

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. 43

January 1, 1954, through December 31, 1954

VERNON W. THOMSON
Attorney General



MADISON, WISCONSIN
1954

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, Rich- land Center	from Jan. 1, 1951, to

ATTORNEY GENERAL OF WISCONSIN

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- VERNON W. THOMSON.....Attorney General
- STEWART G. HONECK.....Deputy Attorney General
- MORTIMER LEVITAN.....Assistant Attorney General
- WARREN H. RESH.....Assistant Attorney General
- HAROLD H. PERSONS.....Assistant Attorney General
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- JAMES R. WEDLAKE.....Assistant Attorney General
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VOLUME 43

Real Estate Brokers' Board—Powers—Wisconsin real estate brokers' board has power under sec. 136.04 (1), Stats., to issue rules defining "improper practices" applicable both to real estate brokers and business opportunity brokers.

January 6, 1954.

WISCONSIN REAL ESTATE BROKERS' BOARD.

You state that during the past several months certain real estate brokers and business opportunity brokers have initiated the practice of demanding advance retainer's fees which are not refundable and which, upon the subsequent sale of the listed property, are deductible from the agreed commission. You state further that complaints have been received from Wisconsin residents which claim that once such advance fees have been paid, there has been little or no activity with reference to the future sale.

You inquire whether the Wisconsin real estate brokers' board may adopt a general rule declaring that the demand for and receipt of such advance fees is "an improper practice" under the provisions of ch. 136 of the statutes.

The Wisconsin real estate brokers' board as an administrative agency of the state of Wisconsin has such powers, and only such powers, as may be found within the four corners of the statutes under which it operates. *American*

Brass Company v. Board of Health, (1944) 245 Wis. 440, 15 N. W. 2d 27. Accordingly, it is necessary to examine the statutes to determine if there is a sufficient delegation of power to your board to authorize the issuance of the contemplated rule.

Sec. 136.04 (1), Stats., reads:

“The board, immediately following the qualification of the member appointed in any year, shall organize by appointing a secretary and by selecting from its number a president, vice president and a treasurer, and *may promulgate rules and regulations* for carrying into effect the provisions of this chapter and for the performance of its duties and functions. * * *

Such a delegation of rule-making power is uniformly held valid when adequate statutory standards are established to guide the agency involved in declaring a rule.

Sec. 136.02, Stats., which requires that brokers be licensed, concludes with the following sentence:

“* * * Licenses shall be granted only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman *in such manner as to safeguard the interests of the public*, and only after satisfactory proof thereof has been presented to the board.”

Further, under sec. 136.08 (1), Stats., there are set forth some twelve statutory grounds for the suspension or revocation of a broker's or salesman's license. Par. (k) of this section specifies as a ground for revocation the following:

“Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes *improper, fraudulent or dishonest dealing*;
* * *

Similar provisions in regard to business opportunity brokers are found in secs. 136.20 and 136.25 of the statutes.

On the basis of the foregoing statutes, if your board should find upon its own investigation that the demand for, and the receipt of, advance retainer fees by either class of broker constituted an “improper practice” it can so declare by rule, and such rule is valid and enforceable, subject to the review provisions of ch. 227, Stats. That is, in our opin-

ion, the term "improper" practice, as used in sec. 136.08 (1) (k) and sec. 136.25 (2) (k) is sufficient as a standard to guide the board in the exercise of the rule-making power conferred under sec. 136.04 (1).

RGT

*Business Opportunity Brokers—Licenses and Permits—*A nonresident corporation operating as a business opportunity broker, by means of agents in the state of Wisconsin who hold the corporation out as able to effectuate the sale of Wisconsin businesses, is subject to the requirements of the Wisconsin business opportunity brokers' law and must obtain a license as a broker. The agents of such corporation must obtain licenses as salesmen.

January 6, 1954.

BOYD A. CLARK,
District Attorney,
Waushara County.

You have asked my opinion on the applicability of the Wisconsin business opportunity brokers' law, that is, sec. 136.19 *et seq.*, Stats., to the following state of facts:

The ----- Business Brokers is a corporation incorporated in the state of Delaware and having its principal place of business in Chicago, Illinois. By means of its agents who travel in Wisconsin, it solicits listings from Wisconsin owners of Wisconsin businesses which will be offered for sale on a nationwide market, and holds out to the Wisconsin owner that it will provide advertising and promotional service for the purpose of securing a buyer for his business. The corporation claims that its agents solicit from the Wisconsin owner only "offers to list" which are not binding on the corporation until accepted by it at its home office in Chicago. It appears that the solicitor obtains from the Wisconsin owner a so-called retainer fee of from 1 to 2 per cent of the total sale price of the property, and provides in its contract for a total brokerage fee of approxi-

mately 10 per cent on properties costing \$20,000 or less. As part of a guarantee service bond furnished to the Wisconsin owner, it is provided in paragraph 3 of such bond:

"In conjunction with its national newspaper display advertising program ----- Business Brokers guarantees to include, from copy expertly prepared and geared to attract buyers, the certificate holder's business in a minimum of 110 newspapers nationally; it being understood that such insertions will include a minimum of two such newspapers in *each* state of the 48 states, * * *"

You inquire whether the corporation so doing business, and its agents operating in Wisconsin, are required to have a business opportunity broker's license and business opportunity salesmen's licenses under sec. 136.19, Stats.

A business opportunity broker is defined in sec. 136.19 (2) as follows:

"(2) 'Business opportunity broker' means any person, firm or corporation, not excluded by subsection (3):

"(a) Who for another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of any business, its good will, inventory, fixtures or an interest therein; or

"(b) Who is engaged wholly or in part in the business of selling business opportunities or good will of an existing business or who is engaged wholly or in part in the business of buying and selling, exchanging or renting of any business, its good will, inventory, fixtures or an interest therein."

The requirement for a license is set forth in sec. 136.20, Stats., which reads:

"No person, firm or corporation shall engage in or follow the business or occupation of, or advertise *or hold himself or itself out* as or shall act temporarily or otherwise as a business opportunity broker or business opportunity salesman in this state, without first procuring a license therefor as provided in sections 136.19 to 136.36. * * *"

Sec. 136.29, Stats., provides for the licensing of nonresident brokers.

In our opinion the statute by its express terms applies to any person who holds himself out in the state of Wisconsin

as able to effect the sale of a Wisconsin business. Since the solicitors traveling in Wisconsin are concededly the agents of the foreign corporation, the foreign corporation is acting in Wisconsin through its agents and hence is subject to Wisconsin law.

The validity of the statute so construed appears to be clearly settled by the case of *Robertson v. California*, (1946) 328 U. S. 440, 90 L. ed. 1366, 66 S. Ct. 1160.

The *Robertson* case involved the application of the provisions of the California statutes governing insurance companies, both domestic and foreign, to an unlicensed agent, Robertson, and his unlicensed principal. Robertson was convicted of violating provisions of the California insurance code, which made it a misdemeanor for an unlicensed person to act as agent for a non-admitted insurer in the transaction of the insurance business, and also for acting as an insurance agent without a license. This conviction was challenged before the United States supreme court on the ground that it violated the commerce clause of the federal constitution. The United States supreme court upheld the California statutes and stated (90 L. ed. 1366, 1373) :

“* * * We accept the regulation for what it purports to be on its face and by the statute’s express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of the minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. * * *”

Further the United States supreme court stated, in holding that the foreign company also required a license (90 L. ed. 1366, 1378) :

“* * * [Robertson also makes] the contention that the state cannot exclude foreign companies, such as the First National Benefit Society, or their agents, from carrying on their business in California for failure to meet her reserve requirements.

“This is the crucial contention. It too is without merit. The evils flowing from irresponsible insurers and insurance certainly are not less than those arising from the activities of irresponsible, incompetent or dishonest insurance agents.

The two things are concomitant, being merely different facades of the same sepulchre for the investments and security of the public. * * *"

It would appear that the evils which might arise from the solicitation of insurance contracts, either upon lives or property, by unlicensed agents representing unlicensed foreign companies are indistinguishable in principle from the evils which might arise from the solicitation of the listing of Wisconsin businesses for sale by unlicensed business opportunity salesmen representing unlicensed foreign business opportunity brokers.

In a previous case, *Hoopeston Canning Co. v. Cullen*, (1943) 318 U. S. 313, 87 L. ed. 777, 63 S. Ct. 602, the court had previously held that the state of New York had complete and extensive power to regulate foreign insurance companies doing business in the state of New York and insuring property in the state of New York.

In view of the foregoing, it would appear that the solicitor agents operating in Wisconsin are subject to the provisions of the Wisconsin licensing law, sec. 136.20. Further, that their principal, the corporation in Chicago, may properly be required to obtain a business opportunity broker's license as a condition precedent to employing agents in the state of Wisconsin who, by soliciting offers for listings, hold the corporation out as able to effectuate the sale of Wisconsin businesses. In this connection see also, *State v. Helwig*, (1952) 262 Wis. 299, 54 N. W. 2d 907.

RGT

Physical Therapy—Certificate of Registration—Sec. 147.185 (2), Stats., created by ch. 411, Laws 1953, and relating to educational requirements of applicants for licenses to practice physical therapy, is applicable as of the date of graduation of the applicant, who must be a graduate of a school of physical therapy with standards substantially equivalent to those of the university of Wisconsin at the time he graduated.

January 7, 1954.

DR. A. G. KOEHLER, *Secretary,*
Wisconsin State Board of Medical Examiners.

You have called our attention to the provisions of sec. 147.185 (5) of the statutes as created by ch. 411, Laws 1953, and which relates to the licensing of physical therapists on the basis of previous practice without examination.

This subsection reads in part:

“(5) REGISTRATION WITHOUT EXAMINATION. The board may issue a certificate of registration without examination to any person who applies on or before December 31, 1953, and who furnishes the board with sufficient and satisfactory evidence that, on the effective date of this section he had practiced physical therapy in this state and possesses the prerequisites for examination set forth in sub. (2). * * *”

Subsec. (2) of sec. 147.185 referred to in subsec. (5) above provides in part:

“(2) APPLICATION. An applicant for a certificate of registration as a physical therapist shall file written application on forms provided by the board. The applicant shall present satisfactory evidence that he is at least 20 years of age, is of good moral character, has obtained a high school education or its equivalent and has been graduated from a school of physical therapy with standards of education and training substantially equivalent to that of the university of Wisconsin. * * *”

You have inquired whether the educational qualifications of applicants for license without examination under subsec. (5) are to be evaluated upon the basis of their equivalency

to the present-day standards of the university of Wisconsin or whether it is sufficient if they are equivalent to the standards of the university of Wisconsin as they existed at the time the applicant graduated from a school of physical therapy. In this connection you point out that of upwards of 200 physical therapists presently practicing in Wisconsin only about 26 have graduated from schools having standards and requirements equal to the present-day standards of the university of Wisconsin.

Sec. 147.185 is a part of ch. 147 on "Treating the Sick," which chapter is commonly referred to as the medical practice act, although it now covers branches of treating the sick other than medical practice. The primary purpose of all statutes relating to the licensing of those who treat the sick is to safeguard the public health. Such statutes are not intended to create a monopoly except insofar as that may be an incidental result in protecting the public from the practice of incompetents.

It is not uncommon nor unconstitutional to set up a so-called "grandfather's clause" in a new licensing statute such as sec. 147.185. By the adoption of such a provision, the legislature deems prior practice to be sufficient evidence of skill and competency to justify the state in permitting the continuance of practice without examination and even without a diploma. Sec. 41 Am. Jur., Physicians and Surgeons §38.

The troublesome language which must be construed here is the wording in sec. 147.185 (2) which reads, "and has been graduated from a school of physical therapy with standards of education and training substantially equivalent to that of the university of Wisconsin."

If the legislature had added the words "at the time the applicant graduated," the ambiguity would have been avoided.

It seems likely, however, that this is what the legislature meant in the light of the somewhat absurd consequences which would flow from the adoption of a contrary construction.

The underlying yardstick set up by the legislature was equivalency with the standards of the university of Wisconsin, whose standards have increased rapidly over the

years to keep pace with the rapid growth of developments in the field of physical therapy.

There would be no point in expecting another school to meet 1953 standards of the university of Wisconsin back, let us say, in 1930 when the standards of the university of Wisconsin were undoubtedly much less exacting than they were in 1953 when ch. 411 was enacted.

Moreover, if the 1953 standards are to be applied, they would have to be applied to university of Wisconsin graduates as well as to others, and a 1930 graduate of the university of Wisconsin would be barred as would a 1952 graduate if there had been any substantial increase in requirements in 1953 prior to the enactment of ch. 411.

Also to point up the absurdity of limiting the standards to those of 1953 and subsequent years, let us suppose for a moment that an applicant had graduated from some school other than the university of Wisconsin a few years ago and that at the time the standards of such school were actually equivalent to the 1953 standards of the university of Wisconsin but that in the intervening years such school's standards had greatly deteriorated or that the school had gone out of business. This particular applicant would then have to be excluded regardless of the excellence of his training because of things which had happened at his alma mater long after his graduation and over which he had no control.

No violence is done to the language in the troublesome clause in sec. 147.185 (2) by construing the standards of equivalency to be applicable as of the date of graduation, since the only time element involved or implied is that which may properly be inferred from the words "and has been graduated." This speaks as of the time when such event occurred, be it 1930 or 1940 or 1952 or 1953. To the extent that these words are qualifying words they apply to and modify the language immediately following, and the clause is properly clarified by supplying the obviously intended words to make it read:

"and has been graduated from a school of physical therapy with standards of education and training substantially equivalent to that of the university of Wisconsin *at the time the applicant graduated.*"

Where the construction is elliptical, which is to say that there is an omission of a word or words that would complete or clarify the thought, such word or words as are obviously necessary to complete the sense will be supplied. *Nichols v. Halliday*, 27 Wis. 406.

It is accordingly concluded that the equivalency standards of the university of Wisconsin provided by sec. 147.185 (2) are applicable as of the date that the applicant "has been graduated from a school of physical therapy." It also follows that the same principle governs applicants for licenses by examination and by reciprocity, since sec. 147.185 (2) applies to all applicants whether licensed by examination or on the basis of prior practice or by reciprocity.

WHR

*Counties—County Highway Committee—Powers—*The authority to contract and expend county funds for the construction of a county highway garage is solely within the powers of the county board as provided for in sec. 59.07 (4) (a) and (c), Stats., and such authority does not exist in county highway committee members or a county highway commissioner under the provisions of sec. 83.01 (7) or sec. 83.015 (2), Stats.

Only the county board, under the provisions of sec. 59.07 (2), Stats., has the authority to lease county-owned land; no such power exists in members of the county highway committee.

January 11, 1954.

DONALD L. HOLLMAN,
District Attorney,
Adams County.

You request my opinion on two questions concerning actions taken by the county highway commissioner and the county highway committee of Adams county.

1. Does the county highway committee or the county highway commissioner, or both, have the authority to erect

a new building for the storage of the county highway machinery without the authorization or knowledge of the Adams county board?

2. Does the county highway committee have the power to lease the Adams county gravel pits to a private contractor without the express authority or knowledge of the Adams county board?

In my opinion it is clear that under the present statutes such actions are invalid. The authority to build and maintain county buildings is vested in the county board as provided in sec. 59.07 (4) (a) and (c), Stats., which reads as follows:

“59.07 The county board of each county is empowered at any legal meeting to:

“* * *

“(4) BUILDINGS, HIGHWAY GARAGE; MAINTENANCE; PUBLIC WORK. Build and keep in repair the county buildings and cause the same to be insured in the name and for the benefit of the county, and in case there are no county buildings, to provide suitable rooms for county purposes.

“(a) Provide and designate the location of buildings to shelter the machinery and equipment used for construction and maintenance of highways.

“(c) All public work, including any contract for the construction, execution, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind whatsoever where the estimated cost of such work will exceed \$1,000 shall be let by contract to the lowest responsible bidder, such contract shall be let, made and entered into pursuant to and in accordance with section 66.29, except that the county board may by a three-fourths vote of all the members-elect provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make.”

As was stated in 40 O.A.G. 81, the placing of buildings to shelter highway machinery in a separate paragraph, namely (a) above, makes it appear as though these buildings are of a different status than other county buildings. However, after analyzing the history of that paragraph, it is concluded, on page 82, that construction of county buildings used in connection with highway work is still governed by all the provisions of sec. 59.07 (4).

You further state that the county highway committee and the commissioner did not submit the contracts for bids as required by sec. 59.07 (4) (c), quoted above. The wording of that subsection makes it obvious that where the construction costs will exceed \$1,000, as in this case they will, bids are to be obtained. The wording reads:

“All public work, * * * any contract for the construction * * * of any * * * building * * *.”

In the presence of such clear language it is obvious, in my opinion, that contracts must be let by competitive bidding. As stated in 36 O.A.G. 229, 230:

“After considering the legislative history of sec. 59.07 (4) (c) which was created by ch. 456, Laws 1945, as well as its context, we are of the opinion that the proper construction of that subsection is to the effect that all contracts for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of supplies or material of any kind whatsoever by a county, must be let by competitive bidding as provided by sec. 66.29 where the estimated cost will exceed \$1,000.
* * *”

The last sentence of sec. 59.07 (4) (c), Stats., reads: “This paragraph shall not apply to highway contracts which the county highway committee is authorized by law to let or make.” That language refers to highway contracts as such, and is only applicable in reference to contracts relating to the actual construction of roads.

I find nothing in the wording of sec. 83.01 (7) or sec. 83.015 (2), Stats., relating to the respective powers and duties of the county highway commissioner and the county highway committee, which would lead one to conclude that the action in question is therein authorized. The legislature has delegated that authority and responsibility to the county board, not to two subordinate governmental agencies of the county.

It is not necessary here to determine whether or not the county board could authorize, by the granting of general authority, the county highway committee to spend money for the construction of the building in question. As I read

your question, there is no claim that there was any delegation of such authority. However, if such is claimed to be granted in the November resolution of the county board, No. 14 (and in my opinion, no such power is therein given), the authorization is invalid for the reasons stated in 40 O.A.G. 81, 82-83, citing 38 O.A.G. 54, and quoting therefrom. The opinion in 40 O.A.G. 81, 83, then concludes:

“This construction of a new boiler room and the installation therein of a furnace boiler in my opinion does not fall within the category of maintenance. It involves a major change and therefore constitutes an improvement or addition to the structure. An expenditure therefore is thus in the nature of a capital outlay and must be specifically authorized by the county board itself. In so doing the provisions of sec. 59.07 (4) (c) must be followed.”

The same rule, in my opinion, applies in this case. As the court said in *Marathon County v. Industrial Comm.*, (1935) 218 Wis. 275, 281, 260 N. W. 641:

“Unless the acts of the county highway commissioner upon which the claim of liability is based were authorized by action of the county board under the statutory provision first above stated, his acts imposed no liability upon the county. It is a rule of general application that a county officer, acting without authority of law, cannot bind the county by his unauthorized acts. *Fernandez v. Winnebago County*, 53 Wis. 247, 10 N. W. 447; *Endion Improvement Co. v. Evening Telegram Co.*, 104 Wis. 432, 438, 80 N. W. 732. The same rule applies as of course to a county committee, and applies to the acts of the county committee on roads and bridges and to the county highway commissioner. That the latter has no authority to bind the county beyond the powers expressly conferred on him by the statutes to bind it, is held in *Joyce v. Sauk County*, 206 Wis. 202, 210, 239 N. W. 439. * * *”

Your second question relates to the validity of a lease whereby the county highway committee leased gravel pits, owned by Adams county, to a private contractor, without the authority of the Adams county board. The power to make leases is in the county board. See sec. 59.07 (2), Stats., which reads as follows:

“59.07 The county board of each county is empowered at any legal meeting to:

“* * *

“(2) LEASES, CONTRACTS, CONVEYANCES. Make such leases (including oil and gas leases), contracts or other conveyances in relation to lands acquired for public purposes as in their discretion are in the interest of the public welfare.”

Members of the highway committee or the highway commissioner have no authority to enter into leases which transfer rights in county-owned property; the lease is therefore void. In 25 O.A.G. 689, the question was presented as to whether or not the county was liable for the unauthorized acts of one commissioner who attempted to sell county-owned land. It is stated in that opinion, on page 690:

“It does not appear that the county board, as a body, sold the land in question but that the sale, if any, was made by one of the commissioners. If that is the case, the well settled rule that a county officer not authorized to act may not bind the county by his unauthorized transactions, would apply. *Marathon County v. Industrial Commission*, 218 Wis. 275, 281.

“Thus the county is not bound by the alleged acts of the commissioner as it does not appear he was ever authorized to make the sale under discussion. * * *”

In conclusion, in my opinion your analysis of the situation is correct. A county highway committee or a county highway commissioner may not expend funds for a county building without the authorization of the county board, nor may members of such a committee enter into leases affecting county property without the express consent and knowledge of the county board.

REB

Circuit Court—Clerk's Fees—Under sec. 10 of ch. 662, Laws 1953, the clerk of the circuit court upon entry of judgment or other disposition of cases commenced prior to the effective date of ch. 511, Laws 1953, should charge the total clerk's fee provided by ch. 662 less a credit for the \$2 paid under sec. 59.42 (40) of the 1951 statutes.

January 12, 1954.

FRANCIS L. EVRARD,
Corporation Counsel for Brown County,
Green Bay, Wisconsin.

You have called attention to chs. 511 and 662, Laws 1953, relating to the fees of clerks of circuit courts and other courts of record, and inquired if the provisions of sec. 10 of ch. 662 are applicable to the payment of fees on entry of judgment or other disposition of a case commenced prior to the enactment of ch. 511 but which is terminated subsequent to the effective date of ch. 662.

Sec. 10 of ch. 662 reads:

"This act shall become effective January 1, 1954. If the initial fee under s. 59.42 (2) is paid prior to said date, there shall be no further charge if entry of judgment or other disposition is made after that date."

The sec. 59.42 (2) referred to in sec. 10 above was undoubtedly sec. 59.42 (2) as it existed under ch. 511, Laws 1953, at the time of the enactment of ch. 662. Sec. 59.42 (2) had been repealed and recreated by ch. 511, Laws 1953, published July 29, 1953. Sec. 59.42 (2) prior to its amendment by ch. 511 merely provided for a 10 cent fee "for filing every paper in a cause, or any paper required by law to be filed in the office of the clerk of the circuit court." The section in the 1951 statutes which related to the filing fee at the time of the commencement of every action or special proceeding was sec. 59.42 (40) and the fee was \$2 in addition to the state tax.

Under ch. 511, sec. 59.42 (2) provided the following fee schedule:

"Manner of disposition of action	At commencement of action (excluding state tax)	At time of entry of judgment or other disposition
(a) Cognovit -----	\$6	
(b) Divorce, real estate foreclosure, partition and quiet title actions -----	\$6	\$6
(c) Other contract actions -----	\$6	\$7
(d) Tort actions --	\$6	\$8
(e) All other actions	\$6	\$6"

Under ch. 662, sec. 59.42 (2) changed the fee schedule as follows:

"Kind of action or proceeding	At time of filing initial document required for commencement of action or proceeding (in addition to state tax)
(a) Cognovit -----	\$6
(b) All special proceedings independent of an action taken at the instance and for the benefit of one party without notice to or contest by any person adversely interested--	\$4
(c) All other actions and special proceedings--	\$8"

It is to be noted that ch. 662 eliminated all fees at the time of entry of judgment or other disposition of the action or proceeding except insofar as the charging of a fee is implied by the wording of sec. 10 quoted above.

This specifically provides that if the initial fee under sec. 59.42 (2) [ch. 511] is paid prior to January 1, 1954 there shall be no further charge if entry of judgment or other disposition is made after that date. While the expression of the intention of the legislature as to what is to be done

in other cases is by no means clear, the implication in sec. 10 is that there is to be a final charge in all such instances, the exemption applying only where the initial fee payable under ch. 511 had been made during the brief time that ch. 511 was in effect. By the expression of the one exemption the legislature has impliedly excluded others under the doctrine of *expressio unius est exclusio alterius*.

This being so, there would appear to be a balance due where the initial fee was paid prior to the effective date of ch. 511, with credit to be given for the \$2 paid prior to that date. In other words, the *total* fees prescribed by ch. 662 are payable in all cases, with the exception of those commenced during the effective period of ch. 511.

Since sec. 10 indicates an intention not to exempt these earlier matters from the fees which would otherwise be payable under ch. 662, the proper fee in each instance would be that provided for the total fee under ch. 662 less a credit for the \$2 already paid under the old (1951) law.
WHR

Platting Lands—Requirements for Recording—Various platting requirements under ch. 236, Stats., briefly discussed.

January 19, 1954.

RODNEY O. KITTELSEN,
District Attorney,
Green County.

You have asked my opinion on several questions concerning the statutory requirements of ch. 236, Stats., which must be complied with in order to entitle a plat to be recorded.

Without detailing the fact situations out of which your questions arise, we will first summarize the steps which must be followed in order to entitle a plat to record and then answer the specific questions raised by your inquiry.

The steps may be summarized as follows:

1. The land must be surveyed and monumented in accordance with sec. 236.03.

2. A final plat must be prepared which must comply with both the formal requirements and the restrictions, and provide the detail, required by sec. 236.04.

3. In accordance with sec. 236.05, the plat must contain: (a) The surveyor's affidavit, and (b) the owner's certificate of dedication.

4. Certificates of unpaid taxes and assessments, signed by the clerk and treasurer of the municipality where the land is located and the treasurer of the county, in accordance with sec. 236.055, must be obtained.

5. The plat must show the approvals of the governing bodies in accordance with sec. 236.06, which approvals must be placed upon the plat within 90 days prior to the time at which the plat is offered for record, in accordance with the various provisions of sec. 236.06. Under sec. 236.06 (2) these approvals can be evidenced only by certified copies of *the ordinances or resolutions* adopted by the governing bodies approving the plat, and shall be attached to the final plat.

Your specific questions will now be answered in order.

1. May a plat be recorded which abuts on a state trunk highway without the approval of the state highway commission?

The answer to this question is clear from the provisions of sec. 236.06 (1) (j), Stats., which specifically designates the state highway commission as one of the governing bodies which must approve a plat, with certain exceptions which appear not to be applicable in your county.

In 34 O.A.G. 290, the attorney general stated that in view of sec. 236.06 (3) a plat recorded without the necessary approvals has no validity whatsoever.

2. You state that the plat was approved by the common council of the city of Monroe under date of December 6, 1952, and inquire whether it is now possible to place the approval of the highway commission on the plat and thereby validate it.

Again the answer under the statute is clearly, "No." Sec. 236.06 (3) definitely places a statutory limit of 90 days between the first approval and the recording date.

3. You ask what can now be done to validate a plat which has been handled as described in the first two questions.

The plat should be withdrawn from the register of deeds, submitted to the common council of the city of Monroe for approval, and approval by a certified copy of a resolution of the state highway commission obtained, and the plat re-offered for record all within a period of 90 days.

If there is any suggestion that the register of deeds refuses to release the plat, you may well point out to the register of deeds that under the provisions of sec. 236.06 (5) the register of deeds was not entitled to receive the plat for record, its alleged recording has no validity whatsoever, and in view of the penalties provided by the quoted statute it would appear highly advisable for the register to surrender the plat for proper subsequent handling. Accordingly, it appears that your suggestion that the prior plat be vacated need not be considered, since in fact there is no plat validly recorded to be vacated.

4. You ask if the city planning commission is a governing body whose approval must appear on the plat.

There is nothing in the language of sec. 236.06 which refers in any way to the city planning commission as a governing body whose approval is necessary.

5. You inquire whether a statement on the plat "approved by Wisconsin State Highway Commission this 5th day of June, 1953, O. J. Hughes—Secretary" is a sufficient approval.

As has been indicated above, under sec. 236.06 (2) the approval must be evidenced by a certified copy of the resolution adopted by the governing body approving the plat. It would appear that the quoted sentence is insufficient to comply with this statute.

6. You inquire how the owner's certificate can be executed and sworn to when the owner is a corporation.

A corporation can act only through its agents duly authorized. It would appear that the owner's certificate in

the case of a corporation should be made in the name of the corporation by its president and secretary with a statement that they are properly authorized so to act. Since the certificate is a dedication, the corporate seal should be indicated as prescribed in sec. 370.01 (37).

7. You inquire whether names must be typed under signatures.

While under the provisions of sec. 59.51 (1) the register is not required to accept for record any documents which do not have the names of the parties plainly printed or typewritten thereon, it is provided in sec. 59.515 that the validity of the record of any instrument is not lessened by the failure to type or print such names on the instrument.

In closing you ask general questions in regard to certain notary seals and seals of governing bodies without specifying the instrument on which you assume such seals should be placed. In view of the lack of such specification of facts, no general answer to such question will be attempted. You may find that, in view of the foregoing, upon examination of the statutes, these questions will clarify themselves.
RGT

County Court—Register in Probate—Register in probate appointed pursuant to sec. 253.27, Stats., who acts as court reporter in county court and juvenile court without having been appointed court reporter under sec. 253.33, Stats., is not entitled to additional compensation for services as court reporter nor to the fees for transcripts mentioned in sec. 253.33 (3), Stats. Reasons for official appointment of county court reporter discussed.

January 21, 1954.

RAYMOND H. SCOTT,
District Attorney,
Taylor County.

You have inquired whether the register in probate appointed by the county judge pursuant to sec. 253.27, Stats., is entitled to additional compensation for her serv-

ices in acting as court reporter, either in the county court or the juvenile court, in the absence of an official appointment as reporter. The question is also raised as to whether the register in probate would be entitled to any fees for the making and filing of a transcript of testimony in county court or juvenile court, in the absence of an official appointment as reporter by the judge.

Sec. 253.27, Stats., so far as material here, provides that the county judge may appoint a register in probate who shall perform such duties as the judge may direct. If the county board does not fix the salary of the register in probate, the judge shall compensate him for his services. As we understand it, the county board of your county has fixed the salary of the register in probate.

Sec. 253.33, Stats., relating to the county court reporter, as amended by ch. 61, Laws 1953, sec. 130, provides:

“(1) APPOINTMENT, OATH, DUTIES. The judge of the county court may appoint, and remove at pleasure, a reporter to take the testimony in contested matters and may require him to file a transcript of such testimony. Every person so appointed is an officer of the court, and shall discharge such duties as the court or judge thereof shall require, and before entering upon his duties shall file his official oath in such court.

“(2) Such reporter shall be paid by the county for his services such compensation as the county board shall direct. [Quoted from 1953 session laws.]

“(3) TRANSCRIPT OF TESTIMONY. Such reporter shall furnish to any party a transcript of the testimony taken by him in any matter or proceeding mentioned in this section upon being paid therefor the fees provided by law for transcripts of testimony in circuit court.”

Under sec. 48.01 (2) (b), Stats., judges of the courts of record in the county designate one of their number to act as juvenile judge, and under subsec. (3) his clerk and stenographic reporter shall be respectively the clerk and reporter of the juvenile court.

You state that the county judge, who is also the juvenile judge, has made no appointment of either a county court reporter or a juvenile court reporter.

Under the circumstances we concur in your conclusion that the register in probate is entitled to no additional com-

compensation when rendering services as a court reporter for either the county or juvenile court nor for transcripts of testimony taken in said courts.

While these specific questions have not heretofore been considered by this office it has been concluded that where a county court reporter has been appointed under sec. 253.33, Stats., he is entitled to the fees for transcripts therein provided. 23 O.A.G. 111; 31 O.A.G. 219. The implication is that this would not be true in the absence of an official appointment under sec. 253.33.

It is a truism that a public officer takes his office *cum onere*, and is entitled to no salary or fees except those which the statute provides. *Henry v. Dolen*, 186 Wis. 622, 624.

Also it should be noted that even though the county judge names the register in probate as county court reporter, this alone would bring no additional compensation in the absence of county board action, although it would permit the reporter under subsec. (3) to charge for transcripts furnished to parties.

While the point is not raised in your inquiry, we suggest that some consideration be given to the designation of the register in probate as county court reporter (leaving the element of additional compensation, if any, to the county board) for the reason that in the absence of such designation questions may be raised as to the authenticity of records on appeal, in that the register in probate would not be able to certify to the correctness of the transcript as official court reporter. We do not wish to be understood here as passing upon the merits of such a controversy should it arise, but in the interests of orderly procedure it would seem that where a person purports to act as official court reporter he should have such designation, rather than to have his transcripts left open to challenge in litigation that could be both expensive and prolonged regardless of outcome. See sec. 327.11, Stats., which permits the transcript of the official reporter to be used as a correct statement of the evidence and proceedings had on a trial or hearing. This statute could not be used under the arrangement existing in your county. *Wells v. Chase*, 126 Wis. 202.

Not only this, but such designation of an official court reporter would eliminate disputes over charges for tran-

scripts which are now open to challenge because of an absence of compliance with sec. 253.33, Stats. Conceivably also under the present arrangement a party to litigation could be refused a copy of the transcript on the grounds that copies need be furnished only where there is an official court reporter appointed pursuant to sec. 253.33. The rights of litigants to obtain copies of transcripts should not be so left to whim and caprice. In effect, the fair if not obvious intentment of sec. 253.33 is that an official court reporter should be named to take testimony in contested matters and that otherwise the record may be subject to possible attack and serious disputes may arise over the furnishing of transcripts.

WHR

Constitutional Law—Appropriations and Expenditures—State Board of Pharmacy—The \$1,500 allotted by sec. 20.46 (3), Stats., to the state pharmaceutical association out of the appropriation made to the state board of pharmacy for the execution of its functions, may not be used for other purposes. To construe the statute otherwise could result in the expenditure of public funds for private purposes contrary to constitutional limitations.

January 22, 1954.

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

You have inquired whether you may properly audit and allow certain vouchers presented to you by the secretary of the state board of pharmacy, calling for payments of \$125 each for the months of July through December, 1953, to the Wisconsin Pharmaceutical Association for the following stated purpose: "Services to the pharmacy profession relative to the promotion of professional standards through educational activities such as professional relations, meetings, conferences, and talks before high school audiences and other groups."

These vouchers are submitted under sec. 20.46 (3), Stats., which reads:

"20.46 All moneys collected or received by each and every person for or in behalf of the state board of pharmacy shall be paid within one week after receipt into the general fund, and are appropriated therefrom for the execution of the functions of the board. Of this there is allotted:

"(3) \$1,500, to the state pharmaceutical association."

Subsec. (3) was added to the statutes by ch. 473, Laws 1919, but so far as we know there has been no attempt to draw upon this appropriation until now. The records of the Wisconsin legislative reference library furnish no information relating to the legislative history of this particular enactment.

Your inquiry in essence presents two questions as you have indicated, although we are going to take the liberty of rewording your questions and reversing their order.

The first question is whether the proposed expenditure comes within the language of the appropriation and the second question is whether the statute constitutes an appropriation of public funds for a private purpose contrary to constitutional limitations.

In answering the first question it must be kept in mind that appropriation statutes are strictly construed and that no money may be paid out of the state treasury except in pursuance of an appropriation by law. See art. VIII, sec. 2, Wis. Const.

The only purpose expressed in the appropriation made by sec. 20.46 is "for the execution of the functions of the board." The fact that \$1,500 of the appropriation is allotted to the state pharmaceutical association in no way changes or broadens that purpose. At the most it constitutes authorization to the board to utilize the association as its agency to the extent of \$1,500 in carrying out the board's activities. Nowhere in ch. 151, Stats., under which the pharmacy board operates, is there any authorization to carry on pharmaceutical educational activities so far as the general public is concerned by giving talks before high school audiences and other groups. The board does have the right under sec. 151.01 (3) and presumably could utilize facilities of the

association in the employment of "inspectors, special investigators, chemists, agents and clerical help for the purpose of carrying on the work of the board" and it has the right to employ an attorney when it deems necessary, although such particular employment would also require the governor's approval under sec. 20.81.

However, at least without further and specific itemization supported by proper receipts, invoices, purchase orders, or contracts, etc., it would be impossible to conclude that the vouchers presented would sustain a proper claim under sec. 20.46 for the execution of any of the functions of the board under ch. 151.

If we are correct in this analysis the vouchers in question should not be honored as not coming within the statute, but even if we are wrong in this position and the appropriation of the \$1,500 to the association is not restricted to functions of the board itself but is an independent and unrestricted appropriation of \$1,500 to a private corporation, the appropriation would be of doubtful validity because it is not for a public purpose. In the absence of definitive language as to the public purpose for which the association is to use the \$1,500, it could conceivably be spent for any purpose, however private, that the officers of the association might devise. The validity of the statute cannot be measured by the use to which the money was actually put, however public and laudable that use might be.

The validity of an appropriation must be judged by the validity of any tax which might be levied to support it, and for the state to appropriate public money for a private purpose would be to take the property of one citizen or group of citizens without compensation and to pay it to others, which would constitute a violation of the equality clause as well as the taking of property without due process of law. See *State ex rel. W.D.A. v. Dammann*, 228 Wis. 147; *Curtis's Admr. v. Whipple*, 24 Wis. 350; *Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis. 167; *Citizens' Sav. & L. Assn. v. Topeka*, 87 U. S. 655.

It must be remembered also that individual pharmacists from whose examination fees, drug store permit fees and license fees, the appropriation made by sec. 20.46 is derived, are not required to belong to the Wisconsin Pharma-

ceutical Association, a purely private and unofficial organization. The legislature has set up no standard for any program the association might undertake, nor has it delegated to the pharmacy board the authority to approve the program of the association. This makes in effect the right to practice pharmacy dependent upon enforced contributions which are used in part at least to finance the unregulated activities of a private association uncontrolled by either the pharmacy board or pharmacists who are not members. Under the doctrine of *State ex rel. Week v. State Board of Examiners in Chiropractic*, 252 Wis. 32, this could be an improper exercise of the police power as well as a taking of property without due process of law and a violation of the equality clause within the meaning of the *W.D.A.* case, *supra*, and other cases cited above in connection therewith.

It is true, of course, that the legislature may utilize a private agency to carry out a public purpose but the question always in a particular case is whether it has done so, and we are unable to conclude here that the public purpose test has been satisfactorily met.

To elaborate on this conclusion we direct your attention to 38 O.A.G. 202, for a very detailed discussion of state appropriations to private associations for promotional purposes and the constitutional limitations which apply to such appropriations. In addition, mention might be made of a number of statutes wherein the public purpose of the appropriation is spelled out one way or another in a manner that is entirely absent in the statute under discussion.

For instance, sec. 20.16 makes an appropriation from the general fund to the state historical society. However, sec. 44.01 specifically makes the society an official agency and trustee of the state.

Sec. 20.61 makes a large number of appropriations from the general fund to various agricultural societies and associations. All of these, however, carry the wording "as provided in sec. 94.80" or similar language. Sec. 94.80 requires these societies and associations to file annual reports with the state department of agriculture setting forth receipts and disbursements and such other information as the department may require. The department must be satisfied that their operations have been efficiently conducted "and

in the interest of and for the promotion of the special agricultural interests of the state and for the purpose for which the society was organized." Then the department of agriculture files a certificate with the director of budget and accounts who draws his warrant and the state treasurer pays to the societies the amounts appropriated by sec. 20.61.

Perhaps other illustrations could be furnished but the foregoing sufficiently emphasize the contrast with sec. 20.46 (3) and the constitutional difficulty that may be encountered if the appropriation be construed as an unrestricted one without a designated public purpose rather than as an appropriation restricted to carry out the functions of the state pharmacy board, and as we have already pointed out, the vouchers on their face do not purport to represent any expenditures incurred in executing the statutory functions of the pharmacy board.

At any rate, and without attempting to fully resolve the questions raised either one way or the other, the wise practice of refusal to audit in doubtful cases should be followed by you in this instance as has been done in numerous other situations recently, leaving the claimant to appropriate legal proceedings to establish the validity of the appropriation and the correctness of the claim presented under such appropriation.

WHR

Marketing and Trade Practices—Unfair Sales Act—Provision of sec. 100.30 (6) (g), Stats., excepting price of merchandise "made in good faith to meet competition" from prohibitions of unfair sales act, construed.

Proof of sale below cost is *prima facie* evidence of criminal intent, under sec. 100.30 (4), Stats., unless justified by one of the exceptions in subsec. (6).

January 25, 1954.

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

You have requested an opinion with reference to the meaning of the unfair sales act, sec. 100.30, Stats., upon a question which you state as follows:

"Some of the large merchandising chains manufacture or otherwise produce certain staple grocery items such as bread, flour, coffee, canned milk, salad dressing and the like. They thus have no 'invoice cost' as that term is used in Section 100.30. They generally sell such articles at a price which is lower than the price at which independent merchants can sell similar items marketed under the trade name or trade-mark of another manufacturer.

"Listed among the exceptions in Section 100.30 is the provision, (6) (g), that the statute is not applicable where 'the price of merchandise is made in good faith to meet competition.' Specifically our question is this: When chain grocers sell items, such as those listed above, of their own manufacture and under their own exclusive trade names, may other grocers sell similar but other branded items 'below cost' to meet the competition of the chains?"

The nature and purpose of the unfair sales act must be taken into consideration in arriving at an answer to your question. The policy of the act is stated in sec. 100.30 (1) in part as follows:

"(1) POLICY. The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. * * *"

Subsec. (2) contains definitions and need not be considered in this opinion. Subsec. (3) provides as follows:

"(3) ILLEGALITY OF LOSS LEADERS. Any advertising, offer to sell, or sale of any item of merchandise either by retailers or wholesalers, at less than cost as defined in this section and any advertising, offer to give, or gift of any item of merchandise contingent upon the sale of any other item of merchandise, with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this section."

Subsec. (4), which defines the criminal offense created by the statute, provides in part as follows:

"(4) PENALTIES. Any retailer who, with the intent of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, shall advertise, offer to sell, or sell at retail any

item of merchandise at less than cost to the retailer as defined in this section; * * * shall be fined not less than \$50, nor more than \$500 for the first offense and not less than \$200 nor more than \$1,000 for the second and each subsequent offense, or, for each offense, imprisoned not less than one month nor more than 6 months, or both. Evidence of any advertisement, offer to sell, or sale of any item of merchandise by any retailer or wholesaler at less than cost as defined in this section shall be prima facie evidence of intent to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor."

Subsec. (5) provides for enforcement by injunction, and subsec. (6) creates certain exceptions in part as follows:

"(6) EXCEPTIONS. The provisions of this section shall not apply to sales at retail or sales at wholesale where:

"* * *

"(g) The price of merchandise is made in good faith to meet competition;

"* * *"

No judicial construction of the exception about "meeting competition" has been found which bears upon this problem. It seems clear that the question is essentially one of fact (cf. *Federal Trade Comm. v. A. E. Staley Mfg. Co.*, (1945) 324 U. S. 746, 758, 65 S. Ct. 971, 976, 89 L. ed. 1338) and that the exception must be construed in the light of the purpose and intent of the rest of the statute, which may be succinctly stated to be to prevent the use of loss leaders as bait to attract customers. Whenever an article is advertised and sold below cost it is presumptively a loss leader, unless it comes within one of the exceptions. Under what conditions, therefore, may an article be sold below cost "to meet competition"?

Examination of a substantial number of cases defining "competition" indicates that the three following definitions are typical:

"* * * Competition exists only where both parties are soliciting purchasers of similar goods in the same territory at the same time." *Silbert v. Kerstein*, (1945) 318 Mass. 476, 62 N. E. 2d 109, 111.

“‘Competition’ is defined as ‘the act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; rivalry as between aspirants for honors or for advantage in business.’ Funk & Wagnalls’ Standard Dictionary.” *Merchants’ Nat. Bank v. Dawson County*, (1933) 93 Mont. 310, 19 P. 2d 892, 896.

“* * * Competition implies a struggle for advantage between two or more forces, each possessing in substantially similar if not identical degree, certain characteristics essential to the contest; and as used in political economy, is thus defined in Funk & Wagnalls’ dictionary: ‘An independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade.’” *Schill v. Remington Putnam Book Co.*, (1941) 179 Md. 83, 17 A. 2d 175, 178.

It is apparent that the legislature did not mean to permit sales of one type of item below cost in order to meet competition in another item. Such conduct, in fact, is the very evil against which the law was directed. For example, suppose dealer A finds himself being undersold by dealer B in some specific item of merchandise, such as brand X canned peas. Assuming that A in good faith believes that B’s price is not itself in violation of the statute, it is apparent that A may reduce the price of brand X canned peas to the price set by B, even though as to A that price is below cost. But A cannot retaliate by selling some other quite unrelated item, for example shoe polish, below cost, in order to meet competition in the field of canned peas. This much appears to be certain. The competition must be *in the same or similar goods*.

It may also be pointed out that a dealer in Madison, Wisconsin, would not be justified in cutting his price for brand X canned peas to a point below cost in order to meet the price for which that article is being sold in Milwaukee or Chicago, even though newspapers carrying the advertised price in the latter two cities may be circulating in Madison. The competition must be for business patronage *in the same territory*. 37 O.A.G. 420, 422.

The question which you have submitted, however, is not quite so simple. It involves competition between articles

which are similar but not identical and which, moreover, attract customers by reason of different brand names.

In the case of bread, for example, we are informed that a certain large grocery chain sells its own bread under its own brand name for 19 cents a loaf in a certain trading area, and also purchases bread manufactured by local bakers, which it sells for 25 cents a loaf. Some customers do not want the bread manufactured by the chain and are willing to pay 6 cents more for bread manufactured by local bakers.

Now the question is whether competing grocers, who buy the bread of local bakeries for 21 cents (which bread they have been selling for 25 cents and which the chain continues to sell for 25 cents) may sell it for 19 cents "to meet competition" from the bread manufactured and sold by the chain.

In view of the fact that the bread of the local bakers apparently has sufficient appeal to customers so that it can be sold by the chain itself for 6 cents more per loaf than the price of the chain's own bread, it seems apparent that there is no such identity as would justify independent dealers in cutting the price of local bread to compete with what the public evidently considers an inferior product. If a loaf for which at least some members of the public are willing to pay 25 cents were to be advertised and sold for 19 cents, it would be quite apparent that it was being used as a loss leader and that the claim that the price was cut in good faith to meet competition could not be sustained.

On the other hand, if a product produced and sold by a chain is in actual price competition with a product of like quality and size produced by someone else and sold by competing retailers, then the competing article could lawfully be sold at the same price as the chain article, even though that be below "cost to retailer" as defined in the statute. In that case it would not be a loss leader used as bait to get customers, but would be priced in accordance with competitive conditions in the trade.

As pointed out above, these are questions of fact which have to be determined in each specific case. The same point was made in 37 O.A.G. 420, 422, dealing with the exception of "bona fide clearance sales," sec. 100.30 (6) (a).

In that opinion, however, it was stated that in criminal prosecutions "the state must prove an intent to violate the statute beyond a reasonable doubt," citing *State v. 20th Century Market*, (1940) 236 Wis. 215, 294 N. W. 873, and *State ex rel. Heath v. Tankar Gas, Inc.*, (1947) 250 Wis. 218, 26 N. W. 2d 647. The statement is technically true, but it should be pointed out that after the decision in the *20th Century Market* case, subsec. (4) was amended to make the sale below cost *prima facie* evidence of the intent required. The *Heath* case does not deal with this question. It appears that under the present statute proof of sale below cost, not shown to be included in the statutory exceptions, is a *prima facie* case of violation without further proof of criminal intent. *State v. Ross*, (1951) 259 Wis. 379, 385-386, 48 N. W. 2d 460.

WAP

Automobiles and Motor Vehicles—Motor Vehicle Department—Allotment of Registration Fees to Municipalities— Under sec. 86.35 (1), Stats. 1953, the 11 per cent allotment therein provided is applicable only to the fees collected for the specific vehicles registered under sec. 85.01 (4) (c), Stats. All moneys collected under the other paragraphs specified in sec. 85.01 (4), Stats., are subject to the 20 per cent allotment rate.

January 25, 1954.

MOTOR VEHICLE DEPARTMENT.

You request my opinion upon the following question:

"[Under sec. 86.35 (1), Stats., as renumbered and amended by ch. 636, Laws 1953] are we to allot 20 per cent of all fees collected under 85.01 (4) (cc), 85.01 (4) (cd), 85.01 (4) (dm), 85.01 (4) (e), 85.01 (4) (f), 85.01 (4) (cm) and 85.01 (4) (eL)? All of these are various classes of trucks, tractors, trailers, semitrailers and farm trucks, and as you will note are licensed under sections other than 85.01 (4) (c)."

Your question calls for my opinion as to the meaning of ch. 636, Laws 1953, which reads as follows:

"86.35 (1) From the appropriation made by s. 20.49 (8) there shall be allotted annually on December 15, 1954, and annually thereafter, to each town, village and city, a privilege highway tax in an amount as herein set forth in lieu of the general property tax assessed prior to 1931 on motor vehicles. Each town, village and city shall receive an amount equal to 11 per cent of the net registration fees derived from motor vehicles customarily kept in such town, village or city in the fiscal year ended the previous June 30 and registered under the provisions of s. 85.01 (4) (c) and 20 per cent of the net registration fees derived from all other motor vehicles registered under s. 85.01, but in no case less than the approximate amount collected by said municipalities from the property tax on motor vehicles levied in the year 1930 as computed under ch. 22, laws of 1931. On December 15, 1953, the allotments to municipalities in lieu of general property tax on motor vehicles shall be made according to s. 20.49 (2) of the 1951 statutes."

It is my opinion that the 11 per cent allotment is applicable only to the fees collected for the specific vehicles registered under sec. 85.01 (4) (c) as repealed and recreated by ch. 320, Laws 1953. All moneys collected under paragraphs (cc), (cd), (dm), (e), (f), (cm) and (eL) are subject to the 20 per cent allotment rate. This is so by virtue of the plain, unambiguous language of the statute. There appears to be no reasonable basis for any other interpretation.

SGH

Platting Lands—Requirements for Recording—The term “drawn” as used in sec. 236.04 (3), Stats., does not mean “printed.”

January 26, 1954.

HERBERT J. MUELLER,
District Attorney,
Winnebago County.

You have inquired whether a plat printed with a proper ink and on the proper paper by means of a metal plate or die is entitled to record under the provisions of sec. 236.04 (3), Stats., which requires that the plats be “drawn.” The statute in question reads as follows:

“All plats shall be *drawn* with waterproof nonfading black ink on a scale showing not more than 100 feet to an inch, and the scale used shall be indicated on the plat graphically.”

Essentially your question is whether the word “drawn” means, or may be interpreted to mean, “printed.”

In my opinion it cannot.

It is one of the elementary rules of statutory construction that ordinary words used in a statute must be given a common, ordinary or approved meaning. *Van Dyke v. Milwaukee*, 159 Wis. 460, 146 N. W. 812; *Sharpe v. Hasey*, 134 Wis. 618, 114 N. W. 1118.

This rule is confirmed by our Wisconsin statutes. Sec. 370.01 (1) provides that:

“All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.”

The word “draw” or “drawn” has no technical or peculiar meaning in law. The transitive verb “draw” of which “drawn” is a past participle is defined in Webster’s New International Dictionary, 2d Ed., as follows:

“14. To produce by, or as if by, tracing a pen or other instrument of delineation over a surface; as, to *draw* a line or picture; also, to represent by lines drawn; to make thus a picture of; to delineate;”

Further, in the same dictionary, the term "drawing" is defined:

"3. a. The act or part of representing an object or outlining a figure, plan, or sketch, by means of lines; delineation, as by pen, pencil, or crayon; drafting."

Further, the primary meaning of the verb "draw" as shown by all of the definitions of the word when used as a transitive verb is given by Webster as follows:

"1. To cause to move continuously forward by force applied in advance of the thing moved; to pull; drag; to cause to follow; to haul in a cart or wagon;"

That is, in its primary meaning the word "draw" is synonymous with "pull." When used in reference to the production of a pictorial representation, it refers to such a representation made by drawing or pulling a pen, stylus, pencil, crayon, or other writing instrument over the surface of the material which is to receive the impression.

The term "printing" on the other hand from the time of Johannes Gutenberg has always referred to the production of a representation by a single impression of a previously prepared type plate or die.

Under the circumstances it would appear to me to be an act of legislation to declare that the word "drawn" as used in the statute has the same meaning as the word "printed."

Whether a printed plat might ultimately be held by our court to be a substantial compliance with the terms of the statute is a question that can be decided only by the court itself. In the case of *Superior v. Northwestern Fuel Co.*, (1917) 164 Wis. 631, 161 N. W. 9, the court held that the platting statute should be given a broad construction and that substantial compliance therewith would be sufficient. However, this case did not discuss the precise question involved herein.

In any event, the doctrine of substantial compliance is not applicable at the time a plat or other document is tendered for record. It is a doctrine, equitable in nature utilized after the fact to waive minor defects in proceedings which otherwise might cause severe financial loss all out of proportion to the significance of the deficiency complained of. When,

however, a particular procedural requirement of a statute is under scrutiny, and a ministerial officer must decide whether the specific requirement has been complied with, it would appear both unsound and unwise for that officer, or his counsel, to speculate in advance upon the degree of compliance that might satisfy some court at a later date. We cannot safely assume that a printed plat would be in substantial compliance with the statute.

RGT

Motor Vehicle Department—Traffic Officers—Powers—
State traffic patrol has no authority under sec. 110.07, Stats., to make complaints and testify in actions for violation of county or local traffic ordinances.

February 4, 1954.

MELVIN O. LARSON, *Commissioner,*
Motor Vehicle Department.

You have requested an opinion as to whether a member of the state traffic patrol is authorized to sign complaints for violation of county traffic ordinances and to appear in behalf of the county in court proceedings resulting from such complaints.

The state traffic patrol exists by virtue of sec. 110.07, Stats. Subsec. (1) (as amended by ch. 326, Laws 1953) provides in part as follows:

“The commissioner of motor vehicles shall employ not to exceed 70 traffic officers to enforce and assist in the administration of the provisions of chapters 85, 110 and 194, or *orders, rules or regulations* issued pursuant thereto. Such traffic officers shall have the powers of sheriff in the enforcing of the above chapters and section and *orders, rules or regulations* issued pursuant thereto. * * *”

Sec. 110.07 (2) provides in part as follows:

“The traffic officers employed pursuant to the provisions of this section shall constitute a state traffic patrol to assist local enforcement officers wherever possible in the regulation of traffic and the prevention of accidents upon the public highways. * * *”

It will be observed that the state traffic officers have the duty of enforcing the provisions of chs. 85, 110 and 194, Stats., "or orders, rules or regulations issued pursuant thereto." Under sec. 110.06 (1) the commissioner of the motor vehicle department has power "to make such reasonable and uniform *orders, rules and regulations* not inconsistent with law as he may deem necessary" etc. It is those "orders, rules and regulations" which are contemplated by sec. 110.07. It is true that under sec. 85.84, Stats., the local authorities may adopt ordinances, resolutions, rules or regulations in strict conformity with the provisions of ch. 85, but the fact that sec. 110.07 (1) does not refer to ordinances and resolutions indicates clearly that the legislature did not have county and municipal traffic ordinances in mind when it authorized state traffic officers to enforce "orders, rules or regulations."

Nor does the provision of sec. 110.07 (2), requiring the state traffic patrol "to assist local enforcement officers wherever possible in the regulation of traffic and the prevention of accidents upon the public highways," authorize the state traffic officers to make complaints under local ordinances rather than under the state law. The state traffic patrol can extend such assistance to local officers and still make complaint under the state law in case of a violation.

Prosecution for violation of county and municipal ordinances is governed by the statutes relating to proceedings in justice courts in civil actions. The statute under which warrants are issued in such cases is sec. 301.10, which provides in part as follows:

"301.10 The plaintiff is entitled to a warrant to arrest the body of the defendant upon filing with the justice an affidavit, made by him *or in his behalf*, showing to the satisfaction of the justice either:

"* * *

"(4) That the defendant has incurred a penalty or forfeiture by the violation of some law, specifying the same, for which the plaintiff has a right to prosecute. The affidavit shall state the facts within the knowledge of the affiant, constituting the grounds for a warrant."

In order to commence a prosecution under the foregoing statute it is necessary that the officer state under oath in

his complaint "that he is acting in behalf of" the county or municipality named as plaintiff in the action. *South Milwaukee v. Schantzen*, (1950) 258 Wis. 41, 44 N. W. 2d 628. There is no statute authorizing members of the state traffic patrol to act "in behalf of" any county or municipality in commencing prosecutions for violation of their ordinances.

You are therefore advised that the duties of the state traffic patrol do not include the swearing out of complaints for violation of county or municipal traffic ordinances, or testifying in court on behalf of counties and municipalities in such actions. Where a state traffic officer makes an arrest, he should make a criminal complaint for violation of the state law.

WAP

*Automobiles and Motor Vehicles—Occupational Driver's License—Courts—Clerk's Fees—*Under sec. 85.08 (25c), Stats., petitions for occupational drivers' licenses do not institute actions or special proceedings in the courts but the proceedings before the judge are administrative. No clerk fees or suit tax may properly be charged under sec. 59.42, Stats., or otherwise.

February 23, 1954.

HERBERT J. MUELLER,
District Attorney,
 Winnebago County.

You have inquired whether a suit tax and clerk's fees are payable in proceedings for the granting of an occupational driver's license.

Sec. 85.08 (25c) (a) as amended by ch. 338, Laws 1953, provides so far as material here:

"If a person has had or will have his license revoked because he has been convicted of operating a motor vehicle while under the influence of intoxicating liquor, and if such person is engaged in an occupation or trade making it essential that he operate a motor vehicle, that person may file with a judge of a court of record or of a municipal court having criminal jurisdiction in the county of residence a verified petition setting forth in detail his need for operating a motor vehicle. Thereupon, if the petitioner has not been convicted of any such offense within the 18-month

period immediately preceding the present conviction, the judge may order the commissioner to issue an occupational license to such person. * * *

Sec. 260.02, Stats., provides that remedies in the courts of justice are divided into actions and special proceedings. Sec. 260.03 defines an action as an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. This section further provides that every other remedy is a special proceeding.

Under ch. 662, Laws 1953, sec. 59.42 was amended in part to read as follows:

“59.42 Except as otherwise provided in the statutes the clerk of circuit court and the clerk of any other court of record (in all actions and proceedings civil or criminal brought under jurisdiction concurrent with the circuit court, except those handled under essentially justice court or small claims procedure) shall collect the following fees:

“* * *

“(2) In civil actions and cognovit judgments at the times indicated below, for all necessary filing, entering, docketing and recording, drawing of jurors, swearing of witnesses, jurors and officers to take charge of jurors, placing cases on the calendar and taxing costs (but no fee other than suit tax shall be paid by counties, municipalities or school districts initially or upon change of venue, nor shall fees other than suit tax be paid in judicial reviews of industrial commission orders or awards; the state shall pay fees but no suit tax):

“Kind of action or proceeding	At time of filing initial document required for commencement of action or proceeding (in addition to state tax)	
“(a) Cognovit -----		\$6
“(b) All special proceedings independent of an action taken at the instance and for the benefit of one party without notice to or contest by any person adversely interested_		\$4
“(c) All other actions and special proceedings_		\$8”

The basic question that has to be decided here is whether a petition for an occupational driver's license is filed in *court* so that it becomes an action or special proceeding. Note that the statute directs that the petition be filed with a *judge* of a court of record or of a municipal court, and note also that it is the *judge* and not the *court* who orders the issuance of an occupational license.

Our supreme court has drawn a sharp distinction between matters which are heard by the *judge* rather than the *court*. See *Tobin v. Willow River Power Co.*, 208 Wis. 262; *Breckheimer v. Dane County*, 209 Wis. 131; *Highway Committee of Jefferson County v. Guist*, 235 Wis. 18; *State ex rel. Department of Agriculture v. Aarons*, 248 Wis. 419; and *Thielman v. Lincoln County Highway Committee*, 262 Wis. 134.

These cases all related to the exercise of the power of eminent domain under condemnation statutes, but they emphasize the fact that where, pursuant to statute, proceedings are had on an application to the judge rather than the court, the entire matter is purely statutory so that no judgment and no proceeding whatsoever is authorized in court. Any judgment entered would be void and the judge has no power to award costs.

In 30 O.A.G. 418, 419, this office expressed a doubt that the power exercised under sec. 85.08 (25c) was judicial, as the power is conferred upon the magistrate or the judge and not upon the court.

The same view was taken by the supreme court in *State ex rel. Marcus v. County Court*, 260 Wis. 532, where it was held that under sec. 85.08 (25c) the "judge" of a court of record was authorized to order the commissioner of the motor vehicle department to issue an occupational driver's license but that the statute conferred no judicial power on the county or other courts, so that any order issued pursuant to the statute, including an order to show cause, is solely an administrative order and not a judicial order. See also *State v. Marcus*, 259 Wis. 543, where it was held that the judge in entering an order directing the issuance of an occupational license was acting solely in an administrative capacity and in so acting was without power to punish the commissioner for contempt in failing to issue the license.

Since proceedings under sec. 85.08 (25c), Stats., are not in court, they are neither actions nor special proceedings. The petition therein mentioned is not required to be filed with the clerk of the court and the statutes relating to fees of the clerk of court and suit tax have no application. The entire matter being administrative and statutory, it is governed by the well known principle 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. Since there are no statutory provisions for clerk fees or state tax in a proceeding under sec. 85.08 (25c), Stats., before a judge acting in an administrative capacity rather than as a court, none may be imposed.

WHR

Cities—Prisoners in County Jail—Sec. 62.24 (2) (b), Stats., relating to payment by the city to the county for the expense of city prisoners in county jails, covers only out-of-pocket expenses for food, medical care, laundry, and like items, and does not justify a "lodging" charge based upon any cost accounting share of salaries, heat, light, gas, water, insurance, supplies, etc.

February 26, 1954.

JOHN J. RUTCHIK,
District Attorney,
Kenosha County.

We are informed that a controversy has arisen between the city of Kenosha and Kenosha county over the proper interpretation to be given to that part of sec. 62.24 (2) (b), Stats., reading as follows:

"* * * Prisoners confined in the county jail or in some other penal or correctional institution for violation of a city ordinance shall be kept at the *expense* of the city and such city shall be liable therefor."

The question is as to the proper scope of the word "expense."

Prior to October 1952, the practice of the county was to charge the city for food, medical care, and other out-of-pocket items. Presently there is no controversy as to the propriety of such charges by the county, but since October 1952, the county has also been billing the city for "lodging" of prisoners at a figure which is based upon the cost of salaries, heat, light, gas, water, supplies, laundry, linen, insurance, and the like.

It is the position of the county that all legitimate expenses necessary to the operation of the jail should be included under the item of "lodging," and the city contends on the other hand that if the statute is so construed, the city is in effect paying twice because when the county sets up its budget and levies a tax therefor it includes all of the items in the tax which is apportioned among the various municipalities of the county.

The limitations of the word "expense," as used in this statute, are by no means clear or express and no attempt has been made in the statute to set up the expense on any kind of a cost accounting per capita basis with, for instance, allowance for depreciation, as is done in some of our statutes relating to institutional cases. Perhaps this is a matter which should receive further legislative study, but in the meantime the question arises as to why the interpretation of the statute should suddenly be changed in 1952 without any change in the wording of the statute.

It has been the rule of construction in this state for more than 75 years at least that: "Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it." *Harrington v. Smith*, (1871) 28 Wis. 43, 68.

In the present instance the practical construction given the statute prior to 1952 is not without respectable support. In *State ex rel. Leis v. Ferguson*, 149 Ohio St. 555, 80 N. E. 2d 118, 120, it was held that "expense" is that which is expended, laid out, or consumed; an outlay, charge, cost, or price. "Expense" has been held to mean an actual and hon-

est disbursement. *H. B. Humphrey Co. v. Pollack Roller Runner Sled Co.*, 278 Mass. 350, 180 N. E. 164, 166, and it has been held, for instance, that "expenses for the care of a sick person" means only such expenses as pertain to attendance, nursing, board, and treatment, and not to expense of erecting and furnishing a building in which such care is furnished. *L. H. Kurtz Co. v. Polk County*, 136 Iowa 419, 109 N. W. 612, 613.

The Iowa case cited above involved a statute relating to a detention hospital. The sections which provided for imposing a charge upon patients detained in the hospital spoke of the "expense incurred for the care of such persons" and the court said at p. 613:

"* * * Given its plainest and most obvious meaning the phrase 'expenses for the care' of a sick person means only such expenses as pertain to attendance, nursing, board, and treatment, and certainly not to the expense of erecting and furnishing the building in which such care is furnished. If a sick person admitted to one of our city hospitals is received with the assurance that the charge against him will be limited to the expense incurred in his care while he remains an inmate, he could hardly be blamed for manifesting some surprise if, on being discharged, he finds the cost of erecting, heating, and furnishing the hospital charged up in his bill. We are not disposed to enlarge the apparent meaning of the statute to make possible such an inequitable result. The patient is not to be, and ought not to be, charged for any expense other than such as has been reasonably incurred in his care, giving that term its usual and ordinary signification. As to other expenses, if any, and especially expenses made in establishing and fitting up property of a permanent character which remains the property of the city or county, while the statute does not in express terms say they are to be paid by the county, the provision that they shall be certified to, and audited by, the board of supervisors clearly indicated that such was the legislative intent.
* * *"

In view of the practical construction given the statute prior to 1952 and following the substance of the reasoning of the Iowa supreme court, it is our conclusion that the word "expense" as used in sec. 62.24 (2) (b) relates to actual out-of-pocket expense by the county for food, medical care, laundry, and like items and that in the absence of more

definitive legislation no per capita charge may be made for "lodging" based upon any cost accounting share of salaries, heat, light, gas, water, insurance, supplies, etc.

WHR

Public Assistance—Old-Age Assistance Lien—Mortgages—Merger—Where the value of land on which a county has an old-age assistance lien under sec. 49.26 (5), Stats., is insufficient to satisfy the lien, the county may, in lieu of foreclosing the lien, take conveyance from heirs of the old-age assistance beneficiary under circumstances in which merger by conveyance from mortgagor to mortgagee would be proper.

March 4, 1954.

THORPE MERRIMAN,
District Attorney,
Jefferson County.

You have submitted the following facts:

"Recipient of old-age assistance owns real estate in Jefferson County on which a lien has been filed; she dies, leaving no personal property; the total amount of old-age assistance granted is \$7647.07 and the lien is on real estate appraised at \$5000.00, indicating no surplus beyond the amount secured by lien, and the only heir releases his interest to Jefferson County by Quit Claim Deed which county in turn, to effect collection, had a Certificate of Heirship Proceeding and proceeds to sell such real estate on public auction receiving the \$5000.00 appraised price.

"After deed given, the attorney for buyer objects that there may be some other claims which would come in as liens against this real estate under the wording of a part of Sec. 49.26 (5).

"There is no personal property; the funeral expenses paid; there are no claims for last sickness even though decedent died December 5, 1952; and the total secured claim for old-age assistance, protected by the lien is about 50% more than was realized on the sale."

With respect to those facts you ask the following questions:

"Where a county seeks to collect old-age assistance granted by foreclosure or otherwise, are there any claims that have priority over such claim under Sec. 49.26 (5) outside of administration expenses?

"Also, would you indicate whether procedure of Certificate of Heirship is proper in such cases where the heirs recognize the claim is more than the value of the real estate and are willing to Quit Claim to the county which, in turn, sells the property to apply on the lien claimed."

As you have pointed out, the supreme court has held that the lien under sec. 49.26 (4), Stats., is comparable to the lien under a mortgage. *Goff v. Yauman*, 237 Wis. 643. The opinion was given in 27 O.A.G. 751 that it has priority over unsecured claims against the lienor, even as to claims which would otherwise have priority in the administration of the lienor's estate.

The lien is a statutory one, however, so that the extent of its priority depends on the statutory provisions by which it is created. There has been a change in that respect since the above opinion was given. Sec. 49.26 (5) now provides in part:

"* * * 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 * * *."

The priority given by the foregoing provision extends only to "amounts allowed by court in the estate" of the deceased beneficiary. Until a claim has been allowed as provided in the statute, it does not constitute a lien but at best only a potential lien; and unless the claim falls within one

of the enumerated classes, as for administration and funeral expense, etc.. it does not even constitute the basis for a potential lien.

The opinion was given in 41 O.A.G. 300 that if the personal property of an old-age assistance beneficiary is insufficient to pay debts and costs of administration, sec. 316.01 (1) of the statutes makes real estate which is subject to a lien for old-age assistance, subject to administration proceedings if such proceedings are undertaken. If petition for administration is made and granted, sec. 49.26 (5) provides that certain claims shall have priority over the old-age assistance lien.

