

OPINIONS  
OF THE  
ATTORNEY GENERAL

OF THE  
STATE OF WISCONSIN

VOL. 44

January 1, 1955, through December 31, 1955

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VERNON W. THOMSON  
Attorney General



MADISON, WISCONSIN  
1955



## ATTORNEYS GENERAL OF WISCONSIN

### FROM THE ORGANIZATION OF THE STATE

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

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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  
WILLIAM A. PLATZ.....Assistant Attorney General  
JAMES R. WEDLAKE.....Assistant Attorney General  
BEATRICE LAMPERT.....Assistant Attorney General  
ROY G. TULANE.....Assistant Attorney General  
RICHARD E. BARRETT.....Assistant Attorney General  
GEORGE F. SIEKER.....Assistant Attorney General  
GORDON SAMUELSEN\*.....Assistant Attorney General  
E. WESTON WOOD.....Assistant Attorney General

\* Resigned October 24, 1955.

OPINIONS  
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VOLUME 44

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*Salaries and Wages—Circuit Court Clerk*—Where county board under sec. 59.15 (1) (a), Stats., has provided for a straight salary for the clerk of court of \$50 per month plus \$5 per day for attending circuit court sessions, the clerk is not entitled to retain the fees provided by sec. 59.42 (1), Stats., in criminal cases.

January 12, 1955.

V. P. DAVIS,  
*District Attorney,*  
Sawyer County.

You state that the county board of your county has provided under sec. 59.15, Stats., for the salary of the clerk of court at the rate of \$50 per month plus \$5 per day for attending court during sessions of the circuit court. Nothing was said in the resolution about retention of any fees. It is the contention of the clerk that he is entitled to the fees provided in criminal actions by sec. 59.42 (1) by virtue of the language in par. (d) thereof reading:

“If criminal fees are lawfully retained by the clerk as part of his compensation, the foregoing fees, if not assessed against the defendant and paid by him, shall be paid by the county.”

This language poses the question but does not answer it, and resort must be made to the provisions of sec. 59.15 and

the action of the county board pursuant thereto in order to determine whether the fees in criminal actions may be lawfully retained by the clerk as part of his compensation.

Sec. 59.15 (1) (a), Stats., provides:

“59.15 (1) ELECTIVE OFFICIALS. (a) The county board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county or part thereof (other than county board members and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid such officer (exclusive of reimbursements for expenses out-of-pocket provided for in 59.15 (3)). The annual compensation may be established on a basis of straight salary, fees, or part salary and part fees, and if the compensation established by the county board is a salary, or part salary and part fees, such compensation shall be in lieu of all fees except those specifically reserved to the officer by enumeration regardless of the language contained in the particular statute providing for the charging of the fee. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the county board by timely action.”

This gives the county board the option of providing for a straight salary or for part salary and part fees, and if the compensation is to consist partly of fees they are to be enumerated.

The question then boils down to what the county board has provided, and from your statement of its action there appears to be no provision for any fees whatsoever. Therefore none may be retained.

This type of question is not wholly a new one in Sawyer county. Reference is made to 11 O.A.G. 104 where, in an opinion to the district attorney of Sawyer county on February 4, 1922, it was concluded that the clerk of court was entitled to no fees in criminal cases under a county board resolution calling for a salary of \$300 per year and all civil fees. Note also 40 O.A.G. 460 to the effect that the clerk of court may not retain fees received for services in naturalization proceedings where the county board has provided an annual salary under sec. 59.15 (1) without specifically pro-

viding for retention of such fees. See also 26 O.A.G. 394; 24 O.A.G. 730; 23 O.A.G. 111; 21 O.A.G. 932; and 12 O.A.G. 287.

WHR

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*Taxation—Railroads—Car Ferries, Terminal Facilities—Statutes—Construction*—Administrative construction for over 30 years that secs. 76.16 and 76.28 (4), Stats., do not include car ferry properties is controlling as to the construction and interpretation thereof, and any change would require legislative action.

January 19, 1955.

DEPARTMENT OF STATE AUDIT.

You request an opinion whether car ferry properties are included in the so-called "terminal facilities" specified in secs. 76.16 and 76.28 (4), Stats., providing for the separate valuation thereof and the distribution to the local units in which they are located of the amount of railroad taxes attributable thereto.

A decision of the supreme court in 1915 held invalid a statutory provision that certain specified "terminal facilities" should not be included in the state assessment of railroads but should be subject to local taxation. Thereupon, the 1915 legislature enacted the provisions now in secs. 76.16 and 76.28 (4), Stats., that after making the state unit assessment of railroad operating properties, designated "terminal facilities" should be separately valued and the amount of railroad taxes attributed thereto should be distributed to the local units. For the 30 years commencing with 1918, the department of taxation and its predecessors uniformly interpreted these provisions as not encompassing car ferry properties, and therefore in those years there was no separate valuation thereof and no distribution was made to local units of railroad taxes attributable thereto. However, in 1948 the department of taxation took a position opposite to this view, and therefore in the distributions for 1948 and subsequent years to the city of Milwaukee it included rail-

road taxes deemed attributable to car ferry properties in that city. The occasion for your request for opinion is that in the course of recent audit procedures attention was directed to this reversal of the interpretation and application given these provisions all during said prior years.

For more than the last 45 years the statutes have provided, as do now secs. 76.01, *et seq.*, for the taxation of operating property of railroads by annual assessment thereof by the department of taxation and its predecessors, and the application thereto of the average state rate of property taxation. By ch. 540, Laws 1911, sec. 1212-3 (later sec. 51.02 (7)), the forerunner of the present provisions in sec. 76.02 (10) and (11), Stats., was amended to provide that certain described "terminal facilities" should not be included in such state assessment but taxed locally. In *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas Co.*, (1915) 159 Wis. 408, this provision was held invalid because it separated railroad operating property from the state unit assessment. As a result thereof, there were enacted by ch. 407, Laws 1915, the provisions now in sec. 76.16 (except for the later additions of the words "ore yards" and the last sentence now therein), and also the provisions now in sec. 76.28 (4), Stats.

Apparently in the years 1915, 1916 and 1917 the tax commission interpreted these newly enacted provisions as encompassing car ferry properties. However, definitely those in the tax commission in charge of public utility taxation in 1918 reasoned that as car ferry properties are not used to transfer freight from cars to vessels, and vice versa, but to transfer entire railroad cars from one to the other, they would not come within the language "used in transferring freight or passengers between cars and vessels," and therefore were not to be included in the terminal properties to be separately valued and for which attributable railroad taxes were to be distributed to the local units. Thus, commencing with 1918, and for the next 30 years, the department of taxation and its predecessors interpreted these provisions as not including car ferry properties, and no distribution of any railroad taxes attributable thereto was made in those years.

In 1948 the department of taxation took the view that car ferry properties were intended to be included in such provisions and that the previous interpretation followed during the past 30 years gave too limited a meaning to the language therein. Therefore, in 1948 it included the two car ferry properties of railroads in the city of Milwaukee in a separate valuation of the "terminal facilities" of those railroads, pursuant to sec. 76.16, Stats., and included in the distribution to the city of Milwaukee for that year pursuant to sec. 76.28 (4), Stats., the amount of the taxes of such railroads attributable to such car ferry properties. It has continued to do the same in making distributions for "terminal facilities" taxes to the city of Milwaukee in subsequent years. However, during the years there were car ferry properties in the cities of Kewaunee and Manitowoc, and they are still there, but there never has been any separate valuation thereof nor any distribution to such cities of railroad taxes attributable thereto.

In the normal situation, the approach would be to endeavor to ascertain from the language used in the provisions involved, and the background and setting thereof, what was intended thereby. What application to car ferry properties is to be given to these provisions containing "used in transferring freight or passengers between cars and vessels" would involve a construction of that language. As a matter of first impression, the argument that the operation of a car ferry is not the transfer of freight between cars and vessels, but a transfer of the freight cars themselves, and so not within the language, would be of considerable force. But on the other hand, there is likewise force in the contention that considering the purposes of these statutes, the function performed by car ferry property falls within the kind of an operation that was intended to be included. Whatever conclusion might be ultimately reached would involve a consideration and weighing of the arguments on both sides of the question and a determination of what interpretation should be given to the statutory language. But in view of the above recited circumstances here involved, it appears to us that there is no occasion for indulging in that process of resolving the various arguments

and making a determination of the construction to be given the statutory language.

The statutory language involved is not so precise and definite that car ferry property is covered thereby without any question. Only by construing the language used as intended to include them, would such properties fall thereunder. The department of taxation and its predecessors, the state agency which over the years has had the administration of the statutory provisions, in 1918 made a definite administrative construction of the application of these statutory provisions as respects car ferry properties and consistently maintained and followed that construction for at least 30 years. During that time the legislature had come and gone numerous times. In our opinion, such definite and long-continued administrative interpretation and construction of the statutes is controlling and has become a part of such statutes just as effectively as if written into the same. Consequently, the department of taxation was without power or authority to give a different construction and interpretation to these statutes in 1948 and subsequent years, but was bound by interpretation which it had consistently given to the statutes during the previous 30-year period.

An administrative agency of the state has no power or authority to change the law as expressed in the statutes but only to make interpretation thereof that is necessary in the administration thereof. Having made the interpretation in 1918 and consistently given the same interpretation and application to this statute all during the succeeding 30 years, such maintenance of that construction and interpretation has established the proper meaning to be given to the statutory language. The acquiescence therein by the legislature is of the same effect as if the legislature had enacted it into specific statutory language.

It is the well-settled rule in this state that the uniform continued construction of a statute by a state department charged with the administration and application of such statute is entitled to controlling weight as to how such statute is to be construed. It is deemed that the legislature would have enacted some statutory provisions otherwise if it desired that such construction should not be the proper construction of such statute. It was early decided in *Dean v.*

*Borchsenius*, (1872) 30 Wis. 236, that uninterrupted practice through a long series of years with the acquiescence of all of the government departments is sometimes decisive even upon questions of constitutional construction.

In *Scanlan v. Childs*, (1873) 33 Wis. 663, it was held that the general interpretation of a law by all of the officers of the government charged with its administration for over a period of 20 years, and unquestioned by any public or private action in the courts in respect thereto, is strong, if not conclusive, evidence of the true meaning of the statute involved. In numerous cases our supreme court has said that the long-continued practical construction of a statute by the state officers administering the same is entitled to great weight in determining the meaning of the statute. In *State ex rel. Bashford v. Frear*, (1909) 138 Wis. 536, 120 N. W. 216, it was held that such a construction continuing for 50 years is entitled to controlling weight. Other cases to similar effect are *State ex rel. Taylor v. McKinny*, (1911) 146 Wis. 673, 132 N. W. 600; *State ex rel. Time Ins. Co. v. Smith*, (1924) 184 Wis. 455, 200 N. W. 65; *State ex rel. State Ass'n. of Y.M.C.A. v. Richardson*, (1928) 197 Wis. 390, 222 N. W. 222; *Messar v. Southern Surety Co.*, (1929) 197 Wis. 578, 222 N. W. 809; *State ex rel. Green v. Clark*, (1940) 235 Wis. 628, 294 N. W. 25; *Milwaukee v. Milwaukee Co.*, (1940) 236 Wis. 7, 294 N. W. 51; *State ex rel. Koch v. Retirement Board*, (1944) 244 Wis. 580, 13 N. W. 2d 56.

In *Helvering v. Winmill*, (1938) 305 U. S. 79, 83, 59 S. Ct. 45, 83 L. ed. 52, it was said:

“Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.”

