territory in the state is to be in some common school district. Sec. 40.30, providing for the creation and alter-

ation of school districts by municipal bodies, expressly says in subsec. (1) that no territory shall be detached from a district unless by the same order it is attached to some other district or districts. Sec. 40.33 provides that if a school district neglects to furnish schooling for two successive years the territory thereof shall be attached to some other district or districts.

It therefore is doubtful that the legislature ever intended that a county school committee, acting under sec. 40.303, could merely dissolve a school district and make no disposition of its territory. Were such an order to be made it would create a situation that not only would be unsatisfactory but does not fit into the present general school statutes. The policy appearing to be that all territory should be in some common school district, an order dissolving this district should expressly provide for the disposition of the territory thereof.

HHP

Public Assistance—Dependent Children—Wages of unemancipated minor children living in the home are to be considered in preparation of the family budget under sec. 49.19 (5), Stats., upon which the amount to be granted as aid for dependent children is based.

A county agency might require as a condition to a grant of aid to dependent children that a parent resume authority over an emancipated minor child, if the circumstances are such that the emancipation is revocable and if the county agency deems the revocation in the best interests of the child for whom aid is being given.

October 10, 1952.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked several questions relating to the administration of sec. 49.19, Stats., which makes provision for aid to dependent children.

Your first question is: Is it mandatory in determining the amount of the grant of aid to dependent children that

all of the wages of unemancipated minor children living in the home be considered?

I believe it is mandatory that the wages of unemancipated minor children living in the home be "considered," although the fact that the wages must be considered does not mean that any specific result must follow upon that consideration. As pointed out in 40 O. A. G. 190 and 32 O. A. G. 53, the legislature has removed from the statute arbitrary rules with respect to the amount of aid to be granted and left considerable leeway for discretion of local administrative authorities. Sec. 49.19(5) provides in part:

"The aid shall be sufficient to enable the person having the care and custody of such children to care properly for them. The amount granted shall be determined by a budget for the family in which all income as well as expenses 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 this section."

The amount to be granted is to be based on a budget for the "family." The primary meaning of the word "family" is given in Funk and Wagnalls New Standard Dictionary as: "A group of persons consisting of a father, a mother and their children." The family budget is to comprehend "all income as well as expenses." The family income includes earnings of unemancipated minors. Under the law such earnings belong to the parent charged with the duty of support of the child. See *Patek v. Plankinton Packing Co.*, 179 Wis. 442, 190 N. W. 920, and *Peppercorn v. The City of Black River Falls*, 89 Wis. 38, 61 N. W. 79, among the many cases enunciating that principle. Legislative recognition that the earnings of a minor child are to be considered as a source of support for the parent is included in sec. 49.07, Stats., relating to enforcement of the liability of relatives for support of dependent persons. After providing that the children of a dependent person shall maintain him so far as they are able, sec. 49.07 (1) states, "but no child of school age shall be compelled to labor contrary to the child labor laws." The supreme court recognized in *Milwaukee County v. Waukesha County*, 236 Wis. 233, 294 N. W. 835, that a mother receiving aid for her dependent

children is a dependent person within the meaning of ch. 49, Stats.

Your second question is: Can a county agency as a condition to a grant of aid to dependent children require a parent who has emancipated a minor child to resume his parental authority?

As pointed out in the discussion of your preceding question, there is a substantial area for the exercise of the discretion of local administrative authorities in determining whether aid should be granted in a particular case. Sec. 49.19 (3) reads in part:

"After the investigation and report, aid may be granted to the person having the care and custody of the child as the best interest of the child requires. * * *"

It is conceivable that administrative authorities might conclude under proper conditions that the best interest of a child would be served by revoking the emancipation of another minor child of the family.

There may, however, be circumstances involved in a specific case which render it impossible for a parent to revoke the emancipation of a minor child and to resume parental authority. In such cases the authorities charged with administration of aid to dependent children could not make the grant of aid to other children of the family conditional upon resumption of parental control over the emancipated minor. Circumstances under which the emancipation is not revocable are discussed generally in 39 Am. Jur. 706-707:

"The general rule is that the emancipation of a child is a mere license, gift, or indulgence on the part of the parent, and as such may be revoked, in so far as such revocation does not interfere with the rights of either the infant or third persons, acquired during the period of emancipation. When a child has been emancipated, whether expressly or impliedly, and has entered into a lawful contractual relationship, the parent cannot revoke the child's emancipation so as to abrogate such contract or affect the rights of the contracting parties acquired thereunder.

"Complete emancipation gives to the minor his time and earnings, and does away with the parent's right of custody and control. It has been said to be an entire surrender of all right to the care, custody, and earnings of the child,

as well as a renunciation of parental duties. In some jurisdictions it has been held that emancipation works a severance of the filial relation as completely as if the child were of age. After emancipation, the earnings and acquisitions of the child belong to it, and not to its father. It is clear that the emancipation of the child cannot be revoked after the child has earned wages, so as to give the parent a right to such wages. * * *

"The emancipation of a child competent to support itself discharges the parent from obligation for its support, although, if the child becomes unable to support itself, the father's duty revives. And parents owe no duty to support a married son. * * *"

Emancipation of a child may result not only from express agreement by the parent, but from abandonment or failure to meet parental obligations. See, for example, the discussions in *Patek v. Plankinton Packing Co.*, *supra*, and *Caskey v. Peterson*, 220 Wis. 690, 263 N. W. 658. See, also, sec. 48.34, Stats., which reads:

"During any time when, by reason of abandonment, drunkenness or profligacy, a parent of a minor shall neglect or refuse to provide for his support, or for his support and education, the earnings of such minor shall be his sole property as against such parent or any creditor of such parent."

Whether the emancipation of a minor which has resulted from nonsupport can be revoked is a question which need not here be considered because it does not appear that such circumstances are involved in your question.

Your third question is: If question 2 is answered in the affirmative, is it mandatory that the county require such resumption of parental authority?

The answer is "No." It is for the administrative authorities to determine whether, in the particular case, that would be in "the best interest of the child" for whose benefit aid to dependent children is to be given.

BL

Elections — Circuit Judge — Vacancy — Where a circuit judge whose term expires on the first Monday of January 1954 dies less than 75 days prior to the first Tuesday in April 1952 and the governor appoints a judge under sec. 17.19 (2), Stats., to occupy the office until his successor is elected and qualifies, there may not be an election under sec. 8.02 (2), Stats., or otherwise to fill the vacancy at the time of the regular election for the full term in April 1953, and the appointee continues in office until succeeded on the first Monday of January 1954 by the person elected for the full term in April 1953.

October 15, 1952.

OLIVER L. O'BOYLE,
Corporation Counsel,
Milwaukee County.

You have called attention to a judicial election question arising under secs. 8.02 (2) and 17.19 (2), Stats. Honorable Daniel W. Sullivan, circuit judge of Branch No. 2, Milwaukee county, died in March of this year. His term expires the first Monday of January 1954 and Honorable Ronald A. Drechsler was appointed on April 4, 1952 by Governor Kohler to succeed Judge Sullivan and to occupy the office of judge of Branch No. 2 of the circuit court of Milwaukee county "until his successor is duly elected and qualifies."

The question raised is whether Judge Drechsler must run in April 1953 for the balance of the unexpired term of Judge Sullivan and run for the full 6-year term in April 1954, or whether he must run in April 1953 for the full 6-year term and continue serving out Judge Sullivan's term pursuant to his present appointment.

Art. VII, sec. 9, Wis. Const., provides in part:

"When a vacancy shall happen in the office of judge of the supreme or circuit courts, such vacancy shall be filled by an appointment of the governor, which shall continue until a successor is elected and qualified; and when elected such successor shall hold his office the residue of the unexpired term. * * *"

Sec. 17.19, Stats., relating to vacancies in elective state offices provides in subsec. (2) that judicial offices shall be filled as follows:

“(2) JUDICIAL. In the office of justice of the supreme court or judge of the circuit court, by temporary appointment by the governor, which shall continue until a successor is elected, as provided in section 8.02; and qualifies. When so elected such successor shall hold his office for the residue of the unexpired term and shall take office as follows:

“* * *

“(b) A circuit court judge, on the first Monday of June next succeeding such election.”

Sec. 8.02 (2), Stats., reads:

“(2) The election to fill a vacancy in the office of justice or judge shall not be held at the time of holding the regular election for the same office. If the vacancy occurs 75 days or more before the first Tuesday in April, in the case of a judge, such election shall be held on the first Tuesday of the succeeding April, and in case of a justice, at the first judicial election when no other justice is to be elected. In either case, if the vacancy occurs less than 75 days prior to the first Tuesday of April, the election to fill the vacancy shall not be held until the judicial election of the next year.”

In *Hauerwas v. Zimmerman*, 230 Wis. 449, 453, the court said:

“Considering sec. 8.02, Stats. 1937, as in *pari materia* with sec. 17.21 (2), it is clear that the legislature did not intend that elections to fill vacancies were to be held on an election day on which a regular election is held.* * *”

Since the election for the full 6-year term falls in April 1953 it is obvious that there may be no election to fill the vacancy at the same time. Here the vacancy occurred less than 75 days prior to the first Tuesday in April 1952, and normally the election to fill such a vacancy would be held in April 1953 as provided in the last sentence of sec. 8.02 (2) quoted above, except that this would be in conflict under the circumstances here with the provision contained in the first sentence of sec. 8.02 (2) that the election shall not be

held at the time of holding the regular election for the same office.

There is no language in the constitution or statutory provisions mentioned above from which it may be inferred that the regular election date for a full term is to be shifted in any way because of a vacancy occurring prior thereto. As a matter of fact, sec 252.01, Stats., rigidly fixes the regular term for the second branch of the second circuit as it does the term of office for all circuits. The term of office commences with the first Monday of January next succeeding the judge's election. This section goes on to provide:

“* * * Full terms shall hereafter commence in the respective circuits with the first Monday of January in the following years and every sixth year thereafter, namely:

“First Circuit ___A. D. 1914	Tenth Circuit __A. D. 1916
Second Circuit—	Eleventh Circuit A. D. 1913
First branch _A. D. 1918	Twelfth Circuit A. D. 1913
Second branch A. D. 1918	Thirteenth Circuit
Third branch A. D. 1916	_____A. D. 1918
Fourth branch	Fourteenth Circuit
_____A. D. 1918	_____A. D. 1914
Fifth branch _A. D. 1915	Fifteenth Circuit
Sixth branch _A. D. 1917	_____A. D. 1918
Seventh branch	Sixteenth Circuit
_____A. D. 1926	_____A. D. 1916
Eighth branch A. D. 1926	Seventeenth Circuit
Ninth branch A. D. 1934	_____A. D. 1916
Third Circuit __A. D. 1915	Eighteenth Circuit
Fourth Circuit _A. D. 1917	_____A. D. 1918
Fifth Circuit ___A. D. 1913	Nineteenth Circuit
Sixth Circuit __A. D. 1913	_____A. D. 1916
Seventh Circuit A. D. 1915	Twentieth Circuit
Eighth Circuit _A. D. 1915	_____A. D. 1918
Ninth Circuit—	Twenty-first Circuit
First branch _A. D. 1927	_____A. D. 1958
Second branch A. D. 1932	Twenty-second Circuit
	_____A. D. 1958”

The only flexible election date is that relating to the election to fill the unexpired term, and this is subject to the positive statutory prohibition that it must not be at the time of holding the regular election for the same office. In this case if the election to fill the term were to be held a year later as normally would be done, there would be no vacancy

to fill since the judge elected in April 1953 for the full 6-year term will be in office in April 1954, which is the first available date under the statute for holding an election to fill the unexpired term.

Because of the time sequence under the circumstances existing in connection with the death of Judge Sullivan and the appointment of Judge Drechsler as his successor, it is concluded that there can be no election to fill the unexpired term of Judge Sullivan and that Judge Drechsler will continue to serve out that term until succeeded on the first Monday in January 1954 either by himself if he stands for election for the 6-year term in April 1953 or some other successful candidate. By April 1954 when an election could be held for the vacancy, the question of filling it will naturally be moot. To recapitulate,—the election to fill the unexpired term could not have been held in April 1952 as this was less than 75 days from the date of the vacancy. It could not be held in April 1953 as that is the date for the regular election, and it could not be held in April 1954 as that would be too late.

WHR

Marketing and Trade Practices—Surety Bond—Produce Wholesaler—Bond provided for by sec. 100.01 (2) (d), Stats., is not applicable to payment for produce purchased by a licensed produce wholesaler who is not a commission merchant.

October 15, 1952.

D. N. McDOWELL, *Director,*
State Department of Agriculture.

Our attention is directed to sec. 100.01 (2) (d), Wis. Stats., relating to the bond of produce wholesalers. A "produce wholesaler" is defined by sec. 100.01 (1) (f) to mean a commission merchant, dealer or broker, and sec. 100.01 (2) (d) provides:

"Every produce wholesaler shall execute and file with the department a bond in such form and with such surety or

sureties as it directs, conditioned that he will faithfully perform his obligations and comply with all laws and regulations governing his business. The filing of such bond is a condition of granting license. Whenever the department determines that a bond is insufficient it may require additional bond, which shall be filed within such reasonable time as the department fixes in a written demand. Failure to make timely application or to file bond does not relieve a produce wholesaler of liability for any part of the license fee."

Sec. 100.01 (3) (e) provides that it shall be unlawful:

"For a commission merchant to fail to render a true itemized statement of the sale or other disposition of a consignment of produce with full payment promptly in accordance with the terms of the agreement between the parties, or, if no agreement, within 15 days after receipt of the produce. Such statement of sale shall clearly express the gross amount for which the produce was sold and the proper, usual or agreed selling charge, and other expenses necessarily and actually incurred or agreed to in the handling thereof."

You state that a creditor of a licensed produce wholesaler who was not a commission merchant complained to the department that the wholesaler had defaulted in paying for produce sold to him, and question has been raised as to whether the bond provided for by sec. 100.01 (2) (d) covers such a default.

Sec. 100.01 (3) lists a number of unlawful acts. Paragraphs (a) and (c) apply to commission merchants or brokers. Paragraphs (b) and (f) apply to dealers. Paragraphs (d), (g), (h) and (i) apply to produce wholesalers. Paragraph (e) relating to commission merchants and quoted above is the only provision specifically relating to payment for produce.

To name the one is normally to exclude the others and there is logic in the above statutory arrangement whereby the bond so far as it relates to indebtedness coverage is limited in its application to the commission merchant. Normally bonds are provided for to cover the defaults of persons acting in a trust capacity in the handling of other people's property and not to cover the ordinary debtor-creditor relationship, although, of course, this may be done where the statute specifically so provides.

In the case you have mentioned there was a sale to the produce wholesaler. The seller could have sold the property C.O.D. but chose to extend credit to the buyer, whereas if the goods had been placed with a commission merchant for sale to a third party the seller would have been in no position to exercise discretion as to extending credit, and since the commission merchant is presumably handling money of others in large amounts so that his individual credit would not be adequate to cover the same, some independent source of protection such as a surety bond is highly desirable, which probably accounts for the language of sec. 100.01 (3) (e).

A statutory bond is to be read, construed and enforced according to the statute pursuant to which it is given. 8 Am. Jur. 709, Bonds, §4. If there is doubt or uncertainty growing out of ambiguity of language, which makes construction necessary, the doubt will be resolved in the surety's favor. 50 Am. Jur. 926, Suretyship, §32.

Here there is no ambiguity making it necessary to resort to any rules of construction, since under sec. 100.01 (3) the only licensee who is required by statute to make prompt payment is the commission merchant, mentioned in paragraph (e), and under the facts here stated the licensee in question is not a commission merchant. It therefore becomes unnecessary to go into any discussion of statutes, cases or text authorities relating to bonds given to secure payment of open accounts, since we are dealing with no such statute here so far as produce dealers other than commission merchants are concerned.

You are therefore advised that sec. 100.01 (3) (e) is not applicable to produce wholesalers other than commission merchants and that the bond filed with your department under sec. 100.01 (2) (d) does not cover the transaction in question.

WHR

Public Assistance—Old-Age Assistance—Old-age assistance lien under sec. 49.26, Stats. 1939, discussed as it affects rights of vendee under executory land contract.

October 27, 1952.

WAYNE B. SCHLINTZ,
District Attorney,
Vernon County.

You submit the following statement of facts:

On August 13, 1937, A was the owner of a tract of land. On that date he entered into a land contract to convey to B for \$800, \$300 of which was paid at the execution of the contract and the balance to be paid at the rate of \$15 per month. The land contract was never recorded, but B entered possession.

In March, 1938, A applied for old-age assistance. It was granted and a pension lien filed in the office of the register of deeds March 3, 1938.

Payments on the land contract were completed on September 25, 1939, and A gave B a warranty deed which was recorded. On March 17, 1944, B sold the land by warranty deed to C. Neither B nor C had actual knowledge of the old-age pension lien.

On September 25, 1939, when the warranty deed from A to B was executed, A had received old-age assistance to the amount of \$440.

Your question is: Is the property subject to the old-age assistance lien and if so, to what extent?