Your factual statement indicates that there has been no petition for administration. The supreme court held in *Scholl v. Adams*, 206 Wis. 174, 176, 239 N. W. 452:

“* * * that no debt or claim against any deceased person which was not a lien upon his real estate before his death shall be a lien upon or valid claim against any such real estate for the payment of which such real estate can be sold by an executor or administrator unless certain steps are taken within three years from the death of such decedent. * * *”

The foregoing decision was based on secs. 315.01 (now sec. 316.01 (2)) and 315.02, Stats. Under the above decision the enforcement of any claims having priority to the old-age assistance lien under sec. 49.26 (5) would be barred three years after the death of the beneficiary. Until the end of that period, however, there is a possibility that at least the cost of the administration expenses might be charged against the realty if petition for administration should be made.

Whether there are any other claims within the classifications given priority by sec. 49.26 (5) would seem to be a question of fact. If there are none, then no debts of the decedent could take priority over the old-age assistance lien. The existence, or lack of existence, of debts having priority under sec. 49.26 (5) would be established of record by a judgment on claims in administration proceedings. What other means might be adequate to satisfy a prospective purchaser of the nonexistence of any such claims would doubtless vary according to the circumstances.

Sec. 49.26 (7), Stats., provides that old-age assistance liens shall be enforceable in the manner provided for enforcement of mechanics' liens. Some of the methods for enforcement of the lien, including enforcement in administration proceedings, are outlined in 41 O.A.G. 300. Under proper circumstances a county might, in lieu of foreclosing its lien, take a conveyance of title from the lienor or his successors, thus effecting a merger of title by inheritance and the lien. A conveyance from the heir whose title is evidenced by a certificate of heirship, however, can convey no greater interest than he had. In a case where the value of the realty is insufficient to cover the value of the lien, this would amount only to an equity of redemption.

In 37 Am. Jur. 429, it is said:

"Ordinarily, a transfer of the interest of the mortgagor in mortgaged property to the mortgagee operates as a merger of the two estates, whether the interest transferred by the mortgagor to the mortgagee is a legal title or an equity of redemption. * * *"

See, also, *Clark v. Clark*, 76 Wis. 306, 45 N. W. 121.

The various limitations upon the power to transfer title to a mortgagee through merger are discussed upon the pages of the above text following the excerpt quoted.

Even assuming that the procedure followed effects a valid merger of the interests of the lienor and lienee, as the reported facts indicate is true with respect to the interests of the county and the old-age assistance beneficiary in your case, the resulting estate in the realty can be no greater than the combined interests. The merger cannot extinguish the interests of third parties which have priority over the merged interests. See, for example, *Crane v. Cook*, 61 Wis. 110, 20 N. W. 673.

For practical purposes, it might be possible to meet the requirements of prospective purchasers for protection against potential claims under sec. 49.26 (5), by some kind of title insurance, until the right to establish such claims is wholly extinguished by the lapse of time.

BL

Public Assistance—County Administration—De Facto Officers—Officials disbursing social security aids for county department of public welfare under secs. 46.30 to 46.35, Stats. 1951, continue to be *de facto* officers upon the repeal of those sections by ch. 513, Laws 1953, effective January 1, 1954, where no steps have been taken to reorganize the department under ch. 513 and no new appointments have been made, and the aids which they have disbursed are subject to state reimbursement as provided by sec. 49.51 (3) (b), Stats.

March 4, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You state that a county agency administering social security aids was organized and was operating pursuant to secs. 46.30 to 46.35, Stats., immediately prior to January 1, 1954. As of that date ch. 513, Laws 1953, became effective. This chapter repealed the above sections and created sec. 46.22 (1), which among other things states:

“In every county having a population of less than 500,000 there is hereby created a county department of public welfare. * * *”

Such department consists of a county board of public welfare, a county director of public welfare, and necessary personnel. The statute provides that the county board of supervisors may continue to authorize the county judge to administer the aids mentioned in sec. 49.51 (1) (1951 Stats.).

As we understand it, in the county in question the county judge was not administering these aids as of January 1, 1954, and apparently the county board of supervisors has taken no steps to implement the provisions of ch. 513, Laws 1953, although it proposes to do so at the regular spring meeting of the board.

Under these circumstances you inquire whether the state department of public welfare may properly reimburse the county under sec. 49.51 (3) (b), Stats., for the expenses of child welfare services rendered between January 1, 1954 and the date when the county board takes steps to implement the provisions of ch. 513.

Sec. 49.51 (3) (b) provides in part:

“(b) *State aid.* The state shall also reimburse the counties 25 per cent of the expenditures incurred in the administration of old-age assistance, aid to dependent children, aid to the blind, and aid to totally and permanently disabled persons, and for related welfare services performed by a county agency administering such aids in co-operation with or at the request of the state department pursuant to express authorization; * * *.”

The provisions of sec. 46.22, Stats., created by ch. 513, Laws 1953, are not materially different from the provisions of secs. 46.30 to 46.35 under which the county agency was set up. The old law also provided for a county department of public welfare consisting of a county board of public welfare, a county director of public welfare, and necessary personnel. Sec. 46.22 spells out the provisions and duties in somewhat greater detail and provides that the county board of public welfare shall consist of three, five, or seven members, whereas the old law provided for a five-member board.

Ch. 513 contains no requirement that the county board of supervisors shall take any particular steps in transforming the old department into a new department. However, in the interests of orderly procedure it would seem that the county board of supervisors ought to name a new county board of public welfare under sec. 46.22 (2), and the draftsmanship of ch. 513 is subject to criticism for not having set up some provisions for the period of transition.

However, it is concluded that until the county board of supervisors acts, the old members of the county board of public welfare should be considered as *de facto* officers of the new board and the old county director of public welfare and other official personnel should likewise be deemed to be acting in a *de facto* capacity. When an office is abolished and another substituted in its place and the former officer holds over until a new officer is chosen, he is a *de facto* officer for such period. *Germany v. Pope* (Tex. Civ. App.), 222 S. W. (2d) 172, 176.

The whole doctrine of *de facto* officers is founded on public policy and necessity in order to protect the public and individuals where they may become involved in the official

acts of persons discharging the duties of an office without being lawful officers. Accordingly the law validates the acts of *de facto* officers as to the public and third persons in furtherance of the above policy. See 43 Am. Jur., Public Officers, §470.

A stronger case for applying the doctrine could scarcely be imagined than that arising under the facts here. If the doctrine were not applied here, it would mean that all the social security aids disbursed in the county in question since January 1, 1954, would be illegal, there would be personal liability on the part of the officials involved as well as on the part of the recipients, and the county would lose the reimbursement provided by sec. 49.51 (3) (b), Stats., with the possibility of malfeasance charges being made against county board members because of their failure to act, to mention just a few of the possible tragic consequences in passing.

You are therefore advised that the county should be reimbursed under sec. 49.51 (3) (b) for the expenses of child welfare rendered between the effective date of ch. 513, Laws 1953, and the date of such action as the county board of supervisors may take in reorganizing the county department of public welfare under said ch. 513. See also 26 O.A.G. 52.

WHR

Public Welfare Department—Public Assistance—Aid to Dependent Children—The department of public welfare has the responsibility under sec. 49.19 (8) (b), Stats., to make audit adjustments so as to prevent any county from receiving reimbursement from state and federal funds for aid to dependent children which is given in a manner so as not to conform with the provisions of sec. 49.19 (5), Stats., requiring that aid pursuant to such section shall be the only form of public assistance granted to the family for the benefit of such child.

March 4, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask the following question: "In the event that general relief is granted by the agency administering the aid to dependent children program simultaneously with a grant of aid to dependent children contrary to the provisions of section 49.19 (5), does the department have the responsibility to take an audit exception with respect to the amount that has been granted as aid to dependent children in which aid there is state and federal financial matching?"

Sec. 49.19 (5) reads in part:

"Aid pursuant to this section shall be the only form of public assistance granted to the family for the benefit of such child * * *"

The department is required by sec. 46.206 (1), Stats. 1953, to "supervise the administration of * * * aid to dependent children." One of the primary objectives in providing for supervision by the state department is to insure that the general standards fixed by the legislature are observed in administration of the law.

Sec. 49.19 (8) (b) provides that the department shall certify to the director of budget and accounts one-third of the amount paid by the county plus federal aid received for such expenditures if "the department is satisfied that the amount claimed is correct and that the aid allowed has been granted in compliance with the requirements of this section." By inclusion of the above quoted provision, the legislature has implied that a county is not to be reimbursed

unless the aid allowed has been granted in conformity with the statutory provisions.

Where both relief and aid to dependent children are granted to the same family in a manner contrary to sec. 49.19 (5) above quoted, the department has not only the authority but the duty under sec. 49.19 (8) (b) to take action to compel observance of the law.

It is immaterial whether general relief and aid to dependent children are administered by the same or separate county agencies. It is the duty of the county agency administering aid to dependent children to conform to the statutes governing that type of assistance, and to grant aid only under the conditions provided in sec. 49.19.

Upon the conclusion that it is the function of the state department to exercise supervision to insure compliance with the law, there remains the question what steps it is authorized or required to take. As a statutory body its powers are limited to those conferred by statute. In addition to authority expressly conferred, officers may have "by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted." *Kasik v. Janssen*, 158 Wis. 606, 610, 149 N. W. 398.

Sec. 49.50 (9), Stats., reads in part:

"HEARING TO INSURE PROPER ADMINISTRATION. The department may at any time terminate payment of state or federal aid on any grant of * * * aid to dependent children * * * which may have been improperly allowed or which is no longer warranted due to altered conditions. Such action shall be taken only after thorough investigation and after fair notice and hearing. Such notice shall be given to the recipient of the assistance, the county clerk, and the county officer charged with the administration of such assistance, and their statements may be presented either orally or in writing, or by counsel. Any decision of the department terminating the payment of state and federal aid shall be transmitted to the county treasurer, and after receipt of such notice he shall not include any payments thereafter made in such case in the certified statement of the expenditures of the county for which state or federal aid is claimed."

The foregoing provision might be construed to indicate a legislative intent that no county should be denied state and

federal reimbursement for aid improperly granted except upon the procedure there outlined, including a hearing. The provision is prospective in its terms and would apply only to future payments.

As against this provision there is the provision limiting the department's authority to certify reimbursement to counties in the first instance, to aid which the department "is satisfied * * * has been granted in compliance with the requirements of this section."

There is also the provision in sec. 49.19 (8) (b) that if reimbursement has been made on the basis of certified statements from county officers "any necessary audit adjustments for any month of current or prior years may be included in subsequent certifications." Our supreme court made the following comment with respect to the word "audit" in *Travelers Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 106-107:

"* * * The word 'audit' is sometimes restricted to a mere mathematical process, but generally is extended to include the investigation, weighing of evidence, and deciding whether items should or should not be included. *People ex rel. Ramsdale v. Orleans Co.* 16 Misc. 213, 38 N. Y. Supp. 890; *People ex rel. Hamilton v. Jefferson*, 35 App. Div. 239, 54 N. Y. Supp. 782; *People ex rel. Brown v. Board*, 52 N. Y. 224; *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *Territory ex rel. Donzelmann v. Grant*, 3 Wyo. 241, 21 Pac. 693; *In re Clark*, 5 Fed. Cas. 853. * * *"

It is possible that the statutory authorization to make audit adjustments for past months, so as to deduct for payments of aid which were not made in compliance with the statutes, might be construed as relating only to past payments with respect to which future payments had been stopped through the procedure described in sec. 49.50 (9). The opinion in 42 O.A.G. 193 did not deal with that aspect of the question, because it involved audit adjustments for improperly allocated collections. The opinion in 26 O.A.G. 576, however, was to the effect that the state department might offset aid improperly extended in the past against future allotments when making reimbursement to counties; and no reference was made to the necessity for hearing

under the provisions of sec. 49.50 (5) of the statutes then in effect, which are now incorporated in substance in sec. 49.50 (9). The opinion in 26 O.A.G. 576 was based largely on a rule of the department providing for audit adjustments.

Shortly after the opinion was issued, the legislature incorporated in the statutes provisions for audit adjustment similar to those in the earlier departmental rule (ch. 110, Laws 1939) but included no requirement that an adjustment must be preceded by hearing under sec. 49.50 (9). In view of the opinion in 26 O.A.G. 576, it would seem that the legislature would have so stated in ch. 110, Laws 1939, if it had intended that a deduction or disallowance might never be made without a hearing.

Sec. 46.22 (7), Stats., created by ch. 513, Laws 1953, provides in part that county administrators "shall observe all rules and regulations promulgated by the department pursuant to sec. 49.50 (2) and shall keep such records and furnish such reports as the department requires in relation to their performance" of duties in connection with administration of social security aids. It was recognized in 39 O.A.G. 403 that the legislature intended the department's supervisory and rule-making power to be coextensive with the requirements for obtaining federal grants. I find nothing in the federal regulations which requires a hearing before audit disallowances may be made for aid improperly granted by a county.

The procedure outlined in sec. 49.50 (9) appears to be designed for application to cases where there is a question as to the need of a particular recipient, or where there is some basis for belief that the administrative discretion has been arbitrarily exercised. It appears to be intended to counterbalance sec. 49.50 (8), so as to supply a procedure for reviewing grants as well as denials of grants. I do not believe the legislature intended to make the time-consuming investigation and procedure a prerequisite to withholding state and federal funds where the records of a county show on their face a direct violation of a positive statutory requirement. The legislature could not have intended to require an expensive, time-consuming procedure

to determine a question which has already been resolved, in effect, by admission in a county's records. Secs. 49.19 (8) (b) and 49.50 (9) can be harmonized by applying each to appropriate situations.

It is my opinion that sec. 49.19 (8) (b) imposes upon the department the duty to withhold state and federal funds for aid to dependent children, which a county's records establish was given in violation of sec. 49.19 (5), and that the department's authority may be exercised either by disallowance in current certifications or by offsetting past payments through audit adjustments.

BL

Historical Society—Appropriations and Expenditures—Statutes—Construction—State historical society may use funds appropriated by sec. 20.16 (5), Stats., and not otherwise earmarked for specific purposes, to hire personnel in the unclassified service under sec. 16.08 (2) (c), Stats., in instances where competitive examinations would be impractical.

March 23, 1954.

CLIFFORD L. LORD, *Director,*
State Historical Society.

You have called our attention to sec. 20.16 (5), Stats., which provides:

“(5) All fines, fees or other money collected by said society shall be paid within one month after receipt into the general fund and are appropriated therefrom to the state historical society as an additional appropriation to carry out its powers, duties and functions.”

We are asked whether funds from the foregoing appropriation may be used by the state historical society to hire employes in the unclassified service under sec. 16.08 (2) (c), Stats., within the meaning of the words, “and any per-

son or persons whose entire salary is paid from funds re-appropriated to said society by section 20.785 where competitive examination is impractical.”

Sec. 20.785 was repealed by sec. 1 of ch. 251, Laws 1953. It provided:

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

Sec. 20.78 therein referred to provides in substance that all appropriations of state revenues to the state historical society and to other state agencies are made on condition that such agencies deposit all of their moneys in the state treasury within a week after receipt and that there be compliance with statutory pre-audit procedures and appropriation statutes both as to the agency's own receipts and also as to appropriations made by the state from state revenue.

Apparently sec. 20.785 was repealed on the theory that it was surplusage, since sec. 20.16 (5) in effect makes the same appropriation in somewhat different language.

This raises the question of whether or not there is an implied repeal of that portion of sec. 16.08 (2) (c) quoted above and which includes the reference to sec. 20.785, now repealed.

Sutherland, *Statutory Construction*, 3rd ed., §2012, says in part:

“The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to effectuate a repeal of the 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 or of the common law is readily found in the terms of a later enactment. It is the necessary effect of the later enactment construed in the light of the existing law, regardless of whether such an effect is the child of the legislative mind or a creature of fortuity, that ultimately determines an implied repeal.* * *”

In *State ex rel. Hayden v. Arnold*, 151 Wis. 19, it was held that repeals of statutes by implication are not favored;

therefore, if two legislative enactments, in terms, seem to conflict, they should be reconciled if practicable. There is no irreconcilable inconsistency or repugnance between the repeal of sec. 20.785 and the continued applicability of that portion of sec. 16.08 (2) (c) quoted above. All that has happened is that since the subject matter of sec. 20.16 (5) was duplicated by sec. 20.785, the latter was repealed in the apparent interests of eliminating surplusage in the statutes, while its subject matter still remains intact in sec. 20.16 (5) which was not touched by the repealing statute.

The gist of the statute remains the same, and the only result is that the reference to sec. 20.785 in sec. 16.08 (2) (c) is no longer appropriate. The reference in sec. 16.08 (2) (c) could have been either to sec. 20.785 or to sec. 20.16 (5) since the one duplicates the other, and the repeal of either one should not have the effect of repealing another statute using the statute repealed for purposes of reference only.

Normally such a situation is cleared up by a revisor's bill, but this one seems to have been missed, which is readily understandable because the reference to the section number repealed is buried in the statute using it without any particular guidepost or warning signals to alert anyone to its presence.

Therefore, in order to reconcile sec. 16.08 (2) (c) with the repeal of sec. 20.785, we should construe sec. 16.08 (2) (c) as though the words "section 20.785" therein contained, were changed to read "section 20.16 (5)." In that way and in that way only can the apparent discrepancy be reconciled and full effect be given to the obvious legislative intent.

It should be noted that the state historical society is both a private corporation and an official agency of the state. See 36 O.A.G. 285, 39 O.A.G. 110, and 42 O.A.G. 333. As we understand it, about 80 per cent of the society's income is derived from direct legislative appropriations from the general fund under sec. 20.16. The remainder of its income is derived pretty much from the following eight major sources: (1) Fines levied on late returns of books to the library or for damage to books; (2) dues; (3) income from endowment; (4) sales of publications; (5) services such as

charges made for photostats, photographs, microfilm, and so forth; (6) admission fees at historic sites; (7) sales of souvenirs; and (8) gifts.

Some of these funds are earmarked for specific purposes by terms of the endowment bequest, or by terms of the gift, or, as in the case of Wade House and Villa Louis, by the contract under which the society operates such sites.

You state that this question does not pertain to those of the foregoing funds that are specifically earmarked, but it does relate to unrestricted gifts and income for the general purposes of the society.

Confining the scope of the question to the funds indicated, it is our opinion, in view of the statutory construction herein discussed, that the state historical society may properly use funds appropriated by sec. 20.16 (5), Stats., to hire unclassified personnel under sec. 16.08 (2) (c), Stats., where competitive examinations would be impractical.

WHR

Counties—Highways and Bridges—Municipalities—Torts—Governmental or Proprietary Capacity—The county, in maintaining county trunk highways under sec. 83.025 (2), Stats., is discharging a governmental function with respect to the rights of the traveling public and except as modified by statute is not liable for the negligence of its officers or agents in the performance of such function. However, the county may be liable for damages caused to adjoining land owners by nuisances which it has created on such highways and as to such adjoining land owners the county is deemed to be acting in a proprietary capacity. 24 O.A.G. 246 is withdrawn to the extent that it is inconsistent herewith.

March 24, 1954.

WILSON H. BRUE,
District Attorney,
Iowa County.

You state that during the summer of 1953 two Iowa county highway employes were sent out by the county highway foreman to spray weeds along county trunk highways,

it being the duty of the county to maintain the county trunk system of highways under sec. 83.025 (2), Stats. The county rented a sprayer for this work. The highway commissioner inquired of the county agent whether or not the proposed spray was safe for livestock and was advised that it was considered harmless.

While spraying the roadway along a particular farm, the farmer inquired of the workmen whether the spray would harm livestock, as it was necessary to drive his cattle on the highway about a quarter of a mile to get them to pasture. The workmen told the farmer that they had been informed that the spray was harmless.

It is claimed that in the course of spraying the weeds and brush the wind blew some of the spray over on to four rows of the farmer's corn which it is alleged resulted in damage to the corn. Apparently the cattle may also have reached through the fence and eaten some of the sprayed weeds and brush.

About three weeks after the spraying, two of the farmer's cattle became sick and were sold at a loss. He has filed a \$500 claim against the county. Whether this covers alleged damage to the cattle alone or also includes damage to the four rows of corn is not clear.

You have tentatively concluded that the maintenance of the county trunk highways is a governmental function of the county and that there is no liability on the part of the county. In support of this view you have cited the following authorities: 24 O.A.G. 246; 7 Wisconsin Law Review 53; *Higgins v. Superior*, 134 Wis. 264; *Bruhnke v. La Crosse*, 155 Wis. 485; *Bernstein v. City of Milwaukee*, 158 Wis. 576; *Apfelbacher v. State*, 160 Wis. 565; *Milwaukee v. Meyer*, 204 Wis. 350; *Erickson v. West Salem*, 205 Wis. 107; and *DeBaere v. Oconto*, 208 Wis. 377.

The county board has adopted a resolution asking you to request the opinion of the attorney general as to the county's liability under the circumstances, both as to possible poisoning of the cattle from eating vegetation within the right-of-way and from eating vegetation on the landowner's property affected by spray blown there by the wind.

The situation presents both factual and legal difficulties.

In the first place the burden is on the claimant to establish, in the event of litigation, that the spray was in fact

toxic and that it did in fact damage his cattle and corn. It ought to be possible to obtain expert scientific advice as to the toxicity of the spray to cattle and corn. Assuming that such report does establish the toxicity of the spray and that it appears that the farmer did thereby sustain the damage which he claims, we are then confronted with the difficult problem of legal liability.

The authorities you have cited undoubtedly support the view you have taken but, unfortunately for your position, there is respectable authority to the contrary in the field of highway maintenance by counties, or that indicates at least that the authorities you have cited do not govern a highway maintenance situation such as is presented here, and there has also been a tendency in some cases to allow recovery upon the theory of maintenance of a nuisance, irrespective of whether the activity involved can be regarded as a governmental duty or as an activity conducted in a proprietary capacity. We cannot here take the space to collect and analyze all of these cases. See, however, the cases cited and quoted in *Matson v. Dane Co.*, 172 Wis. 522, at 527 and 528.

To illustrate the three concepts of governmental capacity, proprietary capacity, and nuisance, which run through many of the cases, we will discuss briefly the case of *Nemet v. Kenosha*, 169 Wis. 379.

There a drowning occurred when a bather at a city bathing beach stepped into an excavation in the lake bed which had been made for the purpose of laying an intake pipe for the city's water system. It was held that the city in maintaining a bathing beach was acting in a governmental rather than a proprietary capacity, but that the excavation for a water intake pipe was in a proprietary capacity, since the furnishing of water to private consumers is not a governmental function. Liability was imposed upon the city under the theory that excavation by a city to extend its private waterworks system over premises used by the public for bathing purposes, without giving notice of the presence of the danger, constituted a nuisance created in the course of discharging a proprietary function and that the city was liable for the damages proximately caused thereby.

The case of *Matson v. Dane Co.*, 172 Wis. 522, is an important one for present purposes. That action was brought to recover damages for the drowning of the plaintiffs' two children in a water hole on premises adjoining a state trunk highway which the county was maintaining. The question was as to the sufficiency of the complaint upon demurrer.

The gravamen of the complaint was that the defendant negligently adopted an inadequate and defective plan for construction of a culvert on the highway and negligently constructed the culvert, causing the water to create a deep gully on the adjoining farm of Mary Connor which the plaintiffs occupied as tenants, and that this was a dangerous trap and nuisance especially attractive to children. It was held that the complaint stated a good cause of action and that while the maintenance of a state trunk highway by a county may be a governmental function with regard to the rights of the public traveling thereon, it is not such a function with respect to injuries occasioned to the owners of the adjoining property. As to them the county acts in a proprietary capacity and is liable for injuries resulting from its acts.

Again in the recent case of *Lloyd v. Chippewa County*, decided last year, the court said at pp. 302-303 of 265 Wis. 293:

"The defense of immunity of the county based upon governmental function is not available in the instant case under the decision of this court in *Matson v. Dane County* (1920), 172 Wis. 522, 179 N. W. 774. In that case the court held that, while the maintenance of a public highway by a county may be a governmental function with respect to the rights of the public traveling thereon, it is not such a function with respect to injuries thereby occasioned to the owners of adjoining property, and as to such adjoining owners the county acts in a proprietary capacity. In the *Matson Case* the court also held that a nuisance was created. Likewise in the case at bar, if plaintiffs' lands were flooded due to fault of the defendant county, we would also be confronted with a nuisance. In case of liability grounded upon nuisance there is no defense of immunity based upon performance of a governmental function available to the county where, as here, the relation of governor and governed did not exist between the county and the plaintiffs. *Holl v. Merrill* (1947), 251 Wis. 203, 207, 28 N. W. (2d) 363."

This is apparently the last word on the subject from the supreme court, although perhaps an explanation is in order on the significance of the court's observations as to the absence of the relationship of governor and governed between the county and the plaintiffs.

In the case of *Robb v. Milwaukee*, 241 Wis. 432, the plaintiff was walking along a sidewalk adjacent to a baseball field maintained by the city and was struck in the eye by a batted baseball which caromed off the top of a fence along the sidewalk. The court held that although the city was acting in a governmental capacity in maintaining the field, it was not so acting in that capacity as to the plaintiff, since she was not availing herself at the time of the benefit of the instrumentality (baseball field) furnished by the city, and hence the relation of governor and governed did not exist between her and the city. The court also quoted the doctrine that the primary purpose of highways is for the use of the public and the general rule is that anyone who interferes with such use commits a nuisance. See also *Pohland v. Sheboygan*, 251 Wis. 20, 22, and *Holl v. Merrill*, 251 Wis. 203, 206-207, for further discussions of the importance of the relationship of governor and governed as a prerequisite to applying the doctrine of no liability where the municipality is engaged in the discharge of a governmental function.

Here that doctrine may have some applicability as to one phase of the case involved in the eating of the vegetation by the cattle within the right-of-way as they were driven to pasture. As to such use of the highway the claimant was availing himself of the instrumentality maintained by the county for purpose of public travel so that the relationship of governor and governed existed, and as the court said in the *Matson* and *Lloyd* cases, the maintenance of a highway by a county is a governmental function with respect to the traveling public, so that as to this phase of the case the county may be able to avail itself of the general doctrine of non-liability for the negligence of its officers and agents when acting in a governmental capacity.

However, as to the claimant in his capacity as an adjoining land owner, such immunity would not attach and there might be liability under the doctrine of the *Matson* and

Lloyd cases, *supra*, for any nuisance causing damage to the claimant's crops or cattle arising out of the blowing of the alleged poisoned spray onto the farmer's lands.

The authorities you have cited all deal with the general doctrine of non-liability of the municipality for the negligence of its officers or agents in the performance of a governmental function and hence are not in point as to the exception to the rule involved in damages to the property of an adjoining land owner, although perhaps it should be mentioned in passing that except in the matter of damages to adjoining land owners as set forth in the *Matson* and *Lloyd* cases, a municipality is not regarded as having a proprietary interest in its roads. See *Town of Levis v. Black River Improvement Co.*, 105 Wis. 391, 394; *Marion v. Southern Wisconsin Power Co.*, 189 Wis. 499, 504; and *Town of St. Joseph v. Willow River Power Co.*, 205 Wis. 231, 234.

To the extent that 24 O.A.G. 246 is in conflict herewith the same is withdrawn, and you are advised that the county may properly pay for any damages proximately resulting from the blowing of toxic spray onto the crops and vegetation growing on the lands of an adjoining land owner.

WHR

Cemeteries—Plats—Under sec. 157.07, Stats., county and town boards may not refuse to approve cemetery plats which meet the requirements of ch. 157, Stats., solely for the reason that they do not want the cemetery in a certain town.

March 31, 1954.

HERBERT J. MUELLER,
District Attorney,
Winnebago County.

You call my attention to sec. 157.07, Stats., and ask whether a county board or a town board has the right to refuse to accept a cemetery plat which complies with all of the requirements of the statute, for the reason that they do not want the cemetery in that town.

The location of cemeteries is regulated under the police power for the protection of public health. The establishment of cemeteries cannot be prohibited entirely. In 14 C.J.S., Cemeteries §15, the law is stated as follows:

“* * * The interment of the bodies of the dead is proper and necessary, and state and municipal authorities may not prohibit the location of cemeteries in places where no possible danger to human life or health can result, merely for aesthetic reasons, or because cemeteries are not an agreeable subject of contemplation and are a source of annoyance to nervous or superstitious persons, or because the value of adjoining land will be lessened. * * *”

The location of cemeteries is prescribed by sec. 157.06, Stats. This is not an absolute prohibition of cemeteries except in certain defined areas.

Ch. 157, Stats., relates to the organization of cemetery associations and the establishment of cemeteries. Sec. 157.07 provides that cemeteries shall be platted by such associations. This section reads in part:

“The board of trustees shall cause to be surveyed and platted such portions of the lands as may from time to time be required for burial, into lots, drives and walks, and record map thereof in the office of the register of deeds. No such plat or map shall be recorded unless laid out and platted to the satisfaction of the county board of such county, and the town board of the town in which such land is situated * * *.”

This section confers upon the county board and the town board the power to determine only whether they are satisfied with the way in which the cemetery is laid out and platted. This power does not include a right to refuse to allow a cemetery to be established in the location chosen where such location meets the requirements of sec. 157.06.

A careful search discloses no authority on the exact point at question here. However, in an analogous situation this office rendered the opinion that under sec. 236.06, Stats., the director of regional planning must approve a plat of a subdivision if the statutory requirements are fulfilled. See 24 O.A.G. 532. In 27 O.A.G. 638, this office modified that opinion to the effect that as to matters not spe-

cifically covered by statute, the state director of regional planning may exercise discretion in approving plats, provided such discretion is exercised reasonably and not arbitrarily or capriciously. A reading of these two opinions indicates that the discretion of the governing body extends only to approving or disapproving the provisions of the plat itself.

It is my opinion that a county board and a town board do not have the power under sec. 157.07 to refuse arbitrarily to approve a cemetery plat which complies with all of the requirements of ch. 157, for the reason that they do not want the cemetery in that town.

GFS

Counties—Forests—Towns—Highways and Bridges—County Aid—County boards have no authority to make specific grants to towns from funds received for the sale of county-owned timber sold under the provisions of sec. 28.13, Stats. Sec. 83.03, Stats., authorizes counties to construct or repair specific town roads but does not authorize counties to make grants and delegate decision as to the manner in which funds may be expended.

March 31, 1954.

HARRY E. WHITE,
District Attorney,
Marinette County.

You state that several towns of your county have presented a resolution to the county board requesting that they be allotted a portion of the money received by the county for the sale of its forest crop authorized by sec. 28.13, Stats. It is the position of the towns that their roads are damaged by the lumbering operations conducted by the county, and therefore they feel that they should be allotted a percentage of the money received from timber sales based upon the amount cut within the respective towns, for town highway maintenance.

You have written an opinion for the county board which appears to answer the problem fully. The county board has only such powers as are expressly conferred upon it by law or necessarily implied from the powers expressly given. I wish to confirm your view that no such power, either express or implied, appears in the statutes. Sec. 83.03, Stats., which states that "the county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county," while granting very broad powers, cannot be construed to allow such appropriations. In 1914 Attorney General Owen wrote an opinion discussing the statute, and in it he concluded that the county board had no authority to make grants to towns and to delegate the right to select where moneys for highways could be expended. 3 O.A.G. 97. This statute had the same broad terms then as it does now and I believe his opinion is still controlling.

The problem is not without a practical solution. As you point out, the county can aid in repairing specific roads that have been damaged.

In answer to your two specific questions: (1) The county has no authority to give towns a share of money derived from the sale of county-owned timber; (2) sec. 83.03 allows the county to carry on, or aid in, the construction, improving or repairing of specific town roads, but does not allow the county to make grants of funds for highway purposes and delegate to towns the manner in which the funds may be expended.

REB

Counties—Fences—Under sec. 90.03, Stats., a county owning tax delinquent land is not required to share the cost of maintaining partition fences adjacent to such land.

April 1, 1954.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire County.

You have asked me the following question: Where the county holds title to tax delinquent land and the owner of adjoining land uses his land for grazing purposes, is the county charged with the legal responsibility of keeping and maintaining its portion of the partition fence between the two adjoining premises, pursuant to section 90.03, Stats.?

Sec. 90.03 reads as follows:

“The respective occupants of adjoining lands, used and occupied for farming or grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and next adjoining premises in equal shares so long as either party continues to so occupy the same, and such fences shall be kept in good repair throughout the year unless the occupants of the lands on both sides otherwise mutually agree.”

It is clear under this section that, if either of two owners of adjoining land uses his land for farming or grazing purposes, each such owner must bear half of the expense of maintaining partition fences between the two adjoining properties. The question then arises whether the word “owners” as used in the above statute can be construed to include a county in respect to tax delinquent lands owned by such county.

Sec. 90.03 is a statute of general application. It is not specifically made applicable to the state or its subdivisions. The law is well settled that a general statute is not to be construed to include the state, to its damage. *Sullivan v. School District*, (1923) 179 Wis. 502, 507, 191 N. W. 1020; *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 38, 121 N. W.

642; *Sandberg v. State*, (1902) 113 Wis. 578, 589, 89 N. W. 504.

In the *Sullivan* case, *supra*, the court said :

“In connection with what has been said there is also the general rule, adopted both by this court and the supreme court of the United States, that general statutes are not to be construed to include, to its hurt, the sovereign. *Sandberg v. State*, 113 Wis. 578, 589, 89 N. W. 504; *Dollar Savings Bank v. U. S.* 19 Wall. 227, 239; *U. S. v. Verdier*, 164 U. S. 213, 219, 17 Sup. Ct. 42.”

This rule is stated in Sutherland, *Statutory Construction*, 3rd ed., Vol. 3, at p. 183, as follows :

“General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provision or necessary implication, the sovereign remains unaffected. * * *”

At p. 185 of the same volume, it is said :

“* * * The subdivisions of a state, including administrative agencies, counties, cities and school districts, against the claims of individuals, are recognized as branches of the ‘sovereign,’ so that they are not bound by the general language of a statute. * * *”

In *In re Miller's Estate*, (1936) 5 Cal. 2d 588, 55 P. 2d 491, the question was whether a county was practicing law in violation of a prohibition against the practice of law by a corporation. The court said (55 P. 2d 495) :

“* * * A county is not a corporation, nor even a municipal corporation. Strictly speaking, a county is not a corporation at all. It is a legal subdivision of the state, charged with governmental powers. [Citing cases.] Even if it be held that a county is a quasi corporation, * * * it is well settled that in the absence of express words to the contrary, *neither the state nor its subdivisions are included within the general words of a statute.* [Citing cases.] The prohibition against a corporation practicing law for these reasons does not apply to a county.” (Emphasis supplied.)

In *Commonwealth et al. v. Allen*, (1930) 235 Ky. 728, 32 S. W. 2d 42, the county attorney of Breathitt county brought several actions to recover possession of land sold

for nonpayment of taxes. The clerk of court refused to file such actions unless the county attorney would pay \$5 costs in each case. The county attorney then brought a mandamus action against the clerk. The statute in question read in part:

“That the clerks of the various circuit courts of this Commonwealth shall collect the sum of five dollars (\$5.00) on each original action or suit, commencing with original process, in their respective courts * * *.”

The court held that the above statute would not apply to the state itself, citing the following rule from 36 Cyc. 1171:

“The state, or the public, is not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless expressly named therein, or included by necessary implication.”

The court also held that the same rule would apply to the county, saying (32 S. W. 2d 43):

“Breathitt county is an integral part of the state of Kentucky. The taxes levied by its fiscal court are in legal effect the taxes of the state of Kentucky levied by its authorities. The duty of levying the local taxes is committed to a local tribunal, but they are still state taxes no less than the taxes levied by the Kentucky Legislature, and there is no more authority for making the fiscal court pay in advance for filing a suit to recover these taxes than there would be to require the commonwealth to pay out of the treasury without any statute authorizing the payment. The fiscal court is just as much without obligation to make such a payment as the auditor would be. *Com. v. Hazel*, 155 Ky. 30, 159 S. W. 673, 47 L. R. A. (N. S.) 1078. The actions in question to recover possession of the land are simply proceedings provided by law to secure the collection of the taxes and impose no liability on the state or the county.”

In *Liebman v. Richmond*, (1930) 103 Cal. App. 354, 284 P. 731, the plaintiff brought an action against the county supervisors to abate the county courthouse as a nuisance. The court said (284 P. 733):

“* * * It is settled law that, in the absence of express words to the contrary, the state is not included within the general terms of a statute. [Citing cases.] It may not be

sued except it gives its consent. 23 Cal. Jur. 578. Statutes giving consent will not be construed in favor of a private litigant. [Citing a case.] That rule applies to each of the counties as agencies of the state. [Citing a case.] The measure of any of those statutes is the measure of the right. If the statutes do not *expressly* include the right to sue one of the counties to abate a nuisance, the power does not exist.
* * *

In *Crowley v. Clark County*, (1935) 219 Wis. 76, 82, 261 N. W. 221, the court said:

“It is elementary that a county is a governmental arm of the state with limited powers and limited responsibilities
* * *

Under the above authorities, it is my opinion that the word “owners” used in sec. 90.03, Stats., cannot be construed to include a county in respect to tax delinquent lands owned by such county, and that a county is not required to maintain partition fences under such circumstances. So construed, sec. 90.03 is consistent with sec. 75.14 (4), Stats., which provides that counties owning tax delinquent lands shall not be required to spend money to keep the premises in sanitary or sightly condition or to contribute to the cost of maintaining private roads or to abate nuisances or undesirable conditions. This opinion is also consistent with a former opinion rendered by this office in 19 O. A. G. 579 which was based on different reasoning.

GFS

Public Assistance—Dependent Children—A child who is a parolee from the Wisconsin school for girls and who has been placed in her sister's home, but who has not been deprived of parental support or care by reason of the death, continued absence from the home, or incapacity of a parent, is not a dependent child within the meaning of sec. 49.19 (1) (a), Stats., so as to be subject to the statutory provisions relating to aid to dependent children.

April 2, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You state that a child, who is a parolee from the Wisconsin school for girls, is living with a sister in a county other than the county where the child's parents reside. The parents, because of limited financial means, are not able to support the child outside of the parental home. However, they are both living, are not absent from their home, and are not incapacitated. The child was placed in the sister's home by the parole authorities.

We are asked whether the statutory requirements set forth in the definition of a dependent child in sec. 49.19 (1) (a), Stats., must be met when aid is granted to the sister, or whether the requirements of sec. 49.19 (4) (d), Stats., apply.

Sec. 49.19 (1) (a) reads:

"A 'dependent child' as this term is used in this section is a child under the age of 16, or under the age of 18 if found by the department to be regularly attending school, who has been deprived of parental support or care by reason of the death, continued absence from the home, or incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in a residence maintained by one or more such relatives as his or their own home, or who is living in a foster home having a permit under section 48.38, when a permit is required under such section and placed in such home by a county agency pursuant to chapter 48."

Sec. 49.19 (4) (d) provides:

“The person having such care and custody must be fit and proper to have the same, and the period of aid must be likely to continue for at least 3 months. Aid may not be granted to the mother or stepmother of a dependent child unless such mother or stepmother is without a husband, or the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least 3 months in the opinion of a competent physician, or the wife of a husband who has been sentenced to a penal institution for a period of at least 3 months, or the wife of a husband who has continuously abandoned her for at least 3 months, if the husband has been legally charged with abandonment under section 52.05, or if the mother or stepmother has been divorced from her husband for a period of at least 3 months, dating from the interlocutory order, and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought.”

Since a sister is not one of the relatives mentioned in the second sentence of sec. 49.19 (4) (d) quoted above, the restrictions relating to the other relatives named therein have no application. The only part of this provision which could have any application is the first sentence which provides that the person having the care and custody of the child must be a fit and proper person and the period of aid must be likely to continue for at least 3 months, and this provision would be applicable only where the child is a dependent child within the meaning of sec. 49.19 (1) (a).

The basic difficulty here is that the child is not a dependent child within the meaning of sec. 49.19, since she has not “been deprived of parental support or care by reason of the death, continued absence from the home, or incapacity of a parent.” This being true, it is pointless to discuss any of the circumstances under which aid to dependent children may be granted under sec. 49.19.

WHR

Counties—Zoning—A county must use the method of amending a zoning ordinance set forth in sec. 59.97 (3), Stats., and any ordinance establishing a different method is void.

April 21, 1954.

J. R. DICKERSON,
District Attorney,
Vilas County.

You have requested my opinion on the question: Can the county board of Vilas county validly pass an ordinance that would require all petitions for amendment of the zoning ordinance to be passed on at the annual meeting of the board the second Tuesday in November? This was done to enable all the public hearings on proposed amendments to be held at one time, just prior to the annual meeting of the county board in November.

The statute in question is sec. 59.97 (3). It reads in part:

“(a) The county board may amend the regulations of an ordinance or change the district boundaries. The procedure with reference to such amendments or changes shall be as follows:

“(b) A petition for amendment of any county zoning ordinance * * * shall be filed with the county clerk who shall present it to the county board at its next succeeding meeting.

“(c) At such meeting of the county board the petition shall be referred directly to the agency designated by the county board to consider county zoning matters as provided in subsection (2) (a) for its consideration, report and recommendations.

“(d) Upon receipt of such petition by such agency it shall call a public hearing thereon. * * *

“(e) As soon as possible after such public hearing, the agency shall act on such petition either approving, modifying and approving, or disapproving of the same. * * *”

This statute requires that the petition for amendment be presented to the county board at the meeting following the filing of the petition with the county clerk. At that meeting it must be referred to the zoning agency, which shall then hold a public hearing. The method used pursuant to the

ordinance in question is different from that prescribed by the statute. The county board had no authority to pass such an ordinance. It is stated in *Spaulding v. Wood County*, (1935) 218 Wis. 224, 228, 260 N. W. 473:

"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. * * *"

In 20 O. A. G. 81, this office rendered the opinion that a county ordinance adding another date to the statutory date for regular meetings of the county board was void because it was in conflict with the statute.

You state that the reason Vilas county passed this ordinance was to save expenses of the public hearings. That fact does not give the county the authority to set up a system contrary to that of the statute. It is stated in *McDougall v. Racine County*, (1914) 156 Wis. 663, 665, 146 N. W. 794:

"* * * In governmental matters the county is simply the arm of the state; the state may direct its action as it deems best and the county cannot complain or refuse to obey. * * *"

As to an alternative proposal before the county board, that of enacting an ordinance which would require the petitioner to pay for the expenses of a public hearing if he wanted to get it before a meeting other than the annual meeting in November, it is also contrary to the method established in sec. 59.97 (3). In *Henry v. Dolen*, (1925) 186 Wis. 622, 624, 203 N. W. 369, the court said:

"A consideration of this case must be premised upon the well established proposition that a public officer takes his office *cum onere* and is entitled to no salary or fees except what the statute provides. * * *"

In addition to these reasons, I agree with your contention that it would be contrary to good public policy.

GFS

Counties—Zoning—Platting Lands—A county zoning ordinance enacted pursuant to sec. 59.97, Stats., is a “county platting, regional or zoning plan” so as to require approval by the county board of plats pursuant to sec. 236.06 (1) (b), Stats. When plats were recorded without the required approval, the recordation of them was void and they must be rerecorded, but the records now in the register of deeds’ office must remain for chain of title and description purposes only. Retroactive approval by the county board to plats that were recorded without approval is not possible. Plats in towns electing not to come under such a zoning ordinance must be approved by the county board in accord with sec. 236.06 (1) (b). The improper recording meant that there was no dedication of the streets and alleys unless the dedication was effected by a user or some other method.

April 21, 1954.

EDWARD A. KRENZKE,
District Attorney,
Racine County.

These are the facts upon which you base your inquiries:

“In July, 1949, Racine County enacted a county zoning ordinance pursuant to section 59.97 of the Wisconsin Statutes and therein provided for a county zoning committee pursuant to section 59.97 (2) (a), which committee is comprised of five members of the County Board appointed by the chairman, and also provided for the election of a zoning administrator, pursuant to section 59.97 (7) (b). Originally but two of Racine County’s nine townships elected to come under such ordinance; however, as of the present time five townships have voted to come under the zoning ordinance. During the past 4½ years, fifteen plats have been offered to and accepted by the Register of Deeds for recording. Some of these plats covered lands in townships which had elected to come under the county zoning ordinance while the rest of the plats concerned lands located in townships which had not made such election. In all instances the lands platted were outside the limits of any city or village, but in no instance was the plat approved by the ‘governing body’ empowered to supervise or administer the county zoning ordinance.”

The pertinent statutes are:

"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:

"(a) For lands lying in a town the town board.

"(b) For lands lying outside the limits of any city or village in any county having a county platting, regional or zoning plan, the governing body empowered to supervise or administer such county plan. * * *"

"59.97 (2) FORMATION OF ZONING ORDINANCE; PROCEDURE.

(a) The county board shall designate the county park commission, rural planning board, county highway committee, or a special zoning committee which it may create, as its agency in all matters pertaining to county zoning. When such agency shall be directed by the county board to draft a proposed zoning ordinance for its consideration, the agency shall do all things necessary to comply with such direction, including the collection and analysis of pertinent data, the drafting of a tentative ordinance and the layout of tentative districts either by maps or words of description, holding public hearings, preparation of a proposed final draft, and its submission to the county board for its consideration prior to adoption. In any county in which a zoning ordinance has been finally adopted and is in force, the zoning agency designated by the county board shall oversee the administration of such ordinance and to this end such agency shall meet at least once each year.

"(b) When the county zoning agency shall have completed a draft of a proposed zoning ordinance, it shall hold a public hearing or hearings thereon, * * * After such hearing the agency may make such revisions in the draft as it shall deem necessary, or it may submit the draft without revision to the county board with recommendations for adoption. * * *

"(c) When the draft of such ordinance, recommended for adoption by the zoning agency, is received by the county board, it may adopt the ordinance as submitted, or reject it, or return it to the agency with such recommendations as the county board may see fit to make. * * *

"(d) A county ordinance adopted as provided by this section shall not be effective in any town until it has been approved by the town board. * * *"

The questions you ask will be answered individually. The first question: Is a county zoning ordinance enacted pursuant to sec. 59.97, Stats., such a "county platting, regional

or zoning plan" as to require the approval of the "governing body" empowered to supervise or administer such county plan?

It is clear that the county zoning ordinances set up by sec. 59.97 contemplate a "zoning plan." Sec. 59.97 (3) provides for amendment of such ordinances. Subsec. (7) (a) states that "the continuance of the nonconforming use of a temporary structure may be prohibited." These provisions manifest an intention to set up a "plan," something that is anticipatory in nature, something to regulate future uses of land.

Your second question is: Assuming the answer to the first question to be "Yes," who is the "governing body" that must give the approval?

Sec. 59.97 (2) (a) allows the county board to set up an agency in matters pertaining to zoning. This agency is to draft a proposed ordinance, (2) (a); oversee the administration of the ordinance, (2) (a); hold public hearings on the proposed ordinance, (2) (b); and submit the proposed ordinance to the county board for approval, (2) (c). This latter subsection states that the county board can accept, reject, or return the proposed ordinance to the agency with recommendations. Amendments to the zoning ordinance are made by the county board. Sec. 59.97 (3). The county may delegate purely ministerial or executive power to a committee but not discretionary authority. *Duluth, South Shore & Atl. R. Co. v. Douglas County*, (1899) 103 Wis. 75, 79, 79 N. W. 34. Approving plats would not be ministerial. Also, the definition in sec. 236.01 (2), Stats., with its stress on "supervisory," is another reason to hold the county board is the approving body. "Governing body" is defined in sec. 236.01 (2) as:

"'Governing body' includes a town, county or village board, city council, board or county park commissioners, or any other public body empowered to supervise or administer zoning plans restricting the use of land."

"Governing" control over zoning is the county board and the zoning committee is merely its administrative agent. Therefore, the answer to question two is "the county board."

The third question is: Assuming the answer to the first question to be "Yes," shall or may the plats improperly recorded remain of record in the office of the register of deeds?

To be clear on this point, this must be subdivided into these questions:

1. Was there a legal recordation of the plat?
2. May the records remain in the register of deeds' office even if there was no legal recordation?

Sec. 236.06 (3), Stats., reads:

"Any final plat not approved or not accompanied by proper evidence of its approval, or which shall not be offered for record within thirty days after the date of the last required approval, or which shall not be offered for record within ninety days after the date of the first approval, shall not be recorded or received for record and shall have no validity whatever."

This statute makes it clear that the answer to the first question is "No." The required approval was not given since the county board did not give approval pursuant to sec. 236.06 (1) (b). This is in accord with 34 O. A. G. 290. The latter opinion also held that conveyances that used descriptions from this invalidly recorded plat were effective nevertheless.

While the plats were never legally recorded because of sec. 236.06 (3), the records involving the plat that were filed with the register of deeds should remain there. This is to keep a clear record of title. Also the improperly recorded documents are needed to furnish the descriptions. To clarify this matter, an affidavit should be affixed to the records of the plat which should state that the records are there for chain of title purposes even though the recording was void. The answer to your question is that the recordation was void and the plats will have to be rerecorded, but the records involving conveyances must be left in the register of deeds' office with the aforementioned affidavit to keep a clear record of title.

Your fourth question is: Assuming the answer to the first question to be "Yes," may the "governing body" by resolution, motion, or affidavit give retroactive approval to such plats?

I agree that approval cannot be made retroactive. The present board is not the same as the one that should have approved the plat. The former cannot decide what the latter should have. Also sec. 236.06 (3) requires that the plat must be filed within 30 days of the last approval and within 90 days of the first approval. Therefore, a retroactive approval would have no effect since the plat would not have been filed in time. Also the standards used now may not be the standards used when the approval should have been requested.

Your fifth question is: Assuming the answer to the first question to be "Yes," does a plat of lands lying in a township which has not elected to come under the provisions of a county zoning ordinance also require the approval of the "governing body"?

Sec. 59.97 (2) (d) provides for a local option type of zoning authority. Towns in the county must agree to the ordinance or it shall not be effective in those towns. However, the platting law, ch. 236, Stats., says that *no* plat shall be valid until the proper agencies approve it. You state that these plats are outside of any city or village. That means that they must be approved by the town board under sec. 236.06 (1) (a) and by the county board under sec. 236.06 (1) (b). The latter subsection does not make an exception for plats in towns which have elected not to come under the county zoning ordinance. Therefore, the zoning ordinance does not bind those towns electing not to come under it, but any plat in those towns must be approved by the county board since Racine county has a zoning plan. For a detailed study of Wisconsin platting laws, see Melli, Subdivision Control in Wisconsin, 1953 Wis. L. Rev. 389-457.

Your sixth question, which is contained in your subsequent letter is: Are streets and alleys described in the plats improperly recorded legally dedicated streets and alleys?

Since you state that less than 5 years have elapsed since the actions in question took place, we are denied the easy answer to your question that is provided after 5 years by the curative provisions of sec. 80.01 (4), Stats.

In 34 O. A. G. 290, 292, this office stated:

"Our supreme court has held that although a plat not entitled to be recorded does not operate as a grant to the public of lands therein designated as streets * * *."

However, a reference to the cases cited in that opinion shows that the above statement did not mean that a street could not be dedicated without a proper recordation. It meant that where a plat had been improperly recorded, and there was no other express or implied dedication, there was no dedication.

The valid recording of a plat is not required for an offer to dedicate. It is stated in 16 Am. Jur., Dedications, §22:

“* * * From these examples, and also in reason, it would seem that recording is not an indispensable essential to dedication by plat, but merely the most satisfactory evidence of the offer, from which it would follow that if sufficient publicity were given to the plat, though not spread on the records, the offer would be complete. * * *”

It is stated in *In re Vacation of Plat of Garden City*, (1936) 221 Wis. 134, 139, 266 N. W. 202:

“* * * Consequently, mere dedication by the proprietor without acceptance by the public for use as a street does not give rise to that statutory exception [in cases of dedication]. But the mere approval of a plat by the common council ‘is in no sense an acceptance of the street as a public highway.’ * * *”

The *Vacation of Plat of Garden City* case, *supra*, held that approval of the plat was not an acceptance. This was changed by sec. 236.06 (10), Stats., which says that approval is an acceptance. It is also stated in the *Vacation of Plat of Garden City* case that:

“* * * The law is well settled that, to constitute a public street or highway by dedication, there must not only be an absolute dedication,—a setting apart and a surrender to the public use of the land by the proprietors,—but there must be an acceptance and a formal opening thereof by the proper authorities, or a user which is equivalent to such acceptance and opening. * * *” (Emphasis supplied.)

This means that there are other methods of dedication besides a valid recording of a plat. *Galewski v. Noe*, (1954) 266 Wis. 7, 15, 62 N. W. 2d 703. It is stated on page 12 of the *Galewski* case, *supra*:

“* * * The intention of the owner to dedicate and the acceptance thereof by the public are the essential elements of a complete dedication. * * *”

See 16 Am. Jur., Dedications, §§33-38.

User has been accepted in Wisconsin as another method. *Galewski v. Noe, supra; Buchanan v. Curtis*, (1869) 25 Wis. 99. Also see *Lins v. Seefeld*, (1906) 126 Wis. 610, 105 N. W. 917; *Smith v. Beloit*, (1904) 122 Wis. 396, 100 N. W. 877. These cases state that a common law dedication may be presumed if the streets are opened to the public even though the plat is not properly accepted by the public. Since I have no additional facts on this point, I can only express the opinion that the failure of the county board to approve the plat meant that there was no acceptance and therefore no dedication. This does not mean that it may not have been accomplished another way, such as repairing the streets or user. But since no facts such as these were brought to my attention, I must answer your question “No.”
GFS

Automobiles and Motor Vehicles—Registration Fees—
The only vehicles owned and operated by charitable corporations which may be registered for the \$1 reduced fee under sec. 85.01 (4) (g), Stats. (upon the condition stated in the statute) are motor busses. Other types of vehicles must be registered at the full commercial rate.

April 28, 1954.

MOTOR VEHICLE DEPARTMENT.

You request my opinion as to whether “charitable corporations” referred to in sec. 85.01 (4) (g), Stats., as amended by ch. 252, Laws 1953, are entitled to register motor vehicles *other than* motor busses used exclusively for the purposes for which incorporated, for a fee of \$1.

The pertinent part of the statute reads as follows:

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

Specifically, your inquiry is whether the clause beginning with the words "or by a charitable corporation," etc., relates back to the enumeration of "automobiles, motor trucks, motor delivery wagons, trailers or semitrailers owned and operated exclusively in the public service," etc., or whether it relates only to "motor busses owned and operated by a private school," etc.

Registration of the vehicles described for a \$1 fee, as contrasted with the higher regular commercial rates imposed by sec. 85.01 (4), Stats., is in the nature of a favor or exemption which constitutes an exception to the higher registration fees which are applicable to owners and operators who do not fall within the particular classes specified.

It is my opinion, based on the plain grammatical construction of the statute, that as regards charitable corporations, the \$1 fee is limited to busses which they may own and operate. Any other type of vehicle owned or operated by charitable corporations must be registered at the regular, full rate.

Prior to the adoption of ch. 252, Laws of 1953, the statute (sec. 85.01 (4) (g)) read as quoted above, with the emphasized words omitted. It was clear, prior to the 1953 amendment that the only "automobiles, motor trucks, motor delivery wagons, trailers or semitrailers" which could be registered for the \$1 fee were those "*owned and operated exclusively in the public service by the state of Wisconsin, or by any county or municipality thereof.*" It was equally clear that the only other vehicles authorized to be registered for

the \$1 fee were "motor busses owned and operated by a private school or college."

If the legislature had intended to grant favor of the reduced fee (for vehicles other than busses) to others than the state, county, or municipalities thereof, the place to have made such amendment most logically would have been in the enumeration of "state, county," etc.

The use of the conjunctive "and" between the two classes of vehicles and owners described in the statute prior to its amendment, and the use of the disjunctive "or" to separate the two classes of *owners or operators* in the two clauses following the "and," satisfies me by the resulting plain language and the application of the ordinary rules of grammar that there was no intention to enlarge the class of owners and operators first enumerated (state, county, municipalities) by adding "charitable corporations" thereto. Even if we were to treat the "or" as intended to mean "and," as is sometimes done to ascertain true legislative intent (2 Sutherland, *Statutory Construction*, 3rd ed., §4923), the result would be no different.

Finally, the application of the "last antecedent doctrine" would preclude the construction contended for by claimant. (See cases collected in §293, 15 Callaghan's *Wisconsin Digest* 658.) Qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or evident meaning of the enactment requires a different construction. It cannot be fairly said that the context or "evident meaning" of the enactment requires a different construction.

SGH

Counties—Schools and School Districts—County School Committee—Provisions in sec. 40.02 (3), Stats. 1953, for nominations of candidates for the county school committee are directory, and failure to make such nominations prior to the meeting at which the county board makes appointments does not render such appointments invalid.

May 3, 1954.

RODNEY LEE YOUNG,
District Attorney,
Rusk County.

At the November 1953 meeting, the Rusk county board selected two members of the county school committee for the new terms starting January 1, 1954. The county education committee had not made nominations of candidates therefor "at least 30 days before" said meeting as provided in sec. 40.02 (3), Stats. 1953 (formerly sec. 40.303 (2)), and had made no such nominations previous to the meeting. It was thereafter contended that nominations by the county education committee in accordance with sec. 40.02 (3) are prerequisite to valid appointment by the county board and, as there had been a selection of two members of the county school committee at the November 1952 meeting under like circumstances, there were therefore four vacancies to be filled by appointment by the chairman of the county board as provided in sec. 40.02 (2), Stats. 1953 (formerly in sec. 40.303 (1)).

At the February 1954 meeting of the board, at the request of the chairman of the board to submit recommendations to him for consideration, the county education committee by a report to the board submitted four persons "for consideration for appointment" to the four memberships on the committee that it was asserted were vacant because of no valid appointments by the board. The chairman read the report at the meeting and its adoption was duly moved and carried. Thereafter it was contended that this mere reading of such report by the chairman and its adoption by the board did not amount to an appointment of the persons named therein by the chairman as he did not thereby

present such names as persons he had appointed to the committee for confirmation by the board, and that consequently there are still four vacancies existing in the committee.

You advise that as a result, the county school committee has not had meetings or functioned because of the confusion as to who are validly members thereof, and ask for our opinion upon the foregoing.

Sec. 40.02, Stats. 1953, so far as here material provides as follows:

"40.02 COUNTY SCHOOL COMMITTEE. (1) CREATION, MEMBERSHIP. In each county, there shall be a county school committee of 6 county residents. The county board shall appoint 2 members for 3-year terms at its annual November meeting. * * * Each term commences January 1 after appointment. All members shall serve until their successors have qualified. * * *

"(2) VACANCIES. Any vacancy shall be filled by appointment by the chairman of the county board for the remainder of the unexpired term, subject to confirmation by the county board at its next succeeding meeting. Upon failure of the county board to approve of an appointment made by the chairman of the county board, the board shall appoint a successor to fill the vacancy for the balance of the unexpired term. * * *

"(3) NOMINATION OF COMMITTEE MEMBERS. The education committee of the county board, or if no such committee exists, a committee designated by the chairman of the county board, shall nominate candidates for the county school committee. Such nomination shall be made at least 30 days before the meeting of the board at which the appointments are made. * * *"

Under these statutes the determination at the county level of who should be members of the county school committee rests in the final analysis in the county board. The committee as set up is composed of six members, two of whose terms expire each year at the end of the year. Thus, each year there is the necessity for the selection of two new members to replace the two members whose terms expire. Provision is made that the county board shall at each annual November meeting select these two new members of the board.

Provision is also made that in the case of a vacancy occurring in the membership of the county school committee the county board chairman may make an appointment, but such appointment is subject to confirmation by the county board at its next meeting after the appointment. It is also provided that if the county board does not confirm the appointment so made by the chairman, then the board itself shall appoint someone to fill the vacancy for the balance of the unexpired term. Thus, the county board has the final determination as to who shall fill a vacancy.

The provision in subsec. (3) of sec. 40.02 that the county education committee shall make nominations of candidates at least 30 days before the November meeting is for the purpose of aiding the county board in making its selection of the new members of the committee. Were this provision construed to mean that if the county education committee did not make such nominations at least 30 days before the meeting, the board at the meeting could not select the two new members of the board, the result would be that a power was placed in the hands of the county education committee to preclude the county board from making this selection. Furthermore, if such were the effect given to this language, the county education committee could merely nominate one person for each of the two new memberships, and then the county board would have to select these two persons as the new members because of the fact that there would be no other nominations before it. Consideration of all of the provisions of sec. 40.02 leads to the conclusion that the provisions in subsec. (3) were not intended as anything more than directory and do not preclude the county board at its meeting from selecting a person for the new membership on the committee even though such person would not be on the list of nominations furnished by the education committee. Clearly, if the county board can go outside the nominations made by the county education committee in full compliance with subsec. (3), and is not restricted to select only the persons nominated by the committee, then certainly the failure or refusal of the county education committee to make such nominations cannot preclude the county board from making its selection at the November meeting.

It is therefore our opinion that the provisions in sec. 40.02 (3), Stats. 1953, are directory only, and that the failure of the county education committee, or other committee designated under the provisions of this subsection, to make a list of nominations of candidates prior to the November meeting does not prevent or preclude the county board from itself nominating and selecting persons for the membership on the county school committee as provided in sec. 40.02 (1).

In this connection, it may also be observed that the failure to select members for the county school committee at the November meeting does not create a vacancy so that the county board chairman would be entitled to make an appointment to fill the two new memberships, subject to confirmation at the next meeting of the county board. Subsec. (2) provides only that the chairman may fill a vacancy for the remainder of the unexpired term. His authority is only to act in the case of a vacancy and to make the appointment for the balance of an unexpired term. While perhaps not controlling, the provisions of sec. 17.03, Stats., defining a vacancy in public office, do not include the failure to elect or appoint a successor to an officer whose term has expired. Subsec. (1) of sec. 40.02 says that members shall serve until their successors have qualified. Thus, upon failure of the board to make an appointment at the November meeting, the members whose terms expire at the end of the year would continue to hold over until their successors are chosen and take on the duties of the committee. In 42 Am. Jur., Public Officers, §139, it is said as follows:

“The general rule, discussed in a subsequent section, is that on the expiration of an officer’s term he holds over until his successor is chosen and qualifies. So, if a vacancy may be said to occur when an officer’s term expires, the law itself fills the vacancy by providing that the incumbent shall so hold over. Accordingly, in the absence of some positive provision of the law necessitating a different conclusion, the view is generally taken that where the incumbent holds over at the expiration of his term, no vacancy results in the sense that the appointing power may proceed to select a successor. * * *”

It would thus seem that under the provisions of this statute, sec. 40.02, the chairman of the county board would have power to make an appointment to a membership on the county school committee only where no one was holding the membership. Where members' terms have expired and the county board has not made appointments of successors, under the statute such old members would hold over until their successors were appointed and took over membership. Therefore there would be somebody occupying the position, and the county board chairman in that case could not make an appointment.

However, it is our view that the power of the county board to make the appointment would be a continuing one, and even though it did not make the appointment at the November annual meeting it could still make such appointment at its next succeeding or a later meeting in the same way that it could at the designated November meeting. But, where the county board has not made appointment of a successor, then under the statute the state superintendent could make the appointment. Subsec. (2) so states in the last sentence. Of course, if the county board in the exercise of its appointing power should make the appointment before the state superintendent acts under such authority, then the membership would be filled and the state superintendent could not make such appointment. In the situation where the county board has not made the appointment and the members' terms have expired, it would be a matter of whether the county board or the state superintendent first acts, and whichever one does so, the appointment so made would be valid.

In the instant situation, if the appointments made at the November 1953 meeting were not properly made, then under the continuing power of the county board to make appointments, it would be our view that the appointments made at the February 1954 meeting were validly made by the county board. However, as it is our opinion that the making of recommendations by the county education committee under subsec. (3) is not prerequisite to selection of new members of the county school committee by the county board, it is our view that the appointments made at the November

1953 meeting were valid and that the persons there selected are members of the county school committee. This would be the result unless in some way it can be demonstrated and shown that the persons so appointed at the November meeting have failed to qualify or have abandoned the membership. Our understanding is that no meetings of the committee have been held since that time and we find no requirement that the members of such committee take an oath or otherwise formally qualify. Should it be, however, that there is a factual situation showing that they have failed to assume the membership of the committee, then there would be vacancies which the county board chairman could fill by appointment. As failure to qualify for an office is one of the grounds of vacancy set forth in sec. 17.03, Stats., in respect to public offices, it is our opinion that the same principle would apply to membership vacancies in that instance.

HHP

Automobiles and Motor Vehicles—Accident Reports—Words and Phrases—Immediately—As used in sec. 85.141 (6) (a), Stats., the word “immediately” means within a reasonable time under all of the facts and circumstances of the case. Whether or not a person under duty to report did or did not make report “immediately” is a question of fact and not a question of law, and no general rule can be laid down to guide enforcement officers other than to suggest: (a) A motorist’s humanitarian duty to render aid to the injured or to call medical help in case of serious injury would undoubtedly be regarded by courts and juries as a reasonable excuse for failure to report first to local enforcement officers; (b) the longer the interim between the occurrence of the accident and the time of the report, the more unlikely it is that reasonable excuse exists for failing to report earlier; and (c) the burden of showing such excuse is upon the defendant, that is to say, it is not incumbent on the prosecution to disprove the existence of an excuse, but rather on the accused to establish his excuse by way of affirmative defense.

The failure to report “immediately” to local enforcement officers and failure to report “within 10 days” in writing to the motor vehicle department are two separate offenses. Prosecution will lie in appropriate cases for failure to comply with either of the two requirements.

May 3, 1954.

RODNEY O. KITTELSEN,
District Attorney,
Green County.

You request my opinion on two questions involving the construction of sec. 85.141 (6) (a), Stats., which reads as follows:

“The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of \$100 or more shall immediately report the accident to the police department, the sheriff’s department or the traffic department of the municipality or county in which the accident occurred and within 10 days after the accident forward a written report of the accident to the state motor vehicle department.”

Your questions are as follows:

1. What is meant by the term "immediately" as used in the above quoted paragraph?

2. Are the failure to report "immediately" to the local enforcement officers specified, and the failure to report in writing to the motor vehicle department within 10 days two *separate* offenses, or two essential elements of one offense?

The questions apparently originate with your local enforcement officers whom you quote as believing that compliance with the statutes requires that "local authorities should be summoned * * * before calling for wrecker service or medical attention." You state that from the standpoint of law enforcement, "it is difficult to prosecute a driver for drunken driving if he waits several hours to sober up before reporting the accident to local authorities, and impossible if all he is required to do is make a report to the state on the 9th day."

Addressing ourselves to the first question, "immediately," being a word of common usage and not a technical term, is to be construed according to common and approved usage unless such construction would produce a result inconsistent with the manifest intent of the legislature. See sec. 370.01, Stats. Webster defines the word thus: "* * * without interval of time; without delay; straightway." Black's Law Dictionary has supplemented the identical definition with the further explanation: "The words 'immediately' and 'forthwith' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt, vigorous action without any delay." The American College Dictionary (1947 ed.) enumerates "directly, instantly, and presently" as having been "originally close synonyms denoting complete absence of delay or of any lapse of time." The work continues: "'Instantly' is the only one retaining the meaning of action or occurrence on the instant."

Upon a consideration of the numerous cases in which the word "immediately" has been construed, it is at once apparent that the courts have repeatedly found that "immediately" does not mean "instantaneously," but requires action to be taken within a reasonable time under the circumstances of the case. And in any event, whether under given

circumstances a person under duty did or did not make report "immediately." is a question of fact and not a question of law. For examples of the various factual situations involved in litigation in which the word "immediately" was construed, see 20 Words and Phrases, pp. 105-131, and 1953 Supplement, pp. 26-29.

A survey of Wisconsin cases in which the word "immediately" was interpreted indicates that it is generally taken to mean a reasonable time under the circumstances of each case. *Cashau v. Northwestern Nat. Ins. Co.*, (1873) 5 Fed. Cas. 270, 271; *State ex rel. Cothren v. Lean*, (1859) 9 Wis.* 279; *Richardson v. End*, (1877) 43 Wis. 316; *Hepler v. State*, (1878) 43 Wis. 479; *Kentzler v. American Mutual Accident Ass'n of Oshkosh, Wis.*, (1894) 88 Wis. 589, 60 N. W. 1002; *Merrill v. The Travelers' Ins. Co.*, (1895) 91 Wis. 329, 64 N. W. 1039; *Foster v. The Fidelity & Casualty Co. of New York*, (1898) 99 Wis. 447, 75 N. W. 69.