It is our opinion that this 30-year period of consistent interpretation and application of these statutes as not including car ferry properties, and the tacit approval thereof by the legislature arising from its acquiescence therein by making no enactment to the contrary, made such construction and interpretation a part of such statutes to the same effect as if such interpretation and construction had been specifically written into such statutes in unequivocal lan-

guage. It therefore became a part of the statutes with the result that any different or other interpretation or construction of such statutes could only be effected by legislative action. Accordingly, it is our opinion that the department of taxation was without power and authority in 1948 and subsequent years, and is now without power and authority, to give such statutory provision any different interpretation or application than that given to it during the preceding 30-year period. Therefore, until or unless the legislature acts in respect to these statutes, they must be given the interpretation and application that was given thereto over the 30 years from 1918 to 1948.

HHP

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*Municipalities—Co-operation—Mental Health Clinics—Municipal Budgets—Pensions—Wisconsin Retirement Fund*  
—Under secs. 141.10 and 66.30, Stats., two or more counties may join in setting up a mental health clinic.

Decision in *Heimerl v. Ozaukee County*, 256 Wis. 151, has no application to an exercise of the police power in the interests of public health, welfare, and safety.

County board budget under sec. 65.90, Stats., must be passed upon annually, and budget for 1955 cannot include an appropriation for 1956 which will be beyond the power of the county board to change when it conducts budget hearings for 1956.

The functions delegated by sec. 141.10 (2), Stats., to the committee appointed by the county board cannot be redelegated to the advisory committee.

Employees of a joint county mental health clinic are joint county employees and would not come under the Wisconsin retirement fund definitions set up by sec. 66.901, Stats.

January 21, 1955.

LEROY J. GONRING, *District Attorney*,  
Washington County.

BEN R. RUNKEL, *District Attorney*,  
Ozaukee County.

The district attorneys of Ozaukee county and Washington county have joined in a request for an opinion on a

number of questions that have arisen as a result of county board resolutions in each county providing for the creation of a joint mental health clinic by the two counties.

The questions are seven in number and read as follows:

"I Can the County Boards legally adopt a resolution creating a joint Mental Health Clinic under Section 141.10 of the Wisconsin Statutes?

"II Is Section 141.10 of the Wisconsin Statutes constitutional in view of the decision in *Heimerl vs. Ozaukee County*, 256 Wis. 151 which holds in effect that where private individuals are prepared to perform the duties or function undertaken by the governmental unit, that such function competes with private persons and takes away from them the opportunity for a livelihood or a right to work?

"III Is the two year appropriation in the first paragraph, page 4 of the resolution, adopted by Washington County illegal insofar as it affects an appropriation for the year 1956?

"IV May the counties appropriate money to subsidize or assist any organized group (assuming such group to be a non-profit organization) for the purposes intended under the Statutes if the organization renders services to the people of both counties, specifically referring to this paragraph which appears in both resolutions:

" 'RESOLVED FURTHER That subject to the control of the directing committees designated and referred to just above, the actual detailed operation of the Clinic may be under the management of an advisory committee consisting of not fewer than twelve members, an equal number from each county who shall serve without salary, fees or compensation of any kind.

" 'RESOLVED FURTHER That such advisory committee members for Ozaukee County shall be selected and named by the Statutory committee under Section 141.10.

" 'RESOLVED FURTHER That the committees designated and referred to and representing the two counties shall have full power and authority to carry out the purposes contemplated by the law and this authority for the two year period specified in the proper operation of said Mental Health Clinic'.

"V May the committee as provided in Sub-Section (2) of 141.10 of the Wisconsin Statutes delegate to the advisory committee the function of actually operating the Clinic if the expenditure of funds and the actual direction and supervision of the Clinic is controlled by the Committee designated in Sub-Section (2) of the Statutes?

"VI May the Committee as provided in Sub-Section (2) of the Statutes delegate to the advisory committee as provided by the resolution, the authority to hire the personnel for the actual operation of the clinic?"

"VII Are the employees of the Clinic under the resolution county employees and if so, of which County? Does it make any difference in their status whether they are hired by the advisory committee or by the statutory committee? Do the employees come under the Wisconsin Municipal Retirement plan and who will administer this?"

### I.

Sec. 141.10, Stats., reads:

"141.10 (1) Any county, town, city or village may establish and maintain a mental health clinic and employ psychiatrists, clinical psychologists, psychiatric social workers and others necessary to meet the county or municipal needs in providing a mental health program.

"(2) Such program shall be directed by a committee appointed by the county board or local governing body (one of whom shall be a practicing physician) which may set up an advisory committee, except that in counties having a population of 500,000 such county program shall be directed by the county board of public welfare.

"(3) Gifts may be accepted to establish or maintain such clinics.

"(4) The local authorities may co-operate with state agencies in obtaining federal funds for setting up and carrying out mental health programs."

These provisions, standing alone, would not authorize the creation of a joint mental health clinic by the two counties, since counties have only such powers as are expressly granted or necessarily implied from the statute, and if there is a reasonable doubt as to an implied power, it is fatal to its being. *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 11 N. W. 2d 348. See also *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N. W. 2d 27, where two state agencies, which are subject to the same rule, attempted unsuccessfully to act jointly without specific statutory authorization.

However, the answer to the question in this instance is solved by another statute, sec. 66.30, which furnishes the necessary authorization. This section provides:

"66.30 (1) Any city, village, town, county or school district may, by action of the governing body thereof, enter into an agreement with any other such governmental unit or units or with the state or any department or agency thereof including building corporations created pursuant to section 37.02 (3) for the joint or co-operative exercise of any power or duty required or authorized by statute, and as part of such agreement may provide a plan for prorating any expenditures involved.

"(2) Any city, village, town, county or school district in the exercise of its powers may contract jointly with any other city, village, town, county or school district for any joint project, wherever each portion of the project is within the scope of authority of the respective city, village, town, county or school district."

See 41 O.A.G. 335 to the effect that two counties may cooperate in establishing, maintaining, and prorating the costs of, public library services on a joint basis.

Question No. I is therefore answered in the affirmative.

## II.

We do not regard the case of *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151, 40 N. W. 2d 564, as having any application here. The distinction is to be found within the language of the opinion in that case. It was there held that the county could not be authorized constitutionally to construct private roads for landowners in competition with private contractors who could do that type of work on a competitive business basis. The court made it clear, however, that municipalities may with propriety be authorized by the legislature to exercise their police power in the preservation of the public health. Without discussing the matter at length, it would appear rather clearly that the maintenance of a mental health clinic could be classified as a natural governmental function reasonably essential to the health, safety, and welfare of the community, particularly in the light of the increasing emphasis on the social importance of mental health diagnosis and treatment in meeting problems such as child guidance, delinquency, crime, etc.

## III.

The 2-year appropriation referred to in the third question reads as follows:

“RESOLVED FURTHER that by the passage of this resolution and a similar one by Ozaukee County Board, and the acceptance thereof in writing by the State Board of Health directed to the County Clerk, the sum of \$5000.00 be and is hereby appropriated to be applied to the purposes herein set forth for the year 1955 and that a like sum is hereby pledged for the year 1956;”

In view of the municipal budget law, sec. 65.90, Stats., which requires action annually on county budgets, it would appear that separate action would be required as to the \$5,000 pledged for 1956 when the annual budget for that year is processed by the county board in accordance with the procedures provided by sec. 65.90. In the matter of appropriations one county board cannot bind a future county board any more than one legislature can bind a subsequent legislature to make the same appropriation. The question of the power of a county board to execute a contract that is intended to operate beyond the term of office of the board is a troublesome one. See 14 Am. Jur., Counties § 41. However, without attempting to go into all of the ramifications of that problem here, the resolutions of the two counties appear to fall short of constituting a contract for a 2-year period binding on either county.

Moreover, the resolution does not specifically appropriate any money for 1956 but pledges it. While we do not have a copy of the 1955 budget before us, we would surmise that it shows only \$5,000 for the year 1955, and even if it did show \$5,000 for 1956 the requirements of sec. 65.90 as to setting it up in the annual budget for 1956 could not be avoided by including it in the 1955 budget only. Thus the reference to 1956 must be construed merely as an expression of intent and good faith rather than as a binding obligation.

## IV.

As we read the resolutions they do not purport to appropriate money to subsidize or assist any organized group in the nature of a nonprofit organization.

## V.

The answer to this question is in the negative. Sec. 141.10 (2) provides that the program shall be directed by a committee appointed by the county board. This committee may set up an advisory committee. The statute uses the term "advisory committee," and we assume the legislature meant just what it said. In other words it is the duty of the *advisory* committee to *advise* only and not *direct*. The *directing* is to be done by the committee appointed by the county board. The statute so provides specifically, and neither that committee nor the county board itself may delegate the committee's statutory duties to any other agency under familiar rules of administrative law. *Delegata potestas non potest delegari*. A delegated authority cannot be again delegated.

## VI.

This question is answered in the negative for the same reasons discussed under V.

## VII.

These employes would appear to be on the same footing as employes of other joint county institutions. As indicated above, the duty of hiring these employes could not be delegated to the advisory committee. It would have to be exercised by the joint committee appointed by the two county boards or by separate committees appointed by each board but acting jointly. They would appear to be joint county employes, but in the absence of special legislation they would not come under the Wisconsin municipal retirement act. Your attention is directed to sec. 66.901 (2), Stats., which defines a municipality for purposes of the Wisconsin retirement fund as follows:

"66.901. The following words and phrases as used in ss. 66.90 to 66.918, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

"\* \* \*

"(2) MUNICIPALITY. The state of Wisconsin and any city, village, town, county, common school district, high school

district, county-city hospital established under section 66.47, sewerage commission organized under section 144.07 (4) or a metropolitan sewerage district organized under sections 66.20 to 66.209, now existing or hereafter created within the state."

It is our understanding that the wording "county-city hospital" was inserted in the statute after it was concluded that in the absence of such language employes of a joint county-city hospital would not be covered. Sec. 66.47 (13), Stats., provides that a county-city hospital, by an affirmative vote of all members of the board, may elect to be included in the fund. We know of no similar provision for joint employes of two or more counties. Note also that sec. 66.901 (4) (b), Stats., defines a municipal employe as a person whose name appears on a regular pay roll of *such* municipality. Perhaps the difficulty could be solved in this instance by making the employes in question the employes of one county, with a contract being arranged for partial reimbursement by the other county to the employing county. This might also be important from the standpoint of workmen's compensation, unemployment compensation, and the like.

WHR

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*Dogs—Claims for Damage—Claims against Municipalities—Waiver and Estoppel*—A person making a claim under sec. 174.11, Stats., for damage done by dogs must comply strictly with the provisions thereof. The county board has no authority to waive defects in a claim which does not comply with the provisions of this section.

January 21, 1955.

RICHARD W. BARDWELL,  
*District Attorney,*  
Dane County.

You present the following fact situation: On May 27, 1953, and June 25, 1953, dogs killed chickens belonging to farmer A. Within a few hours of his knowledge of this dam-

age, farmer A orally notified the town officers but did not give written notice at this time. The town officials told farmer A to wait and that they would try to catch the dogs involved to establish ownership. The town board did investigate the damage within 30 days but was unable to establish ownership of the dogs. On or about November 16, 1953, farmer A filed a written claim for the damage with the town clerk. Thereafter, the town officials certified said claim to the county clerk. The county board approved the claim but the county clerk refuses to authorize payment.

The question is: Does the county board have the power to approve this claim?

Sec. 174.11 (1), Stats., reads as follows:

“(1) The owner of any domestic animals (including poultry) attacked, chased, worried, injured or killed by a dog or dogs may within 10 days in counties of a population of 500,000 or more and in other counties within 2 days after the owner shall have knowledge or notice thereof, file a written claim for damages with the clerk of the town, village or city in which the damage occurred. The form of such claim may be prescribed by the state department of agriculture. Upon presentation of such claim the supervisors of the town, the board of trustees of the village, or the common council of the city, or a committee appointed for that purpose by the supervisors, the board of trustees or the common council shall promptly investigate said claim and may subpoena witnesses, administer oaths and take testimony relative thereto and shall within 30 days after the filing of said claim make, certify and return to the county clerk said claim, a report of the investigation, the testimony taken and the amount of damages suffered by the owner of said animals, together with the assessed valuation of same as shown on the last assessor's blotter or record for personal property assessments or if there be none, then the assessed value of similar animals on such blotter or record.”