The opinion was given in 39 O.A.G. 432 that the granting of old-age assistance does not give the county the status of a purchaser in good faith for valuable consideration so as to give its lien priority over an earlier unrecorded instrument. That principle, however, is not necessarily involved in a determination of your question, because it is a generally established rule that possession of land is notice of every right that the possessor has in it. See 39 Am. Jur. 242, 55 Am. Jur. 1087-1088; *Honzik v. Delaglise*, 65 Wis. 494, 27 N.W. 171, 56 Am.Rep. 634; *Wicke v. Lake*, 21 Wis. 410, 94 Am.Dec. 552; *Bell v. Protheroe*, (Okl.) 1 A.L.R. 2d 315, 188 P. 2d 868; and *Oberholtz v. Oberholtz*, 79 Oh. App.

540, 74 N.E. 2d 574. Under the foregoing rule, the interest of the vendee in possession under an executory land contract would not be defeated by a pension lien subsequently filed. The pension lien could attach to no more than the vendor's interest in the land as of the date the lien was filed.

It appears to be the rule that judgment liens entered against a vendor under an executory land contract or mortgages given by such vendor before the contract has been performed are a lien against the land to the extent of the vendor's interest, that is, to the extent of the unpaid portion of the purchase price, provided the vendee is chargeable with knowledge of the judgment or mortgage. In 87 A.L.R. 1510, it is said:

"Many of the cases cited in support of the rule that the lien of the judgment cannot attach in excess of the rights of the judgment debtor (vendor) under the contract as they exist at the effective date of the judgment, apparently assume that the lien of the judgment does, as against a vendee under a prior executory contract who is chargeable with knowledge of the judgment, attach to the rights of the vendor under the contract as of that time. And this seems to be the view of the text-writers. See 2 Freeman, Judgm. 263; 1 Black, Judgm. 438."

A number of cases are cited in 87 A.L.R. 1510-1514 in support of the proposition. In addition see: *Oberholtz v. Oberholtz*, 79 Oh. App. 540, 74 N.E. 2d 574, and *American National Ins. Co. v. Bass*, 111 S.W. 2d 769 (Tex. Civ. App.); *Reid v. Gorman*, (S.D.) 158 N.W. 780; *May v. Emerson*, (Ore.) 96 P. 454; and *American Law of Property*, Vol. III, §11.29, p. 85 (1952).

The supreme court of Wisconsin commented in *Goff v. Yauman*, 237 Wis. 643, 650, 298 N.W. 179, that an old-age assistance lien "is comparable to the lien under a mortgage in that it likewise is a lien upon property as security for the repayment of money, and rests upon the consent of the person upon whose interest in the property the lien attaches." It would seem to follow that an old-age assistance lien attaches to the interest which the beneficiary has in land under contract of sale if the vendee has actual knowledge or is legally chargeable with knowledge of the lien. It is stated in 87 A.L.R. 1519 that

“* * * it has been expressly declared in some cases and apparently assumed in others, that a subsequent purchaser from the vendor, chargeable with actual or constructive notice of the executory contract, succeeds to the rights of the vendor (grantor) as regards the part of the purchase price that remains unpaid at the time the vendee has notice, or is chargeable with notice, of the conveyance.”

According to the following cases cited in 87 A.L.R. 1519-1520 any payments made by the vendee to the vendor after a lien is acquired against the vendor, of which the vendee has or should have knowledge, cannot be credited against the lien; but the lien may be enforced against the land to the full extent of the amount of the purchase price unpaid at the time the vendee became chargeable with knowledge of it. *Farmers Loan & T. Co. v. Maltby*, 8 Paige (N.Y.) 361; *Ten Eick v. Simpson*, 1 Sandf. Ch. (N.Y.) 244; *Quaschneck v. Blodgett*, 32 N.D. 603, 156 N.W. 216. See, also, *Heath v. Dodson*, 110 P. 2d 845 (Wash.) and *Poole v. Atlanta Joint Stock Land Bank*, 5 S.E. 2d 368 (Ga.).

You have indicated that neither the vendee nor the person to whom he subsequently conveyed had actual knowledge of the old-age pension lien. The question remains whether they are chargeable with constructive notice so as to give the lien precedence over their interest in the land to the extent of the purchase price which remained unpaid at the time the lien was filed.

The opinion was given in 38 O.A.G. 380 that the filing is constructive notice of the existence of a lien for all amounts paid as old-age assistance thereafter, including amounts paid after the recipient of the assistance has conveyed the land.

It has been held that the mere entry of judgment or recording of a mortgage against a vendor is not sufficient to charge the vendee in possession under an executory land contract with knowledge of the judgment lien or mortgage, so as to bind the vendee at his peril to discharge the lien or mortgage out of unpaid purchase money. See *Marion Mortgage Co. v. Grennan*, 106 Fla. 913, 143 So. 761, 87 A.L.R. 1492, and *Caltrider v. Caples*, 160 Md. 392, 153 A. 445, 87 A.L.R. 1500, relating to judgment liens and *Jaeger v. Hardy*, 48 Oh. St. 335, 27 N.E. 863 and *Ranney v. Hardy*,

43 Oh. St. 157, 1 N.E. 523, with respect to mortgages. The following excerpt appears from *Caltrider v. Caples, supra*:

“The appellee apparently labors under the impression that, because his judgment was entered before the deed to the appellant was executed, it was the duty of the appellant to see that his judgment was paid out of the balance owing on the purchase money, which was more than sufficient to satisfy it. Mr. Tiffany, in his *Real Property*, 2781, §670, says that, though the weight of authority in this country recognizes the lien of the judgment creditor against the vendor’s title, it is ‘liable to be divested by the payment of whatever remains due by the vendee.’” (87 A.L.R. 1504-1505)

With respect to mortgages it was said in *Jaeger v. Hardy, supra*:

“* * * A mortgage executed by the vendor, on the premises, after the purchaser is put in possession, is subordinate to his prior equity. He is not bound to examine the records for such incumbrances, nor is the record constructive notice to him. Until actual notice of the incumbrance, he may safely continue to make payments of the purchase money to his vendor in pursuance to the contract. Such payments, though made after the recording of the mortgage, will not be regarded as a fresh purchase, but are made effective for the protection of the purchaser, by relation to the original contract. Nor can the subsequent mortgagee be allowed to impede the progress of the legal estate to the purchaser, or intercept the conveyance. But the mortgage creates a valid lien on the interest remaining in the vendor at the time of its execution, which, before conveyance, is the legal title, and a beneficial estate in the lands to the extent of the unpaid purchase money; and payments made on the purchase money to the vendor by the purchaser, after he has knowledge of the mortgage, will be unavailing as against the mortgagee. *Lefferson v. Dallas*, 20 Ohio St. 68; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244; *Young v. Guy*, 87 N.Y. 457; *Fasholt v. Reed*, 16 Serg. & R. 266; 1 Warv. Vend. p. 188, and 2 Warv. Vend. p. 687. * * *” (27 N.E. 864)

The latter case held that while the vendee in possession is not chargeable with the constructive notice arising from mere recording, he is chargeable with notice of the lien or mortgage if he is in possession of facts which should put him on inquiry. If a vendee in possession under an execu-

tory land contract had information that his vendor had applied for old-age assistance or that he was receiving such assistance, I believe it would constitute sufficient notice of the old-age assistance lien so that the land would be subject to the lien to the extent of the unpaid purchase price at the time such facts came to the attention of the vendee.

The supreme court of this state has held that knowledge of facts sufficient to put one on inquiry is presumed to be knowledge of the facts which would be discovered by such inquiry. See *Zdunek v. Thomas*, 215 Wis. 11, 254 N.W. 382 and *Schoedel v. State Bank of Newburg*, 245 Wis. 74, 13 N.W. 2d 534.

Where comparative rights of persons having interests in the same property are to be determined solely on the basis of fixed rules charging them with constructive notice of records, the questions involved are largely matters of statutory construction. The cases holding that the mere entry of judgment or recording of a mortgage does not charge a vendee in possession with constructive notice of a lien against the vendor's interest are not necessarily authority for holding that the legislature did not intend the recording of an old-age assistance lien to charge a vendee with such notice. In view of the fact pointed out in 39 O.A.G. 432, that the granting of old-age assistance is not conditional upon the giving of security for repayment, it seems unlikely that the legislature intended to place an old-age assistance lien in a position superior to a mortgage given for value.

It may be pertinent, too, that at the time the old-age assistance lien here involved was filed, the law provided that such lien should "take priority over any other lien subsequently acquired or recorded except tax liens"; but did not provide, as it does now, that such lien should take priority over any lien "or conveyance" subsequently acquired.

It is my opinion that under the provisions of sec. 49.26, Stats. 1939, the old-age assistance lien in the case you have described exists against the property to the extent of the amount of the purchase price remaining unpaid at the time of the filing of the lien if the vendee had information that the vendor had applied for or was receiving old-age assist-

ance; but that the property is not subject to the old-age assistance lien if the vendee had no information which should have put him on inquiry.

BL

Schools and School Districts—City Plan—Bonds—

Where a city is operating under the city school plan, secs. 40.50 to 40.60, Stats., and has territory attached thereto for school purposes only:

1. Debt limitation of 8 per cent in art. XI, sec. 3, Wis. Const., is computed only on the property in the city proper and property in the attached area is not included.

2. Issuance of bonds by such city to construct schools is under sec. 67.04 (2) (b), Stats., and to be voted by the city council.

3. Annual instalments of the irrepealable tax to retire bonds issued by such city to construct schools are collectible as a tax spread each year as they accrue over the property in both the city proper and the attached area in that year.

4. Bonds may be issued by such city to construct schools regardless of whether the schools are to be located in the city proper or in the attached area.

October 28, 1952.

GEORGE E. WATSON,

State Superintendent of Public Instruction.

Several questions have arisen relative to the issuance of bonds for construction of schools by a city operating under the city school plan set out in secs. 40.50 to 40.60, Stats., to which parts of adjacent towns have been attached thereunder for school purposes only. Fiscal control of the school affairs is exercised in accordance with the method provided in sec. 40.50 (4) (b), Stats., that is, by the common council and the town chairmen of the towns involved, acting together. The purpose of the bonds is to construct additional school facilities, some of which would be located in the area

outside the city proper but which is attached to it for school purposes only.

While these questions involve local municipal matters and normally would be viewed as not within the proper area for an opinion, their pertinency to problems arising in the administration of your department, particularly in respect to school district reorganizations and appeals to you from orders in that field, justifies our answering them.

The first question is whether the 8 per cent debt limitation of art. XI, sec. 3, Wis. Const., is computed upon only the taxable property within the city proper or upon the taxable property within the city and the areas outside the city which have been attached to the city for school purposes. It is our opinion that the 8 per cent debt limitation is to be computed upon only the taxable property within the city limits.

Sec. 40.51 (1), provides:

“(1) Each city, affected by this plan, is a single and separate school district; and 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.”

The court has held that the enactment of this provision was not intended to and does not create a school district which is a separate legal entity from the city but merely constitutes a school system operated thereunder as nothing more than a division, department, or branch of the city government. In *State ex rel Board of Education v. Racine*, (1931) 205 Wis. 389, 236 N.W. 553, the court said, at page 395:

“In arriving at our conclusion we have not overlooked the provisions of sec. 40.51, Stats., which provides that ‘Each city, affected by this plan, is a single and separate school district.’ Just what the legislative thought was in making this declaration is not clear. It is quite apparent that by so doing it was not intended to create a separate and distinct municipal entity out of the territory within the city limits. It was rather to make the school system a unit under city government. It is to that end that the same section attached to the city for school purposes any territory outside of the city which was joined with the city territory

in the formation of a school district when the plan became effective. The boundaries of the city were simply enlarged to include only for school purposes territory lying outside of the city which theretofore had been joined with city territory in the formation of a school district. In other words, the term 'school district' as used in sec. 40.51 implies a system rather than a municipal entity."

The language quoted above makes it clear that the court did not intend its construction of sec. 40.51 (1) to be limited to cases where the city school system covers only the territory within a city. Even where territory outside the city is attached to the city for school purposes, under the *Racine* case, the school system would not be a separate municipal entity with power to levy taxes or to issue bonds. The *Racine* case was followed in *Huettner v. Eau Claire*, (1943) 243 Wis. 80, 9 N.W. 2d 583, and *Seifert v. School District*, (1940) 235 Wis. 489, 292 N.W. 286.

In the *Racine* case the court held that in a city operating its schools under the city school plan it was the common council, rather than the board of education, which had the power to levy taxes and issue bonds for school purposes, since the board of education had no existence as a separate entity and was but an arm of the city established for the purpose of managing and supervising the schools, similar in nature in its own field to other departments of the city government. The court there noted that several provisions of the statutes were inconsistent with any separate existence or entity of the board of education, and pointed to, among others, sec 17.12, giving the common council power to remove members of the school board for cause; sec. 67.04 (2) (b), giving cities the power to issue bonds for the construction of school buildings; and sec. 40.53 (6), providing that deeds and leases taken by the school board must be in the name of the city and that title to all school property should vest in the city.

Subsecs. (4) and (5) of sec. 40.50 were not in existence at the time of the *Racine* decision, having been created by ch. 501, Laws 1949. However, those provisions reinforce the proposition that where schools are operated under the city school plan there is no separate school district entity. Sec. 40.50 (4) clearly provides for fiscal control of the

school affairs by the members of the city council and the town chairmen and village presidents of any other municipalities whose territory is involved. The same subsection together with subsec. (5) expressly provides a means for alternative operation of such schools by the creation of a separate independent school district, the latter specifically stated to have power to levy taxes and incur indebtedness. Thus, said subsecs. (4) and (5) in no way detract from the force of the *Racine* case.

Clearly there is nothing in sections 40.50 to 40.60, or elsewhere in the statutes, which empowers the members of a city council and the town chairmen and village presidents of territory attached to the city for school purposes only, to issue bonds. It is fundamental that there is no power to issue bonds except as there is express statutory authorization therefor. Sec. 67.04, Stats., constitutes the grant of power to issue bonds, and the only provisions thereof for school bonds are in subsecs.(2) (b), (4) (a) and (6), which grant such power to cities, villages and school districts respectively.

Since the bonds must be issued by and are the obligations of the city as a municipality, the 8 per cent debt limitation has to be computed upon taxable property of that same municipality, with the result that it is computed on only the property which is in the city for all purposes.

The debt limitation provision in art. XI, sec. 3, Wis. Const., reads:

“* * * No county, city, town, village, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness: except that for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not exceed in the aggregate 8 per centum of the value of such property. * * *”

The limitation clearly is expressed in terms of a percentage of “the value of the taxable property therein,” and the word “therein” can refer only to the “county, city, town,

village, school district, or other municipal corporation" which is issuing the bonds. Since, in the situation you present, it is the city which must issue the bonds, the debt limitation is expressed in a percentage of the value of the taxable property in such city.

Our decision is further buttressed by the case of *Lippert v. School District*, (1925) 187 Wis. 154, 203 N.W. 940, where the court held that in the case of a village and a school district each having territorial limits which were coterminous, the limitation upon the indebtedness of the school district was to be computed without regard to the indebtedness of the village. At page 155 the court said:

"Each municipality mentioned in the constitution is authorized to borrow up to the limit of its indebtedness, not to that of its and another municipality's indebtedness. Each municipality is a separate entity qualified to borrow and is separately liable for its indebtedness."

As applied to the instant case the rule of this *Lippert* case means that the city, as a separate entity, individually liable for its own indebtedness, is authorized to borrow up to and only up to the constitutional limit computed upon its own taxable property.

The second question is whether the city council alone, or said council acting together with the heads of the other municipalities involved, is the proper body to pass the initial bonding resolution and the irrevocable tax levy resolution required by sec. 67.05 (1) and (10) respectively. For the reasons stated above, namely, that the bonds are the obligations of the city only and it is the council which is the governing body of and acts for a city, it is our opinion that the common council alone is the one to pass the required resolution.

In the situation presented here, we are informed that the bonding resolution was passed at a meeting of the city council at which the chairmen of the towns involved were in attendance, and that said town chairmen voted thereon. However, the resolution was offered by a member of the city council, seconded by another member thereof, and adopted by an affirmative vote which included therein more than three-fourths of the council. The fact that the two

town chairmen sitting with the common council also voted to adopt the resolution neither adds to nor detracts from the validity thereof. If their votes were not required then their voting thereon was merely surplusage. The resolutions were properly adopted without their votes because their adoption was not dependent thereon.

Thirdly, the question is whether the annual required tax voted for the retirement of principal and interest upon the proposed bonds can be spread each year as the same accrues over both the taxable property within the city and the taxable property in the areas attached thereto for school purposes only, or over only the taxable property in the city proper.

Sec. 40.56 (1), Stats., provides:

“(1) All property attached to a city for school purposes shall be taxed for such purposes the same as property within the city.”