Sec. 85.141 (6) (a) was created by ch. 427, Laws 1935. At that time the word "immediately" was not used in the section; in its place was the phrase "as soon as reasonably possible." The section was amended six different times over the years but the above phrase was left untouched. Then, in ch. 341, Laws 1949, the phrase was replaced by the words "within 10 days." Finally, ch. 365, Laws 1951, struck out the phrase "within 10 days" and replaced it with the word "immediately." This history suggests that in any event the word "immediately" was intended to mean a period less than 10 days.

From the nature of the meaning of the word "immediately" as discussed above, it is impracticable to set down a definite pattern of conduct that the driver must follow after the occurrence of an accident. While it is conceivable that in some situations this construction of the word would preclude the prior calling of wrecker service, it would certainly not preclude the prior calling of medical assistance in a case of serious injury. The word is a relative one, and it is impossible to set down a more specific meaning without a more specific factual situation in mind. Each case must be viewed in the light of its own particular facts, bearing in mind the foregoing considerations.

It is clear in any event that the longer the interim between the occurrence of an accident and the time of the actual report, the more unlikely it is that the motorist under duty to report has acted within a reasonable time under all the facts and circumstances. Further, the burden of showing that he did act within a reasonable time under the circumstances of the case is upon the accused as a matter of affirmative defense.

Your second question inquires whether each requirement is but one of two essential elements of a single offense and failure to perform both duties must be shown to prove the whole offense. In effect that would be equivalent to saying that a telephone report to a local enforcement officer discharges the duty to report in writing to the motor vehicle department within 10 days. This concept wholly ignores the purposes for which these two requirements were enacted. The local report is for the purpose of bringing to the accident scene trained officers to aid the injured, to restore normal traffic conditions as quickly as practicable, to avoid further accidents and injuries, and to record objectively their findings with respect to physical facts as they may aid in fixing responsibility for the accident and thus enable the officers to vindicate public wrongs by prosecuting for traffic law violations, if necessary. The purpose of the report to the motor vehicle department is to enable the motor vehicle department to discharge its duties in connection with the administration of sec. 85.09, Stats. (safety and financial responsibility), and to obtain an accurate collection of facts relating to the number and circumstances of traffic accidents for legislative and other related purposes. See 35 O. A. G. 377, 378. It is clear, in the light of these purposes, that the making of a report to the local enforcement officers does not meet the requirements of the report to the motor vehicle department and *vice versa*.

As you correctly point out, sec. 85.141 (6) (a), Stats., requires that two separate acts be performed by a person coming within its provisions. The word "and" is actually used in the disjunctive sense to mark a separation between these two requirements. This is permissible under the familiar rule of construction that the words "and" and "or"

are often used incorrectly, and that where a strict reading would render the sense dubious, one may be read in place of the other, in deference to the meaning of the context. *State ex rel. Wisconsin D. M. Co. v. Circuit Court*, 176 Wis. 198. See also 2 Sutherland, *Statutory Construction* 450 *et seq.*, §4923, where it is said that there has been "so great laxity in the use of these terms ["and" and "or"] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent."

It is my opinion, therefore, that the fulfillment of the legislative intent requires a negative answer to your second question.

SGH

Counties—Taxation—Exemption—Subsec. (8) of sec. 70.11, Stats. 1953, is inapplicable to county-owned property.

May 3, 1954.

DONALD J. BERO,
District Attorney,
Manitowoc County.

You state that the county owns land adjoining the courthouse property, upon which is a building fitted for business purposes on the ground floor and with living quarters upstairs, which it leases to private persons, and also that the county owns its fairground properties upon which are situated buildings, including some that at times it leases to private individuals and concerns. You ask whether the fact that the county rents out these properties as above renders the same taxable on some proportionate basis under subsec. (8) of sec. 70.11, Stats.

Sec. 70.11, Stats., was revised by ch. 63, Laws 1949. Prior thereto, the provisions comparable to those now contained in subsec. (8) were scattered in subsecs. (4), (4a) and (25) (a) of the old section. As so contained in the old section, such provisions obviously were only applicable to situations where exemption was predicated in part at least upon either

exclusive or substantial use for exempt purposes. In the revision, there was no intention to make such provisions applicable to anything other than similar situations, but to make them applicable to all situations where exemption was founded in whole or in part upon use for an exempt purpose.

Ever since the 1949 revision and the creation thereby of subsec. (8) of present sec. 70.11, it has been our opinion that the provisions of that subsection are applicable only where exemption is stated in the statutes to be grounded upon use for an exempt purpose. Consequently, the provisions thereof have no application to property owned by the state or by a county, city, village, town, or school district, because the exemptions provided in subsecs. (1) and (2) of sec. 70.11 that are applicable to such property are not predicated upon anything except ownership.

That the provisions in subsec. (8) are not intended to be applicable to property owned by the state or a county, city, village, town, or school district, is shown by the language used therein. In both the second and third sentences the word "organization" is used and it is most inappropriate as a reference to the state or its subdivisions. Rather, it is appropriate for reference to private corporations, associations, societies, and the like, and evidences an intention that the provisions of the subsection should continue, as in the past, to apply only to the exemptions accorded in terms of use for an exempt purpose.

In the case of *State ex rel. Wis. Univ. Bldg. Corp. v. Bareis*, (1950) 257 Wis. 497, 44 N. W. 2d 259, the assessment involved was the 1949 assessment, which of course was made as of May 1, 1949, and, said ch. 63, Laws 1949, having been published the previous day so that under sec. 370.05, Stats., it was effective on said May 1, 1949, the provisions of present sec. 70.11, Stats., were applicable thereto. While there is no mention of subsec. (8) in the decision, if there had been any possibility of its application to property owned by the state, the city attorney would have raised the point or the court would have dealt with the case on the basis thereof. It was the use factor with which the city attorney was primarily concerned and that gave rise to the

case, so that if he felt there was any applicability of subsec. (8) he would have raised it. The case, of course, is not direct authority upon this point, but the fact that it was not even suggested in the case lends substantial support to our position as to the applicability of said subsec. (8).

It is therefore our opinion that subsec. (8) of sec. 70.11, Stats. 1953, is inapplicable to the county property you mention and that, being owned by the county, it is exempt under sec. 70.11 (2), Stats. 1953.

HHP

Automobiles and Motor Vehicles—Driver's License—Juvenile Court—Records—Notwithstanding sec. 48.01 (3), Stats., juvenile courts must, under sec. 85.08 (24) (b) and (c), Stats., forward the record of conviction for any moving traffic violation of ch. 85, Stats., or conforming local ordinance, to the motor vehicle department.

May 4, 1954.

MOTOR VEHICLE DEPARTMENT.

You have requested my opinion as to whether the provisions of sec. 48.01 (3), Stats., which close juvenile court records to the public except on order of the judge, prevail over the provisions of sec. 85.08 (24) (b) and (c), Stats., which make it mandatory that juvenile courts forward all records of motor vehicle convictions relating to moving vehicles to the motor vehicle department.

It is my opinion that your question must be answered in the negative.

While the two statutes cited above are clear and unambiguous when considered separately, it is apparent that both may not reasonably be given full effect. In such a situation the rule is well settled that in the absence of a contrary legislative intent, the specific statute controls the general, and the statute which was passed later in point of time prevails over the earlier. See 2 Sutherland, Statutory Construction, 3rd Ed., §5204.

In the situation presented, the sanctions of ch. 85 are more specific and later in point of time than those of ch. 48. Thus, only the legislative intent of the two statutes need be considered.

Sec. 48.01 (3) states in part:

“* * * and the record thereof shall not be open to the public except upon the order of the judge. * * *”

This section was enacted by ch. 439, Laws 1929. Its coverage is broad, preventing the use of all juvenile court records without the consent of the juvenile judge. The purpose of the section was to protect the reputation of the child, the fundamental idea of the juvenile law being reformation rather than punishment. 41 O. A. G. 70.

Turning to ch. 85, subsec. (b) of sec. 85.08 (24) states:

“Every court, *including a juvenile court*, having jurisdiction over offenses committed under this section, or any other law of this state, or a county, city or village ordinance which is in conformity with state law regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in such court for any moving traffic violation of chapter 85 or any local ordinance which is in conformity therewith.”

Subsec. (c) of that statute not only imposes the duty of complying with subsec. (b) upon the clerk of such court or the justice of the peace, judge or magistrate of such court not having a clerk, but requires the commissioner to bring an action against the person who breaches that duty, the breach being imputed as a misdemeanor.

Sec. 85.08 (1) (i), Stats., states:

“‘Conviction’ means a final conviction; a forfeiture of bail or collateral deposited to secure a defendant’s appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction; *a finding of a juvenile court under chapter 48 shall be equivalent to a conviction.*”

The italicized portions of the above quoted statutes were added by ch. 173, Laws 1949. The same chapter created two new sections. The first was sec. 85.08 (27g), since renumbered as sec. 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.”

The second was sec. 48.07 (1) (e) :

“The court [juvenile 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 [one found delinquent, neglected or dependent] 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.”

Also relevant in determining the legislative intent is the following statement of the legislative council on the bill that became ch. 173, Laws 1949 (Wisconsin Legislative Council Report, 1948) :

“*Recommendation*—The subcommittee makes the following recommendations in regard to youthful drivers:

“* * *

“(2) Applying the provisions of section 85.08 governing operators’ licenses to all offenders under 18 years of age brought into the juvenile court for traffic violations.”

Read together, the changes made by ch. 173, Laws 1949, clearly manifest an intent of the legislature that, notwithstanding the provisions of ch. 48, juvenile offenders should be subject to the provisions of ch. 85 insofar as the suspension, revocation, and reinstatement of juvenile drivers’ licenses are concerned.

That it intended strong controls to carry out this intent is evident; the main legislative problem lay in determining the best method of imposing them. The method finally adopted was not to create the type of statute contemplated in the notes of the legislative council, but to add the amendments and statutes which are noted above.

The effect of those provisions—the vesting of the power to suspend operators' licenses in *both* the judge and the motor vehicle department—is consistent with the legislative policy of strongly controlling this particular area, and should not be lessened by the operation of a general statute, the existence and effect of which the legislature recognized and obviously intended to by-pass.

If full effect is given to those provisions, the policy of sec. 48.01 (3), Stats., will not seriously be impaired. For that section relates to *all* records of juvenile courts; secs. 85.08 (24 (b) and (c) deal only with *one* particular record, that of the conviction for any moving traffic violation of either ch. 85 or any conforming local ordinance. The words of these subsections are specific enough to exclude situations in which there have been no law violations. Thus, while some juvenile court findings might carry implications of wrongdoing neither warranted by the facts nor the procedure, that danger is greatly decreased in the present situation.

The forwarding of such records to the motor vehicle department by a juvenile judge is a legitimate administrative function which was authorized in order to aid in furthering a policy which the legislature, cognizant of the conflicting policy of sec. 48.01 (3), *deemed paramount*. While the judicially defined scope of sec. 48.01 (3) may have been broad, the scope and meaning of the words of any statute are controlled, in the first instance, by the *entire* context in which they are used.

Finally, a holding that sec. 85.08 (24) (b) and (c), Stats., prevails over sec. 48.01 (3), Stats., would not repeal the broad sanction of the latter statute, but would merely modify it. 1 Sutherland, Statutory Construction, 3rd ed., §2022, states:

“* * * The subsequent enactment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals * * * [only] the provisions of the general statute with which it conflicts. * * *”

Accordingly, it is my opinion that sec. 85.08 (24) (b) and (c), Stats., prevails over sec. 48.01 (3), Stats., and that

juvenile courts must forward all records of motor vehicle convictions, as specified in those subsections, to the motor vehicle department.

SGH

Automobiles and Motor Vehicles—Reciprocity—Statutes—Construction—The word “may,” as used in sec. 85.055 (4), Stats., construed to mean “must” or “shall.” Such construction is imperative where the rights of the public are involved, and where no standards have been prescribed in the statute for guidance in administering the statute on a discretionary basis.

May 6, 1954.

MOTOR VEHICLE DEPARTMENT.

You request my opinion as to whether you have a mandatory duty to revoke reciprocity permits under sec. 85.055 (4), Stats., where you receive a certificate of conviction of an out-of-state carrier for violation of highway weight limitations.

Sec. 85.055 (4) reads as follows:

“Any operator or owner of a foreign motor vehicle operating with a nonresident identification plate or certificate convicted of violating the weight limitations of sections 85.47 and 85.48 may have such nonresident identification plate or certificate canceled by the motor vehicle department, and further shall pay the same tax and fees for a period of one year as is required for like vehicles owned by residents of Wisconsin under chapters 85 and 194.”

While the word “may” is generally regarded as permissive, the authorities are replete with instances where it has been loosely used in place of “shall” in the mandatory sense; and the converse is also true. The rule is frequently expressed that “may” makes a conferred power imperative; that “may” means to have power, and that the word “may” is mandatory where the public interest and the public good so require. (See collection of cases, 26A Words and

Phrases, perm. ed., pp. 390, *et seq.*) It becomes necessary, particularly in an instance such as the present, where no standards have been provided for the commissioner of the motor vehicle department to cancel one carrier's permit and to allow another carrier to retain its permit, to resort to the context of the statute to determine the legislative intent, if at all possible.

Accepting for the moment, solely for the purpose of argument, that the word "may" was used only in its permissive sense, it is clear that as to the instances where it would be conceded by all that the commissioner should exercise the power conferred by statute, the purpose of the statute is to impose a further sanction upon those who violate the highway weight limitations in addition to the criminal sanctions imposed by secs. 85.47 and 85.91, Stats. The end objective of sec. 85.055 (4) is to compel obedience to the weight limitation laws. Where is the commissioner to draw the line as between two offending carriers, in the absence of any statutory standards or guide? Certainly the legislature had in mind that the statute be applied in appropriate cases. It must be presumed not to have acted futilely. The public right to have the laws obeyed and to have its property (highways) protected against damage is the pivotal factor, therefore, in determining whether the word "may" is to be construed as permissive or mandatory.

If "may" were to be construed as permissive, a constitutional question might well be presented as to whether the commissioner's action in canceling one carrier's permit and declining to cancel another's upon similar facts would constitute arbitrary or discriminatory action. It is a fundamental rule that of two constructions, that which will avoid a constitutional question will be followed. (See *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, for discussion of the necessity of standards where a discretionary power is vested in a state agency.)

Wisconsin cases discussing the principles involved in determining the meaning to be ascribed to the word "may" are: *The Market National Bank of New York v. Hogan*, 21 Wis. 322, 323-324; *Cutler v. Howard*, 9 Wis.* 309; *Curry v. Portage*, 195 Wis. 35, 37.

It further appears that your department has regarded the word "may" as being mandatory since the enactment of the statute in 1951. Your administrative decision was communicated to certain motor carriers, motor carrier associations, and their legal representatives on July 16, 1952. The states with which you have consummated reciprocity agreements were advised of your construction. You have, in fact, canceled reciprocity permits upon receipt of notices of conviction for overweight violations, and it is known throughout the industry what your administrative policy is. No steps have been taken to seek judicial review of the administrative action in thus canceling permits. The legislature has not amended the law. Under these circumstances, and particularly in view of the applicable legal principles, it is my opinion that you have correctly construed the statute and should adhere to such construction.

SGH

Automobiles and Motor Vehicles—Reciprocity—Semi-trailer owned by nonresident and registered in foreign state with which Wisconsin has reciprocity under sec. 85.05 (5), Stats., and operated in Wisconsin on interchange basis in intrastate commerce must be registered in Wisconsin under sec. 85.01 (4) (e) 2, Stats., and the \$10 fee paid. Said fee is payable on annual, and not on quarterly, basis.

May 6, 1954.

EUGENE MCESSEY,
District Attorney,
Fond du Lac County.

You have requested my opinion as to whether a Wisconsin corporation which has interchanged a semitrailer (which it owns and for which the Wisconsin registration fee has been paid) for a semitrailer owned by a foreign corporation and registered in a state with which Wisconsin has consummated a reciprocity agreement, is required to register such foreign trailer in Wisconsin if it uses such trailer in

intrastate commerce. If that question is answered in the affirmative, you ask further whether the vehicle may be registered on a quarterly basis, or whether it must be registered on an annual basis.

While your letter does not directly indicate, the implication is present that the "semitrailer" you have in mind is one which falls within the definition of sec. 85.10 (12), Stats.

Further, it must be assumed that interchange of semitrailers was made under authority of sec. 85.05 (5), Stats., as created by ch. 593, Laws 1953.

Sec. 85.01 (4) (e) 2, Stats. (as recreated by ch. 320, Laws 1953), provides as follows:

"2. For the registration of each semitrailer defined in s. 85.10 (12) operated in connection with a truck tractor an annual fee of \$10."

This statute, which is applicable generally to all semitrailers, is clear and unambiguous. It calls for an annual fee and makes no provision for quarterly registration. Nor can authority for quarterly registration be implied.

The only exception to registration requirements for semitrailers relates to interchanged vehicles used in *interstate* commerce. This exception is a part of the reciprocity statute, sec. 85.05 (5), as amended by ch. 593, Laws 1953. One must comply with the several conditions set forth in that statute in order to operate validly an interchanged semitrailer in Wisconsin on a foreign license plate. The exception, being limited to vehicles in *interstate* commerce, is inapplicable under your statement of facts. The owner of the vehicle cannot lawfully operate the vehicle in intrastate commerce in Wisconsin. That being true, its operation by a bailee (on interchange basis) is illegal and violates sec. 85.01 (1), Stats., which prohibits such operation without lawful registration. Reciprocity is limited to interstate commerce.

It has been urged in some cases where a bailee is operating a vehicle without lawful registration that he cannot register the vehicle because he is not the owner. (Sec. 85.01 (2), Stats., requires it to be registered in the owner's name.)

The clearly stated policy of sec. 85.01, Stats., is that every vehicle shall be lawfully registered as a condition precedent to its operation on the public highways. Sec. 85.01 (1) makes operation of a motor vehicle by *any person* without proper registration an offense. "Any person" unquestionably includes others than the owner. The court in which the operator is tried has the power to "require *such person* to make application for registration and pay the fee therefor." This subsection must be read *in pari materia* with subsec. (2), and may reasonably be interpreted to mean that a bailee or agent of the owner may be compelled to register such vehicle (in the name of the owner, of course) and to pay the fee therefor.

SGH

Marketing and Trade Practices—Unfair Sales Act—Under sec. 100.30 (2) (a), Stats., it is permissible to deduct from invoice cost a quantity discount which can be accurately computed for the purpose of determining cost to retailer within 30 days prior to the date of sale.

May 6, 1954.

ROBERT C. ALTMAN,
District Attorney,
Marathon County.

You have asked this office to construe the language "less all trade discounts" found in sec. 100.30 (2) (a), Stats. The facts upon which this opinion will be based are as follows:

The A & P store at Wausau purchases a product known as Premium Saltines from the National Biscuit Company. A Nabisco salesman takes orders from A & P twice a week and deliveries are made to A & P twice a week. Each delivery is accompanied by an invoice for the goods delivered. Twice monthly a master invoice is sent by Nabisco to the Milwaukee office of A & P covering purchases for the

past two weeks. A & P pays these invoices twice monthly. Nabisco allows all customers a 4 per cent quantity discount on purchases over \$500 a month. This discount is paid by Nabisco by check approximately 30 days after the end of the month in which the purchases are made. This quantity discount plan is made known to all customers in advance of their purchases. The A & P store at Wausau consistently buys over \$500 worth of this product each month. This discount is not stated on any invoice rendered to A & P by Nabisco and is not deducted by A & P in paying the twice monthly invoices.

Upon these facts you ask whether this 4 per cent quantity discount can be deducted from invoice cost in determining cost to retailer as defined in sec. 100.30 (2) (a), Stats. This section reads in part:

“‘Cost to retailer’ means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; * * *.”

You state that for some time you have been engaged in the active enforcement of this statute, called the unfair sales act, and that it has been your practice as well as the practice of the department of agriculture to require that all discounts, which are to be deducted from invoice cost to determine cost to retailer, must be stated on the invoice. This practice facilitates enforcement of this statute by making cost to retailer readily determinable from the invoice alone. You point out that the problem of determining cost to retailer will be greatly complicated if you have to search beyond the invoice to find out whether there are any applicable discounts which might properly be deducted. Also you point out that many such discounts not appearing upon the invoice are of a nebulous, uncertain, prospective nature, which discounts may or may not be allowed depending upon whether the retailer purchases a certain required volume before the end of the month. Thus at the time the retailer receives his delivery of goods and the accompanying invoice he would in effect have to guess at what his discounts

were going to be in order to deduct them from his invoice cost to arrive at cost to retailer.

It is clear that any criminal statute which required a businessman to estimate accurately what his future discounts were going to be in order to determine his cost would be void for lack of certainty. To constitute due process of law a statute must prescribe the elements of the offense with reasonable certainty, fix an ascertainable standard of guilt, and make known to those to whom it is addressed what conduct on their part will render them liable for its penalty. 16 C. J. S., Constitutional Law, §580. Under this constitutional principle, as applied to the unfair sales act, a merchant must be able to determine accurately at the time he establishes his selling price exactly what his cost to retailer is going to be. It is also a familiar rule of statutory construction that in the interpretation of a statute, that construction of the language employed is to be adopted, if possible, which will sustain the validity of a statute under the constitution. *In re Petition of State ex rel. Attorney General, et al.*, (1936) 220 Wis. 25, 264 N. W. 633; 16 C. J. S., Constitutional Law, §98. We must construe the statutory language "less all trade discounts" in the light of these constitutional principles.

These statutory words "less all trade discounts" are broad enough to cover all discounts allowed by the seller as a reduction of the price of goods sold. This, of course, does not include cash discounts. The statute makes no distinction between discounts stated on the invoice and quantity discounts not stated on the invoice but computed on the basis of a full month's purchases and paid at a subsequent time in the form of a rebate. It appears that no court has ever distinguished these two types of discounts in construing the unfair sales act. Callman, *Unfair Competition and Trade-Marks*, 2nd ed., Vol. 1, p. 539. It has been said that trade discounts and quantity discounts are synonymous terms referring to an amount taken off a list price, varying according to the quantities purchased. *Standard Oil Co. v. State*, (1937) 283 Mich. 85, 276 N. W. 908, 911. Also a rebate may be considered as the equivalent of a discount. Either is a

reduction of cost. *State v. Loucks*, (1924) 32 Wyo. 26, 228 P. 632, 634.

Even though the words "less all trade discounts" are broad enough to include a quantity discount computed at a time subsequent to the purchase of goods, the question arises whether the merchant receiving such a discount can readily determine his cost to retailer at the time he establishes his selling price. The section of the statutes previously quoted provides that a merchant in computing his cost to retailer may use the invoice cost within 30 days prior to the date of sale. Under this provision, a merchant on any given date may compute his cost to retailer based upon his invoice cost for that commodity at any time within the preceding 30-day period. Thus a merchant who buys a commodity for 10 cents on January 1 can use that 10-cent invoice cost in computing his cost to retailer for all sales of that commodity which he makes during the next 30 days, regardless of the fact that his actual cost for such commodity may have gone up to 12 cents on January 2.

Applying these principles to the present situation, we arrive at a result as follows: In any one month A & P buys in excess of \$500 worth of merchandise from Nabisco. Thus A & P purchases total \$500 before the end of the month. On the day A & P receives an invoice raising its total purchases for that month to \$500, A & P knows the exact amount of the quantity discount which it will earn for that month, regardless of the fact that such discount has not yet been paid. A & P also knows its invoice cost. Knowing both the invoice cost and the discount, A & P can compute accurately its cost to retailer for that month. Under the 30-day provision of the statute, A & P can use this cost to retailer throughout the next 30-day period regardless of the fact that on purchases made from Nabisco during this next 30-day period A & P may not know exactly what quantity discount it will qualify for on those purchases. This 30-day period begins the day A & P receives the invoice which raises its total purchases for that month to \$500.

Under the above reasoning, a merchant could not deduct such a quantity discount from his invoice cost to compute cost to retailer during the first month that he did business

with a company such as Nabisco, until his purchases totaled \$500. However, after his purchases totaled \$500, he could compute his cost to retailer based upon his invoice cost less the quantity discount earned.

If this procedure unduly hampers effective enforcement of the unfair sales act it would be appropriate to call this fact to the attention of the legislature.

GFS

Public Assistance—Social Security Aids—Public Welfare Department—Audit Adjustments.—Where a county grants to a recipient of a social security aid amounts in excess of those fixed by statute or valid departmental rule, the state department of public welfare should in all cases exercise its power under secs. 49.18 (10), 49.19 (8) (b), 49.38 (1), and 49.61 (9), Stats., to disallow the county's claim with respect to the excess payment.

Where there is a statutory provision, such as in sec. 49.19 (5), Stats., or a valid rule of the state department of public welfare, establishing a fixed policy that no other public assistance shall be allowed for the benefit of a recipient of a particular social security aid, the department should disallow in full the county's claim with respect to any recipient receiving more than the specified maximum.

In other cases where a county grants in excess of the maximum, the department may disallow the claim in full if it determines that the circumstances are such that to do so is necessary to compel compliance with state policies.

Where a county's grant to a recipient of a social security aid is less than the proper amount established under state regulations, the state department of public welfare should exercise its power under secs. 49.18 (10), 49.19 (8) (b), 49.38 (1), and 49.61 (9), Stats., to disallow the county's claim with respect to the total amount.

May 6, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked two questions for guidance of your department in making audit adjustments of state and federal

funds paid to counties for social security aids, under secs. 49.18 (10), 49.19 (8) (b), 49.38 (1) and 49.61 (9), Stats.

Before undertaking discussion of your specific questions, it will be helpful to review the functions and duties of the department in connection with the administration of these social security aids. As pointed out in the opinion given to you on March 4, 1954, in connection with administration of aid to dependent children, sec. 46.206 (1), Stats., as created by ch. 513, Laws 1953, obligates the department to "super-
vise" the administration of old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons. The opinion given in 39 O. A. G. 403 indicates that the supervisory and rule-making power of the department was intended by the legislature to be adequate to insure observance of statutory regulations and of valid state-wide standards established by the department.

In 42 O. A. G. 193 and 26 O. A. G. 576, it was recognized that the department's authority and duty to make audit adjustments under the various statutory provisions above designated is one of the primary sanctions provided by the legislature to enable the department to require that the administration of the social security aids meet the state and federal standards. Our supreme court made the following comment with respect to the word "audit" in *Travelers Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 106-107, 123 N. W. 643:

"* * * The word 'audit' is sometimes restricted to a mere mathematical process, but generally is extended to include the investigation, weighing of evidence, and deciding whether items should or should not be included. *People ex rel. Ramsdale v. Orleans Co.* 16 Misc. 213, 38 N. Y. Supp. 890; *People ex rel. Hamilton v. Jefferson*, 35 App. Div. 239, 54 N. Y. Supp. 782; *People ex rel. Brown v. Board*, 52 N. Y. 224; *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *Territory ex rel. Donzelmann v. Grant*, 3 Wyo. 241, 21 Pac. 693; *In re Clark*, 5 Fed. Cas. 853.
* * *

All of the above cited statutory sections authorize the department to make "necessary audit adjustments" to insure that the total amount of money turned over to coun-

ties, and permitted to be retained by them, does not exceed the amount to which they are entitled.

Sec. 49.18 (10), Stats., provides that a county shall receive a certain percentage "of the approved amount paid by the county for blind aid pursuant to this section" and also states that the county's claim shall be certified only "if the department approves it."

Sec. 49.19, Stats., relating to aid to dependent children, provides in subsec. (8) (a) that the county's claim for state and federal reimbursement shall be "for aid under this section." Subsec. (8) (b) provides that if the department "is satisfied that the amount claimed is correct and that the aid allowed has been granted in compliance with the requirements of this section," it shall certify the claim for payment.

Sec. 49.38 (1), Stats., dealing with old-age assistance, provides that if the department "is satisfied that the amount claimed has actually been expended in accordance with sections 49.20 to 49.38" it shall certify the county's claim for payment.

Sec. 49.61 (9), Stats., dealing with aid to totally and permanently disabled persons, provides that the county shall make its claim "for state and federal reimbursement under this section" and that "if the department approves such claim" it shall certify the same for payment.

Under all sections the department is entitled to make its original certification without investigation or audit, on the basis of the data supplied by counties, in order to facilitate prompt reimbursement, and to make its audit adjustments at a later time.

Your first question is: If a county agency deliberately or through gross negligence deviates from state-wide standards in such a manner that the amount of aid furnished is more than the proper amount, should the department take an audit exception with respect to (1) the excess amount granted or (2) the total amount of aid granted?

Sec. 49.18 (1) (a), Stats., as amended by ch. 61, Laws 1953, provides that the maximum aid to the blind per month "shall not exceed \$75."

Sec. 49.19 (5), Stats., does not fix a rigid maximum for aid to dependent children, but provides that the aid shall be

"sufficient to enable the person having the care and custody of such children to care properly for them." It further provides that the amount shall be determined by a budget for the family in which all income as well as expenses shall be considered, and that such family budget shall be based on a "standard budget." The section does fix a maximum amount which may be allowed to cover burial expenses. The opinion was given in 40 O. A. G. 190 that the department does not have authority to establish an arbitrary administrative maximum for the monthly grant under sec. 49.19 (5), Stats., but that the department might promulgate standard budgets under the principles discussed in 39 O. A. G. 403, which could specify that no more than certain amounts should be taken into consideration for certain purposes. In connection with your question as applied to aid to dependent children, we are assuming that the maximum to which you have reference would be the result of valid departmental regulations within the scope of the foregoing opinions.

Sec. 49.22, Stats., as created by ch. 337, Laws 1953, dealing with old-age assistance, provides in part: "The amount granted shall be determined by a budget in which all income and resources as well as expenses shall be considered and the aid per month shall not exceed \$75."

Sec. 49.61 (6) (a) and (b), Stats., renumbered and amended by ch. 558, Laws 1953, dealing with aid to totally and permanently disabled persons, provides:

"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. * * *"

Where the legislature fixes a specific maximum for the aid to be granted, one of its primary considerations is doubtless the protection of the public treasuries out of which aid is supplied to counties to administer the programs locally. There can be little question that it is the department's duty, in making audit adjustments, to disallow state aid for any portion of grants in excess of the maxima specified in the statutes or in valid rules promulgated pursuant to the statutes. Whether the department may, or should, disallow *all* aid to the counties for any grant in which the total exceeds

the statutory maximum is not, I believe, susceptible of a categorical answer for uniform application to all cases alike.

Counties are authorized under secs. 49.01 to 49.12, Stats., to grant relief. Administration of relief is not subject to supervision of your department as is administration of the social security aids. The opinions in 31 O. A. G. 400 and 26 O. A. G. 306 appear to recognize that counties may give aid in the form of relief to persons who are also recipients of social security aids, if there is no contrary provision, express or implied, in the statutes. In some instances there are specific statutory restrictions against a recipient of a social security aid receiving any other form of assistance. See, for example, sec. 49.19 (5), providing that "aid pursuant to this section shall be the only form of public assistance granted to the family for the benefit of such child." Where a county furnishes aid in excess of an amount specified in a state-wide standard, and to do so is in direct violation of a statutory requirement or a valid rule to the effect that no other relief may be furnished by counties, it is incumbent on your department to disallow the county's claim with respect to such grant in full, as pointed out in my opinion to you dated March 4, 1954.

Whether a county's claim for payments to a particular person in excess of the maximum specified by state regulation should be disallowed in full, or only with respect to the excess over the maximum, would seem to leave some leeway for the exercise of your discretionary powers to supervise the administration of the social security aids in a manner to carry out the statutory policies.

The term "supervise" is defined in Webster's New International Dictionary as "to oversee for direction; to superintend; to inspect with authority." While the term is sufficiently flexible to permit of varying constructions according to its use, the cases which have considered its meaning in connection with authority given to public officials to supervise others indicate that it carries a certain amount of discretion within the area where the matter of statutory policy is open to interpretation. In *State v. Manning*, 220 Ia. 525, 259 N. W. 213, it was held that the authority of a public official to supervise certain activities imposed upon him the

duty to carry out and enforce the statute in the best interests of the taxpayers. In *Van Tongeren v. Heffernan*, 5 Dak. 180, 38 N. W. 52, 56, it was held that authority to supervise includes the power to review the acts of local officers and to correct their errors. In *Finlay Straus, Inc. v. University of State of N. Y.*, 62 N. Y. S. 2d 892, 893, 270 App. Div. 1060, it was held that authority to supervise included authority to make rules pertaining to professional conduct. In *Swartley v. Harris*, 351 Pa. 116, 40 A. 2d 409, 410, it was held that authority to supervise tax appraisal and collection was sufficiently broad to enable the supervising official to disallow salaries for the number of employes he considered were in excess of those needed for efficient administration.

Accordingly, where the payment of relief by counties to recipients of social security aids, in excess of the maxima fixed for the latter, is not expressly forbidden, the authority of your department to supervise would, we believe, enable you to determine whether the circumstances of the case constitute a payment of social security aids in violation of state-wide policies so that entire payment should be disallowed; or whether a county under its authority which is not subject to supervision by your department has made some supplemental payment which will not be contrary to, or defeat, the policies of the statutes.

Your second question is: If a county agency deliberately or through gross negligence deviates from state-wide standards in such a manner that the amount of aid granted is less than the proper amount, can the department properly take an audit exception with respect to the total amount of aid that was granted?

In any case where valid minimum payments for security aids are fixed on a state-wide basis, the objective differs from the purpose of regulations fixing maximum amounts. The former are not for the protection of the public treasuries but for the purpose of establishing what is deemed to be a fair and stable social program, and are at least partially for the benefit of the persons whose circumstances bring them within the statutory definitions as eligible for aid. It is a general rule that statutory mandates cannot be waived by persons other than those for whose benefit they

were intended: In any case where a county's payment of social security aids is less than the minimum specified in a valid statute or regulation of state-wide application, I believe it is incumbent upon your department to disallow *in toto* the entire claim of the county with respect to such aid.

If a county were to be reimbursed by state and federal funds on the amount claimed, there would be no inducement for it to raise the grant to accord with established state-wide standards.

BL

Physicians and Surgeons—License—Whether a graduate of an unapproved foreign medical school who is ineligible for licensure in Wisconsin may be employed by a state agency in an “administrative capacity” where the duties require that he “do some consultation work” in connection with the position, depends upon the specific nature of the duties. If such duties require the performance of acts which constitute the practice of medicine or any other branch of healing or treating the sick, he could not be so employed.

May 12, 1954.

STATE BOARD OF MEDICAL EXAMINERS.

You request my opinion as to whether a graduate of an unapproved foreign medical school may be employed in an “administrative capacity” by a state agency. The subject is not eligible for licensure as a medical physician or surgeon in Wisconsin. Your request states: “We understand that he would also be required to do some consultation work in connection with this position.”

Your facts are somewhat meager, and my opinion must accordingly be general.

The answer to your question hinges on what you mean by “administrative capacity.” If by “administrative capacity” you mean to exclude any and all acts which might fall within the definition of treating the sick or practicing medicine,

surgery, osteopathy, or any other system of treating bodily or mental ailments requiring registration under ch. 147, Stats., the fact that the subject is a graduate of an unapproved foreign medical school and is not eligible for licensure in Wisconsin does not disqualify him for employment in an administrative capacity, provided he otherwise meets the qualifications of such position.

If, on the other hand, his duties would require him to perform any act for which a license is required by ch. 147, Stats., then he could not lawfully perform such act without a license. When you say "we understand that he would also be required to do some *consultation* work in connection with this position," we infer you mean "consultation" in the professional sense. If it is intended that the subject shall professionally counsel either laymen or doctors for purposes of treating the sick, such consultation would be unlawful without a license.

It is impracticable to attempt to lay down a rule or guide as to what conduct would and what would not constitute treating the sick without a complete statement of facts as to precisely what the subject will be required to do.

We shall be glad to give this question further consideration if you or the employing agency are able to specify with particularity what the duties of the position will be that you may consider to be borderline between "administrative" and the actual practice of medicine or other form of treating the sick.

SGH

State Board of Medical Examiners—Physicians and Surgeons—Registration—State board of medical examiners is not authorized to include physical therapists and chiroprodists in its annual publication of registrants required by sec. 147.175 (3), Stats., as amended by ch. 342, Laws 1953.

May 13, 1954.

STATE BOARD OF MEDICAL EXAMINERS.

You inquire whether physical therapists and chiroprodists should be included in the list of registrants which your secretary-treasurer is required to cause to be published each year under sec. 147.175 (3), Stats., as amended by ch. 342, Laws 1953.

Subsec. (1) provides for annual registration of medical and osteopathic physicians and surgeons. Reference is made in said subsection to "persons registered hereunder," i.e., persons registered under sec. 147.175, Stats., which, as indicated, is limited to medical and osteopathic physicians and surgeons.

Subsec. (3), as amended by ch. 342, Laws 1953, reads as follows:

"On or before March 10 in each year the secretary-treasurer of the state board of medical examiners shall cause to be published and mailed to *each person registered hereunder* a printed list of those so registered, which list shall be divided according to the branch of healing in which the registrant is licensed. The secretary-treasurer of the board shall also cause to be mailed a copy of such published list to the secretary of state, the district attorney of each county, each local board of health, the sheriff of each county, the chief of police of each community, and to any other public official who may request or have need thereof."

Registration of physical therapists is required under sec. 147.185, Stats., as recreated by ch. 411, Laws 1953. Registration of chiroprodists is provided for under sec. 154.04, Stats.

In my opinion, the reference in subsec. (3) of sec. 147.175, as amended by ch. 342 (quoted above), to "each person registered hereunder" means only persons registered under

sec. 147.175. That would exclude persons registered under secs. 147.185 or 154.04, and accordingly you would have no authority to include physical therapists and chiropradists in such published list of doctors.

SGH

Appropriations and Expenditures—State Board of Health—State Tuberculosis Camp—The board of health is authorized under secs. 50.04 and 50.05, Stats., to make the following expenditures on behalf of patients authorized to be supported at Lake Tomahawk state tuberculosis camp at public charge: (1) Necessary transportation costs; (2) necessary clothing; (3) emergency medical care at the nearest available medical facility; and (4) high school and vocational school tuition for training of patients in a nearby community, where that is the cheapest and most efficient method of providing the training authorized under sec. 50.051 (4), Stats.

May 14, 1954.

STATE BOARD OF HEALTH.

You have asked a number of questions relative to what expenditures may properly be paid out of public funds on behalf of patients at Lake Tomahawk state camp. For purposes of this opinion, we are assuming that your questions relate solely to persons admitted as public charges pursuant to secs. 50.05 (3) and 50.03 (2), (3), and (4) of the statutes.

Sec. 50.04, Stats., authorizes and directs the state board of health to "establish and operate" a state tuberculosis camp in which persons threatened with or recovering from tuberculosis may be received and cared for. Subsec. (2) of the same section provides that the board shall prescribe regulations for the administration of such camp not inconsistent with the section.

Since the board's authority with respect to the camp is couched in rather general terms, instead of being defined

by specific enumeration, it necessarily leaves a considerable leeway for the exercise of discretion as to what constitutes the necessary and proper care of a patient. As pointed out in *Kasik v. Janssen*, (1914) 158 Wis. 606, 609-610, 149 N. W. 398:

"In addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers. * * *"

The discretion of course is not unlimited, but must be deemed to be co-extensive with the objectives and purposes of the statutes under which the institution is set up. The objectives in the care of patients at the tuberculosis camp may be deemed not only to include the general "prevention and suppression of disease" (sec. 140.05 (1)) but also require attention to the social and economic habilitation of the patients. The latter objective is shown by the grant of authority in sec. 50.051, Stats., to give instruction in occupational therapy and vocational training consisting of vocational advice and technical training necessary for the proper qualification of the patients for present and future usefulness.

You ask: 1. May Lake Tomahawk state camp pay transportation costs for patients discharged from the camp, to their homes, to a place of employment, or to the county sanatorium from which the patient was originally transferred to the camp?

I believe that such traveling expenses may be paid where necessary, provided the patient is entitled to care as a public charge. Sec. 50.05 (3), Stats., provides that any person who is unable to pay for his care may be admitted pursuant to subsecs. (2), (3), and (4) of sec. 50.03, Stats. Subsec. (3) of sec. 50.03 is thus apparently made applicable to such patients as are admitted to Lake Tomahawk state camp as public charges, and provides:

"The support, maintenance and necessary traveling expenses * * * and emergency surgical and dental work of every patient supported in said institution at public charge shall be paid by the state; * * *"

It is largely a matter of administrative discretion to determine what are "necessary" traveling expenses.

Your second question is: 2. May Lake Tomahawk state camp provide patients with essential clothing when it is not possible to obtain such clothing from county relief agencies?

The portion of sec. 50.03 (3), Stats., above quoted, provides that support and maintenance of every patient supported at public charge shall be paid by the state. The term "support and maintenance" is broad enough to include such clothing as is needed by the patient when it is not available from other sources. See, for example, *Orphan Society of Lexington v. Fayette County*, (1869) 69 Ky. (6 Bush.) 413; *Western Commercial Travelers' Ass'n v. Tennent*, (1908) 106 S. W. 1073. What clothing is needed in a particular case is likewise largely a matter for administrative discretion.

Your third question: 3. May Lake Tomahawk state camp provide patients with emergency medical care at the nearest available medical facility when it appears to the camp director that the transfer of the patient to Wisconsin general hospital would be impractical or not in the best interests of the health of the patient?

Sec. 50.03 (3), Stats., above quoted, provides, in addition to support, maintenance and necessary traveling expenses, that "emergency surgical and dental work" shall be paid for every patient supported at public charge. The foregoing provision does not impose a restriction as to the place where the treatment is to be obtained, probably because emergency treatment must be taken where it is most readily available.

Your fourth question is: 4. Is it proper for Lake Tomahawk state camp to pay for high school tuition and vocational school tuition for training of patients in a nearby community?

We have previously referred to sec. 50.051 (4), Stats., which reads in full:

"The board may give such instruction in occupational therapy or vocational training at such institutions as it shall deem wise; such instruction shall consist of vocational advice and technical training necessary for the proper qualifications of the patients of such institutions for present and future usefulness."

The question arises whether the phrase "at such institutions" precludes all training except that given at the camp itself.

The word "at" may in some statutes be used with the same meaning as the word "in"; but generally speaking it has a broader scope, which makes it susceptible to use in the sense of "near." Indeed, many cases have indicated that the primary sense of the term is "near" rather than "in." See, *Jordan v. Board of Supervisors*, (1950) 99 Cal. App. 2d 356, 221 P. 2d 977; *Caldwell v. State*, (1939) 136 Tex. Cr. R. 524, 126 S. W. 2d 654, 656; *Clark v. Sayle*, (1950) 208 Miss. 559, 45 So. 2d 138, 140; *Chesapeake & O. Ry. Co. v. Hill*, (1926) 215 Ky. 222, 284 S. W. 1047, 1048, 48 A. L. R. 327. See, also, *Lovin v. Hicks*, (1911) 116 Minn. 179, 133 N. W. 575, 576; *Town of Waynesville v. Satterthwaite*, (1904) 136 N. C. 226, 48 S. E. 661, 665.

In *Abernathy v. Peterson*, (1924) 38 Ida. 727, 225 P. 132, 133, it was held that logs stored at a lumber yard 6 miles from a mill were deemed to be "at" the mill where manufactured, for purposes of a mechanic's lien law.

In *Kramer v. State*, (1940) 60 Nev. 262, 108 P. 2d 304, 311, it was held that a prison located a mile from the limits of a city was located "at" the city within the meaning of a certain statute.

If used in the sense of "near," the question what is sufficiently near to an institution to be deemed "at such institution" is relative.

It is interesting to note that in sec. 50.04 (1), Stats., it is provided that patients may be received and cared for "in" the camp. It may well be that in the use of a contrasting term in sec. 50.051 (4), Stats., the legislature manifested its intent to provide a more flexible rule with respect to the provision of vocational and technical training. In the light of the fact that the legislature provided in sec. 50.04 (1) that patients should be cared for "in" the camp and in sec. 50.051 (4) that training should be provided "at" such institution, it may well have meant that the training might be supplied elsewhere than in the institution, for persons being cared for in the institution. There is an implied limitation

that the training should be at a near enough point so as to be feasible and economic.

You have pointed out that it is considerably cheaper for the state, in some instances, to make tuition payments, than it would be to set up a sufficiently varied program to meet the needs of all patients. Certainly I believe it was the intent of the legislature that the statute should be so interpreted as to permit the most economical means of obtaining its objectives which are consistent with the best interests of the patients. It is my opinion, therefore, that the board and the administrator of the camp have the discretion to make use of nearby educational facilities and to pay for them when that is the cheapest and most efficient method by which the training can be provided.

In a supplementary memorandum you have also raised the question whether the camp may pay, on behalf of the students it sends to the schools, for the hot lunches there provided, instead of sending cold lunches packed in the camp. Your letter indicates that not only is it less expensive for the state to pay for the hot lunches but that the medical director has indicated it is preferable for the health of the patients. Certainly the provision of food is a part of the support and maintenance authorized by sec. 50.03 (3), Stats. Presumably some of the materials even for lunches prepared at the camp would be purchased away from the camp. There does not appear to be any reason why the prepared lunch could not likewise be so purchased in cases where that may be done at a smaller cost and with greater benefit for the patients.

BL

*Elections—Intoxicating Liquors—Malt Beverages—*Under secs. 176.06 and 176.34, Stats., the sale of fermented malt beverages containing 5 per cent or more of alcohol by weight, is prohibited on election days until after the polls are closed. Under sec. 66.054 (10), Stats., the sale of fermented malt beverages by "Class B" licensees (except in Milwaukee county) is prohibited on election days until after the polls are closed. But there is no prohibition against the sale of fermented malt beverages containing less than 5 per cent of alcohol by weight by "Class A" licensees or by wholesalers, or by "Class B" fermented malt beverage licensees in Milwaukee county.

May 17, 1954.

JAMES D'AMATO,
District Attorney,
Waukesha County.

You have requested an opinion whether the sale of beer on election day is permitted under the statutes. You state that you have ascertained that most of the standard brands of beer contain somewhere between 3.7 and 4.75 per cent of alcohol by weight, but that there are a number of beers and ales on the market which exceed 5 per cent of alcohol by weight.

Those beers and ales containing 5 per cent or more of alcohol by weight are included in the definition of "intoxicating liquors" in sec. 176.01 (2), Stats. Accordingly, they are subject to the provisions of ch. 176, Stats., regulating the sale of intoxicating liquor. 32 O. A. G. 48.

Sec. 176.34, Stats., prohibits the sale, giving away or bartering of "any intoxicating liquors on the day of the annual spring election, the biennial fall election, special election, or primary election, until after the polls at any such election are closed." This section clearly prohibits the sale of fermented malt beverages containing 5 per cent or more of alcohol by weight, since such beverages are "intoxicating liquors" in the meaning of the statute.

Moreover, under sec. 176.06, Stats., premises for which a wholesale or retail liquor license has been issued are required to be closed for the sale of liquor on election days

during such hours as the polls may be open. This is a prohibition of the sale of intoxicating liquors at licensed premises, whereas sec. 176.34 is not limited to sales and is not limited to licensed premises.

The traffic in fermented malt beverages containing less than 5 per cent of alcohol by weight is regulated by sec. 66.054, Stats. Except in Milwaukee county, "Class B" licensed premises are required by sec. 66.054 (10) (a) to be closed on any election day until after the polls of such election are closed. except that under par. (b), hotels and restaurants whose principal business is the furnishing of food or lodging to patrons may remain open for the conduct of their regular business but are not permitted to sell fermented malt beverages during the hours mentioned in par. (a). See 38 O. A. G. 349.

It follows that no "Class B" licensee may sell beer on an election day until after the polls are closed, with the exception that beer of less than 5 per cent of alcohol by weight may be sold by taverns holding only a "Class B" fermented malt beverage license in Milwaukee county. Taverns in Milwaukee county holding a "Class B" intoxicating liquor license in addition to the fermented malt beverage license are required to be closed by sec. 176.06 (6) (d), Stats.

However, there is no prohibition against the sale of beer having less than 5 per cent of alcohol by weight, on an election day by "Class A" licensees or by wholesalers, except of course that no delivery of beer can be made to a tavern during the hours when it is required by law to be closed. See 41 O. A. G. 125.

WAP

Child Protection—Child Care Centers—Licenses and Permits—One who operates a boarding home for mothers and children requires a permit under sec. 48.50, Stats., if she provides care and supervision for 4 or more children for more than 2 and less than 24 hours a day, while the mothers are at work, irrespective of whether a separate charge is made for the children's care or it is included in the charge for board and room.

May 21, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You request our opinion as to whether sec. 48.50 (1), Stats., applies to the following situation: A woman, who twice has been denied a permit for a day nursery or child care center, has established a home for working *mothers and children*. Rather, she has established two such homes for mothers and children, and is contemplating a third one. In each such home there are four or more unrelated mothers and children. The mothers work out during the day. The proprietress does not live on the premises, but has employes to care for the children during the day while the working mothers are absent.

Sec. 48.50 (1), Stats., reads in part:

"PERMITS REQUIRED. No person shall for compensation provide care and supervision for 4 or more children under the age of 7 years for periods of more than 2 hours but less than 24 hours per day unless he shall have been issued a permit therefor by the state department of public welfare.
* * *"

Sec. 48.50, Stats., requires a permit when any person "for compensation" provides "care and supervision" for more than 2 and less than 24 hours a day. From your statement of facts, it appears that the owner of the establishment does provide "care and supervision" for 4 or more children during the periods when the mothers are away at work, which we will assume, for purposes of this opinion, exceeds 2 hours per day. Similarly, it appears that such care is provided for less than 24 hours a day, since it is only during the periods when the mothers are at work. The care is pre-

sumably provided for compensation, even though the compensation may be included in a lump sum which also covers board and room. The fact that the children and their mothers are being supplied with lodging in addition to the "care and supervision" does not take the situation out of the terms used in the statute.

It is significant that in sec. 48.38, Stats., relating to foster homes, the legislature has expressly provided that there be excluded from the definition cases in which the parents are "resident in the same home." If the legislature had intended a similar exception in sec. 48.50, Stats., it would have so stated.

BL

Public Welfare Department—Audit Adjustments—Public Assistance—Totally and Permanently Disabled—Where the federal government has disallowed federal aid for payments by a county under sec. 49.61, Stats., because federal regulations were not complied with, the state department of public welfare is obligated to recoup any payments advanced to the county as federal aid; but if the payments made by the county complied with state regulations, the county is to be reimbursed in the prescribed percentage for state aid.

May 21, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You report that the federal security agency has taken exception to certain grants of aid by county agencies under sec. 49.61, Stats., because "federal regulations were not complied with, despite the fact that such agencies complied with state laws, rules and regulations." You have asked a number of questions with respect to such cases in which the federal agency has made disallowances and thus withdrawn federal aid for expenditures for assistance to totally and permanently disabled persons.

Questions 1 and 2 are: 1. Can the state recoup from the counties the federal share of the grants?

2. If the answer to question 1 is in the affirmative, is the state required to recoup from the county the amount of the federal share of such grants or may it absorb the amount of the federal exception?

I believe the state not only can but should recoup from the counties the federal share of grants which have been disallowed or recouped by the federal government. Sec. 49.61 (9), Stats., authorizes only the payment of a certain percentage of aid from state funds "plus federal aid received for such expenditure." The only payments which may be made to counties as federal aid must be federal funds actually received. If federal funds are not forthcoming after payments have been made to the counties, the department's authority and obligation to make "necessary audit adjustments" makes it obligatory that there be recouped any funds paid out as federal aid, which were not in fact received.

Your third question is: 3. Can the state recoup from the counties the state's share of such grants?

If, as you state in your inquiry, the exceptions taken by the federal agency were solely on the basis of failure to meet certain federal regulations but there was full compliance with state law, rules, and regulations, I believe it is the intent of sec. 49.61 (9) that the county should receive the prescribed percentage from state funds. Sec. 49.61 uses different terminology for the provisions relating to the payment of state aid than for federal aid. It provides that the department shall certify to the director of budget and accounts "50 per cent of the approved amount paid by the county for aid to the disabled pursuant to this section, plus federal aid received for such expenditure." The authority given to the department to withhold approval may not be exercised arbitrarily, but is for the purpose of insuring that the administration of aid to totally and permanently disabled persons shall conform to the pattern of state statutes and state regulations. If a county has made payments as prescribed by state statutes, I am of the opinion that the legislature intended that the county should be reimbursed out of state funds, for the percentage designated in sec. 49.61.

Your fourth question is: 4. If question 3 is answered in the affirmative, is the state required to make such recoupment or may it at its option refrain from recouping from the county the state's share of such grants?

Since your third question was answered in the negative, no consideration is required of your fourth question.

BL

Appropriations and Expenditures—Public Welfare Department—Public Assistance—Poor Relief—Claims for reimbursement under sec. 49.04 (3), Stats., for relief furnished in 1952–1953 are payable out of appropriation by sec. 20.18 (10), Stats. 1951, if certified to department of budget and accounts by August 31, 1953, but if not certified thereto by that date are payable out of the appropriation for 1953–1954 by sec. 20.18 (10), Stats. 1953. Specification in sec. 49.04 (3), Stats. 1953, of time during which claims are to be filed is not a statute of limitations and not in conflict with the 2-year limitation of sec. 49.11 (5) (g), Stats.

May 21, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask a number of questions as to the appropriation from which claims under sec. 49.04, Stats., founded on relief granted in June, 1953, should be paid. Except as involved in the statement of the question, all of your questions assume that all other conditions and requirements of the statutes and department rules have been met to entitle the claim to payment.

Question 1. If a claim for reimbursement for relief granted in June, 1953, is filed with your department in that month, but is not approved by your department and certified to the director of budget and accounts until July, 1953, would the payment be made out of the appropriation made by the 1951 statutes or out of the appropriation made by ch. 251, Laws 1953?

The provisions of sec. 49.04, Stats. 1953, that are here material, read as follows, and were the same in the 1951

statutes, except for the underlined words which were added and the words stricken out that were deleted, by ch. 251, sec. 63, Laws 1953, that took effect on July 1, 1953:

"49.04 State dependents. (1) From the appropriation made in section 20.18 (10) the state shall reimburse the counties for the relief of all dependent persons who do not have a settlement within any county in this state and who have resided in the state less than one year.

"(2) The state department of public welfare shall make suitable rules and regulations governing notification of reimbursement charges, the relief to be provided, the presentation of claims for reimbursement and other matters necessary to the provision of relief to such state dependent persons. The observance of such rules and regulations by a county shall be a condition for reimbursement.

"(3) The presentation of a claim for reimbursement shall be accompanied by a verified copy of the sworn statement required by s. 49.11 (1), and an affidavit that diligent effort was made to ascertain the facts relating to the dependent's legal settlement and period of residence in the state, and reciting such other facts as the department requires. *Any claim for relief furnished after June 30, 1953, shall be filed with the state department of public welfare on the following June 30 or not to exceed 30 days thereafter.* If the department is satisfied as to the correctness of the claim it shall certify the same to the director of budget and accounts for payment to the county entitled thereto; *provided that if the total amount payable to all counties exceeds the amount available under the appropriation made in s. 20.18 (10) the department shall prorate the amount available among the counties according to the amounts due them.* Any necessary audit adjustments for any ~~month~~ of the current or prior fiscal years may be included in subsequent certifications."

Sec. 20.18 (10), Stats. 1951, appropriated from the general fund as follows:

"(10) TO COUNTIES FOR STATE DEPENDENTS. Annually, beginning July 1, 1945, the sums necessary to reimburse counties for aid to persons chargeable against the state upon certification of the state department of public welfare as provided in section 49.04."

This last appropriation provision was amended by ch. 251, sec. 21, Laws 1953, to read as follows, the underlined words being the additions and the stricken words deleted:

"(10) Annually beginning July 1, 1945, the sums necessary 1953, \$75,000 to reimburse counties for aid to persons chargeable against the state upon certification of the state department of public welfare as provided in section 49.04. *The unencumbered balance on June 30, 1954, shall be non-lapsible until June 30, 1955.*"

Sec. 20.77, Stats. 1951, so far as here material and unchanged in the 1953 statutes, reads:

"20.77 Construction of appropriation statutes. * * *

"(1) Appropriations in the following language, or substantially similar language, shall be construed to be annual, continuing appropriations, and balances shall be available as provided in subsection (8) :

"There is annually appropriated, beginning (day of month and year) ---- dollars, payable from any moneys in the ---- fund not otherwise appropriated, for (department) for (purpose or object).

"There is annually appropriated ---- dollars, payable from any moneys in the ---- fund not otherwise appropriated, for (department, purpose or object).

"There is annually appropriated, such sums as may be necessary, from the state treasury, for (department, purpose or object).

"* * *

"(5) Where any appropriation is repealed or any balance of an appropriation is caused to revert, any indebtedness incurred under the authority of such appropriation or balance prior to the time as of which such repeal or reversion of balance is to take effect, shall be paid from the appropriation or balance thus repealed or reverted as the case may be unless otherwise specifically provided by law.

"* * *

"(8) All appropriations or balances of appropriations remaining unexpended and unincumbered at the end of the fiscal year for which they are made, shall revert to the fund from which appropriated, * * *

"* * *"

The appropriation made in sec. 20.18 (10), Stats. 1951, of a sum sufficient for the fiscal year ending June 30, 1953, is an annual appropriation, which by the provisions in sec. 20.77 (1), Stats., is subject to the reversion provisions in sec. 20.77 (8), Stats. Under this latter subsection any balance of said appropriation which remained "unexpended

and unincumbered" on June 30, 1953, would revert on that date to the general fund. This would be true regardless of any repeal or amendment of said provision as operative to make the same appropriation for the fiscal year 1953-1954 and other future years. In effect this sum sufficient annual appropriation by sec. 20.18 (10) was repealed as to the fiscal year 1953-1954 and future years by virtue of the language having been amended by ch. 251, Laws 1953, to provide an annual amount of \$75,000 starting July 1, 1953. To the extent it can be said there is an unexpended balance of a sum sufficient appropriation at the end of a fiscal year, any balance in said appropriation for the fiscal year 1952-1953 that remained unexpended on June 30, 1953, would revert by virtue of sec. 20.77 (8) to the general fund, except to the extent it is incumbered on that date.

However, sec. 20.77 (5) provides that "any indebtedness incurred under the authority" of an appropriation that is repealed or reverts, which was incurred prior to such repeal or reversion taking effect, is payable out of such appropriation "unless otherwise specifically provided by law." Application of this provision would mean that, aside from the provisions in sec. 20.77 (8), if a liability was incurred prior to the end of a fiscal year for something for which the appropriation was intended to be used and there was sufficient unexpended balance to pay therefor, to the extent of the amount thereof there would be no lapsing of the balance of that appropriation and the liability is payable therefrom even though the occasion for the payment or the presentation of a voucher therefor does not arise until subsequent to the end of the fiscal year.

The provisions of these two subsections must be construed together and each given effect so as to avoid a conflict if possible. Subsec. (5) was in the statutes for a number of years before the provisions of subsec. (8) were enacted by ch. 97, Laws 1929, in the present form so far as here material. The variance in terminology, subsec. (5) using the words "indebtedness incurred" and subsec. (8) using "unincumbered," might give rise to considerable argument as to the intended application of these provisions. It can hardly be said that one subsection is general and the other special,

and therefore the rule that the latest enactment controls in the case of conflict would make the provisions in subsec. (8) paramount if they conflict.

Opinions in 10 O. A. G. 1125 and 27 O. A. G. 800, stating that "incurred" as used in subsec. (5) means "become liable for," furnish some support for a view that all that is necessary to authorize payment to be made after the close of a fiscal year out of the unexpended balance of the appropriation of that year is that liability therefor exist at the end of the year. Under such view, when the local unit furnished the relief the state immediately became liable to pay therefor and an indebtedness therefor was incurred by the state at that time. But this, like the opinions mentioned, gives no consideration to the fact that the language in subsec. (8) is that it is only the "unincumbered" balance that does lapse and revert. It might also be that the terms were intended to be synonymous. Thus, under subsec. (8) there would be no reversion or lapsing of an appropriation balance to the extent a previously "incurred indebtedness" was entered as an "incumbrance" against it, and subsec. (5) is the authorization to use such preserved nonlapsing balance in paying such "incurred indebtedness" after the end of the fiscal year has passed.

In the above mentioned opinions no reference is made to the matter of whether the appropriation was incumbered for the items at the end of the fiscal year. The first of them was long before the enactment of subsec. (8), so there could be no concern therewith at that time. It may be that in the later one in 1938, it was assumed an incumbrance existed therefor, because it was prior to 1940 at which time the machine system of bookkeeping was installed in the central accounting office of the secretary of state. Prior to such installation, departmental purchase orders were not pre-audited by that office, so that no record thereof was kept there but only in the bookkeeping records kept by each department. Possibly at that time such record so kept by each department was, under the then existing system, sufficient to be an incumbrance, and the only doubt was as to whether an indebtedness to pay the purchase price of the items or-

dered arose when the order was placed and accepted or when delivery of the items was made.

Whatever might have been the initially intended effect of these two subsections, the fact is that the practice followed was to honor vouchers for the payment out of an appropriation for a fiscal year, even though presented after the close of the year, if for items chargeable to such fiscal year as liabilities thereof. The result was that constantly vouchers were put through for payment of liabilities of past years. As a result of the potentialities of old bills coming in, and not just for matters concerning the last year but for a number of years past, there was no way of knowing or estimating the amount of money the state would be called upon to disburse in any given period or year. This was the situation that gave rise to legislative action in 1947.

By ch. 9, Laws 1947, creating the department of budget and accounts and transferring to it the state central accounting and pre-audit functions from the secretary of state, there was created as sec. 15.19, Stats., the provisions which are those now in sec. 15.16 (5) (a), Stats., except that the cut-off time was the end of the month of October instead of August. This was the first time anything of this nature was found in the statutes. Subsequently such provisions were renumbered and modified to their present form.

Sec. 15.16 (5) (a), Stats. 1953, provides:

“(5) (a) On August 31 of each fiscal year all outstanding incumbrances entered for the previous fiscal year shall be transferred by the director as incumbrances against the appropriation for the current fiscal year, and in the case of maintenance and miscellaneous capital appropriations for state institutions, and capital outlay for the conservation commission, an equivalent prior year appropriation balance shall also be forwarded to the current year by the director. Payments made on previous year incumbrances forwarded shall be charged to the current fiscal year. All other charges incurred during any previous fiscal year, and not evidenced by incumbrances, which are presented for payment between September 1 in any fiscal year and August 31 in the next succeeding fiscal year shall be entered as charges in the fiscal year in which said September 1 falls; but such charges shall not be paid if they exceed the unincumbered appropriation balance as of August 31 of the fiscal year preceding the year of payment.”

These provisions in sec. 15.16 (5) (a) are a later enactment than sec. 20.77, Stats., and would take precedence to the extent they may conflict therewith. Furthermore, such provisions would probably in any event constitute provisions that would come within the "unless otherwise specifically provided by law" in sec. 20.77 (5).

Whatever may have been the case prior to 1947, it is clear that, under the provisions of subsec. (5) and the other subsections of sec. 15.16, in order that there be an incumbrance against an appropriation there must be an entry in the records of the department of budget and accounts of a liability incurred or respecting the existence of such liability. Consequently, in order to prevent any portion of the balance of an appropriation that is unexpended at the end of the fiscal year from reverting, there must be an entry in the records of the department of budget and accounts on or before August 31 next following such fiscal year, of an incurred liability as an incumbrance against the appropriation. If there is no such incumbrance entered at that time there could be none for the department of budget and accounts to transfer to the appropriation for the next and current fiscal year.

Construing the mentioned statutory provisions together means that up to August 31 each year payment may be made out of the appropriation for the fiscal year ending the previous June 30 for all bills and charges incurred during such fiscal year, if they are presented for payment before that date. After said August 31, all bills or charges for liabilities incurred during the previous fiscal year which on said August 31 were entered as incumbrances against the appropriation for the prior fiscal year, are transferred as incumbrances on the appropriation for the *current* fiscal year, being the fiscal year which started the July 1 next preceding said August 31, and are payable only out of the appropriation for said current fiscal year or a subsequent one. Other bills and charges for liabilities incurred during the preceding fiscal year which were not entered on said August 31 as incumbrances against the appropriation of said prior fiscal year, may be paid thereafter if presented but only out of the appropriation for the *current* fiscal year in which presented, and only to the extent such charges do

not exceed the unexpended portion of the prior year's appropriation that was unincumbered on the August 31 next preceding presentation for payment.

There thus exists under sec. 15.16 (5) (a) a period up to the August 31 following the end of a fiscal year, in which bills and charges arising because incurred in said fiscal year can be presented and paid out of the appropriation for that year regardless of whether such bills or charges were entered in the central accounting office in the department of budget and accounts as incumbrances against such appropriation on June 30, the last day of such fiscal year. But, any bills or charges arising out of liabilities incurred during an expired fiscal year and not paid by said next succeeding August 31, are payable if they were on that date entered as an incumbrance against the appropriation for such expired fiscal year and at that time transferred to the new appropriation for the next or current year. But, such last mentioned bills or charges are then payable only out of an appropriation for a fiscal year to which they are transferred as an incumbrance. The over-all effect thereof is that, except in the specific instances mentioned in sec. 15.16 (5) (a) for a forwarding or carrying over to the next year of the necessary amount from the expiring appropriation, the appropriation for the current year available for payment of bills and charges of such current year is reduced by the amount of the incumbrances so transferred to it on said August 31. Then further, under sec. 15.16 (5) (a), *other* bills and charges for liabilities incurred during a fiscal year that have not been presented for payment by August 31 of the next fiscal year and which were not entered as incumbrances against the appropriation during said fiscal year, are payable even if they are presented after August 31. But, they are payable only out of the appropriation of a later fiscal year and just as though they were bills or charges for liabilities incurred during such later fiscal year. There is, however, a limitation that the amount of such last mentioned bills or charges that may be paid out of a later year's appropriation cannot exceed the balance of the appropriation of the prior fiscal year that was unincumbered at the end of such year.

Accordingly, the answer to question 1 is that the claim would be payable out of the appropriation by sec. 20.18 (10), Stats. 1951, for the fiscal year ending June 30, 1953. It was received by the department of budget and accounts within the period expiring August 31, during which liabilities incurred during the previous fiscal year are payable out of the appropriation for that year even though not entered as an incumbrance against such appropriation at the end of such year.

Question 2. Can such claim be paid by the state if such certification is made in September 1953, and if so, out of what appropriation?

In such instance the claim would be properly payable, but out of the appropriation for the fiscal year ending June 30, 1954, as made by sec. 20.18 (10) as amended by ch. 251, Laws 1953, along with any other claims that are payable out of said appropriation.

As a practical matter it makes no difference whether the state's liability to reimburse for such relief is "incurred" at the time the local unit furnished the relief or at the time the claim for reimbursement is filed with your department. If it were the former then clearly under the present statutory provisions no incumbrance therefor was entered against the 1952-1953 appropriation by the department of budget and accounts on June 30, 1953, or for the matter even on August 31, 1953. As a result, the voucher or certification for such reimbursement not being presented to the department of budget and accounts by August 31, 1953, it is payable only out of the new \$75,000 appropriation for the fiscal year 1953-1954 along with any bills for reimbursement for relief furnished during 1953-1954 and upon the same basis of proration applicable to them. On the other hand, if the date of incurring of the state's liability to reimburse is when the claim therefor is filed with your department, then this claim would be a liability incurred in the fiscal year ending June 30, 1954 and therefore payable only from the \$75,000 appropriation for that year on the pro-rata basis specified therein.

It might appear that the last clause in sec. 15.16 (5) (a) would preclude payment out of the \$75,000 appropriation

for 1953-1954 of claims for relief furnished in 1952-1953 that were not certified to the department of budget and accounts by August 31, 1953. It might be claimed that inasmuch as the old appropriation by sec. 20.18 (10), Stats. 1951, for the fiscal year ending June 30, 1953, was a sum sufficient, there was no fixed or definite number of dollars that reverted on that date pursuant to sec. 20.77 (8), Stats. However, it is deemed that for the purposes of the limitation in said clause there were an indeterminable number of dollars as the unused and unincumbered balance in said sum sufficient appropriation on August 31, 1953, so that the claims presented after August 31, 1953, are within that balance and therefore can be paid out of the 1953-1954 appropriation.

Question 3. If a claim for reimbursement is filed with your department on or after July 1, 1953, but before August 31, 1953, for relief furnished on or before June 30, 1953, can reimbursement for such claim be paid out of the "sum sufficient" appropriation under the 1951 statutes or must payment be made out of the "pro-rata" appropriation made by ch. 251, Laws 1953?