It is clear that claims under this statute must be filed with the town clerk in writing within 2 days after the owner of the damaged animals has knowledge of the damage and that the town officers must, within 30 days after the filing of the claim, investigate and certify the claim to the county clerk. The claim in the present case is defective in that these requirements were not complied with.

The question then arises whether the county board has the power to waive these defects. On the question whether the governing body of a municipality has the power to waive defects in claims presented, there is a split of authority. 38 Am. Jur., Municipal Corporations § 702; 82 A.L.R. 749; 148 A.L.R. 637. On the subject of the power to waive a defect or to create an estoppel to assert it, the majority view is that a substantial defect in the notice of claim required by statute or ordinance may not be waived by any county or municipal officials, and that such officials may not, by express words or conduct, estop the county or municipality from later taking advantage of the insufficiency. The reason usually given for this holding is that the statute or ordinance provisions were meant to be for the benefit and protection of the public. The minority view is contra. Wisconsin follows the majority view. 148 A.L.R. 638.

In *Maynard v. De Vries*, (1937) 224 Wis. 224, 272 N. W. 27, plaintiff brought an action against the county for injuries alleged to have been caused by a defective highway. The statute provided that a verified claim must be presented to the county board before action is commenced. The claim was made but was not verified. The county objected on this ground. At p. 227, the court said:

“\* \* \* Unless we ignore the plain letter of these statutory provisions, the contention of the defendant county must be sustained. \* \* \*”

and, further, at p. 228, the court said:

“\* \* \* The filing of a verified claim is under the statutes of this state a condition precedent to the existence of a cause of action. \* \* \*”

“The county itself cannot waive these statutory requirements. \* \* \*”

A similar result was reached in *Read v. Madison*, (1916) 162 Wis. 94, 155 N. W. 954.

In the instant case, the claim for damages was not filed in writing within 2 days' time as required by statute. This is a fatal defect. The county board has no authority to waive this defect and has no power to pay this claim.

GFS

*Hotels and Restaurants—Marketing and Trade Practices—Trading Stamps*—Trading stamps redeemable in merchandise may be issued to hotel guests in proportion to their payment of room rent, since renting of hotel room is not a "sale of goods, wares or merchandise" in the meaning of sec. 100.15 (1), Stats., but such trading stamps may not lawfully be issued in connection with payment for meals served.

February 14, 1955.

WILLIAM J. GLEISS,  
*District Attorney,*  
Monroe County.

You have requested an opinion whether the following described promotional scheme would be in violation of sec. 100.15 (1), Stats., the trading stamp law:

"A corporation has been proposed to be formed, intending to increase public demand for rooms in small hotels. The corporation would sell to hotel operators who wish to take part in the plan, coupons which the hotel operator would, in turn, give to his customers in an amount equal to 5 per cent of the room rent paid by each customer. Thus, if a customer obtained a \$5 hotel room, upon payment of his bill he would receive a coupon for 25 cents. These coupons would then be redeemed by the corporation for substantial merchandise when the customers had collected enough coupons to pay the stated value of a particular piece of merchandise. The coupons would have a nominal cash value of one-tenth of the value of the coupon if the coupon were traded in for merchandise."

The applicable provisions of sec. 100.15 (1), Stats., are the following:

"No person \* \* \* shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person \* \* \* *in connection with the sale of any goods, wares or merchandise*, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device \* \* \*."

There are certain exceptions to the foregoing statute not material here. It will be observed that the statute in substance prohibits the issuance of trading stamps and other similar devices redeemable in merchandise, when such trading stamp or other device is issued to the purchaser in connection with the sale of goods, wares or merchandise.

According to the facts stated in your question the hotel operators would issue the coupons only in connection with the payment of room rent, which is not a sale of goods, wares or merchandise. Therefore, the statute on its face does not apply to such a transaction.

It must be pointed out, however, that the coupons may not be given for any part of the hotel bill representing the price of meals served in the hotel. It is the majority view that where food is served to a person for immediate consumption for a stipulated price, the transaction is a sale and not a service, although there is a sharp conflict in the authorities on this point with a minority holding that the serving of meals is a service and not a sale. 7 A.L.R. 2d 1032; 18 N.C.C.A. (n.s.) 573, 595. The Wisconsin supreme court has expressly left this question open in *Prinsen v. Russos*, (1927) 194 Wis. 142, 146, 215 N. W. 905. However, in view of the trend of decisions elsewhere it seems probable that in a proper case the Wisconsin supreme court will hold that the transaction is a sale and not a service.

And being a sale, it is a sale of "goods." *Ford v. Waldorf System*, (1936) 57 R. I. 131, 188 A. 633, 636.

WAP

*Public Welfare Department—Child Protection—Nursery Schools—Christian Science—Compulsory Physical Examinations and Vaccination*—Under sec. 48.50 (3), Stats., state department of public welfare may adopt rule requiring physical examinations of children attending child care centers, day nurseries, and nursery schools, but by virtue of sec. 147.19 (2), Stats., such rule may not require the vaccination or immunization of Christian Scientists.

February 14, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have inquired whether standards adopted under sec. 48.50 (3), Stats., may include health regulations without exempting persons who object on religious grounds. These health regulations would apply to child care centers, day nurseries, and nursery schools operated by private persons or groups for compensation, although sometimes subsidized in part by private charities but not by public funds.

The type of health regulations under consideration are substantially as follows:

All state and local health regulations shall be followed.

All paid and volunteer members upon beginning work, and annually thereafter, shall submit a physician's certificate based on examination, stating they are free from any evidence of illness which might be detrimental to children.

Every child shall have a health examination by a licensed physician or organized health center before admission, and annually thereafter, which shall include tests necessary to rule out the presence of active tuberculosis.

Every child before admission shall have a physician's certificate stating that he has been satisfactorily immunized against smallpox, whooping cough, and diphtheria, and booster injections shall be required as recommended by a physician.

Specific objection has been raised on behalf of children from Christian Science families to examinations by physicians and immunization, on the ground that such require-

ments would be compulsory so as to bar such children from these facilities in violation of sec. 147.19 (2), Stats.

Sec. 48.50 (3) provides:

“(3) STANDARDS. The department, after public hearing, shall prescribe rules and regulations for the issuance of permits, and shall establish standards for the operation of child care centers, day nurseries and nursery schools. The department shall consult with the industrial commission, the department of public instruction and the state board of health in promulgating such rules, regulations and standards which shall provide for the safety, health and welfare of the children.”

Sec. 147.19 (2) provides:

“(2) None of the provisions of this chapter or the laws of the state regulating the practice of medicine or healing shall be construed to interfere with the practice of Christian Science, nor shall any person who selects such treatment for the cure of disease be compelled to submit to any form of medical treatment.”

While it is true that no child is compelled by law to attend a child care center, a day nursery, or a nursery school, the practical effect of the proposed rules would be to bar the children of Christian Scientists from the use of such facilities unless their parents are willing to forego their religious scruples, and by the same token the children of parents belonging to other religious sects or groups opposed to medication would likewise be denied the privilege afforded by these facilities, although they can make no claims to the protection afforded by sec. 147.19 (2).

We are not called upon here to consider either the constitutional or statutory rights of these other groups but will confine ourselves entirely to the objections raised by the Christian Scientists to the proposed rules. Nor will we discuss here the rights of the operators of private facilities to impose such rules themselves. What we are concerned with solely is whether sec. 147.19 (2) bars the state department of public welfare from adopting a rule which requires the children of Christian Scientists to submit to physical examinations and immunization by medical practitioners.

At the outset we can rule out any extended discussion of the physical examination. A physical examination is not in

and of itself "any form of medical treatment," even though under sec. 147.01 (1) (a) it may constitute "treating the sick." Exemptions from general statutory provisions are to be strictly construed, and we see no occasion to extend the meaning of the term "medical treatment" as used in sec. 147.19 (2) to include anything other than medical treatment. It has been held for instance that mere diagnosis is not included in the statutory phrase "medical, surgical and hospital treatment." *Lutman v. Amer. Shoe Mach. Co.*, (Mo. App. 1941) 151 S. W. 2d 701. However, it may constitute "medical treatment" if the examination is accompanied by the giving of instructions by the physician. *Gesmundo v. Bush*, (1947) 133 Conn. 607, 53 A. 2d 392.

It is therefore concluded that a mere physical examination by a physician does not in and of itself constitute any form of medical treatment within the meaning of the protection afforded by sec. 147.19 (2), and you are advised accordingly that the proposed rule requiring physical examinations of children, adopted pursuant to sec. 48.50 (3), is not in conflict with sec. 147.19 (2).

On the other hand, the administering of a drug (and presumably the administering of a serum) would appear to fall within the category of medical or surgical treatment. *Order of United Commercial Travelers of America v. Shane*, (C.C.A. 1933 S.D.) 64 F. 2d 55. We hear much these days of the practice of preventive medicine which is defined in the dictionary as that branch of medical science "dealing with methods, as vaccination, etc., of preventing the occurrence of disease." Webster's New International Dictionary.

It must be accordingly concluded that vaccination constitutes a form of medical treatment which may not be imposed by compulsion upon Christian Scientists.

The question still remains as to whether a person who is free to attend or stay away from these child centers is "compelled" to submit to medical treatment where his parents voluntarily elect to place him in one of these centers.

We do not propose to write a philosophical or metaphysical essay on the various nuances or shades of meaning that may be attributed to the word "compel" as used in various contexts, but content ourselves with the observation that one is subjected to a species of compulsion where

he must submit to a procedure in fundamental conflict with his religious tenets in order to exercise an otherwise lawful right or privilege.

Under the 5th amendment to the federal constitution no person shall be compelled to be a witness against himself. If a court were to say to a witness that he has his choice of waiving this right or of going to jail for contempt, no reviewing court would have any difficulty in reaching the conclusion that the witness was being compelled to testify against himself.

In other words, most compulsions involve alternatives, usually unpleasant ones, whereby the compulsion may be avoided, and it would seem rather clear, for example, that compulsion is involved in the case of a working widow of the Christian Science faith who can hold a job and support herself and children only by placing her children in a day nursery where they would have to be vaccinated. She has the alternative of starving or going on relief, but it would appear to be very doubtful that the legislature intended to impose any such harsh alternatives. The law, on the contrary, recognizes the desirability of having child centers available and without specifying any religious tests.

The discussion should not be closed without reference to the case of *State ex rel. Adams v. Burdge*, (1897) 95 Wis. 390, 70 N.W. 347, where without specific statutory authority the state board of health adopted a rule excluding from public and other schools all children who did not present certificates of vaccination. The court held that even if the board had possessed the statutory power to make such a rule, it would be void, because unreasonable, if at the time of its adoption there was no epidemic of smallpox existing in the state and but few cases scattered through the whole state, and if in the city where it was sought to be enforced there had been but one case and that properly quarantined, and the board of education had no belief or apprehension that it either was prevalent there or approaching the place. (See 93 A.L.R. 1413 note for other cases.)

This case stands unreversed, and whether the court would reach the same conclusion today is a matter of speculation which we do not feel called upon to explore here, but the de-

cision is one which should not be overlooked in any careful study of the question you have raised.

By way of summary, it is our conclusion that your department may adopt a rule for child centers under sec. 48.50 (3) requiring physical examinations of all children attending such centers, but that by virtue of sec. 147.19 (2) the department may not require the children of Christian Scientists to submit to vaccination or immunization as a condition precedent to attending such centers.