This is a clear and unequivocal statement of legislative intent that all the taxable property in areas attached to a city for school purposes only is to be subject to and bear the same tax burdens and liabilities for the furnishing of education through such city school system as the taxable property within the city proper. It would seem anomalous that sec. 40.53 (6), Stats., provides that title to all school property vests in the city, but in the final analysis, because of the necessity that title be held by some legal entity, some such provision as to title is required consistent with the nonexistence of the school system as a separate legal entity. In other words, the legislative intent is that even though the territory in the city and that in the areas attached thereto for school purposes do not constitute a school district which has legal existence as a separate municipal entity, and the title to school property rests in the city as a municipal entity, nonetheless the attached areas are to be subjected to exactly the same tax payments to provide and operate the schools which serve both the city proper and the attached areas as an operational unit as property within the city at the same time is subjected to for the same purpose, because for such purpose areas outside the city are considered as

though they were a part of the city. Sec. 40.56 (2), Stats., provides the mechanics for adjusting such concept to the distribution over and collection from the entire property of the annual tax burden for school purposes that all the property is thus required to bear.

Certainly the retirement of principal and interest on bonds, the proceeds of which were used to construct school buildings, is a school purpose and thus the annual irrevocable levy for that purpose is a tax for school purposes within the above concept. Consequently, it follows that as such annual instalment for such purpose falls due, it is a tax for such purpose and is to be spread over the entire taxable property which is made subject to taxation for such purposes, namely, the taxable property in the attached areas as well as that within the city proper.

If the property in such attached areas were not subjected to the payment of its proportionate share of the recurring annual instalments of the irrevocable tax, then it would not be sharing the cost of education in those years to the same extent as property in the city proper. As respects effectuating the legislative declaration in this regard, it is immaterial whether the schools, constructed or acquired by the use of the proceeds of the bonds, are located in the city proper or within the attached areas, or whether the bonds therefor were issued before or after said areas were attached to the city for school purposes. The school operation under such system is for the entire territory and where the schools are located or the pupils who attend them reside are purely matters of administration and depend upon a variety of circumstances.

Where a municipality issues bonds it votes the required irrevocable tax and then each year as the annual instalment thereof falls due it is automatically spread over whatever taxable property then is in the municipality. No further levy is required each year but it is carried into the tax roll and collected the same as other taxes. Sec. 67.05 (10), Stats., so provides. If, for instance, property has been detached therefrom subsequent to the issuance of the bonds such annual tax levy is not spread over such property but only over the taxable property still in the municipality. So

likewise if property subsequently has passed into an exempt class the tax is not spread against it. Conversely, if property has become attached to the municipality or has passed from an exempt to a nonexempt class subsequent to the issuance of the bonds, it is included along with the other taxable property in the municipality over which the tax is spread.

Accordingly it is our opinion that the annual instalment of the irrepealable tax for retirement of school bonds is to be included each year as it accrues and apportioned under sec. 40.56 (2), Stats., along with the amount voted to be raised by taxation that year for the operation of the schools of the system.

Last, the question is whether a city can issue bonds for the purpose of constructing school buildings located in the area outside the city limits attached thereto for school purposes. This question involves two considerations, one, whether authority to do this can be given to a city, and secondly, whether such authority has been given to it.

The legislature can give to a city any power that is a proper municipal activity. Whether a particular grant of municipal power is valid depends upon whether it is a public purpose and one that may be delegated to a municipality. The ownership and operation of public schools is beyond any question a public purpose. The ownership, operation and conduct of local schools is certainly a matter of local concern and can be delegated to a local governmental unit. Were this not so, then a city could not validly own or operate schools even within its own boundaries. Art. X, sec. 3 of the Wisconsin constitution establishes the local character of the conduct of schools by specifying that the legislature shall provide by law for the establishment of district schools. *State ex rel. Horton v. Brechler*, (1925) 185 Wis. 599, 603, 202 N.W. 144.

The legislature by the city school plan law, secs. 40.50 to 40.60, Stats., has provided that a city operating thereunder constitutes a school district. It then provides that when any outlying territory is attached thereto for school purposes only, such outlying area is a part of that city as a school district just as much as if it were within the city limits. By so operating under said city school plan a city is granted the

power and duty of a school district to the extent of all the territory included therein. Its power and duty as such school district is to furnish education throughout the entire district and applies equally to territory outside the city proper but attached thereto for school district purposes and to territory within the city proper.

As respects the validity of a grant of power to furnish educational facilities for said entire territory, there is no pertinency as to where the building facilities might be located. A school building located in the city proper might well serve the entire area of the district under some circumstances. On the other hand, a school building might equally serve if located in the outlying area. Where more than one school might be selected as desirable to serve the whole area, it might be a matter of the best judgment to locate some in the city proper and some outside. Where the schools are located is purely a matter of local judgment and administration.

A city can operate, as many do, schools within its boundaries for the education of pupils who reside outside the city. This is recognized by the provisions in the statutes for non-resident tuition, such as sec. 40.47. If a city can be given that power, which apparently it is, then it would seem to follow that it is equally valid for it to be given power to operate schools outside its boundaries but within territory attached thereto for school purposes, when the objective is to furnish education to both pupils who reside within the city proper and within the outlying area attached to the city as a school district. It would be no objection to the issuance of bonds that the city would use the proceeds thereof to construct school buildings within the city limits but in anticipation that the schools so constructed would be attended by pupils residing outside the city within areas attached to the city for school purposes. It is the use that determines the public purpose, and thus the location of the school facility is of no consequence.

Sec. 40.53 (6), Stats., provides that the title to all school property is vested in the city. This applies whether the school premises are located within the city limits or not. There are other instances in the statutes where a city is

authorized by express provision to own, construct, and operate property outside its own limits. Sec. 66.069 (2), Stats., authorizes this in the case of a municipally owned public utility. Such a utility may render service outside the city limits and many do. Sec. 114.11 (1), Stats., authorizes a city to own, acquire, construct, operate, and spend money for, airports and landing facilities located outside its corporate limits. Sec. 66.025, Stats., impliedly recognizes that a city may own property outside its limits and spend money therefor.

In *Burlington v. Industrial Comm.*, (1928) 195 Wis. 536, 218 N.W. 816, the court held that an employe of a city fire department was injured while in the employ of the city although the injury occurred while the department was responding to a call from a neighboring town with which the city had contracted to provide fire protection. The court discussed the broad powers of cities under sec. 62.11 (5), Stats., and declared, at p. 539:

“While we might well affirm the judgment of the lower court on the ground that *Pieters* was properly in the employ of the city at the time of the injury, we prefer to place the decision on the broad ground that cities, by their general charters, have the power to contract and to furnish fire service to people and communities adjacent to the cities and at least within their trading areas. * * *

While the *Burlington* case dealt with the furnishing of fire protection to adjacent areas, the principle relied upon by the court there should be equally applicable to the furnishing of education to adjacent areas; and certainly the construction of school buildings is a necessary part of furnishing education. If convenience or judgment calls for the location of a school building outside of the city and in the attached territory, it would be a valid purpose for the expenditure of city funds and for the issuance of bonds by the city.

Any question as to the authority of a city to own school premises outside its corporate limits and expend money therefor is finally disposed of by the provisions in sec. 62.22 (1), Stats., wherein a city is expressly given authority to acquire property, real or personal, within or *without the*

city, for certain stated purposes and "for any other public purpose," and to construct and maintain buildings thereon for "public purposes."

It is therefore our opinion that a city operating under the city school plan may validly be granted power to construct school buildings located in areas attached thereto for school purposes, and that such a city has such power under the statutes and therefore may issue bonds for such purpose.

EWV

HHP

Municipalities—Libraries—Two counties may co-operate under secs. 66.30 and 43.25, Stats., to establish, maintain, and prorate the costs of public library services on a joint basis.

November 10, 1952.

WISCONSIN FREE LIBRARY COMMISSION.

You have directed our attention to sec. 43.25 (1), Wis. Stats., which reads:

“43.25 (1) Every city of the second, third or fourth class and every village, town or county may establish, equip and maintain a public library or reading room, or maintain and support any public library or reading room already established therein, and may annually levy a tax or appropriate money to provide a library fund, to be used exclusively to maintain such library or reading room; and may enact and enforce police regulations to govern the use, management and preservation thereof.”

We are asked whether two counties may co-operate in establishing, maintaining, and prorating the costs of public library services on a joint basis by authority granted to counties under sec. 66.30, Wis. Stats., which provides:

“66.30 (1) Any city, village, town, county or school district may, by action of the governing body thereof, enter into an agreement with any other such governmental unit or units or with the state or any department or agency thereof including building corporations created pursuant to section 37.02 (3) for the joint or co-operative exercise of any power or duty required or authorized by statute, and as part of such agreement may provide a plan for prorating any expenditures involved.

“(2) Any city, village, town, county or school district in the exercise of its powers may contract jointly with any other city, village, town, county or school district for any joint project, wherever each portion of the project is within the scope of authority of the respective city, village, town, county or school district.”

The reason this request for an opinion is submitted by your commission is that two counties are presently contemplating such a joint project and the district attorney of one of the counties has been studying the question and has

an understanding with you that the problem is to be placed before this department for consideration.

In the absence of any specific information as to the details of the proposal which the counties in question may contemplate, the proposition as put to us broadly is certainly within the general scope of the statutes set forth above (and any attempt to elaborate by going into a detailed discussion would merely belabor that which is obvious).

You are therefore advised that two counties may cooperate under secs. 66.30 and 43.25, Wis. Stats., to establish, maintain, and prorate the costs of public library services on a joint basis.

WHR

Architects and Professional Engineers—Registration—
An engineer not registered, exempted, or the holder of a permit to practice professional engineering as defined in sec. 101.31 (2) (d), Stats., who advertises himself as qualified to perform services in the design and supervision of construction of buildings wherein the public welfare and safeguarding of life, health, or property is involved, and who prepares construction plans for additions and alterations to buildings, where such buildings are not of the class described by sec. 101.31 (10), Stats., violates sec. 101.31 (1) (b) and (1) (c), Stats.

November 14, 1952.

WISCONSIN REGISTRATION BOARD OF ARCHITECTS
AND PROFESSIONAL ENGINEERS.

You have forwarded certain materials concerning the activities of a person who is not registered by the board as a professional engineer or exempt from registration, and request my opinion as to whether these materials indicate that he has violated sec. 101.31, Wis. Stats. It appears that the individual in question has advertised himself as a graduate engineer qualified in the design and supervision

of construction of sewage disposal and other municipal facilities and the design and construction of electric utilities. On two occasions he submitted construction plans to the industrial commission for additions and alterations to buildings not within the class of exempt buildings specified by sec. 101.31 (10) where the services of a registered architect or engineer are not required. The commission refused its approval for the reason that the plans did not bear the seal of a registered architect or engineer.

Secs. 101.31 (1) (b) and (1) (c) provide as follows:

“(b) It is unlawful for any person to practice the profession of architecture or the profession of professional engineering in this state unless such person has been duly registered, is exempt under the provisions of subsection (9) or has in effect a permit under subsection (11) (d).

“(c) It is unlawful for any person to offer to practice the profession of architecture or the profession of professional engineering or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is an architect or professional engineer or to advertise to furnish architectural or professional engineering services unless such person has been duly registered or has in effect a permit under subsection (11) (d).”

Whether the conduct outlined above violated the quoted sections is to be determined from the following definition found in sec. 101.31 (2) (d) :

“The practice of professional engineering within the meaning and intent of this section includes any professional service, requiring the application of engineering principles and data, wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, industrial plants and buildings, machines equipment, processes, works, and the structural members of other than industrial buildings. A person shall be deemed to offer to practice professional engineering, within the meaning and intent of this section, who by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer; or who through the

use of some other title implies that he is a professional engineer; or who holds himself out as able to practice professional engineering.”

That the services performed in the design and supervision of construction of sewage disposal facilities and electrical utilities are professional in character and that such services concern and involve the public welfare and the safeguarding of life, health, or property as defined in the above section is manifest. One who offers to engage in such practice without being registered, exempted, or the holder of a permit under the registration act must be considered as offering to practice professional engineering in contravention of sec. 101.31 (1) (c), Stats. Likewise, a person who prepares construction plans for an addition to and structural alterations of buildings not of the classification exempted by sec. 101.31 (10), Stats., without proper registration, exemption, or permission under the statute violates sec. 101.31 (1) (b), Stats.

GS

Courts—Criminal Law—Fines—Although under sec. 353.25 (3), Stats., courts have jurisdiction to remit taxable costs in criminal cases, in whole or in part, they have no authority to remit fines. But under secs. 57.01 and 57.04, Stats., execution may be stayed and the defendant placed on probation. If execution is stayed without placing the defendant on probation the stay is unlawful.

November 14, 1952.

LAWRENCE P. GHERTY,
District Attorney,
St. Croix County.

You have requested an opinion whether the county court of St. Croix county has inherent power to remit or suspend fines. You point out that ch. 254, Laws 1951, conferring on that court increased civil and criminal jurisdiction, does not provide authority to remit or suspend fines.

It has always been the position of this office that fines once lawfully imposed may not be remitted. 1908 O.A.G. 278; 5 O.A.G. 46; 14 O.A.G. 244; 24 O.A.G. 440; 29 O.A.G. 371. See also *In re Webb*, (1895) 89 Wis. 354, 62 N.W. 177, 46 Am.St.Rep. 846, 27 L.R.A. 356; *Drewniak v. State ex rel. Jacquest*, (1942) 239 Wis. 475, 1 N.W. 2d 899.

Sec. 353.25 (3), Stats. (which was created as part of the 1949 revision of the criminal procedure statutes), provides that "the court may remit the taxable costs, in whole or in part." No similar authority has ever been given to remit fines.

However, the payment of the fine may be suspended by any court, whether a court of record or not, providing that the defendant is placed on probation as provided in sec. 57.01, Stats., relating to felonies or sec. 57.04, Stats., relating to misdemeanors and abandonment. This means, under sec. 57.01, that if a fine is imposed in a felony case, execution may be stayed and the defendant placed on probation to the state department of public welfare for a term not less than the statutory minimum nor more than the statutory maximum term of imprisonment for the crime. If the crime is a misdemeanor, then under sec. 57.04 execution may be stayed and the defendant placed on probation not less than one nor more than two years in the custody of either a probation officer or the state department of public welfare. Any other suspension of the payment of the fine is beyond the jurisdiction of the court. *In re Webb*, *supra*.

WAP

Malt Beverages—Minors—Exemption of “grocery stores” from secs. 66.054 (19) and 176.32 (1), Stats., relating to the presence of minors on premises licensed for the sale of fermented malt beverages and intoxicating liquors, respectively, does not extend to a separate room containing a bar where fermented malt beverages and intoxicating liquors but no groceries are sold, even though that room and the part of the premises where the grocery business is conducted are both covered by the fermented malt beverage or liquor license and constitute a single “premises” in the meaning of the fermented malt beverage and intoxicating liquor laws.

November 14, 1952.

THORPE MERRIMAN,
District Attorney,
Jefferson County.

You have requested an opinion regarding the construction of sec. 66.054 (19), Stats., relating to the presence of minors under 18 in “Class B” retail fermented malt beverage licensed premises. Since the identical problem is presented with reference to sec. 176.32, Stats., relating to the presence of minors in premises licensed for the sale of intoxicating liquors, this opinion will apply to both sections.

The facts which give rise to your problem are as follows: The licensed premises consist of a country store building with the proprietor's residence overhead. On the front three-fourths of the main floor is a shop where general merchandise, including groceries, is sold. The back one-fourth of the main floor contains a bar where soft drinks and beer are sold. The barroom and the front of the building are separated by a solid wall containing an archway about 5 feet wide and 6½ or 7 feet high giving access between the shop and the barroom. The barroom also has a door leading to the outside. The fermented malt beverage license covers the entire building.

A minor under 18 years of age and unaccompanied by his parent or guardian was present in the barroom part of the premises during evening hours when the general

store was not open or operated. You inquire whether his presence there was lawful by reason of the exemption of "grocery stores" from sec. 66.054 (19), Stats. That section provides as follows:

"Every keeper of any place, of any nature or character, whatsoever, for the sale of any fermented malt beverage under a 'Class B' retailer's license, who shall directly or indirectly suffer or permit any person of either sex under the age of 18 years, unaccompanied by his or her parent or guardian, who is not a resident, employe, or a bona fide lodger or boarder on the premises controlled by the proprietor or licensee of such place, and of which such place consists or is a part, to enter or be on such licensed premises for any purpose, excepting the transaction of bona fide business other than amusement, the purchase, receiving, or consumption of edibles or beverages, shall, for every such offense, be liable to a penalty not exceeding \$250, besides costs, or imprisonment in the county jail or house of correction not exceeding 60 days; and any such person so remaining as aforesaid, who is not a resident, employe, or a bona fide lodger or boarder on such premises, or who is not accompanied by his or her parent or guardian, shall also be liable to a penalty of not more than \$20, besides costs. *This section shall not apply to hotels, drug stores, grocery stores, bowling alleys, premises in the state fair park, and parks owned or operated by agricultural societies receiving state aid, cars operated on any railroad, regularly established athletic fields or stadiums nor to premises operated under both a 'Class B' license and a restaurant permit where the principal business conducted therein is that of a restaurant.* It shall be presumed, however, where such premises are so operated under both a 'Class B' license and a restaurant permit, that the principal business conducted therein is that of the sale of fermented malt beverage, until such presumption is rebutted by competent evidence. The provisions of subsection (15) providing for punishment of violators of this section by fine and imprisonment shall not apply to this subsection."