In accordance with the foregoing, in such instance if the certification reached the department of budget and accounts on or before August 31, 1953, the claim would be payable out of the sum sufficient appropriation made by sec. 20.18 (10), Stats. 1951, for the fiscal year 1952-1953.

Questions 4 and 5. If the claim for reimbursement for relief furnished in June, 1953, is filed with your department in November, 1953, can such reimbursement be made and if so from which appropriation?

Reimbursement would be proper but only out of the appropriation for the fiscal year ending June 30, 1954, made by sec. 20.18 (10) as amended by ch. 251, Laws 1953.

Question 6. Are claims for relief furnished on or after July 1, 1953, reimbursable under sec. 49.04, Stats. 1953, if they are not filed with your department within 30 days after June 30, 1954?

The obvious purpose in the amendments of sec. 49.04, Stats., made by ch. 251, Laws 1953, was to accommodate the filing of claims for reimbursement with your depart-

ment to the appropriation of a specific sum and the provision therein for proration if the amount should be inadequate. Necessarily, in such case your department would have to wait until the end of the fiscal year to determine whether the claims filed exceed the appropriation. It could not pay any of them until then, otherwise it might find too late that the appropriation amount would be short.

Previously, these claims came in intermittently throughout the year and were paid as soon thereafter as processed and approved. But, under this new appropriation, claims filed throughout the year could not be paid until all are in and so would have to be held until the end of the year. To avoid this intermittent filing, with the accompanying necessity of holding them in your files until the end of the year, it was provided that such claims should not be sent to you except during the specified period starting with the June 30 ending the fiscal year and continuing for 30 days thereafter. This permits processing and certifying them all together so they can be presented to the department of budget and accounts on or before August 31 for payment out of the appropriation for the fiscal year just ended, either in full or pro-rata as the situation may be.

The language in sec. 49.04 (3) respecting the time for filing the claims with your department is to effect this result and is not intended as a statute of limitations, which is the nature of the provision in sec. 49.11 (5) (g) that reads:

“Accounts against state. All claims by counties against the state under the terms of section 49.04, which are not filed within 2 years from the date the relief is granted, are barred.”

Had the legislature intended that the provision respecting the time for filing in sec. 49.04 (3) were to preclude a claim for relief furnished in a fiscal year from ever being filed if not filed within 30 days after the end of that year, it would have used more positive language to that effect than it did in the amendment of sec. 49.04 (3). Statutory provisions are to be construed if possible to avoid conflict. Therefore, in our opinion the provision in sec. 49.04 (3) is merely to provide a time for filing as a basis for determining the claims which are payable from the appropriation of the fiscal year

ending on that June 30. However, if a claim is not filed during the period specified in sec. 49.04 (3) it may be filed within the filing period for the next year. The language in the last sentence of sec. 49.04 (3), Stats. 1953, clearly indicates that errors or oversight in presentation of claims may be corrected and taken care of by certifications of a subsequent year. It is therefore our opinion that the answer to question 6 is "yes," provided the claim is filed within the 2-year period specified in sec. 49.11 (5) (g).

HHP

Elections—Intoxicating Liquors—Under sec. 66.054 (10) (a), Stats., taverns in municipalities where no election is being held are not required to close, notwithstanding that an election is being held in other municipalities within the county, except that where the polling place of an adjacent town which is holding an election is located in a city which is not holding an election, taverns in the city must close. If a primary election is being held in any precinct in a city, all taverns in the city are required to close.

May 25, 1954.

EDWARD A. KRENZKE,
District Attorney,
Racine County.

You have requested an opinion with reference to whether or not the taverns are required to be closed in a certain city under the following circumstances:

At an annual spring primary election, where there is no contest for state office to be voted upon, there are not sufficient candidates to require a primary election in the city in question and accordingly no election is held in that city. However, there is a primary election in the city of Racine, which is in the same county, and in a town whose voting place, the town hall, is located within the territorial limits of the city in question. In the city of Racine the polls are

open from 7 a. m. till 8 p. m. and in the town they are open from 9 a. m. till 5:30 p. m.

The only statute which need be considered is sec. 66.054 (10) (a), which provides as follows:

"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."

The first question is whether all taverns in the county must be closed pursuant to the foregoing statute whenever an election is held in any municipality within the county. The answer appears to be that only the taverns in the municipality where the election is being held are required to be closed. The only reason for reference to "any county having a population of less than 500,000" in the foregoing statute was to exclude Milwaukee county from its provisions, because tavern closing hours in Milwaukee county are separately treated in sec. 176.06 (6), Stats. See *State v. Potokar*, (1944) 245 Wis. 460, 15 N. W. 2d 158.

Before the portion of the statute relating to election days can come into force to require the closing of taverns, it must appear that there is an "election day" in existence. It is clear that a day may be an "election day" in one community but not in others. Special elections are often held in individual communities and it has never been thought that this required closing of all taverns throughout the county. For example, when a special referendum election was held in Baraboo some time ago, it was not considered necessary for the taverns in other communities in Sauk county to be closed.

As a matter of fact, in such a situation only the tavern-keepers in the municipality where the election is being held could be considered to have notice of the fact that there is an election. Tavernkeepers in Madison, for example, could not be expected to know of the existence of a special municipal election in Mt. Horeb, Black Earth, or Belleville, all communities within the same county.

Nor does the purpose of the legislation requiring tavern closing make a different construction necessary. Consider,

for example, the village of Waterloo located in the north-west corner of Jefferson county. Suppose that a special election were held in that village and it were to be required that all taverns throughout the county, including Jefferson, Lake Mills, Fort Atkinson, Palmyra, Sullivan, Watertown, Pipersville, and other communities quite distant from Waterloo, be closed until after the closing of the polls in Waterloo. Would this prevent the residents of Waterloo from obtaining liquor on election day? Obviously not, since both Dane and Dodge counties are within a mile or so to the north and west of Waterloo, and if no election were being held anywhere in those two counties their taverns would be open and doing business.

If the statute were designed to cause the closing of taverns on election days within a certain distance from the polling place, it seems that the legislature would have so provided. In the case particularly of communities located close to county lines, a requirement that the entire county close whenever an election is held in such a community is not an effective way of stopping the liquor traffic at all points close to that municipality. It seems, therefore, that the legislative intent was only to close the taverns within the municipality where the election is actually being held.

The same is true under the spring primary law, when no state-wide primary is being held and only certain municipalities find it necessary to conduct such a primary. In those communities where no primary election is actually being held, it is not an "election day" requiring that the taverns close.

The second question is whether the taverns must close in a city which is not itself holding a primary, because a neighboring town which is conducting such an election has its polling place within the territorial boundaries of the city, as authorized by sec. 10.53 (1), Stats. A diligent search has failed to disclose any cases bearing upon this problem.

The purpose of the law is to prevent drunkenness among voters. While this purpose may not always be successfully achieved, as pointed out above, yet the law must be construed in the light of what it was intended to accomplish. To say that the town's polling place may be located in the

city and that taverns in the city may remain open would be inconsistent with the legislative purpose, for the polling place might be surrounded by taverns or might even be located in a building containing a licensed bar.

I am therefore of the opinion that when a town election is being conducted within a city, the day is an "election day" in the city as well as in the town and taverns may not open until the polls are closed.

I may also point out that where only certain precincts are voting in a city primary, the taverns in other precincts are also required to close. So long as a primary is being conducted anywhere in the city, it is an "election day" throughout that municipality.

WAP

University—Prisons and Prisoners—Sheriffs—Duties—
Violation of regulations adopted by the regents of the university of Wisconsin pursuant to secs. 36.06 (8) and 27.01 (2), (3), (4), (5) and (8), Stats., is a criminal offense. Sheriff has a duty to accept prisoners from university policemen when arrest is made with or without warrant under those statutes and to hold prisoners pending court appearance, and university is not liable to county for maintenance of such prisoners.

May 25, 1954.

A. W. PETERSON,
Vice President, Business and Finance,
University of Wisconsin.

You have requested an opinion whether the university may pay for the maintenance of prisoners held at the county jail before arraignment for alleged violations of the university of Wisconsin rules and regulations. It is our conclusion that the university is not required to make any such payments.

The regents of the university are authorized by sec. 36.06 (8), Stats., as amended by ch. 631, sec. 13, Laws 1953, to

exercise for lands under their control all special powers conferred on the conservation commission for state parks by sec. 27.01 (2), (3), (4), (5) and (8), Stats.

Sec. 27.01 (2) (j) and (k) authorizes the conservation commission to do the following with reference to state parks:

“(j) Make such rules and regulations as may be necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

“(k) Designate parking areas and regulate the use and movement of automobiles or other vehicles in the state parks.”

The penalties for violating such regulations are fixed by sec. 23.09 (11), Stats., and violation of the regulations is therefore a criminal offense against the state of Wisconsin.

Sec. 27.01 (8) vests the following powers in the conservation commission, and therefore the regents of the university have the same powers by virtue of sec. 36.06 (8), Stats.:

“(8) POLICE SUPERVISION. The conservation commission shall have police supervision over all state parks, and its duly appointed agents or representatives in charge of any state park are *hereby authorized and empowered to arrest, with or without warrant*, any person within such park area, committing an offense against the laws of the state or in violation of any rule or regulation of the state conservation commission in force in such state park, *and to deliver such person to the proper court* of the county wherein such offense has been committed and to make and execute a complaint charging such person with the offense committed. The district attorney of the county wherein such offense has been committed shall appear and prosecute all actions arising under the provisions of this subsection.”

Therefore, the police officers employed by the university have the power of arrest with or without warrant, and are authorized to deliver the arrested person to the proper court for prosecution. The power of arrest includes the power of imprisonment pending such time as the arrested person may be taken to court, and as this office has pointed out, the proper place of imprisonment is the county jail, and the sheriff has a duty to accept prisoners arrested without war-

rant on state charges by conservation wardens. 39 O. A. G. 132. Likewise, he has a duty to receive prisoners from university of Wisconsin police officers who have arrested them pursuant to the foregoing statutes.

Under sec. 59.23 (1), Stats., it is the duty of the sheriff to take the charge and custody of the jails in his county. Sec. 53.31, Stats., after enumerating certain specific types of prisoners who may be detained in the county jail, concludes by authorizing the use of the jail "for other detentions authorized by law."

Sec. 53.33 provides as follows:

"The maintenance of persons who have been sentenced to the state penal institutions, persons accused of crime and committed for trial, persons committed for the nonpayment of fines and expenses, and persons sentenced to imprisonment therein, while in the county jail, shall be paid out of the county treasury; but no claim shall be allowed to any sheriff for keeping or boarding any person in the county jail unless he was lawfully detained therein."

Although the foregoing statute does not specifically provide for the maintenance of prisoners who have been arrested and detained in the jail but have not yet been taken to court, there is no question about the duty of the sheriff to keep such prisoners in the jail, whether arrested by himself or by other officers having the power to arrest, such as county or state traffic officers, conservation wardens, university police and the like. This is also true where the arrest has been made by a city policeman, although the city police departments generally have their own lockups where prisoners are held before being taken to court. See 39 O. A. G. 50.

Where the prisoner is charged with violation of a city ordinance, by statute the cost of his maintenance in the county jail must be borne by the city. Sec. 62.24 (2) (b), Stats.; 39 O. A. G. 50. This has no application to prisoners charged with violation of the regulations prescribed by the board of regents, since as remarked above, the violation of those regulations is a criminal offense punishable by the law of the state.

If a person were arrested on the university campus on a charge of murder or robbery and taken to the county jail

by the arresting officer to be held pending the time that he could be taken to court, there would be no question about the obligation of the sheriff to receive the prisoner nor would there be any authority to require the university to pay for the maintenance of the prisoner. There is no distinction between such a case and the case of a prisoner arrested for violating the rules and regulations prescribed by the regents.

You are therefore advised that the university is not obliged to pay for the maintenance of prisoners arrested by university police officers and detained in the jail prior to being taken to court.

WAP

Public Assistance—Poor Relief—County officials charged with administration of relief under secs. 49.02 and 49.03, Stats., may, if they deem it advisable, provide for payment of taxes and interest on behalf of a dependent person who is the owner of an equity in the home in which he and his family live.

They may advance payments on the principal in such a case only if they make provision under secs. 49.06 and 49.08, Stats., for reimbursement to the county of the amount of any such payments resulting in increase of the recipient's property interest.

May 26, 1954.

EDWARD A. KRENZKE,
District Attorney,
Racine County.

You ask whether a county may, under its authority to furnish relief pursuant to secs. 49.02 and 49.03, Stats., pay taxes, interest, and principal on behalf of a dependent person who is the owner of an equity in the home in which he and his family live.

You state that you have reached the conclusion that, while the county may furnish monies for such purposes, the question whether or not such payments should be made is

one of local administrative policy, and each case is to be considered on the basis of its individual merits.

You have referred to the obligation of the municipality under sec. 49.02 to furnish relief to all dependent persons, and pointed out that the provision negates any theory of charity or contractual status and makes the furnishing of relief a statutory duty. You have also pointed to the definition of relief contained in sec. 49.01 which reads in part:

“‘Relief’ means such services, commodities or money as are reasonable and necessary under the circumstances to provide * * * housing * * *. The housing provided shall be adequate for health and decency. * * *”

You have also pointed to sec. 49.02 (6) which reads:

“Officials and agencies administering relief shall assist dependent persons to regain a condition of self-support through every proper means at their disposal and shall give such service and counsel to those likely to become dependent as may prevent such dependency.”

You indicate that for the purposes of your inquiry it is to be assumed that the person on whose behalf the taxes, interest, and principal are to be paid is an indigent person entitled to relief. The question of dependency is one which must be determined independently for each individual case because, as pointed out in *Two Rivers v. Wabeno*, (1936) 221 Wis. 158, 165, 266 N. W. 178:

“* * * Whether persons are properly furnished support or aid because of their poverty, destitution, or pauperism is ordinarily a question of fact. *Scott v. Clayton*, 51 Wis. 185, 8 N. W. 171; *Port Washington v. Saukville*, 62 Wis. 454, 22 N. W. 717; *Ettrick v. Bangor*, 84 Wis. 256, 54 N. W. 401.”

On the assumption then that there is a proper case for payment of relief, we limit our discussion to what items may properly be included within such payments.

As you have indicated, there is an area for the exercise of discretion on the part of local relief administrators not only on the question of whether a person is in need of relief but as to “what amount should justly be allowed for relief.”

See *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 181-182, 282 N. W. 111, where the court said:

"While the question does not seem to have been considered in this state, it has been held in other jurisdictions under statutes similar to sub. (1) that the state commits to the municipal authorities the *quasi*-judicial duty of determining first whether the person is in need of relief, and, second, what amount should justly be allowed for relief. It has been held that where they act in good faith and without abuse of discretion their action is not subject to review. *Hardin County v. Wright County* (1885), 67 Iowa, 127, 24 N. W. 754; *Board of Commissioners of Warren County v. Osburn* (1892), 4 Ind. App. 590, 31 N. E. 541; *Wood v. Boone County* (1911), 153 Iowa, 92, 133 N. W. 377, 39 L. R. A. (N. S.) 168."

As pointed out in *Ashland County v. Bayfield County*, (1944) 246 Wis. 315, 318, 16 N. W. 2d 809, however, the area for discretion is limited. The court there said:

"Equitable considerations do not enter into the solution of the problem presented by this record. Counties or municipalities do not have a right to furnish relief under the statute. They are under a duty to do so. The extent of the duty of the county or of the municipality is fixed by statute.
* * *"

One of the reasons why the discretion of local administrators is not unlimited is that relief given by one locality automatically imposes liability on the municipality in which the recipient has a legal settlement, if the statutory conditions are met.

As the foregoing cases have pointed out, the questions of who is a dependent person and what relief should be granted in a given case are questions of fact, but they are inter-related so that they cannot be considered wholly independently of one another. As pointed out in *Coffeen v. Preble*, (1910) 142 Wis. 183, 185, 125 N. W. 954:

"* * * 'Relief' is a relative term, and covers such an emergency as is claimed here by the plaintiff, and the question whether the afflicted person was so poor and indigent as to entitle him to relief from the town notwithstanding he had some little property not edible or easily convertible was a jury question. *Poplin v. Hawke*, 8 N. H. 305; *Stur-*

bridge v. Holland, 11 Pick. 459. 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. * * *

You have reviewed the history of legislation from which your conclusion has been drawn, to the effect that the legislature intended that relief might include payments of taxes, interest, and principal on behalf of a person who is the owner of an equity in the home in which he and his family live. In order that others may have the benefit of your research, a portion of your opinion is quoted:

"In reviewing the more recent history of relief it is noted that prior to 1931 it was the practice in many Wisconsin counties for relief authorities to hold that ownership of an equity in a real estate constituted a bar to relief. This was true despite the ruling of our Supreme Court in the case of *Elkey vs. Seymour*, 169 Wis. 223, 172 N. W. 138, where it was held that the mere present ownership of property, subsequently available to recompense a city for relief and support given, was not a jurisdictional lack of authority in city officials to furnish or contract for the furnishing of such aid.

"As you perhaps recall it was shortly before 1931 when the effects of the depression began to be felt. Fortunes were lost in a fallen market; foreclosures increased; there were bankruptcies and bank failures; and unemployment became widespread. Individuals otherwise considered as among the best citizens in the community suddenly found themselves in the position of needing public assistance. Among such persons were many who owned equities in the homes in which they lived. In response to those conditions the legislature enacted Ch. 187, Laws of 1931, which amended section 49.01 to include the following:

" . . . The ownership of a home or an equity therein shall not bar the granting of relief, *in the discretion of the authorities* in charge of such relief, to any person who by reason of unemployment or sickness stands in need of such relief."

"In the early 1930's it became common practice for mortgagees to forestall foreclosure proceedings against homesteads if the mortgagor would but keep up his interest payments due on his note. As a result of these practices and for the purpose of enabling municipalities to meet their duty of furnishing relief (including shelter) at a minimum

cost, the legislature again amended section 49.01 by enacting Ch. 99, Laws of 1937, which added the following:

“ . . . Whenever a person receiving poor relief is residing in a homestead which is mortgaged, the relief authorities are authorized to pay the *interest on such mortgage* in cases where to do so will result in preventing the relief authorities from paying a larger sum as shelter allowance for the relief recipient. . . .”

“Subsequent to 1937 economic conditions improved and mortgagees became more demanding and insisted upon not only the payment of interest in order to forestall foreclosure but they also insisted on the payment of taxes. Despite improved circumstances, a goodly number of our citizens who owned a home or equity therein were still in need of public assistance (including housing). The net result was a further amendment of section 49.01 by the passage of Ch. 82 and 464, section 6a, Laws of 1939, which provided the following:

“ . . . Whenever a person receiving poor relief is residing in a homestead which is mortgaged, the relief authorities are authorized to pay the *interest on such mortgage or taxes on such mortgaged homestead or both*, in cases where to do so will result in preventing the relief authorities from paying a larger sum as shelter allowance for the relief recipient if such recipient were to lose such homestead for failure to pay such interest or taxes.”

“Thus by virtue of the amendments enacted by the legislature in 1931, 1937 and 1939, there was expressed an intention to authorize relief authorities to pay on behalf of the mortgagors who were dependent persons not only interest but also taxes for the sole purpose of providing shelter for such dependent persons at a minimum cost to the municipality. It is noteworthy that this was not a mandatory proposition, but the payment of such interest and taxes was discretionary and a question of administrative policy to be determined by the relief authorities.

“Following the year 1939, economic conditions improved; however, with the onset of World War II our country experienced an inflationary period and although there was less unemployment than at any time in the preceding ten to fifteen years, and wages were higher than during any time in the same period, nevertheless the income did not always meet the needs of individuals and their families. In addition war brought on a housing shortage and a resulting shortage of rental units, and the problem of housing generally became acute, especially as it pertained to larger families and the rents which were demanded.

"In 1945 the Wisconsin Legislature revised the laws governing public assistance. Old section 49.01 was renumbered section 49.06 and amended by Ch. 585, Laws of 1945, and read as follows:

"No person shall be denied relief on the ground that he has an equity in the home in which he lives. . . . No applicant for relief shall be required to assign such equity . . . as a condition for receiving relief. Where persons are not in fact dependent, as defined by this chapter, but who, if they converted their limited holdings, real or personal, would, by reason of a fallen market or by reason of economic or other conditions, be required to suffer a substantial loss, then and in that event such persons shall be permitted, by proper assignments to the county or municipality, to render themselves qualified to receive relief."

"Again in 1947 section 49.06 was amended by the enactment of Ch. 282 which added the following:

" . . . The county agency may sell, lease or transfer the property, or defend and prosecute all actions concerning it, and pay all just claims against it, and do all other things necessary for the protection, preservation and management of the property.'"

Prior to the enactment of ch. 585, Laws 1945, creating the provisions of sec. 49.06 quoted in your letter, authorizing a person to assign property in order to render himself qualified to receive relief, the opinions of this office had been to the effect that counties might not require a needy person to contract to reimburse the county as a condition of receiving relief. The statutory provision that persons might render themselves qualified to receive relief by proper assignments to the county or municipality may well have been intended to extend the items which might be properly included in payments of relief; but if so, apparently on the theory that the county or municipality should be permitted to require reimbursement for provisions which would not properly have been payable before the amendment was adopted.

I think there can be little question that payments of taxes and interest on behalf of a dependent person who is an owner of an equity in a home is permissible under authority to furnish housing. Certainly the authority to furnish housing would permit the payment of rental which is ordinarily intended to cover such items as taxes and interest.

The question whether relief may be given in the form of payments on the principal, which would have the effect of increasing the value of the equity of the dependent person and thus in effect transfer public funds to private ownership, is doubtful.

It is the rule in this state, as in others, that money derived from public taxes can only be expended for public purposes. *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, (1940) 235 Wis. 443, 293 N. W. 161 and *State ex rel. Smith v. Annuity & Pension Board*, (1942) 241 Wis. 625, 6 N. W. 2d 676.

It has been frequently decided that payment of relief constitutes a public purpose. Whether a statute could authorize payment of relief in such a manner as in effect to constitute a transfer from the public funds of an interest in real estate to the recipient of relief, I believe to be doubtful. In *Alameda County v. George A. Janssen*, (1940) 16 Cal. 2d 276, 106 P. 2d 11, 130 A. L. R. 1141, the court upheld a statute authorizing county boards of supervisors to release the county's statutory lien for aid furnished to needy persons upon the real property of such persons, upon the payment of such amount as in the opinion of the board equals the net amount which would be realized in the event of foreclosure of the lien. The court reached the result, however, on the basis of the fact that there was no giving away of public property in such case since the county would be receiving all that it could have received had it foreclosed instead of releasing the lien. The court pointed out that such circumstance distinguished the statute from the one held invalid in *Los Angeles County v. Jessup*, 11 Cal. 2d 273, 78 P. 2d 1131, 1134.

Sec. 49.08 provides, in part, that if any person at the time of receiving relief or at any time thereafter is the owner of property the authorities charged with the care of the dependent may sue for the value of the relief from such person or his estate. While secs. 49.06 and 49.08 appear to leave to the discretion of the local administrators the question whether reimbursement should be sought from a recipient of relief, I am of the opinion that, if the relief is given in such form as to result in the creation of property inter-

ests in the recipient, the authority under sec. 49.06 to accept an assignment together with the provisions of sec. 49.08 imply an obligation on the part of the county or municipality to require reimbursement at least to that extent. The county's authority, to "sell, lease or transfer the property, or defend and prosecute all actions concerning it, and pay all just claims against it, and do all other things necessary for the protection, preservation and management of the property" which has been assigned to it, is identical with the authority to deal with property assigned under sec. 49.26 (1), Stats. Subsec. (2) of sec. 49.26 expresses the legislative intent that the county is to be reimbursed out of the assigned property for old-age assistance paid to the owner of the property, and only the excess returned to the beneficiary.

While sec. 49.06 expressly provides that no applicant for relief shall be required to assign "such equity" in the home in which he lives as a condition for receiving relief, that restriction applies to the equity he had prior to the granting of relief and not to any equity which is created by payments of public funds.

To conclude, I am of the opinion that counties may, if they deem it advisable, make payments as relief for taxes and interest on behalf of a dependent person who is the owner of an equity in the home in which he and his family live; and that they may, in cases falling within the scope of sec. 49.06, make payments on the principal; but that they must take steps to require reimbursement of the county for any property interest created by the latter payments.

BL

Physical Therapy—Licenses and Permits—Persons practicing physical therapy in veterans' administration hospitals located in Wisconsin, who confine their practice to patients whom the veterans' administration has the duty to treat, are not required to be licensed under sec. 147.185, Stats., as created by ch. 411, Laws 1953.

May 28, 1954.

STATE BOARD OF MEDICAL EXAMINERS.

You request my opinion as to whether physical therapists employed in veterans' administration hospitals located in Wisconsin are required to be licensed by your board under sec. 147.185, Stats., repealed and recreated by ch. 411, Laws 1953.

You have been informally advised heretofore that physicians, surgeons, and dentists employed by the federal government to practice in federally owned and operated institutions are not required to be licensed under Wisconsin statutes. The reasoning of these opinions was based upon the doctrine of *In re Neagle*, 135 U. S. 1, to the effect that one acting in the discharge of his duty as an officer of the United States could not be held to answer to the state courts for an act prohibited by state statute for which he had the authority of the laws of the United States.

The practice of physical therapy without a state license is expressly prohibited by sec. 147.185, as amended by ch. 411, Laws 1953.

In the early history of our country, there was no federal law providing treatment for disability incurred in the active military or naval service. Certain of the states and communities of residence of disabled veterans provided a measure of medical and hospital care. By successive enactments between 1811 and 1953, the congress provided for medical, hospital, and domiciliary care of veterans suffering from disability, disease, or defects requiring such professional ministry. The earlier acts involved a system of aid to state homes caring for veterans otherwise eligible as such to care by the federal government. The first legislative provision for purely medical benefits was enacted in 1917.

The World War II load of service-connected disabilities produced a major problem in the care of the nation's war-

disabled. While, prior to World War II, veterans were receiving the highest type of care which could be found, the demand for doctors, dentists, nurses, and medical technicians in the military service, plus the post-war load on the veterans' administration, required definite steps to enlarge and strengthen the medical facilities of the veterans' administration. By Act of January 3, 1946, Public Law 293, 79th Congress (38 U. S. C. A. §15 *et seq.*), there was established in the veterans' administration the "department of medicine and surgery." (See History of Legislation—Veterans' Benefits, 38 U. S. C. A. pp. xxxv–xxxvii.) The functions of said department are declared to be those necessary for a complete medical and hospital service to be prescribed by the administrator of veterans' affairs, pursuant to statutory authority and regulations established pursuant to law, for the medical care and treatment of veterans.

The composition of the department is made up of the chief medical director, deputy chief medical director, assistant chief medical directors, *and such other personnel and employes as may be authorized by secs. 15–15n. of Title 38, U. S. C. A. §15b. (f)*, among other things, authorizes the administrator to appoint a chief physical therapist. §15c., which is particularly pertinent here, provides:

"Appointment of professional and technical personnel

"There shall be appointed by the Administrator additional personnel as he may find necessary for the medical care of veterans, as follows:

"(a) Doctors, dentists, and nurses;

"(b) Managers, pharmacists, *physical therapists*, occupational therapists, dietitians; scientific personnel, such as pathologists, bacteriologists, chemists, biostatisticians, and other medical and dental technologists." (Emphasis supplied.)

§15d., so far as pertinent, provides:

"Qualifications for appointment of personnel; compensation during terminal leave from armed forces

"Any person to be eligible for appointment in the Department of Medicine and Surgery must—

"(a) Be a citizen of the United States.

"(b) In the Medical Service—

"hold the degree of doctor of medicine or of doctor of osteopathy from a college or university approved by the

Administrator, have completed an internship satisfactory to the Administrator, and be licensed to practice medicine, surgery, or osteopathy in one of the States or Territories of the United States or in the District of Columbia.

“* * *

“(e) * * *

“(3) physical therapists, occupational therapists, dietitians, and other auxiliary employees shall have such scientific or technical qualifications as the Administrator shall prescribe.”

While it is perhaps unnecessary to support the conclusion reached in this opinion, it is deemed of interest and concern to the veteran population of the federal hospitals or other institutions located and to be located in Wisconsin in the future to know that qualified personnel is employed by the veterans' administration in the fulfillment of the duties laid upon it by congress.

This congress has expressly included physical therapists in the department of medicine and surgery of the veterans' administration, confided to the administrator the responsibility of setting up standards or qualifications for the position, and placed the therapists under the authority and direction of a chief medical director who is required to be a doctor of medicine licensed to practice in one of the states of the United States or in the District of Columbia.

Without laboring the details of organization, functions, duties, etc., of the department of medicine and surgery of the veterans' administration, it is sufficient to say that congress manifestly regards physical therapy as a necessary form of treatment of the sick and disabled veterans for whose care and benefit the department of medicine and surgery was established. The responsibility for furnishing qualified personnel to practice physical therapy in such federal institutions rests upon congress.

It is my opinion, therefore, based on the doctrine of *In re Neagle, supra*, that the state of Wisconsin may not require physical therapists employed in federally-operated institutions to procure licenses to practice physical therapy in such institutions so long as such practice is confined to patients under federal care.

SGH

Physicians and Surgeons—License—Reciprocity—Where applicant for license to practice medicine and surgery by reciprocity otherwise meets all requirements imposed by secs. 147.15 and 147.17, Stats., he is entitled to license without regard for the number of years of premedical college courses he has completed, provided he has completed courses in physics, chemistry, and biology equivalent to the courses taught as premedical subjects at the university of Wisconsin.

June 1, 1954.

STATE BOARD OF MEDICAL EXAMINERS.

You request my opinion as to whether you have statutory authority to issue a license to practice medicine and surgery in Wisconsin by reciprocity to an applicant now licensed to practice in the state of Minnesota under the following circumstances: Applicant completed 2 years of premedical studies at the Duluth junior college in 1937, and was admitted to the medical school of the university of Minnesota in that year. He received the degree of doctor of medicine following an internship at Milwaukee county hospital and was awarded a diploma of graduation by said medical school in 1942. He thereafter served in the United States naval reserve, and upon discharge in 1946 held a residency in internal medicine at the Mayo Foundation and Clinic until 1949. He practiced medicine at Santa Barbara, California, from 1950 to 1953 and has been practicing at Duluth since August 1953.

Sec. 147.17 (1), Stats., as amended by ch. 342, Laws 1953, lays down the conditions upon which such licenses may be granted by reciprocity. It reads in part:

“If 6 members find the applicant for license qualified, it shall issue a license to practice medicine and surgery, signed by the president and secretary-treasurer and attested by the seal. Before granting a license by reciprocity, the board shall conduct an investigation in the manner provided in s. 147.15 to determine whether the requirements for licensure in the state in which the applicant for reciprocity is licensed are equivalent to those of this state. If it finds that the requirements in another state are equivalent to those of this state, the board may issue a license to practice

medicine and surgery without written examination to a person holding a license to practice medicine and surgery, or osteopathy and surgery, in such other state, upon presentation of the license and a diploma from a reputable professional college approved and recognized by the board,
* * *.”

The requirements for licensure in Wisconsin are contained in sec. 147.15, Stats., as amended by ch. 342, Laws 1953. They are:

(1) Evidence of good moral and professional character.

(2) Preliminary education equivalent to graduation from an accredited high school of this state.

(3) Diploma from a reputable medical or osteopathic college with standards of education and training substantially equivalent to the university of Wisconsin medical school, said professional college to be “approved and recognized” by the board.

(4) Satisfactory evidence of having completed a college course in physics, chemistry, and biology, substantially equivalent to the premedical course at the university of Wisconsin.

(5) If the professional college from which a diploma is presented does not require for graduation a hospital internship of at least 12 months in addition to a 4 years’ course, a certificate of completion of such internship in a reputable medical or osteopathic hospital.

You point out that in 1937 at the time applicant entered the medical school of the university of Minnesota, premedical requirements for admission to that school were 2 years of college, as contrasted to the 3 years premedical requirements of the university of Wisconsin medical school.

Your request for opinion states that applicant meets all requirements for admission to practice in Wisconsin except that he has completed but 2 years premedical studies.

The question for decision, therefore, is narrowed to whether applicant is qualified for a license by reciprocity, although he has had but 2 years of premedical studies.

The only statutory requirements respecting pre-professional studies are contained in sec. 147.15, Stats., summarized above. The one requires graduation from high school.

The other requires a study of physics, chemistry, and biology at college level, equivalent to the same courses as taught in the premedical course at the university of Wisconsin. The statute does not require any college premedical courses beyond the three subjects mentioned.

Reciprocal licensing between the states of Minnesota and Wisconsin depends upon the strict language of the statute. In my opinion the premedical studies imposed as requirements for entrance into the university of Wisconsin medical school by the board of regents (other than physics, chemistry, and biology) cannot be added to the statutory requirements by your board as a condition to granting a license by reciprocity where all the other statutory requirements have been met.

It is true that more and more stringent requirements may be imposed by the board of regents within the professional college itself, which must constitute the measuring stick for evaluating the standards of education and training of all other medical and osteopathic schools by your board. But the legislature has expressly adopted the standards of the university of Wisconsin medical school for this purpose. It has not, however, adopted the university's standards of premedical education. To the contrary, it has expressly prescribed the premedical requirements as discussed above.

Assuming, as you say, that the applicant in question has met all other requirements, you have the authority under the statute to grant him a license by reciprocity, notwithstanding he has completed but 2 years of premedical studies.

SGH.

Public Assistance—Poor Relief—County Administration
—Where a county system of relief has been adopted under sec. 49.03 (1), Stats., all relief as defined by sec. 49.01 (1), Stats., must be administered by the same agency. It may be either the welfare department under sec. 46.22 (5) (b), Stats., or such other official or agency as may be designated under sec. 49.02, Stats.

June 2, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked several questions with respect to the right of the state department of public welfare to reimburse counties pursuant to sec. 49.04, Stats., for the expense of hospitalizing indigent persons.

You recite the following facts:

“Two ordinances for the operation of public welfare and relief are in existence in ‘X’ county. The one ordinance, passed in November of 1953, establishes a county department of public welfare consisting of a county board of public welfare, a county director of public welfare and necessary personnel. This department unquestionably meets the specifications of a county department of public welfare. It has been vested with the mandatory functions, duties and powers as specified by section 46.22 (4), Stats. In addition thereto, this department has been vested with certain other functions, duties and powers. Among other delegations of powers is included:

“b. To perform all of the accounting functions and keep all of the necessary records required in the administration of general relief, and to administer relief under section 49.02 and 49.03 as it pertains to hospitalizing indigent persons.’

“‘X’ county also passed another ordinance in February 1954, setting up the manner in which the relief should be operated in said county. This ordinance provided that all other ordinances and resolutions heretofore enacted and adopted should be repealed. It also provided that a relief department for ‘X’ county was created, ‘which shall have jurisdiction over all general relief matters in Chapter 49 of the Wisconsin Statutes except as hereinafter provided and except those required by law or county ordinance to be administered by some other department.’ The relief department is administered by three commissioners and each commissioner has a specified area in which he administers

relief. This ordinance creating a relief department further specifies:

“*SECTION VII.* The relief department shall use the facilities of the county public welfare department for all accounting functions and as a repository for such records as should establish need for relief and dates and amounts of relief. The relief department and the county clerk shall also route all documents and correspondence pertaining to non-resident relief through the county welfare department so that central records may be maintained which will be readily available to any county official needing to make use of them.”

Your first question is: Does this joint system, set up by “X” county, comply with secs. 49.02 and 49.03, Stats.?

Sec. 49.02 (1), which obligates municipalities to furnish relief to dependent persons, provides that each municipality “shall establish or designate an official or agency to administer the same.” Sec. 49.03 (1) provides that when a county has provided for a county system of relief, “all powers conferred and duties imposed by this chapter upon municipalities shall be exercised and performed by the county.”

Ch. 513, Laws 1953 enacted sec. 46.22, making provision for a county welfare department which should in every case have certain mandatory functions and duties, including administration of the social security aids. Sec. 46.22 (5) further provides:

“(5) The county board of supervisors may provide that the county department of public welfare shall, in addition to exercising the mandatory functions, duties, and powers as provided in sub. (4), have any or all of the following functions, duties and powers and such other welfare functions as may be delegated to it by such county board of supervisors:

“* * *

“(b) Administer relief under ss. 49.02 and 49.03 in the event that the county administers relief under those sections.

“* * *”

There is some question whether the legislature, in authorizing the county board to delegate to the county welfare department “any or all” of the following functions, intended

that each of the enumerated subdivisions should be regarded as a single function which could not be further subdivided, or that the board might delegate a portion only of the functions described in one subdivision, such as subsec. (5) above quoted. Administration of relief under secs. 49.02 and 49.03 includes not only what has been referred to in the county ordinance as "general relief," but also "medical, dental and surgical treatment (including hospital care)." Sec. 49.01 (1): See, also, *Legault v. Owen*, (1940) 235 Wis. 675, 293 N. W. 920. The apparent intent of the ordinances in "X" county is to leave in the relief department all administration of relief except hospitalization and to confer upon the welfare department all authority and duties in that respect.

As was pointed out in *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 282 N. W. 111, the matter of relief is "purely and strictly statutory." Municipalities have no power to supersede the statutes on the subject.

I do not believe that sec. 59.08 (8), authorizing the county board to abolish and create positions, has any applicability in connection with relief administration. Sec. 49.03 (1) (a) provides that when counties undertake to administer relief "all powers conferred and duties imposed by this chapter upon municipalities shall be exercised and performed by the county." On this subject a county must find its authority in ch. 49 rather than ch. 59.

The opinion in 42 O.A.G. 172 was to the effect that counties could not be reimbursed under sec. 49.04 for expenditures authorized by officials other than the ones designated by statute to administer relief. The statutory provisions there involved were the ones pertaining to populous counties, specifically designating the officials to be charged with administration of relief, whereas your inquiry deals with counties having populations of less than 500,000. In the latter cases the counties may either follow sec. 46.22 (5) (b) and designate the county public welfare department to administer "relief under secs. 49.02 and 49.03" or "designate an official or agency to administer the same" under sec. 49.02.

In either case the legislature has dealt with "relief" as a single subject, to be administered by the same official or

agency. It has expressly defined in sec. 49.01 (1) what shall be included in the term "relief." I do not believe that it was the intent of the legislature to permit the subject of relief to be dealt with within one county or municipality on a basis of divided responsibility. The legislature may have felt that it would be unfair to persons eligible for relief to require them to deal with several agencies; or it may have felt that a more efficient service from the point of view of administering public funds would result from a central administration. Whatever its reasons, the legislature appears to have laid down a plan by which all the forms of relief covered by the definition in sec. 49.01 (1) are to be administered by the same agency, except in cases where it has expressly made provision to the contrary. The fact that it has expressly made provision whereby a county may assume that portion of relief relating to "medical, surgical, dental, hospital and nursing care and optometrical services" (49.03 (1) (b)) signifies that it did not intend that there should be a segregation of administration for purposes of "hospitalization" only; or that there should be dispersion of authority between departments within a municipality or county. Since the legislature made express provision for the one circumstance in which there might be a separation of administration, it can be presumed that it would have specified others if it had intended any.

It is my opinion all forms of relief are to be centered for purposes of administration in the same official or agency of the municipality or county.

You also ask: Would the state department of public welfare be permitted to make reimbursement for claims filed in conformance with sec. 49.04, Stats., covering hospitalizing relief to indigent persons, which have been authorized and approved by the public welfare department of "X" county?

As pointed out in 42 O.A.G. 172, the state is to reimburse counties only for "relief." Relief includes only such expenditures as are directed by the officials authorized to administer relief. In a county which has designated a particular agency for administration of relief, it is my opinion that expenditures not authorized by such agency, but only by

other officials, cannot be regarded as relief within the meaning of sec. 49.04.

Since sec. 46.22 (5) of the statutes, as created by ch. 513, Laws 1953, authorizes the county board of supervisors to delegate to the county public welfare department "other welfare functions," hospitalization issued by the department may be regarded as performance of a welfare function other than administration of relief, where the county has designated a different agency for the administration of the latter.

BL

Public Assistance—Poor Relief—A county administering relief under secs. 49.02 and 49.03 (1), Stats., has no right to condition the granting of relief upon authorization by a county court.

If relief has been granted to dependent persons on the basis of an application to the court by a county's poor commissioner, the county may be reimbursed under sec. 49.04, Stats., for payments to state dependents.

June 2, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You state that a certain county has in effect a resolution relating to the administration of relief, as follows:

"RESOLVED, by the County Board of Supervisors of X County, Wisconsin;

"1. That Victor James be and he hereby is appointed as the Poor Commissioner in and for said County, to handle all County at large poor cases, pursuant to Section 49.04 of the Wisconsin Statutes, to act without further pay. It is further

"RESOLVED, that when the Poor Commissioner is of the opinion that an applicant for aid is in need of immediate cash payments therefor, on a monthly basis, he may petition the Court for an Order for said payment of money on the County Treasurer of X County, and the County Court

is hereby authorized to issue said Order and to designate the amount that said applicant for poor relief may receive. It is further

“RESOLVED, that when said Poor Commissioner is in doubt as to whether or not the said applicant is a County at large poor case, he may petition the Court by written petition to make findings as to whether or not the said applicant is a County at large case.”

You also state that the section 49.04 referred to is probably from the 1937 statutes, the provisions of which are now in sec. 49.02 (2). Your question is: “May we properly allow claims for reimbursement under section 49.04, Stats., (state dependents) for relief furnished pursuant to the above resolution? We do not believe it the intent of section 49.02 (2) that it contemplates that a relief official petition a county court for the purposes stated in the resolution; as we understand 42 OAG 172 aid must be furnished by an agency or officer provided for under the statutes.”

The portion of the resolution making the issuance of relief dependent upon petition to, and action by, the county court is probably invalid for two reasons. I believe that the obligations placed upon municipalities and counties to furnish relief under secs. 49.02 and 49.03, Stats., do not permit the issuance of relief to be conditioned upon authorization by a court. Secondly, I do not believe that a county has power to place upon the court duties additional to those prescribed by statute, in the absence of a statutory provision authorizing it to do so.

With respect to the first point, the supreme court said in *Ashland County v. Bayfield County*, (1944) 246 Wis. 315, 318, 16 N.W. 2d 809:

“* * * Counties or municipalities do not have a right to furnish relief under the statute. They are under a duty to do so. The extent of the duty of the county or of the municipality is fixed by statute. * * *”

The legislature did not intend that the municipalities and counties, which it obligated to furnish relief, might limit their obligation by imposing such conditions as might prevent dependent persons from obtaining needed relief without undue delay. Sec. 49.02 provides that each municipality

obligated to furnish relief shall "establish or designate an official or agency to administer the same." That provision contemplates that the need for relief shall be determined in the first instance by administrative authorities. In *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 181-182, it is said:

"While the question does not seem to have been considered in this state, it has been held in other jurisdictions under statutes similar to sub. (1) that the state commits to the municipal authorities the *quasi-judicial* duty of determining first whether the person is in need of relief, and, second, what amount should justly be allowed for relief. It has been held that where they act in good faith and without abuse of discretion their action is not subject to review. *Hardin County v. Wright County*, (1885) 67 Iowa, 127, 24 N.W. 754; *Board of Commissioners of Warren County v. Osburn*, (1892) 4 Ind. App. 590, 31 N. E. 541; *Wood v. Boone County*, (1911) 153 Iowa, 92, 133 N.W. 377, 39 L.R.A. (N.S.) 168."

While judges may in some cases perform administrative duties (see, for example, those dealt with in *State v. Marcus*, (1951) 259 Wis. 543, 49 N. W. 2d 447), such functions are performed by them only on the basis of some statutory authorization.

Sec. 253.03 (1), Stats., prescribing the jurisdiction of county courts, provides that in addition to certain specified matters, the court "shall have and exercise such other jurisdiction and powers as are or may be conferred by law." The legislature has expressly given to county judges some functions in connection with administration of relief as, for example, under sec. 49.09, Stats., relating to removal of dependents. The fact that the legislature has specified certain matters with respect to which judges are authorized and required to act negates an intent that they should do so with respect to other matters in the same field.

While I am of the opinion that the portion of the resolution conditioning relief upon allowance by the county court is invalid, that does not of itself answer the remaining facet of your question. You are concerned with whether you may properly allow reimbursement under sec. 49.04, Stats., for payments made to dependent persons under the

resolution, when the circumstances otherwise meet the requirements of sec. 49.04 (1), which reads:

“From the appropriation made in section 20.18 (10) the state shall reimburse the counties for the relief of all dependent persons who do not have a settlement within any county in this state and who have resided in the state less than one year.”

The question is whether payments made under the resolution constitute “relief” of dependent persons.

There is little question, I believe, that the invalid provisions of the resolution of X county could be challenged by persons adversely affected as, for instance, someone whose application for relief had been denied or delayed by the procedure. If your department had been authorized or required by statute to supervise administration of relief by counties and municipalities (as it has been authorized to supervise the administration of social security aids under sec. 46.206, Stats. 1953) it would probably have both the authority and the duty to withhold reimbursement from state funds to whatever extent is necessary to compel compliance with state standards. Since the legislature has not directed the department to supervise the administration of poor relief, it is only necessary under sec. 49.04 that it be established that payments by counties were actually made as relief of dependent persons in order that reimbursement may be given, at least if the department has not promulgated rules under sec. 49.04 (2) which cover such a situation as you describe. If the payments made by the department pursuant to the foregoing resolution were actually made to dependent persons eligible for relief under the definitions in sec. 49.01 (1) and (4), they constitute relief even though improperly restricted. The poor commissioner, by making an application to the court under the foregoing resolution, indicated that he was “of the opinion” that the applicant was “in need of immediate cash payments.” According to the excerpt quoted from *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 181-182, such finding by the administrative officer should have been sufficient to establish payments to such applicant as relief.

The situation here is different from the one discussed in 42 O. A. G. 172, where services which might have been given as relief, if extended by the administrative officer authorized to perform such functions, were given instead by officials authorized to operate certain county institutions. The point was made in 42 O. A. G. 172 that the services were originally given with the idea that payment was to be made by the recipient and that it was not determined until a later time that the bill was uncollectible. That opinion also dealt with different statutory provisions than those here involved, because it dealt with a county having a population of more than 500,000. In the absence of any rule to the contrary made under sec 49.04 (2), I am of the opinion that you may allow claims for reimbursement under sec. 49.04 for relief furnished by petition of the poor commissioner under the resolution quoted from X county, despite the fact that the resolution attempts invalidly to circumscribe or modify the county's obligation under secs. 49.02 and 49.03.

BL

State Historical Society—Copyright Infringement—Liability for Damages—State historical society is an arm or agency of the state and is not liable for damages for copyright infringement.

June 8, 1954.

STATE HISTORICAL SOCIETY.

You request our opinion as to whether the state's immunity from suit without legislative consent extends to the state historical society so as to exempt it from liability for copyright infringement.

The historical society is an official state agency. Wis. Stats., sec. 44.01. Consequently, when it acts within the scope of its delegated powers, its action is, in effect, state action; a suit against the society would be, in substance, a

suit against the state. *Mitchell Irr. District v. Sharp*, (1941, C. C. A. Wyo.) 121 F. 2d 964, cert. den., 314 U. S. 667; *Holzworth v. State*, (1941) 238 Wis. 63, 298 N. W. 163; 39 O. A. G. 110.

Copyright protection is authorized by art. I, sec. 8, cl. 8, of the United States constitution, which gives congress the power to secure "for limited times to authors *** the exclusive right to their respective writings." But the extent of both the right and its protection are not, primarily, constitutional matters; hence, copyright infringement does not constitute an infringement of constitutional rights.

The entire subject matter, however, is inherently federal in nature. Jurisdiction of controversies arising under the copyright act is exclusively federal. 28 U. S. C. A. 1338; *U. S. v. American Bell Telephone Co.*, (1895) 159 U. S. 548, 16 S. Ct. 69, 40 L.ed. 255. And since the right to sue for infringement is given by the copyright act, the state of Wisconsin cannot, by statute, deprive the federal courts of jurisdiction by prohibiting the bringing of such a suit. *Leo Feist, Inc. v. Young*, (1943, C. C. A. Wis.) 138 F. 2d 972.

However, the liability of the state for copyright infringement is an entirely distinct matter. Under the common law doctrine of sovereign immunity no suit could be maintained against the sovereign without its express consent. In this country the consent of a sovereign state could conceivably be given indirectly by its surrendering certain of its sovereign powers to the federal government, which, in turn, could surrender them by statute to private individuals. But "the United States have no claim to any authority but such as the States have surrendered to them. Of course the part not surrendered must remain as it did before." *Chisholm v. Georgia*, (1793) 2 Dall. 419, 435, 1 L.ed. 440.

While the *Chisholm* case held that art. III, sec. 2, of the United States constitution constituted a partial surrender of state sovereignty so as to allow suits against a state by citizens of other states, the states, as a direct response to that holding, adopted the eleventh amendment which precluded such suits.

Since the common law doctrine of sovereign immunity still applies in cases not covered by the eleventh amendment,

Sullivan v. State of Sao Paulo, (1941 C. C. A. N. Y.) 122 F. 2d 355, today a suit against a state by one of its own citizens, the state not having consented to be sued, is forbidden by law as much so as suits against a state by citizens of another state of the union. *Gunter v. Atlantic Coast Line R. Co.*, (1906) 200 U. S. 273, 26 S. Ct. 252, 50 L.ed. 477; *Fitts v. McGhee*, (1899) 172 U. S. 516, 19 S. Ct. 269, 43 L.ed. 535.

In such situations the federal courts have no jurisdiction, *Georgia R. R. & Banking Co. v. Redwine*, (1952) 342 U. S. 299, 72 S. Ct. 321, 96 L.ed. 335. This, however, is not the result of a *deprivation* of federal power by the states, since that power, not having been given to the federal government (by the surrender of the immunity of the sovereign states to suit) is *not possessed* by it.

The only express consent by the state of Wisconsin to suits by individuals is given in sec. 285.01, Wis. Stats. But copyright infringement is a tort, *Leo Feist, Inc. v. Young*, *supra*, and sec. 285.01 is inapplicable to tort actions. *Holzworth v. State*, *supra*.

While not in the copyright field, attention is called to the recent case of *Kraft Foods Co. v. Walther Dairy Products*, (D. C. W. D. Wis., Feb. 12, 1954) 118 F. Supp. 1, a patent infringement case in which the state of Wisconsin subjected itself to the jurisdiction of the court by intervening as a party defendant and in which case the state was charged not only with patent infringement but with having conspired with others to infringe the patent in question. Judge Stone, in writing the court's opinion, said at p. 24:

"A long unbroken line of authorities in Wisconsin has established the doctrine that:

"Municipalities, as well as the state itself, have long been held immune from liability for the tortious acts of their agents and officers while engaged in the discharge of a governmental function." *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144, 146.

"It is undisputed that the State in aiding and abetting Wild in its infringement activities was not engaged in a proprietary enterprise but was engaged in a governmental function, not for financial gain, but for the general welfare of its inhabitants.

“The doctrine of *respondeat superior* does not apply to the State where as in this instance it is exercising a governmental function.

“The activities of the State of Wisconsin and its Department of Agriculture were purely experimental and not for commercial purposes and it is not liable to plaintiff for its activities in aiding Wild in its infringement of plaintiff’s patent.”

The court concluded that the plaintiff was entitled to an injunction against each of the defendants and each of the intervenor-defendants, restraining them from using, causing to be used, or inducing any other person to use, any process which infringes the patent, and that the plaintiff was entitled to an accounting to determine the amount of its damage by reason of the infringement of the patent by parties other than the state of Wisconsin.

It is, therefore, our opinion that the state and its agencies, such as the state historical society, are not liable for damages in copyright infringement cases.

WHR

Public Assistance—Old-Age Assistance—Trust Funds—
A trust for payment of funeral expenses may be terminated by agreement of the parties during the life of the person for whose funeral it is provided.

The fact that an irrevocable trust has been provided for payment of funeral expenses of an applicant for old-age assistance does not render him ineligible for assistance under sec. 49.22, Stats. 1953, if the fund does not exceed \$300.

If such fund exceeds \$300, the owner is ineligible for old-age assistance.

June 17, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask a number of questions which arise out of changes in the statutes relating to eligibility for old-age assistance, effected by chs. 337 and 667, Laws 1953.

Before ch. 337 became effective it was permissible under the rules of your department for a recipient of old-age assistance to reserve \$300 of his personal assets for burial expenses.

Since the enactment of chs. 337 and 667, Laws 1953, sec. 49.22 (2) reads in part:

"A person shall be considered dependent within the meaning of this section even though he *** owns property * * * not in excess of the following:

"(c) \$500 in liquid assets of which:

"1. The first \$300 shall be transferred to the county agency for the sole purpose of providing a fund for the payment of the recipient's funeral expenses. ***"

You state that prior to the enactment of the above provisions several methods and forms were used by different county agencies to provide burials for old-age assistance recipients. Most common methods were a joint account between the recipient and the county agency or a trust agreement, usually between the recipient and some specified bank or depository. X county adopted the latter practice and used the following form of agreement to carry out the burial trust:

"TRUST AGREEMENT

"ARTICLES OF TRUST AGREEMENT, entered into this _____ day of _____, 19____, by John Doe of the City of B, X County, Wisconsin, party of the first part, and B Bank of the City of B, party of the second part,

"WITNESSETH—

"I. Party of the first part has and by these presents does assign, grant, and irrevocably set over to said party of the second part the sum of _____ Dollars to be held in trust by said party of the second part in a savings account under the terms of this agreement, and this agreement only.

"II. Said party of the second part agrees to hold said _____ Dollars and the income thereon, if any, until the death of the said party of the first part, and at that time to reimburse up to the sum of _____ Dollars any person who presents to the party of the second part proper bills showing payment of burial and funeral expenses, or to pay said burial and funeral expenses direct.

"III. The liability of the Trustee hereunder shall extend only to the use of ordinary care and diligence in the management of said trust property.

"AND IT IS FURTHER UNDERSTOOD AND AGREED by and between the parties hereto, that if any surplus remain in said trust account after said burial and funeral expenses are paid to the extent permitted in paragraph II above, such surplus shall be paid by the party of the second part to the X County Public Welfare Department to reimburse X County for assistance granted to the party of the first part.

"IN WITNESS WHEREOF, the parties hereto have set their hands and seals this _____ day of _____, 19____.

"WITNESSES:

"_____”

Your first question is: Has an irrevocable trust been created whereby said monies cannot be returned to the first party?

As a general proposition, when one has transferred property to a trustee for the benefit of others, without reserving the right of revocation, he has no power to change the arrangement without the consent of the beneficiaries.

See *Boyle v. Kempkin*, (1943) 243 Wis. 86, 9 N. W. 2d 589; *Estate of Horkan*, (1927) 193 Wis. 286, 214 N. W. 438; *Wetutzke v. Wetutzke*, (1914) 158 Wis. 305, 148 N. W. 1088.

It is also true that a trust agreement may ordinarily be terminated by mutual consent of all the parties involved. The rules are set out in Restatement, Trusts, that:

"§ 338. (1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished.

"§ 339. If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished."

The trust agreement above quoted expressly provides that it shall be irrevocable, and so the first party cannot by his sole act extinguish the rights of any beneficiaries. The X county public welfare department is expressly named as one beneficiary. Until the settlor has died and funeral or burial expenses have been incurred, there can be no other known beneficiaries. The question arises whether the contingent interest of such unknown persons as might furnish or pay for funeral expenses makes them trust beneficiaries, so that the agreement could not be terminated without their consent.

The purpose of the agreement casts some light on the intentions of the testator in that respect.

The purpose of setting aside the funds was to render the settlor eligible to receive old-age assistance from the X county public welfare department. He could not receive assistance without transferring his assets to the county as provided in sec. 49.26 (1), Stats., except by earmarking them for funeral and burial expenses. He accordingly entered the trust agreement, not primarily for the benefit of potential creditors or claimants, but for his own benefit, to insure for himself a better funeral than would otherwise have been available to him under sec. 49.30, Stats.

If the trust had been created solely for his own benefit, the settlor could himself have terminated the trust as stated in Restatement, Trusts, § 339, above quoted.

It is my opinion that, during the life of the settlor, the only beneficiaries contemplated by the agreement are the settlor and the X county public welfare department; and that the trust could be terminated by their agreement for the purpose of placing the funds with the county agency subject to sec. 49.22 (2) (c), Stats. 1953.

There is another principle set out in Restatement, Trusts, § 336, on the basis of which the trust might be terminated by a court:

“§ 336. If owing to circumstances not known to the settlor and not anticipated by him the continuance of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, the court will direct or permit the termination of the trust.”

The purpose of the trust is primarily to reserve or earmark funds for burial of a recipient of old-age assistance in accordance with the laws and regulations governing such subject. A change in the law might well form a basis on which a court could terminate a trust agreement which was originally entered for the purpose of conforming to the law.

To summarize, I believe your first question should be answered in the negative, provided both the welfare department and the settlor agree.

Your second question is: If your answer to question 1 is in the affirmative, does the first party continue to be eligible for a grant of old-age assistance wherein he has failed to meet the eligibility requirements of sec. 49.22 (2) (c) 1, Stats.?

While the foregoing discussion indicates that I believe the trust to be terminable upon agreement between the settlor and the county agency, a trustee who disagrees with that conclusion might decline to turn over the funds without a court order. There is always the possibility that a court might not agree with the opinion here reached and, in any event, the amount involved is hardly large enough to warrant litigation. An answer to your second question is desirable in the event a trustee declines to recognize the right of the settlor and county agency to terminate the trust.

Sec. 49.22, as amended, provides that old-age assistance may be granted only if the applicant owns property "not in excess" of \$500 in liquid assets. Moneys tied up in an irrevocable trust would not be liquid assets; and if they do not *exceed* in value the amount there specified I do not believe they would preclude the grant of assistance. The legislature apparently contemplated that a recipient of old-age assistance might own property of a different nature than that specified in sec. 49.22 (2), because it has retained the provision of sec. 49.26 (1) authorizing the county to "require as a condition to a grant of assistance that all or any part of an applicant's personal property (*except that mentioned in s. 49.22 (2)*)" be transferred to the county. If one having property of a different nature than that described in sec. 49.22 (2) were not eligible for assist-

ance in any case, the provisions of sec. 49.26 (1) would be nullified for all practical purposes.

Your third question is: If your answer to question 1 is in the negative, is the first party required to withdraw the monies from the second party and deposit them with the county agency in accordance with sec. 49.22 (2) (c) 1 in order to remain eligible for a grant of old-age assistance?

If the trustee makes no objection, so that the funds can be withdrawn without difficulty, I believe they should be considered liquid assets subject to sec. 49.22 (2) (c) 1. If, however, they cannot be withdrawn without litigation, they are obviously not "liquid" assets, and are not subject to that provision.

Your fourth question is: Where an applicant for old-age assistance has paid for a complete funeral service with some undertaker, is the contract irrevocable and the money unavailable to the applicant for other purposes?

Ordinarily a valid contract may not be revoked by one party without the consent of the other, but it may be terminated by mutual consent.

There may be circumstances or provisions involved in connection with a particular contract which render it voidable or subject to cancellation, but without a copy of the agreement or a complete report of the circumstances only a general answer can be given.

Funds paid under the circumstances described in your fourth question are now governed by the new statutory provisions created by ch. 291, Laws 1953, reading:

"156.125 (1) Whenever any agreement is made with a funeral director, cemetery or any other person, firm, association or corporation, herein referred to as beneficiary, for the final disposition of a dead human body wherein the delivery of personal property to be used under a pre-arranged funeral plan or the furnishing of services of a funeral director or embalmer in connection therewith is not immediately required, all payments made under the agreement shall be and remain trust funds, including interest if any, until occurrence of the death of the person for whose benefit the funds were paid, unless the funds are sooner released to such person after written notice to the designated beneficiary.

• “(2) All such trust funds shall be deposited with a bank, trust company or savings and loan association within the state carrying federal deposit insurance and shall be held in a separate account in the name of the person for whose benefit such funds were paid, in trust for the designated beneficiary until the trust fund is released under either of the conditions provided in sub. (1). The depositor shall furnish to the person for whose benefit such funds were deposited the trust fund deposit receipt for the funds deposited. Upon receipt of a certified copy of the certificate of death of the person for whose benefit the funds were paid, together with the written statement of the beneficiary that the agreement was complied with, the bank, trust company or savings and loan association shall release such trust funds to the beneficiary.”

You will note that the foregoing provides that funds may be released to the person for whose funeral they were paid, after written notice to the undertaker or other “designated beneficiary.” If the undertaker should refuse to give his consent after such notice, court action would probably be required to secure the funds; and the outcome would depend upon the circumstances of the particular case.

Your fifth question is: If the agreement is irrevocable, is the recipient ineligible for a grant of old-age assistance because he has not complied with sec. 49.22 (2) (c) 1?

As indicated in the discussion of your second question, ownership of a prepaid funeral is not a liquid asset if it cannot be converted into cash. Such ownership of a prepaid funeral would not of itself preclude a grant of assistance unless the amount involved were more than \$300.

If the amount prepaid for the funeral exceeds \$300, however, I believe it would preclude a grant of assistance.

The fact that sec. 49.22 (2) makes eligibility depend on not having property “in excess of” that described in the ensuing subdivisions indicates that the legislature intended the amounts specified for particular purposes to be maxima.

Accordingly, the maximum which the legislature intended should be allowed for the funeral of an old-age assistance beneficiary is \$300.

Nonliquid assets do not necessarily preclude a grant of assistance, but if assistance is given, such assets are subject to assignment to the county under sec. 49.26 (1), so

as to be available to reimburse the county for the aid given. Even if an applicant's rights with respect to a prepaid funeral in excess of \$300 could be assigned, which is doubtful, it is difficult to see how they could be applied as a practical matter to reimbursement of the county.

You have also asked several questions involving what you term a "joint" account in the name of an old-age assistance beneficiary and a third person, to provide for the funeral of the former. Your first question in that respect is: Is the agreement for the joint account irrevocable or can the recipient terminate the agreement and withdraw the money from the account?

One of the characteristics of the usual joint account is that it may be withdrawn by either depositor while both are living. See secs. 221.45 and 222.12 (9), Stats.

If an old-age assistance beneficiary has deposited his funds in a joint account with another, to provide for the funeral of the former, the beneficiary could withdraw the funds at any time before his death unless there is some supplementary agreement to the contrary. You have referred to an "agreement," but I cannot give you an opinion as to the effect of such "agreement" unless its details are submitted.

Your second question relating to joint accounts is: If the agreement is irrevocable, is the recipient ineligible for a grant of old-age assistance because he has not complied with sec. 49.22 (2) (c) 1?

As previously indicated, such a nonliquid asset would not render the recipient ineligible for assistance unless the amount provided for the funeral exceeded \$300.

Your third question on this subject is: If the agreement is not irrevocable, must the recipient withdraw the funds from the joint account and deposit such monies with the county agency in accordance with sec. 49.22 (2) (c) 1, in order to remain eligible for a grant of old-age assistance?

The answer is in the affirmative, because in such case it would be a liquid asset subject to sec. 49.22 (2) (c).

BL

County Court—Fees of Clerk and Register in Probate—
Filing fees prescribed by sec. 253.29 (2) (a), Stats., are payable in special administrations under sec. 311.06, Stats., and in case of summary settlements of small estates under secs. 311.05 and 311.055, Stats. Only one fee is chargeable against any one estate.

The fee under sec. 253.29 (2) (b), Stats., for a certificate issued under sec. 230.47 (1), Stats., terminating a life estate, is \$1. This has nothing to do with certified copies.

The fees charged for certified copies by registers in probate and clerks of county court under sec. 253.29 (2) (g) and (h), Stats., are: For copies prepared by the court, 75 cents per page; for copies brought in, 25 cents per page; for the certificate in all cases, 50 cents; and the minimum charge, \$1 in all cases.

June 23, 1954.

DONALD J. BERO,
District Attorney,
Manitowoc County.

You have requested our opinion on the following questions:

1. Are the fees provided in sec. 253.29 (2) (a), Stats., applicable to special administrations under sec. 311.06, Stats., and to summary settlements of small estates under secs. 311.05 and 311.055, Stats.?

2. What are the minimum fees to be charged by registers in probate and clerks of county courts for certified copies of documents in their possession?

1. It is clear that both special administrations and summary settlements are begun by the filing of a petition. Both concern the estates of deceased persons.

Sec. 253.29 (2) (a) applies to the filing of a petition "whereby *any* proceeding in estates of deceased persons is commenced." It admits of no exceptions.

Consequently the first question must be answered in the affirmative, but this raises the further question of whether a double fee is payable where there is a special administration followed by a regular administration.

It is our opinion that only one filing fee is chargeable in such a situation and we know that such is the interpretation placed on the statute by the Dane county court. Filing fees, while not exactly taxes, are nevertheless brought into play and apply to county court proceedings dealing with the transfer of property of deceased persons. Since there is but one transfer and but one estate being probated in the case where there are both special administration and regular administration proceedings, there should be but one filing fee in the absence of compelling language in the statutes calling for a contrary conclusion. Where a statute designed to produce revenue is susceptible of two meanings, that should be preferred which imposes the lighter burden. *State ex rel. Abbott v. McFetridge*, 64 Wis. 130, 24 N.W. 140.

This view is borne out by the language of the statute reading "Such fees shall be paid at the time of the filing of the inventory, or other documents, setting forth the value of *the estate* in such proceedings."

Sec. 311.10 (3), Stats., was amended by ch. 300, Laws 1953, so as to require special administrators to file an account. Apparently it was not contemplated that there would be two inventories, one in the special administration and one in the regular administration. Frequently, if not usually, the special administrator files no inventory where regular administration follows. Ch. 300, Laws 1953, also provides that if the special administrator is subsequently appointed executor or administrator, he need not then file an account.

2. In considering the second question we will first discuss sec. 253.29 (2) (b), Stats., which provides for a fee of \$1 "for a certificate terminating a life estate."

The statute does not say "for a *certified copy* of a certificate terminating a life estate." Hence this language must refer to the original and not to the furnishing of a certified copy thereof.

Sec. 230.47 (1), Stats., provides:

"(1) Whenever a person has died or shall hereafter die who was during his or her lifetime entitled to an estate for life in any real estate in this state or whenever one joint tenant in any real estate has died or may hereafter die

leaving surviving his co-tenant, upon application by duly verified petition of any person interested in such real estate to the county court of the residence of the deceased (or if the deceased was a nonresident, of the county where the real estate is situated), *the county judge may issue and shall deliver to the petitioner a certificate*, under the seal of the county court, setting forth the fact of the death of such life tenant, or of such joint tenant, and the termination of such life estate, or the right of survivorship of any joint tenant and other facts essential to a determination of the rights of the parties interested, which certificate, or a duplicate or a certified copy thereof, when recorded in the office of the register of deeds of the county in which such real estate is situated shall be prima facie evidence of the facts therein recited."

Thus no *certified copy* is involved where the original is delivered to the petitioner as above provided, and sec. 253.29 (2) (g) and (h) relating to other certificates issued by registers in probate or county judges and to the copying, comparing and attesting of documents has no application.

Sec. 253.29 (2) (g) and (h) reads:

"(g) For each certificate issued by the registers in probate or county judges, fifty cents.

"(h) For copies of records or other papers in the custody and charge of registers in probate at the rate of fifty cents a page; and for the comparison and attestation of such copies as are not provided by the registers, twenty-five cents for each page, but the minimum charge in each of the above mentioned instances shall be one dollar."

These provisions are confusing if we attempt to apply them literally.

The confusion arises out of the use of the words "and attestation" in paragraph (h).

"The word 'attested,' when used with reference to judicial writings or copies thereof, as copies of records or judicial process, seems to have a legal meaning which is an authentication by the clerk of the court so as to make them receivable in evidence." *Goss & Phillips Mfg. Co. v. People* (1879), 4 Ill. App. 510, 515.

It has also been held that the word "certify" is but one of the meanings of the word "attest." *State v. Morgan*, (1952) 205 Minn. 388, 51 N.W. 2d 61.

Thus if we were to give the word "attestation" in par. (h) its proper meaning of certification, it would result in a charge of 25 cents per page with a minimum charge of \$1 where the copy is not furnished by the register, this being the natural construction of the language reading "for the comparison *and attestation* of such copies as are not provided by the registers, twenty-five cents for each page, but the minimum charge in each of the above mentioned instances shall be one dollar."