WHR

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*Optometry—Prohibited Advertising—Interstate Commerce—Sec. 153.10, Stats., prohibiting price advertising of eyeglasses, appears not to be applicable to the Wisconsin distributor of an out-of-state newspaper which carries the price advertising of a concern located in another state where such price advertising is permitted.*

February 15, 1955.

NEWTON E. W. LENZ, *Secretary,*

*State Board of Examiners in Optometry.*

You have called our attention to the fact that newspapers published in an adjoining state carry advertisements of optical companies located in the adjoining state and that such advertisements are in conflict with sec. 153.10, Stats. We are asked whether Wisconsin distributors who receive these newspapers in bulk for Wisconsin circulation are subject to the provisions of sec. 153.10.

Sec. 153.10 reads:

“It shall be unlawful for any person to advertise either directly or indirectly by any means whatsoever any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising.”

The validity of this statute was sustained in the case of *Ritholz v. Johnson*, (1944) 246 Wis. 442, 17 N.W. 2d 590. It was there held that the furnishing of eyeglasses to fit the needs of the public so affects the public health as to authorize statutory prohibition of deceptive and misleading advertising of prices.

There would seem to be some doubt at the outset that the local distributor or circulation agent of an out-of-state newspaper is the "person" doing the advertising within the meaning of the statute, although we are aware of the fact that in the case of *Commonwealth v. Allison*, (1917) 227 Mass. 57, 116 N.E. 265, the word "advertises" as used in the statute there under discussion was held to include the calling of public attention by any means whatsoever and included every agency of every form and kind directly or indirectly tending to promote the use or purchase of certain drugs, medicines, instruments, and articles for the prevention of conception. The pamphlets in question were described in the indictment as containing "obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the same being too lewd and obscene to be more particularly set forth."

There, of course, the viciousness aimed at included the very language of the advertisement itself which was considered likely to corrupt public morals. Here, however, it would have to be conceded that no such element is present in the mere price advertising of eyeglasses. The evils aimed at in sec. 153.10, Stats., were the vicious practices that followed the price advertising and which in the language of the court in *Ritholz v. Johnson*, *supra*, amounted to the working of a "plain bare fraud" under the facts before the court in that case. It appeared, for instance, that seldom were glasses sold at the advertised price. Free examinations were advertised but the doctor demanded a fee over the protests of customers and said that the fee was not for the examination but for the prescription, etc.

However, if we assume for the sake of argument that the wording of the statute is literally applicable to the distributor of an out-of-state newspaper, we are faced with the question as to whether the statute when so construed constitutes an improper interference with interstate commerce.

In *Ritholz v. Ammon*, (1942) 240 Wis. 578, 4 N.W. 2d 173, the court was concerned with the activities of an Illinois optical firm which, however, maintained retail stores in this state. This concern sought to enjoin the Wisconsin department of agriculture from proceeding against it administratively under sec. 100.20, Stats., relating to unfair methods of competition and unfair trade practices. It was held that the business carried out in this state with the assistance of local physicians and requiring the services of a local manager could not be made into an interstate transaction and put beyond the police power of the state by arbitrarily designating the transaction a sale and ingeniously managing that the sale should take place outside the state where the glasses were ground and assembled. The court said at p. 588:

“\* \* \* While under the cover of exercising its police power Wisconsin cannot undertake what amounts to regulation of interstate commerce, police regulations, reasonable in themselves, *addressed to local activities* and bearing a genuine relation to the welfare of people of this state, are not invalid by reason of the fact that they incidentally affect interstate commerce.” (Emphasis supplied.)

By way of contrast it should be noted here that the out-of-state advertiser does no business in Wisconsin. He merely advertises in a newspaper published in the state where he is located, although the newspaper has some circulation in Wisconsin.

The question presented here is a very difficult one and it is discussed as to some of its phases in the following A.L.R. annotations: 22 A.L.R. 1484; 48 A.L.R. 563; 57 A.L.R. 105; 79 A.L.R. 551; and 115 A.L.R. 952.

In *Utah v. Salt Lake Tribune Publishing Co.*, (1926), 68 Utah 187, 249 P. 474, it was held that a state could not prohibit the publication of advertisements of cigarettes or tobacco so far as it concerns a newspaper circulating in interstate commerce carrying the advertisement of a nonresident advertiser, where the sale of such articles is not prohibited by the state but is merely regulated.

One of the most widely cited cases is that of *Post Printing and Publishing Co. v. Brewster*, (1917) 246 F. 321.

That case dealt with a Kansas statute which prohibited the sale or advertising of cigarettes in Kansas. The plaintiff was a Missouri newspaper company whose papers were sold and distributed in Kansas. The sale of cigarettes was authorized in Missouri and congress had placed no restrictions on interstate commerce in cigarettes. The publication of a newspaper and its distribution from one state to another was held to be interstate commerce which the state of Kansas could not prohibit or unduly burden. Hence the statute insofar as it was leveled against the advertisement of cigarettes in a newspaper distributed in interstate commerce was unenforceable.

This case appears to be very much in point. In its opinion the court distinguished the situation from that which was considered in the case of *State v. Bass Pub. Co.*, (1908) 104 Me. 288, 71 A. 894, 20 L.R.A. (N.S.) 495, where it was held that while the state could not interfere with newspapers from other states in the advertising of intoxicating liquor, it could do so as to newspapers published within the state. Mention should perhaps also be made of the case of *Delamater v. South Dakota*, (1908) 205 U.S. 93, 27 S. Ct. 447, 51 L. ed. 724, where the court upheld a South Dakota statute imposing an annual license on traveling salesmen who solicit orders for intoxicating liquor. This statute was considered not to be repugnant to the commerce clause of the federal constitution because congress by the Wilson Act, 26 Stat. 713, had permitted the states to control intoxicating liquors coming into a state as completely as though manufactured therein. Hence the owner of intoxicating liquor could not go himself or send his agent into another state, and, in defiance of its laws, carry on the business of soliciting proposals for the purchase of such liquors. In other words, the Wilson Act had, in some degree at least, withdrawn liquor from the protection of the United States constitution.

In some cases the result reached by the court seems to depend upon its views of the seriousness of the evil sought to be prevented, as in the case of *Solomon v. Cleveland*, (1926) 26 Ohio App. 19, 159 N.E. 121 (cause dismissed, 1927, in 116 Ohio St. 739, 158 N.E. 8). There the court sustained, as a valid exercise of the police power, a municipal ordinance

making it a misdemeanor to sell, or offer for sale a newspaper or periodical which contained horse racing news or tips on horse races, as against the objection that the ordinance would prohibit the lawful sale of newspapers published in other states and thereby unconstitutionally interfere with interstate commerce.

The court delivered quite a moral discourse, pointing out that the gambling tendency is perhaps the greatest evil in our body politic, causing crime in the way of defalcations, embezzlements, and the dire results which follow as an aftermath, and stated that the supreme court of the United States has frequently sustained legislation which promotes the moral welfare of its people or conserves their health, although it may in a measure interfere with interstate commerce.

As will be pointed out later, the courts admit that there is great difficulty in knowing where to draw the line, and we disclaim any clairvoyant powers which would enable us to gaze into the crystal ball and predict how any particular court would handle a close case, although it is our considered judgment, for what it is worth, that sec. 153.10 with all of its wholesome objectives probably lacks the challenge to spark the moral fervor of the court as contrasted with those statutes relating to more sinful pursuits such as gambling, purveying obscene literature, and the like, which have been unable to enshroud themselves with the protecting mantle of the interstate commerce clause of the United States constitution.

One other phase of the problem should be discussed relating to advertising in the form of handbills and the like as distinguished from newspaper advertising. It was held in *International Text Book Co. v. District of Columbia*, (1910) 35 App. D.C. 307, that a provision of the police regulations of the District of Columbia making it unlawful to scatter papers, circulars, or advertising matter of any kind in such a manner as to litter the streets, was a proper exercise of the police power and not an unlawful interference with interstate commerce, as applied to a foreign corporation doing business in the district, although engaged in interstate commerce. The court pointed out that the right

to engage in interstate commerce does not carry with it the right to create a nuisance.

In *Jell-O Co. v. Landes*, (1927) C.C.A. 9th, 20 F. 2d 120, the court upheld a Seattle ordinance which required a license to distribute advertising matter. In its decision the court stated that the line of demarcation between that which constitutes an interference with commerce and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and that it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. The court went on to say at p. 121:

“For present purposes we deem it sufficient to say that in our opinion the distribution of advertising matter is not so directly connected with interstate commerce as to form a part thereof, and that a proper regulation of that business is within the police power of the states.”

It is to be noted that this conclusion is restricted to advertising matter as such, and in view of the decisions in *Utah v. Salt Lake Tribune Publishing Co.* and *Post Printing and Publishing Co. v. Brewster*, *supra*, that the publication and distribution of newspapers, even though they carry advertising, is protected by the interstate commerce clause of the federal constitution (if the advertising is not too sinful), we would have to conclude that sec. 153.10 may not be applied to an out-of-state newspaper or its Wisconsin agents and distributors. Or at least, since the statute is a penal one, if there is a fair doubt as to whether the act in question comes within the prohibition of the statute, that doubt should be resolved in favor of the defendant. *State ex rel. Dineen v. Larson*, (1939) 231 Wis. 207, 284 N.W. 21, 286 N.W. 41.

WHR

*Physical Therapy—License*—An unlicensed person may operate an establishment for giving steam baths and rub-downs and may also use heat lamps, provided that none of such procedures are employed for therapeutic purposes.

He may not practice in premises carrying the sign "Chiropractic Clinic" used by a former chiropractor occupying the premises.

One who treats disease by physical therapy methods must be licensed under sec. 147.185, Stats., and must practice under a prescription with direct supervision by a person licensed to practice medicine and surgery.

February 15, 1955.

DR. THOS. W. TORMEY, JR., *Secretary,*  
*State Board of Medical Examiners.*

You have inquired whether an individual who has never been licensed in any way under ch. 147 may operate an establishment for giving steam baths and rub-downs and use diathermy or infra-red ray lights for massage purposes in a building bearing the sign "----- Chiropractic Clinic and Bath." The individual in question had been working under the supervision of a licensed chiropractor who is not active at the present time.

At the outset it may be stated categorically that regardless of the nature of his practice he could not legally operate in premises which carry the sign of the chiropractor formerly practicing therein. Sec. 147.23 (1), Stats., provides:

"147.23 (1) No person shall practice chiropractic, or in any manner attempt or *hold himself out to do so*, unless he have a certificate of registration in the basic sciences and a license to practice chiropractic from the state board of examiners in chiropractic, and shall have recorded such certificate and license with the county clerk of any county in which he shall so practice or attempt or hold out to practice, and pay a fee of fifty cents for each recording."

By practicing in premises which bear a sign containing the words "Chiropractic Clinic" it would appear that this person would be impliedly holding himself out as a chiropractor. This is likely to be particularly true in the practice

of massage since the general public is not too well informed on the distinction between massage and chiropractic adjustments. No attempt will be made here to discuss the propriety of the use of the term "Chiropractic Clinic" by a licensed chiropractor not practicing in association with other chiropractors, since that subject lies outside the scope of the present inquiry.

The question of whether this person may practice at all in the manner indicated is a much more difficult question.

Sec. 147.185 (1) (a), Stats., provides:

"147.185 (1) PRACTICE OF PHYSICAL THERAPY. (a) The practice of physical therapy is the treatment of disease as defined in s. 147.01 by the use of physical, chemical and other properties of heat or cold, light, water, electricity, massage, and therapeutic exercises, including posture and rehabilitation procedures, but the use of Roentgen rays and radium for any purposes, and the use of electricity for surgical purposes, including cauterization, are not included in the practice of physical therapy."

The practice therein described is limited to licensed persons by sec. 147.185 (1) (b). There is an exception in favor of those licensed under the old massage and hydrotherapy law, prior to its amendment by ch. 411, Laws of 1953, but that exemption would be of no avail to a person who was never licensed.