For the purposes of this opinion it will be assumed that the fact that general merchandise other than groceries is for sale in the front three-fourths of the building does not affect the status of that part of the building as a "grocery store." No reason is perceived why a store or shop in which groceries are for sale loses its character as a "grocery store" merely because other items of merchandise are

also for sale there. The purpose of the exemption was undoubtedly to permit minors to enter licensed premises to buy groceries, and this purpose is applicable even though other articles are also for sale on the premises.

But there is no reason to suppose that the legislature intended the exemptions set forth in the statute to apply to premises devoted *exclusively* to the sale of fermented malt beverages or intoxicating liquors. In the case which you submit, the barroom is sufficiently separated from the balance of the premises so that it can be said that it is no part of the grocery store. It is true that both parts are included in the fermented malt beverage license and from that point of view constitute a single premises. 37 O.A.G. 534. Beer may therefore be lawfully sold in the part of the premises devoted to the sale of groceries and other general merchandise. But it does not follow that the barroom part, where no part of the grocery business is conducted, is a part of the grocery store within the meaning of the exemption. The purpose of the exemption does not extend to a separate barroom, for children can easily purchase groceries without entering it.

You are therefore advised that in my opinion the presence of the minor under 18 years of age in the barroom part of the premises was in violation of sec. 66.054 (19), Stats. If the premises were also licensed for the sale of intoxicating liquor, the presence of any minor (unaccompanied by parent or guardian) in the barroom of such premises would violate sec. 176.32, Stats., which, so far as this problem is concerned, is identical in form with sec. 66.054 (19).

WAP

Counties—Superintendent of Schools—Schools and School Districts—Taxation—Only territory in a city, including outside territory attached to it for school purposes, that is operating under city school plan in secs. 40.50 to 40.60, Stats., is exempt under sec. 39.01 (5), Stats., from taxation to pay expense of office of county superintendent.

November 21, 1952.

GEORGE F. MILLER,
District Attorney,
Kewaunee County.

The city of Kewaunee has not adopted the city school plan provided in secs. 40.50 to 40.60, Stats. 1951, and lies in two separate school districts. Joint school district No. 1, which is a common school district and operates the grade school, is composed of the entire territory in the city and also some additional territory in two adjoining towns. The union free high school district, which operates the high school, is larger in area than joint school district No. 1 and includes all of the territory thereof plus some additional territory in the adjoining towns. The grade school and the high school are both housed in the same building which is located in the city of Kewaunee. Pursuant to contracts with the school boards of both districts, the same person has charge of and is superintendent of both schools.

You ask whether the property in either or both of these districts is exempt from the tax levied to pay the salary and expenses of the county superintendent of schools.

The tax for the support of the office of county superintendent of schools is provided for in sec. 70.62 (1), Stats. 1951. After providing that the county board shall make the annual levy for county general taxes and county school taxes, this subsection then says the county board shall

“* * * by separate resolution adopted by majority of the members of the board not prohibited from voting thereon by section 39.01, 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.”

It might seem upon a first reading that under the last clause of this provision the county board would have the power to designate what property should be exempt from such tax. However, that language merely links the provisions thereof with the exemption in sec. 39.01 (5), Stats. 1951, which reads as follows:

“(5) 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.”

It is clear that under the language of these two provisions the exemption is extended only to “cities.” The result is that it is only the territory in cities that is exempted from the tax. As was pointed out in 39 O.A.G. 356, while this exemption refers only to cities it must be construed to extend to land outside of a city but which is attached to the city for school purposes. The only situation where anything of that nature could arise is where a city is operating under the city school plan provided in secs. 40.50 to 40.60, Stats. It is specifically stated in sec. 40.51 that any territory outside of a city which is joined with a city in operating its schools under the city school plan is attached to the city for school purposes. Thus, even though territory is not within the boundaries of a city, if it is attached to the city for school purposes, then it is a part of the municipality for school purposes and would be accorded the same exemption in respect to school matters as it would be if it were a part thereof for all purposes.

Upon the basis of the foregoing none of the territory in either of the two districts that is outside the city of Ke-waunee would be excluded from supervision by the county superintendent or exempted from the tax to support his office. But, location is not the only consideration set forth in the statutes. It is not all cities that are accorded the exemption. It is only those cities “which have a city superintendent of schools.”

A superintendent of schools is an employe of whatever governmental unit it is that operates the schools. Secs.

40.43 and 40.53 (4), Stats. *Sieb v. Racine*, (1922) 176 Wis. 617, 187 N.W. 989. To be a *city* superintendent of schools necessarily means that the person must have an employment relation with a city as a governmental unit. Obviously it is only where the city itself, as a legal entity or governmental subdivision, is operating schools that there can be a superintendent who is so employed by such city. Under the statutes the only situation where this can exist, except as to a city of the first class, is when the city has adopted and is operating its schools under the city school plan set out in secs. 40.50 to 40.60, Stats.

Unless schools are operated by a city under this city school plan, any superintendent of the schools cannot be a city superintendent because as such he is not an employe of the city. Where a city has adopted the city school plan, the schools operated thereunder and the entire school system are merely branches or departments of the city government the same as other branches or departments thereof and there exists no separate and independent school district. *State ex rel. Board of Education v. Racine*, (1931) 205 Wis. 389, 236 N.W. 553. In that case the superintendent of the schools is employed by the city school board under sec. 40.53 (4), Stats., and is an employe of the city.

Where the city school plan has not been adopted, the schools are not operated by the city but by a separate and distinct governmental unit, namely, the school district. The boundaries of a school district may be coterminous with those of the city, but nevertheless the school district is a separate entity and exists entirely independent of and distinct from the city. Any employes of such a school district clearly are not in any sense city employes. On the other hand, the city may not be all in one school district but divided and in two or more districts, or the city may not be the sole territory in the school district and the school district may also include additional territory in an adjoining town or towns. Whatever is the situation, the school district is entirely distinct and separate from the city so that if such a school district employs a superintendent for its schools such person would not be a city superintendent because he would not be an employe of the city whose territory may compose or is included in the district. He would

be an employe or officer of the school district as a separate and distinct legal entity.

The city of Kewaunee does not have a city superintendent of schools because it is not operating under the city school plan. The person who is in charge of the schools in question is not an employe of the city. He gets none of his authority from and owes no duty to that municipal entity which is the city. His authority is derived from and he owes his duties to the two school districts which are governmental units that are wholly separate and distinct from the city of Kewaunee.

In the opinion in 39 O.A.G. 356 it was reasoned that where the city is operating under said city school plan, territory outside the city but attached to the city for school purposes is in exactly the same situation as respects exemption from the control of the county superintendent and the payment of tax to finance his office, as the territory in the city proper. By the same reasoning, where a city is not under the city school plan but in a school district that also includes some territory in adjacent towns, there is no basis for exempting the lands within the city and not exempting the lands outside the city but in the same school district. Thus, in the present situation either all the land in joint school district No. 1, whether within or without the city of Kewaunee, should be exempt from the tax to support the county superintendent's office or none of such lands should be exempt. The same would be true for the territory in the union free high school district. To say that the territory in the city of Kewaunee is exempted, but the territory outside the city is not, would produce an unreasonable result. It would require ignoring the language of sec. 39.01 (5), Stats., that cities which have a city superintendent are exempted. This shows the particularity with which the statutory language is to be applied.

It is the well established law of this state that before exemption from taxation is accorded there must be found statutory language granting the same and then the situation must be brought squarely within that language. The rule of construction is that exemption statutes are strictly construed and if any doubt arises it is to be resolved against granting of the exemption. Applying these princi-

ples it is our opinion that none of the property in the school districts involved, whether in the city of Kewaunee or in the adjoining towns, is excluded under sec. 39.01 (5), Stats., from the county superintendent's district or exempted from the tax to support that office.

In so concluding, we are aware of two prior opinions of this office and also that in a number of cases where the schools are not operated on the city school plan but by a school district which is composed either solely of the territory in a city or of territory in the city and additional territory outside the city, and said school district employs a superintendent for its schools by virtue of the authorization in sec. 40.43, Stats., all the territory in the district, or, where the district covers more than the city, then just the territory in the city, has been exempted from this tax in the past.

Explanation therefor would appear to lie either in failure to apply the above recited principle of strict construction of exemption statutes or in being misled by the fact that for years the title of sec. 40.43, Stats., has read, as it does now, "City school superintendent." Sec. 40.43 now appears in the statutes as follows:

"40.43 City school superintendent. 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."

The language of this statute does not say that when a superintendent is employed as therein authorized, he is, or has the status of, a "city superintendent," or that the territory in the school district so employing him is excluded from the county superintendent's district and exempted from the tax to support the county superintendent's office, or that the part of such district that lies in the city is so excluded or exempted. All that it says is that a school district which includes within its boundaries all of a city, regardless of how that school district is organized, may employ a superintendent of schools. Clearly this has no application except to authorize a school district—which has

an existence as a separate and distinct governmental unit—to employ a superintendent. There are two reasons why it cannot apply to a city operating under the city school plan. First, in such a case there exists no school district, because the school system is not a separate entity as in the case of a school district, but is merely a part or arm of the city government the same as other departments thereof. Secondly, sec. 40.53 (4), Stats., contains specific authorization for the employment of a superintendent in the case of operation under the city school plan.

Sec. 40.43, Stats., was created by ch. 31, Laws 1927, as a new subsec. (4) to sec. 40.65, Stats. By ch. 503, sec. 1, Laws 1927, it was renumbered to be sec. 40.43. As set out in the legislative act it contained no title but merely the subsection number followed by its context. The title of "city school superintendent" was added by the revisor of statutes in the printing of the statutes. This presents an excellent illustration of the reason for the provision in sec. 370.001 (6), Stats., wherein it is provided as a rule to be followed in the construction of the statutes:

"(6) STATUTE TITLES. The titles to subchapters, sections, subsections and paragraphs of the statutes are not part of the statutes."

We do not overlook the fact that, although eliminated by subsequent amendments by ch. 53, Laws 1939, and ch. 566, Laws 1949, so it is no longer there, as originally enacted, sec. 40.43, Stats., did say that the superintendent employed thereunder was to "supervise and manage the schools of said city." However, this language is subject to an observation of the same import as was made by the court in *State ex rel. Board of Education v. Racine*, (1931) 205 Wis. 389, 236 N.W. 553, at page 395, that just what the legislative thought was in using that language is not clear, but obviously it was not intended to provide that such a superintendent should supervise and manage any schools other than those operated by the district by which he was employed. Furthermore, it is to be noted that this enactment was prior to the decision in that case which held that under the city school plan the territory in the city is not a separate and distinct school district but, rather, the school

system operated thereunder is merely a unit or division of the city government.

In 22 O.A.G. 56, the indication is that if a joint school district employed a superintendent for its schools under sec. 40.43, Stats., the electors of that district would be disqualified by sec. 39.01 (5), Stats., from voting in the election of the county school superintendent. That was not necessary to the purposes of the opinion and overlooks the fact that the exemption in sec. 39.01 (5) is conditioned on the existence of a *city* superintendent and that a superintendent employed by a joint school district under sec. 40.43 would be only a *district* superintendent. In this connection see 39 O.A.G. 5, at page 7. Likewise, the opinion in 39 O.A.G. 542, which states that if either of the districts here involved employs a superintendent the property in that district would be exempted, overlooks the distinction between a *city* superintendent and a *district* superintendent. To the extent said opinions are contrary to this opinion, they are overruled.

Not only are exemption statutes to be strictly construed, but they are not to be extended by implication. *Katzer v. City of Milwaukee*, (1899) 104 Wis. 16, 20-21, 80 N.W. 41; *Gymnastic Association v. Milwaukee*, (1906) 129 Wis. 429, 434, 109 N.W. 109; and *Milwaukee E. R. & L. Co. v. Tax Comm.*, (1932) 207 Wis. 523, 242 N.W. 312. In the latter case it was said at p. 536:

“* * * But even if, by reference or otherwise, terms had been used because of which some ambiguity had arisen, the rule would be applicable that an exemption from taxation to be valid must be clear and express; that all presumptions are against it; and that it should not be extended by implication. [citations omitted]”

However, even if it were possible to expand the exemption by implication, we find nothing in the history of the provisions of sec. 39.01 (5), Stats., that would furnish any basis for any other conclusion than that which we reach. This exemption first appears in ch. 179, Public Laws 1861, which created the office of county superintendent of schools; permitted the board of education of any incorporated city to elect to be exempt from the act; and granted

to cities whose boards of education so elected, an exemption from taxation to support the office of county superintendent. The act also provided that the electors and the supervisors of such city would have no voice in matters relating to the county superintendent. These provisions were incorporated into secs. 96 and 97 of ch. 155, Public Laws 1863. Up to that time it was fairly clear that the power to bring a city within the exemption lay with the city's board of education and that the legislature intended to extend the exemption only to those cities which chose not to submit to the control of the county superintendent.

Such 1863 statute was amended by ch. 177, Public Laws 1869, to provide:

“Every incorporated city having a board of education, a superintendent of schools, or other board or officer with power to examine and license teachers, and supervise and manage the schools, shall be exempt from the provisions of this act relating to county superintendents of schools * * *. The electors of such city shall have no voice in electing a county superintendent, nor shall the members of the county board of supervisors from said city have any voice in determining or providing for the compensation of such county superintendent, or in any other matter relating to such officer; nor shall any tax be levied on said city to pay the salary or *per diem* of such superintendent * * *.”

These provisions of the 1863 statutes, as amended in 1869, were incorporated into sec. 703, R.S. 1878, and with only slight immaterial changes became sec. 703, R.S. 1898.

Ch. 531, Laws 1915, created a section 704 providing for a committee on common schools, which in subsec. 4 provided, so far as here material:

“4. The members of the county board of supervisors representing only cities or wards of cities or districts in cities having an independent system of schools supervised by an independent city superintendent, shall have no voice in electing members of the committee on common schools, nor shall any tax be levied in such city to pay any part of the *per diem* or expenses of the members of such committee. * * *”

Said ch. 531, Laws 1915, also repealed sec. 698, Stats. 1913, and created a new sec. 698, Stats. 1915. So far as here material, sec. 698, Stats. 1913, so repealed, had provided:

"All supervisors from cities included in any part of the county or superintendent district or districts, the schools of which are under the direction and control of a city superintendent elected under the provisions of sections 926-115, 926-116, 926-117 are excluded from any participation in the deliberations of the supervisors of any superintendent district had with reference to the manner of directing the administration of its school affairs."

Sec. 698, Stats. 1915, so created, as far as here material, provided in subsec. 9:

"9. All supervisors representing only cities or wards of cities or districts in cities having an independent system of schools supervised by an independent city superintendent are excluded from any participation in the deliberations of the supervisors of any superintendent district had with reference to the manner of directing the administration of its school affairs, nor shall any tax be levied in any such city to pay any part of the salary, expenses, printing or postage of such county or district superintendent, or the salary of the clerk for such superintendent, or the per diem and expenses of the members of the board of examiners for common school diplomas."

In 1917 said sec. 703, R.S. 1898, was renumbered sec. 39.05, and in 1919 subsec. 9 of sec. 698, Stats. 1915, was renumbered sec. 39.04 (8). They remained unchanged until in the 1927 revision of the school laws, sec. 39.05 was renumbered sec. 39.01 (5) and revised to its present form. According to the revisor's notes the new sec. 39.01 (5) was derived from the former secs. 39.04 (8) and 39.05 without changing the substance of the law.

The effect of the 1869 amendment mentioned was to base the exemption, not upon a city's election to be out from under the control of the county superintendent, but upon the existence of a city board of education or city superintendent of schools having power to supervise and manage its schools and to examine and license teachers. Although the power to examine and license teachers was taken from city superintendents by ch. 53, Laws 1939, the above history of the statutes shows there has been no other change that results in a departure from the long standing basis for exclusion from the county superintendent's districts, namely, that it extends only to cities having a city super-

intendent to manage and supervise *its* schools. Superintendents of joint school districts which embrace the entire territory of any city were also empowered by sec. 40.43, Stats., to examine and license teachers. Yet such districts never came within the language that was in the statutes at any time relative to exclusion from the county superintendent's districts and exemption from the tax. The elimination of the power to examine and license teachers left the other statutory language still operative so that thereafter only cities having a *city* superintendent continued to be excluded the same as before, and as they are excluded today.

It is our opinion, based upon the above, that it is only the territory in a city, including any territory outside its boundaries that is attached to it for school purposes, which is operating under the city school plan set out in secs. 40.50 to 40.60, Stats., that is exempted under sec. 39.01 (5), Stats., from the tax to support the office of county superintendent. Accordingly, you are advised that none of the territory in the two school districts here involved, regardless of whether such territory is within the city of Kewaunee or outside it, is exempt from such tax.