Our attention, however, has been directed to the fact that the provisions here involved have been effective in Milwaukee county since the enactment of ch. 350, Laws 1939, and that the uniform administrative practice there has been to apply the 50 cent charge specified in par. (g) for certification, in addition to the 25 cent charge for attestation specified in par. (h), on copies not furnished by the register, with a minimum fee being \$1 in all cases.

The practice also is to charge 75 cents per page for copies furnished by the register, 50 cents being for the copy as provided in par. (h), plus 25 cents for comparison (although it is doubtful that the charge for comparing is applicable except as to copies not provided by registers), in addition to which there is charged the 50 cents for the certificate under par. (g), with the minimum charge being \$1 in all cases.

By ch. 644, Laws 1953, the provisions here under discussion were extended to all counties, and our attention has been called to the following schedule of fees printed by the Dane county court:

"For copies prepared by County Court—75¢ per page.

"For copies brought in—25¢ per page.

"Minimum Charge—\$1.00.

"All plus 50¢ for the Certificate."

These fees have also been circulated by the Dane County Bar Association in a fee schedule bulletin which it has just published.

While, as above indicated, we would have some strong misgivings as to the correctness of the charges made in Milwaukee county for the past 15 years, and which are now apparently being followed in other counties since the pub-

lication of ch. 644, Laws 1953, on November 26, 1953, we nevertheless feel that it is not incumbent upon the attorney general to disregard this administrative interpretation even though he were inclined to reach a different conclusion had the matter been presented as an initial proposition without such an administrative history.

As was said in *Harrington v. Smith*, 28 Wis. 43, 68:

“* * * Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it.”

In other words under the practical construction discussed above, paragraph (h) is to be read as though the words “and attestation” were missing, and as though the word “comparison” modifies copies prepared by the court as well as copies brought in.

WHR

Banks and Banking—Credit Insurance—Wisconsin state banks may make credit life, accident and health insurance policies available to their borrowers.

Such banks cannot charge more than the premium or participate in any way in the premiums or commissions for writing such insurance.

June 29, 1954.

G. M. MATTHEWS,

Commissioner of Banks.

You have asked our opinion on several questions concerning the rights of banks organized under the law of Wisconsin to make available to their debtors credit life insurance and credit accident and health insurance.

In view of the fact that the answers set forth herein to certain of your questions render an answer to other ques-

tions unnecessary, we have restated your questions as follows:

1. Can the creditor bank be the policyholder under a group credit life insurance policy issued under the provisions of sec. 206.60 (2), Stats.?

2. Can the creditor bank be either the policyholder or the beneficiary under an individual credit life insurance policy?

3. Can the bank be either the policyholder or the beneficiary under an individual accident and health policy?

4. Can the creditor bank receive any payment, over and above the premium, from the insured debtor for effectuating any of the above insurance policies?

5. Can the creditor bank receive any payment from the insurance company out of the premium paid under any of the above policies, either as a commission or service charge for negotiating the sale of the insurance, or as a refund of premium on a loss experience rating?

The answer to your first three questions is "Yes." The answer to your last two questions is "No."

There are several provisions of the statutes which must be considered for the purpose of determining the answer to the questions which you have raised. They are as follows:

"206.60 Group life insurance, definitions, requirements. No policy of group life insurance shall be delivered in this state unless it conforms to one of the following descriptions:

"* * *

"(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

"(a) The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in instalments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term 'debtors' shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.

"(b) The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from

charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors of identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least 75 per cent of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

“(c) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than 75 per cent of the new entrants become insured.

“(d) The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in instalments to the creditor, or \$10,000, whichever is less, except that such limitation as to amount shall not apply to any group policy existing on July 15, 1949 nor to any amount thereafter written pursuant to such policy.

“(e) The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.”

“201.44 Policies issued through resident agents; exceptions; penalty. (1) No policy of insurance shall be solicited, issued or delivered in this state, except through an agent lawfully authorized as to the kind of insurance effected by such policy. * * *”

“209.04 Licensing of agents other than life. (1) APPLICATION; LICENSE; FEE. (a) *‘Agent’ defined.* The term ‘agent’, as used in this section, shall mean any natural person, resident in this state, authorized by law to solicit, negotiate or effect contracts of insurance other than life insurance. * * * It shall be unlawful for any person to act as an agent unless he holds an agent’s license issued by the commissioner.”

“209.05 Who are agents. Every person or member of a firm or corporation who solicits insurance on behalf of any insurance company or person desiring insurance of any kind, or transmits an application for a policy of insurance, other than for himself, to or from any such company, or who

makes any contract for insurance, or collects any premiums for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance company, or advertises to do any such thing, shall be held to be an agent of such company to all intents and purposes, unless it can be shown that he receives no compensation for such services. This section shall not apply to agents of town mutual fire insurance companies."

"209.045 Insurance advisers. No person, firm or corporation acting in the capacity of an insurance adviser, counselor or analyst and as such serving any person, firm or corporation not engaged in the insurance business for compensation paid or to be paid by the person served, shall directly or indirectly receive any part of commission or compensation paid by any insurer or agent of any insurer in connection with the sale or writing of any insurance which is within the subject matter of any such service. * * *"

"206.17 (1) Policies; prerequisites; approval of form. No policy of life or disability insurance as defined in section 201.04 (3) and (4) shall be issued or delivered in this state until the commissioner has approved the same or until there has been filed with him at least 30 days the form of such policy and a copy of any table of rates or statement of benefits furnished to agents or to the public in this state." (Sec. 201.04 (3) relates to life insurance, and sec. 201.04 (4) relates to accident and health insurance.)

Sec. 206.41 (3) (b), Stats., is herein set forth, including in italics an amendment proposed by Bill No. 696, S., session of 1953. The proposed amendment, which was intended to allow splitting of commissions received on credit life, accident or health insurance, was defeated.

"206.41 (3) (b) No commission or other valuable consideration for services as a life insurance agent shall be paid directly or indirectly by an insurer or licensed life insurance agent to any person or persons other than a person holding a currently valid license to act as a life insurance agent as required by the laws of this state. Nor shall any person, partnership or corporation other than a duly licensed life insurance agent accept any such commission or other valuable consideration, except that any duly licensed agent may direct that his commissions be paid to any partnership of which he is a member, employe or agent, or to any corporation of which he is an officer, employe or agent, if such corporation or partnership is engaged pri-

marily in the insurance business *or if the insurance written is life, accident or health insurance against loss from the failure of persons indebted to the partnership or corporation to meet their liabilities*; and except that the provisions of this section shall not prevent the payment or receipt of renewal or other deferred commissions to or by any person solely because such person has ceased to hold a license to act as a life insurance agent."

By the same Bill No. 696, S., it was proposed to amend sec. 206.41 (5) (e) to exempt officers, employes or agents of banks from the requirement of an examination for a license to sell credit insurance by adding the italicized language to read as follows:

"This subsection shall not apply to officers, employes or agents of credit unions organized under chapter 186, *banks organized under chapter 221*, of persons holding permits under section 115.07 (4), nor of licensees under section 115.09 or 218.01, nor to such permittees or licensees, when:

"1. The insurance is written upon the life of the debtor, and all or a portion of the insurance is payable to the creditor in satisfaction of the debt.

"2. The term of the insurance does not substantially exceed the term of the obligation, and

"3. The amount of the insurance does not substantially exceed the amount of the original obligation."

By the same bill it was proposed to amend sec. 206.41 (11) (a) 9, regarding the reasons for revoking or suspending licenses, by adding the italicized language, to read as follows:

"Has obtained or attempted to obtain such license, not for the purpose of holding himself out to the general public as a life insurance agent, but primarily for the purpose of soliciting, negotiating or procuring life insurance or annuity contracts covering himself or members of his family, or the officers, directors, stockholders, partners, employes or debtors of a partnership, association or corporation of which he or a member of his family is an officer, director, stockholder, partner or employe. *This subdivision shall not apply to the obtaining of a license for the purpose of soliciting life, accident or health insurance against loss from the failure of persons indebted to a partnership or corporation (of which the licensee is an officer, member, employe or agent) to meet their liabilities.*"

As indicated above, the amendments to sec. 206.41 proposed by bill No. 696, S., session of 1953, were all defeated.

“204.31 Accident and sickness insurance policy. (1) DEFINITION. ‘Policy of accident and sickness insurance’ as used in this section includes any policy or contract covering the kind or kinds of insurance described in section 201.04 (4).

“(2) FORM OF POLICY. (a) No policy of accident and sickness insurance shall be delivered or issued for delivery to any person in this state unless:

“* * *

“3. It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of an adult member of a family who shall be deemed the policyholder, any 2 or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed 19 years and any other person dependent upon the policyholder;”

Sec. 204.31 (3) (e) provides:

“*Third party ownership.* The word ‘insured’, as used in this section, shall not be construed as preventing a person other than the insured with a proper insurable interest from making an application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits and rights provided therein.”

Sec. 204.32 (2) (a) provides:

“Group accident and health insurance is declared to be that form of accident and health insurance covering not less than 10 employes or members, including employes of members of associations, whether such association member be an individual, copartnership or corporation, and which may include the employe’s or member’s dependents, written under a master policy issued to any governmental corporation, unit, agency or department thereof, or to any corporation, copartnership, individual employer, or to any association, including a labor union, upon application of an executive officer or trustee of such association or labor union having a constitution or by-laws, and formed in good faith for purposes other than that of obtaining insurance, where the officers, members, employes or classes or department thereof, may be insured for their individual benefit and which may include the individual’s dependents. * * *”

Sec. 206.41 (1) (b) reads as follows:

"Any person having attained the age of 21 years or more, and who is a citizen of the United States, may be licensed as a life insurance agent upon compliance with the provisions of this section."

Sec. 206.41 (3) (a) reads as follows:

"No person shall act as a life insurance agent within this state until he shall have procured a license as required by the laws of this state."

In addition to the above statutes, the following well-established rules of insurance law are applicable in a consideration of your questions.

It is well established that an insurable interest is essential on the part of the person who takes out the policy. 32 C.J. 1110.

Further, "a person has an insurable interest in the life of another where he is a creditor or surety of the latter or otherwise has a pecuniary interest in the continuance of his life." 32 C.J. 1111.

And finally, "in general a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, it that he will derive pecuniary benefit or advantage from its preservation and will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against." 32 C.J. 1111.

We will now consider the application of the foregoing statutes and principles to your specific questions.

First, creditors including banks are expressly authorized by the provisions of sec. 206.60 (2) to become policyholders on policies of group credit life insurance covering the lives of their debtors under the terms of said section. Said section is necessary both for the purpose of providing the statutory authorization for the group form of contract, and for the purpose of allowing the creditor to charge the premium costs against the particular debtor insured in accordance with the risk. Were it not for this section the other prohibitions to be discussed later might be operative to prevent the

creditor bank from negotiating with the debtor to effectuate the insurance and from collecting the premium for such insurance.

Second, it appears to be established law that a person has an insurable interest in his own life which is unlimited and which will support a policy in favor of another person regardless of whether or not such other person has an insurable interest. So, an individual may take out a policy of term insurance and name his creditor as the beneficiary of such policy. Further; in this connection, it appears established that a creditor has an insurable interest in the life of his debtor so that the creditor could in fact become a policyholder of a policy of credit life insurance upon the life of his debtor.

Third, while this question may not be free from doubt, it appears by the express terms of sec. 204.31 (3) (e), dealing with health and accident policies, that a person other than the one who is insured may become the policyholder if that person has an insurable interest. The definition of insurable interest quoted above appears to be broad enough to cover the interest of a creditor who may suffer from a default or loss of his entire obligation if his debtor becomes sick or disabled so that he is unable to meet the payments upon his obligation. In this connection we point out that group health and accident insurance by the terms of sec. 204.32 is not available to groups composed of debtors, but only to the groups mentioned therein.

Fourth, it appears clear under the laws of Wisconsin, from the foregoing statutes, secs. 201.44, 206.41 (1) (b) and 209.04, that all policies of insurance must be solicited, negotiated and sold only by licensed agents who must be natural persons and more than 21 years of age. Hence, a bank could not be licensed as a life insurance agent or as an agent for any other form of insurance. Further, it cannot receive any fees for the services normally rendered by an agent, such as soliciting, negotiating and consummating by the completion of forms and reports, a contract of insurance.

The only doubt cast upon the foregoing might arise from the provisions of sec. 209.045, which appears to recognize the occupation of insurance adviser or consultant. The occu-

pation of insurance adviser or consultant comprises the business of analyzing and advising other persons upon an insurance program and cannot properly be extended to cover those functions normally performed by the agent of the company, such as soliciting the policy, writing the application and accepting the premium. These latter functions can only be performed by an agent, and only an agent can be paid therefor.

Fifth, continuing the discussion under fourth, *supra*, sec. 206.41 clearly provides in regard to life insurance that the agent must be a natural person, and that the agent cannot split his fees or commission with any firm or corporation other than a firm or corporation principally engaged in the insurance business. This conclusion is confirmed by the fact that the proposed amendment to sec. 206.41 (3) (b) was written for the express purpose of allowing a corporation or partnership to share in premiums on life, accident and health policies, and this provision was defeated by the legislature. Sec. 209.04 provides that agents of insurance companies other than life must be natural persons, and commission splitting is prohibited by sec. 201.53 (5).

In view of the broad prohibition against splitting the commissions received out of the premiums on life insurance, it would appear that the charges which may be made against a debtor insured under a group credit life insurance policy must be limited to the net premium, or else a person not a licensed insurance agent would be receiving a benefit out of the premium as a result of the sale of such a policy. Hence, any refund of premium, however named, whether as a loss experience refund or otherwise, could not be retained by the bank creditor but must be refunded to the person who has paid such charge.

RGT

Historical Society—Powers—Meetings—Constitution—Right to Assemble—State historical society has the right to hold general meetings as a private corporation under ch. 17, Laws 1853, which power is continued by sec. 44.01, Stats., and it may invite members of junior chapters to attend. Under art. I, sec. 4, Wis. Const., the right of any group to assemble peaceably shall not be abridged.

June 29, 1954.

CLIFFORD L. LORD, *Secretary,*
Board of Curators,
State Historical Society.

You have inquired whether the state historical society has a legal right to arrange for a convention of junior historians. We understand that these junior chapters are not incorporated as auxiliaries or affiliates under sec. 44.03, Stats., but that each of them has been given a charter by authority of the board of curators, the charter being signed by the director and the supervisor of school services. The state society does furnish uniform suggestions to these chapters as to constitution and by-laws. Also it plans to provide for annual or other meetings of officers or representatives of such chapters. While these junior chapters are not auxiliaries or affiliates under sec. 44.03, they do report annually to the state society and work with it even more closely than do the legally organized auxiliaries and affiliates.

We do not have before us a copy of the constitution or by-laws of the state society, but in sec. 44.03 (2) it is stated: "Any such auxiliary or affiliated society shall be a member and entitled to one vote *in any general meeting* of the state historical society."

This clearly implies the authority of the society to hold general meetings, although such right no doubt exists independently under the general powers of the society as a private corporation, the society being a private corporation with a public purpose. See *State v. Giessel*, (1953) 265 Wis. 185, 60 N. W. (2d) 873, 879.

Ch. 17, Laws 1853, which incorporated the society, provided that it should have all of the faculties of a corporation. Subject to the provisions of ch. 44, Stats., these powers

and privileges are continued by sec. 44.01, Stats. One of the basic powers of any corporation is to have meetings of its members, and in fact it could not very well function otherwise. Thus if the society has the faculties of a corporation, there should be no question as to its authority to hold meetings.

Among other things, the 1853 act provided that the society may take proper steps to promote the study of history by lectures, and to diffuse and publish information relating to the description and history of the state. If a convention were called for the purpose of providing lectures for, or diffusing historical information to, these junior historians, it would seem to be in keeping with the foregoing provision, subject only to adequate budgetary appropriations.

If the society can call for a general meeting of its membership, there is no good reason why it might not legally invite junior chapters or the general public to attend. It would be understood, of course, that officially the meeting would be a meeting of the state society and not just a meeting of the junior chapters collectively. We would assume from your inquiry that the junior chapters as such have no collective organization but that each is an autonomous unit, and that no officer of any one chapter is specifically authorized to call a meeting of all the chapters at which official action could be taken collectively in a way to bind each chapter individually.

No indication is given in your request as to any proposed official action to be taken at the suggested meeting. However, as above indicated we do not see that any serious legal question is presented in merely having the society arrange a meeting to which the junior historians will be invited. As a matter of fact, anyone can call a meeting. Art. I, sec. 4, Wisconsin constitution, provides that the right of the people peaceably to assemble, shall never be abridged. The question of whether anyone will attend or must attend or what binding action may be taken at such a meeting involves other considerations not reached by your inquiry and which are therefore not discussed here, nor do we express any opinion on the question of expenses, which likewise has not been raised.

WHR

Highways and Bridges—Town Bridge—Moneys received in state disaster aid for damage to town bridges pursuant to sec. 86.34, Stats., should be applied solely to the bridge damage and the remaining costs divided by the town and county pursuant to sec. 81.38, Stats. Adjustments between town and county should be made on this basis in cases where their respective shares have been appropriated prior to receiving disaster aid. The county may allow towns to pay their share on an instalment basis under contract pursuant to sec. 59.08 (35), Stats.

June 30, 1954.

ELMER D. QUERAM,
District Attorney,
Crawford County.

You state that several towns in your county have received county aid for bridges under the provisions of sec. 81.38, Stats., and that later state "disaster" aid to the towns has been granted pursuant to sec. 86.34, Stats. The county has taken the position that it is entitled to reimbursement from the town of a sum equal to the difference between what was actually paid by the county and what would have been paid had the state aid been granted prior to the county paying the town. I understand from this that the state aid was greater than the one-half share the towns are required to pay by sec. 81.38.

Your first question is whether there should be an adjustment between the town and the county or whether all the state aid money should go to the town regardless of the fact that it is a greater sum than that expended by the town to complete the bridge project.

If the town keeps the state aid in a sum greater than that expended for the bridge, the state aid in part would amount to a special grant to the town for general governmental purposes. I cannot read such intent into sec. 86.34, Stats. This law was obviously intended to help out municipalities that suffer unusual flood difficulties. The legislature intended that the money granted to a municipality under authority of this section was to be expended to repair the bridge

damage and for nothing else. No other intention is indicated by the language of the statute and grave constitutional objections are apparent in any other interpretation.

This does not mean that a municipality must wait for a grant and do nothing about repairing the bridge or applying for county assistance in order to be eligible to receive the state aid. Sec. 86.34, Stats., allows the highway commission 6 months within which to make investigation and determination as to the granting of the aid. It would be unreasonable to suppose that the municipality would not repair its bridge property within this period. Furthermore, subsec. (3) of sec. 86.34 states that the money granted as disaster aid is to be held by the highway commission and paid out on "certified statements setting forth the cost of the construction, reconstruction, repair or improvement of the facilities determined in the commission's finding to be eligible for aid." This clearly allows repayment to municipalities of amounts they have already expended. I also note that the last sentence of sec. 86.34 (2) reads:

"* * * The county, town, village or city shall pay the remainder of the cost not allowed as aid, but this shall not invalidate any other provision of the statutes whereby the cost may be shared by the county and the town, village or city."

The only reasonable interpretation that can be given to this sentence, considering it with secs. 81.38 and 86.34 as a whole, is that the state grant should be applied to the bridge project, and any amount remaining unpaid is the debt of the town, or the county and the town, according to the terms of sec. 81.38, if this section is invoked. The chief reason that there is confusion in interpreting secs. 81.38 and 86.34 is the time element involved. A town bridge is damaged. The town invokes sec. 81.38 and the details of payment between the county and the town are worked out and concluded. The state then grants disaster aid which was previously applied for by the town. It is my opinion that the same end result must follow from this situation as would be reached had the state aid been available at the moment when the bridge damage occurred. In the latter case clearly

the actual damage to the town is the cost of the project less the state aid.

Originally the full burden of bridge construction and maintenance on town roads and bridges was that of the town. County aid and later, state aid, were provided by the statutes. The reason for granting such aids was to offer relief to the towns, but I do not believe these laws ever were intended to shift the entire town obligation elsewhere.

In an opinion of the attorney general in 39 O.A.G. 273, the position was taken that a county could not refuse the aid provided to towns under sec. 81.38 because application for state disaster aid had been made. The opinion states that adjustments in the amount of overpayment could be made when the amount of state aid was determined. I believe the position there taken is correct and that adjustments could be made on the basis above indicated.

You state that it is the contention of the town that the state aid should be considered as a gift to the town and all go to the credit of the town. A gift for bridge construction to a town was considered the same as an amount raised by town taxation in 7 O.A.G. 340 (1918). I do not consider this position to be correct nor the opinion applicable since, as stated above, the intention of the legislature in authorizing state aid was to have the aids spent for the actual damages done to the bridges, and that such aid is not to interfere with any provision of the statutes whereby the cost may be shared by the county and the town, village or city as stated in sec. 86.34 (2).

You also ask whether a county board may by resolution enter into an agreement with a town to accept instalment payments for the share of the bridge cost that must be borne by the town. This general topic was the subject of an opinion of the attorney general written last year. See 42 O.A.G. 59. This opinion points out that counties are authorized by sec. 59.08 (35), Stats., to enter into contracts with cities, villages and towns for the purpose of enabling the county to construct and maintain streets and highways in such municipalities. Bridges are part of the highway system and I believe that there is no doubt that this section applies to bridge contracts as well. I am therefore of the opinion

that it would be proper for the county and town to enter into a contract which would specify among other things the manner and time in which the town is to pay for its share of the project.

REB

Civil Defense—Appropriations and Expenditures—Director of civil defense has authority to purchase radio equipment for civil defense purposes by virtue of sec. 20.035 (2), Stats., and has implied power to place the same in homes of licensed radio amateurs participating in the civil defense program, licensed amateurs being recognized as part of the federal civil defense plan.

June 30, 1954.

RALPH J. OLSON, *Adjutant General.*
Director of Civil Defense.

You have asked whether or not the state office of civil defense may buy radio equipment and place it in the homes of licensed radio amateurs who are participating in the civil defense program. You state that the equipment to which you refer would be used in connection with test exercises and enemy caused emergencies as part of the Radio Amateur Communications Emergency Service (RACES) which is authorized by the federal communications commission to be the official civil defense amateur radio network. You further state that the type of equipment would be transmitters and receivers which would be complete units, and in some instances it might be special equipment to supplement that which is now owned and operated by the amateurs.

Sec. 20.035 (2), Stats., appropriates \$50,000 from the emergency disaster fund to the state director of civil defense to be used for the immediate purchase, on a 50-50 matching basis with the federal government, of communication equipment and other items. I believe this would give

the necessary authority to make the purchase of the equipment on a 50-50 basis with the federal government, but I cannot find any other authority for purchase of the equipment at the present time prior to a state of emergency.

Assuming that the purchase is made pursuant to this section, I can see no objection to placing equipment with licensed radio amateurs who are recognized in the federal civil defense plan and who are also partaking in the civil defense program. I take it from this that they are members of a local civil defense unit. It would seem to me far better to have this equipment in the hands of those able to use it, who have volunteered to act in an emergency and are trained for such action, than to store the equipment where it might be inaccessible and useless when most needed.

The state civil defense law leaves much unsaid as to details, but it would be almost impossible to write a law that would cover any and all contingencies that might arise, such as the one you point out here. However, the law implies sensible use and care of the equipment or its purchase would not have been authorized. It is, therefore, my opinion that the placing of the equipment as you suggest is authorized.

REB

Public Assistance—Social Security Aids—Medical care may be provided under sec. 49.40, Stats., for a dependent child for any month in which a money payment has been made, even though the child becomes ineligible for aid to dependent children during the month, but only if the care is authorized before the county agency learns of the ineligibility.

Funeral expenses may be paid as aid to dependent children under sec. 49.19 (5), Stats., only if eligibility for aid exists at the date of death.

Funeral expenses for a mother may be paid as aid to dependent children under sec. 49.19 (5) only if eligibility for aid exists at the date of the mother's death.

Funeral expenses may not be paid as old-age assistance under sec. 49.30, Stats., for a person who dies after the county agency has discontinued his grant because of ineligibility arising during a month for which a money payment has been made.

July 7, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask a number of questions arising out of changes during a particular month of the circumstances of recipients of social security aids, in matters affecting their eligibility for such aids. You call our attention to your rule 8, section 3, promulgated pursuant to sec. 49.50 (2), Stats., which reads in part:

“Payments of assistance shall be made monthly and not later than the third day of the month for which the grant of aid is designated * * *.”

Your first question is:

“A child in a family receiving aid to dependent children becomes ill after the first of the month. Medical care is authorized by the county agency. During the period of illness, the mother becomes ineligible for further aid. We would assume the mother cannot be granted aid in the following month to cover these expenses. Can all the medical expenses be paid under 49.40? If not, can those incurred prior to the time of ineligibility be paid? Can payment be

made in the form of a supplemental grant to the recipient during the latter part of the month and after ineligibility has arisen?"

Sec. 49.40 (1), Stats., insofar as it is applicable to this question, provides:

"The county agency administering * * * aid to dependent children * * * may provide for medical care needed by recipients of such aids. A person shall be considered a recipient if *at the time such care is authorized* * * * aid to dependent children * * * 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 ss. * * * 49.19 (5) * * *."

Sec. 49.19 (1) (c), Stats., defines the term "aid to dependent children" as follows:

"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 *for any month* to meet the needs of the relative with whom any dependent child is living *if money payments have been made* under the state plan with respect to such child *for such month*."

Obviously, from the point of view of practical administration, eligibility cannot be reinvestigated and redetermined daily; and the foregoing provisions indicate that the unit of time to be observed for purposes of administration should be the month. Under sec. 49.40 medical care may be paid if at the time it is authorized aid is being granted to the person for whom it is provided. Under the definition contained in sec. 49.19 (1) (c) aid for dependent children may include payments for medical care for any month if a money payment has been made for that month. Accordingly, all medical expenses incurred for the month may be paid under sec. 49.40 if authorized prior to the time the ineligibility arose, and may be handled either by payment of the medical bills directly or by supplemental grant to the recipient.

Your second question is:

"The child does not become ill until after the ineligibility arises. The county agency, not knowing of the ineligibility factor, authorizes medical care. Before the end of the month, the county agency learns of the ineligibility. Is the county agency obligated to pay under 49.40? Would the answer be the same if the county agency knew of the ineligibility but even so authorized the medical care?"

Under the literal terms of the statutory provisions discussed in connection with the preceding question, any medical expense authorized and incurred during the month for which a money payment is made under sec. 49.19 may be paid by the county agency as aid to dependent children. I believe, however, that the legislature intended the qualification to be read into the statutes that the expenditure must have been authorized in good faith, without knowledge that there had been a change in circumstances so that the person for whose benefit the payment is to be made is no longer eligible for aid. Sec. 49.40 covers medical care "needed" by recipients of such aids. If the county agency is aware of a change in status eliminating the element of need under statutory standards, the necessary factual basis to bring sec. 49.40 into operation is not present.

To summarize, the county agency may provide for medical care under sec. 49.40 during any month for which a money grant has been made under sec. 49.19, provided that prior to the authorization it has received no information as to a change in status rendering the recipient ineligible for further aid; but it may not authorize supplemental care under sec. 49.40 after it has learned that eligibility has been lost.

Your third question is:

"The child dies during the month but after the ineligibility has arisen. Is the county agency obligated to provide a funeral under sec. 49.19 (5)? May they do so? Would your answer be the same if, before the death of the child, the county had decided to discontinue the grant of aid?"

Sec. 49.19 (5) provides in part that not to exceed \$150 shall be allowed to cover burial expenses of a "dependent child." Under the definition contained in sec. 49.19 (1) (a)

a dependent child is one with respect to which all the conditions there prescribed are met, or, in other words, one which is "eligible" for aid to dependent children. It is questionable whether funeral expenses might be considered a "type of remedial care" referred to in sec. 49.19 (1) (c), which may be paid for a month for which money payments have been made. It is my opinion that payment of funeral expenses is contemplated under sec. 49.19 (5) only on the basis of eligibility at the date of the child's death.

Your fourth question is:

"In cases where the mother remarries and the mother of the dependent child, subsequent to the marriage, becomes ill or dies is the county agency obligated to pay the medical or funeral expenses? May they do so?"

The same provision of sec. 49.19 (5) above referred to provides for payment of funeral expenses of a "dependent child or its parents." As was pointed out in connection with the previous question, the term "dependent child" is defined by statute. Funeral expenses may be paid under sec. 49.19 (5) for a mother only if she is the mother of a "dependent child." Sec. 49.19 (4) (d) provides in part that "aid may not be granted to the mother * * * unless such mother * * * is without a husband," etc.

By the latter phrase it appears that the legislature intended to recognize that the primary liability for support of a wife is on her husband. Some of the authorities with respect to that proposition are discussed in 40 O.A.G. 385.

It is my opinion that the authority of a county agency to pay funeral expenses for a mother, under the provisions relating to aid to dependent children, depends on the existence of eligibility of the mother at the date of her death.

Your fifth question is:

"A recipient of old-age assistance, after receiving a grant of aid the first of the month, is committed to a mental institution creating ineligibility under sec. 49.20 (2). The county agency decides to discontinue aid. He dies before the end of the month. Is the county agency obligated to provide a funeral under sec. 49.30? May they do so? (The same questions arise in aid to the blind under sec. 49.18 (1a) and in aid to totally and permanently disabled persons under sec. 49.61 (6) (b).)"

The portion of your rule 8 above quoted applies to old-age assistance as well as aid to dependent children. The statutory provisions, however, are somewhat different. That the legislature contemplated that old-age assistance as well as aid to dependent children is to be paid on a monthly basis is shown by sec. 49.29, which reads:

“(1) A certificate shall be issued to each applicant when old-age assistance is allowed stating the date upon which payments shall commence and the amount of each monthly instalment.

“(2) Each beneficiary shall file such reports as the department may require. If it appears at any time that the beneficiary's circumstances have changed his certificate may be modified or revoked. Any sum paid in excess of the amount due shall be returned to the county and may be recovered as a debt due the county.”

The statutory provisions relating to old-age assistance contrast with those relating to aid to dependent children, in that the former provide for a modification or revocation of the certificate if the beneficiary's circumstances change “at any time,” whereas sec. 49.19 (1) (c), defining aid to dependent children, appears to contemplate that no modification is required because of a change in status during a month for which payment has been made.

In order that funeral expenses may be paid as old-age assistance, the person for whose benefit they are paid must have been a “beneficiary” upon his death. If a grant has been revoked under sec. 49.29 (2) because of a change in circumstances, the person to whom the grant was made thereby loses his status as a “beneficiary,” and funeral expenses cannot be paid under sec. 49.30.

Your sixth question deals with reimbursement of counties from state and federal funds for payments of aid. Since our answers do not recognize that county authorities have discretion either to authorize or withhold aid in the circumstances you describe, an answer is not required. As a general proposition, counties are entitled to reimbursement in any case where they grant aid as authorized. If they make payments for which there is no statutory authority, they are not entitled to reimbursement.

In the case of payments made in good faith to ineligible persons, as the result of concealment or misrepresentation on the part of applicants, there are special statutory provisions, such as secs. 49.33, 49.34 and 49.35, Stats.

BL

*Emergency Board—Powers—Agriculture—Live Stock—Brucellosis Control Program—*Under sec. 14.72 (2), Stats., the state emergency board has no authority to grant an emergency appropriation to the state department of agriculture for the purpose of brucellosis testing of Plan B herds under sec. 95.26 (6) (a), Stats., as amended by ch. 321, Laws 1953.

July 8, 1954.

E. C. GIESSEL, *Secretary,*
State Emergency Board.

You have asked whether the state emergency board can grant an emergency allotment to the state department of agriculture to be used for brucellosis testing of cattle herds operated under Plan B of the brucellosis control program pursuant to sec. 95.26, Stats.

Sec. 95.26 (6) (a) as amended by ch. 321, Laws 1953, reads in part as follows:

“* * * The required periodic original brucellosis tests in Plan A herds, all tests in Plan A counties and all calfhood vaccination provided for in this section shall be at state expense and may be conducted by an approved veterinarian of the herd owner’s preference. All brucellosis tests in Plan B herds and the follow-up tests in Plan A herds shall be paid for by the herd owner. * * *”

Under this statute the state does not pay for brucellosis testing of Plan B herds. The current appropriation under sec. 20.60 (2) to the department of agriculture for brucel-

lisis testing, was based upon the program provided by the above quoted section, and no money was appropriated for such Plan B testing.

The authority of the emergency board is provided in sec. 14.72 (2), which reads as follows:

“The emergency board is authorized to supplement the appropriation of any department, board, commission or agency which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made, if the board finds:

“(a) That an emergency exists;

“(b) That no funds are available for such purposes in any appropriation; and

“(c) That the purposes for which a supplemental appropriation is requested have been authorized or directed by the legislature.”

Under this section the emergency board can supplement an existing appropriation which is insufficient to accomplish the purpose for which it was made if an emergency exists, there are no funds available for such purpose, and the purpose of the supplemental appropriation has been authorized or directed by the legislature. It cannot be said that the existing appropriation to the department of agriculture is insufficient to accomplish the purpose for which it was made because by the wording of the statute it was not intended to cover testing of Plan B herds. Also the purpose of the supplemental appropriation to test Plan B herds has not been authorized or directed by the legislature. Instead the legislature has directed that testing of Plan B herds must be paid for by the herd owner.

It is therefore my opinion that the state emergency board has no authority to grant an emergency appropriation to the state department of agriculture for the purpose of brucellosis testing of Plan B herds.

GS

Agriculture—Live Stock—Brucellosis Control Program
—Secs. 95.25 and 95.26, Stats., providing for the Plan A county brucellosis control program stated to be a valid enactment and discussed. Secs. 95.16, 97.02 (1), 97.045, 97.25, 97.36, and 97.55, Stats., as they relate to the use of products of brucellosis infected cattle, commented on.

July 12, 1954.

DONALD N. MCDOWELL,
State Department of Agriculture.

You have asked my opinion concerning the various aspects of the brucellosis control law of Wisconsin as recently amended. This law provides for so-called "Plans A and B" to aid in the eradication of the disease.

You state that bovine brucellosis, also known as "bangs disease" and "contagious abortion," is a very serious disease found in approximately 32 per cent of the dairy cattle herds in the state, and that there is an incidence among all cattle in Wisconsin of approximately 3 per cent. The disease is also dangerous to human health. It is difficult to diagnose since its symptoms correspond to typhoid fever and arthritis. When it occurs in man it is known as undulant fever and is contracted either through direct contact with the infected animals by eating or handling infected meat or by the consumption of milk from such animals. Brucellosis has been designated by sec. 95.16, Stats., as one of the "contagious or infectious" diseases subject to the live stock sanitary laws.

Briefly, sec. 95.26 of the statutes provides in both Plan A and Plan B that the herds be given certain tests and vaccinations. Plan A may be used by individual dairy farmers and also may be invoked on a county basis by election of 75 per cent of the cattle owners in the county. The essence of Plan A is that cattle infected by brucellosis must be slaughtered and may not be kept in the herd. This is not required under Plan B, although in either case the state pays indemnity to the owners of slaughtered cattle.

The questions you ask pertain to Plan A, and my answers are as indicated.

1. Is sec. 95.26 (4), Stats., a valid constitutional enactment as applied to the owners of brucellosis infected animals within a Plan A county?

It is the rule in this state that while the legislature may not delegate its power to make a law it may delegate any power which it may rightfully exercise which is not legislative, and may enact a statute, the operation of which is dependent upon the happening of the contingency fixed therein, and such contingency may consist of the determination of some fact, even if such fact is determined by private individuals. *State v. Wakeen*, (1952) 263 Wis. 401, 57 N.W. 2d 364. See, also *Smith v. Janesville*, (1870) 26 Wis. 291; *State ex rel. Van Alstine v. Frear*, (1910) 142 Wis. 320, 125 N. W. 961.

While it is true that in its present form the law may not apply to all counties of the state uniformly, yet the group which elects to come under its provisions is most directly affected by it economically and the county basis offers an efficient and convenient means by which the law can be administered. In my opinion, such statute does not violate sec. 23, art. IV of the constitution which provides that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable. Questions of uniformity are subject to review by the courts "but it must also be remembered that under the repeated decisions of this court a broad discretion is vested in the legislature in determining whether the system of government under sec. 23, art IV, of the constitution is as nearly uniform as practicable." *State ex rel. Scanlan v. Archibold*, (1911) 146 Wis. 363, 369, 131 N. W. 895. See also, *State ex rel. Busacker v. Groth*, (1907) 132 Wis. 283, 112 N. W. 431. A similar law pertaining to live stock with county and district control districts was sustained in California in 1938. *Stanislaus County D. P. Ass'n. v. Stanislaus County*, 65 P. 2d 1305, 8 Cal. 2d 378.

Constitutional objection might be raised that because the destruction of the diseased cattle would be an economic loss to the farmer the effect of the law would be to take property without just compensation or due process. I cannot give this objection serious consideration since it was held as early as 1904 that a malignant and contagious disease in cattle is

such a menace to public health as to warrant destruction of the cattle under the police power of the state. *Lowe v. Conroy*, (1904) 120 Wis. 151, 97 N. W. 942.

The constitutionality of the legislative acts must be presumed unless it clearly appears that the law is invalid. It is my opinion, therefore, that until the courts of this state have held otherwise you may safely assume that the statute is a valid constitutional enactment.

2. Does sec. 95.26 (4), Stats., authorize and direct that the department of agriculture, by summary action, cause the slaughter of brucellosis infected cattle within a Plan A county?

Sec. 93.07 (24) charges the state department of agriculture with the enforcement of the provisions of chs. 93 to 100 of the statutes. Sec. 95.26 does not contain any specific statement as to how the law shall be enforced, but in view of the foregoing statute I do not believe that such provision would be necessary. Sec. 95.26 (4) provides in part that "reactors to the brucellosis test shall be slaughtered." Surely the legislature intended that there would be enforcement of this provision and did not intend to rely solely upon voluntary compliance, for if it had, it is apparent that Plan A would be of little force or effect. It is therefore my opinion that it is the duty of the department to enforce the provisions of Plan A where it has been duly adopted.

3. Are the restrictions imposed on brucellosis indemnity payments, as set forth in secs. 95.26 (7), 95.36 and 95.48, Stats., applicable to claims arising from the slaughter of animals within a Plan A county?

Sec. 95.26 (7) reads as follows:

"For each animal condemned and slaughtered, unless otherwise provided by law, the owner shall receive and, upon certificate of the department, the state shall pay one-third of the difference between the net salvage and the appraised or agreed value of the animal, but such payment shall not exceed \$50 for a registered animal and \$25 for an unregistered one. * * *"

Sec. 95.36 provides that the owners of animals condemned and slaughtered under the provisions of ch. 95 shall receive

no indemnity in certain cases, such as animals owned by the United States, state, county, city, town or village, animals brought into the state contrary to the provisions of the law, animals purchased known to be diseased, animals diseased at the time of arrival in the state, and other similar cases.

Sec. 95.48 is a statute specifically dealing with indemnity restrictions in the case of cattle infected with brucellosis. It does not allow an indemnity to be paid on steers, animals not reactor tagged and permanently marked, and animals officially vaccinated until past 24 months of age. It contains other similar provisions apparently aimed at the particular problems of bangs disease. In my opinion, all three of the statutes apply to Plan A. Sec. 95.36 specifically states that it applies to animals slaughtered under the provisions of ch. 95, Stats. There is no indication in the provisions of sec. 95.26 that sec. 95.48 would not apply to it. Since all of these are statutes *in pari materia* they must be read and considered together, because there is no indication that the legislature intended one statute to override the others.

4. Is sec. 95.49 (1) (a), Stats., which permits the transfer of reactors which are valuable because of blood lines or production records, applicable to reactors in a Plan A county?

In my opinion, the intent of sec. 95.26 was not only to free the herds under Plan A of infected cattle but also to cause the destruction of the infected cattle to prevent the further spread of the disease. Sec. 95.26 (4), as amended by ch. 321, Laws 1953, states in part: "Reactors to the brucellosis test shall be slaughtered." This appears to me to be very plain language and therefore I do not believe that an owner of a herd in a Plan A county can rely on the provisions of sec. 95.49 (1) (a), allowing the transfer of an infected animal to another infected herd.

5. Did sec. 95.26 (4), Stats., prior to its amendment by ch. 321, Laws 1953, require the slaughter of all brucellosis reactors in herds within a Plan A county?

Prior to its amendment by ch. 321, Laws 1953, sec. 95.26 (4) read as follows:

"Upon petition of 75 per cent of the cattle owners in a county the department may determine in the manner pro-

vided in section 95.25 that all herds in the county be under Plan A. The provisions of section 95.25 except subsection (8) shall apply to such work with like effect as though the word 'brucellosis' be substituted for the word 'tuberculosis' and that consistent with Plan A the appropriate 'A.B.R. test' or 'brucellosis test' be substituted for 'tuberculin test.' All the provisions under Plan A shall apply including the slaughter of brucellosis test reactors."

Sec. 95.26 (3) (a) 3, Stats., states that brucellosis test reactors be identified and slaughtered in compliance with the laws and regulations of the department. In my opinion, this means that brucellosis infected cattle are required to be slaughtered but that the manner, time of slaughter, etc., are to be controlled by the department. The amendment of 1953 omitted everything in sec. 95.26 (4) after the sentence, "All the provisions under Plan A shall apply," and added, "Reactors to the brucellosis test shall be slaughtered. Indemnity shall not be denied because of retention of diseased animals prior to adoption of Plan A county status." I do not believe that the legislature meant to change the law requiring the slaughtering of diseased cattle but to clarify it and make the language stronger. However, the chief purpose of the amendment seems to have been the allowance of indemnity payments for diseased animals kept in the herd through the choice of the farmer, prior to the time he was forced into Plan A by county action.

6. Is it necessary that a petitioner under sec. 95.26 (4) be both a resident and an owner of cattle in a county for which Plan A status is sought?

This section provides that upon petition of "75 per cent of the cattle owners in a county the department may determine in the manner provided in section 95.25 that all herds in the county be under Plan A." The reference to sec. 95.25 is only for the purpose of the administrative procedure involved in the making of a determination of a fact by the department of agriculture and does not appear to invoke that part of sec. 95.25 which states that the petitioners must be cattle owners resident in the county. It appears to me that the law, while having as its object public health and the protection of the state's live stock industry in general, was

designed by the legislature to allow persons affected to make the decision. It deals with the cattle as its specific object, ownership of the animals being incidental. The county feature allows for efficient administration of a plan, but it should make no difference where the owner resides, the main point being to get all the herds in a particular county entirely free of the disease. For these reasons, and because the statute makes no mention of residence, it is my opinion that the petitioners may be those residing in the county or outside of it as long as they are owners of cattle customarily kept in the county. The customary situs of any cattle is a question of fact to be determined in each case.

7. In determining whether 75 per cent of the cattle owners have petitioned for a Plan A county, is it necessary that a petitioner's name appear on the last assessment roll (provided for in sec. 95.25 (1)) if he is in fact a cattle owner in such county?

This question is answered above by the statement that the provisions of sec. 95.25, referred to in sec. 95.26, are the administrative steps taken by the department in making the determination of the validity of petitions and do not refer to the provision of sec. 95.25 which states that the petitioners must be cattle owners resident in the county as disclosed by the last assessment rolls. The only necessary requirement is that a petitioner be an owner of cattle in the county regardless of where he lives. I might add that sec. 95.25 is rather confusing, in that the assessment roll has no relation to residency.

8. Would the validity of the department's determination of Plan A county status for any county be affected by the fact that the amount of indemnity money payable to owners of slaughtered reactors was reduced subsequent to the time of filing a Plan A county petition under sec. 95.26 (4)?

In my opinion the validity of your determination of Plan A county status should in no way depend on any change that has been made in either the state or federal law regarding the bounty that is payable for the destruction of the cattle that might take place at any time during the process of the formation of a Plan A county. The moneys

paid by the state and by the federal government are bounties and do not rest upon any contractual basis whatsoever. They may be raised or lowered as the legislature or the congress decides, and when a particular person joins in a petition to place his county under Plan A he does so subject to the risk that the bounty might be lowered. By the same token the bounty might be raised, in which event I do not believe that anyone would contend he was not entitled to the additional benefit on the ground that his rights had become fixed prior to such change. As stated in the answer to your first question, the power to destroy cattle exists under the police power, and this power is present whether or not any bounty is paid.

I feel that comment is required about the confused status of some of the pure food laws as they relate to the products of brucellosis infected cattle. For example, meat is defined by statute as "any clean, sound, dressed, and properly prepared edible part of animals *in good health* at the time of slaughter." Sec. 97.02 (1), Stats. This section also defines milk as "the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more *healthy* cows." And, as pointed out above, sec. 95.16 defines brucellosis as a "contagious or infectious" disease. Sec. 97.25 prohibits the sale of adulterated foods and states that any part of the product of a diseased animal is deemed adulterated.

In the case of meat it might be claimed that sec. 97.55, as amended by ch. 200, Laws 1953, would allow the sale of meat from brucellosis infected cows. This section prohibits the sale of meat from a diseased animal for human consumption but states that this prohibition shall not apply "to meat from animals affected by any disease which does not ordinarily render such meat unfit for human consumption." Sec. 97.36 prohibits the sale of adulterated milk and defines adulteration to include milk drawn from any "sick cow." However, subsec. (7) of this section states that, "This section does not prohibit the sale of milk from cows known as 'reactors', when such reacting cows show no external evidence of disease to a competent veterinarian designated by the department to examine the same, and when such milk is pasteurized or sterilized in accordance with the methods

prescribed by the department." Sec. 97.36 (7) was created by ch. 592, Laws 1917, long before brucellosis was recognized or legislatively defined as a dangerous disease in this state. Thus, there may be doubt as to the applicability of this statute to brucellosis "reactors." There is also a question as to whether it should be applied to cases where there is a certain diagnosis but no external evidence or whether it is limited to those cases where the diagnosis is doubtful as in instances where a recent vaccination might cause a reaction in a perfectly healthy animal. I also note that sec. 95.49 (1) (a) allows the sale and movement of brucellosis "reactors" into herds containing reactors to preserve animals valuable because of blood lines or production records. This statute contains some implication at least that the legislature may have intended that milk from brucellosis infected cattle be used for human consumption. A similar implication may be said to exist in sec. 97.045 which requires fluid milk to be pasteurized, yet sets forth an exemption for milk from herds which are negative to brucellosis and tuberculosis tests.

To decide which of these statutes are applicable in a particular case would necessarily entail determinations of fact. I am aware that there are conflicting opinions of experts in this field and I am in no position to act as a jury and determine which facts are true and which are erroneous. I do, however, believe it most urgent that this serious problem be called to the immediate attention of the legislature in order that the statutes may be clarified in the interest of public health and welfare.

REB

Creditors' Actions—Voluntary Proceedings—Circuit Court—Clerk's Fees—Filing fees provided by sec. 59.42, Stats., have no application to petitions for amortization of debts of wage earners for which a filing fee of \$10 is provided by sec. 128.21 (1), Stats.

July 13, 1954.

JOHN M. POTTER,
District Attorney,
Wood County.

You have directed our attention to sec. 128.21 (1), Stats., relating to voluntary proceedings by wage earners for amortization of debts, and which provides for the filing of a verified petition by the debtor with the circuit court in the county of his residence. Among other things this subsection provides: "The petition shall be accompanied by a filing fee of ten dollars."

Sec. 128.21 (6), Stats., provides that upon the dismissal of the proceedings the trustee is to report his expenses, his receipts and disbursements, "and the court shall thereupon direct the clerk to pay to the trustee the ten dollars filing fee, unless the court on its own motion or on the complaint of any creditor or the debtor finds that the trustee did not satisfactorily discharge his duties, in which case the court may direct the return to the debtor of all or any part of the fee," etc.

Since the clerk does not retain the fee, the question is raised as to whether it is in fact a filing fee, and if not, whether the clerk is required to charge another fee as a filing fee under sec. 59.42, Stats., in the amount of \$5 for suit tax and \$4 for filing a special proceeding.

We must take the legislature at its word. It has said in unmistakable language in two places that the \$10 fee is a *filing fee*. It is nonetheless a *filing fee* even though the clerk is not permitted to keep it or dispose of it in the same way that other fees are handled. Its character is established when it is paid, and the ultimate disposition of the money is purely incidental. Under familiar principles of statutory construction the specific filing fee provisions of sec. 128.21

are controlling as against the general filing fee provisions of sec. 59.42.

While, as above indicated, it does not appear that the statute is subject to two meanings in view of the clarity of the language employed, it must also be remembered that where a statute designed to produce revenue is susceptible of two meanings, that should be preferred which imposes the lighter burden. *State ex rel. Abbott v. McFetridge*, 64 Wis. 130, 24 N. W. 140.

You are therefore advised that proceedings under sec. 128.21 (1) are not subject to the payment of a double filing fee, one under that section, and another under sec. 59.42.
WHR

County Judge—Insanity Proceedings—Travel Expenses
—Mileage and other expenses of a judge conducting a proceeding under sec. 51.07, Stats., not expressly provided for therein, may not be included in the expenses of the proceeding for which provision is made in subsecs. (4) and (5).

July 19, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask whether the expenses of proceedings under sec. 51.07, Stats., to be charged to the county of the patient's legal settlement or to the state, may include a mileage allowance for travel of the judge to and from the place where the hearing is held.

Sec. 51.07 deals with hearings relating to commitment of persons under the mental health act. Subsecs. (4) and (5) read:

“(4) Expenses of the proceedings, from the presentation of the application to the commitment or discharge of the patient, including a reasonable charge for a guardian ad litem, shall be allowed by the judge and paid by the county

from which the patient is committed or discharged, in the manner that the expenses of a criminal prosecution in justice court are paid, as provided in section 59.77.

“(5) If the patient has a legal settlement in a county other than the county from which he is committed or discharged, that county shall reimburse the county from which he was committed or discharged all such expenses. The county clerk on July 1 shall submit evidences of payments of all such proceedings on nonresident payments to the department, which shall certify such expenses for reimbursement in the form of giving credits to the committing or discharging county and assessing such costs against the county of legal settlement or against the state at the time of the annual audit.”

Liability for payment of costs of court proceedings ordinarily exists only by force of statute. See *Rheingans v. Hepfler*, (1943) 243 Wis. 126, 9 N. W. 2d 585 and *Morse Chain Co. v. T. W. Meiklejohn*, (1942) 241 Wis. 45, 4 N. W. 2d 162. If that be true as between private parties, it is no less true as between political subdivisions of the state, which have no rights except as conferred and imposed by the state through the legislature. See *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 282 N. W. 111.

Sec. 51.07 provides for payment of “expenses of the proceedings.” The term “expenses” may be synonymous with the term “costs.” See *Chapin v. Collard*, (1948) 189 P. 2d 642, 646, 29 Wash. 2d 788. It is also flexible enough to be used with a different significance, according to the purpose and context of the statute in which it appears. See, for example, *Kohn Bros. v. Zimmerman*, (1872) 34 Ia. 544, 545. The fact that items of costs generally allowable in proceedings in courts of record are enumerated in sec. 271.04 of the statutes furnishes ground for the assumption that the legislature used the term “expenses” in sec. 51.07 so as to cover the cost items ordinarily allowable in addition to the specific items for which provision is made in sec. 51.07. I do not believe, however, that the legislature intended to use the term “expenses of the proceedings” to cover any items other than those which would ordinarily be allowable as costs under sec. 271.04 and those additional items expressly made allowable by sec. 51.07. We find no provision in either sec-

tion which would authorize payment of mileage or other expenses of the judge conducting the hearing. Sec. 51.07 (1) provides expressly for a fee of \$5 to the judge for the hearing of the application. Such item is allowable as an expense of the proceeding.

Sec. 51.07 (2) makes provision for a fee of not less than \$4 nor more than \$10 for the examining physician and, in addition, "10 cents per mile for necessary travel." Since the legislature expressly provided for payment of mileage for the examining physician, the fact that it failed to make such provision with respect to the judge conducting the hearing is indicative of its intent that mileage in the latter case should not be considered an expense of the proceeding.

BL

Public Assistance—Minors—Legal Settlement—Under sec. 49.10 (2), Stats., minor children whose legal settlement was derived from their mother, who obtained their custody upon her divorce, lost such settlement upon the death of the mother, the father having no settlement in this state.

July 20, 1954.

ALBERT J. CIRILLI,
District Attorney,
Oneida County.

You have made an inquiry as to who is chargeable for the cost of care of children in foster homes under the following circumstances:

The parents of the children were divorced, and custody was awarded to the mother who had legal settlement in O county. The children resided in B county with the mother, where aid to dependent children was issued for them. The mother died, and following her death the children were placed in foster homes in B county. An attempt is now be-

ing made to recover the cost of foster home care from O county. The father of the children is still living but has no legal settlement in this state.

You have not stated the procedure by which the children were placed in foster homes, nor whether they were committed to the custody of persons other than the father by the judgment of a juvenile court under sec. 48.07. In such case the matter of chargeability is governed by sec. 48.07 (6), Stats., under which one possibility is that the court may order a parent to pay all or a part of the cost. Chargeability for the care of children committed to custody other than their parents, under sec. 48.07, Stats., was discussed in 39 O.A.G. 423, 31 O.A.G. 294, 23 O.A.G. 118 and 22 O.A.G. 312.

Since you have mentioned no court proceedings, I am assuming that there has been no judicial order transferring custody of the children away from the parents. In such case the father would ordinarily be entitled to custody according to the rule laid down in 17 Am. Jur. 524-526 as follows:

“§689. Death of Custodian.—There are various views as to the effect of the death of a parent having the custody of a child under a divorce decree upon the right of the surviving parent to such custody. The general rule is that where the custody of children is granted to one spouse, such custody does not forever cut off and bar the other spouse's right to their custody so long as the decree is unmodified, but only establishes the right between the two spouses during their lives; and upon the death of the one to whom the custody of the child was awarded, his or her right does not descend nor can it be transmitted, and therefore the right of the other spouse to the custody of the child revives or attaches as against third persons, provided, of course, he or she is a suitable person. In other words, upon the death of one of the parties divorced by judicial decree, the divorce proceeding falls so far as concerns any further right to the custody of children. In the absence of statute otherwise providing, it is the rule that the right of a surviving parent to the custody of a child cannot be divested by provisions of the will of the deceased parent. Thus, it has been held that upon the death of the mother to whom a child was awarded, the father, if he is of good character and able to provide for it, has a right to it prior to that of the wife's parents to whom she had given it. A testamentary guardian appointed by a mother who was granted the custody of a child by a divorce decree cannot, as against the father, retain the cus-

tody of the child. In all such cases, however, the court will determine what is best for the well-being of the child; and while the prima facie right of custody is in the surviving parent, he may be denied the custody if the interests of the child will be better served thereby."

See, also, *Yates v. Yates*, (1917) 165 Wis. 250, 161 N. W. 743.

According to the rules discussed by the supreme court in *Hoard v. Gilbert*, (1931) 205 Wis. 557, 559, 238 N. W. 371, *Judge v. Barrows*, (1883) 59 Wis. 115, 17 N. W. 540, *McGoon v. Irvin*, (1845) 1 Pinney 526, *Zilley v. Dunwiddie*, (1898) 98 Wis. 428, 74 N. W. 126, *Carpenter v. Tatro*, (1874) 36 Wis. 297, the father is the person primarily liable for the support of the children since the death of the mother. As pointed out in 39 O.A.G. 470, however, such common-law principle relating to the liability of parents does not apply if custody of a child has been taken over pursuant to some statute which specifically governs chargeability.

On the assumption that the father is unable to pay for the children's care, aid to the children by a governmental agency constitutes relief to him as the person legally liable for their support. See *Milwaukee County v. Waukesha County*, (1940) 236 Wis. 233, 294 N. W. 835, and *Jefferson County v. Dodge County*, (1940) 236 Wis. 238, 294 N. W. 838.

The right of the governmental unit furnishing such relief to recover from any other governmental unit is dependent wholly on statute. *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 282 N. W. 111, 282 N. W. 448.

Under sec. 49.11, Stats., the cost of relief may be recovered under certain circumstances from the county of legal settlement.

The question of legal settlement is likewise governed solely by statute. See *Holland v. Cedar Grove*, *supra*.

It was pointed out in 39 O.A.G. 423, 424, and in various other opinions, that under the Wisconsin statutes the legal settlement of unmarried children is wholly derivative. Under sec. 49.10 (2), Stats., legitimate, unemancipated, minor children have the settlement of their father if he is living, unless the parents are divorced. In the latter case, the children have the settlement of the parent who has

legal custody. During the life of the mother the settlement of the children was derived from her. Since the mother has died, she can no longer have the custody of the children, and the latter provision of the statute cannot apply. The only portion of sec. 49.10 (2), which could be applicable to the facts you report is that which gives legitimate minor children the settlement of their father.

In view of the fact that the children had the settlement of the mother in O county up to the time of her death, the question arises, however, whether that settlement continued under the following provision of sec. 49.10 (4), Stats.:

“* * * No legal settlement shall be lost, acquired or changed while a person is supported in whole or in part in any institution or foster home as a public charge. * * *”

Opinions were given in 40 O.A.G. 380, 38 O.A.G. 191, and 27 O.A.G. 183, that the legal settlement of children did not change while relief was being given on their behalf. The opinions were based, however, on the circumstance that the relief given for the children was relief to the parent from whom their settlement was derived, that the provision of such relief prevented a change in the legal settlement of such parent, and, accordingly, in the derivative legal settlement of the children. If legal settlement of children is wholly derivative, it is difficult to see how they could have a legal settlement different from that of the person from whom they derive their settlement. The mother, being dead, has no settlement. Since the children can have no settlement except by derivation, it cannot be said that they derive a settlement from her.

The opinion in 35 O.A.G. 222 might seem at first glance to be to the contrary, since it is to the effect that for purposes of institutional care children might be regarded as having a settlement different from that of their parents. The opinion was there given that the settlement of a child committed to a state institution at public charge remained the same during the period of his residence although the father acquired a different settlement during that period. One of the primary reasons given for the result reached in 35 O.A.G. 222 is the policy of the law that the governmental unit chargeable for the upkeep of the inmate of a state

institution be determined finally as of the date of application for admission. The scope of the opinion need not be extended beyond the specific circumstances to which it was applied. Since express provision is made for unemancipated minors in sec. 49.10 (2), it would seem that the legislature intended the other provisions of the section to apply to them only on the basis of derivation of legal settlement from a parent.

It is my opinion that the children no longer have a settlement in O county since the death of the mother.

BL

Schools and School Districts—Alteration—Orders by county school committees under sec. 40.03, Stats., are subject to provisions in sec. 40.06 (1), Stats., that no territory shall be detached from a district unless attached to another and no district shall be created with less than \$150,000 valuation.

July 26, 1954.

GEORGE E. WATSON,

State Superintendent of Public Instruction.

You ask whether the provision in sec. 40.06 (1), Stats. 1953, which reads as follows:

“* * * No territory shall be detached from a district unless by the same order it is attached to another district or districts. * * *”

is applicable to orders of the county school committee made pursuant to the provisions of sec. 40.03, Stats. 1953, there being no comparable language in the latter statute.

It is, of course, arguable that this language is applicable solely to orders by local municipal boards because it is solely in the section pertaining thereto. However, as is always the case when construing statutes, the effect to be given a par-

ticular provision is determined by the legislative intent, which, in this instance, involves consideration of the setting in which the provisions now in sec. 40.03 were enacted.

For many years, the creation, alteration, consolidation, and dissolution of local school districts has been provided by statutory provisions containing the limitations that territory may not be detached from a district without being at the same time attached to another, and that no district may be created which has less than a prescribed minimum amount of taxable property. The same provisions to this effect now in sec. 40.06 (1) have been in the statutes for more than 30 years, the prescribed minimum having been raised to \$150,000 in 1927, at which figure it has remained ever since. These limitations are grounded upon a legislative policy that school districts shall not be created too small for feasible operation, and are to prevent that happening by the means covered therein. As an expression of this over-all policy, such limitations are applicable regardless of what agency is utilized by the legislature to perform its function as to the composition of school districts.

With minor variations and exceptions, until a recent enactment in 1949 of the provisions now in secs. 40.03, *et seq.*, constituting county school committees as agencies of the legislature to act in respect to the composition of school districts, the local municipal boards have been the exclusive agency to which the legislature has delegated authority to act for it in this field. But, in somewhat recent years, there grew up dissatisfaction with the functioning of local boards in such matters, in that, for one reason or another, they were reluctant to act and did not keep abreast of the times. The trend of thinking appears to have been that continuation of relatively small school districts resulted in inadequate educational facilities, and that to meet the modern educational standards there should be consolidation in many instances so as to have larger districts that would be able to be equipped to meet such standards.

It was in the development of this attitude that the legislature attempted to meet the situation in 1939 by giving the state superintendent the power upon his own initiative

to attach districts of valuations of less than \$100,000 to contiguous districts. Sec. 40.30 (1), Stats. 1939. This apparently did not satisfactorily meet the problem and it was repealed by ch. 493, Laws 1945, which set up an advisory committee arrangement. Further attention was given to the matter through a study by a legislative committee, with the result that by ch. 501, Laws 1949, provisions were adopted that are now secs. 40.02, *et seq.*, setting up county school committees as agents to act for the legislature in this field in addition to the local municipal boards.

As indicated in the opinion in 40 O. A. G. 62, the bill which became said ch. 501, as initially introduced, proposed to repeal the provisions then in sec. 40.30 that have since been revised and renumbered to be present sec. 40.06, and used the word "sole" so that the county school committee idea thus proposed would have provided the only method thereafter for the creation, alteration, consolidation, and dissolution of school districts. However, in the process of consideration of the bill, both the repeal of what is now sec. 40.06 and the use of the word "sole" were eliminated. Thus, in the final analysis, what the legislature there did was provide another legislatively authorized agency to act for it in the creation, alteration, consolidation, and dissolution of school districts.

Nowhere in the enactment of what became said ch. 501, Laws 1949, is there any indication that the legislature was doing other than providing an additional agency to act for it in respect to the composition of school districts and prescribing the procedures to be used by such agency in so doing. There is not the slightest indication of any legislative intent to depart from, abandon, or any way lessen, the over-all legislative policy as to the size of school districts previously mentioned which had been maintained and followed for the many years and was continued by the retention in the statutes of what is now sec. 40.06. On the contrary, giving consideration to the motivation behind the adoption of what is commonly designated as the county school committee law, it is inconceivable that the legislature could have had any intention to depart in any way from said basic limitations which were a part of its over-all policy.

Rather than doing anything in said enactment of 1949 which would permit or provide for the creation of small school districts by splitting up existing districts or taking pieces from several districts, the purpose and objective in such enactment was only consistent with the basic concept that districts should not be too small and was the encouragement and promotion of consolidation, rearrangement and reorganization of school districts into districts of sufficient size as to assure an adequacy in equipment, curricula, and teaching staff so as to furnish education up to minimum modern standards. Accordingly, considering the objective of the legislature in the 1949 enactment and following the same approach as in 40 O. A. G. 62, it is our opinion that the mentioned limitations in sec. 40.06 (1), Stats., were intended by the legislature to be applicable, regardless of what legislatively designated agency might act as to the composition of school districts. Therefore, any school district that is created by a county school committee pursuant to sec. 40.03 or any territory that is detached by an order of a county school committee under that section, is to be subject to the same provisions as if such action had been taken by a local municipal board under sec. 40.06 (1).

It is therefore our opinion that a county school committee is not authorized to detach territory from a district without, by the same order, attaching such territory to another district or districts, or to create a school district with less than \$150,000 of taxable property.

HHP

Public Assistance—Legal Settlement—The provisions of sec. 49.10 (4), Stats., relating to time spent on lands located in one municipality and owned by another, do not apply where the lands are owned by a county operating on the county system of relief under sec. 49.03 (1) (a), Stats., and are located in said county.

July 27, 1954.

ALBERT J. CIRILLI,
District Attorney,
Oneida County.

You ask whether a person gains legal settlement in O county if he resides for one whole year without receiving aid under ch. 49, Stats., in a nursing home located in O county, owned, maintained, and controlled by said county but operated by individuals under lease.

You state that it is your opinion that a person under such circumstances could not gain legal settlement in O county because of the following provisions of sec. 49.10 (4), Stats.:

“* * * The time spent by any person while residing on lands owned, operated or controlled by another municipality shall not be included as part of the year necessary to acquire a legal settlement in the town, city or village wherein such lands are located, but shall be included as part of the year necessary to acquire a legal settlement in such other municipality.”

The above quoted provision applies only in the case of residence on lands owned, operated, and controlled by one municipality but located in another.

If the nursing home in question, which is owned by O county, were in fact located in another municipality, the provisions above quoted would result in a resident of the home gaining legal settlement in O county rather than in the municipality where the home is located, assuming that other conditions for acquisition of legal settlement have been met.

The case you report does not involve such a situation, although that fact would not alter the result. The records in the state department of public welfare indicate that O

county has adopted the county system of administering relief pursuant to sec. 49.03 (1) (a), Stats. Sec. 49.10 (11), Stats., provides:

“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.”

Accordingly, the lands on which the nursing home is located are in the same municipality by which they are owned, operated, and controlled, and the quoted provisions of sec. 49.10 (4) do not apply.

Residence in the nursing home would result in acquisition of legal settlement in O county in such case if the other statutory conditions relating to acquisition of legal settlement are met.

BL

Public Assistance—Support of Dependents—District Attorney—Powers—A district attorney has no authority under sec. 52.01, Stats., to compromise the amount of support which authorities in charge of a dependent person have found should be furnished by the specified relatives.

July 30, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask the following question relative to the procedure under sec. 52.01, Stats., respecting the enforcement of the liability of parents, spouse, and children to support dependents: After referral made to him by the county agency under sec. 52.01 (2), does the district attorney have any authority to compromise the amount of support that the responsible relative is expected to contribute?

Subsec. (1) of sec. 52.01 requires the parents, spouse, and children of any dependent person to maintain such

dependent, so far as able, "in a manner approved by the authorities having charge of the dependent, or by the board in charge of the institution where such dependent person is." Sec. 52.01 (2) reads:

"Upon failure of relatives so to do said authorities or board shall submit to the district attorney a report of its findings, and upon receipt thereof the district attorney shall, within 60 days, apply to the county court of the county in which such dependent person resides for an order to compel such maintenance. Upon such application said district attorney shall make a written report thereof to the county welfare department, with a copy to the chairman of the county board and to the department."

The ensuing subsections prescribe the procedure to be followed and the nature of the action which is to be taken by the county court. If the court orders support of a dependent person by a relative, subsec. (6) provides the method by which "the authorities or board" may recover from such relative.

Action under sec. 52.01 is not litigation as that term is usually understood, but rather a special statutory proceeding in which the duties and obligations of the parties and officials involved are grounded wholly upon the provisions of the statutes.

The duties imposed upon the district attorney in sec. 52.01 are couched in mandatory language, and such discretionary power as is conferred is in the court or the authorities charged with administering public assistance.

The authority of the district attorney with respect to compromising claims arising out of the public assistance statutes was discussed in 30 O. A. G. 480. The opinion was there given that the district attorney might not compromise any claim except upon the direction of the authorities charged with the administration of the assistance.

While different statutory provisions were there involved we find nothing in sec. 52.01 indicating an intent to confer more extensive power upon the district attorney.

The supreme court pointed out in *State v. Coubal*, 248 Wis. 247, 255-259, 21 N. W. 2d 381, that a district attorney has no powers except as prescribed by the legislature. The court said in part:

“The office of the district attorney was created by the constitution, sec. 4, art. VI. No provision has been made in the constitution as to what the duties of the district attorney are to be. The constitution likewise provides for the office of the attorney general, sec. 1, art. VI. His duties shall be such as the legislature may prescribe, sec. 3, art. VI. Pursuant to the provisions of sec. 3, art. VI, there have been many instances in which the attorney general has been required by law to institute proceedings in the trial courts.

“* * *

“It is true that the district attorney is a *quasi*-judicial officer. This court has so held in the sense that it is his duty to administer justice rather than to obtain convictions. No one would deny that there are many instances in the performance of his duty in which he may be called upon to exercise discretion. All his duties are not ministerial. There is, however, no basis for holding that his duties in representing the state are not subordinate to legislative direction as to the cases in which he shall proceed. * * *”

BL

Public Assistance—Old-Age Assistance—Funds recovered through assignment of insurance policies under sec. 49.22 (2) (c) 3, Stats., should be paid to the United States, the state and its political subdivisions, in the proportion in which they contributed to the old-age assistance, in the manner provided in sec. 49.25, Stats.