It is to be noted that the present physical therapy law includes the treatment of disease by massage and that no one may engage in this practice unless licensed as a physical therapist nor unless he practices under the prescription and the direct supervision of a person licensed to practice medicine and surgery. Sec. 147.185 (1) (b). This, of course, is subject to the exemption above noted that has no application to a person who was never licensed.

In 26 O.A.G. 61 it was concluded that the old sec. 147.185 relating to massage and hydrotherapy was applicable to the practice of massage for therapeutic services but that it did not extend to athletic rubs given by clubs in connection with athletics or physical exercise, and the legislature has apparently continued this distinction in the new sec. 147.185.

Similarly it should be noted that the treatment of disease is the postulate upon which all of the other branches of the

practice of physical therapy are based, whether the means employed be "the use of physical, chemical and other properties of heat or cold, light, water, electricity, massage," or therapeutic exercises.

In other words, the operation of a bath house, or the use of massage or of heat lamps, etc., does not constitute physical therapy so as to require a license under sec. 147.185, Stats., except where disease is treated as that term is defined in sec. 147.01.

This may give rise to difficulties of enforcement and it may be very difficult in some instances to draw the line between what is done for therapeutic and what is done for nontherapeutic purposes. The answer in each case must depend upon the particular facts and circumstances.

One of the items mentioned was diathermy. This is defined as the production of heat in body tissues by high currents for *therapeutic* purposes. American College Dictionary. If that is the sole purpose of diathermy, it would seem clear that its use could be explained only upon the basis of treating disease and that evidence of such use would constitute *prima facie* evidence of practicing physical therapy which is prohibited except by persons licensed under sec. 147.185 or who are otherwise exempt from the provisions of that section.

The use of an infra-red light presents more of a borderline case. We have found no definition which makes it *per se* a therapeutic device as in the case of diathermy. Conceivably it could be used by one who merely wanted to enjoy its warmth in relaxing after a bath or massage. On the other hand, it might be used to relieve and treat a person suffering from injuries or from the pains of arthritis, etc., in which case its use would constitute treatment of disease so as to be subject to the physical therapy statute.

In fact the use of an infra-red light for therapeutic purposes may be accompanied by dire consequences, as is evidenced by the case of *McCullough v. Langer, et al.*, (1937) 23 Cal. App. 2d 510, 73 P. 2d 649, where in a malpractice suit a jury awarded \$50,000 to a patient who suffered third-degree burns when an infra-red light was used by a physician and his nurse to keep compresses warm in the course of treating the crushed thigh of a patient. A 500-watt lamp

was on for a period of 4 hours at a distance of 21 inches. The patient, who was under opiates which prevented him from knowing the cause of his burns, suffered considerable pain and was permanently injured, requiring repeated grafting of skin, and he sustained considerable loss of earning ability. The trial court reduced the verdict to \$25,000 but the judgment for the patient was sustained on appeal. See also *Tetting v. Hotel Pfister, Inc.*, (1936) 221 Wis. 141, 266 N.W. 249, involving massage.

It is accordingly concluded that while an unlicensed person may operate an establishment for giving steam baths and rub-downs and may use infra-red lights in connection therewith, he may do so only for nontherapeutic purposes, but if he uses diathermy or otherwise conducts his practice for therapeutic purposes, he must be licensed under sec. 147.185 (if not exempt from the provisions thereof), and such practice must be under the prescription and direct supervision of a person licensed to practice medicine and surgery.

WHR

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*State Board of Health—Appropriations and Expenditures—Hospital Survey and Construction Plan—Federal Aid—*State board of health may properly apply for federal funds under secs. 140.15 and 20.43 (2), Stats., for purpose of making an inventory of hospital, medical, and other related facilities and to develop a state program for the construction of such facilities.

February 24, 1955.

DR. CARL N. NEUPERT,  
*State Health Officer.*

You have asked for an opinion as to whether secs. 20.43 (2) and 140.15, Stats., are broad enough to authorize the state board of health to make an inventory of hospital, medical, and other related health facilities and to develop a state program for the construction of such facilities.

The opinion is requested for the purpose of determining whether the board would be justified in making application for federal funds to make an inventory of existing diagnostic or treatment centers, hospitals for the chronically ill and impaired, rehabilitation facilities, and nursing homes.

Sec. 20.43 (2), Stats., reads:

"20.43 There is appropriated from the general fund to the state board of health:

"\* \* \*

"(2) FEDERAL AID FOR PUBLIC HEALTH. All moneys received by this state as federal aid for public health services, to be expended for the purposes specified in the acts of congress pursuant to which such federal aid is given and in accordance with plans prepared by the board of health and approved by \* \* \* (b) the U. S. public health service for public health assistance to the states \* \* \*."

Sec. 140.15, Stats., provides:

"140.15 The board is authorized and directed to make an inventory of existing hospitals, including public, non-profit and proprietary hospitals, to survey the need for construction of hospitals, and on the basis of such inventory and survey, to develop a program for the construction of such public and other nonprofit hospitals as will, in conjunction with the existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic and similar services to all the people of the state. The state health officer is authorized to make application to the surgeon general for federal funds to assist in carrying out the survey and planning activities."

The language of sec. 20.43 (2) is very broad. It appropriates "all moneys" received by the state as federal aid for public health services and includes the moneys received from the U. S. public health service which is the federal agency to whom the application in question would be made.

In sec. 140.15 the words "in conjunction with the existing facilities" make necessary some inventory or appraisal of these facilities mentioned in your inquiry in order to carry out the legislative mandate of developing a program which will "afford the necessary physical facilities for fur-

nishing adequate hospital, clinic and similar services to all the people of the state.”

A more restricted interpretation of the language of this section would result in the defeat of the over-all intent expressed by the legislature and would result in denial to the state of federal funds which otherwise would be available. The two sections read together make it clear that the legislature does not want the state to lose any federal funds which may be available for public health service, and that it had a complete program in mind rather than one which would be confined strictly to hospital service.

WHR

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*Intoxicating Liquors—Malt Beverages—Restrictions on Brewers, Manufacturers, etc.*—Subject only to exceptions enumerated in the statute, the furnishing, giving, or lending of money or other thing of value by either a brewer, bottler, or wholesaler to a trade association comprised of holders of Class “B” licenses is prohibited by sec. 66.054 (4) (a), Stats.

Similarly, the furnishing, giving, or lending of money or other thing of value by a manufacturer, rectifier, or wholesaler to a trade association comprised of persons engaged in selling products of the industry for consumption on the premises where sold, is prohibited by sec. 176.17 (2), Stats.

February 28, 1955.

THE HONORABLE, THE ASSEMBLY.

You have requested my opinion upon two questions, communicated to me by Resolution No. 9, A., 1955 session, which read as follows:

“[Whether] 1. The provisions of section 66.054 (4) (a) (or any part thereof) prohibiting brewers, bottlers and wholesalers from furnishing, giving or lending money or other value to any retail Class ‘B’ fermented malt beverage licensee or guaranteeing the repayment of any loan or the fulfillment of any financial obligation of any such retail

Class 'B' license, applies to Wisconsin incorporated non-profit trade associations composed of such Class 'B' licensees as well as to such Class 'B' licensees; and whether:

"2. The provisions of section 176.17 (or any part thereof) prohibiting manufacturers, rectifiers and wholesalers from furnishing, giving or lending any money or other thing of value to any retail Class 'B' intoxicating liquor licensee or guaranteeing the repayment of any loan or the fulfillment of any financial obligation of any such Class 'B' licensee or from conferring on such licensees other benefits therein prohibited, applies to Wisconsin incorporated nonprofit trade associations composed of such Class 'B' licensees as well as to such Class 'B' licensees;"

Sec. 66.054 (4) (a), Stats., provides in part:

"(4) RESTRICTIONS ON BREWERS, BOTTLERS AND WHOLESALEERS. (a) No brewer, bottler or wholesaler shall furnish, give or lend any money or other thing of value, other than consumable merchandise intended for resale, including the containers thereof, nor furnish, give, lend, lease or sell any furniture, fixtures, fittings or equipment, directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof, to any Class 'B' licensee, or to any person for the use, benefit or relief of any Class 'B' licensee, or guarantee the repayment of any loan, or the fulfillment of any financial obligation of any Class 'B' licensee; except that brewers, bottlers and wholesalers may: \* \* \*." (Here follow four exceptions which are inapplicable.)

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

"(2) No manufacturer, rectifier or wholesaler shall furnish, give, or lend any money or other thing of value, directly or indirectly, or through a subsidiary or affiliate, or by any officer, director, or firm member of the industry, to any person engaged in selling products of the industry for consumption on the premises where sold, or to any person for the use, benefit, or relief of said person engaged in selling as above; or to guarantee the repayment of any loan or the fulfillment of any financial obligation of any person engaged in selling as above. Nothing herein contained shall affect the extension of usual and ordinary commercial credits for the products of the industry sold and delivered. No person licensed to sell intoxicating liquors for consumption on the premises where sold shall receive, or be the beneficiary of, any of the benefits hereby prohibited."

While your resolution does not contain a detailed statement of facts as such, it is implicit from the context of your questions that you have in mind a situation where a brewer, bottler, or wholesaler (as to question numbered 1) has either "furnished, given or lent money or other thing of value" to a trade association, comprised of such licensees, which money or thing of value, if "furnished, given or lent" directly to a Class "B" fermented malt beverage licensee, would fall within the prohibition of the statute.

The answer to the first question is, "Yes." It is my opinion that the interposition of a trade association of the character you describe between the brewer, bottler, or wholesaler, and the individual licensee is no defense to a charge of violation of the statute where all the other essential elements of the crime are present. The evils to which the statute was addressed when enacted are well known, and it is unnecessary to review the legislative history of the same. The statute is plain and unambiguous. The ban of the statute is extended to the doing of the forbidden acts indirectly, as well as directly. And the employment of the words "or to any person for the use, benefit or relief of any Class 'B' licensee" renders the statute clear beyond any doubt. See sec. 370.01 (26), Stats., which provides that in the construction of Wisconsin laws the word "person" (unless inconsistent with manifest legislative intent) includes all partnerships, *associations and bodies* politic and *corporate*. Further, the statute has been thus interpreted administratively by the beverage tax division, the state agency to which your honorable body has confided the duty of its enforcement. In my opinion, it cannot validly be denied that money or other things of value furnished, given, or loaned to a trade association comprised exclusively of the class of licensees described in the statute, is for the use and benefit of such licensee members. And that is what is expressly condemned by the statute.

The answer to the second question is, "Yes," for the same reasons. The language of the two statutes reveals the identical legislative purpose and intent to proscribe the same course of conduct in both instances.

SGH

*Constitutional Law—Courts—Clerk's Fees*—Bill No. 27, S., 1955 legislature, which provides for clerk's fees at variance with those provided generally by sec. 59.42, Stats., for courts of record does not result in an invalid classification. Inferior courts are not required to be uniform under art. VII, sec. 2, Wisconsin constitution.

March 1, 1955.

THE HONORABLE, THE SENATE.

By senate Resolution No. 8, S., this office has been requested to issue an opinion on the validity of Bill No. 27, S., which creates ch. 168, Laws 1951, sec. 24m, relating to fees of the clerk of the civil court of Milwaukee county.

The bill reads as follows:

"Chapter 168, laws of 1951, section 24m, is created to read:

"(Chapter 168, laws of 1951) Section 24m. Section 59.42 of the statutes shall not apply to the civil court after the effective date of this section but the fees required to be collected by the clerk or deputy clerk thereof shall, as to the items subject to fees in said section 59.42, be as provided by this chapter."

The question has been raised whether this bill if enacted would be invalid as class legislation because it provides different fees for the civil court of Milwaukee county than are provided for other courts of record under sec. 59.42, Stats.