EWV

HHP

Trust Funds—State Investment Board—Investments and Loans—State annuity and investment board has the same authority as domestic insurance companies in the making of unrestricted loans under sec. 206.34 (1) (m), Stats., to the extent of 5 per cent of its admitted assets in each fund, irrespective of the fact that such loans might not qualify under sec. 25.17 (1a), Stats., or other statutes permitting particular types of investments.

December 1, 1952.

EARL SACHSE, *Executive Secretary,*
Legislative Council.

You state that the legislative council has requested the opinion of this department on the following question: Was the state annuity and investment board authorized by sec.

25.17 (1a), Stats. 1949, to make loans to the Wisconsin university building corporation secured by mortgages on non-income-producing property?

The question as worded embodies an assumption of fact contrary to information that has been furnished to us, and while the inquiry might well be closed with that observation, we will nevertheless discuss the question so as to clear up any misunderstandings which may exist as to loans heretofore made to the Wisconsin university building corporation by the state annuity and investment board.

Sec. 25.17 (1a), Stats. 1949, reads the same as that section in the 1951 statutes and provides that the investment board shall have the power and authority and that it shall be its duty:

“(1a) To invest any of the funds specified in subsection (1), except operating funds, in loans to the Wisconsin university building corporation, teachers colleges building corporation or Stout institute building corporation secured by mortgages upon income-producing property or upon leasehold estates in improved real property for a term of years where 25 years or more of the term is unexpired.”

There is no ambiguity as to the language employed and about the only observation we can make is that it means what it says. The loans authorized under that provision must be made either upon “income-producing property” or upon “leasehold estates in improved real property for a term of years where 25 years or more of the term is unexpired.”

We do know that loans were made by the state annuity and investment board to the Wisconsin university building corporation other than those which would qualify under the provisions of the above section and so far as we are able to determine such board never attempted to make any loans under that section which did not meet the requirements thereof.

Attention is directed to sec. 25.17 (2), Stats., created in substantially its present form by ch. 491, Laws 1929, and which authorizes and directs the board:

“(2) To invest any of the funds specified in subsections (1) and (2a) in loans, securities and any other invest-

ments authorized by section 206.34 and to dispose of such loans, securities and other investments when in their judgment it is to the best interest of these funds to do so.* * *

Sec. 206.34, Stats., relates to the authorized investments of domestic life insurance companies.

Sec. 206.34 (1) (ee), with certain limitations, permits investments in bonds or other evidences of indebtedness of any solvent company organized under the laws of the United States or any state thereof, and more particularly sec. 206.34 (1) (m) authorizes investments

“(m) In loans, securities or investments in addition to those permitted in this subsection whether or not such loans, securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this section or under other sections of the statutes; provided, that the aggregate of such company’s loans, securities and investments under this paragraph shall not exceed 5 per cent of such company’s admitted assets.”

In other words, as to 5 per cent of its admitted assets in each fund, the state annuity and investment board has wholly unrestricted authority to make investments in loans, securities or investments “whether or not such loans, securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this section or under other sections of the statutes.” With the exception of minor amendments not material here this statute was created by ch. 277, Laws 1945.

This exception is stated about as broadly as the English language permits, and it is our understanding that its provisions were relied upon by the board in the making of such loans as it did make to the Wisconsin university building corporation where these loans did not otherwise qualify under sec. 25.17 (1a).

WHR

Railroads—Train Crews—A three-unit-electric diesel locomotive towing five steam locomotives is not subject to the provisions of sec. 192.25 (2), Stats.

A “diesel-mail and express” car, which has the power plant located forward with a 40-foot space for mail, express, and baggage in the rear, is not subject to the provisions of sec. 192.25, Stats.

Weed mowers and weed disks used by railroads to cut weeds along their rights of way are not subject to the provisions of sec. 192.25 (4a), Stats.

December 2, 1952.

WILLIAM E. TORKELSON, *Chief Counsel,*
Public Service Commission.

You request my opinion upon the following questions:

1. Does the operation of a three-unit-electric diesel locomotive towing five steam locomotives from Green Bay, Wisconsin, to Iron Mountain, Michigan, and operated without two brakemen by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, violate the provisions of sec. 192.25 (2), Stats.?

2. Is certain equipment which is commonly referred to as a “diesel-mail and express” car, and which has the power plant located forward with a 40-foot space for mail, express and baggage in the rear, and is operated on trains 30 and 35 by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company between Milwaukee and Berlin, Wisconsin, a “car” as that term is used in sec. 192.25, Stats.?

3. Does sec. 192.25 (4a), Stats., require that a conductor-pilot be employed on a Fairmont weed mower and weed disk, Series M5, operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company?

Secs. 192.25 (1), (2) and (4), Stats., which provide:

“(1) PASSENGER CREWS; EXEMPTIONS. No railroad shall run outside of the yard limits any passenger train without a full passenger crew, which for a train of three cars or units or less shall consist of one engineer, one fireman, one conductor and one brakeman; and for more than three cars or units, of an additional brakeman. On all passenger trains the conductor and brakeman shall not be required

to perform the duties of the baggagemaster or express agent. Nothing in this subsection shall apply to trains picking up cars or units between terminals in emergencies or to trains propelled by electricity except that on trains propelled by electricity, gas or oil, the conductor shall not be required to perform the duties of baggagemaster or express agent. This subsection shall not apply to interurban electric railways not operated as a part of a steam railway system.

“(2) FREIGHT CREW. No railroad shall run outside of yard limits any freight train of three cars or more with less than a full train crew consisting of an engineer, a fireman, a conductor and two brakemen.

“* * *

“(4) ENGINE CREW. It shall be unlawful for any railroad company in the state of Wisconsin to move over its main line outside of yard limits an engine with no cars attached with less than a full crew consisting of one engineer, one fireman and one pilot; said pilot to have had not less than three years' experience in train or engine service and who shall have passed standard examination on book of rules and has qualified as a conductor or an engineer; except that such pilot need not be used if one is not available when it is necessary to run engine to the relief of an injured person or to raise a blockade of traffic.”

apply only to steam-propelled trains because of the fact that firemen are specifically required by these sections, which definitely indicates that the legislative intent was to establish full crews for the operation of steam trains upon which there is employment for firemen. 11 O.A.G. 177, 19 O.A.G. 82, and 23 O.A.G. 758.

Subsec. (4a) which provides:

“(4a) EXTENSION FULL TRAIN CREW REQUIREMENT. It shall be unlawful for any railroad company in the state of Wisconsin to operate any locomotive, locomotive crane, pile driver, steam shovel, cut widener, gas-electric motor car, or gas-electric switch engine or any other similar self-propelled vehicle propelled by any form of energy whether properly denominated an engine or locomotive, when used on its tracks for the purpose of switching cars, with less than a full train crew consisting of one engineer, one fireman, one conductor and two helpers. Said train crew shall be selected from seniority lists of train and locomotive engine employes on the division of the railroad on which the crew is to be worked.”

extends full crew requirements to the operation of the engines, cars, and other vehicles therein enumerated only when used for the purpose of switching. 23 O.A.G. 758.

The train in question 1, being propelled by a three-unit-electric diesel locomotive and not used for the purpose of switching, is not one subject to the requirements of sec. 192.25 (2).

The "diesel-mail and express" car referred to in question 2, not being propelled by steam nor used in switching operations, is not subject to the provisions of sec. 192.25.

The weed-cutting operation described in question 3 obviously does not include the operation of switching, and sec. 192.25 (4a) is, therefore, not applicable to the situation described and does not require that a conductor-pilot be employed in such operation.

RGT

Vocational and Adult Education—Tuition—Vocational education at public expense may not be denied to Wisconsin residents meeting the standards prescribed in sec. 41.18 (1), Stats., by a local board's withholding approval on grounds other than those referred to in the statute.

If a vocational school admits such a pupil on a tuition basis, it may not charge him tuition, but must bill the proper municipality as provided in sec. 41.19, Stats.

Course fees such as provided in sec. 41.20, Stats., should cover the cost of materials consumed in a course and should not be set so high as to cover the cost of instruction and collected in lieu of tuition.

December 3, 1952.

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

You have made the following inquiry with respect to students seeking to enroll in vocational schools in municipalities other than those in which they reside, for specific courses which are not given in their home communities:

"1. Is it legal for a local board of vocational and adult education to accept tuition payments made by an individual less than 21 years of age, or his parents, for attendance in a school of vocational and adult education when approval for attendance in this school has been withheld by the local board of vocational and adult education of the home community because of a lack of funds to pay such tuition or for some other reason?"

Such cases fall within the following provisions of sec. 41.18, Stats.:

"(1) * * * The schools of vocational and adult education shall be open to all persons 14 years of age or over who reside in other municipalities having local boards of vocational and adult education but in which the specific courses desired by such persons are not given; provided, such courses are given in the municipality in which such persons elect to attend and the local board of such municipality agrees to admit them; provided further, that such nonresidents shall present the written approval of the local board of vocational and adult education of their home municipality. * * *"

Your query involves two considerations: (1) Whether a vocational school may admit a nonresident seeking courses not given by the vocational school maintained in the community of his residence, without the approval of the local board of vocational and adult education of the home municipality; (2) if the board may admit such students, whether it may collect tuition from the student instead of from the home municipality as provided in sec. 41.19, Stats.

The propositions are well settled that officers charged with the administration of schools have only such authority as is given by statute, and that an enumeration of their powers in a statute impliedly denies to them all powers not enumerated. See *Costigan v. Hall*, 249 Wis. 94, 23 N.W. 2d 495, and *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 166, 11 N.W. 472. These principles do not mean, however, that school districts or boards can do no acts except those expressly described; because each specific authorization necessarily carries with it the authority to do the incidental acts necessary to carry it out. As pointed out in *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 166:

“* * * But this does not mean that it [the Board of Regents] can do no act except such as is specifically mentioned in the statute. It would be altogether impracticable to prescribe by statute the numerous and varying duties of such a board. Much must necessarily be implied from the character and objects of the corporation, the nature of the trust imposed, and the general powers granted. * * *”

The following general statement as to the functions of the local board of education appears in sec. 41.15 (1), Stats.:

“* * * The duty of the local board shall be to establish, foster and maintain schools of vocational and adult education for instruction in trades and industries, commerce, agriculture, and household arts in part-time day, all-day and evening classes and such other courses as are enumerated in section 41.17.* * *”

The duty to maintain schools for such instruction necessarily implies the authority to admit pupils to receive such instruction, unless some other provision of the statutes contains a limitation.

Sec. 41.18 (1), Stats., deals with admission of pupils to vocational schools. It is not, however, couched in language of authorization but rather uses the phrase that the schools “shall be open” to persons under certain circumstances there described. The purpose of the section appears to be to establish the classes of persons who shall be entitled to training in the vocational schools at public expense (either at the expense of the admitting district or the district in which the student resides) rather than to limit the persons who may have the advantages of such education at their own expense. The provisions of sec. 41.18 requiring the approval of the local board of vocational and adult education would have little purpose if they were not related to cases involving charges to be made against the local community. It does not seem likely that the legislature intended to give a local board of education the power arbitrarily to prevent a resident from obtaining vocational education in another community in any case where it is not sought to charge the first community with the cost.

I do not believe that the legislature intended in sec. 41.18 (1) to define and limit the authority of vocational

schools to admit pupils, so as to exclude all cases not there described. That belief is supported by the fact, for instance, that sec. 41.19 (3) shows that the legislature contemplates that local boards may admit pupils who are not residents of this state, whereas it is apparent that sec. 41.18 (1), read in context with the provisions of sec. 41.19, relative to collection of tuition, refers to residents of this state.

If a local board of education elects to admit pupils under circumstances other than those described in sec. 41.18 (1), there remains the question whether it may charge tuition and, if so, from whom such tuition may be collected.

The opinion has been given in 34 O.A.G. 230 and 31 O.A.G. 155 that local boards of vocational education may elect to admit nonresidents without charging tuition if they wish. The opinions are based in part upon the language in sec. 41.19, Stats., to the effect that a local board "is authorized" to charge tuition, as contrasted to the mandatory language relating to the amount and the collection. If the board elects to charge tuition, subsec. (1a) of sec. 41.19 provides that the secretary of the board "shall" send a statement to the proper officials of the community of residence. The provisions of subsec. (1b) to the effect that no local board shall be liable to pay tuition "without its consent" under certain circumstances raises the implication that the local boards shall be liable for the tuition in other cases. This subsection was the basis of the opinion in 39 O.A.G. 582 (together with the decision of the supreme court in *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94) that a municipality cannot escape its liability for tuition of residents who are within the classes to whom the statute intended to guarantee vocational education at public expense, by withholding its approval on any grounds except that the individuals or circumstances do not meet the standards set out by the legislature in sec. 41.18 (1), Stats.

Those standards relate to the age and residence of the individuals and the availability of the desired courses in the home community. Lack of funds of the home community is not one of the reasons recognized by the legislature under sec. 41.18 (1) as grounds for withholding approval of the admission of persons whom the law contemplates should be entitled to free vocational education.

The tuition is not payable, in any event, at the time the approval is to be given. It is to be billed later, "before July," and to be paid thereafter as other claims are paid. If funds are not available at the time the approval is sought, they may nonetheless be included in the next budget and collected by tax levy.

Such intent of the legislature seems to be further demonstrated by the fact that it has expressly provided two cases in which vocational boards are authorized to charge tuition directly to the students themselves, i.e., in cases where the students are over 21 and in cases where the students are not residents of the state. The legislature contemplated that residents of the state who are between 14 and 21 years of age should be entitled to available vocational education without payment of tuition. The ramifications of sec. 41.18 (1) are for the purpose of determining in what school that education may be received, and what municipality shall pay for it.

If a board of education accepts a pupil on a tuition basis, if that pupil is between the ages of 14 and 21 and a resident of the state of Wisconsin, and if the courses are not available in the student's home community, I believe that the provisions of sec. 41.19 (1a), Stats., require the admitting board to bill the proper municipality.

If the case is not within one of the provisos of sec. 41.18 (1) (if, for example a pupil between the ages of 14 and 21 elects to go to a vocational school in another community for his own convenience, even though the same courses are available in his home community), the tuition may be charged against and received from the student himself or his parents.

Your second question is:

"2. Section 41.19 of the statutes among other things states that local boards of vocational and adult education may charge 'course fees' where applicable. Is it legal for a local board of vocational and adult education to make charges for 'course fees' in lieu of tuition for nonresident students?"

It is apparent from a reading of sec. 41.20, Stats., that course fees are designed to cover the costs of materials con-

sumed in the course of instruction whereas nonresident tuition is designed to cover the cost of instruction (41.19 (1)). In my opinion it would not be proper to set course fees at an amount which would cover both the cost of the materials consumed and the cost of instruction.

BL

Feeble-Minded—Competence—Child Protection—Termination of Parental Rights—In view of secs. 51.22 (5) and 48.07 (7) (a) 4, Stats., it is doubtful if the parental rights of one committed to an institution as mentally deficient, and subsequently discharged, could be terminated under sec. 48.07, Stats., without a redetermination of mental condition.

December 8, 1952.

JOHN W. TRAMBURG, *Director,*
State Department of Public Welfare.

You have submitted to us a question involving a case in which an illegitimate child was committed to your department on the basis of a termination of the mother's parental rights pursuant to sec. 48.07, Stats. You state that the mother of the child was committed to a state institution upon a finding of mental deficiency about 5 years previous to the termination of parental rights, that she was given a temporary discharge from the institution about 2 years previous to the termination of the parental rights, and that she was married shortly after such discharge. You desire to know whether the termination of parental rights is binding upon the mother, in view of the commitment for mental deficiency, when there has been no further finding with respect to her mental condition since her commitment.

For purposes of this opinion I am assuming that the mother has not been returned to the institution from which she was discharged 2 years prior to the termination of her parental rights, and that she is not at present under con-

inment. This circumstance is the basis of a distinction from the case discussed in our opinion in 40 O.A.G. 362, where the parent had been committed to an institution as a mentally ill person and had never been discharged from such institution.

As a general proposition, in the absence of statute, a lawful discharge from an institution to which one has been committed on the grounds of mental illness would overcome whatever presumption of insanity may have arisen by reason of the original commitment. It is said in 28 Am.Jur. 681:

“A commitment ceases to be effectual after an unconditional discharge from the place of lawful restraint by competent authority. If circumstances thereafter arise which seem to require a renewal of custody and continued confinement, another hearing must be had to determine that question. Accordingly, the rule is stated that an unconditional discharge of an insane person puts an end to his judicial commitment; and his confinement afterward without commitment proceedings is illegal, unless, of course, made necessary by temporary necessity. It has been held that where a discharge is conditional or probationary, the person so discharged may be recommitted without a trial by jury. Whatever capacity to sue is lost by one, upon being found insane and being committed to a public asylum, is restored, it has been held, upon his discharge from the asylum, if he is not under guardianship.”