August 2, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You ask: "Does the county agency have to prorate any recovery made from an insurance policy assigned under section 49.22 (2) (c) 3, which they may receive in excess of the amount provided for burial?"

Sec. 49.25, Stats., reads in part:

"On the death of a person who has received old-age assistance, the total amount of such assistance paid * * * shall be a claim against his estate * * *. 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. * * *"

Those provisions of sec. 49.25 which govern allocation of recovered funds do not expressly refer to amounts received pursuant to sec. 49.22 (2). Sec. 49.22 (2) was not in existence, however, when the above quoted provisions of sec. 49.25 were enacted.

Sec. 49.25 contains an expression of policy, indicating the legislative intent that the ratio of contribution of the respective governmental units to old-age assistance should not be unbalanced through collections.

This is borne out by sec. 49.38, Stats., providing counties are to be reimbursed by federal and state funds only in the prescribed percentage of "aid paid under ss. 49.20 to 49.38." If a county has been reimbursed by collections, the amount of "aid paid under ss. 49.20 to 49.38" has been correspondingly reduced; and the state and federal governments are entitled to corresponding credits under sec. 49.38. See 42 O.A.G. 193, pointing out that such considerations should be taken into account in "audit adjustments" under sec. 49.38 (1).

Sec. 49.20, Stats., provides that old-age assistance is to be "administered" by counties under the "supervision" of a state department. The county has no independent proprietary interest in any of the funds handled, but acts rather in a representative capacity to carry out the program of old-age assistance planned by the state and federal governments. Such funds as the county collects from recipients pursuant to the statutes are collected in such representative capacity on behalf of all the governmental divisions participating in the program.

To eliminate doubt, the department might promulgate a rule under sec. 49.50 (2), Stats., expressly providing for allocation of recoveries from assignments of insurance policies under sec. 49.22 (2) (c) 3, to accord with the legislative policy expressed in secs. 49.25 and 49.38.

BL

Public Officers—Compatibility—Sheriff—Dance Supervisor—Office of county dance supervisor cannot be held by sheriff by reason of art. VI, sec. 4, Wis. Const. Offices of undersheriff and county dance supervisor are not incompatible.

August 25, 1954.

LEROY J. GONRING,
District Attorney,
Washington County.

You have inquired whether the sheriff and undersheriff may be appointed as county dance supervisors and receive compensation therefor. The provision for appointment for county dance supervisors is in sec. 59.08 (9), Stats., which provides in part as follows:

"* * * Upon the passage of such an ordinance [regulating places of amusement] the county board shall select from persons recommended by the county board a sufficient number thereof whose duty it shall be to supervise public

dances according to assignments to be made by the county board. Such persons while engaged in supervising public dances or places of amusement shall have the powers of deputy sheriffs, and shall make reports in writing of each dance visited to the county clerk, and shall receive such compensation as the county board may determine and provide. Their reports shall be filed by the county clerk and embodied by him in a report to the county board at each meeting thereof. * * *

Art. VI, sec. 4, Wis. Const., provides in part: "Sheriffs shall hold no other office."

Since the position of dance supervisor is clearly an office, the sheriff is prohibited by the constitution from holding such office and of course can receive no compensation for performing the duties of a dance supervisor. 15 O.A.G. 156.

That same opinion states, however, that a deputy sheriff may be appointed as a county dance supervisor, there being no specific provision of law to prevent it and the two offices not being incompatible. In that regard there is no difference between the undersheriff and a deputy sheriff, and you are therefore advised that the undersheriff may be appointed to the office of county dance inspector and receive compensation therefor.

You point out that the undersheriff in your county is on a monthly salary basis paid by the county. If his duties as county dance supervisor are such as to interfere with the performance of his duties as undersheriff, that is a matter which the sheriff may take into consideration in determining whether to retain him in the office of undersheriff or to dismiss him and appoint someone else, but it does not make the two offices incompatible nor prevent the payment of compensation for both.

WAP

Public Officers—Traffic Patrolmen—Defense in Criminal Actions—County traffic patrolman is an officer of the county within the meaning of sec. 331.35, Stats., and the county board is authorized under that section to pay reasonable expenses incurred by him in successful defense of criminal action brought against him by reason of acts done in the performance of his official duties. 16 O.A.G. 593 overruled.

August 25, 1954.

JOHN M. POTTER,
District Attorney,
Wood County.

You have requested an opinion with reference to two questions arising under sec. 331.35, Stats., which provides as follows:

“Whenever in any city, town, village, or county *charges of any kind shall be filed* or an action be brought *against any officer thereof in his official capacity*, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or *such matter shall be determined favorably to such officer*, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county *may* pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses *may* likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.”

Your first question is, “Is a county traffic patrolman an officer of the county employing him within the meaning of the above statute?”

In *Heffernan v. Janesville*, (1946) 248 Wis. 299, 21 N.W. 2d 651, it was held that a city police patrolman is not a “public officer” so as to be entitled to recover his salary for a period during which he had been illegally suspended, without deduction for money earned elsewhere during the period

of suspension. Since the decision in that case, however, the supreme court has held that a patrolman on a city police force is a public officer within the meaning of sec. 270.58, Stats., so as to require the city to pay any damages and costs adjudged against him by reason of an act done by him in his official capacity and acting in good faith. The court expressly distinguished the *Heffernan* case as follows:

"Some words and phrases are subject to more than one meaning, depending upon the context in which used. The term '*public officer*' falls within this category. A city police patrolman is not a public officer in the sense of having a salary attached to his position which would be due to him if he were wrongfully suspended or ousted from such position irrespective of whether he had sustained any actual damage thereby. On the other hand, a police patrolman is commonly referred to as a police officer and in this sense is a public officer. We are satisfied that it was the intention of the legislature to include police officers within the term '*public officers*' appearing in sec. 270.58, Stats.

"If, as applied to police departments of cities like Green Bay, the term '*public officers*' appearing in sec. 270.58, Stats., were restricted to the chief of police (and thus excluded the patrolmen), we would have the absurd result that the chief, whose duties largely confine him to his desk in his office thereby having no occasion to personally make an arrest or to fire a gun in the line of duty, would be afforded the protection of the statute; while the patrolmen on the beat, who do make arrests and who on occasion do have to resort to use of firearms in performance of their duties, would be denied such protection." *Matczak v. Mathews*, (1953) 265 Wis. 1, 5-6, 60 N.W. 2d 352.

For the same reasons given in the foregoing quotation, it seems clear that a police officer is included in sec. 331.35 (a statute of the same general nature as sec. 270.58) and that this would include a county traffic patrolman as well as a city police patrolman.

The answer to your first question is, therefore, "Yes."

Your second question is, "Would a county be authorized under the provisions of sec. 331.35 to pay reasonable expenses incurred by an officer of the county in successfully defending himself in a criminal action brought against him and growing out of performance of his official duties?"

Substantially the same question was submitted to this office in 1927 and was answered in the negative on the ground that "a public official, as such, is never proceeded against criminally. For a violation of a criminal statute he is prosecuted personally and in his individual capacity only." 16 O.A.G. 593, 594.

In a later opinion the question was whether a town board could pay the legal expenses of inspectors of election incurred in defending a criminal action where they were charged with a violation of the election laws in respect to their duties as such inspectors, after the criminal action was dismissed by the district attorney, in view of the fact that they were not "being compensated on a salary basis." The attorney general stated that in his opinion that part of sec. 331.35 which authorizes reimbursement of an officer compensated on a salary basis for expenses incurred in connection with an action to subject him "to a personal liability growing out of the performance of official duties" did not apply to the criminal action because the term personal liability, as here used, "means financial liability as distinguished from criminal liability, since the matter of criminal liability is covered by that portion of the statute which relates to 'charges of any kind shall be filed * * *.'" 30 O.A.G. 318, 319.

Ignoring the earlier opinion quoted above, the attorney general stated that under sec. 331.35 the town board was authorized to reimburse the election inspectors for their expenses in connection with the criminal prosecution.

There is considerable force in the assertion in 16 O.A.G. 593 that criminal charges are not brought against public officers in their official capacity, but there is authority for holding that the statute does not mean that the action must be brought *against the officer in his official capacity*, which is its literal meaning, but rather that the action must be brought *against the officer for something that he did in his official capacity*. In *Larson v. Lester*, (1951) 259 Wis. 440, 444-445, 49 N.W. 2d 414, the supreme court construed the following language of sec. 270.58, Stats.:

"Where the defendant in any action * * * is a public officer and *is proceeded against in his official capacity* * * *." (Italics supplied.)

That case involved an action for damages brought against a village marshal for injury sustained by the plaintiff when shot by the marshal. The complaint alleged that the defendant "at the time when he made the assault upon the said Kermit Larson then and there acted in good faith, believing that he was carrying out his duty as a police officer under the circumstances." The supreme court held that the village would be liable for the damages, "if it is found upon the trial that Lester was indeed a public officer of the village at the time of the assault, [and] *that he was acting in his official capacity and in good faith.*" (Italics supplied.) This holding was reaffirmed in *Matczak v. Mathews*, (1953) 265 Wis. 1, 60 N.W. 2d 352 (quoted *supra*).

Of course, a police officer sued for damages for wounding a person is no more sued in his official capacity than is a police officer prosecuted criminally for an act done in the course of official duty. If the language in sec. 270.58, Stats., "a public officer * * * proceeded against in his official capacity" means "a public officer * * * proceeded against *for an act done* in his official capacity," then the language in sec. 331.35, "charges * * * filed * * * against any officer * * * in his official capacity" must mean "charges * * * filed * * * against any officer * * * *for an act done* in his official capacity."

For the foregoing reasons the answer to your second question is "Yes."

In conclusion, it may be pointed out that although the authority to the county board to pay the reasonable expenses of the officer is discretionary and not mandatory, the supreme court of Wisconsin in *Curry v. Portage*, (1928) 195 Wis. 35, 40-41, 217 N.W. 705, stated as follows with reference to paying such claims:

"* * * The claims of public officers to reimbursement for expenditures reasonably incurred by them in defending themselves against groundless charges or litigation arising out of faithful discharge of duty are founded in equity and justice, and, in all fairness, should be paid by the public.
* * *"

WAP

Secretary of State—Election Notice—Suggestion for statement in accordance with sec. 6.10 (1), Stats., in notice submitting question proposed by Joint Resolution No. 66, 1953 legislature, to the people at the coming November election.

August 30, 1954.

FRED R. ZIMMERMAN,
Secretary of State.

You ask that I prepare, for the purpose of enabling you to comply with sec. 6.10 (1), Stats., a brief statement of any change that would be effected in existing laws if the question submitted to the people by Joint Resolution No. 66, 1953 legislature, is approved by a majority of the electors voting thereon in the coming November election.

Sec. 6.10 (1), Stats., provides as follows:

“* * * The secretary of state shall append to each such constitutional amendment or other question to be submitted to the people a brief statement of the change that will be made in the constitution or the existing laws if such amendment or other 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 amendment or other question so submitted. * * *”

Joint Resolution No. 66, 1953 legislature, reads:

“A JOINT RESOLUTION

“Relating to a referendum on the establishment of a state-wide educational television network.

“WHEREAS, events of the past 5 months have indicated a great deal of interest in an educational television network for the state; and

“WHEREAS, it is difficult for the legislature to judge the public reaction to the proposal at this time, and the legislature would be in a better position to make a decision in accordance with the will of the people if an expression of popular opinion were available; and

“WHEREAS, the legislative council will study the proposal for the next 2 years; and

“WHEREAS, a full commitment by the state cannot be delayed beyond 1955 if channels are to be made available for educational purposes; now, therefore, be it

“Resolved by the assembly, the senate concurring, That there be submitted, for advisory purposes, to the qualified

electors of this state at an election to be held on the first Tuesday after the first Monday in November, 1954 the following question:

"Shall the state of Wisconsin provide a tax-supported state-wide noncommercial educational television network?"

In my opinion the following statement will constitute compliance with sec. 6.10 (1) :

"If a majority of the electors answer the above question 'yes,' no change in existing laws will be directly effected thereby. The question is submitted for the purpose of enabling the legislature to ascertain the wishes of the people on an advisory basis with respect to the establishment of a state-wide noncommercial educational television network. The legislature may be persuaded by a majority affirmative vote to establish such educational television network, but will not be bound to do so."

SGH

GS

Secretary of State—Election Notice—Suggestion for statement required by sec. 6.10 (1), Stats., in notice submitting ch. 76, Laws 1953, creating secs. 9.045 and 9.046, Stats., to the people at the coming November election.

August 30, 1954.

FRED R. ZIMMERMAN,
Secretary of State.

You request me to prepare a statement in compliance with sec. 6.10 (1), Stats., for use in giving notice to the electorate of the change that will be effected in the existing laws if ch. 76, Laws 1953, creating secs. 9.045 and 9.046 of the statutes, is approved by a majority of the electors voting thereon in the forthcoming November election.

Sec. 6.10 (1) provides in part:

"* * * The secretary of state shall append to each such constitutional amendment or other question to be submitted to the people a brief statement of the change that will be made in the constitution or the existing laws if such amend-

ment or other 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 amendment or other question so submitted. * * *

Sec. 2 of ch. 76, Laws 1953, provides as follows:

"SECTION 2. The question of whether the foregoing provisions of this act shall take effect and be in force shall be submitted to a vote of the people of this state, in a manner provided by law for the submission of an amendment to the constitution, at the next general election to be held in November, 1954. If approved by a majority of all the votes cast on that subject at such election, it shall take effect and be in force from and after such approval by the people; otherwise it shall be of no effect. Upon the ballot shall be printed, 'Shall Chapter ___ (insert on the ballot the number of chapter) of the laws of 1953, entitled "An act extending the right to vote for presidential and vice presidential electors to persons who have resided in the state for less than one year" be adopted?' The secretary of state shall within 10 days after the receipt of the returns from the county clerks canvass, certify, record and publish as in the case of a constitutional amendment the number of ballots cast in favor of such proposed extension of suffrage and the number of ballots cast against it."

In my opinion the following statement will constitute compliance with sec. 6.10 (1) :

"If the majority of electors voting on this question favor such legislation, persons otherwise eligible, but who have been residents of this state for less than one year next preceding a presidential election, will, upon proper application, be entitled to vote for presidential and vice presidential electors in such election."

GS

Salaries and Wages—Sheriffs—Under sec. 59.15 (1), Stats., where sheriff is on straight salary basis he may not be paid in addition the per diem allowance provided by sec. 59.29 (1), Stats. 42 O.A.G. 289 withdrawn.

August 31, 1954.

FRANK X. KINAST,
District Attorney,
Rock County.

You have requested an opinion with reference to the following situation: Since 1943 the sheriff and certain other county elective officers have been paid on a straight salary basis under a resolution which provides that such salaries are to be "in lieu of all fees, per diem, and compensation for services rendered." You inquire whether the sheriff is nevertheless entitled, in addition, to the compensation provided by sec. 59.29 (1), Stats., for traveling outside the state to apprehend and return a fugitive from justice who voluntarily returned without requisition. The statute provides that for such service, "such sheriff shall be entitled to eight dollars per day for the time necessarily expended in traveling to, apprehending and returning with such person and his actual and necessary expenses for such time, which compensation and expenses shall be allowed by the county board of such county upon the presentation thereto of an itemized and verified account," etc.

In 1943, when your sheriff's compensation was changed from fees to salary, sec. 59.15 (1), which authorized county boards to fix an annual salary for each county officer, provided in part as follows: "The salary so fixed shall not be increased or diminished during the officer's term, and *shall be in lieu of all fees, per diem and compensation* for services rendered," with certain exceptions enumerated in the statute, not material to the present question.

Therefore, the resolution of the Rock county board in 1943 unquestionably meant that the sheriff would not receive the \$8 per day provided by sec. 59.29 (1).

By ch. 559, Laws 1945, sec. 59.15 (1) was repealed and recreated to read as it is in its present form. It now reads in part as follows:

"(1) ELECTIVE OFFICIALS. (a) The county board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county or part thereof (other than county board members and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid such officer (exclusive of reimbursements for expenses out-of-pocket provided for in 59.15 (3)). The annual compensation may be established on a basis of straight salary, fees, or part salary and part fees, and if the compensation established by the county board is a salary, or part salary and part fees, such compensation *shall be in lieu of all fees* except those specifically reserved to the officer by enumeration regardless of the language contained in the particular statute providing for the charging of the *fee*. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the county board by timely action."

It will be observed that in its present form the statute says that the salary "shall be in lieu of all fees except those specifically reserved to the officer by enumeration," whereas the old statute in 1943 provided that it should be "in lieu of all fees, *per diem and compensation.*" The payment of \$8 per day provided by sec. 59.29 (1) is not specifically denominated a fee, and is undoubtedly a "per diem." Nevertheless, the attorney general issued an opinion that under the new statute, if the resolution fixing the salary of the sheriff did not reserve any fees to him, "he would not be entitled to the special compensation provided by sec. 59.29 for the return to this state of fugitives apprehended in other states." 36 O.A.G. 328, 332.

This would be a complete answer to your question except for the fact that the construction of new sec. 59.15 (1), Stats., received further consideration in a later opinion, 42 O.A.G. 289, where the conclusion was reached, on the basis of a number of cases from other states, that the word "fees" does not include a per diem allowance, and therefore a county superintendent is entitled to receive a per diem for services on the county normal school board and the county agricultural school board in addition to his salary even though the salary resolution does not reserve such per diem allowance to the officer.

The proper interpretation of the change made by the 1945 amendment of sec. 59.15 (1) has been troublesome in a number of counties and still is in several. It was the variant applications of the prior provisions in the several counties and, in some cases, even with respect to different offices in the same county, that gave rise to this 1945 amendment. However, subsequent to the amendment there was either an unawareness thereof or a lack of appreciation of its impact in quite a number of instances, with the result that the practice or system in operation prior thereto in a county continued to be followed until some question was raised in respect thereto, as would appear to be the case in the instant situation. It is our information that this is still the situation in some counties, at least as to some offices. In other counties where there has been cognizance of the amendment, particular applications of the amended language have been grounded upon arguments of somewhat persuasive effect, as is evidenced by the conclusion in 42 O.A.G. 289. As a consequence, there has been uncertainty and the lack of uniformity as to the effect of the present language in sec. 59.15 (1).

The importance of the problem is obvious. Because of it and the conflict between the two opinions, the question has been fully reconsidered and it is concluded that the later opinion, 42 O.A.G. 289, is incorrect and that the term "fees" as used in sec. 59.15 (1) (a) and (b) undoubtedly includes per diem allowances, and therefore no officer whose compensation is fixed on a salary basis, or on a part salary and part fees basis, is entitled to retain a per diem allowance unless the same is specifically reserved to him in the salary resolution. This conclusion is reached for the following reasons:

In the first place, the cases holding that the word "fees" does not include per diem allowances, cited in the opinion in 42 O.A.G. 289, do not represent the unanimous opinion of all courts on that subject. That the word "fees" may be used in a statute in a broad sense including per diem allowances is established by the following cases:

In *Henderson v. Board of Com'rs*, (1894) 4 Colo. App. 301, 35 P. 880, 881, it was held that the "per diem" allowance for services of a county clerk for acting as clerk of the county board was included in the "fees" required by

statute to be paid over to the county treasurer and placed in the fee fund from which the clerk's annual salary was paid.

And in *Anderson v. Beadle County*, (So. Dak. 1927) 211 N.W. 968, 969, the court held that the sheriff's per diem for opening court and attending thereon was a fee within the meaning of a statute requiring the sheriff to render an annual report of fees received. The court stated in part as follows:

"Appellant calls our attention to numerous cases in which a distinction is made between the terms 'fees' and 'per diem.' It is true that per diem is sometimes and by some courts held to be included in the term 'fees,' and sometimes otherwise, and that the two terms are not always synonymous. The fact remains that, from statehood until 1919, the only authority sheriffs had to collect this compensation was by virtue of a statute which denominated it as 'fees.'"

That the Wisconsin legislature has used the word "fees" as including compensation fixed on a per diem basis is apparent from sec. 59.28, Stats. That section provides in part:

"Every sheriff shall be entitled to receive the following fees for his services * * *:

"* * *

"(17) Attending a view when ordered by the court, one dollar and fifty cents *per day*, and ten cents per mile traveling fee, going and returning.

"* * *

"(21) Attending the supreme court, one dollar and fifty cents *per day*, to be allowed on the certificate of the chief justice or clerk and paid out of the state treasury.

"(22) Attendance upon the circuit or county court, three dollars *per day* to the sheriff and two dollars each *per day* to the necessary deputies, to be paid out of the county treasury; provided, that in any county having a population of at least sixty thousand, the sheriff or necessary deputies shall receive such salary or per diem in excess of the amount herein prescribed as the county board may determine.

"* * *

"(32) Attending any court with a prisoner, one dollar and fifty cents *per day* and seventy-five cents *for each half day*, besides actual and necessary expenses. Guarding any prisoner sentenced to imprisonment at hard labor in the county jail, when the prisoner performs such labor upon

any highway or public improvement and there are no secure means for preventing his escape, one dollar and fifty cents for each day and seventy-five cents for each half day so employed.

“* * *

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

And sec. 59.31 again refers to the compensation of sheriffs and their deputies, for attendance required by law upon any court of record, as “fees.”

Finally, it is apparent that in revising sec. 59.15 (1) it was the legislative intent to cover the entire subject of the compensation of the county officers affected by that subsection. To say that by dropping the words “per diem and compensation for services rendered,” which had appeared after the word “fees” in sec. 59.15 (1), Stats. 1943, the legislature intended to exclude per diems, would be wholly inconsistent with the general purport and intent of the 1945 amendment creating present sec. 59.15 (1). It is evident that the draftsmen intended by the use of the word “fees” to comprehend all compensation other than the annual salary itself. A typewritten memorandum submitted to the 1945 legislature by a draftsman and the proponent of the bill by which sec. 59.15 (1) was repealed and recreated (a copy of which memorandum is in the file of the legislative reference library relating to ch. 559, Laws 1945), clearly shows that no *casus omissus* was intended. The statute requires the county board to establish the “total annual compensation for services,” which may consist of “straight salary, fees, or part salary and part fees.” There is no room in that language for the payment of “per diems” in addition to salary and “fees.”

WAP

Tuberculosis Sanatoriums—Joint Institutions—Surgical Care—Secs. 50.06 and 50.07, Stats., relating to county tuberculosis hospitals, apply to hospitals operated and maintained jointly by two or more counties.

Under sec. 50.07 (2), Stats., maintenance of patients in such hospitals includes emergency surgical work. What is emergency surgical work is a medical and surgical question depending upon the particular circumstances.

Surgical work of a non-emergency character for indigent tuberculosis cases in such hospitals, where such surgery is not incidental to the treatment for tuberculosis, is to be handled as in other indigent cases.

September 1, 1954.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

You state that Ashland, Bayfield, and Iron counties jointly maintain and operate the Pureair Sanatorium for tuberculosis cases and that this has given rise to the following questions:

"1. Do the provisions of Section 50.06 and 50.07 governing county tuberculosis sanatoriums govern the Pureair Sanatorium, it being a tri-county institution?

"2. Assuming that a patient duly admitted to the sanatorium is in need of surgical work not directly connected with his treatment for tuberculosis; for example, an appendectomy, for which he must be transferred to a local hospital, does the county judge have any authority to authorize such hospitalization as a county charge, or is such hospitalization a matter of maintenance of the patient, assuming that the patient is not ready for discharge and will return to the sanatorium immediately upon completion of his hospitalization for further tuberculosis treatment?

"3. Will the answer to number 2 be affected by facts and circumstances such as the question of whether or not such surgery comes within the definition of emergency surgical work, as referred to in Section 50.07 (2)?

"4. What is meant by emergency surgical work in Section 50.07 (2)?

"5. May the counties concerned by action of the county boards authorize the superintendent of their sanatorium to authorize surgery at a local hospital and authorize pay-

ment for the same directly by the county of residence rather than as a part of the maintenance cost of the patient, having in mind that the counties are on the unit system of relief and that the patients in each case are indigent and their hospitalization will be paid for as a public charge?"

I.

The provisions of secs. 50.06 and 50.07, Stats., are applicable to tri-county institutions.

Sec. 50.06 relates to county tuberculosis hospitals and sec. 50.07 to the administration and maintenance of patients therein. These sections are *in pari materia*, and sec. 50.07 (3) refers to "each county maintaining *in whole or in part* such an institution." This language is clearly broad enough to cover a hospital maintained jointly by three counties. Otherwise there would have been no point to the choice of the words "in whole or in part."

II.

Questions 2, 3, 4, and 5 are so closely interrelated that they should be discussed together so as to avoid repetition.

Sec. 50.07 has nothing to do with surgery except "emergency" surgery referred to in subsec. (2).

Sec. 370.01 (1), Stats., provides that in the construction of our statutes all words and phrases shall be construed according to common and approved usage but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning. According to the dictionary the word "emergency" implies an unforeseen occurrence; "a sudden and urgent occasion for action."

Whether or not "emergency surgical work" is involved in a particular case is a medical and surgical question depending upon the particular facts and circumstances. The same type of surgery may be of an emergency character in one case and not in another. For instance, you mention an appendectomy in your second question. This may involve emergency surgery or it may not, depending upon how critical the situation is.

Sec. 50.07 (2) provides that maintenance shall include emergency surgical work. By implication this excludes surgi-

cal work of a non-emergency character where the same is not incidental to the treatment for tuberculosis. Presumably the latter type of surgery would have to be taken care of in the same way that it would if the patient were not tubercular, and in the case of an indigent patient the procedure and charges would be as in other indigent cases, since, as above pointed out, sec. 50.07 (2) is not applicable. This calls for an affirmative answer to your 5th question. Cf. 42 O.A.G. 213. See also sec. 49.01 (1) which defines "relief" so as to include surgical treatment and hospital care. WHR

Physical Therapy—Licenses and Permits—Under sec. 147.185 (4), Stats., the annual renewal fee for a physical therapy certificate is \$3 if paid on or before February 1 of each year and \$7 thereafter. There is no authority under the statute for issuing registration certificates for license years that have already elapsed. If a lapse of 5 or more years occurs, the applicant must submit to oral examination by the examining committee and may be required to take a refresher course.

September 16, 1954.

DR. THOS. W. TORMEY, JR., *Secretary,*
State Board of Medical Examiners.

You have referred to our opinion to the board under date of May 28, 1954, 43 O.A.G. 152, in which it was concluded that persons practicing physical therapy in veterans' administration hospitals located in Wisconsin and who confine their practice to patients whom the veterans' administration has the duty to treat, are not required to be licensed under sec. 147.185, Stats. We are now asked whether such a physical therapist who was once licensed in this state but who subsequently permitted his license to lapse must, on application for renewal of his license, pay a \$7 renewal fee for each year that has elapsed since his last registration.

The same question is also asked concerning physical therapists who have moved to other states or who have entered the armed forces.

Sec. 147.185 (4) provides in part:

“(4) CERTIFICATE. If the board finds the applicant qualified it shall issue a certificate of registration which shall expire on February 1 of each year and shall be renewed only upon application and the sending of a \$3 annual renewal fee to the secretary of the state examining committee for physical therapy on or before January 31. Upon receipt of such application, the examining committee shall send the application and fee to the board for renewal. A renewal fee of \$7 shall be paid by any physical therapist who seeks reregistration but who fails to renew his application on or before February 1 of any year. If the applicant has failed to renew his certificate for a period of at least 5 years, the board shall require the applicant to take a refresher course approved by the board before issuing a renewal certificate if, after oral examination, the committee recommends to the board that such refresher course is necessary. * * *”

The language of the statute is clear. It provides for an annual renewal fee of \$3 if paid on or before February 1 of any year (in one place the date is January 31 but presumably the applicant would be entitled to the benefit of the later date, February 1). If the applicant is late in applying for the renewal certificate in any particular year, he pays \$7 for that year. However, he pays nothing for any year during which he does not seek registration, and there is no statutory authority on the part of the board for requiring as a condition of registration years later that the applicant must be assessed either the \$3 or \$7 fee for each of the years he was not registered or required to be registered in Wisconsin. The only additional burden imposed upon the licensee whose registration has lapsed is that if he fails to renew his certificate for a period of at least 5 years he must take a refresher course, if after oral examination the examining committee recommends to the board that such refresher course is necessary. This implies an oral examination in every case of a lapsed registration for a period of 5 years or more and a refresher course if so recommended by the examining committee. (There is an ex-

ception in the case of persons in the armed forces which will be discussed later.)

The specific requirements of a licensing statute are exclusive. The board administering the same has only the powers with respect thereto that are expressly granted or necessarily implied, and any power sought to be exercised by the board must be found within the four corners of the statute under which the board proceeds. See *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N.W. 2d 27.

The only way a registrant (except members of the armed forces) can avoid the oral examination and possibility of being required to take a refresher course is by not permitting his registration to lapse for a period of 5 years or more. It is up to him each year to decide whether he wants to pay on time and receive the benefit of the \$3 rate or whether he wants to delay until after February 1 each year and pay the \$7 rate for late annual registration, but once the license year has elapsed, there is no authority on the part of the board to issue a license for that particular year. If the board were to follow such a practice, it would result in evasion of the examination and refresher course requirements mentioned above, since the individual permitted to come back and pick up registration certificates for each lapsed year at \$7 each would presumably then have his certificates to show that he had not "failed to renew his certificate for a period of at least 5 years."

Thus the suggestion of requiring the holder of a lapsed certificate to pay \$7 for each of the years lapsed would not only be beyond the power of the board but it would defeat a wholesome provision in the law designed to protect the public from the incompetence of those whose skills might have largely disappeared by nonuse.

It is immaterial under the statute that the reason for nonrenewal was that the licensee did not need a Wisconsin license because he was practicing in another state or under the jurisdiction of some federal agency. However, where the licensee enters the armed forces, effect must be given to sec. 45.22, Stats., which provides:

"45.22 (1) The provisions of any section or chapter imposing the requirements of a license or registration certificate or permit by the state in order to engage in the practice of any profession, trade, occupation or business in the state, and prescribing requirements of residence, examination, registration or application, payment of fees or renewals, expiration, revocation or suspension thereof, or prescribing time limitations or increased fees for issuance of licenses or permits after the expiration thereof, shall be suspended for such period of time as the holder of the license, certificate or permit is in the active service of the armed forces of the United States. The holder of such license, certificate or permit shall apply for reinstatement or make application for renewal thereof, as the case may be, within 6 months from the date of his discharge from the armed forces, and proper evidence of such discharge shall be presented with such application. In the event a proper application is not so presented within such 6-month period, then the license, certificate or permit shall lapse or terminate as otherwise provided by law. The provisions contained in s. 158.12 (2), relating to the licensing of barbers, shall not apply to persons who are required under rules and regulations of the federal government to engage in work other than that for which the license was issued, providing they return to their usual occupation within 6 months from the date they are released from such other work. Nothing in this section contained shall apply to or in any wise affect the provisions of any statute relating to liquor licenses, or relating to licenses for nonintoxicating beverages, or relating to licenses for fermented malt beverages.

"(2) This section shall be in effect from June 30, 1953 to June 30, 1955."

The certificate renewal form submitted by you for our approval does not appear to be in conflict with the views expressed above, and it is therefore approved.

WHR

Automobiles and Motor Vehicles—Farm Tractor—Registration—Driver's License—Farm tractor used as road tractor for pulling trailer loaded with farm produce from place of production to market is exempt from registration under sec. 85.01 (4) (cd) 9, Stats.

Where farm tractor exempt from registration by reason of use in agricultural operations is nevertheless used regularly upon public highways as a road tractor, the operator thereof must possess motor vehicle operator's license. Such operation is not "temporary," and exemption under sec. 85.08 (4) (b), Stats., accordingly is inapplicable.

September 20, 1954.

MOTOR VEHICLE DEPARTMENT.

You request my opinion upon the following two questions:

1. Where a vehicle which physically conforms to what is commonly known as a farm tractor is used by a farmer as the motive power for pulling a trailer loaded with farm produce from the owner's farm into a nearby city each day, and where said farmer delivers the farm produce from the trailer to buyers, must the tractor in question be registered as a road tractor under sec. 85.01 (4) (f), Stats.?

2. Under the circumstances described in question numbered 1 above, do the statutes require the operator of such tractor to have a motor vehicle operator's license?

Sec. 85.10 (7), Stats., defines a "road tractor" as "every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of the vehicle or load so drawn."

Sec. 85.01 (4) (f), Stats., provides that for the registration of all road tractors as defined in sec. 85.10 (7) and not exempt under par. (cc) the fees prescribed in par. (c) for trucks of the same gross weight are payable. (The exemption contained in par. (cc) is inapplicable here and need not be considered.) While the above definition of road tractor is clearly broad enough to include the ordinary farm tractor when used as a road tractor, the following statutory

provision has a decisive bearing upon the answer to the first question. Sec. 85.01 (4) (cd) 9 reads as follows:

“Tractors used exclusively in agricultural operations, including threshing, or used exclusively to provide power to drive other machinery, or to transport from job to job machinery driven by such tractor, or tractors used exclusively for construction operations, no fee.”

It becomes necessary at this point to determine whether the use of the tractor under the circumstances described is “in agricultural operations.” In 2 Am. Jur. 395, § 2, the term “agriculture” is defined as “the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, *including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account.*”

In *State ex rel. Brittain v. Hayes*, (1918) 143 La. 39, 78 So. 143, 144, it was held that a farmer who goes from place to place selling at retail the products of his farm is only pursuing his farming business and is not a peddler or hawker. He was held to be engaged in an agricultural pursuit.

In 29 O.A.G. 126, the attorney general stated that in his opinion, hauling limestone used by a farmer, hauling hay to market, hauling peas to a viner station and hauling feed to a grist mill and back were all agricultural operations.

The conclusion that the tractor is being used in agricultural operations seems warranted. This conclusion is further strengthened and supported by a consideration of the definition of a farm trailer. Sec. 85.10 (11a), Stats., defines a farm trailer as every vehicle of the trailer type designed for carrying property wholly on its own structure or designed so that some part of its own weight and that of its own load rests upon or is carried by a motor vehicle, and which is owned and operated by a farmer and is used exclusively for the transportation of farm products from the licensee's farm to market or for the transportation of supplies to his farm.

It is my opinion, therefore, that the tractor in question is a farm tractor, used in agricultural operations; and assuming that its use is otherwise confined exclusively to agricultural operations (when not used to draw the trailer of farm produce as described in question numbered 1), it need not be registered under sec. 85.01, but is exempt from registration by virtue of sec. 85.01 (4) (cd) 9.

Respecting the second question as to whether the operator of the tractor furnishing the motive power for the pulling of the trailer is required to have a motor vehicle operator's license, it is necessary to interpret the following exemption statute in the light of the above facts. Sec. 85.08 (4) (b) provides as follows:

"PERSONS EXEMPT FROM LICENSE. The following persons are exempt from licenses hereunder:

"* * *

"(b) Any person while operating any farm tractor or implement of husbandry temporarily operated or moved on a highway;"

It is a familiar rule of statutory construction that exemptions are to be strictly construed. In the present instance, it is to be noted that the exemption applies only to "temporary operation" on a highway. It is a matter of common knowledge that farm tractors are used primarily off the highway and that the public safety considerations which prompted the legislature to require operators of motor vehicles generally to be licensed usually do not obtain under the ordinary circumstances in which farm tractors are used in the fields, about farm yards, etc. The exception to license requirements where the farm tractor is temporarily operated or moved on the highway contemplates a movement from field to field or from farm to farm, the tractor temporarily traveling along or traversing the public highway when necessary. The exemption might well apply to other situations such as the one considered by the attorney general in 42 O.A.G. 66, where the driving of a tractor from Rhineland, where it had been repaired, to a farm 9 miles away was held to be a temporary operation.

However, in the situation which you present, it appears that the driver operates the tractor in the same manner

as the ordinary road tractor for hauling a trailer from a farm into the city of Eau Claire each day. It appears from your opinion request that the operation extends over the city streets of Eau Claire to bring the vehicles in question to the residences of various customers who buy produce from the farmer. This daily use, bringing the vehicles in question into proximity with all other users of the highway, cannot, in my opinion, be regarded as a "temporary" operation. On the contrary, it is a regular daily occurrence and the same considerations which would require the operator to have a driver's license if the motive power were a standard road tractor, apply here. In my opinion, the operator of the combination of vehicles described in your opinion request is required to have a motor vehicle operator's license.

SGH

Public Assistance—Old-Age Assistance—A contract of life insurance issued in the name of an applicant for old-age assistance is subject, to the extent of the cash or loan value at the date of the first old-age assistance, to the provisions of sec. 49.22 (2) (c) 3, Stats., irrespective of the source of the money from which premiums were paid.

September 20, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have asked a number of questions about the interpretation of sec. 49.22 (2) (c) 3, Stats., as enacted by ch. 667, Laws 1953, which reads in part:

"(2) Any person shall be considered dependent within the meaning of this section even though he or his spouse owns property if the property owned either by him or his spouse is not in excess of the following:

"* * *

"(c) \$500 in liquid assets of which:

"* * *

"3. The cash or loan value of a life insurance policy at the date the recipient first received old-age assistance shall be considered a liquid asset subject to the provisions of this paragraph; however, if the recipient owns a policy of insurance on his life within the limitations of this paragraph the county agency may authorize him to retain it and provide for the payment of premiums thereon in his budget, provided that he designates the county as assignee under the policy to the extent of the amount of old-age assistance granted him during his lifetime. Where the county as such assignee receives proceeds from such policy and where less than \$300 had been transferred to it by the recipient for funeral expenses, the county shall allocate from such available proceeds a sum sufficient to provide a fund for funeral expenses not exceeding \$300."

Your questions are concerned with the situation which exists where a child of an applicant for or recipient of old-age assistance pays the premiums on a policy of insurance on the applicant's or recipient's life. You further state that your questions are not concerned with the situations which exist when a person who has an insurable interest in the life of an applicant or recipient owns the policy, or when such applicant or recipient has assigned the policy and consequently no longer has any property interest in it.

Your specific questions are:

"1. If the applicant or recipient cashes in his life insurance policy, is it permissible for the department to allow such applicant or recipient to reimburse the child out of the proceeds received from cashing the policy, in the amount of the premiums that such child has paid on such policy?"

"2. If such reimbursement is permissible, may the department place a limitation on the amount of reimbursement by requiring that before such reimbursement for premiums is made, that \$300 (if available) be deposited with the county agency for burial purposes pursuant to section 49.22 (2) (c) 1?"

"3. After the recipient dies (the policy having been assigned to the county for recovery purposes pursuant to section 49.22 (2) (c) 3), can the county reimburse the child for the premiums such child has paid out of the money recovered by the county on the policy at the death of the recipient?"

"4. If a child has paid premiums in an amount equal to or greater than the cash or loan value of the policy, can the

county permit the applicant or recipient to assign the policy to such child?

"5. If question No. 4 is answered in the affirmative, can the department, as a condition to consenting to such assignment, require such child to undertake completely the burial expenses of such applicant or recipient?"

"6. If a child buys the policy of an applicant or recipient (and the policy is accordingly assigned to him), can the department recognize as part of the purchase price paid by the child, such amount as such child has paid in premiums?"

"7. If the answer to question No. 6 is in the affirmative, can the department, as a condition to making such allowance for premiums paid, require the child to undertake to pay the burial expenses of the applicant or recipient?"

In the opinion given in 42 O.A.G. 234, it was pointed out that sec. 49.22 (4) (b) 3 provides categorically "that the 'cash or loan value of a life insurance policy at the date the recipient first receives old-age assistance shall be considered a liquid asset subject to the provisions of this paragraph,' which would mean that in all cases it is subject to transfer as provided in paragraphs 1 and 2, if assistance is granted." In that opinion it was said (pp. 236-237) :

"It should be pointed out, however, that sec. 49.22 (4) applies to a life insurance policy only when the cash or loan value is the property of the applicant for assistance. It is conceivable that another person might be the owner of a policy of insurance on the life of an applicant. As examples, a third person with an insurable interest might have taken insurance on the life of the applicant for the benefit of the former; or the insured might have assigned his policy in payment of a bona fide debt."

Your request for an opinion in this case specifically excludes the examples set out in the above excerpt. While there may be other factual situations under which some person other than the insured might be the owner of the policy of life insurance, such a result is not established by the mere fact that a third person may have paid, or advanced money for payment of, premiums. Money advanced to another person for payment of premiums on a life insurance policy issued to the latter may, for example, have been regarded as a gratuity or gift. In such case the policy of insurance may

be the property of the donee of the money as fully as would a suit of clothes he had purchased with the gift.

The effect of the advancement of money for payment of premiums upon the ownership of a particular insurance policy is a question of fact determinable upon the specific circumstances of each case, including the provisions of the contract of insurance itself. The mere fact that money for payment of premiums may have been supplied by a person other than the assured, i.e., the beneficiary, does not itself effect a transfer of the ownership of the policy in the absence of a showing that the policy was issued or transferred to the person supplying such money, or of some other circumstance which might bring about the same result.

It would seem that if a policy of insurance has been issued to an applicant for old-age assistance, ownership of the policy may be in the first instance presumed to be in the assured; and the burden lies upon the person asserting the contrary to establish his assertions. In general it may be assumed that a person who would have no status to demand the cash surrender value of a life insurance policy from the insurance company, or to pledge the policy as security for a loan, is not the owner of the policy for the purposes of sec. 49.22 (2) (c) 3 of the statutes as created by ch. 667, Laws 1953.

Our court has held that where the right to change a beneficiary under a life insurance policy is reserved in the contract, the insured may assign the policy without the consent of the beneficiary. See, for example: *Oldenburg v. Central Life Assur. Society*, (1943) 243 Wis. 8, 9 N.W. 2d 133; *Beck v. First Nat. Bank of Madison*, (1941) 238 Wis. 346, 298 N.W. 161; and *Meggett v. Northwestern Mut. L. Ins. Co.*, (1909) 138 Wis. 636, 120 N.W. 392.

1. The answer to your first question is in the negative, at least unless the proceeds exceed \$500. Your first question above refers to the situation in which a recipient cashes "his own" life insurance policy. If the policy is his own, sec. 49.22 (2) (c) 3 categorically requires the cash or loan value to be treated as a liquid asset in exactly the same manner as any other cash which he may have in the bank or elsewhere. It is, accordingly, subject to the requirement that the first \$300 must be transferred to the county agency and

the amount remaining not to exceed \$200 may be retained by the recipient for emergency use. It seems no more likely that the legislature intended the administrative agency to assume the burden of tracing the source of every premium payment than that it intended that agency to examine the source of every deposit made in a bank account.

2. Since the answer to question 1 indicates that reimbursement is not permissible, the answer to the second question is unnecessary.

3. Sec. 49.22 (2) (c) 3 provides only that the "cash or loan value of a life insurance policy" shall be considered a liquid asset; and there is express provision that the county's interest upon assignment shall be limited "to the extent of the amount of old-age assistance granted" to the insured during his lifetime. Where a recipient of old-age assistance dies, the proceeds of the policy should be used as provided in sec. 49.22 (2) (c) 3, for funeral expenses and to reimburse the county in full for old-age assistance granted during the life of the insured. The remaining proceeds presumably are to be paid to the parties who would be entitled to them in the absence of the assignment.

4. If the contract under which the child has paid the premiums renders him a creditor in good faith, I do not believe it was the intent of sec. 49.22 to preclude assignment of the policy in payment of the debt. Sec. 49.22 (1) (e) indicates that a person is not to be deemed eligible for old-age assistance if he has transferred property to avoid the provisions of ch. 49, and indicates that any transfer of property made within 2 years prior to application for old-age assistance "without an adequate and full consideration in money or money's worth shall, unless shown to the contrary, be presumed to have been made in contemplation of such assistance, or to avoid the provisions of ch. 49." An assignment of an insurance policy by an applicant for old-age assistance within 2 years prior to the application would place upon him the burden of showing that he received full value for the assignment, to the same extent as would be necessary if the transfer were of real estate or a bank account.

5. If the child is entitled to assignment of a policy in payment of a *bona fide* debt, and the policy is actually as-

signed for that purpose, it is no longer subject to the provisions of sec. 49.22 and the department would have no authority to impose conditions.

6. The department could not credit a child with premiums paid by him on a life insurance policy, except under such circumstances as would entitle the child to recover the value of such premiums as a creditor.

7. In cases in which the child is entitled to recover the premiums paid, the department has no authority to impose conditions on such recovery. If he is not entitled as a creditor to recover for the premiums paid, the department has no authority to authorize such payment.

Doubtless the above discussion, and the answers to specific questions, will furnish only nebulous guidance for administration. In view of the innumerable factual possibilities comprehended in the scope of the questions, however, it is impossible to give categorical affirmative or negative answers which would fit all cases. Generally speaking, it might be more helpful if we suggest that the best rule for an administrator to follow (since he cannot be expected to act as a judicial tribunal) is to assume that where a policy of insurance on its face is issued to an applicant for old-age assistance, the cash or loan value is the property of the insured himself unless there is provision in the policy to the contrary. If a beneficiary or other person seeks to establish ownership of part or all of the cash or loan value the burden is on him to take such steps as would entitle him, without consent of the insured, to claim and receive the cash surrender value from the insurer. Of course, under sec. 52.01, Stats., a child is always under an obligation to support according to his ability. It would seem reasonable that a child who is able to contribute insurance premiums is able to that extent to contribute to the support of his parent.

BL

Words and Phrases—Transient Merchant—A person who rents a building by the month and conducts a sale there only one night a month, having only a small stock of merchandise there the balance of the month, and carrying on the same type of sale in a different place each night, is a transient merchant as defined in sec. 129.05, Stats.

September 21, 1954.

BOYD A. CLARK,
District Attorney,
Waushara County.

As the basis for the question hereinafter posed, you state the following facts: A merchandising organization rents a building by the month. Throughout the month they keep a small amount of merchandise there. They hold a sale one night a month. On the night of the sale truck loads of merchandise are delivered to the building and offered for sale. Each customer receives a numbered card upon entering the premises. The person conducting the sale then sets a price on an item and offers to sell it at that price to any person who will hold up his card. Clerks take down the numbers of such cards and upon completion of the sale, settlement is made for all items purchased. The individuals conducting the sale do not reside in the locality and the sales are conducted in different localities each night. They will not have an inventory of merchandise on the premises on May 1 when the assessment of personal property is made. You enclose certain advertising materials which refer to this sale as a "liquidation sale" and state that there are "free valuable door prizes."

You ask whether an organization, operating as above described, is a transient merchant as defined in sec. 129.05 (1), Stats.

Sec. 129.05 (1) reads in part:

"A transient merchant is one who engages in the sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. * * *"

The question whether a certain individual is a transient merchant has been the subject of much litigation and many opinions of this office. In 14 O.A.G. 572, the attorney general said:

“* * * It is engaging temporarily in the sale of merchandise at any place without intending to become, and without becoming, a permanent merchant of the place, which stamps one as a transient merchant. * * *”

The term “transient merchant” does not have reference to the residence of the individual but to the character of the business carried on by him. *Ottumwa v. Zekind*, 95 Ia. 622, 64 N.W. 646, 29 L.R.A. 734. The fact that a business is newly established, or has been carried on but a short time, or that the proprietor has but recently come to the city or town, or is a stranger whose purpose and intention are unknown, affords neither reason nor justification for holding him to be a transient merchant. Whether a merchant is to be classed as a transient merchant depends entirely upon the intention with which his business is established and carried on. *State v. Cater*, (1918) 184 Iowa 667, 169 N.W. 43.

Where a merchant set up a store for a month or so during the holiday season, closing up and quitting business after the holiday season, this office expressed the opinion that he was a transient merchant. 14 O.A.G. 572. Where space is rented temporarily and the merchant has no intention of doing business from this locality permanently, he is a transient merchant. 19 O.A.G. 273. Sale of goods from a temporary stand makes the seller a transient merchant. 1912 O.A.G. 719. Where goods are sold from a truck at a particular time and place each working day, the truck is a temporary place of business and the proprietor is a transient merchant. 22 O.A.G. 714.

In 22 O.A.G. 454, at 455, 456, these principles were stated as valid tests for determining whether a merchant was transient or permanent:

“In the majority of cases a transient merchant is one who moves his merchandise from place to place, selling from a definite place of business for a short period of time.

“* * *

“The transient merchant statute was directed against those individuals who temporarily locate in a municipality, carry on their business, make a profit and then remove from that municipality without paying any taxes or without contributing in any manner to the upkeep of governmental agencies.”

In the light of the foregoing principles, it is my opinion that the merchant in question is a transient merchant subject to the license requirements of sec. 129.05, Stats. His operations are clearly temporary as to any one place. This operation is not characteristic of the familiar operation of a permanent merchant.

Furthermore, the advertising of this sale refers to it as a “liquidation sale.” If this is a true liquidation sale, that only emphasizes the temporary character of the operation. A merchant cannot rent a building by the month and claim to be operating on a permanent basis so as to be exempt from the transient merchant law if all he is doing is liquidating a business. Liquidation means a winding up of a business rather than a continuous operation. On the other hand, if it is not a true liquidation sale, the advertiser may be violating sec. 100.18 (1), Stats., relating to untrue, deceptive or misleading advertising.

The only support for his claim that he is a permanent merchant is that he rents the building by the month. But this is far outweighed by the temporary nature of the conduct of his business. It is the character of the business which determines whether he is a transient merchant. *Ottumwa v. Zekind, supra.*

The giving of “free valuable door prizes” probably constitutes a lottery under sec. 348.01, Stats., and the specific facts should be examined in the light of 27 O.A.G. 225, 38 O.A.G. 157. You should also consider whether the method of conducting this sale constitutes an auction, requiring a license under sec. 130.065, Stats.

SGH

Apportionment—County Supervisor—Vacancy in Redistricted Ward—As a general rule reapportionment laws are prospective in operation only and are intended to affect only full terms commencing after the date of the reapportionment law, and in the case of the death of a supervisor from Milwaukee county the vacancy is to be filled under sec. 17.21 (5), Stats., from the assembly district as it existed when the deceased supervisor was elected.

September 22, 1954.

OLIVER L. O'BOYLE,
Corporation Counsel,
Milwaukee County.

We are asked to render an opinion on the filling of vacancies in the Milwaukee county board of supervisors caused by the death of two supervisors whose wards have been redistricted.

You have taken the position that since both supervisors were elected originally to serve full 4-year terms by residents of the old districts, both the temporary appointments presently to be made by the chairman, as well as the special elections to be held in April, 1955, for the unexpired term, should be limited to residents of the old assembly districts as they existed at the time the deceased supervisors were elected, and the boundaries of the new districts should not be considered in either the appointments or a special election for the unexpired terms.

We concur fully in your conclusions and believe this view is supported by language of this office in 39 O.A.G. 360, 363, where it was pointed out that reapportionment laws are prospective in operation only and intended to affect only full terms commencing after the date of the reapportionment law (citing authorities). In one of the cases cited, reference was made to the proposition that if the people who choose a representative are not entitled to fill the vacancy happening by his resignation, it is impossible to tell what portion of the population may most properly exercise this privilege.

Sec. 17.21 (5), Stats., relating to the filling of vacancies in the office of county supervisor of counties having a popu-

lation of at least 250,000, provides that the appointment shall be by the chairman of the county board from among the electors of the assembly district for which such vacancy occurs. Under the principles discussed above this would mean that the vacancies are to be filled from the assembly districts as they existed when the deceased supervisors were elected.

WHR

Public Assistance—Assignment of Cause of Action—One may be a “dependent person” under sec. 49.01 (4), Stats., even though he has a cause of action for damages against another, where such other denies liability.

Where one has a cause of action on which liability is denied so that it cannot be established without litigation, the cause of action is not a source of “present available” means of support and does not furnish a proper case for assignment under sec. 49.06, Stats.

Where one has a cause of action on which liability is admitted, it may be a proper subject for assignment under sec. 49.06, Stats., if it might be converted into “present available” means of support and if doing so would involve “substantial loss.”

September 29, 1954.

EDWARD A. KRENZKE,
District Attorney,
Racine County.

You ask several questions relative to the application of sec. 49.06, Stats., which reads:

“No person shall be denied relief on the ground that he has an equity in the home in which he lives or a cash or loan value not in excess of \$300 in a policy of insurance. No applicant for relief shall be required to assign such equity or insurance policy as a condition for receiving relief. Where persons are not in fact dependent, as defined by this chapter, but who, if they converted their limited holdings, real or personal, would, by reason of a fallen market or by reason

of economic or other conditions, be required to suffer a substantial loss, then and in that event such persons shall be permitted, by proper assignments to the county or municipality, to render themselves qualified to receive relief. The county or municipal agency may sell, lease or transfer the property, or defend and prosecute all actions concerning it, and pay all just claims against it, and do all other things necessary for the protection, preservation and management of the property."

In 42 O.A.G. 178, 181, the opinion of this office was given on the question when assignment of a cause of action might be required as a condition of granting relief, and it was said:

"Under sec. 49.06, it is my opinion that the county department of public welfare has authority to request an assignment of a cause of action, prior to the granting of relief (whether the cause be for medical expenses or for pain, suffering, disability or other damages), only if such cause of action is a means by which its owner might obtain the wherewithal to meet his medical and surgical expenses. In such case assignment might be requested prior to the granting of relief, in the circumstances described in sec. 49.06."

Your questions deal with the following fact situation: A, a pedestrian, who is a single person without relatives, is injured by B's operation of a motor vehicle. At the outset B denies liability for A's injury. The injuries incurred by A as a result of the accident cause A to become hospitalized, and A is incapacitated for a period of one year. A has no income during this period.

Your first question is: Is A a dependent person within the meaning of sec. 49.01 (4), Stats., if B denies liability?

I agree with your conclusion that if A has no property or source of income or credit other than his claim against B, he is a dependent person within the definition of sec. 49.01 (4). As you have pointed out, sec. 49.01 (4) defines a dependent person as one without "present available" means of supplying needed services. A contested claim which can be established only through litigation is not, at least in the absence of extraordinary circumstances, a means by which "present available" property or credit can be secured.

Your second question is: Does the county have a right under sec. 49.06, Stats., to require that A give the county

an assignment of the cause of action inuring to him as a prerequisite to granting relief if B denies liability?

I also agree with your conclusion that this question should be answered in the negative, although any collection which A might later effect on his claim would, as you have pointed out, be subject to reimbursement of the county under sec. 49.08, Stats.

This follows from the fact that assignments are authorized under sec. 49.06 only where "persons are not in fact dependent," but would suffer a substantial loss if they converted their "limited holdings" into "present available" means of support. Since my opinion given in answer to your first question is that A is a dependent person, the circumstances do not fall within the quoted provision of the authorization.

On the basis of practical considerations, it seems improbable that the legislature intended that the administration of relief should include the litigation of contested personal injury claims.

Your third question is: If B admits liability, does the county have a right to insist on an assignment of the cause of action before granting relief?

If, in order to obtain "present available" means to cover hospital and medical treatment, it would be necessary for A to settle or compromise the claim for substantially less than its potential value, I agree there would be a proper case for the county to take an assignment so as to permit A to render himself "qualified to receive relief."

It is conceivable, however, that on the basis of B's admission of liability, credit would be extended for the services needed by A. In such a case there would be no occasion for an assignment because there would be no occasion for relief.

The questions whether a cause of action does constitute a source of "present available" means of support, and whether converting it would involve a "substantial loss," ordinarily involve a factual determination on the basis of specific circumstances. Such a determination is, in the first instance, the function of the administrative authorities. An opinion from this office can supply only hypothetical guidance.

BL

Railroads—Train Crews—Sec. 192.25 (4a), Stats., does not apply to switching of boxcars by employes of industrial plant using rubber-tired tractors as motive power on side-tracks located on the employer's premises and crossing a public street, since such employer is not a "railroad company" and rubber-tired tractor is not a vehicle covered by the statute.

October 15, 1954.

PUBLIC SERVICE COMMISSION.

You have requested an opinion regarding the following situation:

The Miller Brewing Company has three railroad tracks on its premises which cross State Street in the city of Milwaukee. For the purpose of moving boxcars on those tracks rubber-tired tractors are used, which are operated by employes of the brewing company, and another employe on the boxcar operates the hand brake. In addition another employe acts as a watchman when the cars are crossing State Street, and a fourth man on the ground sometimes gives signals to the tractor operator.

You inquire whether this operation violates sec. 192.25 (4a), Stats., which provides as follows:

"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."

The foregoing statute is penal in nature and must be strictly construed and not extended by implication. *State v. Chicago & N. W. R. Co.*, (1931) 205 Wis. 252, 254, 237 N.W. 132.

However, without reference to the foregoing rule of construction, it is apparent that the operation does not violate the statute for the following reasons:

First, the statute applies only to railroad companies, and the Miller Brewing Company is not such a company. Although the term "railroad" is defined in sec. 195.02 (1), for purposes of ch. 195, Stats., as embracing "all corporations, companies * * * that own, operate, manage or control any railroad or part of a railroad as a common carrier in this state, or cars, or other equipment used thereon, * * * or sidetracks, used in connection therewith, whether owned by such railroad or otherwise," that definition does not apply to ch. 192, Stats., where the "full train crew" law appears. Hence, a corporation which is not engaged in the operation of a railroad is not a "railroad company" within the meaning of sec. 192.25 (4a), even though it owns and controls sidetracks and controls railroad equipment thereon. Moreover, the statute requires the train crew to be selected from seniority lists of employes on the division of the railroad on which the crew is to be worked, which is clearly inapplicable to employes of the industrial firm who move or switch cars only on the premises of such firm and not on the tracks of the railroad itself.

Secondly, the statute applies only to self-propelled vehicles used on the tracks of the railroad company. The only self-propelled vehicle involved in this situation is a rubber-tired tractor which is not operated on the tracks and is not similar to the vehicles specifically named in the statute, to wit: "any locomotive, locomotive crane, pile driver, steam shovel, cut widener, gas-electric motor car, or gas-electric switch engine."

I am therefore of the opinion that sec. 192.25 (4a) does not apply to the operation of the Miller Brewing Company, described above.

WAP

Criminal Law—Lotteries—Radio give-away program called "Number Pleeze," described in the opinion, although it contains the elements of prize and chance, is not a lottery because the element of consideration is absent, in view of sec. 348.01 (2), Stats., but listeners may not be required to register at a sponsor's store to be eligible to participate.

October 18, 1954.

RICHARD W. BARDWELL,
District Attorney,
Dane County.

You have requested an opinion as to the legality of a radio give-away program entitled "Number Pleeze." The program operates as follows: The announcer states that the game will commence with a given number, for example 100. He then asks a question as follows: "Who discovered America? If the answer is Columbus, add 5. If the answer is George Washington, subtract 5." After filling in with some recorded music, another similar question will be asked with instructions to add or subtract, depending on which is the correct answer. In this way the initial number will be increased or decreased several times during the program. When the initial number as thus modified agrees with the street address of a listener he may telephone the radio station, identifying himself and stating the number. If his answer is correct and he does indeed reside at such a street number he will be entitled to a prize. Only the first telephone call received with the correct number will be a winner.

A person having won a prize in the manner described above is then asked to name a number between 1 and 10. Thereafter a phonograph record is played which depicts a person counting from 1 to 10, but at a certain point instead of continuing the count the person repeats a number as though the record were broken and the needle stuck in a groove. For example: "1, 2, 3, 3, 3, etc." If the prize winner has guessed the number "3," in the foregoing example, he will receive a "jackpot" prize.

There are certain refinements to enable people in rural areas where there are no house numbers to participate in

the game. It is also suggested that from time to time the game be arranged so that the street address of the sponsor comes up as the correct answer, in which case the first person who calls the station and correctly identifies the number receives the prize and is eligible to guess the "broken record" number.

The question is whether the foregoing game violates the lottery statute, sec. 348.01, in view of the provisions of subsec. (2) which reads as follows:

"In order for a radio or television show or program to be held in violation of this section it shall be necessary to show that consideration involves either the payment of money, or requires an expenditure of substantial effort or time. Mere technical contract consideration shall not be sufficient. Listening to a radio, or listening to and watching a television show shall not be deemed consideration given or received."

The elements of a lottery are prize, chance, and consideration. The element of prize is clearly present and the element of chance is so obviously present as to require but little discussion.

It is chance whether the participant knows the correct answers to the questions submitted. 37 O.A.G. 126. Thus a person who erroneously thinks or guesses that George Washington discovered America would in the foregoing plan subtract 5 from the number 100 instead of adding it. Presumably no one would make that mistake, but presumably also more difficult questions would be used from time to time.

Secondly, whether or not the winning number on any particular program happens to coincide with a particular street address is a matter of chance which participants cannot know in advance.

Third, assuming that several listeners reside at the same number on different streets, the winner will be determined by which one first completes a call to the radio station, which also is largely determined by chance even though both listeners commence to dial, or place their calls through a manual switch board, at the same instant.

Fourth, the "broken record" feature is determined by pure lucky guessing and is clearly chance.

However, as described above, the game does not involve any element of consideration except listening to the radio program, which the statute excludes. The making of a telephone call is not a "substantial" expenditure of effort and time.

However, there is one recommended variation which would introduce the element of consideration into the game and thus cause it to be in violation of the lottery statute. The brochure describing the program contains the following statement, after suggesting that rural listeners be called on the telephone from time to time in order to give them a chance to participate: "We would suggest that you ask your rural audience to send in a post card or register at a sponsor's store if they would like to be called. If the registration method is used, *this will encourage store traffic at the sponsor's place of business.*" This registration feature would, by encouraging store traffic, constitute consideration sufficient to make the game a lottery. *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 294 N.W. 491; 40 O.A.G. 284. WAP

Funeral Directors—Death Certificate—Removal of Dead Body—Under sec. 69.37, Stats., in a death certificate the statement of facts relating to the disposition of the body need not be signed by a licensed Wisconsin funeral director. A dead body may be moved by persons other than licensed Wisconsin funeral directors.

October 18, 1954.

STATE BOARD OF HEALTH.

In connection with the removal of bodies from Wisconsin by out-of-state funeral directors, you have asked several questions. Since these questions overlap considerably, we will take the liberty of condensing and restating them as follows:

1. Must a death certificate be signed by a licensed Wisconsin funeral director before a burial or removal permit can be issued?

2. Must a dead body be moved only by a licensed Wisconsin funeral director?

There are a number of statutory provisions and rules of the state board of health bearing on these questions and which lead to answers in the negative.

I.

Sec. 69.35, Stats., provides for a standard death certificate, and sec. 69.37, Stats., reads:

"The statement of facts relating to the disposition of the body shall be signed by the undertaker or the funeral director or by the person acting as such undertaker or director."

Since the provision is in the alternative as to the signing of the certificate by the funeral director "or by the person acting as such undertaker or director," it is perfectly clear that the certificate need not be signed by a Wisconsin licensed funeral director. Otherwise the optional provision would have been omitted.

Sec. 69.42 (1), Stats., provides that the register of deeds, city health officer and clerk of an incorporated village are authorized to issue a burial or removal permit, and sec. 69.44 (1) provides:

"The body of any person whose death occurs in this state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, until a permit for burial or removal is issued, and no burial or removal permit shall be issued until a complete and satisfactory certificate of the death has been filed as herein provided."

In 39 O.A.G. 480 it was concluded that the transportation across the state boundary of a corpse of one whose death occurred in Wisconsin, without a burial or removal permit from the proper Wisconsin authority, constitutes a violation of lawful regulations of the state board of health. This opinion was issued in response to the following factual situations:

"1. The removal by Minnesota undertakers just across the state boundary of a body at the scene of death upon request of relatives or others without a burial or transport permit from the proper Wisconsin authority, and

“2. The removal of a body by a Wisconsin undertaker at the scene of death and removing it to a city in Minnesota just across the state boundary for embalming without a burial or transport permit from the proper Wisconsin authority.’”

However, it should be noted again that sec. 69.45 (1), Stats., places the responsibility of securing the burial permit upon either the funeral director or person acting as such. If the legislature had intended to restrict the obtaining of a permit to a licensed Wisconsin funeral director, it could easily have said so.

Sec. 69.47, Stats., provides:

“In case the interment or other disposition of the body is to be made in some registration district other than that in which death occurred, a complete copy of the certificate of death issued by the authorities where the death occurred or the certificate of removal issued when shipped by any transportation company, shall be accepted as a burial permit for the interment of the body.”

Thus there must be both a death certificate and a removal certificate or permit except as otherwise provided in sec. 69.47 but as above pointed out it is not mandatory that these be signed by a Wisconsin funeral director. Perhaps it should be noted in passing that there is another exception to the foregoing statement contained in sec. 69.445, Stats., which permits removal of a corpse from a hospital without a death certificate upon written notice to the superintendent of the hospital by a funeral director. There is no option or alternative as to the signing of this notice by any person other than a funeral director and presumably the reference to a funeral director is to one licensed in Wisconsin.

With respect to fetal deaths, sec. 69.34, Stats., relating to certificates, provides in subsec. (2) that:

“The funeral director *or person selected by one of the parents* to assume responsibility for disposition of the remains shall have the items pertaining to the causes and conditions of the fetal death filled in and signed by the physician or other person attending the birth or, if no person attended, by the mother, and shall be responsible for filing the certificate with the nearest city health officer before obtaining a burial permit from him.”

The italicized language again makes it clear that the certificate of fetal death may be prepared by someone other than a licensed Wisconsin funeral director.

II.

Sec. 156.04 (2), Stats., provides that no person shall engage in the business of a funeral director, or hold himself out as engaging in such business, in whole or in part, unless first licensed as a funeral director.

Sec. 156.01 (3) (a), Stats., so far as applicable here defines a funeral director as a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in, preparing, other than by embalming, for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies.

The transportation of a dead body is neither the preparation of the body for burial or disposal nor the directing and supervision of the burial or disposal of a dead human body.

Sec. 69.47, Stats., quoted above, and which relates to burial elsewhere than in the registration district where the death occurred is silent as to who may move the body, but the fact that the body may be shipped by any transportation company negatives the idea that only a licensed Wisconsin funeral director may move it. Further support for this conclusion is found in Rule Emb. 2.01 of the state board of health, 1950 Red Book, p. 175, reading as follows:

“A burial-transit permit issued by any local registrar shall be required for each dead body *transported by common carrier*. Said burial-transit permit shall be in the form prescribed by the state board of health and shall agree, in the main, with the burial-transit permit form recommended by the state and provincial health officers and the association of state registration executives.” (Emphasis supplied.)

It should also be noted that Rule Emb. 1.28 on the same page provides:

“The funeral director *or other person in charge of removing a body* from a hospital or other institution or from any other place where death occurs shall file the death certifi-

cate with any local registrar, any deputy registrar or a subregistrar but in no case shall the remains be removed from the registration district in which death occurred until a burial or removal permit has been obtained." (Emphasis supplied.)

Rule H. 17.01 of the state board of health (Rule Emb. 1.15, 1950 Red Book, p. 174) reads:

"H 17.01 Post-mortem examinations. In all cases where a post-mortem examination has been ordered or is approved by the next of kin it shall be the duty of the funeral director or other person authorized to remove the body, to delay removal of the body for a reasonable length of time until the post-mortem has been completed." (Emphasis supplied.)

These rules again emphasize the fact that the person removing the body may be a person other than a licensed Wisconsin funeral director.

Rule Emb. 2.03, p. 176, provides:

"Any body to be shipped by common carrier shall be embalmed if its condition permits. If embalming is not possible, or if the body is in a state of decomposition, it shall be shipped only after enclosure in a strong, tightly sealed outer case."

This would require the services of a licensed Wisconsin embalmer, and it perhaps should be made clear in closing that nothing said above is intended in any way to imply that an out-of-state funeral director or embalmer not licensed in Wisconsin can perform services in Wisconsin for which a Wisconsin funeral director's or embalmer's license would be required under ch. 156, Stats., relating to funeral directors and embalmers.

It should perhaps also be noted that the foregoing conclusions are in accord with the long-standing interpretation of the statutes involved by the state board of health. Also it must be remembered that violations of ch. 156 are penal in nature subjecting the violator to fine or imprisonment under sec. 156.15. If there is a fair doubt as to whether an act is embraced in the prohibition of a penal statute, that doubt is to be resolved in favor of the defendant. *State ex rel. Dineen v. Larson*, 231 Wis. 207, 284 N.W. 21, 286 N.W. 41.

Since the provisions of ch. 156 specifically permit the signing of death certificates by persons other than licensed funeral directors, and since the statute defining a funeral director describes his function as that of preparing bodies for burial or disposal (other than by embalming) and of directing and supervising the burial or disposal of bodies but makes no mention of the moving of bodies, we conclude that the part of the death certificate relating to disposition of the body may be signed by a person other than a licensed Wisconsin funeral director and that the moving of a body is not restricted to such a licensee.