The provisions of the Milwaukee civil court act are set forth at pages 1777 to 1790 of the 1950 Wisconsin Annotations. Without attempting to go into detail it can be noted that the clerk fees provided by this act are at considerable variance with the fees provided generally for courts of record by sec. 59.42.

That the legislature may make different provisions relating to the operating expenses of different courts of the same type without creating a discriminatory classification violating the equal-protection-of-the-laws clause of the 14th amendment to the United States constitution is well established by the case of *Milwaukee County v. Halsey*, (1912)

149 Wis. 82, 136 N.W. 139. It was there held that counties having a population of 100,000 or more, each constituting a single judicial circuit, have the characteristics of a class in numbers, in wealth, in amount of litigation therein, etc., so as to furnish a sufficient reason for imposing upon such class a share of the expense of administering justice other than that applicable to other counties.

Sutherland, *Statutory Construction* (3d ed.) § 2117, states that statutes relating to courts and procedure are usually declared valid when attacked as local or special legislation and that unless the classification creates an arbitrary discrimination, the power of the legislature over such matters will be recognized.

It is to be noted that art. VII, sec. 2, Wis. Const., provides, among other things, that "the legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction." A somewhat similar constitutional provision was involved in the case of *State v. Sullivan*, (1928) 95 Fla. 191, 116 S. 255. There the legislature had created a court of crimes in certain counties, and the constitutionality of the act was attacked. The court pointed out that population is recognized by law as a reasonable basis for classification, and that under the Florida constitution it was competent for the legislature to create by general or special law a court of crimes in any county of the state, including as provided in the act in question, a "court of crimes in each county of the state of Florida which alone constitutes a judicial circuit for which there is provided by law two or more resident circuit judges and having a population of more than 100,000 according to the last state census." In sustaining the act the court said at p. 262:

"In this holding we are mindful of the fact that classifications adopted by the Legislature cannot be arbitrary or unreasonable, they must bear some just relation to the act and the subject regulated; *but the question of classification becomes unimportant in this case because the power to create additional courts or commissions is exclusively a legislative discretion and there is no showing here of an abuse of this discretion.*" (Emphasis supplied.)

The great lack of uniformity in Wisconsin's system of inferior courts is discussed at length in 1954 Wis. Law Review 376, in an article by E. Harold Hallows and J. R. DeWitt. Not only do the jurisdictions of the various county courts, municipal courts, superior courts, etc., present the widest possible pattern, but jurisdiction has even been carved away from many circuit courts by special court acts, and at page 387 of the article it is said :

“\* \* \* This possibility seems to have been contemplated by the constitution, frequently indulged in by the legislature, and approved by the Supreme Court in several cases. It is thus impossible to say that all of any kind of court in the state—circuit, county, other inferior, municipal or justice—have uniform jurisdiction.”

If there is a lack of uniformity of jurisdiction without impingement on constitutional safeguards, no reason suggests itself why there may not with equal validity be a lack of uniformity as to fees of the clerks of the court, and since in addition thereto the civil court of Milwaukee county constitutes a distinct and proper class, and there is uniformity within that class, it is concluded that Bill No. 27, S., 1955 legislature, is not invalid because of improper classification, or otherwise.

WHR

*Intoxicating Liquors — Malt Beverages — Licenses and Permits*—A Class “B” fermented malt beverage license issued under sec. 66.054 (5) (b) and (8), Stats., is separate from a Class “B” intoxicating liquor license issued under sec. 176.05, Stats., and the liquor license may be voluntarily surrendered by the licensee without surrender of the malt beverage license. There is no provision for issuing a “combination license” covering both liquor and malt beverages.

Sec. 176.32 (1), Stats., does not apply to a place where intoxicating liquor is not sold.

March 1, 1955.

ROBERT T. KOUTNIK,  
*District Attorney,*  
Manitowoc County.

You have requested an opinion relating to the right of Class “B” intoxicating liquor licensees to surrender their licenses and operate only under the Class “B” fermented malt beverage license. You state that two tavern owners have done so and you ask the following questions:

“1. Is the Class ‘B’ liquor license severable from the Class ‘B’ fermented malt beverage license? In most instances, both of the licenses have been issued as a combination license. Are they then recognized as one license, non-severable, or are these licenses independent of each other, so that they can be separated?”

“2. If the combination license is severable, then must the intoxicating liquor license be physically surrendered to the municipality and should a new Class ‘B’ fermented malt beverage license be issued, or can the licensee then operate on the fermented malt beverage license in existence?”

The controlling statutes are the following:  
Sec. 66.054 (5) (b) provides as follows:

“The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided. Said retailers’ licenses shall be of 2 classes, to be designated as Classes ‘A’ and ‘B.’ ”

Sec. 66.054 (8) regulates at some length the issuance and effect of Class "B" fermented malt beverage licenses. Par. (e) provides as follows:

"It shall be unlawful for any person, licensee or the agent, servant or employe of any licensee, to possess on the premises covered by such license, any alcoholic beverage that is not authorized by law to be sold on such premises."

Sec. 176.05 (10) (b) relating to intoxicating liquor licenses provides as follows:

"No retail 'Class B' license shall be issued to any person who does not have, or to whom is not issued, a 'Class B' retailer's license to sell fermented malt beverages under section 66.054."

There is no statutory authorization whatsoever for issuing a so-called "combination license," although the practice has been followed for many years of issuing the Class "B" fermented malt beverage license and the Class "B" intoxicating liquor license as a single document. It follows that the two licenses are not only "severable" but are in fact separate licenses although evidenced by the same piece of paper.

It appears that any license may be voluntarily surrendered by the licensee. 53 C.J.S. 646, Licenses § 43a; *Shemeth v. Selectmen of Holden*, (1944) 317 Mass. 278, 58 N.E. 2d 6, 7.

Had the town issued two separate documents, one containing the Class "B" fermented malt beverage license and the other the Class "B" intoxicating liquor license, there could be no doubt of the right of the licensee to surrender the liquor license and keep the malt beverage license, but in that case he would have to remove from the licensed premises all intoxicating liquors, by reason of sec. 66.054 (8) (e) above quoted.

The fact that the municipality, without statutory authority, has combined both licenses in a single document cannot operate to deprive the licensee of the right to surrender the intoxicating liquor license without at the same time surrendering the malt beverage license. In my opinion, therefore, when a licensee surrenders a so-called "combination

license" intending thereby only to abandon the Class "B" intoxicating liquor license, it becomes the duty of the municipal clerk to prepare and deliver to him a Class "B" fermented malt beverage license dated the same as the original license and covering the balance of the license year. Notice of the surrender of the Class "B" intoxicating liquor license should then be given to the beverage and cigarette tax division of the state department of taxation in order that they may know that the premises are no longer licensed for the sale of intoxicating liquor.

You inquire further whether an arrest could be made for permitting minors to be on the premises if minors of the age of 18 or over were found there. The applicable statute is sec. 176.32 (1), which provides in part as follows:

*"Every keeper of any place, of any nature or character whatsoever, for the sale of any intoxicating liquor, who shall either directly or indirectly suffer or permit any person of either sex under the age of 21 years, unaccompanied by his or her parent, guardian or spouse, of whom one shall be 21 years of age, or suffer or permit any person to whom the sale of any such liquors has been forbidden in the manner provided by law, who is not a resident, employe, or a bona fide lodger or boarder on the premises of such licensed person, to enter or be on such licensed premises for any purpose, excepting the transaction of bona fide business other than amusement or the purchase, receiving or consumption of edibles or beverages, shall, for every such offense, be fined not exceeding \$250 or imprisoned not exceeding 60 days \* \* \*"*

It will be observed that the statute requires that the person charged be a "keeper of any place \* \* \* for the sale of any intoxicating liquor." A place where intoxicating liquor is not in fact sold is not within the terms of the statute and therefore the presence of minors is not prohibited.

Sec. 66.054 (19), Stats., contains a like provision relating to "every keeper of any place, of any nature or character, whatsoever, for the sale of any fermented malt beverage under a 'Class B' retailer's license," but its prohibition is limited to minors under the age of 18 years. Therefore, of course, if the minors are 18 years of age or over that statute is not violated.

WAP

*Corporations—Nonstock*—Corporations organized under secs. 187.01, 94.03, and ch. 157, Stats., and ch. 146, General Laws 1872, may elect to be subject to ch. 181, Stats., by filing and recording restated articles of incorporation in accordance with the requirements of said chapter.

Corporations so electing to become subject to ch. 181, Stats., may not be required to submit a certified copy of their original articles of incorporation to the secretary of state.

March 4, 1955.

MRS. GLENN M. WISE,  
*Secretary of State.*

You have inquired whether or not a corporation formed under sec. 187.01, Stats., can file restated articles of incorporation and elect to become subject to ch. 181, Stats. The same question is asked as to corporations formed under sec. 94.03, Stats., ch. 157, Stats., and ch. 146, Private and Local Laws 1872. (I assume that by the latter you meant ch. 146, General Laws 1872, as there is no such chapter in the private and local laws of that year.) If the answer to this question is in the affirmative, you ask the further question, whether it would be proper or necessary for you to request a certified copy of the original incorporation papers so that your files will be complete, because corporations organized under these provisions have made no record in your office.

The clear import of ch. 181, Stats., requires the conclusion that a corporation organized under sec. 187.01, Stats., can elect to become subject to ch. 181. Sec. 181.76 (3) provides:

“(3) A corporation organized under provisions other than those in ch. 182 and corresponding prior general corporation laws shall not be subject to ch. 181, but may at any time elect to become subject to ch. 181 by filing and recording restated articles of incorporation in accordance with the provisions of ch. 181. The restated articles shall state that the corporation elects to become subject to ch. 181 and shall designate a registered agent for the corporation. The election to become subject to ch. 181 shall be effective upon the filing and recording of the restated articles of incorporation.”

Sec. 181.02 includes the following:

"As used in this chapter, unless the context otherwise requires the term:

"(1) 'Corporation' or 'domestic corporation' means a nonstock nonprofit corporation subject to the provisions of this chapter, except a foreign corporation."

It is clear from its context that in sec. 181.76 (3) the legislature is not referring to corporations organized under said chapter in view of the provision that those not subject to it can elect to become so. Therefore, sec. 181.76 (3) says in effect that nonprofit nonstock corporations organized under provisions other than ch. 182 and corresponding prior general corporation laws may elect to become subject to ch. 181.

In a previous opinion relating to ch. 181, 42 O.A.G. 333, 334, I stated among other things that:

"\* \* \* sec. 181.76, which relates to the applicability of ch. 181, makes it clear that its provisions may be used by special types of corporations to the extent that there is no inconsistency with the articles or form of organization of the corporation or laws relating thereto."

The answer is the same for nonstock nonprofit corporations organized under sec. 94.03, Stats., ch. 157, Stats., and ch. 146, General Laws 1872.

Your second question is whether it is proper or necessary for you to request a certified copy of the original incorporation papers "so that your record will be complete." You will notice in sec. 181.76 (3), set forth above, the legislature has specified the method a corporation is to use in electing to become subject to ch. 181. It has also specified several items which are to be included in the restated articles when they are filed for this purpose. By so doing, the legislature has indicated its intention to exclude from the requirements that which is not specified. The general rule of interpretation that the expression of one thing implies the exclusion of another seems applicable here.

Your attention is also invited to sec. 181.39, Stats., which provides in part:

"\* \* \* Restated articles of incorporation shall contain a statement that they supersede and take the place of the

theretofore existing articles of incorporation and amendments thereto. Restated articles of incorporation shall contain all the statements required by this chapter to be included in original articles of incorporation except that:  
\* \* \*”

This is followed by stated exceptions to the last mentioned requirement such as including the location of the principal office at the time of the adoption of the restated articles rather than the initial location. To require a certified copy of the original articles of incorporation to be filed in your office would serve no useful purpose and would put an unnecessary burden on corporations electing to become subject to ch. 181.