The effect of a discharge from an institution to which one was committed for mental illness is discussed in the case of *Hatton v. State Board of Control*, (1947) 146 Tex. 160, 204 S.W. 2d 390, 393, in which the court said:

“* * * ‘A commitment ceases to be effectual after an unconditional discharge from the place of lawful restraint by competent authority. If circumstances thereafter arise which seem to require a renewal of custody and continued confinement, another hearing must be had to determine that question’. 28 Am.Jur., p. 681, §40. In other words, Hatton’s rights must be measured as if he had never been tried or convicted of lunacy; he stands where he was on January 17, 1930, before his first trial.* * *”

See, also, *Kellogg v. Cochran*, (1890) 87 Cal. 192, 25 P. 677, 12 L.R.A. 104, in which it was held that the discharge

from a hospital for the insane of an inmate over whom no guardian had been appointed, restored him to legal capacity to be a party to court proceedings without any further adjudication as to his restoration to sanity.

The above cited cases deal with mentally diseased, as distinguished from mentally deficient, persons. Mental deficiency has been traditionally dealt with as a form of insanity so far as legal principles are concerned. See 28 Am.Jur. 657, and *In re Streiff*, (1903) 119 Wis. 566.

In the revision of the Wisconsin statutes relating to mental abnormalities by ch. 485, Laws 1947, chs. 51 and 52 of the 1945 statutes were consolidated in recognition that both mental aberration and mental deficiency "relate to the same general subject." See committee comment on Bill 19, S., 1947 session, from which ch. 485, Laws 1947, was enacted. It reads:

"The committee has consolidated old Ch. 51, entitled 'Hospitals and Asylums for the Insane,' and Ch. 52, entitled 'Homes for the Feeble-minded,' into Ch. 51, entitled, 'Care of Mentally Ill, Infirm and Deficient Persons,' for the reason that the two chapters relate to the same general subject."

The question may be raised whether mental deficiency is ever "curable." In the sense that mental capacity which is lacking cannot be supplied, it probably is not. In the sense of restoration of competence to be free of confinement and to handle one's own affairs, a different question arises.

There are varying degrees of mental deficiency extending from idiocy (an absolute want of mental capacity) through imbecility and moronity or feeble-mindedness. The latter term is generally used to refer to the mildest form of mental deficiency. It may border onto a state of normal capacity. See, *Gould v. Gould*, 78 Conn. 242, 61 A. 604, 612, 2 L.R.A. (n.s.) 531; *State v. Haner*, 186 Ia. 1259, 173 N.W. 225; *Downing v. Siddens*, 247 Ky. 311, 57 S.W. 2d 1; and *People ex rel Cirrone v. Hoffmann*, 8 N.Y.S. 2d 83, 85, 255 App. Div. 404.

As to the more extreme types of mental deficiency (as is probably also true of the most aggravated forms of

mental derangement involving complete deterioration of mental tissue) it can probably be recognized that there can be no "cure" in the sense of a restoration to legal competency.

In the cases more nearly approaching the borderline, however, mental deficiency does not necessarily constitute legal incompetence.

The degree of unsoundness of mind which will invalidate a particular transaction may vary according to the nature of the transaction. Our court has indicated that to warrant depriving a person of the management of his affairs the incapacity should be substantially total, "not that partial incapability often seen in persons so intellectually weak that they are capable of managing their affairs with very little judgment." *In re Streiff*, (1903) 119 Wis. 566, 570. See also *Guardianship of Mills*, 250 Wis. 401, 405.

In *Re Masters*, (1944) 216 Minn. 553, 13 N.W. 2d 487, 158 A.L.R. 1210, 1218, it was held that feeble-mindedness, viewed from a sociological rather than a purely medical standpoint, is not necessarily a permanent and incurable condition. The court's discussion follows:

"Absent any statutory definition, we feel justified, however, in accepting the following sociolegal definition of 'feeble-mindedness' proposed by the British Mental Deficiency Committee (Wood, 1929), set forth by Louttit in his work, at p 96:

"... a condition of incomplete development of mind of such a degree or kind as to render the individual incapable of adjusting himself to his social environment in a reasonably efficient and harmonious manner and to necessitate external care, supervision or control."

"Louttit also points out (p 97):

"The social criteria are variable, but this is at once their weakness and their strength. A weakness because it suggests arbitrariness, and makes the feeble-minded condition depend on the contingencies of the moment. From a scientific or technical point of view this is, perhaps, undesirable. . . . It is, however, just this sort of definition that is most useful in clinical work. It seems hardly justifiable to call a man feeble-minded because of low test performance or poor school attainment when he is successfully adjusting to the economic and social environment. Diagnosis which carefully considers this social criterion recognizes

that adequate social adjustment at the present time is no guarantee that such adjustment will continue.'

"To which we add, as applicable to the case here on appeal, that inadequate social adjustment at one time is not conclusive that such maladjustment will continue indefinitely. Hence, feeble-mindedness, viewed from a sociolegal rather than a purely medical standpoint, is not necessarily a 'permanent' and 'incurable' condition, as stated by the trial court in its memorandum."

The foregoing lengthy discussion is set out because I believe the specific provisions of our statutes leave questions open for interpretation.

Sec. 51.13 (3), Stats., expressly provides for presumption of restoration to competency of one released from an institution for the mentally ill; whereas sec. 51.22 (5), Stats., relating to permanent discharges of persons committed to institutions for the mentally deficient, provides that the discharge "shall not be considered a legal restoration of competency."

The question arises whether the legislature intended by the latter provision that there should be a presumption of legal incompetency, at least until further determination by a county judge or the department under sec. 51.11, Stats.; or whether it means merely that the discharge shall have no bearing on the question of legal competence, so that such question is to be determined as if the discharge had never taken place.

Sec. 51.22 (2), Stats., provides that institutions shall maintain a school for "educable" classes of persons committed for mental deficiency, and shall establish vocational training. Sec. 51.22 (1) provides that one of the purposes of the institutions shall be to "train" mentally deficient persons. Sec. 51.02 (5) provides for commitment of persons mentally deficient for custody "and treatment." These provisions, together with those of sec. 51.22, authorizing discharge, and those of sec. 51.11, relating to re-examination, indicate a legislative recognition that mental deficiency may be curable, at least in a sociological sense, as discussed in *Re Masters, supra*.

The references in secs. 51.13 (3) and 51.22 (5), Stats., to presumption of legal competency may have been in-

tended as a legislative declaration that a commitment creates a presumption of legal incompetence.

In view of the fact that the commitment under ch. 51 is by a judge rather than a court, so that the proceedings would not be classified as court proceedings under the rule of *State v. Marcus*, 259 Wis. 543, and *In re Brand*, 251 Wis. 531, there might be a question whether a commitment could constitute more than prima facie evidence of subsequent incapacity, if there were no statutory provision to modify the general rule. The legal effect of an order of commitment by a nonjudicial body is discussed in 28 Am. Jur. 669-670:

"§22. The findings of nonjudicial bodies or officials upon the question of lunacy, or mental condition generally, do not, in the absence of statutory provisions to the contrary, constitute a judgment or have the effect of a judgment rendered in civil proceedings. The finding of a board of commissioners of insanity that a person is insane and a fit subject for treatment in the hospital for the insane generally has no bearing upon his legal capacity. The effect of such a finding is to admit one to the asylum for treatment, and an order, made thereon, for his commitment to such an institution operates like a judgment, to the extent that it will justify the restraint of his person; but the finding is not entitled to the faith and credit which is accorded the judgment of a court, since it is clear that the board does not act in a judicial capacity. The effect of such a finding in criminal prosecutions is considered elsewhere in this work.

"An adjudication, regularly made by a court of competent jurisdiction, which declares that a certain person is of unsound mind and incapable of managing his estate determines that he is a proper subject of guardianship, and is conclusive on this matter until set aside, at least within the jurisdiction. There are authorities which support the proposition that such an adjudication constitutes notice to all the world of the existence of such status. In the absence of a statute so providing, it is doubtful whether an adjudication of insanity, without the appointment of a guardian, renders the contracts and conveyances of the alleged incompetent, subsequently made, absolutely void for want of contractual capacity. There is substantial authority for the rule that an adjudication of insanity is, in itself, at best, no more than prima facie evidence of subsequent incapacity to contract. On the other hand, if in addition to an adjudication of insanity, a guardian or committee is

appointed for the incompetent, he is divested of all power to contract, and thereafter, any agreement entered into by him, prior to the termination of the guardianship, is absolutely void."

28 Am.Jur. Appendix to §22:

"It has been held that an order in a lunacy proceeding adjudging a person to be of unsound mind, or an order in a subsequent proceeding adjudging a person to be of sound mind and restoring him to the management of his own affairs, is not *res judicata* as to those not parties or privies to the proceeding; and while it may serve as evidence of the condition it purports to find, it is not necessarily conclusive."

The legislature of this state, however, apparently intended that the confinement of a person in an institution for the insane or mentally deficient should have the legal effect of an adjudication of incompetence so long as the confinement continues; because sec. 319.20, Stats., provides for appointment of a guardian in such cases without any further adjudication on the question of mental competence.

Whether a person not under confinement is mentally competent at any given time is a question of fact to be determined as of that time. What weight is to be given a commitment or a discharge, in determining the mental competence of an individual at a later time, cannot be predicted with certainty until the supreme court has had occasion to pass upon that specific question. I do not believe it was intended that a commitment for mental deficiency under ch. 51 should create a presumption of perpetual legal incompetence, even after discharge of the person committed. It may well be, however, that the legislature intended the provision quoted from sec. 51.22 (5), Stats., to establish a presumption which would exist until a redetermination under sec. 51.11.

In order to insure that proceedings, subsequent to commitment for mental deficiency and discharge of the patient, should be binding upon her, it would be advisable that there be a further determination. Under sec. 51.11 such a determination may be made by the judge of any court of record, or, if no proceedings are pending in a court, by the department of public welfare.

Sec. 51.11 (7), Stats., reads in part:

“When a proceeding for retrial or reexamination is not pending in a court of record and a jury trial is not desired by the persons authorized to commence such proceeding, the department may, on application, determine the mental condition of any patient committed to any institution under this chapter, and its determination shall be recorded in the county court of the county in which the patient resides or from which he was committed, and such determination shall have the same effect as though made by the county judge.* * *”

If it is determined pursuant to the foregoing provision that the mother is competent, her consent might thereupon be obtained to any contemplated adoption so as to obviate a possible invalidation of the adoption on the basis of the mother's lack of legal competence at the time parental rights were terminated.

If it is determined that the mother is mentally deficient, sec. 48.07 (7) (a) 4 supplies a procedure for termination of parental rights on that basis.

BL

Public Assistance—Old-Age Assistance—No fees for services of an attorney in connection with sale of property subject to old-age assistance liens in administration proceedings have priority over the lien except such as may be included within the \$300 allowed by sec. 49.26 (5), Stats., for administration and other expenses.

December 11, 1952.

WAYNE B. SCHLINTZ,
District Attorney,
Vernon County.

You ask for an interpretation of sec. 49.26 (5), Wis. Stats., with respect to whether “costs of the sale” are allowable items, in addition to the \$300 limitation contained therein; and more specifically, whether these “costs of the sale” would include the attorney's fee based on the value of the estate and the fee for sale of the real estate.

You state that the attorney who performed the legal work in connection with the sale of real estate (including preparing the petition for license to sell, order for hearing on petition, and notice of hearing on petition, appearing in court upon hearing, preparing order for sale, notice for sale, report of sale and order confirming sale) takes the position that he is entitled to recover out of the proceeds of the sale of real estate not only his fees for such work, but also his entire attorney fees for all services in connection with the administration, in addition to the items which may be included in the \$300 allowance referred to in sec. 49.26, Stats., for "administration and funeral expense, for hospitalization, nursing and professional medical care furnished such decedent during his last sickness." You state that he argues that the entire administration of the estate was necessary in order to effectuate sale of the realty and consequently could and should be considered as a part of the "costs of the sale."

The applicable statutes read:

Sec. 49.26 (5) :

"Upon such filing the lien herein imposed attaches to all real property of the beneficiary presently owned or subsequently acquired * * *. The county court may order sale of such realty free and clear of the lien and the lien shall attach to the net proceeds of such sale after taxes, prior incumbrances and the costs of the sale have been deducted. Such lien shall take priority over any lien or conveyance subsequently acquired, made or recorded except tax liens and except that the amounts allowed by court in the estate of any deceased beneficiary and remaining unpaid after all funds and personal property in the estate have been applied according to law, for administration and funeral expense, for hospitalization, nursing and professional medical care furnished such decedent during his last sickness, not to exceed \$300 in the aggregate, shall be charges against all real property of such deceased upon which an old-age assistance lien has attached, and which in such order shall be paid and satisfied prior to such lien out of the proceeds derived from such real property upon liquidation of such old-age assistance lien. * * *"

Sec. 49.26 (7) :

"Such liens shall be enforceable by the county filing the certificate * * * in the manner provided for the enforcement of mechanics' liens upon real property * * *."

The term "mechanics' liens upon real property" apparently refers to liens under secs. 289.01 and 289.02, Stats., which are made enforceable by foreclosure as are real estate mortgages. When foreclosure is carried out by judgment and sale, the action is ordinarily prosecuted in circuit court. The provision of sec. 49.26 (5), relating to a sale by order of the county court, was apparently not intended to apply to an action pursuant to ch. 278, Stats., which might be followed under sec. 49.26 (7), but rather to cases in which the sale is ordered as part of the process of administering insolvent estates.

In the latter case, the costs of sale are an incident of the administration, subject to jurisdiction of the county court under secs. 316.23 and 49.26 (5).

Since the statute expressly limits the county's lien to proceeds remaining after deduction of "costs of sale," the actual costs of the sale are to be deducted before the remaining provisions of sec. 49.26 (5) are applied with respect to other items allowed by the court.

Whether the "costs of sale," which are given precedence over the county's lien on the proceeds, along with "taxes" and "prior incumbrances," may include attorney's fees over and above those allowable as administration expenses within the \$300 limitation is largely a question of statutory interpretation.

An attorney giving services in connection with an estate ordinarily has no lien on funds of the estate, in the absence of statute, but must look to the personal representative for his payment. It is said in 50 A.L.R. 657:

"The general rule is that attorneys employed by the personal representative of a decedent, though employed on behalf of the estate and for the benefit thereof, have no personal claim against the estate for the services rendered, but must look to the personal representative for settlement of their claim. * * * See 11 R.C.L. 232, 233. This rule would seem to preclude an attorney from asserting a lien against an estate for services rendered * * * unless such lien is given by statute."

See, also, *Estate of Arneberg*, 184 Wis. 570, 200 N.W. 557, and 50 A.L.R. 665. The latter states:

“And under a statute which provides that, where the real estate has been sold by the order of the surrogate, the moneys arising from such sale shall be brought to the office of the surrogate for purposes of distribution, and retained by him for that purpose, and directs the surrogate to pay out of the moneys, in the first place, the charges and expenses of the sale, it was held in *Re Lamberson*, (1872) 63 Barb (N.Y.) 297, that there could be no lien upon such moneys, even for fees, distribution, and disbursements upon the application of the sale; that the entire fund must be brought intact into the office of the surrogate, and the attorney could then apply to that officer whose duty it would be, before making general distribution, to pay him a reasonable fee for his services in the matter of the sale, together with the necessary outlay; and that for services rendered the administratrix, apart from the matter of the sale of the real estate, there was not only no lien, but no right to priority of payment.”

The term “costs of sale” in sec. 49.26 (5), Stats., might possibly be open to a construction which would include attorney’s fees, but the contrary construction is more usual. See *Mutual Life Insurance Co. v. Kroehle*, 61 N.Y.S. 944; *William Brown v. Corey*, 134 Mass. 249, 250; *City of St. Louis v. Meintz*, 18 S.W. 30.

“The only word used is ‘costs,’ which has a well-defined, and, when applied to legal proceedings, universally understood, meaning; and that meaning does not include counsel fees.” *Mutual Life Ins. Co. v. Kroehle*, *supra*, 945.

The Wisconsin court has recognized that, at least in a strict sense, costs and attorney fees are two distinct and separate subjects. See, *In re Donges’s Estate*, 103 Wis. 497, 516–518, 79 N.W. 786, 74 Am.St.Rep. 885, where it is said:

“The confusion of counsel fee allowances with costs is not peculiar to Wisconsin, but appears in many states. Probably it results from the practice of the English court of chancery to allow such an item sometimes as part of the costs, under the designation of ‘costs taxed as between solicitor and client;’ but even there such item was really distinct in kind from the regular fee bill, and was allowed, only in extreme cases, by virtue of Stat. 17 Rich. II. ch. 6, authorizing the chancellor to ‘allow damages according to his discretion to him which is troubled unduly.’ That statute obviously gave the broadest power to make impositions

upon a litigant. Whether or not it became part of the common law, which immigrated to this country with the colonists, it is wholly superseded by the costs statutes, certainly in the code states. *Downing v. Marshall*, 37 N.Y. 380; *In re Carroll's Will*, 53 Wis. 228, where it was urged and denied effect to authorize such allowances.

"Since, then, such allowances are not supported by any statute, how can they be justified? No good reason is apparent why the expenses of a litigant as to his ownership of property should receive the attention of the court or be paid by another when the litigation takes the form of construing a will, any more than if the same issue were tried in ejectment or replevin; but no one would contend that in the latter case any power to make such order existed in the court. Where parties are *sui juris*, and each litigating for the promotion of his own interests, each should bear the expense, as he will enjoy the fruits of his own contention; and the existence of a fund over which the court has control in no degree varies the principle involved or justifies infraction thereof. On mature consideration we are convinced that the habit of ordering payment of counsel fees, other than the executor's, is without authority of law and should not longer be indulged in, but that the cases and extent in which one party or any fund shall be required to contribute to the expenses of another in litigation must be limited by the costs statutes.