WHR

*Railroads—Train Crews—*Movement of railroad cars by means of a locomotive crane in repair yards of railroad constitutes "switching cars" within the meaning of sec. 192.25 (4a), Stats., and hence requires a full train crew as defined in that statute. This does not deny railroads the equal protection of the laws even though like movement of cars in industrial plants is not covered by the statute.

October 20, 1954.

PUBLIC SERVICE COMMISSION.

You have requested an opinion regarding the following situation:

The Chicago, St. Paul, Minneapolis and Omaha Railway Company conducts an extensive car repair operation at its yards located in North Hudson, Wisconsin. As a part of this operation a locomotive crane is occasionally used for moving railroad cars on the same track or from one track to another through switches within the confines of such repair yards. The crane is mainly used for loading and unloading material on cars. The crane is operated by an experienced crane operator accompanied by a helper, both of whom have been and are employed only at the car shops. Locomotive

engineers on the enginemen's seniority roster are not qualified to operate the machine. The cab of the crane will accommodate the operator only.

Sec. 192.25 (4a), Stats., provides as follows:

"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."

You inquire (1) whether the above described operation constitutes "switching cars" within the meaning of the statute, and (2) whether the operation violates the statute.

In regard to the first question, a statement submitted on behalf of the railroad company contends as follows:

"The crane operation here involved does not constitute 'switching cars' as that phrase is commonly understood in railroading. Switching of cars is generally construed to be the common carrier switch engine operation in a switching yard for make-up and break-up of revenue trains and the handling of cars to various industries, team tracks, and freight house tracks, and includes classifying of cars in the switch yard, handling of cars to team, industry, or house tracks for the accommodation of patrons, the uncoupling, riding, and setting of brakes on cars by switchmen, etc. However, movement of cars by crane as above described, does not involve any such ordinary switchmen's duties.

"* * * The crane operation here involved is not a switching operation in railroad yards, or on main lines. It will be noted from plat handed to Mr. Oakey, that the railroad yards are located immediately south of the bridge over the Lake Mallalieu outlet to St. Croix River. The main lines and all industry, team, and house tracks, also are located south of that point. The only tracks located north of the said bridge are the tracks serving the car shops and store department. The crane never operates south of a point immediately north of the said bridge, and consequently it never operates on the main lines or in the above described railroad yards."

Reference is made by the company to the opinion in 23 O.A.G. 758, but it does not appear that the attorney general was there concerned with the problem of defining "switching."

Conceding, as held in *State v. Chicago & N. W. R. Co.*, (1931) 205 Wis. 252, 254, 237 N.W. 132, that "full train crew" laws are penal and in derogation of the common law and therefore subject to strict construction, I am nevertheless satisfied that the phrase "switching cars" cannot be given the limited meaning claimed for it by the railroad.

Judicial construction of the word "switching" and phrases in which it appears has generally occurred in cases involving revenue operations connected with patron service, but there is no suggestion that the meaning is restricted to such operations. Nor is it limited to operations in a switching yard; movement of cars exclusively within the plant or premises of an industrial patron is a recognized form of "switching." See *Detroit Terminal R. Co. v. Budd Wheel Co.*, (1945) 311 Mich. 638, 19 N.W. 2d 126.

Sec. 370.01 (1), Stats., provides as follows:

"370.01 In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

"(1) GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

Standard dictionaries define the verb "switch," as used in railroading, as follows:

Funk & Wagnall's New Standard Dictionary (1941) p. 2441: "To shift from one track to another, as a car or train; shunt; * * *"

Webster's Unabridged New International Dictionary (2d ed. 1935) p. 2552: "To turn from one track to another; to transfer by a switch;—generally with *off*, *from*, etc.; as, to *switch off* a train; also to move cars to different positions on the same track within terminal areas. The usual English term is *shunt*."

American College Dictionary (1947) p. 1225: "a. to shift or transfer (a train, car, etc.) esp. in a railway yard or terminal. b. to drop or add (cars) or to make up (a train)."

I am therefore of the opinion that the moving of cars on the same track or from one track to another within the confines of the railroad's repair yards constitutes "switching cars" within the meaning of the statute.

Second, does the operation violate the statute? In view of the answer to the first question, the second must be answered, "Yes." The locomotive crane is expressly named in the statute as one of the vehicles covered, the tracks are those of the railroad, and the switching is done without a full crew. All the elements of the offense are present.

A case very similar on the facts is *New York Cent. R. Co. v. Public Utilities Commission*, (1929) 121 Ohio St. 383, 169 N.E. 299. The Ohio statute required railroad companies to use a full crew on any engine or locomotive used to switch cars. The court held that a locomotive crane used to move cars in a railroad "stores yard" was an engine or locomotive used to switch cars within the statute, even though the term "locomotive crane" was not specifically mentioned in the statute as it is in sec. 192.25 (4a).

It is claimed by the railroad that such a construction would render the statute unconstitutional because a private industrial company may shunt cars about within its own premises and on its own tracks without complying with the full-crew requirements, and the operation involved here is said to be analogous to such intra-plant movement of cars.

No serious constitutional question is presented, in my opinion. All railroads are treated alike and all industrial plants are likewise treated alike by the law. Plainly, railroad companies are sufficiently different from industrial corporations in this respect to warrant classification by the legislature without violating the equal protection clauses of the state and federal constitutions. A statute is not invalid because it does not cover the entire field of possible abuses. *State v. Seraphine*, (1954) 266 Wis. 118, 123, 62 N.W. 2d 403; *Madison Metropolitan Sewerage Dist. v. Committee*, (1951) 260 Wis. 229, 255, 50 N.W. 2d 424; *Patson*

v. Pennsylvania, (1914) 232 U. S. 138, 144. There is no constitutional requirement that regulation must reach every class to which it might be applied. *Sproles v. Binford*, (1932) 286 U. S. 374, 395.

WAP

Taxation—Tax Lien—Foreclosure by Action in Rem—
Payment may be made after commencement of in rem proceedings under sec. 75.521, Stats., of less than the amount necessary to redeem all of the tax liens listed therein against a parcel of land. Unless the amount paid before the expiration of the redemption period is sufficient to pay all of the listed tax liens in full, judgment may be entered based on any listed tax lien remaining unredeemed, and the county is under no obligation to refund the payment made.

October 28, 1954.

JOHN G. BUCHEN,
District Attorney,
Sheboygan County.

Proceedings in rem under sec. 75.521, Stats., were instituted by your county on several parcels of land which had been sold to it for nonpayment of taxes for 3 or more consecutive years. After notice, as provided in sec. 75.521 (6), was duly published, the owner of some of the included land paid to the county treasurer the amount necessary to redeem the tax certificates on the first 2 years' tax delinquencies on his land, but left unpaid listed tax liens thereon for subsequent years.

You ask whether partial payment can be so made after the commencement of such proceedings, and if so, does that preclude the entry of judgment in the proceedings on such land? You further inquire whether, if such payment does not prevent the entry of such judgment, the county is obligated to refund the amount so paid.

The provisions in sec. 75.521 (5) accord one having an interest in a parcel included in such proceedings, the right

to "redeem such parcel by paying all of the sums mentioned in such list of tax liens together with interest thereon * * * before the expiration of the redemption period mentioned in the notice published pursuant to subsection (6)." The notice provided by subsec. (6) contains a specific date, which must be at least 8 weeks from the first publication thereof, as the last date for redemption. By the definition in sec. 75.521 (1) (b), the tax liens that are listed in the proceedings are only those which are eligible for tax deed.

A general right to redeem land from tax sale certificates is accorded in sec. 75.01 (1), Stats., "by paying * * * the amount of the taxes for which such land * * * was sold * * * with interest * * * and all other charges authorized by law," if paid prior to the recording of a tax deed taken thereon. It is provided in sec. 75.01 (4), Stats., that redemption may be made in partial payments of not less than \$10 and in any multiple of \$5.

Whether such partial payment provisions of sec. 75.01 (4) are applicable to in rem proceedings under sec. 75.521, may be debatable. If not applicable, then there would be the question of whether partial payment of any particular tax lien listed in the proceedings is authorized. In the absence of provisions of the import of those in sec. 75.01 (4), we would be inclined as an original proposition to the view that one desiring to redeem can make payment of whatever amounts he wishes and thus do so in instalments. Presumably, the purpose of provisions such as in subsec. (4) is to relieve the county treasurers from the necessary accounting detail and computations of interest attendant upon payments in other than the multiples specified.

However, the situation you recite is not one involving partial payment of a tax lien. The payment made is the full amount of the two designated tax liens. This situation is comparable to where the owner and holder of several tax certificates upon the same tract of land which are eligible for tax deed, includes all of them in his application for tax deed and the accompanying required notice. Sec. 75.12 (2), Stats., provides therefor. Clearly, in such case, if the owner of the land, or one having an interest therein, pays only an amount sufficient to redeem some, but not all, of the tax

certificates so included, that would not preclude the taking of a tax deed pursuant to such application and notice on the tax certificate or certificates not so redeemed. Certainly the owner of the land, or the person having an interest therein, could make payment sufficient to redeem only a part of the certificates included, if for some reason he desired so to do, and the county treasurer would be required to accept such payment.

It is possible that such owner of the land, or the person having an interest therein, might have collateral reasons, such as agreements or contractual liabilities with other persons, that would impel him to make payments sufficient to redeem only part of the certificates. The existence of any such reasons might equally be applicable in the case of in rem proceedings under sec. 75.521, Stats.

There is nothing in sec. 75.521 that specifically says that the amount required to redeem the lands therefrom must be paid all at once. All that is stated is that, in order to redeem, payment must be made of the amount sufficient to discharge all of the tax liens listed. Before we would conclude that the owner of the land, or a person having an interest therein, could not pay an amount sufficient to discharge some but not all of the listed tax liens, it would be necessary to find in the statutes something of a positive nature to that effect.

Furthermore, the owner of a parcel of land included in an in rem proceeding under sec. 75.521 might wish to pay the county treasurer an amount sufficient to redeem the land from only some of the tax liens listed and to contest the validity of the other tax liens listed against the property by serving and filing an answer to that effect. There is nothing in the provisions of sec. 75.521 which would preclude him from so proceeding. Yet, if the language in subsec. (5) "by paying all of the sums mentioned in such list of tax liens together with interest thereon," were interpreted or applied as authorizing only payment of all the sums due on all of the tax liens listed, that would preclude the owner from paying sufficient to redeem those listed tax liens which he does not contest and litigating the remaining tax liens in that proceeding.

It is therefore our conclusion that if the owner of, or a person interested in, land included in an in rem proceeding under sec. 75.521 wishes to do so, he may make payment to the county treasurer of the sum necessary to redeem the parcel from some but not all of the tax liens listed therein against such lands, and that the county treasurer may not refuse to receive payment of less than the amount necessary to effect a complete redemption from all the tax liens listed in the proceedings against the land. It may be that in doing so, a person making the payment has an erroneous view as to what is accomplished thereby and what he thinks will be the result thereof is not correct, but the county treasurer is not authorized to refuse to accept the same. Obviously, as in the case where several tax certificates are included in the same application and notice for issuance of tax deed, if the amount paid does not constitute a sum sufficient to pay all of the tax liens listed against that parcel, together with interest thereon, there is no redemption from the in rem proceedings and it would not preclude the entry of judgment therein based upon any of the listed tax liens that still remain unpaid at the end of the specified period of redemption.

The above analysis answers the inquiry as to whether the county is legally obligated to make refund of the amount paid in the situation you mentioned, because the owner or person having an interest in the land may pay the amount of some of the tax liens listed against the land. When he pays an amount that is less than the total sum required to redeem all of the listed tax liens he makes such payment at the peril that it will redound to his benefit. Consequently, the county treasurer has legally received the amount so paid and the county is under no obligation to refund it, if it should turn out that it does not accomplish the purpose which the owner or interested person making the payment thought would be effected thereby.

HHP

Circuit Court—County Court—Clerk—Door County—
Under ch. 237, Laws 1945, relating to additional jurisdiction of the county court of Door county, the clerk of the circuit court who is ex officio clerk of the circuit court branch of the county court may be assigned the clerical duties incident to the administration of the justice court branch of said court.

October 29, 1954.

HERBERT W. JOHNSON,
District Attorney,
Door County.

You have inquired whether the county board can legally assign to the clerk of the circuit court the additional duties of the clerk of the justice court branch of the county court of Door county, established by ch. 237, Laws 1945.

There is very little in sec. 59.39, Stats., relating to the duties of clerk of circuit court which throws any light on the answer, although there is a catch-all provision at the end of the section, subsec. (13), which provides that he is to perform such other duties as are required by law.

Sec. 5, sub. (1) of ch. 237, Laws 1945, provides that the county court of Door county shall have concurrent jurisdiction with the circuit court in civil actions and special proceedings except where the demand for relief exceeds \$25,000. Sub. (4) of sec. 5 sets up two branches, a circuit court branch and a justice court branch. Sec. 9 provides that the circuit court branch shall be a court of record with a clerk.

Sec. 23, sub. (1) provides:

“Section 23. CLERK; FEES; SALARY. (1) The clerk of the circuit court shall be ex officio the clerk of said circuit court branch of said county court and shall have the care and custody of all books and papers belonging or pertaining to said court. Said clerk shall perform all clerical duties necessary to carry into effect the provisions of this act and shall keep all necessary records of proceedings and judgments in the same manner provided for in circuit court or as otherwise in this act provided.”

The first part of the first sentence of the above subsection is open to the construction that by having specifically

provided that the clerk of the circuit court shall be ex officio clerk of the circuit court branch of the county court he is impliedly excluded from being ex officio clerk of the justice court branch, under the doctrine that the expression of the one results in the implied exclusion of the other, *expressio unius est exclusio alterius*.

Some doubt, however, is cast upon the application of the foregoing rule of construction in this instance since the second part of the first sentence of sub. (1) quoted above specifically provides that the circuit court clerk in acting as ex officio clerk of the circuit court branch of said county court "shall have the care and custody of all books and papers belonging or pertaining to *said court*." This might mean either the books and papers of the circuit court branch or those of the court including both branches.

Moreover, the second sentence creates further ambiguity in providing that said clerk shall perform all clerical duties necessary to carry into effect the provisions of the act. The ambiguity is emphasized by the fact that sub. (3) of sec. 23 provides in part: "The clerk of said court, for performing the duties required by this act, shall receive such salary, in addition to his salary as clerk of the circuit court, as is fixed from time to time by the county board of Door County."

The picture is further complicated by the fact that sec. 26 provides that the judge of said county court may appoint one or more deputy clerks, which appointments shall be revocable at his pleasure.

Normally a justice court has no clerk, the clerical work being handled by the justice himself, but that does not appear to be procedure contemplated by this act since sec. 32 provides:

"Section 32. FINES AND FEES; TO WHOM PAID. All fines, forfeitures, costs and fees collected by the clerk in every civil and criminal action or proceeding tried in the county court, justice court branch or county court, circuit court branch shall be accounted for and paid over to the county treasurer monthly, except that all fines and forfeitures recovered for municipalities shall be remitted monthly to the proper treasurers of such municipalities."

This makes it clear that it is the duty of "*the clerk*" rather than the duty of the judge or justice to account to the county treasurer for fines, forfeitures, costs, and fees collected in both branches. It is to be noted also that sec. 25 provides in part: "The *clerk* and the reporter shall be furnished with all books, stationery and other necessary equipment at the expense of the county." This would likewise imply that the books are not to be kept by the justice or judge.

Since the only *clerk* specifically provided for in the act is the clerk of the circuit court branch, and since he is the clerk of the circuit court of the county under sec. 23, sub. (1), it seems reasonable to conclude that the legislature intended that such clerical acts as are involved in carrying out the functions of the justice court branch should be performed by this individual or a deputy clerk if one should be appointed by the judge under sec. 26.

Whether the county board provides that the clerk of the circuit court shall be the clerk of the justice court branch or provides that he "shall perform all clerical duties necessary to carry into effect the provisions of the act" as to both circuit court and justice court branches is perhaps immaterial. In either event he could exercise only clerical duties so far as the justice court branch is concerned and he would not be an officer of the court as he is in his capacity as clerk of the circuit court for Door county and as clerk of the circuit court branch of the county court for Door county. Sec. 33 provides that all provisions of law relating to process, pleadings, procedure, practice, trials, and judgments applicable to justice's courts are applicable to the justice court branch. None of these provisions so far as we are aware contemplates the appointment of a justice court clerk or the discharge by such an officer of many of these functions of the court which are performed by the clerk in circuit court, e.g., taxation of costs (sec. 271.10), issuance of executions (sec. 272.05), and administration of oaths to witnesses (sec. 326.01), to mention only a few.

Sec. 25 of the act provides that all court officers shall take and subscribe the oath of office, but as above indicated the person performing the clerical duties necessary to the

functioning of the justice court branch is not an officer of that court and would not be sworn in as clerk of the justice court branch. His oath as clerk of the circuit court branch would be sufficient.

You have indicated that this opinion was requested because it is important to know whether the bond furnished by the clerk of the circuit court would cover justice court branch moneys handled by him. Assuming the correctness of the foregoing analysis, it would appear that such bond would furnish coverage inasmuch as the work performed by the circuit court clerk under the circumstances would be required of him by law within the meaning of ch. 237, Laws 1945, and sec. 59.39 (13), Stats. See also secs. 19.01 (2) and 59.13 (1) (e).

WHR

*Adoption—Nonresidents—Courts—Jurisdiction—*Under sec. 322.01, Stats., a Wisconsin court has no authority to assume jurisdiction in proceedings instituted by nonresidents to adopt children who are nonresidents of Wisconsin.

October 29, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

Our attention is directed to sec. 322.01, Stats., relating to adoption and which reads as follows, the pertinent portion being italicized:

“322.01 Any adult may petition the county court of the county of his residence for permission to adopt a person of any age; and any nonresident of the state who is related to the person to be adopted may petition the county court of the county in which such person resides for such permission; but no petition by a married person shall be granted unless the other spouse joins therein or is the natural father or mother of such person.”

You have inquired as to the application of the italicized language to the following factual situation: A family had been living in X county, Wisconsin, for many years. In

February, 1954, the father died, and the mother and children continued to live in X county until the first week in July, 1954, when she and the children went to live with relatives in Y county, Michigan. The mother was killed in an automobile accident on July 31, 1954. The children continued to live thereafter with the relatives in Michigan. The maternal grandparents who live in Y county, Michigan, wish to petition for the adoption of the children.

If a court enters an order of adoption which is beyond its jurisdiction the order does not become valid by the lapse of time but may be attacked in any kind of proceeding in which it is involved. *Will of Bresnehan*, 221 Wis. 51, 265 N. W. 93. Although adoptions are of a judicial nature, the plain jurisdictional requirements must be observed and the statutory prerequisites of jurisdiction must exist in order to authorize the court to act. *Adoption of Tschudy*, 267 Wis. 272, 65 N.W. 2d 17. See also 33 O.A.G. 57 and 40 O.A.G. 271.

Residence and legal settlement are not synonymous terms under our statutes. See 39 O.A.G. 423. Generally all words and phrases used in the statutes are to be construed according to the common and approved usage of the language, although technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. See sec. 370.01 (1), Stats.

The word "resides" found in sec. 322.01 normally is used as meaning to live in a place. It is a synonym of live, dwell, abide, sojourn, stay, or lodge. See 37 Words and Phrases 308. However, in the case of *In re Webb's Adoption*, 65 Ariz. 176, 177 P. 2d 222, it was held that the word "resides," as used in a statute providing that a person may petition the superior court of the county in which a child "resides" for leave to adopt such child, refers to legal residence or domicile. There was a similar holding in the case of *In re Adoption of -----*, 22 N. J. Misc. 181, 37 A. 2d 645. See also *Johnson v. Smith*, 94 Ind. App. 619, 180 N. E. 188; *Greene v. Willis*, 47 R. I. 375, 133 A. 651; *Cribbs v. Floyd*, 188 S. C. 443, 199 S. E. 677. Legal residence or domicile has been said to mean the place which an individual has made the chief seat of his household affairs or home in-

terests, from which, without some special mission, he has no intention of departing, from which when he has departed, he is considered to be away from home, and to which, when he has returned, he is considered to have returned home. *Wade v. Wade*, 93 Fla. 1004, 113 So. 374.

We do not feel called upon here to decide whether the word "resides" as used in that part of sec. 322.01 here under discussion should be construed broadly to mean the place where the child is personally present and now living even though it be on a temporary basis, or whether it is to be given the somewhat more restricted and technical meaning of legal residence or domicile set forth above.

Under neither concept can it be said that the children in question "reside" in Wisconsin. The father died and the mother moved to Michigan with the children to live with relatives. Now she is dead, and the children are still with the Michigan relatives. They are not physically present in the state of Wisconsin and no facts are given from which it can be concluded that either they or any of their relatives intend that they shall return to Wisconsin, either temporarily or permanently. The children are beyond the jurisdiction of the Wisconsin courts and the state department of public welfare, and there would be no way by which either the courts or the department could effectively enforce any decree or order affecting the custody or adoption of the children.

The Michigan grandparents should be advised to consult with the proper Michigan authorities as to the appropriate steps to be taken for adoption of these children in Michigan, as the state of Wisconsin has lost all jurisdiction in the matter.

WHR

Justice Court and Justice of the Peace—Fees—Under sec. 307.01, Stats., a justice of the peace in a criminal case is entitled to the fees therein provided for the services performed up to and including the transfer of the case to another justice where an affidavit of prejudice is made under sec. 301.24, Stats., and the county is liable for such fees.

November 9, 1954.

RODNEY LEE YOUNG,
District Attorney,
Rusk County.

You have inquired whether a justice of the peace who has had an affidavit of prejudice filed against him pursuant to sec. 301.24, Stats., is entitled, after the transfer of the case to another justice, to receive from the county those fees provided by sec. 307.01, Stats., which are chargeable for services rendered by him prior to the filing of the affidavit of prejudice, such as the drawing of the complaint, issuing of warrant, docketing, return of warrant, filing papers, and administering oath to complainant.

The justice insists that he is entitled to his fees for the work performed, but counsel for defendants have contended that the fees may be charged only upon entry of judgment, and since the case was sworn away from the first justice he is entitled only to a \$1 fee under sec. 307.01 for entering his return upon removal for affidavit of prejudice.

The county is liable for the necessary expenses and services, including fees of justices of the peace, incident to the administration of the criminal laws of the state. *Chafin v. Waukesha County*, 62 Wis. 463, 22 N.W. 732.

Sec. 307.01, which lists the fees of justices states: "Justices are entitled to the following fees and may tax the same as costs in all actions when applicable." We do not read the words "and may tax the same as costs in all actions when applicable" as being words of limitation which in any way diminish the right of the justice to the fees. Rather, such words constitute an additional grant of power in the form of a convenient procedure for collection of the fees. Many justice court cases never proceed to judgment and costs are

accordingly never taxed in these cases, but as we understand it and recall the practice, the justice bills the plaintiff for his fees and receives payment for these services which he has actually rendered in accordance with the fee schedule provided by sec. 307.01.

There is nothing in either sec. 307.01 or in sec. 301.24, relating to removal for prejudice, which states or implies that the justice is not to receive payment for services rendered up to and including the services incident to the removal of the cause to another justice. It is true that so far as the defendant is concerned he need pay only 75 cents to the justice under sec. 301.24 at the time he raises the point of prejudice and asks for a removal of the cause to another justice, but that is only "for making a copy of his docket and transmitting the papers." This does not mean that the justice loses the other fees to which he is "entitled" under sec. 307.01. The word "entitled" means to have a legal right to recover. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787. To use the words of the dictionary it means "to give (a person or thing) a title, right, or claim to something; furnish with grounds for laying claim." The American College Dictionary.

If any of the services listed in sec. 307.01 have been performed by the justice he is "entitled" to the fees therein provided, in the absence of any statutory language (and we find none) which purports to divest him of that right.

WHR

State Board of Health—Towns—Garbage Dumping—

Under sec. 60.72 (1), Stats., the state board of health is not required to obtain the approval of the town board before approving a site for municipal dumping, and it is not necessary for the municipality to have acquired ownership of the site prior to the amendment of sec. 60.72 (1) by ch. 146, Laws 1953.

November 9, 1954.

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

You have directed our attention to sec. 60.72 (1), Stats., which provides:

“60.72 (1) No person or municipality shall transport any garbage, rubbish or other refuse into or within any town for the purpose of dumping or otherwise disposing of the same until such person or municipality shall have first secured a permit so to do from the town board. This section shall not apply where the city or village owns its own dumping or disposal ground and confines its dumping or disposal to the use of the sanitary landfill method on such grounds; provided, that such disposal shall be conducted in a sanitary manner satisfactory to the state board of health and on a site approved by such board.”

In this connection you inform us that frequently the town board is unwilling to grant the premises required by the above provision although the site and proposed manner of disposal are satisfactory to the state board of health.

Our opinion is requested on the following questions which have been raised in the course of the state board of health's administration of the above statute:

1. Must the state board of health obtain the approval of the town board of the town in which a garbage dump is to be located prior to approving such a site?
2. Must the municipality which is requesting approval of a site for a garbage dump have owned the property on which the site is to be located prior to the time sec. 60.72 (1) was approved?

The answer to the first question is, “No.”

The state board of health is not required to obtain the approval of the town board at any time or in any event. That is entirely the responsibility of the person or municipality desiring to transport the garbage, rubbish, and refuse, and the requirement does not apply at all where the municipality owns the land and applies to the state board of health for approval of the site.

In other words, sec. 60.72 (1) sets up two entirely separate and distinct procedures for authorized dumping. In the one class of cases, permission of the town board must be obtained. If that is obtained, there is no need to apply to the state board of health for approval of the site.

The second class of cases comprise those situations where the dumping ground is owned by the municipality. As to this category, no permission from the town board is required, but the disposal must be by the sanitary landfill method in a manner satisfactory to the state board of health and it must approve the site.

In no case is it necessary to have both the permission of the town board and approval of the site by the state board of health.

The answer to the second question is also, "No."

Sec. 60.72 (1) was amended by ch. 146, Laws 1953, published May 19, 1953. Prior to the amendment it read:

"60.72 (1) No person or municipality shall transport any garbage, rubbish or other refuse into or within any town for the purpose of dumping or otherwise disposing of the same until such person or municipality shall have first secured a permit so to do from the town board. This section shall not apply where the city or village owns its own dumping or disposal ground and confines its dumping or disposal to such grounds; provided, that ownership of such grounds was acquired by the city or village prior to June 1, 1943 and provided, that such disposal shall be conducted in a sanitary manner satisfactory to the state board of health."

Thus it will be seen that the requirement as to ownership prior to June 1, 1943 was eliminated from the statute in 1953.

As it is now worded the statute is subject to the maxim, which is said to be as ancient as the law itself, that a new

law ought to be prospective, not retrospective, in its operation.

“Nova constitutio futuris formam imponere debet, non praeteritis.” 50 Am. Jur., Statutes, § 477.

Hence the only requirement as to time of ownership is that the municipality shall own the land when it starts to make use of it for dumping purposes with the state board of health's approval.

WHR

County Court—Register in Probate and Clerk—Fees—
The fee under sec. 253.29 (2) (b), Stats., for a certificate terminating a life estate is \$1, and no further fee can be lawfully collected under sec. 253.29 (2) (a), Stats.

Where the register in probate has made an overcharge under sec. 253.29 (2), Stats., which is not discovered until after he has turned the money over to the county treasurer, who in turn has sent it to the state treasurer as required by sec. 253.29 (3), Stats., the only way to obtain a refund out of the state treasury is under sec. 20.06 (2), Stats.

November 10, 1954.

GEORGE F. MILLER,
District Attorney,
Kewaunee County.

You have requested our opinion on the following two questions:

1. Are the fees provided in sec. 253.29 (2) (a), Stats., applicable to proceedings for termination of a life estate?
2. In the event the register makes an overcharge under sec. 253.29 (2) and the error is not discovered until after the register in probate has turned the money into the county treasury and the county treasurer has turned the same over to the state treasurer, what procedure is followed to make reimbursement?

We concur in your conclusion that sec. 253.29 (2) (a) is not applicable to proceedings for the termination of a life

estate and that the proper fee is \$1 under sec. 253.29 (2) (b).

Sec. 253.29 (2) (a) and (b) provides:

“(a) For filing a petition whereby any proceeding in estates of deceased persons is commenced, where the gross estate or value of the property is ten thousand dollars or less, a fee of three dollars; where the gross estate is more than ten thousand dollars and under twenty-five thousand dollars, a fee of six dollars; where the gross estate is twenty-five thousand dollars or more, a fee of twenty-five dollars. Such fees shall be paid at the time of the filing of the inventory, or other documents, setting forth the value of the estate in such proceedings. The fees fixed in this subsection shall also be paid in survivorship proceedings and in such survivorship proceedings the value shall be based on the value of the property passing to the survivor or survivors.

“(b) For a certificate terminating a life estate, one dollar.”

As you have pointed out, a proceeding to terminate a life estate is not a “proceeding in the estate of a deceased person” within the meaning of sec. 253.29 (2) (a). No estate or part thereof is transferred as in the case of a joint tenancy, and there would be no way of properly applying the schedule of fees based on value of the property as set forth in sec. 253.29 (2) (a). Moreover, that statute specifically mentions estates and survivorship proceedings but omits any mention of a certificate terminating a life estate. Under familiar principles of construction this impliedly excludes the item not mentioned. *Expressio unius est exclusio alterius*.

Even more important is the fact that sec. 253.29 (2) (b) sets up a specific charge of \$1 for a certificate of termination of a life estate. There is nothing in the legislative scheme of treatment of the subject of fees set up by the statute which would indicate any intention to single out certificates of termination of life estates for the payment of double fees, which would be the effect if both paragraphs of sec. 253.29 (2) were applied. Where a statute designed to produce revenue is susceptible of two meanings, that should be preferred which imposes the lighter burden. *State*

ex rel. Abbot v. McFetridge, 64 Wis. 130, 24 N.W. 140. See 43 O.A.G. 177, 178.

It is, therefore, clear that your first question must be answered in the negative.

Your second question relates to overcharges made in error in the collection of fees by the register in probate during the course of administering sec. 253.29, which errors are not discovered until after the money has been paid into the state treasury.

It is your suggestion that although there appears to be no express statutory provision on it, this problem be handled by having the register in probate deduct the overcharge in his next settlement with the county treasurer and the county treasurer in turn make the same deduction in his next settlement with the state treasurer, with the appropriate notations in the reports to show exactly what happened.

Sec. 253.29 (3) provides:

“(3) The register in probate and the clerk of the county court shall, on the first Monday of each month, pay into the office of the county treasurer all fees collected by him and in his hands and still unclaimed as of said day. Each county treasurer of a county under 500,000 shall make a report under oath to the state treasurer on or before the fifth day of January, April, July and October of all fees received by him under s. 253.29 (2) (a) to (f) up to the first day of each of said months and shall at the same time pay 65 per cent of such fees to the state treasurer for deposit in the general fund. Each county treasurer shall retain the balance of fees received by him under this section for the use of the county. In counties having a population of 500,000 or more all fees paid under this section shall be kept for use by the county.”

Sec. 20.06, Stats., provides in part:

“20.06 There are appropriated from the proper respective funds, from time to time, such sums as may be necessary, for refunding or paying over moneys paid into the state treasury as follows:

“* * *

“(2) Moneys paid into the state treasury in error; but no such refund shall be made except upon the written approval of the governor, secretary of state, state treasurer, and attorney general.”

The record of the hearing before the joint committee on finance with reference to the purpose of subsec. (2) contains the following statement:

"Section 14 of the bill provides for repayment from the treasury of moneys paid into it in error. It often happens *that a county treasurer or some other person pays money into the state treasury erroneously*. While it may be ever so clear that in all justice such moneys should be repaid, nevertheless under the constitution they cannot be paid until the legislature, by an act, authorizes such payment. This is the reason why this committee and the legislature is constantly bothered with a lot of small bills which provide for just such repayments. To adequately protect the interests of the public, this section provides that no refund shall be made except with the written approval of the Governor, Secretary of State and State Treasurer. By Senator Bichler: Would it not be well to also include the Attorney General, because legal points may be involved? By Draftsman: Yes, I think the suggestion is a good one and I will also include the Attorney General in this list of state officials." Cf. 29 O.A.G. 329. (Emphasis supplied.)

While we know from discussions with representatives of the municipal auditing and reporting division of the state auditor's office and the state treasurer's office that the practice you have suggested has been followed, we find no express statutory authority for it, and there is some divergence of views among members of the staff of this office as to the legality of the procedure.

As between two procedures, one of which is clearly provided by statute, and the other of which exists by implication if it exists at all, and which is debatable at best, we advise that the express statute, sec. 20.06 (2), be followed.
WHR

Public Assistance—County Administration—Child Welfare—A county board may not divide the governmental functions of administering state laws relating to child welfare between a children's board and a county department of public welfare. It must either delegate the authority to a children's board under secs. 48.29 to 48.31, Stats., or to the county department of public welfare under secs. 46.22 (5) (g) and 48.315, Stats.

November 10, 1954.

STATE DEPARTMENT OF PUBLIC WELFARE.

You inquire about a situation where a county is endeavoring to operate a program under which both a county children's board, established under sec. 48.29, Stats., and a county department of public welfare, created under sec. 46.22, Stats., have functions in connection with child welfare services.

You report that the ordinance organizing the children's board was adopted in 1945; and the resolution providing for administration of child welfare services by the county department of public welfare was enacted in 1953, to become effective January 1, 1954. In August of 1954, the county board adopted another resolution that the children's board "be continued with the powers and duties as stated in sec. 48.30 of the statutes."

You have been requested to appoint two members of the county children's board, and you ask:

"Does the State Department of Public Welfare have responsibility to appoint two members in view of the fact that

"(a) This county now has two county agencies charged with almost identical responsibilities, and

"(b) The county children's board is not carrying out the responsibilities outlined in Stats. 48.30, since they have no paid or voluntary operating staff, and since these functions are being performed by the county agency organized under Stats. 46.22?

"(c) A question has been raised whether a county board can, under the statutes, create two county agencies with identical administrative responsibilities."

It was pointed out in 43 O.A.G. 158, that the powers and duties of counties in respect to welfare matters are wholly

dependent on statute. The opinion was concerned with the authority of a county to divide between a county department of public welfare and other agencies the functions described in sec. 46.22 (5), Stats., "any or all" of which the county board may delegate to such department. It was concluded that the county might not divide between different agencies the responsibility for administration of poor relief as described in sec. 46.22 (5) (b).

The legislative intent on the subject of child welfare services, however, requires a consideration of different statutory provisions.

Sec. 59.08 (9a), Stats., includes among the special powers of the county board the authority to:

"Establish such agencies and employ such personnel as it may deem necessary for the social welfare and protection of mentally defective, dependent, neglected, delinquent and illegitimate children within the county, fix the compensation of personnel so employed, and appropriate money for such agencies and personnel; provided that the personnel authorized to be employed hereunder may include the services of a child welfare agency licensed under section 48.37. Nothing herein shall authorize any departure from any of the provisions of any other statute relating to the social welfare and protection of such children, nor to relieve any county from any obligation imposed by any such statute, but any county board may provide additional facilities and agencies for the social welfare and protection of such children."

Such power, according to sec. 59.08 (5), Stats., must be carried out by ordinance.

Sec. 59.08 (9a) apparently gives a county the power to provide as many additional facilities for child welfare as it deems are called for by local conditions, provided it meets all minimum requirements imposed by the legislature and takes no action inconsistent with the statutory plan.

Sec. 48.29 (1), Stats., which is a part of the chapter of the statutes entitled "Child Protection and Reformation," provides:

"The county board of any county whose population is less than two hundred fifty thousand may by resolution establish a county children's board for such county and may thereafter discontinue such board by vote of a majority of

all of its members at any regular meeting or at any special meeting called for this purpose."

Sec. 48.30 (1) to (8), Stats., which was created by ch. 439, Laws 1929, enumerates the powers and duties of county children's boards.

Later legislation, making provision for centralization of county administration of welfare services, empowered county boards to delegate to county departments of public welfare the authority:

"To administer child welfare service under and subject to the provisions of sections 48.29 and 48.30 and 48.315, thereby administering the functions *otherwise* administered by children's boards." (See sec. 58.55 (10), Stats. 1945, created by ch. 383, Laws 1945.)

The use of the term "otherwise" in the foregoing provision indicates that the legislature did not intend that the administration of child welfare services, from a governmental standpoint, should be divided between two agencies, particularly when read in connection with sec. 48.315, Stats. 1945, also created by ch. 383, Laws 1945:

"If the county board of supervisors of any county shall decide to have child welfare services administered by the county public welfare department under provisions of section 58.55 (10), then such county department shall have all of the powers and duties given to county children's boards under sections 48.29 to 48.31 and be subject to all provisions thereof."

Sec. 58.55 (10) above quoted was later renumbered sec. 46.35 (10), but its provisions remained substantially the same until the enactment of ch. 513, Laws 1953, which repealed sec. 46.35 and created sec. 46.22. The latter reads in part:

"(5) The county board of supervisors may provide that the county department of public welfare shall, in addition to exercising the mandatory functions, duties, and powers as provided in sub. (4), have any or all of the following functions, duties and powers and such other welfare functions as may be delegated to it by such county board of supervisors:

"* * *

“(g) To administer child welfare services including services to children who are mentally defective, dependent, neglected, delinquent, or illegitimate, and to other children who are in need of such services. In administering child welfare services the county agency shall be governed by the following:

“1. The county agency may avail itself of the co-operation of any individual or private agency or organization interested in the social welfare of children in such county.

“2. The county agency shall administer and expend such amounts as may be necessary out of any moneys which may be appropriated for child welfare purposes by the county board or donated by individuals or private organizations.

“3. Upon the request of the judge of the juvenile court, the county agency shall investigate the home environment and other factors in the life of any child brought to the attention of the court for alleged dependency, neglect, or delinquency, and to assume guidance and supervision of any child placed on probation by such court.

“4. Upon the request of the state department of public welfare and under its direction, the county agency shall assume the oversight of any juvenile under parole from or otherwise subject to the supervision of any state institution.

“5. The county agency shall, without being licensed pursuant to s. 48.37 (2), have and exercise any additional powers and duties that are authorized for child welfare agencies under ss. 48.35 to 48.38 except that the county department of public welfare shall not have authority to accept permanent care, custody and control of any child, to place children for adoption, or to place children in foster homes in another state.

“(gm) The authority given to the county department of public welfare under par. (g) to function as an authorized child welfare agency shall not be interpreted as excluding agencies licensed pursuant to s. 48.37 from also exercising such functions.”

Ch. 513, Laws 1953, was enacted from Bill 589, A., which was presented to the legislature with the following note to sec. 46.22 (5):

“Permits the county board at its option to set up child welfare services within the county department of public welfare as they have heretofore been authorized to do under sec. 46.35 (10).”

The note indicates that, in consolidating and revising the provisions, the legislature did not intend substantially to

change the situation which existed under the provisions of sec. 46.35 (10), i.e., that there should be a single agency charged with administration of the services.

If the county board decides to have the services administered by the welfare department, that department shall have the "additional powers and duties given county children's boards under s. 48.30 (1) to (8)"; or, in other words, all the functions which would "otherwise" be administered by the children's board.

The legislature apparently desired to avoid the confusion which might arise if two governmental agencies were to share the responsibility for administration of the same services.

That intent seems to be further borne out by the provisions of sec. 46.22 (5) (g) 1 which authorizes the county agency to avail itself of the co-operation of any "individual or private agency or organization interested in the social welfare of children"; while the ensuing provisions refer specifically to the public agencies with which the department is to deal in its administrative work, but do not include children's boards.

It is my opinion that under the present statutes the county board may elect to have the child welfare services administered either by the county department of public welfare or by a county children's board, but may not divide the statutory functions and responsibilities between the two.

On the premise that the functions cannot be divided between agencies, there remains the question which agency is charged with administration of child welfare services under the ordinances and resolution submitted. In April, 1954, the county board, to clarify its earlier action, amended the 1953 ordinance to provide in part:

"The C County Welfare Department shall upon the request of the County or Juvenile Court, the District Attorney or the State Department of Public Welfare investigate conditions pertaining to Child Welfare, administer the child welfare services under and subject to the provisions of Section 48.315 of the Wisconsin Statutes, thereby administering the functions otherwise administered by the County Children's Board and other licensed child welfare

agencies, including services to children who are mentally defective, dependent, neglected, delinquent or illegitimate, and to other children who are in need of such services. * * * (Emphasis supplied.)

The phrase "upon the request of" the various enumerated agencies appearing in the first part of the sentence does not appear to be intended as a qualification or condition to the delegation of authority, but rather as a designation of the officials who are entitled to avail themselves of the department's services. The ordinance used the statutory terminology of sec. 46.35 (10) of the 1951 statutes, including the phrase "thereby administering the functions *otherwise* administered by county children's board," which shows that it was intended to conform to the statutory plan, and to substitute the welfare department for the children's board. If duly enacted by "a majority of all of" the members at a regular or duly called meeting (sec. 48.29 (1)), the ordinance had the effect of discontinuing the children's board as the governmental administrative agency.

In August 1954, the county board passed the following resolution:

"WHEREAS, Ordinance No. 1 of the April 1954 meeting has caused some confusion concerning the existence, powers and duties of the Childrens Board of C County, which exists pursuant to a resolution of the County Board under the provisions of Sec. 48.29 of the Statutes.

"AND WHEREAS, said Childrens Board has been functioning for approximately nine years and has materially assisted in the problems arising from dependent, neglected and delinquent children and its continuance is very much desired by the juvenile court judge because of the assistance such Children's Board gives him.

"NOW THEREFORE, Be It Resolved, by the Board of Supervisors of C County that the Childrens Board of C County be continued with the powers and duties as stated in Sec. 48.30 of the Statutes."

The resolution does not expressly repeal the earlier ordinance nor modify the powers there conferred on the welfare department. It purports to give the children's board the powers enumerated in sec. 48.30 which, by sec. 48.315, are conferred on the welfare department when the county board authorizes it to administer child welfare services.

In accordance with my statutory interpretation, the resolution is ineffectual unless it may be regarded as repealing the earlier action.

It is pointed out in 37 Am. Jur. 835, that: "Ordinarily, a municipal ordinance cannot be amended or repealed by a mere resolution."

It is not, I believe, necessary for the purposes of this opinion to consider whether there are any circumstances under which an ordinance might be repealed either partially or completely by a subsequently enacted resolution.

The Wisconsin supreme court said in *Wisconsin Gas & E. Co. v. Fort Atkinson*, 193 Wis. 232, 244, 213 N.W. 873, 52 A.L.R. 1033, that the "only substantial difference between a resolution and an ordinance apart from the subject to which it shall apply is that the one is required to be published subsequent to its passage and the other is not"; but at the same time it quoted from authorities recognizing that in common understanding an ordinance prescribes a permanent rule or regulation whereas a resolution is regarded as an act of less solemn nature used to deal with a situation of more temporary character, or a declaration of policy or intent. See also 30 Words & Phrases 150, *et seq.*

In view of the fact that the resolution here involved did not provide expressly for amendment or repeal, and in view of the fact that implied repeals of ordinances are not favored (*State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.*, 144 Wis. 386, 129 N. W. 623, 140 Am. St. Rep. 1025), the fact that the later action was by resolution is an indication that it was not intended by the county board to repeal the earlier ordinance.

We need not consider, either, at least in the absence of further clarifying action of the county board, whether a children's board might be continued as an advisory agency, or in the capacity of a licensed welfare agency under the opening paragraph of sec. 48.30. The terms of the resolution indicate that the board was to have the administrative functions prescribed in sec. 48.30 (1) to (8), which had already been delegated to the county department of public welfare by ordinance, in conformity to the statutory plan. It is not in proper form to be considered an exercise of the

powers conferred by sec. 59.08 (5) and (9a). The later resolution relating to the children's board is, therefore, a nullity for all practical purposes.

Your question is specifically answered in the negative.

BL

Schools and School Districts—Temporary Borrowing—1.
If a school district is indebted to the extent of its 5 per cent constitutional debt limit:

(a) The district may not borrow under sec. 67.12 (8), Stats., against any part of the current tax levy before the tax roll has been delivered to the local treasurer for collection.

(b) If tax roll has been delivered to local treasurer for collection, district may borrow under sec. 67.12 (8) up to 50 per cent of estimated receipts for operation and maintenance but not to exceed 100 per cent of the amount included in tax levy for such purpose.

(c) District may not borrow under sec. 67.12 (8) at any time against unpaid state aids or tuition claims or transportation claims.

2. The foregoing conclusions would not be changed by the fact that the school district had taken action appropriating anticipated receipts to retire loan made under sec. 67.12 (8).

November 12, 1954.

G. M. MATTHEWS,
Commissioner of Banks.

You have requested an opinion which will supply answers to the following questions:

"1. If a school district of Wisconsin has negotiated long term loans, temporary loans, or a combination of both equal to its 5% debt limitation may it negotiate additional temporary loans under Section 67.12 (8)—

"(a) During that period of the year after the tax levy has been voted by the district but prior to the time when the tax roll has been delivered to the local treasurer for collection?

“(b) After the tax roll has been delivered to the local treasurer for collection?”

“(c) During any period of the year when the school district has receivables due and payable in the form of non-resident tuition fees?”

“2. If your decision is ‘No’ in the case of either (a), (b) or (c) above would the fact that the school district has taken action appropriating a sufficient amount of the anticipated receipts to retire the temporary loans change the result?”

Art. XI, sec. 3, of the Wisconsin constitution provides in part:

“* * * 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 * * *. Any county, city, town, village, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within 20 years from the time of contracting the same * * *.”

Sec. 67.12 (8), Stats., as amended by ch. 122, Laws 1953, provides:

“The school board of any school district operating under the district system may on its own motion, made and properly recorded at a lawful board meeting, borrow money in such sums as are needed to meet the immediate expenses of maintaining the schools in such district during the current school year. No such loan or loans except loans made by town boards to school districts shall be made to extend beyond September 1 of the following year nor to an amount exceeding one-half the estimated receipts for the operation and maintenance of the school for the current school year in which the loan is made, as certified by the state superintendent of schools and the local school clerk. Such borrowing may be done any time after the tax for operation and maintenance of the school for the current school year has been voted to be collected on the next tax roll and such estimated receipts have been so certified. All such loans

shall be evidenced by lawfully authorized and drawn school orders, each order, when paid, to be receipted and returned to the treasurer of the board."

Upon numerous occasions our supreme court has considered and construed the first part of art. XI, sec. 3, of the Wisconsin constitution which is quoted above. A number of those cases will be discussed in chronological order. The earliest case was that of *Hebard v. Ashland County*, 55 Wis. 145, 147, 12 N.W. 437, in which said county sought to incur an indebtedness for building a courthouse and to redeem county orders for the payment of which there was no money in the treasury, all at a time when the county indebtedness exceeded 5 per cent of the value of the taxable property therein. The court held that under those circumstances the county could not incur a further indebtedness for building a courthouse or for any other purpose and said:

"* * * The language of that provision could not be made plainer, and will not admit of any construction beyond its ordinary meaning. The prohibition is, that 'no county, etc., shall be allowed to become indebted in any manner, or for any purpose, to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained,' etc. This is the first case in which this court has been called upon to consider and apply this constitutional provision, and at this time it is inconceivable how diverse opinions can be formed of its meaning; but the scrutiny, ingenuity and ability for critical analysis of the bar may hereafter discover some possible meaning beyond what now appears to be so clearly expressed. Arguments of convenience, of policy, or of present necessity, should not be allowed, by loose construction, to weaken the force or limit the extent of a constitutional prohibition so necessary and so beneficially intended. The same provision is in the constitution of the state of Iowa and that of the state of Illinois, and we fully concur in the decision of the supreme courts of those states as to the extent of the prohibition; but, in doing so, we neither concur in nor dissent from the decisions of those courts as to the power of a municipal corporation, notwithstanding the prohibition, to pledge or anticipate the revenue already provided for by the levy of taxes, as that question is not before us. * * *"

One of the earliest cases, and what is probably still the leading case, was that of *Earles v. Wells*, 94 Wis. 285, 298, 68 N.W. 964. In that case the court stated:

“* * * So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit,—even though there may be for a short time some unpaid liabilities. In other words, a municipality’s capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due. But the moment an indebtedness is voluntarily created ‘in any manner or for any purpose,’ with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness * * *.”

In *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Common Council*, 96 Wis. 73, 93, 71 N.W. 86, the court held:

“In order to ascertain the amount of the indebtedness of the city existing at the time the railroad was completed and the bonds were required to have been delivered, so as to determine whether, after deducting such indebtedness from five per centum on the assessment of 1895, as equalized by the city board of review,—that being the limit of indebtedness the city has power to contract, under the amendment to sec. 3, art. XI, of the constitution,—the city had power to issue the bonds in question, not only municipal bonds, but all forms of city indebtedness, must be deducted, except warrants for money actually in the treasury and contracts for ordinary expenses within the current revenue. * * *”

See also *Doon v. Cummins*, 142 U.S. 366.

The court indicated in the *Marinette* case and also in the case of *Crogster v. Bayfield County*, 99 Wis. 1, 74 N.W. 635, that it regarded the *Earles* case decision as being sound.

In *Rice v. The City of Milwaukee*, 100 Wis. 516, 521, 73 N.W. 341, it was unsuccessfully argued that the city could offset anticipated revenue from liquor licenses and from a tax or license from the street railway company against indebtedness. In reviewing the argument, the opinion held:

“* * * *Earles v. Wells*, 94 Wis. 285, is appealed to as sustaining the claims that these items may be considered as ‘revenues in process of immediate collection,’ and ‘available assets and resources,’ convertible into cash, which may be considered as offsets against the city’s debt. As already noted, the moneys to be derived from these sources are entirely indefinite and uncertain. They were not in the process of collection, and could be collected only at the will of parties who sought privileges for which license charges were made, and for that reason could not be considered as available assets or resources. The ‘revenues’ mentioned in this decision had reference only to such revenues as the corporation had levied, and had a legal right to enforce, regardless of any one’s will or pleasure. The ‘available assets and resources’ referred to means tangible property in the treasury, legally available, and properly applicable to the payment of debts, and readily convertible into money for that purpose. Were this not so, it appears from the record that the money reasonably expected to be derived by the city from licenses, etc., had been anticipated in the annual budget. This document shows that the actual financial needs of the city had been reduced by the exact amount estimated as coming from these sources. It therefore seems clear that these unknown and unascertained items of income should not and cannot be considered as offsets against the city’s indebtedness. * * *”

In *Balch v. Beach*, 119 Wis. 77, 82, 95 N.W. 132, the decision interpreted certain language found in the *Earles* case as follows:

“The theory invoked by counsel in support of the first proposition, as regards what constitutes assets to be counted against liabilities of a municipality in determining whether, in respect to the latter, the constitutional limitation to incur the same has been exceeded, was formulated by this court in *Earles v. Wells*, 94 Wis. 285, 68 N.W. 964, in these words: ‘Money and assets in the treasury, and current revenues collected or *in process of immediate collection.*’ That has since been several times approved. *State ex rel. M., T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 93, 71 N.W. 86; *Crogster v. Bayfield Co.* 99 Wis. 1, 74 N.W.

635, 77 N.W. 167; *Rice v. Milwaukee*, 100 Wis. 516, 521, 76 N.W. 341. In the last case cited it was held that the rule under discussion must be restrained to its specific meaning. Taxes in immediate process of collection do not include taxes merely voted. Taxes are not in immediate process of collection till the tax roll shall have been placed in the hands of the proper collecting officer with authority to receive, and with the right of the taxpayer to pay, the tax."

See *Herman v. The City of Oconto*, 110 Wis. 660, 86 N.W. 681.

In *Eiesen v. School District*, 192 Wis. 283, 292, 212 N.W. 783, the court said:

"The district had made some temporary loans for which it had anticipated its revenues for the ensuing year. These amounts were likewise indebtedness within the constitutional limitation. The constitution prohibited the district from becoming 'indebted in any manner or for any purpose to any amount' in excess of five per cent. of the assessed valuation. *Earles v. Wells*, 94 Wis. 285, 297-299, 68 N.W. 964; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 93, 71 N.W. 86; *Riesen v. School Dist.* 189 Wis. 607, 208 N.W. 472, 474."

An examination of the record and briefs in this case disclosed the fact that the temporary loans had been made by the school district under the provisions of sec. 67.12 (1), (2), (3), and (4) of the statutes of 1923. Under sec. 67.12 (2) the school district was obliged to levy a tax to provide for the payment of each of the loans which were made between September 30 and November 5, 1924. Hence, it is not entirely clear what the court meant when it said that the district "had anticipated its revenues for the ensuing year" because the loans presumably would be paid from the proceeds of the taxes levied before or at the time that each of the loans was made rather than from taxes levied at the regular school meeting in connection with the adoption of the annual budget.

In 22 O.A.G. 628, 629, the following opinion was expressed:

"Sec. 67.12 (8), Stats., as amended by ch. 127, Laws 1933, authorizes the school board of any school district operating under the district system to temporarily borrow money in such sums as are needed to meet the immediate

expenses of maintaining the schools in such district, no such loan or loans to extend beyond the first day of May following nor to an amount exceeding one-half the 'estimated receipts as certified by the state superintendent of schools and the local school clerk.'

"The term 'estimated receipts,' etc., plainly refers to the estimated annual income which it is anticipated the school district will receive during the school year in and for which the loans are made, including state aid and local school taxes, and the apparent purpose of authorizing such loans to be made is to enable the district to finance the maintenance of its schools in advance of the realization of such anticipated income. Obviously the term in question does not include school district funds tied up in a closed bank. Such funds do not represent anticipated income. Instead they represent past income, actually realized, but which is presently unavailable. Furthermore, as you suggest, school district funds tied up in a closed bank should not in any event be included in 'estimated receipts' for the reason that it is extremely uncertain what proportion, if any, of such funds will be released to the district during the year."

In 28 O.A.G. 569, 569-570, it was stated:

"You are advised that a school district may borrow under sec. 67.12, subsec. (8) for current and ordinary expenses without regard to the constitutional limitation above set forth provided that it can fairly be said that such borrowing can be repaid within the limits of monies and assets actually in the treasury or from current revenues collected or in process of collection. The theory then is that the municipality or school district may be fairly regarded as doing business on a cash basis and not upon credit—even though there may be for a short time some unpaid liabilities. *Earles v. Wells, et al*, 94 Wis. 285.

"But the foregoing marks the limits of such borrowing. In the same case the court said:

"* * * But the moment an indebtedness is voluntarily created "in any manner or for any purpose," with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness." (p. 299)

"This language was quoted with approval in *Crogster v. Bayfield Co., et al.*, 99 Wis. 1 and *Rice v. City of Milwaukee, et al.*, 100 Wis. 516. In the last cited case the court says:

"* * * There is no disposition to enlarge the rule as there laid down." (p. 519)

"Nor can we find any case where the court has ever indicated that there is any disposition to enlarge the rule. But within the limits of the rule, a school district may borrow for temporary purposes under sec. 67.12, subsec. (8) without regard to the constitutional limitation of Art. XI, sec. 3 above quoted."

In *Prueher v. Bloomer*, 241 Wis. 17, 4 N.W. 2d 186, the court again cited with approval the foregoing quotation from the *Earles* case and announced that the views expressed in that quotation were "well established."

In *Walker v. Joint School District*, 255 Wis. 475, 479, 39 N. W. 2d 382, it was said:

"The argument that a municipality may operate on a so-called 'cash basis' regardless of the debt limitation established by the constitution, based upon *Earles v. Wells* (1896), 94 Wis. 285, 68 N.W. 964, is without merit. In that very case the constitutional provision was applied and the loan was held invalid. That too was an effort to escape the operation of the constitutional provision.

"It is further argued that the 'cash basis' sphere of municipal activities is needed to permit current operations when tax collections are delayed and without regard to the debt-limit provision of the constitution. This strikes us as being an argument that the constitutional provision should be observed only when it is not needed. * * *"

Under the case of *Earles v. Wells*, *supra*, an indebtedness would not be created when the municipality borrows money under sec. 67.12 (8), Stats., for current expenses only if such borrowing is "within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection." In such a case the municipality would be regarded as doing business on a cash rather than a credit basis, and no debt within the meaning of art. XI, sec. 3 of the Wisconsin constitution would be created by such borrowing. As the court said "In other words, a municipality's capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due."

In the case of *Rice v. Milwaukee*, *supra*, the court, in speaking of the *Earles* case, said that: "The 'revenues' men-

tioned in this decision had reference only to such revenues as the corporation had levied, and had a legal right to enforce, regardless of any one's will or pleasure" and that, "The 'available assets and resources' referred to means tangible property in the treasury, legally available, and properly applicable to the payment of debts and readily convertible into money for that purpose."

In the case of *Balch v. Beach, supra*, the court said that "current revenues * * * in the process of immediate collection" did not include current taxes until the tax roll had been placed in the hands of the collecting officer with authority to receive, and with the right of the taxpayer to pay, the tax. In Wisconsin this is, in most municipalities, around the first business day of the calendar year.

The foregoing quotation from the *Walker* case, *supra*, could be interpreted to mean that even after the tax roll has been delivered to the local treasurer for collection the current tax levy is not a proper offset until the taxes are actually received in cash. If such a holding had been intended, however, it would seem that the court would have overruled or at least modified some of its former decisions, including the case of *Earles v. Wells, supra*, which was specifically mentioned in the *Walker* case. Until the court speaks more plainly upon the subject, it is my conclusion that the *Walker* case should not be interpreted as overruling the current tax levy offset sanctioned in the early cases. The *Walker* decision, however, again indicates that the court still feels as it did in the *Rice* case, *supra*, that, "There is no disposition to enlarge the rule" as laid down in the *Earles* case.

State aids are paid to school districts by the state upon certification of the superintendent of public instruction, pursuant to the provisions of secs. 20.25, 40.70, and 40.71 of the statutes of 1953. Such aids are paid upon the basis of the operation of the school by the district as disclosed in the annual report which the school district files with the state superintendent of public instruction, pursuant to sec. 39.02 (19), Stats. Since this report cannot be made until after the end of the school fiscal year on June 30, state aids are paid upon the basis of the report for the prior school year. Due to the time involved in processing the annual reports and to the further fact that, until all of the reports are processed,

the amount of state aid which each district will receive cannot be determined because the state aid must be prorated if the total aids to all districts exceed the available appropriation, the state aids actually are paid in January or February of the calendar year next succeeding the school year covered by the report. This means that, from the start of school operations in September until January or February of the next calendar year, state aid is not available to the district for the purpose of paying its current expenses.

Possibly it was this fact which motivated the creation of sec. 40.71 (2a), Stats., which provides that on or after July 15 a district may make application to the state superintendent of public instruction for an advance payment of up to 75 per cent of the state aid payable to such district, which may be paid if the state superintendent determines that need therefor exists and the district's annual report for the previous year has been filed and processed. The 75 per cent limit may have been inserted to prevent an overpayment of state aids in the event that a proration of aids subsequently becomes necessary.

The question arises whether this authorization for a 75 per cent advance payment of state aid to a district may be deemed to be "in the process of collection" to the extent of such 75 per cent, or any lesser percentage, at some time prior to the actual payment thereof in January or February of the next calendar year. As indicated previously, the filing by the school district of an application for the advance payment, the filing and processing of the annual report, and the determination by the superintendent of public instruction that a need exists for such advance payment are all conditions precedent to the actual payment thereof. Until there has been compliance with all of the conditions precedent, the receipt of the advance payment is a contingent and not an absolute right. Until all of the conditions precedent have been fulfilled, there would be no figure established as the amount of the state aid which the district would receive until all of the claims for state aid had been processed and totaled in order to ascertain whether they could be paid in full or upon a pro rata basis.

If all of the conditions precedent to the making of the 75 per cent advance payment have been fulfilled, such ad-

vance payment can then be paid in full. Obviously, the school district could improve its financial condition more by taking the entire amount of the 75 per cent advance than by treating such anticipated advance as an estimated receipt and borrowing a percentage thereof under sec. 67.12 (8). After the entire 75 per cent advance has been taken, the exact amount of the balance of the state aid still would be uncertain. It is my view that state aid payments do not have that status which would entitle them to be considered as "in process of collection" until the exact amount thereof is determined, which can be done only when all of the state aid claims have been processed. When this point is reached, the claims are paid and there is no necessity for attempting to borrow against them under sec. 67.12 (8).

Tuition claims are paid to a school district by parents, by the state, by the county, or by other municipalities pursuant to the provisions of secs. 40.654, 40.655, 40.657, and 40.91, Stats. 1953. The question arises whether these tuition claims may be said to be "in process of collection" at any time prior to the delivery of the tax rolls in which the same are included.

So far as nonresident tuition claims for elementary grades are concerned, they would appear to be in the nature of open accounts receivable. They are either directly against the school district in which the pupil resides, against the parents of the pupil, or, in special cases, against the county or the state.

On the other hand, there does not appear to be a direct claim against the school district or a municipality for nonresident high school tuition. In some unusual situations, there may be some direct claims for such tuition against the parents or the state or county but the majority of such claims would fall in the same category as the aforesaid claims for nonresident tuition for elementary grades. Sec. 40.91 provides that the school district in which the nonresident pupil attends school shall file a claim for the tuition with the county clerk before August 1 each year. When all of such claims have been adjusted and established as provided in said statute, the county clerk then apportions the total thereof to the several municipalities in the county which have territory therein which is not in a high school

district, upon the ratio of the amount of the valuation of such non-high school district property in such municipality to the total non-high school district property in the county. This amount is certified to the municipal clerk who spreads it over the property in the municipality which is not in a high school district, and the same is entered on the next tax roll and collected when and as other taxes are collected. When such taxes are collected, the school district ultimately receives its proportionate share of the high school tuition. It is noted that sec. 40.91 (5) (c) provides that where no part of a municipality forms a part of a high school district, the municipality may pay the high school tuition tax certified to it by the county clerk from surplus funds on hand rather than put it into the tax rolls.

The claim of a school district for transportation furnished to nonresident high school pupils is handled in much the same manner as a claim for nonresident high school tuition. The claim is filed by the school district with the county clerk through whom it is spread upon the local tax rolls over property not in a district operating a high school. Sec. 40.56 (2), Stats. 1953.

It seems to me that if the taxes levied by the municipality itself cannot be considered to be in the process of collection until the tax roll has been delivered to the treasurer, then likewise the school district taxes and the taxes for nonresident high school tuition and transportation are in the same category so that none of them may be considered to be in the process of collection until the tax roll is delivered to the treasurer for collection purposes.

State aids and claims for tuition and transportation which are to be paid to a school district at some future date undoubtedly are potential assets of the district. However, there is no indication that our court would consider these uncollected assets to be constructively in the treasury or "current revenues in process of immediate collection."

Hence, they may not be counted as offsets against existing indebtedness or proposed indebtedness of the district at any time until they have actually been received by the district.

Therefore, in answer to your first question, if a school district is indebted to the extent of its 5 per cent constitutional debt limit:

(a) The district may not borrow under sec. 67.12 (8) against any part of the current tax levy after such tax levy has been voted by the district but prior to the time when the tax roll has been delivered to the local treasurer for collection.

(b) After the tax roll has been delivered to the local treasurer for collection, the district may borrow under sec. 67.12 (8) up to 50 per cent of the estimated receipts for the operation and maintenance of the school for the current school year as certified by the state superintendent of public instruction and the local school clerk but not to exceed 100 per cent of the amount included in the current tax levy for operation and maintenance of schools.

(c) The district may not borrow under sec. 67.12 (8), at any time, against state aids, tuition claims, or transportation claims which may be due to the district but unpaid.

In view of the answers which have been given to the several parts of the first question, it becomes necessary to discuss the second question which you have submitted. In the *Rice* case, *supra*, the court said that the "available assets and resources" not only should be in the treasury but should be "legally available, and properly applicable to the payment of debts." In the *Riesen* case, *supra*, p. 290, the court said:

"It appears that the school district prepared each year a budget of the funds required to maintain the school for the ensuing year, and that taxes were accordingly levied for school maintenance. This the district was required by statute to do. Sec. 40.25, Stats. The taxes so levied and collected were put into what was known as a general fund. The district kept only one cash account, and into this account all the funds of the district were intermingled.

"It is the contention of the appellants that the cash in the general fund at the date of the contracts sued upon was available as an offset against the district's indebtedness. This was equivalent to the assertion that the district might use the taxes levied for maintenance and operation of the school to build school houses and then be without funds to operate the schools. Sec. 40.26, Stats., provides:

“When lawfully directed by the electors the board shall purchase or lease the site for a school house designated by the district, build, hire or purchase a school house out of the funds provided for that purpose, and sell and convey any site, school house or other property of the district.’

“Here is a clear legislative expression that school houses are to be built out of funds provided for that purpose, and the funds provided for maintenance and operation cannot be diverted to the purpose of building school houses. *Nevil v. Clifford*, 63 Wis. 435, 443, 24 N.W. 65.

“It appears that money was advanced out of the general fund, which belonged to the funds for maintenance and operation of schools, for the purpose of paying other obligations of the district. In setting up the account the accountant charged these amounts as liabilities to the district, that is to say, the district was obligated to maintain and operate the schools and was entitled to a return of the funds so advanced for other purposes. The trial court held, and we think properly so, that the funds so diverted should be returned to the fund for maintenance and operation, and that, therefore, they constituted a liability of the district.”

Because of this language and the fact that there is no provision in sec. 67.12 (8) which specifies that all or any part of the “estimated receipts,” whether in the form of state aids, tuition payments, or tax payments, shall be segregated and kept in a separate fund for the purpose of paying the loan, it has been suggested that it is advisable to have the school district appropriate the tax revenues or other estimated receipts for the purpose of paying the loan so that the funds which should be used for that purpose will be available therefor and will not be diverted. It is possible that as a matter of law the funds raised by taxation for operation and maintenance must be used only for that purpose, in which case the resolution would seem not to have much legal effect, or that, notwithstanding such a resolution the school board might have the right to divert some of the money to another purpose, at least temporarily, by the adoption of another resolution pursuant to sec. 65.90, Stats., a budget law which was not in effect when the *Riesen* case was decided.

Granting, without deciding, that the adoption of such a resolution might be advisable, such action would only be taken to fulfill a supposed condition precedent to the offset

approved by the court under the *Earles* and *Balch* cases. Such a resolution could not operate to enlarge the authority of the school district to borrow as indicated in the answer to the several parts of question 1. Hence your second question must be answered in the negative.

This office has been requested to answer a question similar to your question 1 (c) except that it relates to state aids rather than tuition fees. Hence, this opinion has been enlarged to cover state aids as well as tuition fees in order to avoid the issuance of another opinion relating to state aids which would duplicate much of the material contained herein.

JRW

Physicians and Surgeons—License Requirements—State board of medical examiners has considerable discretion as to how it may satisfy itself that an applicant for a license to practice medicine and surgery has completed a preliminary education equivalent to graduation from an accredited high school required by sec. 147.15, Stats. The board is not required to examine the applicant in high school subjects and it would be justified in accepting the statement of the accredited college or professional school attended by the applicant or the determination of the university of Wisconsin extension division or any other reliable agency versed in evaluating high school education.

November 16, 1954.

DR. THOMAS W. TORMEY, JR., *Secretary,*
State Board of Medical Examiners.

Our attention is directed to that part of sec. 147.15, Stats., which reads:

“* * * Applicants for license to practice medicine and surgery shall present satisfactory evidence of good moral and professional character, and of having completed a preliminary education equivalent to graduation from an accredited high school of this state, and also a diploma from a reputable professional college. * * *”

The question of what is necessary to establish the completion of "a preliminary education equivalent to graduation from an accredited high school of this state," is raised in the case of a prospective applicant for a license who is presently enrolled in a college of another state where he is completing his pre-medical education. This college is duly accredited by the Association of American Medical Colleges. The student, who is doing excellent work in college, was admitted, however, after completing only 3 years of high school work and upon the basis of his excellent standings for 3 years' work. The college in question, because of his fine work, proposes to grant him his bachelor's degree upon completion of the regular curriculum even though he does not actually have a high school diploma.

An accredited medical school where he proposes to enroll has inquired whether this individual will qualify for a license under sec. 147.15 after he has satisfactorily completed his medical education, and whether the taking of a high school equivalency test will be necessary.