It is therefore my opinion that it is neither necessary nor proper to require a certified copy of the original articles of incorporation to be filed in your office when a corporation elects to become subject to the provisions of ch. 181.

SGH

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*Constitution—Amendment—Secretary of State—Election Notice—Suggestion for statement required by sec. 6.10 (1), Stats., in notice submitting questions proposed by Joint Resolutions Nos. 12 and 14, 1955 legislature, to the people at coming April election.*

March 4, 1955.

MRS. GLENN M. WISE,  
*Secretary of State.*

You have submitted copies of Joint Resolutions Nos. 12 and 14, the respective purposes of which are:

“To amend article XI, section 3, of the constitution, relating to the valuation of property in ascertaining the debt limitation of school districts and certain cities for school purposes.” (Joint Resolution No. 12, 1955.)

“To create section 24 of article VII of the constitution, relating to the retirement and eligibility for office of justices and circuit judges.” (Joint Resolution No. 14, 1955.)

You request my advice as to an appropriate "statement of the change" that the adoption of said resolutions will make in the Wisconsin constitution, in order that you may comply with the requirements of sec. 6.10 (1), Stats., which reads 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 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. \* \* \*"

An appropriate "statement of the change" as to Joint Resolution No. 12, which will conform to the requirements of sec. 6.10 (1) quoted above, should, in my opinion, read substantially as follows:

Under existing law (Art. XI, sec. 3, Wis. Const.) a school district's or (certain) city's debt limitation is 5% of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness. The proposed change would substitute the value of property "as equalized for state purposes" according to legislative direction, in lieu of the existing "last assessment" value by local officials. The use of the state equalized value could result in some instances in a higher valuation, which in turn would enable school districts and certain cities to borrow more money under the 5% limitation than they can now borrow under existing law.

In my opinion a "statement of the change" respecting Joint Resolution No. 14, reading substantially as follows, would constitute compliance with sec. 6.10 (1):

If the proposed amendment be approved by an affirmative answer to the foregoing question by a majority of the electors, the change that will be made in the Constitution will be (1) to impose an absolute age limit of 70 years upon all persons elected or appointed to the office of supreme court justice, or circuit court judge; (2) to authorize persons retired by reason of the said age limit to serve temporarily as a circuit judge at the request of the chief justice of the supreme court; and (3) to establish a new

qualification for the office of supreme court justice and circuit court judge that a person elected or appointed to said office be licensed to practice law in Wisconsin for five years immediately prior to his election or appointment. Present incumbents over the age of 70 years, or not having a license to practice law for five years, will be permitted to finish their present terms and will not be affected by this proposed amendment as to such terms.

SGH

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*Tuberculosis Sanatoriums—Private Institution*—Under sec. 58.06 (2), Stats., a philanthropic tuberculosis sanatorium approved by board of health may receive public patients at state and county expense notwithstanding that it rents the buildings and equipment from another nonprofit corporation. The rent paid is a proper item of expense to be considered in calculating the per capita cost of maintenance, and the provisions of sec. 50.07, Stats., relating to depreciation, have no application. Reasonableness of the rental charge is to be considered by the board of health in determining whether to approve the sanatorium, but the use of the rent money by the owning corporation is immaterial.

March 8, 1955.

DR. CARL N. NEUPERT,  
*State Health Officer.*

You have requested an opinion with reference to a private tuberculosis sanatorium operated by a nonprofit corporation in the following manner: The sanatorium corporation rents from another nonprofit corporation the buildings, grounds, and all equipment used by it for an agreed annual rental calculated to be sufficient to cover all repairs and replacements of structures, any necessary additions, and retirement of mortgage indebtedness. The sanatorium corporation hires and pays the personnel, receives the patients, and conducts all sanatorium operations.

Your first question is :

"1. Can a private tuberculosis sanatorium operated under the provisions of Section 58.06, which rents buildings and property for the conduct of a tuberculosis sanatorium, be entitled to the state and county financial aid provided for under Section 58.06 and Chapter 50?"

Sec. 58.06 (2), Stats., provides as follows :

"Any private, philanthropic tuberculosis sanatorium organized on a nonprofit basis, if approved by the state board of health, may admit patients committed to it by any county in the manner and upon the terms provided by s. 50.07 including depreciation charges as provided in s. 50.07 (1), (4) and (5), except that if the amount charged such patients is more than the per capita cost as determined under s. 50.07 including depreciation charges as provided in s. 50.07 (1), (4) and (5) they shall not be entitled to the benefits provided by s. 50.07 (2a)."

Sec. 50.07 (1), Stats., provides in part as follows :

"Any person suffering from tuberculosis may be received into any such county institution and cared for upon payment of a rate which shall not exceed the actual cost of maintenance therein. Such actual cost of maintenance may, when authorized by the county board, include an annual depreciation charge of not more than 2 per cent on all present sanatorium structures and attached fixtures erected or installed prior to January 1, 1937. The said depreciation charge shall be based on the original cost of the structures and fixtures as shown by the records of the county, less any gift, grant, devise or bequest of money or property received from sources other than county funds. If present structures or fixtures are replaced in the future, any net cost of replacement in excess of such original cost shall be deemed an addition in the meaning of subsection (4) and the balance shall continue subject to a depreciation charge under this subsection. But after the amounts charged as depreciation under this subsection equal the whole original cost of any structure or attached fixture, no further charge for depreciation shall be allowed as to such structure or fixture. \* \* \*"

Sec. 50.07 (4), Stats., authorizes depreciation of new additions made after January 1, 1937, at the rate of 5 per cent per annum, and subsec. (5) permits depreciation of equipment, furniture, and furnishings, including X-ray equipment but not including structures and attached fixtures, at the rate of 10 per cent per annum.

The law nowhere requires that a private tuberculosis sanatorium must own its buildings and equipment. If it is able to rent the same from another person on terms agreeable to it and still operate in such a manner as to merit the approval of the state board of health, the rental paid would be a necessary expense of operation and a proper item to be reflected in the per capita cost of maintenance.

The provisions in sec. 50.07 relating to depreciation are inapplicable to a sanatorium which does not own any real or personal property. Therefore, those provisions would not apply to the sanatorium in question, which rents all such property from another corporation.

It is therefore my opinion that the sanatorium in question, if approved by the board, may receive patients and be paid therefor by the state and counties in the manner prescribed by sec. 50.07.

Questions 2 and 3 are as follows:

"2. Can such rental charges include the cost of repairs and maintenance, replacement of fixed structures, remodeling, necessary additions, and a sufficient amount to amortize mortgaged indebtedness?"

"3. Is the board of health obligated to determine whether such rental charges are reasonable?"

As noted above, a private sanatorium must be "approved by the state board of health." In my opinion one of the things to be taken into consideration by the board in determining whether to approve the sanatorium would be, in a case such as is here under consideration, the reasonableness of the rental paid by it for the use of buildings and equipment. So long as the rental is fair and reasonable considering the value of the property rented, the board need not be concerned with the use made of the rentals by the owning corporation. Therefore, it is immaterial whether in fixing the rental the parties have taken into consideration the cost of repairs and maintenance, replacement of fixed structures, remodeling, necessary additions, and amortization of mortgage indebtedness.

WAP

*Chiropractors—License*—One who was licensed to practice chiropractic in 1925 and who permitted his license to lapse at the end of that year and who made no attempt to renew it during the year following cannot now be reinstated under sec. 147.23 (7), Stats., by paying up the registration fees for each of the last 30 years, and he may claim no privileges under the provisions of sec. 147.24 (8), Stats., which was enacted after his license terminated.

March 11, 1955.

E. M. CARDELL, *Secretary,*  
*State Board of Examiners in Chiropractic.*

You have asked for our opinion as to the proper disposition of an application for reinstatement of a chiropractic license which expired in 1925. It is urged on behalf of the applicant that he is now entitled to reinstatement of the license upon paying the annual renewal fees for the years that have elapsed since then.

The answer to the question is not without its difficulties and requires a rather close analysis of two statutory provisions. They are as follows:

Sec. 147.23 (7) reads:

“(7) All licenses issued by the board shall expire on the thirty-first day of December following the issue thereof, except that any holder of a license may have the same renewed from year to year by the payment of an annual fee of \$8.”

Sec. 147.24 (8) reads:

“(8) The board may without further process revoke the license of one who fails to annually register and pay the fee within 60 days after written notice, mailed to his last known address by registered mail. His license may be reinstated, in the discretion of the board, by the payment of \$25 within one year from revocation. If application for reinstatement is not made within a period of one year from revocation he may be required to demonstrate that he is still qualified to practice by taking an examination in such chiropractic subjects as may be required by the board. The fee for such examination and reinstatement of license shall be \$50.”

Sec. 147.24 (8) was created by ch. 406, Laws 1953. Sec. 147.23 (7), on the other hand, has been in the statute books

since 1925, having been created in substantially its present form by ch. 408, Laws 1925, although the annual renewal fee was initially \$5 instead of the present fee of \$8 which came into the statutes by ch. 297, Laws 1949.

In view of this statutory history it becomes necessary to determine whether or not this applicant's license expired under sec. 147.23 (7) prior to the enactment of sec. 147.24 (8).

It is well established that a license may terminate by expiration of the term for which it was granted. 53 C.J.S. 646. That is the clear import of the language in sec. 147.23 (7) reading: "All licenses issued by the board shall expire on the thirty-first day of December following the issue thereof." The question then is: What effect are we to give to the words "except that any holder of a license may have the same renewed from year to year by the payment of an annual fee of \$8"? Does this mean that one whose license expired on the 31st day of December following the issue thereof can come along 30 years later and be reinstated by paying the sum total of the accrued annual fees, or does it mean that the renewal, though tardy, must be within the year following the lapse and "from year to year" thereafter, accompanied each year by the delayed payment of "an annual fee" in the amount specified by the statute?

The language of sec. 147.23 (7) lends itself more readily to the latter interpretation and such interpretation does less violence to the actual wording used than does the first interpretation based on a lump sum payment of \$160, representing 24 annual license payments of \$5 each and 5 annual license payments of \$8 each for the higher fee which became effective January 1, 1950.

The words "from year to year" hardly contemplate a 30-year break in continuity. In the construction of the Wisconsin statutes all words and phrases are to be construed according to common and approved usage, but technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. Sec. 370.01 (1), Stats. According to A New English Dictionary (Oxford) the words "from year to year" mean "through a succession of years, either continuously or at some particular time in each year; every year successively."

This rules out the "once in 30 years construction" urged on behalf of the applicant, and we must therefore conclude that his license has terminated by expiration for want of renewal from year to year during the period of grace allotted by the statute for each year's renewal.

The same conclusion is required by the words "annual fee," since *annual* means yearly or occurring once a year, according to the dictionary.

Inasmuch as the applicant's license terminated prior to the enactment of sec. 147.24 (8), he can claim no benefits thereunder since statutes are normally prospective rather than retroactive in application in the absence of a clearly expressed legislative intent to the contrary. See cases cited in West's Wisconsin Digest, Statutes, § 263.

Sec. 147.24 (8) is not in conflict with sec. 147.23 (7) since license termination by expiration of the term for which the license is granted is entirely different from license revocation by board action which is covered by sec. 147.24.

Sec. 147.24 (8) sets up a new ground for revocation based upon tardy license renewal and was no doubt intended to discourage the practice of laggards in taking advantage of the year of grace previously accorded by sec. 147.23 (7). It assures the board of a more orderly influx of funds upon which to operate by setting up a penalty for late payment, and at the same time it does alleviate somewhat those hardship cases in which for some reason or other there is no renewal during the year after revocation for nonpayment of the annual fee. This provision was copied at the suggestion of the attorney general from sec. 152.06 (1) of the dentistry law as an answer to the perennial problem of late registration, and in the light of many years of successful administration of this statute by the state board of dental examiners.