"It will, of course, be understood that what we have said with reference to allowance of counsel fees, etc., has no application whatever to those reasonably incurred by an executor or any other trustee in the good-faith performance of his duties. No rule is better settled than that the trustee is entitled to pay those, as all other proper expenses which fall on him by reason of his trust, out of the trust funds in his hands, and that when he comes to settle his accounts such payments will be allowed him as credits if, in the opinion of the court, they are proper in character and reasonable in amount. * * *"

As pointed out in *In re Donges's Estate, supra*, the executor or administrator is entitled to include in the administration expenses reasonable fees paid for services of an attorney required for the benefit of the estate. See, also, 21 Am.Jur. 688; *Estate of Arneberg*, 184 Wis. 570; *Mackin v. Hobbs*, 126 Wis. 216; *Will of Matthews*, 174 Wis. 220; *Will of Willing*, 190 Wis. 406; and *Will of Roebken*, 230 Wis. 215.

Since the administrator may claim credit for attorney fees, the cost of necessary legal service is a part of the expense of administration.

I believe the legislature intended that if an old-age assistance lien is enforced under sec. 49.26 (5), Stats., the only attorney's fees which may take precedence over the lien must be included within the \$300 limitation.

While the opinion was given to Edmund Drager, on September 30, 1952, 41 O.A.G. 300, that in the case of insolvent estates the county's lien must be enforced in the administration proceedings "if such proceedings are undertaken," it did not state that such proceedings are obligatory. Unless there is sufficient personalty, or sufficient equity in realty over and above the lien, to cover expenses of administration, anyone petitioning for administration must do so in recognition that the maximum amount available for disposition in the administration proceedings is \$300. If that is not adequate, there is no obligation to petition for administration. The county may be left to its remedy through foreclosure.

As pointed out in 34 O.A.G. 172, 177, "it is the duty of the district attorney to take such legal steps as are reasonably necessary to collect the county's claim and without charge to the county." It could hardly have been the intention of the legislature to make it possible to reduce the amount of the county's security by allowance of legal fees to an attorney other than the one representing the county, if the sole purpose of the administration is to collect the county's claim. If the administration proceedings serve any other purpose, then the legal fees allowable in priority over the lien must be included within the statutory maximum for such cases provided.

BL

Platting Lands—Approval Requirements—Registered civil engineer retained by county on annual basis under sec. 236.06 (1) (i), Stats., is permanent employe even though he is not employed full time.

Plats offered for record in counties permanently employing registered civil engineer need not be approved by state board of health or director of regional planning under sec. 236.06 (1) (g) and (h), Stats., but copies of such plats must be forwarded to such agencies in accordance with sec. 236.06 (1) (i).

December 12, 1952.

M. W. TORKELOSON,
Director of Regional Planning,
Bureau of Engineering.

You ask whether plats of lands in a certain county operating in the manner hereinafter described must be sent for approval to the state board of health and the state director of regional planning, as provided in subsecs. (g) and (h) of sec. 236.06 (1), Stats., in order to be valid and recordable or, if not, whether copies of such plats must still be sent to such agencies pursuant to the provisions of sec. 236.06 (1) (i).

The facts you state are as follows: The county park commission of the county in question has the duty, among others, of checking plats submitted to it for approval under the provisions of ch. 236, Stats. 1951, relating to the platting of lands. The park commission employs a registered civil engineer to check the submitted plats to see that they conform to the requisite standards. He also performs other engineering services. During 1951 he was paid a retainer of \$150 in \$12.50 monthly payments. He also maintains a private practice and occasionally prepares plats for private clients, which plats are also submitted to the county park commission for approval. Such plats are checked by another registered civil engineer, who is, apparently, not regularly employed by the park commission. No plats lying wholly within this county have ever been submitted by the regularly employed engineer to the state director of regional planning for the latter's approval; indeed, it ap-

pears that said engineer has informed another surveyor that the approval of the state director of regional planning is not necessary for plats in that county.

Following are the applicable portions of the statute involved:

"236.06 (1) No plat shall be valid or entitled to be recorded until it has been submitted to and approved by the governing bodies as this section provides:

"* * *

"(g) For lands lying in any subdivision adjoining any lake or stream or where access is provided to any such lake or stream, the state board of health.

"(h) For lands lying in towns the state director of regional planning * * *.

"(i) For lands lying in any county having a county planning board or department employing permanently at least one registered civil engineer, the provisions of paragraphs * * * (g) and (h) shall not apply, and in lieu thereof, when plats are submitted to the county board, and before approval by said board, a copy of said plat furnished at the owner's expense shall be sent immediately by registered mail * * * to the state board of health, and to the state director of regional planning. * * *"

Subsec. (i) goes on to outline a procedure for hearing any objections which the state board of health and the state director of regional planning might have to such plats.

The answer to your question depends on whether the county in question is a "county having a county planning board or department employing permanently at least one registered civil engineer" so that it comes within subsec. (i). If it comes within subsec. (i) then it is clear, from the wording of subsec. (i), that the approvals specified in subsecs. (g) and (h) are not required. If subsec. (i) does not apply, then the approvals in (g) and (h) must be obtained in order for the plats to be valid and recordable. In any case, copies of the plats must be sent to the state board of health and the state director of regional planning. Hence, the county in question has obviously been following improper procedure in not sending any plats to the state director of regional planning.

I hold that this county comes within subsec. (i), i.e., it is a "county having a county planning board or depart-

ment employing permanently at least one registered civil engineer." The words "permanent employment" are generally construed to mean

"* * * a position of some permanence, as contrasted with a temporary job or a temporary employment. Standing alone and by themselves, they do not mean life employment. *Sullivan v. Detroit, Y. & A.A.R. Co.*, 135 Mich. 661, page 671, 64 L.R.A. 673, 106 Am.St.Rep. 403, 98 N.W. 756. An agreement to give a person permanent employment means nothing more than that the employment is to continue indefinitely and until one or the other of the parties wishes for some good reason to sever the relation. *Lord v. Goldberg*, 81 Cal. 596, 15 Am.St.Rep. 82, 22 P. 1126; *Rape v. Mobile & O.R. Co.*, 136 Miss. 38, 35 A.L.R. 1422, 100 So. 585; *Texas & P.R. Co. v. Marshall*, 136 U.S. 393, 34 L.Ed. 385, 10 S.Ct. 846; *Perry v. Wheeler*, 12 Bush (75 Ky.) 541." *Combs v. Standard Oil Co. of Louisiana*, (1933) 166 Tenn. 88, 59 S.W. 2d 525, 527.

It seems clear the registered civil engineer here is being employed permanently by the county park commission in the light of the above criteria. He is being employed to perform the commission's engineering work at an annual retainer for an indefinite period of time until he or the commission wishes to sever the relationship. It is a position of some permanence and stability as contrasted with a mere temporary spot job. The engineer apparently does all of the commission's engineering work except the checking of those plats which he himself prepares for approval. Such plats are checked by another engineer temporarily employed for that purpose, evidently in order to avoid placing the regularly employed engineer in the incongruous position of having to check and approve his own plats. The mere fact that the engineer has a practice of his own and does not put in full time does not detract from the permanency of the employment; nor does the fact that he only received an annual retainer of \$150 in 1951. The important thing is that he is being regularly employed for an indefinite period to perform whatever engineering work the commission has. The obvious purpose of subsec. (i) was to obviate the necessity of obtaining the approvals of the state board of health and the state director of regional planning when the county itself employed

someone qualified to make such approvals. This purpose is being satisfied here.

Hence, this county comes within the provisions of subsec. (i). However, even under the provisions of (i), as seen *supra*, copies of plats must be sent to the state board of health and the state director of regional planning in order that such plats be valid and recordable. Subsec. (i) also provides a method for hearing whatever objections such agencies might have to the submitted plats.

Further, it would appear that when the county does not obtain the benefit of an examination of the plat by its own permanently employed engineer, the exemption in subsec. (i) would not apply, and the approvals required by sec. 236.06 (1) (g) and (h) should be obtained.

RGT

*Barbers—Prisons and Prisoners—*Ch. 158, Stats., the barbering law, does not apply to barbering services performed in the state prison and state reformatory by inmates for other inmates and attendants pursuant to direction and control of the state department of public welfare, and state board of health has no jurisdiction over prices charged for barbering services.

December 15, 1952.

DR. CARL N. NEUPERT,
State Health Officer.

You state that complaints have been made from time to time to your department by licensed barbers in Green Bay and Waupun to the effect that persons regularly employed at the state reformatory and the state prison are given barbering services by inmates of these two institutions at greatly reduced prices.

We are asked whether such practices are in violation of ch. 158, the barbering law, which is administered by the state board of health.

The state department of public welfare which operates the two institutions has explained the procedures and practices employed in the rendering of barbering services at these two institutions as follows:

“Wisconsin State Reformatory. The prices vary and are intended not to show a profit, but are rather set with the intention of covering only the cost of necessary material, equipment and supplies. Full-time employees eligible to use the barber shop buy tickets for a dollar, each ticket containing 36 punches. The services rendered by the shop are priced in terms of punches rather than in terms of money. That schedule is shave—1; haircut—2; hair tonic—1; hair oil—1; face steam—1; scalp massage—2; facial—3; electric massage—3; scalp treatment—4; murine—1; shampoo—2; razors honed—4.

“The barber shop was set up with a two fold purpose in mind—as a training for the more advanced barbers and for the convenience of the institution, since we can thus expect all of our employees to be well groomed at all times, and we feel this is most important. Our barber shop also makes it possible for employees to get haircuts at odd hours since it is open seven days a week from 7:00 a.m. to 7:00 p.m., and thus it is possible to accommodate employees no matter what shift they may be on.”

“Wisconsin State Prison. Inmates who are interested in learning the barber trade are given an opportunity to practice on civilian employees. While the hair cuts and shaves obtained are not the best, these inmate apprentices do attempt to reach perfection, whereas if they were given their training practice on only inmates, the incentive would not be there. The barber shop is a definite unit in the training program at the Prison.

“Inmates who carry on the barber trade in civilian life are given an opportunity to maintain their touch in working in the Officers' Barber Shop. In addition, inmates who had started the practice in civilian life are able to proceed to obtain additional training which will some day allow them to obtain a barber's license when they return to civilian life.

“Because it is the desire of the administration of the State Prison that the officers be always well groomed the barber shop enables employees to always present a favorable appearance. Work schedules at the Prison do not permit an employee sufficient time to get his barber service in an outside shop, and the Prison shop is run strictly for the convenience of its employees and is open at those hours at which employees can make use of it”

"The prices charged in the Officers' Barber Shop are at a level sufficient to meet all operating costs. The profit is sufficient to buy supplies to pay the wages of the inmate employees. This system of prices makes it possible that funds do not have to be taken from any appropriation to maintain the shop. Following are the prices we use:

"Hair cut -----	15¢
Shave -----	5¢
Shampoo, Reg. -----	10¢
Shampoo, Oil -----	15¢
Massage, Reg. -----	10¢
Massage, Mud -----	15¢
Hair Tonic -----	5¢
Shoe Shine -----	5¢"

Ch. 158 is in no way involved in the matter of prices charged for barbering services under any circumstances, but sec. 158.04 (1) provides that no person shall engage in the practice of barbering unless he holds one of the licenses therein enumerated, and we are assuming for purposes of this opinion that none of the inmates in question have current licenses issued by the state board of health. There are also provisions in ch. 158 such as sec. 158.03 relating to the registration of schools teaching barbering, sec. 158.09 relating to apprentices, and sec. 158.04 (5) (e) relating to the physical aspects of barber shops and inspection thereof by the state board of health, etc.

We take it that so far as the operations in question are concerned no attempt is made to comply with any of the provisions of ch. 158 and the question is whether that chapter is applicable under the circumstances.

While we are not advised as to the freedom of choice accorded inmates in selecting the work which is to be assigned to them, sec. 53.09 provides that they are to be employed as provided in ch. 56 which makes provision for the operation of certain prison industries. Sec. 56.03 among other things provides that inmates may be employed in doing any necessary work in the prosecution of the regular business of the institution. Presumably this would include almost any kind of labor that might be deemed essential or helpful in the institutional program of rehabilitating inmates. Sec. 53.11 (1) in part requires each inmate to conduct himself in a proper manner and

to perform all the duties required of him, for which he is entitled to good time or diminution of sentence according to a schedule set up in this section.

Since the inmates are required to work and the warden or superintendent has control over the type of duties to be assigned, the inmate who is barbering without a license would hardly be subject to fine or imprisonment for violating ch. 158, and we do not understand that the complaining barbers are asking that any prosecutions be commenced against the inmates.

Moreover the state which operates these institutions is not subject to the provisions of ch. 158. Statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. General prohibitions apply to all private parties but are not rules of conduct for the state. *Milwaukee v. McGregor*, 140 Wis. 35. The question in that case was whether the state was bound by building ordinances in the construction of a building at a state normal school, and the court said at page 37:

“The infirmity of appellant’s position has been, from the first, in supposing that the state, in respect to constructing a building in the city of *Milwaukee*, has no more free hand than a private person or corporation, while the fact is that the people of the state, in their sovereign capacity, except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as ‘universal trustee’ for his people. 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 interest 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.”

See also *Sullivan v. School District*, 179 Wis. 502.

Statutes imposing license fees do not apply to state public agencies, unless the intention to do so is clearly expressed. 53 C.J.S. 558.

It appears from the facts stated above that the barbering program in these institutions has in part at least for its purpose the rehabilitation of inmates, and also it is considered important for purposes of morale that the attendants in these places should present a neat appearance. This can best be done by providing them with barbering facilities in the institutions, since the hours of duty do not always make it possible for them to be served during the hours observed by downtown barber shops. Moreover, as the institutions have found, the inmates are likely to have more incentive to do good work when barbering for attendants rather than just for other inmates.

The purpose of the barbering law is to protect the public and not necessarily to provide a monopoly for licensed barbers. Their licenses do not provide them immunity from competition such as that which exists here, and it can scarcely be contended that the purpose of the program is to put the state into private business contrary to the doctrine of *Heimerl v. Ozaukee County*, 256 Wis. 151.

You are accordingly advised that ch. 158 has no application to barbering services performed by inmates of state penal institutions under the direction and supervision of the state department of public welfare, whether such services are performed for other inmates or attendants, and that the matter of prices charged for barbering services is in no way subject to the jurisdiction of the state board of health under any circumstances.

WHR

Pensions—Wisconsin Retirement Fund—Circuit Judge—

A circuit judge who is a participating employe under the Wisconsin retirement fund and who was over 70 years of age on September 30, 1952, must retire at the end of his present term, which expires the first Monday in January, 1958, unless he voluntarily retires prior thereto.

A person who, as county judge, elected to participate under the Wisconsin retirement fund pursuant to sec. 66.901 (5) (i), Stats., and who as circuit judge subsequently again elected to participate therein, may not elect to discontinue such participation while continuing to serve as circuit judge.

A circuit judge who elected to participate under the Wisconsin retirement fund must continue to make employe contributions thereto as long as he remains in service as such judge.

A circuit judge who elected to participate under the Wisconsin retirement fund may not withdraw his contributions to such fund as long as he continues to serve as such judge.

December 16, 1952.

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

Waukesha county became a participating municipality under the Wisconsin retirement fund as of January 1, 1947. Present Circuit Judge Allen D. Young, during the time that he was county judge of Waukesha county and prior to the time that he was elected circuit judge, filed an election to become a participating employe under the Wisconsin retirement fund effective February 8, 1951 pursuant to the provisions of sec. 66.901 (5) (i) of the statutes, which provided in part:

“(5) The definition of employe shall not include persons:

“* * *

“(i) Who are elected to office by vote of the people unless such elected person shall request the board in writing to be included within the provisions of this fund * * *. Any elected person who shall be or shall have been included at his request shall automatically be included during any subsequent term or part thereof which he may serve in the

same office or in any other elective office in the same municipality or any other participating municipality, and at all times while he is included shall be subject to the compulsory retirement provisions of section 66.906 (1). Persons so electing to participate shall be considered employes on the effective date of participation of the employing municipality * * * only if such election is received by the board within 90 days of such effective date * * *."

Since former County Judge Young did not file his election to become a participating employe under the Wisconsin retirement fund within 90 days of January 1, 1947, he did not receive any prior service credit for service rendered to Waukesha county prior to said date. Because Judge Young was more than 65 years of age when he became a participating employe under the Wisconsin retirement fund, sec. 66.906 (2) (b) 2, Wis. Stats., as said subdivision existed prior to the effective date of ch. 519, Laws 1951, prevented him from receiving any current service credit from Waukesha county.

Ch. 257, Laws 1951, created the 22nd judicial circuit which is composed of Waukesha county. Pursuant to the provisions of that act, Judge Young was elected on April 1, 1952 as judge of the new circuit. His term of office as circuit judge began on May 5, 1952.