Unlike some other statutes, sec. 147.15 is silent on the matter of establishing the equivalency of the high school education. As an example of another type of statute, attention is called to sec. 158.10 (4) relating to an eighth grade education for barbers which provides for "an equivalent education as determined by the state board of vocational and adult education or the extension division of the university of Wisconsin."

Under sec. 147.15 it is presumably up to the state board of medical examiners to determine what is satisfactory evidence of having completed a preliminary education equivalent to high school graduation, and its discretion reasonably exercised should be final.

Actually the requirement in question is now somewhat anachronistic, although it was no doubt of importance in earlier days when medical schools accepted students with only a high school education or less. The mere suggestion that one who has today completed the requirements for a bachelor's degree in an accredited college and a doctor's degree in an accredited school of medicine could lack the equivalent of a high school education comes as somewhat of

a shock. No doubt the pre-medical school or college satisfied itself that the student had the equivalent of a high school education or it would not have admitted him. There is a growing tendency among some of the more progressive colleges and universities to accelerate the education of unusually capable students without requiring that they go through paces of a traditional 4-year high school course, and the reports on these experimentations are apparently quite encouraging. This is merely a modern extension of the old-time practice in grade school of letting a bright student skip a grade. So far as we know, no one ever raised the point that such a person lacked an eighth grade education.

No good reason suggests itself today for retaining the high school education requirement in sec. 147.15. This could well be left to the pre-medical colleges and medical schools, but as long as it is in the statute it may not be ignored but must be met in some way to the satisfaction of the board of medical examiners. The call of the statute could be met in various ways. For instance, the board would be justified in accepting a statement or certificate from the pre-medical school or medical school that the individual in question has the equivalent of a high school education, or if it desired, the board could insist that the applicant present a certificate from the extension division of the university of Wisconsin certifying that the applicant has satisfactorily passed equivalency tests given by the university.

Certainly it was never intended that the board of medical examiners should itself give examinations to determine the equivalency. With all due respect to the board, it is probably fair to state that it has no special experience or qualifications for giving examinations in high school subjects.

It should be noted that the statute does not specify how the equivalent education is to be obtained, nor does it prescribe the length of the course. All that the board needs to have established to its satisfaction is that somehow and in some way the applicant has acquired the equivalent of a high school education. The word "equivalent" as used in statutes relating to education means equal in worth or

value, force, power, effect, import and the like. *Knox v. O'Brien*, 7 N.J. Super. 608, 72 A. 2nd 389. How the individual acquires it is of no particular significance.

WHR

Courts—Clerk's Fees—Under sec. 301.245, Stats., it is not the duty of the justice of the peace from whose court a case is transferred to collect the suit tax and clerk's fees for the court to which the case is transferred.

In such case it is the duty of the clerk of court to which the case is transferred to collect the fees or suit tax before filing the papers.

In such case the clerk's fee under sec. 59.42 (2) (c), Stats., is \$8 and the suit tax is \$5 under sec. 262.04, Stats.

Burden of advancing clerk's fees and suit tax in case of transfer under sec. 301.245 is on plaintiff. 39 O.A.G. 613 affirmed.

November 22, 1954.

HARLAN W. KELLY,
District Attorney,
Sauk County.

You have called our attention to ch. 108, Laws 1929, which confers limited criminal and civil jurisdiction upon the county court for Sauk county, and in this connection you have raised several questions relating to the fees to be collected where cases are transferred to this court from justice court.

Sec. 301.245, Stats., provides:

"301.245 In counties having a population of less than 500,000, and in which a small claims court or a civil, municipal, superior or county court empowered to exercise civil jurisdiction has been established, the defendant in any action brought in justice court may, on the return day of the process, transfer the cause to the small claims court or to such civil, municipal, superior or county court of said county. Upon receipt of such a request, accompanied by a fee of 75 cents, the justice shall forthwith transmit all the papers in such cause to the clerk of said court of said county."

The questions you have raised read as follows :

"1. In a case such as this, must a suit tax in the amount of \$5.00 and clerk's fees in the amount of \$8.00 be collected by the Justice of the Peace before transferring the file to the Clerk of Court?

"2. Must the Clerk of Court upon receipt of the record from the Justice of the Peace file it until fees and suit tax are first paid?

"3. Are the costs to be collected, by either the Justice of the Peace or the Clerk of Court, in such a case to be the sum of \$5.00 suit tax plus \$8.00 clerk's fees?

"4. If payment of suit tax and Clerk's fees must be paid in the instant case, by whom are they paid, the plaintiff who started the action in Justice Court or by the defendant who removed the case to County Court?"

1. Sec. 301.245 quoted above is perfectly clear and unambiguous. The duty of the justice to transmit the papers to the clerk of the court becomes mandatory upon receipt of the defendant's request for the transfer accompanied by a fee of 75 cents. He has no discretion nor any statutory right or duty to collect any of the fees that are payable to the clerk of the court.

2. There is no obligation on the clerk of the court to file the record prior to payment of fees and suit tax. (While your inquiry does not raise the point specifically, there would be an exception in a case where the state is involved since the state does not pay suit tax. It does pay clerk's fees, but not in advance.)

The question raised here was considered in 39 O.A.G. 613 where it was concluded that when a case was removed from justice court to the county court of Dodge county pursuant to sec. 301.245 the clerk of the circuit court must collect the suit tax and the advance fee of the clerk upon the filing of the papers.

At the time the above opinion was issued sec. 59.42 (40) read in part:

"At the time of the commencement of every action or special proceeding or upon the filing of the original papers therein upon appeal from inferior courts or officers or upon a change of venue except in criminal cases, the sum of two dollars in addition to the state tax * * *."

After quoting the above statute in 39 O.A.G. 613, 614, the attorney general went on to say that while this statute did not specifically refer to a removal from a justice of the peace, unless that be embraced within the term "change of venue," it was nevertheless his opinion under the constitutional and statutory provisions involved that the clerk is required to collect the fee and suit tax upon removal.

Sec. 59.42 (40) is no longer in the statutes, but language of like import is now included in sec. 59.42 (2). There is a reference therein to "change of venue" and the table of fees is preceded by the wording: "At time of filing initial document required for commencement of action or proceeding (in addition to state tax)."

We are accordingly unable to conclude that any statutory changes that have occurred since the issuance of the former opinion are of such a character as to require a different conclusion to this question at this time.

3. The third question is a troublesome one. At first glance it would appear that the clerk's fee is \$5 under sec. 59.42 (3) which reads in part: "On a change of venue at commencement in the court to which the action is transferred (no suit tax), \$5." This is in the nature of a change of venue, but if we are to apply the \$5 fee there provided, we must also give effect to the words in parenthesis (no suit tax) and this raises a constitutional difficulty under art. VII, sec. 18, Wisconsin constitution, which provides:

"The legislature shall impose a tax on all civil suits commenced or prosecuted in the municipal, inferior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges."

That means there must be a suit tax where a case is commenced or prosecuted in a county court with circuit court jurisdiction, and since no suit tax was paid in justice court, a suit transferred from justice court to the county court would completely escape the suit tax if we are to apply that part of sec. 59.42 (3) quoted above. Therefore it must be concluded that this language was intended to apply only to changes of venue from courts where a suit tax has already been paid and not to transfers from justice court under sec. 301.245.

This being true, the clerk's fee of \$8 provided in sec. 59.42 (2) (c) for "all other actions or special proceedings" must be charged in addition to the \$5 suit tax imposed by sec. 262.04, Stats.

4. In 39 O.A.G. 613-614 it was said:

"Sec. 301.245 does not require the defendant to pay the clerk's fee and tax in order to procure removal. Thus as a practical matter the burden of doing so is upon the plaintiff, since he is normally the party who desires the action to proceed."

You have pointed out the hardship which this conclusion places upon the plaintiff in a small case involving perhaps \$10 where he has deliberately selected the justice court so as to avoid the high suit tax and clerk's fees in county or circuit court.

We agree with you that this may seem inequitable and unfair, but unfortunately that appears to be the situation in which the legislature has left it. It might be observed, however, that the hardship would be just as great if it were placed upon a defendant who may have a just defense to the small claim but is unwilling to have the cause tried by a justice of the peace whose fees are in any way dependent upon the business brought to his court by the plaintiff's attorney. There may be no other available or impartial justice of the peace in the county, and if the defendant is to have a fair trial he may be able to get it only by availing himself of the provisions of sec. 301.245. It is difficult therefore to see how the administration of justice is advanced by shifting the burden in question from the plaintiff to the defendant. At any rate if this is to be done at all it should be done by the legislature rather than by reversing the opinion of this office in 39 O.A.G. 613, unless we are able to point to some substantial change of the statutes in question since the date when the above opinion was issued. As stated before, we are unable to find that this feature has been changed, even though there has been a very substantial overhauling of the clerk's fee statute in the 1953 legislature.

In closing it might be well to consider briefly art. I, sec. 9, Wisconsin constitution, which provides:

"SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

This right to justice without sale is a common one in constitutions and was derived from Magna Charta. The better opinion is that the guaranty was designed to abolish the fines which were anciently paid to expedite or delay law proceedings and procure favor. See 16 C.J.S. 1502-3, Constitutional Law, § 714.

The guaranty, however, does not confer the right to litigate entirely without expense, although it is aimed not merely against bribery and corruption, but against the imposition of unreasonable charges for the use of the courts. The guaranty is not abridged by regulations requiring the payment of uniform and reasonable court costs and fees, or security for such disbursements. *Ibid.*, p. 1503. Nor does the imposition of a reasonable tax on litigation conflict with this type of constitutional provision. *Ibid.*, p. 1504.

No attempt will be made here to draw the line between what might be considered reasonable and what might be considered unreasonable fees and suit taxes under art. I, sec. 9, Wisconsin constitution. Presumptively the existing statutory provisions are valid and the attorney general is mindful of the proposition that wherever possible declarations of unconstitutionality of statutes should be left to the appellate courts. See *State v. Stehlek*, (1953) 262 Wis. 642, 56 N.W. 2d 514.

WHR

*Criminal Law—Lotteries—*Television game of "Banko," described in the opinion, is a lottery in violation of sec. 348.01, Stats. 40 O.A.G. 284 followed and applied.

November 23, 1954.

RICHARD W. BARDWELL,
District Attorney,
Dane County.

You have requested an opinion with reference to the legality of a sales promotion television show known as "Banko," which you state is being conducted by a Madison television station under the sponsorship of a chain grocery. The game derives its name and its general format from the well known gambling game of "Bingo."

The program is open to participation by television viewers in their homes and also by a studio audience of 50 persons, who must obtain their tickets from the sponsor's place of business.

The game is played on cards similar to Bingo cards, the source of which will be discussed later in this opinion. The television show runs for one-half hour during which several games are played. One employe of the station throws ping pong balls into a large container which has numbered and lettered holes, which is the method selected for determining the winning numbers. Another station employe provides a running comment including sponsor advertising. A third employe posts the numbers on the television screen for the benefit of the viewing and studio audiences.

Each game ends when a member of the studio audience has a winning card. That person is given a package of the sponsor's groceries by the announcer while the viewing audience is informed that all those who were winners at the same time or prior to the studio winner will be able to obtain their prizes by calling personally at the sponsor's market and presenting their Banko cards for verification of the winning numbers. There are some further refinements, but the foregoing is sufficient to show that the elements of prize and chance are present, which are two of the necessary elements of a lottery.

The third necessary element is consideration. The balance of this opinion will be devoted to determining whether or not that element is present.

The promotion was first announced to the public in full page advertisements which appeared in The Capital Times and the Wisconsin State Journal, newspapers which are published in the city of Madison, on October 29, 1954, and the first telecast was held on November 2. The advertisements contained the following statements in bold face type: "For Your Convenience Get Your FREE BANKO CARDS At Your Neighborhood PIGGLY WIGGLY" which was immediately followed in smaller type by the following, "Ask Attendant at Produce Department for Free Card. This Sat., Mon., Tues. for Tues. Nov. 2nd Games. IN MADISON 2701 Monroe St. 2701 University Ave. 1860 E. Washington Ave. Request must include* IN STOUGHTON Hwy. 51, West Approach OR WRITE TO PIGGLY WIGGLY BANKO 1860 E. Washington Ave. Request must include self-addressed and stamped envelope." In another place in bold face type appeared the following: "Pick up FREE cards at Piggly Wiggly."

In smaller type, the advertisement stated a number of rules, the first of which was: "1. Pick up your free entry card at any Piggly Wiggly Store, or write for a card to Piggly Wiggly Banko, 1860 E. Washington Ave. enclosing a self-addressed, stamped envelope. Your request for Banko cards must be postmarked before midnight Wednesday each week."

After the foregoing advertisement appeared, the rules were slightly changed in an apparent effort to avoid the element of consideration clearly present in the requirement that cards for playing the game could be obtained only by calling at or writing to the places of business of the sponsor. Prior to the first game on November 2, the television station devoted a special 15-minute program to explaining the rules and stated at that time that the cards could be obtained at all Piggly Wiggly stores *along with the named locations of four other business places.*

* This was apparently a typographical error in the advertisement as it appeared in the Wisconsin State Journal.

In another full page advertisement which appeared in the Madison newspapers on November 5, 1954, the following appeared in large bold face type: "PIGGLY WIGGLY invites you to pick up BANKO BLANKS" which was immediately followed in smaller type by the following: "At These Convenient Locations *1860 E. WASHINGTON AVE. *2701 MONROE STREET *2701 UNIVERSITY AVENUE *HIGHWAY 51, STOUGHTON, WIS. And At These Additional Convenient Locations: *BRICKER'S TV APPLIANCE CO., East Side Shopping Center *CLARK'S CLOTHING FOR MEN, 126 State Street *WMTV STUDIOS, Beltline *CLARK'S CLOTHING FOR MEN, East Side Shopping Center *ARTHUR MURRAY STUDIO, 20½ East Mifflin St."

In that advertisement rule No. 1 was amended to read as follows:

"1. Free entry blanks are widely distributed in the Madison area and may be picked up at the following locations:

"Piggly Wiggly Stores—1860 E. Washington Ave., 2701 Monroe St., 2701 University Ave., and Stoughton, Wis.; Brickers TV and Appliance Co., at Madison East Shopping Center; Clark's Clothing for Men at 126 State St., and Madison East Shopping Center; WMTV Studios; Arthur Murray Studios, 20½ E. Mifflin St. Or write BANKO, 1860 E. Washington Ave., enclosing self-addressed, stamped envelope for your blank. Your mail request must be post-marked not later than Wednesday midnight for following Tuesday show."

In a number of opinions prior to 1951 the attorney general had expressed the view that where a television or radio show offered prizes to the audience, the award of which was determined by chance, the attraction of a listening or viewing audience constituted sufficient consideration to make the whole scheme a lottery in violation of sec. 348.01, Stats. 38 O.A.G. 657; 39 O.A.G. 15; 39 O.A.G. 374.

Thereafter, in 1951, the legislature enacted sec. 348.01 (2), Stats., which provides as follows:

"In order for a radio or television show or program to be held in violation of this section it shall be necessary to show that consideration involves either the payment of money, or

requires an expenditure of substantial effort or time. Mere technical contract consideration shall not be sufficient. Listening to a radio, or listening to and watching a television show shall not be deemed consideration given or received."

Very shortly after the enactment of the foregoing amendment, two questions were submitted to this office concerning its effect, and opinions were issued, reported at 40 O.A.G. 282 and 284. It was pointed out that the statute must be strictly construed for two reasons, first, that it is a proviso and therefore subject to the rule of strict construction, and second, to avoid possible unconstitutionality by reason of art. IV, sec. 24, of the Wisconsin constitution, which provides, "The legislature shall never authorize any lottery." For those reasons the opinion was expressed that the amendment could not be held to legalize any prize distribution scheme conducted in part via radio or television where the sponsor obtained other consideration directly connected with his business. The opinion stated as follows at 40 O.A.G. 286:

"* * * For example, any requirement that the participant visit the place of business of the sponsor, either to register or to obtain entry blanks or the like, would be consideration within the meaning of *State ex rel. Regez v. Blumer*, [(1940) 236 Wis. 129] above cited. Such a scheme could not be saved from condemnation as a lottery merely because some portion of the promotion is conducted via radio or television."

Under the *Regez* case, cited in the above quotation, the creation of customer traffic into a sponsor's store as a condition of obtaining a chance for a prize, is a consideration. Therefore, all the elements of a lottery are present in such a case, and the scheme is in violation of the statute and of the Wisconsin constitution. As first announced in the advertisement of October 29, 1954, the Banko game was plainly in violation of law, since cards could be obtained only by visiting or writing to the sponsor's stores.

The question is, then, does the fact that entry blanks are now made available at a few nonsponsoring stores, at the television station, and by mail, remove the element of consideration? In my opinion it clearly does not. The operation

of the scheme will still draw an enormous number of people into the three stores in Madison and the one in Stoughton operated by the sponsor. Indeed, so far as Stoughton and its surrounding area are concerned, the sponsor's store continues to be the only "convenient location" where the entry blanks can be obtained. And the fact that in a relatively few instances entry blanks may be picked up at a television dealer's, a men's clothing store or a dance studio, or at the television station (which is "conveniently located" some distance off a country side road outside the city of Madison) presumably without benefit to the Piggly Wiggly stores, while it may slightly *dilute* the element of consideration, clearly does not *eliminate* it. As a matter of law, the fact that some persons may obtain their chances without giving consideration to the promoter does not save a scheme from being held to be a lottery, so long as enough persons do give consideration to the sponsor to make the scheme profitable for him to operate. *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153.

It is very apparent that the whole purpose of this promotion is to induce people to go to the sponsor's stores to obtain entry blanks. Once they are in the stores a large percentage of them can be counted upon to purchase their groceries there, rather than suffer the added inconvenience of going to some other competing store for that purpose. This continues to be the purpose and effect of the scheme, notwithstanding the feeble attempt to make the entry blanks "widely distributed in the Madison area," by having them available in four or five places other than the sponsor's own stores.

It may be possible, by house to house delivery and by a broad and general distribution to business places and places of public accommodation throughout the area, to make the entry blanks so liberally available that prospective players would come across them wherever they went and no one need visit the sponsor's place of business to obtain them, and thus to eliminate that element of consideration. But it is probable that if that were done the scheme would lose its attractiveness to the sponsor, who would find it unprofitable to continue the very considerable expense attendant upon its operation.

There are some other elements of consideration connected with this promotion, but the foregoing sufficiently disposes of your inquiry.

You are therefore advised that in my opinion this game contains all of the elements of a lottery and is in violation of sec. 348.01, Stats.

WAP

Constitutional Law—Municipalities—Appropriations and Expenditures—Watershed Projects—Proposed bill which would permit various municipalities to raise and appropriate money to assist in creating and developing watershed areas or projects, which would include or benefit all or a portion of the respective municipality, would authorize appropriations for public purposes.

November 24, 1954.

M. W. TORKELSON, *Secretary,*
Natural Resources Committee of State Agencies.

You have submitted a copy of a bill which one of the state agencies proposes to submit to the 1955 session of the legislature. Sec. 2 of the aforesaid bill proposes to amend sec. 60.18, Stats., so that the qualified electors of each town shall have power at any annual town meeting by vote "to raise money for the purpose of assisting in creating and developing watershed protection areas or projects which would include or benefit all or a portion of such town, and to authorize the town board to expend said money or any part thereof for such purposes or either of them, or to pay said money or any part thereof over to any agency of the federal government or state government or to a soil conservation district to be expended for such purposes or either of them, notwithstanding section 92.04 (4) (d)." Secs. 1, 3, and 4 of the bill would make the aforesaid language applicable to the governing body of a county, a village, and a city, respectively, except that such governing bodies would be given the right to "appropriate money" for such purposes instead of "raise money." The reason for

treating a town differently from the other municipalities, of course, is the fact that usually the decision with respect to levying taxes is made by the electors in a town, whereas it is made by the governing body in a county, village, or city. You inquire:

"Can a county, city, village or town *raise and appropriate* * * * money for the purpose of assisting in creating and developing watershed protection areas or projects which would include or benefit all or a *portion of such county* * * * *such town* * * * *such village* * * * *such city* * * *?"

It is not entirely clear what the supposed objection to the bill might be but I presume that you question whether the expenditures proposed to be authorized would be held to be for a public purpose. Public Law 566 of the 83d congress is known as the "Watershed Protection and Flood Prevention Act." The first section of that act recites:

"That erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and that it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages and of furthering the conservation, development, utilization, and disposal of water and thereby of preserving and protecting the Nation's land and water resources."

Other portions of that act provide that the secretary of agriculture for the United States shall co-operate with and furnish financial assistance to a "local organization," which is defined to include a "soil or water conservation district, flood prevention or control district," in constructing "works of improvement," which are defined to include "any undertaking for * * * flood prevention."

Ch. 92, Wis. Stats., is entitled "SOIL CONSERVATION." Sec. 92.02 constitutes a declaration of policy and provides, "It is declared to be the policy of the legislature to provide for the conservation of the soil resources of this state, and for the control and prevention of soil erosion, and thereby to preserve natural resources, control floods, prevent impair-

ment of dams and reservoirs, * * * protect the tax base, protect public lands, and protect and promote the health, safety and general welfare of the people of this state.”

It is noted that the proposed bill provides that the various municipal bodies may turn all or part of the money raised or appropriated for the specified purpose or purposes over to any agency of the federal government or state government or to a soil conservation district, provided it is expended for such purposes or either of them. The decision in the case of *State ex rel. W.D.A. v. Dammann*, 228 Wis. 147, 175 (rehearing), 280 N.W. 698, contains an extensive discussion of the principles relating to the constitutionality of appropriations. It is deemed advisable to quote at length from that case:

“* * * It suffices to state that the validity of an appropriation must be judged by the validity of any tax which might be levied to support it, and that for the state to appropriate for a private purpose money raised or to be raised by taxation would be to take the property of one citizen or group of citizens without compensation and to pay it to others, which would constitute a violation of the equality clause as well as a taking of property without due process of law.

“The rules which determine the approach to this question by a court are extremely liberal. In an early case in this state, *Brodhead v. Milwaukee*, 19 Wis. *624, *652, it was said:

“To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush.”

“In *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 549, 90 N. W. 1098, after stating the principle that the determination as to what is in the public interest must rest with the legislature, the court said:

“If a public purpose can be conceived which might rationally be deemed to justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method.”

“* * *

“* * * In *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 667, 79 N. W. 422, the court said:

“The test to be applied in determining whether a particular agency may be employed by the state or some par-

ticular subdivision thereof by legislative authorization, to perform any particular work, is not whether the agency is public, but whether the purpose is public within the legitimate functions of our constitutional government. If the purpose be public and constitutional, and the agency be an appropriate means to accomplish it, and not expressly or by necessary implication prohibited by state or national constitution, its employment, under reasonable regulations for control and accountability to secure public interests, is legitimate and constitutional.'

*** ch. 181, Laws of 1937, continuing sec. 20.61, Stats., makes annual appropriations to Wisconsin Agricultural Experiment Association, State Horticultural Society, Potato Growers' Association, Wisconsin Cheesemakers' Association, Wisconsin Cheesemakers, Buttermakers, and Dairymen's Advancement Associations, Wisconsin Horse Breeders' Associations, counties and agricultural societies, associations, or boards, and to incorporated dairy or livestock associations. ***

"It is also well established by decisions of the United States supreme court that the fact that an expenditure of public funds benefits certain individuals or one class more immediately than it does other individuals or another class does not necessarily deprive the expenditure of its public character. *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878; *Nobel State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 122, 17 Sup. Ct. 56, 41 L. Ed. 369; *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085; *O'Neill v. Leamer*, 239 U. S. 244, 36 Sup. Ct. 54, 60 L. Ed. 249; *Houck v. Little River Drainage Dist.* 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685; *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 43 Sup. Ct. 689, 67 L. Ed. 1186; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 Sup. Ct. 772, 81 L. Ed. 1193. Thus, in *Carmichael v. Southern Coal & Coke Co.* 301 U. S. 495, 514, 57 Sup. Ct. 868, 81 L. Ed. 1245, the United States supreme court said:

"This court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare. [Citations.] The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, *the modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiarly within the knowledge of the legislature*, and to it, and not to the courts, is committed the duty and responsi-

bility of making choice of the possible methods. [Citations.] As with expenditures for the general welfare of the United States [Citations], *whether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.* [Citations.]'

"The factors that are to be considered in ascertaining whether an appropriation is for a public purpose are well stated by the United States supreme court in *Citizens' Savings & Loan Asso. v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455:

"It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.'

"* * * The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. It is to be observed that the tendency of later cases is toward greater liberality in characterizing taxes or appropriations as public in purpose * * *."

In 38 O.A.G. 228, this office had occasion to discuss a proposed bill which among other things would have authorized

certain municipalities to contract for the performance of soil conservation work on privately owned lands. In discussing those provisions of the bill, that opinion said (p. 232):

“* * * During the past year or two numerous magazine articles as well as books have appeared wherein economists and scientists take a very dim view of the future food supply for the human race unless effective soil conservation measures are promptly undertaken. When a gully starts on one farmer’s field it does not respect the boundary fence but becomes a common enemy which may threaten an entire countryside, and while the farmer upon whose fields soil conservation work is performed derives a private benefit this does not negative the very large and substantial gains which result to the public generally. The fact that the expenditure benefits certain individuals or one class more immediately than it does other individuals or another class does not necessarily deprive the expenditure of its public character. *State ex rel. W. D. A. v. Dammann*, 228 Wis. 147.

“There are a number of cases taking the view that the encouragement or promotion of the agricultural industry is a public purpose for which the taxing power may be validly exercised. See 112 A. L. R. 576 (note). Reference to some of such cases was recently made in an opinion from this office to the assembly on May 28, 1949. Without attempting to discuss such cases here, we will merely cite a few of them: *C. V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248, 112 A. L. R. 562; *State v. Enking*, 59 Ida. 321, 82 P. (2) 649; *Miller v. Michigan State Apple Commission*, 296 Mich. 248, 296 N. W. 245; *Louisiana State Department of Agriculture v. Sibille*, 207 La. 877, 22 So. (2) 202; *Parker v. Brown*, 317 U. S. 341.”

In *Tonn v. Strehlau*, 265 Wis. 250, 256, 61 N. W. 2d 486, our court said:

“At page 177 of this court’s opinion in *State ex rel. Wisconsin Development Authority v. Dammann*, *supra*, there was set forth a considerable list of privately owned or controlled corporations or associations to which state appropriations had been made in the past for public purposes, such as the State Historical Society, and various agricultural associations, which practice had originated as early as 1853. It was the court’s position that this long-continuing practice was a practical construction sanctioning such type of appropriations for public purposes even though made to private organizations.”

In *Heimerl v. Ozaukee County*, 256 Wis. 151, 157, 40 N. W. 2d 564, the court also said:

“Defendant has also cited the following statutes and contends that they provide for improvements on private property or benefits to private individuals: Sec. 59.08 (18), Stats., which allows counties to provide for and engage in the manufacture, sale, and distribution of agricultural lime to be sold at cost to farmers and to acquire lands for such purposes; sec. 59.08 (47) which authorizes counties to purchase or accept by gift or grant tractors, bulldozers, and other equipment for clearing and draining land and controlling weeds on same, and for such purposes to operate or lease the same for work on private lands, and to charge fees for such service and rental of such equipment on a cost basis; and sec. 92.08 which is the soil-conservation statute. These are natural governmental functions and are necessary to the health, safety, and welfare of the community as a whole. * * *”

In the *W. D. A.* case, *supra*, 183, it was also stated:

“* * * It is the general rule applicable to appropriations that a tax must be spent at the level at which it is raised. Applied to an appropriation by the legislature, this means that the appropriation must not merely be for a public purpose but for a state purpose.”

However, a purpose may be public for two governmental units, one of which forms only a part of the other. In *State ex rel. American Legion 1941 Convention Corporation v. Smith*, 235 Wis. 443, 454, 293 N. W. 161, it was said:

“* * * The fact that the furtherance of these purposes is likewise of nation-wide importance does not alter or minimize in any degree their state-wide character. * * *”

From the foregoing decisions, it is my opinion that the proposed bill would not be unconstitutional for the reason that the money which might be expended by the various municipalities would benefit certain individuals more than others nor because of the fact that the expenditure might be made through an agency other than the governmental unit which raised the money and made the appropriation. If an appropriation may be expended for a public purpose through the agency of a private corporation surely it may be expended through the agency of another governmental unit.

It would appear also that the preservation of the tax base should be of prime concern to all taxpayers whether such preservation is accomplished through one governmental agency or another.

JRW

Public Assistance—Old-Age Assistance—A lien for old-age assistance, under sec. 49.26 (4) and (5), Stats., upon realty owned solely by the beneficiary, has priority over the rights of the widow in the absence of the release of lien, or of administration proceedings.

November 30, 1954.

DAVID H. SEBORA,
District Attorney,
Calumet County.

You ask how the proceeds of the sale of certain realty should be divided between C and O counties under the following facts:

C county gave old-age assistance to a man having title to the realty in his name alone. C county filed its lien pursuant to sec. 49.26 (4). The owner of the property died, leaving a widow and eight children. The widow moved to O county where she received old-age assistance, and a lien was also filed by O county pursuant to sec. 49.26 (4).

The realty owned by the decedent was subsequently sold with the consent of the welfare departments of the two counties, and the deed was signed by the widow and children.

It is the contention of O county that it should receive one-third of the total proceeds of the sale because of its lien for old-age assistance paid the widow. C county takes the position that it should receive all of the proceeds necessary to satisfy its lien before O county receives anything.

I am assuming that there was no administration of the estate of the man against whose interest the first lien was filed, and that there was no foreclosure proceeding.

The certificate signed by C county under sec. 49.26 (4) attached a lien, to the full extent of the old-age assistance

paid, on "all real property of the beneficiary." Such lien took "priority over any lien or conveyance subsequently acquired, made or recorded except tax liens," and except for certain allowances which sec. 49.26 (5) authorizes a court to make in administration proceedings.

The supreme court held in *Estate of Wickesberg*, 209 Wis. 92, 244 N. W. 561, that a homestead is subject to the old-age assistance lien notwithstanding the provisions of secs. 237.02 and 272.20, Stats. See, also sec. 237.025 which provides that the exempt homestead shall descend subject to lawful liens thereon.

The legislature has made express provision with respect to the rights of a widow of a beneficiary of old-age assistance in the realty owned by such beneficiary. See, for example, sec. 49.26 (7), Stats., which provides that no lien shall be enforced against the homestead of the beneficiary "while it is occupied by a surviving spouse." This provision is not applicable to the facts you report, since the widow did not continue to occupy the premises. Sec. 49.26 (8), Stats., provides that the county agency of the lienor county may release a lien when it is necessary to provide for the maintenance of the spouse of the beneficiary of old-age assistance. That provision does not apply, since there has been no release by the county.

Sec. 49.25, Stats., provides in part that the court may disallow a claim for old-age assistance if satisfied that the disallowance is necessary to provide for maintenance or support of a surviving spouse. Since there was no administration and no action on claims by a court, such provision does not apply.

The existence of such provisions, however, is indicative that the legislature intended the lien for old-age assistance to take priority over any claims of the widow of the beneficiary unless the widow's rights were implemented under those specific provisions.

The opinion was given in 41 O.A.G. 300, that if the estate of an old-age assistance beneficiary is insolvent, it may be sold in administration proceedings under sec. 316.01 (1); and that in such case the lien of the county for old-age assistance must be enforced through filing a claim in administration proceedings. In that event a question might be pre-

sented involving the authority of the county judge to make provision for the widow under sec. 49.25. Neither that opinion nor the one in 27 O.A.G. 751, would be applicable in cases where there is no administration.

Under the facts you report, C county is entitled to satisfaction in full of its lien for old-age assistance paid the owner of the property, and only the remainder is subject to the lien of O county, to the extent of the widow's interest.

The opinion was given in 32 O.A.G. 10 that no lien for old-age assistance given to a wife attaches to her inchoate dower right during her husband's life, but that a lien for old-age assistance given after her husband's death does attach to her consummate dower right. See, also, 32 O.A.G. 165.

The lien of O county is, accordingly, limited to the interest of the widow in the property remaining after the satisfaction of the lien of C county.

BL

Counties—Tuberculosis Sanatoriums—County Homes—

When authorized by the county board, a portion of a county tuberculosis sanatorium may be used as a unit of the county home for the aged, provided that, as required by sec. 46.18, Stats., responsibility for management and operation of each section is separate, and proper accounts and records are kept which fairly and accurately reflect the cost of maintaining and operating each section, including costs shared. Trustees of the tuberculosis sanatorium may not care for non-tuberculous aged patients on a per capita cost basis, nor rent the portion of the building occupied by such aged persons to the trustees of the county home for the aged. Depreciation of building and equipment used for the aged may be fixed by the county board.

December 3, 1954.

STATE BOARD OF HEALTH.

You state that one of the trustees of a county tuberculosis sanatorium has inquired whether a portion of such sanatorium can be used for care of bed patients usually

admitted to the county home for the aged. Accordingly, you seek my advice upon this and several other questions predicated upon an affirmative answer to the above inquiry.

1. Can a portion of a county tuberculosis sanatorium be made available for use for county non-tuberculous aged patients by action of the county board of supervisors under existing statutes?

Pursuant to secs. 49.14 and 46.17, Stats., a county may establish a home for the aged. In previous opinions, this office has stated that an institution need not be housed in a single structure, but may include several buildings or parts of buildings. 32 O.A.G. 147 and 154. It was concluded in 38 O.A.G. 298, that a proposed wing of a county general hospital could be designated as part of the county hospital for mental diseases or of the county tuberculosis sanatorium, provided that the management of the hospital for mental diseases or that of the tuberculosis sanatorium operated and had actual control of the unit involved.

The circumstances there were analogous to those here presented and a like result must follow. I find no statute relating to county homes for the aged or county tuberculosis sanatoriums which makes for a different conclusion. Changes in the building, in the occupancy thereof, and in the management and operation of each institution must, of course, be authorized by the county board. The approval of such changes by the state board of health and state department of public welfare as to matters within the scope of the jurisdiction of each is also required. In my opinion, the question must be answered in the affirmative.

It should be noted that many questions difficult of solution will be presented if one institution and part of another are housed in the same building, especially with respect to proper accounting and record-keeping in connection with depreciation and shared services and costs. To compute the per capita cost of operation of each institution accurately and fairly would be a complicated undertaking under existing legislation. However, if such practical problems can be overcome, no reason is perceived which would prevent use of a portion of a county tuberculosis sanatorium as a unit of the county home for the aged where there is a proper

separation between the two sections as to management and control, physical arrangement, staff, accounting, and record-keeping.

2. Is it necessary for the county board to transfer jurisdiction and responsibility for that portion of the building and equipment used for the aged from the trustees for the county tuberculosis sanatorium to the trustees for the county home for the aged?

Sec. 46.18 (1), Stats., provides that every county home shall, subject to regulations approved by the county board, be managed by the trustees. The responsibility of the trustees of the home for the aged would include that portion of the county tuberculosis sanatorium which is designated as an annex or unit of the county home for the aged. Responsibility for the management thereof cannot be delegated. See 37 O.A.G. 100, 103-104. The question requires an affirmative answer.

3. What state agency would be responsible for the accounting reports involving that portion of the building used for the care of the aged?

As noted in 38 O.A.G. 298, involving different institutions under the same roof, the arrangement and accounting system must admit of an accurate and fair determination of the cost of maintenance and operation of each unit. Accounting reports for the unit used for care of the aged are to be made to the state department of public welfare, pursuant to the mandatory uniform cost record-keeping requirements of sec. 46.18 (8), (9) and (10), Stats. Said department has approved and prescribed a system of cost accounting developed and administered by the Wisconsin department of state audit.

4. What depreciation allowances would prevail for that portion of the building and equipment used for the care of the aged?

Depreciation allowances for building and equipment are prescribed by sec. 50.07, Stats., for county tuberculosis sanatoriums. Sec. 15.22 (12) (j), Stats., governs depreciation allowances as to county infirmaries. I find no statutory allowance for depreciation applicable to county homes for the aged. For that portion of the building and equipment

used for care of the aged, the allowance for depreciation may be established by the county board in the same manner as for other county buildings and equipment, pursuant to its general powers. Sec. 59.07 (1), (4) and (6), Stats.

5. On what basis would the cost of food, food preparation, and food services be prorated between patients in the tuberculosis section and the section for the care of the aged?

Assuming that the same kitchen facilities are to be used for both units, the cost of food may be prorated if a satisfactory formula can be evolved which fairly and with reasonable accuracy reflects the cost of food used by each unit. Similar arrangements can be made with respect to the cost of food preparation and food services. Wages paid employes engaged in providing services for both units must be allocated to each institution in proportion to the time such employes devote to the service of each unit. The establishment and continuing operation of such practical arrangements is subject to the approval of the state board of health and state department of public welfare under their statutory responsibility for supervising the accounting, reporting, and record-keeping relating to the operation of each institution.

6. Would the responsibility and jurisdiction for staffing the section for the aged be transferred to the trustees for the county home for the aged?

Although geographically separate, a unit for the aged located at the tuberculosis sanatorium must be managed and controlled as part of the county home for the aged. Responsibility and jurisdiction for staffing such unit belongs to the superintendent of the home for the aged, subject to approval of the trustees, as provided by sec. 46.19, Stats.

7. Could the tuberculosis sanatorium trustees, with the approval of the county board, agree to handle aged patients under the jurisdiction of the trustees of the county home for the aged on a per capita cost basis?

The trustees of the county tuberculosis sanatorium have no express or implied authority to care for non-tuberculous aged patients, so the question must be answered in the negative. The trustees of the home for the aged are not authorized to make such an agreement. It is axiomatic that per-

sons to whom an office or duty is delegated cannot lawfully devolve the duty to another unless expressly authorized so to do.

8. Could the tuberculosis sanatorium trustees, with the approval of the county board, rent one floor or a portion of the tuberculosis sanatorium to the trustees of the county home for the aged and apply rental revenues toward reducing the per capita cost of operation of the tuberculosis sanatorium?

Under existing statutes, no authority is conferred upon the trustees of the tuberculosis sanatorium to grant a lease. By sec. 59.07 (2), Stats., such power resides in the county board. The authority of the trustees extends only to management, operation, and maintenance of the institution. Sec. 46.18, Stats. If use of one floor or a portion of the tuberculosis sanatorium is to be discontinued, for occupancy by a unit of the county home for the aged, the change may be effected by resolution of the county board designating such floor or portion of the sanatorium as a unit of the county home for the aged and transferring to the trustees of the home responsibility for the management thereof. The question is answered in the negative.

GS

Pensions—Teachers' Retirement—Credit for teaching experience granted under sec. 42.45 (3), Stats., for which the member has made deposits and the state has made deposits under sec. 42.45 (4), Stats.:

1. May be counted toward the 30 years of teaching experience needed to qualify for an annuity under sec. 42.49 (3c), Stats.;

2. May not be counted as teaching experience in the public schools, state colleges, or university in this state for the purpose of qualifying for, or computing, an annuity under sec. 42.49 (3c);

3. May not be counted as teaching experience in the public schools, state colleges, or university in this state for the purpose of qualifying for, or computing, an annuity under sec. 42.49 (3m), Stats.

December 15, 1954.

STATE TEACHERS RETIREMENT BOARD.

You wish to be advised "whether war service credited under 42.45 (3), as modified by 42.45 (4), can be counted in the calculation of annuities under section 42.49 (3c) and (3m)." You advise that it has been the administrative policy of your department, since the enactment of sec. 42.45 (3) and (4), Stats., to use war service for which credit has been given under those subsections in determining annuities granted under sec. 42.49 (3c) and (3m), Stats. Secs. 42.20, 42.45 (3) and (4), and 42.49 (3c) and (3m) provide as follows:

"42.20. In ss. 42.20 to 42.54, inclusive, unless the context otherwise requires:

"* * *

"'State college' means any college under the control and management of the board of regents of state colleges.

"* * *

"'Public schools' means all schools supported wholly or in part by public funds, and under the control and management of this state, or any subdivision thereof, empowered by law to employ teachers, except schools under the control and management of the board of regents of state colleges or the regents of the university of Wisconsin and except schools in cities of the first class included under s. 38.24.

“‘Required deposit’ means the deduction in accordance with ss. 42.40 and 42.41 (1) from the compensation received by a senior teacher deposited in the retirement deposit fund.

“* * *

“‘State deposit’ means the deposit made by the state in the retirement deposit fund on behalf of any member.

“* * *

“‘University’ means any college, school or department under the control and management of the regents of the university of Wisconsin.

“‘Year of teaching experience’ means a fiscal year during which the teacher was employed as a teacher not less than a full school year.”

“42.45 * * *

“(3) Any member who left the teaching profession in Wisconsin from a position in which he was making or in which he had been compelled to make required deposits or in which he would have been compelled to make required deposits if he had been a senior teacher to serve, and who served, the United States or any of its allies in World War I, in World War II, or after June 25, 1950 and during a period of national emergency, in or with the army, including the WAACS, and WACS, in or with the navy, including the WAVES, in or with the marines, including the U. S. Marine Corps Women’s Reserve, in or with the coast guard, including the SPARS, or in the American Field Service who teaches in Wisconsin after August 4, 1951, in a position in which such member is compelled to make required deposits or in which he would have been compelled to make required deposits if he had been a senior teacher, shall be credited with teaching experience for the time so served upon proof of such service and honorable discharge therefrom being furnished to the state teachers retirement board, or having been furnished, to its predecessor. Any member who left the teaching profession in Wisconsin from a position in which he was making or in which he had been compelled to make required deposits under agreement with the federal government to take training to teach, and who taught persons in any of the aforesaid main or auxiliary branches of the United States military service during World War II, or after June 25, 1950 and during a period of national emergency, and who teaches in Wisconsin after August 4, 1951, in a position in which such member is compelled to make required deposits, shall be given like credit for the time spent in such training as well as in such teaching upon proof of such training and teaching being furnished, or having been furnished to said board.

"(4) Any member who shall receive credit as teaching experience for military or teaching service as provided in sub. (3), who shall so elect may make deposits for the period for which he received such credit as teaching experience, and as of the following June 30, such member shall be credited with corresponding state deposits calculated according to the state deposit formula in effect on June 30, 1947. The deposits which may be made by the member pursuant to such election shall be equal to the required deposits which should have been made by such member for such portion of the period covered by such election during which he would have been a senior teacher had he remained in teaching, computed on the basis of the monthly salary received during the first fiscal year after such period in which said member returned to teaching in a position in which said member was compelled to make required deposits. Any state deposits which shall be made pursuant to this subsection shall be forfeited by the member for whom they were made unless he shall have had at least 4 years of teaching experience under the state teachers retirement system after completion of any of the military service or training and teaching described in sub. (3), except that such state deposits shall not be forfeited if the member shall have taught for a period at least equal to 50 per cent of the time, not exceeding 8 years, between the date of completion of such military service or training and teaching and the date of his death."

"42.49 * * *

"(3c) When a member who, after July 29, 1951, taught in a position which compelled such member to make required deposits, ceases to be employed as a teacher, and is not on a leave of absence from a teaching position, and has attained the age of 60 years or more, and has had not less than 30 years of teaching experience of which not less than 20 years were in the public schools, the state colleges, or the university in this state, and has applied the entire accumulation from required deposits as provided in sub. (2) and the accumulation from the state deposits has been applied by the member to the purchase of an annuity as provided in sub. (3):

"(a) If the annual amount of the annuity provided under sub. (3), together with the annual amount of the annuity, if any, provided for the member under s. 42.51 when computed as an annuity payable to the member during life is less than one-one hundred fortieth of the average annual salary received by the member for the last 5 years of teaching experience in the public schools, the state colleges, or the university in this state, provided that any excess of such average over \$4,800 shall be disregarded, multiplied by the

number of years of the members' teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state, the said annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such amount, or the actuarial equivalent of such life annuity, and

"(b) If the sum of the annual annuity provided in par. (a) and the annual annuity purchased by the accumulation of required deposits when computed as an annuity payable to the member during life is less than one-seventieth of the average annual salary as defined in par. (a), multiplied by the number of years of the member's teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state, the annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such amount, or the actuarial equivalent of such life annuity. Any such increases in the annuity shall be paid from the contingent fund. Any increased annuity herein provided shall not be available for any member who has at any time withdrawn any amount from the retirement deposit fund or received any annuity under ss. 42.20 to 42.54, except that

"(c) The increased annuity shall be available for any member who has withdrawn any amount from the retirement deposit fund provided that the amount withdrawn be repaid to the retirement deposit fund, with interest at the rate of 3 per cent per annum from the date of withdrawal to the date of repayment, before application is made for an annuity under this subsection, and

"(d) The increased annuity shall be available for any member who makes the repayment required by par. (c), who has been an annuitant under ss. 42.20 to 42.54, and who returned to teaching and made required deposits prior to July 29, 1951, provided that when such member makes application for such increased annuity, all of the accumulations then to the credit of such member in the retirement deposit fund shall be used to increase the annuity last granted to such member and the increased annuity must be taken in the form of the annuity so last granted, which shall be decreased by that portion of the annuity or annuities previously granted to such member from his required deposit, state deposit and prior service accumulations.

"(3m) When a member ceases to be employed as a teacher after July 29, 1951, and is not on a leave of absence from a teaching position, and has attained the age of 60 years or more and has had not less than 25 years of teaching experience in the public schools, the state colleges, or the university in this state, or has attained the age of 55

years or more and has had not less than 30 years of teaching experience in the public schools, the state colleges, or the university in this state, and has applied the entire accumulation from the member's deposits as provided in sub. (2), and the accumulation from the state deposits has been applied by the member to the purchase of an annuity as herein provided, and when the annuity purchased by such accumulation from the state deposits, together with the annuity, if any, provided for the member under s. 42.51 (3), when computed as an annuity payable monthly to the member during life is less than an annuity of \$2 per month for each year of the member's teaching experience, not exceeding 35 years, in the public schools, state colleges or university in this state, the annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such annuity, or the actuarial equivalent of such life annuity. The increase in the annuity shall be paid from the contingent fund. The increased annuity herein provided shall not be available for any member who has at any time withdrawn any amount from the retirement deposit fund or received any annuity under ss. 42.20 to 42.54, except that (a) the increased annuity shall be available for any member who has withdrawn any amount from the retirement deposit fund provided that the amount withdrawn be repaid to the retirement deposit fund, with interest at the rate of 3 per cent per annum from the date of withdrawal to the date of repayment, before application is made for annuity under this section, and (b) the increased annuity shall be available for any member who makes the repayment required by (a) immediately preceding, who has been an annuitant under ss. 42.20 to 42.54, who returned to teaching and made required deposits prior to July 29, 1951, and who, after such date teaches in a position in which such member is compelled to make required deposits, provided that when such member makes application for such increased annuity, all of the accumulations then to the credit of such member in the retirement deposit fund shall be used to increase the annuity last granted to such member and the increased annuity must be taken in the form of the annuity so last granted, which shall be decreased by that portion of the annuity or annuities previously granted to such member from his state deposit and prior service accumulations."

As indicated above, sec. 42.45 (3) provides that a member who can meet the requirements of that subsection "shall be credited with teaching experience for the time" spent in the service therein referred to. Sec. 42.45 (4) allows a member who has received credit for teaching experience under

sec. 42.45 (3) to make a deposit equivalent to the required deposit which such member would have made for the period described in said subsec. (3) and be entitled to a state deposit based thereon. The service referred to in sec. 42.45 (3) obviously was not rendered in the "public schools, state colleges, or the university" as defined in sec. 42.20, and sec. 42.45 (3) does not specify that the member "shall be credited with teaching experience" in any of said institutions.

In order to qualify for an annuity under sec. 42.49 (3c) it is necessary that the member shall have "had not less than 30 years of teaching experience of which not less than 20 years were in the public schools, the state colleges, or the university in this state." In computing the annuity to which a member who can qualify under sec. 42.49 (3c) may be entitled, a fraction of the average annual salary received by the member for the last 5 years of teaching experience in the public schools, the state colleges or the university is "multiplied by the number of years of the member's teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state." It is clear that under sec. 42.49 (3c) the legislature distinguished between "teaching experience" and "teaching experience in the public schools, the state colleges, or the university in this state." The years of teaching experience granted to a member under sec. 42.45 (3) may be counted as a part of the "30 years of teaching experience" referred to in sec. 42.49 (3c), but not as any part of the "20 years * * * in the public schools, the state colleges, or the university in this state" or the "years of the member's teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state" by which a fraction of the member's average annual salary is multiplied in determining the annuity under said subsection.

The years of teaching experience which may be counted in determining whether a member qualifies for an annuity under sec. 42.49 (3m) are confined to "years of teaching experience in the public schools, the state colleges, or the university in this state." That subsection also specifically provides that in computing the minimum annuity which is payable by the state, the sum of \$2 per month for each year of the member's teaching experience not exceeding 35 years

is confined to teaching experience "in the public schools, state colleges or university in this state." Again, since the teaching experience with which the member is credited under sec. 42.45 (3) is not in the public schools, the state colleges, or the university in this state, it may not be counted in computing the minimum annuity payable from state deposits under sec. 42.49 (3m).

Your request seems to imply rather strongly that a contrary conclusion should be reached because of the administrative practice which has been followed. However, sec. 42.45 (3) and (4) was created by ch. 604, Laws 1951, which did not take effect until August 4 of that year. Sec. 42.49 (3c) was created by ch. 556, Laws 1951, which became effective July 29 of that year, and sec. 42.49 (3m) was created by ch. 555, Laws 1951, which also became effective on July 29, 1951. It is apparent, therefore, that all four of the subsections involved in your request are of recent origin.

The following quotations will show the attitude of the supreme court of this state with respect to the administrative construction of statutes:

"The rule, that practical construction of a law will be regarded by the court as controlling after long acquiescence, is invoked. * * * But it has no application to a legislative enactment which, in neither its literal sense nor its application to the subject it affects, is ambiguous. In such a case there is no room for the operation of the rule of practical construction, or any other. The act must be taken to mean what its language obviously indicates, regardless of the length of time that a contrary view has obtained. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 265." *Milwaukee County v. Isenring and others*, 109 Wis. 9, 27, 85 N. W. 131.

"* * * Construction by state officers is not controlling, particularly where there is no ambiguity in the statute and its provisions are clear and unmistakable. *Smith v. State*, 161 Wis. 588, 155 N. W. 109." *State ex rel. Time Ins. Co. v. Smith*, 184 Wis. 455, 474, 200 N. W. 65.

"An argument is sought to be based upon the precedent in the respective offices. While such an argument may have weight in construing a doubtful or ambiguous provision, yet it has no force as against the plain language of the clause in question. A customary violation of the plain language of the law gives no authority for continuing such

violation." *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 50, 51 N. W. 1133.

"We find no occasion for resorting to a practical interpretation of the law, since the statute in this particular is plain, and such a statute could not be affected by a practice limited to a few cases. * * *" *Estate of Sletto*, 224 Wis. 178, 182, 272 N. W. 42.

"The construction given laws by administrative departments is certainly entitled to weight—especially when long acquiesced in. But a practically contemporaneous construction of an administrative department cannot be successfully invoked to override a plain meaning of the statute. * * *" *Van Dyke v. Milwaukee*, 159 Wis. 460, 470, 146 N. W. 812.

"* * * At any rate, unless long continued, * * * an administrative practice should not be assumed as settling the interpretation of a statute." *Department of Taxation v. Miller*, 239 Wis. 507, 512, 300 N. W. 903.

It is my opinion that secs. 42.45 (3) and (4) and 42.49 (3c) and (3m) are so unambiguous in respect to the question which you have raised and of such recent origin that an administrative construction contrary to the statutory interpretation hereinbefore given cannot be held to be controlling.

JRW

Constitutional Law—Legislature—Repeal of Administrative Rules by Joint Resolution—Repeal of administrative rules by joint resolution of legislature violates provisions of art. IV, sec. 17, of Wisconsin constitution that "no law shall be enacted except by bill," and therefore sec. 227.031, Stats. 1953, and proposed replacement thereof, are invalid.

December 28, 1954.

LEGISLATIVE COUNCIL.

An opinion has been requested as to the validity of provisions such as are now in sec. 227.031, Stats. 1953, and are also in a new sec. 227.04 proposed to replace it, which specifically recite that at any time the legislature may by joint

resolution abrogate or disapprove a rule adopted by any administrative agency.

Sec. 227.031, Stats. 1953, reads:

"227.031 The legislature may at any time by joint resolution disapprove any rule then in effect. Disapproval is effective only when the joint resolution has been published in the same manner as required of the agency when it enacted the rule and has been filed in the manner prescribed by s. 227.03 for the filing of rules. When so disapproved, the rule is void as if the agency had repealed it. The legislature may indicate in the joint resolution what modifications would result in an acceptable rule."

The proposed new sec. 227.04 would read:

"227.04 LEGISLATIVE REVIEW OF RULES. (1) The legislature may at any time by joint resolution disapprove any rule. Such disapproval has the same effect as the agency's repeal of the rule would have. The legislature may indicate in the joint resolution what modifications would result in an acceptable rule.

"(2) A joint resolution to disapprove a rule shall be referred to the appropriate committee in each house of the legislature. The joint resolution shall be scheduled for public hearing and such hearing shall be held in at least one of the houses. When a joint resolution to disapprove a rule has been adopted by both houses, it shall be published in the same manner as required of the agency in enacting the rule and shall be filed in the manner prescribed by § 227.023 for the filing of rules. Disapproval is effective only when such publication and filing requirements have been complied with.

"(3) If the legislature indicates in the joint resolution what would be an acceptable rule, the agency may adopt such rule in the same manner as it would adopt any other rule. Any rule which re-enacts the substance of a disapproved rule is void unless the legislature has repealed the disapproving resolution.

"* * *"

Although such statutory provisions do not so specify, consideration must be given to whether they could be sustained by viewing them as creating a special state agency composed of the persons that are the members of the legislature. If so, then the joint resolution would not be an act of the legislature as the legislative body, but of such special administrative agency whose membership consists of all of

the individuals who are members of the legislature and which is thereby given power and authority to set aside or modify the rules promulgated by other administrative agencies.

Any such attempt to so view such provisions, and thereby sustain them, would be unsuccessful for several reasons. Quite clearly the language used does not create any new state agency and is most inappropriate thereto. Were such the pattern intended there would have been no occasion to use "joint resolution." Furthermore, the provisions say specifically that it is the "legislature" which is acting through such joint resolution.

Also, even if it were possible to so construe these provisions as creating an independent agency so that the joint resolution would not be an act of the legislature, they would be invalid because of the absence of any prescribed standard. The rule is well established that in delegating subsidiary legislative power to an administrative agency there must be an adequate standard prescribed which it is to apply and follow as a guide in its action pursuant to such delegation. *Clintonville Transfer Line v. P. S. C.*, (1945) 248 Wis. 59, 69, 21 N. W. 2d 5. Here there would be absolutely no standard of any kind.

Any argument that "in the public interest" might be inferred as the intended standard, would be untenable. But, even so, standing alone "in the public interest" is not an adequate standard. It is the standard or underlying guide involved in legislation generally. Were it the specified standard, the provisions then would constitute an abdication by the legislature of its functions as the legislative body of the state, and therefore clearly be invalid. *Clintonville Transfer Line v. P. S. C.*, *supra*.

It therefore becomes necessary to consider whether the legislature, as the legislative body of the state, can nullify or modify an otherwise valid rule of an administrative agency by the passage of a joint resolution.

Art. IV, sec. 17 of the Wisconsin constitution provides:

"The style of the laws of the state shall be 'The people of the state of Wisconsin, represented in senate and assembly, do enact as follows; and no law shall be enacted except by bill."

Art. V, sec. 10 thereof also provides:

“Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor;
* * *”

If a departmental rule has the force and effect of law, then so long as it exists it speaks the law as respects the subject matter it covers. Certainly such a rule performs all the functions of law. A duly promulgated and published rule of an administrative agency which implements, interprets, or applies a statutory provision is controlling as to the conduct, private rights, privileges, duties, or liberties of the citizens and inhabitants of the state coming within its terms. Rules of administrative agencies are an effective medium through which the state, in its sovereign capacity, reaches out and deals with, directs, or regulates private affairs, just as effectively as provisions in statutes, and, as is also the case in respect to statutes, sometimes against the will of the individual persons subjected thereto. It is said in 42 Am. Jur. 432, Pub. Adm. Law, § 102:

“Rules, regulations, and general orders enacted by administrative authorities pursuant to the powers delegated to them have the force and effect of law. * * * Thus, administrative regulations are held to be ‘laws’ or ‘statutes.’ Any enactment, from whatever source originating, to which the state gives the force of law is a law or statute of the state.
* * *”

The decisions of our supreme court are in accord that duly adopted rules and regulations of administrative agencies have the force and effect of law. *Whitman v. Dept. of Taxation*, (1942) 240 Wis. 564, 577, 4 N. W. 2d 180; *Olson v. State Conservation Comm.*, (1940) 235 Wis. 473, 482, 293 N. W. 262; *Long v. Tax Comm.*, (1932) 208 Wis. 668, 671-672, 242 N. W. 562. Therefore, as any action the legislature takes that makes a change in or obliterates a departmental rule effects a change in the law, such legislative action constitutes the making of law.

By virtue of the provisions of art. IV, sec. 17 of the constitution any legislative act which constitutes law must be enacted by a bill and it must have the style of an enactment as there prescribed. By art. V, sec. 10, every bill must be

presented to the governor for approval or disapproval. A joint resolution passed merely by both houses of the legislature is not a bill and any attempt to enact a change in the law by a joint resolution violates both of said constitutional provisions. The underlying concept expressed in those provisions is that any change in the law made by legislative action must be by a bill which is submitted to the governor for approval and either approved by him or passed over his veto by the specified vote.

While there are no decided cases in this state or prior opinions of this office directly in point, all the adjudicated cases in other jurisdictions having like or similar constitutional provisions support the view that action of the legislature which either establishes the law or makes any change therein can be only by a bill passed by both houses and either approved by the governor or passed over his veto, and that no modifications in the law can be made by the mere passage of a joint resolution. *Knorr v. Beardsley*, (1949) 240 Ia. 828, 38 N. W. 2d 236; *State ex rel. Todd v. Yelle*, (1941) 7 Wash. 2d 443, 110 P. 2d 162; *Scudder v. Smith*, (1938) 331 Pa. 165, 200 A. 601; *Sancho v. Acevedo*, (1937) (C. C. A. Puerto Rico) 93 Fed. 2d 331; *Terrell Wells Swimming Pool v. Rodriguez*, (Tex. Civ. App.) 182 S. W. 2d 824; *Moran v. La Guardia*, (1936) 270 N. Y. 450; *Mosheim v. Rollins*, (1935) (Tex. Civ. App.) 79 S. W. 2d 672; *Boyer-Campbell Co. v. Fry*, (1935) 271 Mich. 282, 260 N. W. 165; *Becker v. Detroit Sav. Bank*, (1934) 269 Mich. 432, 257 N. W. 853.

It is stated in 82 C. J. S. 47, Statutes, § 20:

“The view taken in most, but not in all, jurisdictions is that legislation cannot be enacted by joint or concurrent resolution with respect to specified subjects. * * *”

The cases there cited for the divergence from the rule are two Oklahoma cases, *In re Block 1*, (1944) 194 Okl. 221, 149 P. 2d 265, and *Ward v. State*, (1936) 176 Okl. 368, 56 P. 2d 136. When examined it appears that the constitution of Oklahoma does not contain any provision that “no law shall be enacted except by bill,” but on the contrary contains provisions that contemplate and recognize that joint resolutions are proper in enacting temporary measures and that

when so used they constitute law. In addition the joint resolutions there involved were adopted by following the same procedure applicable to a bill, including submission to the governor for approval.

The only other case that might seem contrary to the stated rule does not so hold. *Watrous v. Golden Chamber of Commerce*, (1950) 121 Colo. 521, 218 P. 2d 498, was a case where a statute, providing for the construction, financing, and operation of a turnpike, contained a provision, in respect to setting up a sinking fund to pay bonds issued therefor, that the highway department could pledge thereto out of the proceeds from motor vehicle license fees, registrations, and other highway user charges (including motor fuel taxes), not to exceed 30 per cent of the required payments each year of principal and interest on the bonds, but that such a pledge "shall first be approved by a joint resolution" of the legislature. The Colorado constitution contained a provision that "every order, resolution or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the governor" for approval. The court there held that a joint resolution adopted by the legislature, approving a pledge from the highway fund pursuant to such statute, was valid even though not signed by the governor, as within the express exception "relating solely to the transaction of business of the two houses." It also pointed out that this statute provided that the pledge by the highway department had to be, and it was, approved by the governor before its submission to the legislature for approval by the joint resolution.

Although the case of *Opinion of Justices*, (1950) 96 N. H. 517, 83 A. 2d 738, rests on the particular provisions in the New Hampshire constitution, it does lend support to the general rule. Their constitution provided, "The supreme legislative power, within this state, shall be vested in the senate and house of representatives, each of which shall have a negative on the other." The majority opinion held this provision was violated by a statute providing that the governor, after study, should prepare and submit to the legislature in the form of a statute a plan or plans for re-organization of state departments which would "take effect

and become law" upon the expiration of 25 days from transmittal thereof if a concurrent resolution were not passed during that period stating that the legislature disapproved thereof. The basis of the decision was that if one house disapproved of the submitted plan that would not be effective to defeat the plan becoming law where the other approved it, and therefore the provision for each having a negative on the other was violated. There was also mention of provisions of the constitution that every bill and "every resolve" shall be presented to the governor for approval and passage over a veto. The opinion said in respect thereto that in the sense that this statute would dispense with passage of any measure and presentation to the governor, it provided for a reversal of the democratic processes provided by their constitution.

Of the cited cases holding that legislative action establishing or making change in the law must be by bill and cannot be by joint resolution, *Boyer-Campbell Co. v. Fry*, *supra*, is the one most directly in point on the provisions here involved. There the state tax administrative agency had issued a rule interpreting the Michigan 1933 sales tax statute as imposing the tax upon sales to manufacturers of tangible personal property used in the manufacturing of articles to be ultimately sold at retail but which does not become an ingredient or component part of the manufactured article, because the manufacturer is the final buyer or ultimate consumer thereof, and that as to tangible personal property sold to manufacturers which is consumed in the manufacturing process and becomes an ingredient or component part of the manufactured article, it imposed no tax on the sale thereof to the manufacturer but imposed it on the purchaser at retail, as he is the final buyer or ultimate consumer. Thereafter the Michigan legislature passed a concurrent resolution stating that the intent in the 1933 statute was to exclude from its provisions the sale of anything to manufacturers that was used exclusively in manufacturing. Thereupon the state tax administrative agency changed its rule to conform thereto, but later upon advice of the attorney general rescinded the change and went back to its original rule. Action for declaratory judgment as to

the effect to be given this sales tax statute was brought by a number of manufacturers.

The supreme court of Michigan there said, "Legislative resolutions are not law, although they are entitled to respectful consideration, *Becker v. Detroit Savings Bank*, 269 Mich. 432, 257 N. W. 853," and then proceeded to hold that the sales tax statute was to be interpreted as provided in the rule of the tax administrative agency.

In *Becker v. Detroit Savings Bank*, *supra*, the legislature had passed a joint resolution stating that the 1933 Michigan mortgage moratorium statute was intended to grant relief to, and cover suits at law to recover on mortgage notes brought against, home owner mortgagors. The court in holding the moratorium act afforded no such relief in suits on the notes and was not changed in effect by such legislative resolution, relied upon and quoted at length from *Mullan v. State*, (1896) 114 Cal. 578, 46 P. 670, 672, 34 L. R. A. 262, where a legislative concurrent resolution authorizing the governor to fix the compensation payable to an agent employed by him to act for the state was held invalid because it violated provisions of the California constitution providing: "The legislature shall have no power * * * to pay or to authorize the payment of any claim hereafter created against the state * * * under any agreement or contract made without express authority of law." The California court so held because the California constitutional provision that "no law shall be passed except by bill," furnished a direct answer to the argument that "express authority of law" in the other mentioned provision could include a joint or concurrent resolution of the legislature. It said:

"* * * It provides in express terms that there shall be but one mode of enacting a 'law' thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference. The requirements of the Constitution are not met by that method of legislation. 'Nothing be-

comes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.' Cooley, Const. Lim. p. 155, chap. 6. It is true, as contended, that legislation for certain limited purposes by means of resolutions or legislative orders is in use to some extent in certain of the states and in Congress. But it will be found that in most, if not all, instances, it is under a Constitution which either expressly recognizes it, as does the Constitution of the United States, or one which at least does not forbid it. And it will be usually found to take the form of a resolution, requiring the assent of the executive to give it effect. In Congress this form of legislation is regarded as a bill, and treated with the same formalities. Even if this mode of legislation were competent under our Constitution, the resolution relied upon would not arise to the dignity of law, since it lacks the essential of executive approval. * * *

In *Moran v. La Guardia*, *supra*, mandatory salaries for policemen in the city of New York were fixed by an act of the legislature, but subsequent legislation, which said its provisions should apply "until the legislature shall find their further operation unnecessary," authorized the city to pay reduced salaries during a declared emergency. A concurrent resolution by which a subsequent legislature sought to declare the emergency at an end was held ineffective. The New York court said:

"* * * A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body.
* * *

"* * *

"Not only reason but authority demonstrate that the joint resolution upon which is based the application of petitioner does not constitute action by the Legislature and cannot result in the repeal of the so-called economy bill."

In holding in *Scudder v. Smith*, *supra*, that a joint resolution creating a commission to investigate the oil industry, which was adopted by following the procedures for passage of a bill, including the governor's written approval, was invalid as violative of constitutional provisions in practically

the same language as in our art. IV, sec. 17, the Pennsylvania court said:

“* * * A ‘Joint Resolution’ has been defined by the same authority [Webster’s New Int’l. Dict.] to be ‘A resolution adopted jointly by the two branches of a legislative body.’ A ‘resolution’ by the same authority has been defined as ‘A formal expression of the opinion or will of an official body or a public assembly, adopted by a vote; as a legislative resolution.’ When the Constitution provided that ‘no law shall be passed except by Bill,’ it meant by ‘a form or draft of a law submitted to the legislature for enactment’; it did not recognize a mere ‘formal expression of opinion’ as adequate to the *creation of a law*. * * *

“* * * The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion. * * *”

The case of *Terrell Wells Swimming Pool v. Rodriguez*, *supra*, was grounded on a joint resolution of the legislature, approved by the governor, which stated that there should be equal rights to all races in the matter of admissions to amusement places. The court said that it had no doubt that prior to such resolution the proprietor of an amusement place could under the law deny a ticket or admission to anyone he wished. It then held such law was not changed by this resolution, saying: “A concurrent resolution of the Legislature does not have the effect of a statute.”

The basic objective of these constitutional provisions requiring that enactments of law must be by bill is well stated in *Scudder v. Smith*, as follows:

“* * * The purpose of the constitutional requirements relating to the enactment of *laws* was to put the members of the Assembly and *others interested, on notice*, by the title of the measure submitted, so that they might vote on it with circumspection. What was attempted to be done by the sponsors of this challenged measure was something utterly alien to the proper subject matter of a ‘joint resolution.’ Its deceptive nomenclature is fatal to its validity as a *law*.”

Upon full consideration of the foregoing authorities and principles it is our opinion that the legislature cannot constitutionally abrogate or modify a duly issued rule of an administrative agency by the mere passage of a joint resolu-

tion, and therefore the provisions of sec. 227.031, Stats., and of the proposed sec. 227.04 to replace it, providing therefor, are invalid. Obviously, the legislature can do so by the passage of a bill which is approved by the governor, or passed by the requisite votes over a veto. But there would be no point or object in passing a statutory provision to that effect, because the legislature possesses such power.

HHP

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Immediately—As used in 85.141 (6) (a), relating to reporting of automobile accidents, “immediately” means within a reasonable time under all facts and circumstances of the case. Whether report was made “immediately” is a question of fact and not a question of law -----	90
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Transient merchant—Person who rents building by the month and conducts sale there only one night per month, keeping only small stock of merchandise there in the meantime, and carrying on the same type of sale in a different place each night, is a transient merchant as defined in 129.05 -----	257
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Counties—County zoning ordinance enacted pursuant to 59.97 is "county platting, regional or zoning plan" so as to require approval of plats by county board pursuant to 236.06 (1) (b). When plats were recorded without required approval recordation was void and they must be rerecorded, but such records must remain in register of deeds' office for chain of title and description purposes only. Retroactive approval by county board is not possible. Plats in towns electing not to come under county zoning ordinance must be approved by county board in accord with 236.06 (1) (b). Improper recording meant that there was no dedication of streets and alleys unless effected by a user or some other method -----

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