By ch. 475, Laws 1951, which became effective July 18, 1951, circuit judges were granted the right to become participating employes under the Wisconsin retirement fund. However, the legislature granted them the right to participate on a different basis than county judges. After he was elected judge of the 22nd circuit, Judge Young again voluntarily filed an election to be a participating employe under the Wisconsin retirement fund effective June 1, 1952 pursuant to the provisions of sec. 66.901 (5) (i), Stats., as amended by ch. 475, Laws 1951.

Since Judge Young became 70 years of age on December 8, 1951, you have inquired "as to the status of Judge Young under the provisions of sec. 66.906 (1a)" of the Wisconsin statutes which was created by ch. 475, Laws 1951, and which provides as follows:

"Each * * * circuit judge included under this fund who shall have attained age 70 or more on or before September

30, 1952, shall be retired at the end of his then current term unless he retires prior thereto, and each * * * circuit judge who attains age 70 thereafter shall be retired at the end of the month in which such age is attained. This restriction shall supersede the provisions of subsection (1) for * * * circuit judges."

When Judge Young first elected to become a participating employe under the Wisconsin retirement fund, sec. 66.901 (5) (i) provided that one who so elected should *automatically* be included under the fund *during any subsequent term* which he might serve *in the same office or in any other elective office* in the same municipality or *any other participating municipality* and while so included should be subject to the compulsory retirement provisions of the fund. Sec. 66.901 of the statutes defined "municipality" to include "the state of Wisconsin" and "participating municipality" to mean "any municipality included within the provisions of this fund." The state of Wisconsin was thus included under the fund effective January 1, 1948.

A circuit judge is an officer of the state. *State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 150 N.W. 513. Hence Judge Young is serving in another elective office in another participating municipality. Moreover, after he was elected as circuit judge, Judge Young again voluntarily filed an election to become a participating employe under the Wisconsin retirement fund. Hence, it is our opinion that he is subject to the applicable compulsory retirement provision of the Wisconsin retirement fund.

Sec. 66.906 (1a), Stats., specifically states that it supersedes the provisions of sec. 66.906 (1) for circuit judges, which latter subsection might appear to require the immediate retirement of Judge Young.

Judge Young had "attained age 70 * * * before September 30, 1952." Hence, unless he retires voluntarily prior thereto, Judge Young must be retired at the end of his present term which expires on the first Monday in January, 1958, since, on September 30, 1952 his present term was "his then current term."

Judge Young has requested that he be permitted to discontinue contributing to the Wisconsin retirement fund and that he be allowed to withdraw the contributions which he

has made to such fund because he is under the impression that his credits in such fund will consist only of his own contributions with whatever interest may be added thereto. As indicated above, Judge Young did not receive any prior service credit or current service credit for services rendered as county judge of Waukesha county. However, ch. 475, Laws 1951, amended sec. 66.906 (2) (b) 2, Stats., to provide that circuit judges and supreme court justices who are participating employes under the Wisconsin retirement fund shall receive current service credit without limitation because of age. Hence Judge Young is receiving current service credit from the state of Wisconsin equal in amount to the contributions which he is making to the fund as a participating employe thereunder.

The Wisconsin retirement fund is a purely statutory retirement system. While sec. 66.901 (5) (i) permits certain persons who are not automatically included under the fund to elect to participate therein, there is no statute which authorizes any employe to elect to discontinue participation in the fund. 35 O.A.G. 21.

Sec. 66.903 (2) (a) 1 requires each person to contribute to the fund as long as he is participating thereunder.

The only statute which authorizes a participating employe to withdraw his own contributions is sec. 66.91, which relates to "separation benefits" and which provides:

"The following described persons shall be entitled to separation benefits at the times hereinafter specified:

"(1) Any participant who is not employed by a participating municipality and who at the time of application therefor would not be entitled to either a retirement or disability annuity beginning immediately.

"(2) Such separation benefits shall be paid in the form of a single cash sum as soon as practicable after receipt by the board of both a written application by the participant for such benefits, and a written notice from the last employing municipality certifying that such participant has been separated from the service. The amount of any separation benefit shall be the sum of the accumulated additional credits and normal credits of the participant as of the beginning of the year in which the date of separation occurs plus any normal or additional contributions made to the fund during the year in which the date of separation occurs."

As subsection (2) of the foregoing statute indicates, a separation benefit consists of the sum of the accumulated additional credits and normal credits of the participant as of the beginning of the year "in which the date of separation occurs" plus normal or additional contributions made during the year "in which the date of separation occurs."

Subsec. (1) of the foregoing statute restricts the payment of a separation benefit to a "participant who is not employed by a participating municipality."

As indicated heretofore, Judge Young is in the service of the state of Wisconsin, which under sec. 66.902 (1), Stats., was included as a participating municipality under the Wisconsin retirement fund effective January 1, 1948. Judge Young has not been "separated from the service" of the state of Wisconsin and hence is now employed by a participating municipality under the Wisconsin retirement fund.

Judge Young voluntarily chose to come under the Wisconsin retirement fund while he was county judge. By virtue of the provisions of sec. 66.901 (5) (i), Stats., he was continued as a compulsory participant upon becoming circuit judge. But, even if that were not the result thereof, the voluntary act of Judge Young after he became circuit judge of electing to come under the fund made him a compulsory participant thereafter. Regardless of which of his own acts placed him under the fund, the result thereof was irrevocable because there is no provision which allows one to withdraw after he comes under the fund, whether automatically or by his own voluntary election. Thus, Judge Young cannot undo the effect of his own voluntary acts and withdraw from the obligations which attach upon one's becoming a participant in the fund.

Consequently, Judge Young must continue to participate in the Wisconsin retirement fund and make employe contributions thereto. Since he is not eligible to receive a separation benefit, at the present time there is no way by which he can withdraw the contributions which he has made to the fund.

JRW

HHP

Prisons and Prisoners—Tuberculosis Sanatoriums—Inmate of state prison admitted to Wisconsin state sanatorium upon temporary removal order pursuant to sec. 57.115, Stats., without judicial proceedings pursuant to sec. 50.03 (2), Stats., must be regarded as a pay patient under sec. 50.03 (1), Stats., and the cost of his care billed to the state department of public welfare. Such inmate is not himself liable for the cost of medical care either inside or outside of the prison.

December 22, 1952.

DR. CARL N. NEUPERT,
State Health Officer.

You have requested an opinion with reference to the following facts:

“In the past, prisoners transferred from the State Prison to the State Sanatorium have been charged as state-at-large cases. These prisoners were transferred by order of the Governor in accordance with chapter 57.115. They may now be transferred on order of the director of the department or others to whom he delegates such authority under provisions of chapter 57.115 as amended by chapter 440 of the Session Laws of 1951.

“One such case is V.B., sentenced to the Wisconsin State Prison on March 5, 1951, by Shawano County (Circuit Court Branch) for the crime of non-support, for a term of 12–18 months. Permission was requested to take the said V.B. to the Wisconsin State Sanatorium for treatment, as he was found to have active tuberculosis in the very early stage. The director of the State Department of Public Welfare recommended that permission be granted to take the patient, accompanied by guard, to the Wisconsin State Sanatorium for treatment. The patient was transferred on executive order.

“Is it proper to charge the cost of tuberculosis care of a prisoner transferred to the State Sanatorium from the State Prison as a state-at-large case as defined in chapter 50.075; if not, what method should be employed?”

Sec. 50.075, Wis. Stats., reads as follows:

“Whenever the county chargeable with the support, maintenance and other expenses of a person unable to pay for his care under section 50.03, 50.05 or 50.07 cannot be

determined because his legal settlement is in doubt, or whenever such person has no legal settlement in this state, the total cost of such support, maintenance and other expenses shall be a charge against the state."

It is not proper to charge the cost of tuberculosis care of V.B. under this section of the statutes because there has been no determination of his legal settlement as provided in sec. 50.03, Stats. Therefore, V.B.'s maintenance charges in the tuberculosis sanatorium are controlled by sec. 50.03 (1), Stats., which reads:

"All patients admitted to the said institutions shall pay the cost of their care, except as otherwise provided in this section. Such cost shall be determined by the superintendent and the board of health."

Sec. 46.115, Stats., provides a means of caring for inmates of state institutions at the Wisconsin general hospital, charging half the cost to the state and the other half to the institution. But there is no similar provision for care at the state sanatorium. Since the prisoner has not been admitted to the sanatorium as a public charge under sec. 50.03 (2), Stats., with a determination of his legal settlement, he must be regarded as a pay patient under sec. 50.03 (1), quoted above.

The next question is, who is to pay for his maintenance. In *Guardianship of Gardner*, (1936) 220 Wis. 490, 492, it was held that the estate of an insane person who had been sentenced to the state prison and thereafter transferred to the central state hospital, was not liable to the state for his maintenance while confined in such hospital, since he was there pursuant to his sentence. The court referred to a general rule to that effect expressed in 50 C.J. 367, §112, but pointed out that neither of the two cases cited for the rule actually supported the proposition, and stated as follows:

"* * * That there are no cases bearing directly upon the proposition of the text is quite persuasive that it has never occurred to anyone that a prisoner or his estate is liable for his support while in prison, in the absence of a statute making him so liable, and the proposition from the nature of it seems self-sustaining."

Sec. 53.38, Stats., which applies to medical care for prisoners in county jails, expressly makes the prisoner or his estate liable to reimburse the governmental unit paying the cost of such care, but there is no equivalent provision relating to prisoners in the state prison.

The supreme court of Kentucky has held, citing (among other authorities) *Guardianship of Gardner, supra.*, that the commonwealth has a duty to furnish convicts with all supplies and look to their condition of health. *Department of Welfare v. Brock*, (1947) 306 Ky. 243, 206 S.W. 2d 915.

In 25 O.A.G. 488 the attorney general expressed the view that the board of control was authorized to furnish medical care to paroled prisoners, citing and quoting from an earlier opinion in 24 O.A.G. 492, which conceded that medical service should be rendered to prisoners at the state prison, even in the absence of statutory provisions.

It is therefore clear that the cost of maintenance cannot be collected from V.B. himself, and that it is a proper expense of his imprisonment. You are therefore advised that the department of public welfare should be billed for his care at the state sanatorium.

WAP

Criminal Law—Minors—Dance Halls and Amusement Places—The phrase “seventeen years of age or less” as used in sec. 351.57 (2), Stats., excludes children who have passed the 17th anniversary of the date of their birth.

December 24, 1952.

JOHN M. POTTER,
District Attorney,
Wood County.

You request my opinion as to whether a child who is one day past his 17th birthday is within the prohibition of sec. 351.57 (2), Stats., which reads:

“No person who is the proprietor of any dance hall or who conducts, manages or is in charge of any dance hall or pavilion in this state, whether such dance hall or pavil-

ion be licensed or not under the provisions of any local or county regulation, shall permit during any public dance held in such hall or pavilion the presence of intoxicated persons in such dance hall or on the premises on which such dance hall is situated, *or the presence of any child of seventeen years of age or less* who is not accompanied by his parent or lawful guardian."

It is my opinion that the statute excludes children who have passed the 17th anniversary of the date of their birth.

There is no Wisconsin case on the question. However, in *Gibson v. People*, 44 Colo. 600, 99 P. 333, where a statute defining a "delinquent child" included as an element of the definition any child "sixteen years of age or under," the court, in answering a similar question, said at pp. 334-335:

"* * * It is obvious that the General Assembly intended to fix some limit to the age of children affected by the statute—a point of time beyond which they no longer are amenable to its provisions. In one sense a child is 16 years of age until it is 17; so also it is 16 when it is 18; but, in the true sense, it is 16 and over whenever it has passed beyond the first day of the sixteenth anniversary of its birth. *Had it been the intention to include children up to the time they reach their seventeenth birthday, the General Assembly would naturally have said 'children under seventeen years of age.'* But, when only those 'sixteen (16) years of age or under' were mentioned, it obviously meant what it said, namely, children 'sixteen (16) years of age or under,' not 'sixteen years of age and over.' * * * A child is 16 years of age on the sixteenth anniversary of his birth, and thereafter is over 16 years of age. * * *" (Emphasis supplied.)

This language has been cited with approval in later cases, and no cases have been found holding to the contrary.

Sec. 370.01 (49), Stats., provides that "year" when used in a statute means a calendar year unless otherwise expressed. Applied here, a child is 17 years or less when he has lived 17 calendar years. After his 17th birthday he enters upon his 18th calendar year.

It is noteworthy, too, that statutes regulating the sale of fermented malt beverages forbid such sale to "any person under the age of 18 years * * *." Sec. 66.054 (9) (b).

It must be assumed that the difference in phraseology in that statute and the statute here involved was intentional and that different meanings were implied.

SGH

Architects and Engineers—Board Rules—Interpretations of sec. 101.31 (2) (b), (2) (d), and (10) (b), Stats., published by registration board of architects and professional engineers under authority of sec. 101.31 (4) (d), Stats., and properly filed as required by sec. 227.03, Stats., are valid. The interpretations are rules, as defined by sec. 227.01 (2), Stats. Approval of attorney general is not required to make them effective.

December 30, 1952.

WISCONSIN REGISTRATION BOARD OF ARCHITECTS
AND PROFESSIONAL ENGINEERS.

You call my attention to three interpretations published by the board concerning the practice of architecture and professional engineering as defined in sec. 101.31, Wis. Stats., and ask my opinion as to whether they are valid and binding. You state that a local building inspector charged with enforcement of the provisions of sec. 101.31 has advised you that upon receipt of my approval of the three interpretations he will proceed to enforce the statute as interpreted by the board.

The interpretations in question read as follows:

(1) "Whereas Section 101.31—Wisconsin Statutes, Subsection 2 (b) includes in the practice of architecture any professional service related to—as well as the design of—any *private or public buildings* and since such buildings are specifically enumerated in Subsection 2 (b) and since such buildings are not specifically mentioned in Subsection 2 (d), which defines the field of practice of the engineer, therefore, it has appeared to the Wisconsin Registration Board that the design of such buildings, except as stated below, is limited to the field of practice of architecture. Inasmuch as Subsection 2 (d) specifically includes the

planning, designing, alteration and supervision of construction of industrial buildings and the structural members of other buildings, such buildings and structural members are considered to be within the field of practice of both professions.

"The foregoing differentiation accords with previous interpretations of the Registration Law by this Board and is intended to define the boundaries of the fields of the two professions in the design of buildings."

(2) "Plans and specifications for the first unit of a building that will equal or exceed 50,000 cubic feet total volume when completed require the services of an Architect or Professional Engineer although the unit itself does not have 50,000 cubic feet total volume."

(3) "Plans and specifications for alterations in, or the remodeling of the whole, or any part of, a building having in excess of 50,000 cubic feet total volume of space must be prepared by an Architect or Professional Engineer except where such alterations or remodelings 'do not affect health or safety.' Any addition or alteration that changes the condition of load upon a building or the original disposition of strain, as upon a roof, floor, bearing partitions, column or wall or foundation, and also any important change in the means of entrance or exit to any or all parts, affects safety. Any addition or alteration that affects the lighting, heating, ventilation or sanitary provisions of the building, other than the renewal of such items, affects health. Readjustment of non-bearing partitions, renewal of outworn parts or fixtures, and ordinary maintenance do not affect health or safety."

The first interpretation makes more specific the definitions of the practice of architecture and professional engineering set forth in sec. 101.31 (2) (b) and (2) (d), Stats. This construction is a reasonable one and not in conflict with the terms of the statute.

The second and third interpretations complement and are consonant with the following provisions of sec. 101.31 (10) (b), relating to exempt buildings:

"Nothing contained in this section shall prevent persons, firms or corporations from making plans and specifications for or supervising the erection, enlargement or alteration of any new building containing less than 50,000 cubic feet total volume or addition to a building which by reason of such addition results in a building containing less than

50,000 cubic feet total volume or structural alteration to a building containing less than 50,000 cubic feet total volume. Nor shall anything contained in this section prevent persons, firms or corporations from making repairs or interior alterations to buildings which do not affect health or safety."

They are similar to rules promulgated by the industrial commission construing the statute quoted. See general orders 5001 and 5200, Wisconsin state building code.

So far as the board is seeking my opinion as to its power to make the interpretations involved, it is clear that under sec. 101.31 (4) (d), Stats., the board does have authority to make rules reasonably necessary for the proper performance of its duties. Those duties include enforcement and administration of the provisions of sec. 101.31. Power to make rules embraces issuance of rules, regulations, standards, statements of policy of general application or general orders having the effect of law, which implement, interpret or make specific the legislation enforced or administered by an agency. Sec. 227.01 (2), Stats.

I am informed that the board has filed a certified copy of the three interpretations with the secretary of state and revisor of statutes as required by sec. 227.03, Stats.

In my opinion, the interpretations in question are not in conflict with the statutes, are rules within the statutory definition, and are reasonably necessary for the proper performance of the duties of the board. My approval of these rules is not a requisite to their enforcement. When duly promulgated, their vitality is derived from the sanction of the legislature.

GS

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