The applicant in question must therefore meet the requirements imposed upon applicants generally by the provisions of sec. 147.23 (3), Stats.

WHR

*Motor Vehicle Department—Traffic Officers*—Neither the commissioner nor the director of the division of inspection and enforcement of the motor vehicle department has the power of arrest conferred on the officers of the state traffic patrol by sec. 110.07 (1), Stats.

March 11, 1955.

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

You ask whether the director of the division of "inspection and enforcement" of the motor vehicle department has any power to arrest such as that conferred upon the officers of the state traffic patrol by sec. 110.07 (1), Stats., and whether the director would be entitled to any of the retirement benefits of an officer of the state traffic patrol as a consequence of such power. You further inquire relative to the authority of the commissioner of the motor vehicle department to arrest under sec. 110.07 (1).

It is my opinion that neither the director of the division of inspection and enforcement nor the commissioner of the motor vehicle department is invested with any special power to make arrests other than that possessed by private citizens.

Powers to make arrests, insofar as they exceed those granted by the common law, are specifically conferred by statute. Thus, by sec. 29.05 (1) the state conservation commission and its deputies are granted special powers of arrest in enforcing the fish and game laws; and by sec. 110.07 (1) the state traffic patrol members are granted the powers of sheriffs in enforcing the provisions of chs. 85, 110 and 194, Stats.

Sec. 110.07 (1) specifies the state traffic patrol as a group of "traffic officers" employed by the commissioner to enforce and assist in the administration of chs. 85, 110 and 194. The section then confers upon these traffic officers the powers of a sheriff.

Neither official falls within the definition of a member of the patrol as a "traffic officer" employed by the commissioner; and it could not be said that the commissioner as

the employer of the state traffic patrol is thereby a member of that body, nor that the director of the division in which the patrol operates is by virtue of his supervisory control a member of the patrol.

Since it is my opinion that the director of the division of inspection and enforcement is not possessed of a sheriff's power to arrest, questions arising as a consequence of such power are not here answered.

SGH

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*Schools and School Districts—Reorganization—Consolidation*—Detachment of territory from a common school district by county school committee order under sec. 40.03, Stats., does not effect a transfer to the district of attachment, where, prior to July 1 next succeeding such order, the district from which the detachment was ordered was consolidated with other districts to form a new common school district under sec. 40.07, Stats.

March 23, 1955.

THE HONORABLE, THE SENATE.

By Resolution 12, S., an opinion has been requested as to the school district status of certain property.

It is represented that on July 7, 1953, the county school committees of Waupaca, Outagamie, and Winnebago counties, acting as a joint committee as provided in sec. 40.02 (5), Stats., made an order under sec. 40.03, Stats., that certain isolated parcels of land then in a common school district known as Joint School District No. 1, towns of Bear Creek and Lebanon, Waupaca county, be detached from such school district and attached to another school district known as Joint School District No. 3, city of New London and towns of Caledonia, Dale, Greenville, Hortonia, Clayton, Winchester, and Wolf River in Waupaca, Outagamie, and Winnebago counties. It is also stated that by following the procedures prescribed in sec. 40.07, Stats., an election was held at which the vote was favorable to consolidation,

and on August 19, 1953, the school board of said Joint School District No. 1, towns of Bear Creek and Lebanon, and the school boards of three other school districts—School District No. 1, town of Deer Creek, Outagamie county; Joint School District No. 5, village of Bear Creek and town of Deer Creek, Outagamie county; and School District No. 4, town of Bear Creek, Waupaca county—issued the appropriate order or orders consolidating said four school districts into a new common school district known as Joint School District No. 5, village of Bear Creek and town of Deer Creek in Outagamie county, and towns of Bear Creek and Lebanon in Waupaca county. This new consolidated district will be referred to hereinafter as new Joint School District No. 5.

As sec. 40.03 (1), Stats., provides in respect to county school committees that "orders of the committee providing for the reorganization of school districts shall not take effect until July 1 following the recording of the order," the mentioned order made July 7, 1953, could not "take effect" until July 1, 1954. Accordingly, an opinion is requested as to whether the isolated parcels of land which were in Joint School District No. 1, towns of Bear Creek and Lebanon, when the county school committees' order was made on July 7, 1953, are part of the new Joint School District No. 5 created by the consolidation of the several districts on August 19, 1953 under the provisions of sec. 40.07, or are separated therefrom and a part of Joint School District No. 3, city of New London, etc., to which they were ordered attached by the July 7, 1953 order.

The answer turns on the operative effect of this county school committee order. Initially the provision in sec. 40.03 (1) provided such orders should not "take effect until the end of the school year." The change to July 1 was to eliminate uncertainty as to the date the school year ends, by adopting the school fiscal year instead. The purpose of the provision undoubtedly is avoidance of disruption of school operations during the school year and elimination of financial complications that arise upon changes in territory during the fiscal year. But whatever may be the reasons behind the provision, there is nothing in the language used which in any way qualifies or limits the statement that such orders

“shall not take effect” until the following July 1. This is as clear as it could be stated that under no circumstances do they become operative until that date arrives. Although a county school committee order may have existence as soon as it is issued, so as to be subject to review in court or by referendum, as the case might be, any operative force of such an order is withheld until the succeeding July 1. The express postponement of effectiveness until this specific time precludes an order from having any operational force until then.

On the other hand, nothing in sec. 40.07, providing for the consolidation of common school districts, in any way states or indicates that a consolidation effected thereunder does not become operative immediately upon the entry of the order therein provided. Rather, subsec. (2) of said sec. 40.07 says that if the votes are in favor of the consolidation “the school districts shall thereby be consolidated.” Also subsec. (3) thereof says that when such a consolidated school district is organized thereunder “the school districts out of which it was formed shall cease to exist” and the consolidated district “thereupon” becomes vested with all the property and assets, and subject to all of the claims, liabilities, and contracts, of the several districts. Every indication in sec. 40.07 is that a consolidation effected under the procedure goes into operation at once upon the issue of the orders thereunder.

Thus, on August 19, 1953, an entirely new and different school district came into existence. The property comprising it was all the property that was in the four districts as they existed at that time. As the July 7, 1953 county school committee order had not operated as yet to take the specified parcels of the towns of Bear Creek and Lebanon out of Joint School District No. 1, such parcels were a part of said Joint School District No. 1 when it was consolidated into the new district. Such parcels thereby became a part of the new district on August 19, 1953.

So, when July 1, 1954, arrived, not only was there no Joint School District No. 1, towns of Bear Creek and Lebanon, upon which the order of July 7, 1953, could operate, but the specified parcels already were a part of an entirely new and different district. That order did not provide in re-

spect to any territory of this new Joint School District No. 5 or that any territory thereof should be detached. It merely ordered that certain lands be detached from an entirely different district. Such lands no longer were a part of the specified district, and in addition the specified district no longer existed. Consequently, the subject of the order, namely, the status of specified property as constituting a part of a certain school district, no longer existed at the time the order could have operative effect. Therefore there was nothing on July 1, 1954, to which the order could be applicable. The status of the specified parcels, as respects the school system or subdivision of government of which they constitute a part, was entirely different on July 1, 1954. It had been completely changed in the interim.

There is nothing in the statutory provisions indicating that the making of an order by a county school committee precludes anything contrary thereto being done under other statutory procedures and authorizations until after the next July 1 when the order takes effect. If there were, then absolute finality would be accorded such an order. Then, even the county school committee itself could not, by subsequent proceedings and a new order, do anything that might involve the subject of such order until it had gone into operative effect. But, there is nothing in the statutes expressing anything of that nature.

The legislature has provided several means for making changes in the composition of school districts, and, absent some limitation on the efficacy of following any of such authorized procedures, it must be assumed that the result flowing therefrom was intended to be fully effective. The only limitation we find is that applied in *Oak Park School District v. Callahan*, (1944) 246 Wis. 144, 16 N.W. 2d 395. It was there held that where two bodies have concurrent jurisdiction over a particular subject and one commences upon the exercise of its jurisdiction, the other is precluded from exercising its authority until the official action of the former has been concluded. But that is not the situation in this instance. Here the county school committees completed all of their acts in respect to the matter by the issuance of the order. All that remained was the arrival of the future date on which the order would have the operative effect of trans-

ferring the territory out of the school district of which it was a part on the date the committees concluded their action by the issuance of the order.

When the four districts, including Joint School District No. 1, towns of Bear Creek and Lebanon, proceeded under sec. 40.07, and the orders of the school boards were issued thereunder on August 19, 1953, the county school committees were entirely finished with the exercise of their jurisdiction in respect to the matter covered by their order of July 7, 1953. If they were to do anything further in respect to that matter, it would be necessary for them to embark on a new proceeding. They could not do it in the proceeding which resulted in the order of July 7, 1953, because that was concluded. Consequently, there was no conflict of jurisdiction and the several districts as then composed were fully empowered to take the action they did under sec. 40.07.

The districts *as constituted* on August 19, 1953, were consolidated into a new district which came into existence on that date and existed thereafter. The old districts went out of and no longer had existence. The isolated properties covered by the order of July 7, 1953, were in Joint School District No. 1, towns of Bear Creek and Lebanon on August 19, 1953, because the removal effect of the order could not be operative until the following July 1, 1954. By then they no longer were a part of any such district because it did not exist.

It is therefore our opinion that the order of July 7, 1953, of the county school committees, was not effective to transfer the isolated parcels of land covered thereby from Joint School District No. 1, towns of Bear Creek and Lebanon, Waupaca county, so that they did not become a part of the new Joint School District No. 5 upon its formation by the consolidation proceedings under sec. 40.07, and that absent something else subsequent to the consolidation order of August 19, 1953, that might affect the status of said parcels, said parcels are a part of the new Joint School District No. 5.

Possibly a further ground may exist that would operate to render the July 7, 1953 order similarly ineffective. It is a suggestion of failure of one of the county school committees involved to file a master plan by July 1, 1951, as re-

quired by sec. 40.303 (4) (a), Stats. 1951, and the consequence of the statutory provision of "automatic" removal from office, which is the subject of an opinion in 40 O.A.G. 382. However, as this point appears to be involved in a case now pending hearing by the supreme court, we refrain from considering it here and for the purposes of this opinion assume the committees were duly constituted and authorized to make the order here involved.

HHP

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*Schools and School Districts—Dissolution by Neglect to Operate School*—Requirement in sec. 40.08 (1), Stats., that nonoperating school district be attached to an operating district does not apply to districts which do not operate a school on account of a contract under secs. 37.10 or 41.42, Stats.

March 23, 1955.

G. E. WATSON,

*Superintendent of Public Instruction.*

Ch. 127, Laws 1953, amended the provisions formerly in sec. 40.33 (1), Stats., which were renumbered sec. 40.08 (1) by ch. 90, Laws 1953, by deleting the words "furnish schooling" and substituting therefor "operate a school," with the result that, so far as here material, sec. 40.08 (1), Stats. 1953, reads:

"If a district for 2 or more successive years neglects to operate a school for its children as required by law, it shall be attached to a district or districts that do operate a school or schools \* \* \*."

You have requested an opinion as to whether this provision is applicable to districts which do not operate a school on account of a contract with a state college under sec. 37.10, or with a county normal school under sec. 41.42, Stats.

As indicated in the opinion in 42 O.A.G. 185, these particular situations covered by secs. 37.10 and 41.42 constitute instances in which a district is authorized to suspend

operation of its school or schools and provide school for its children elsewhere. When a district suspends operation of its schools on account of a contract under either of those provisions, it does so pursuant to the authorization therein to so suspend operation of its schools. Therefore in those circumstances it is not "required by law" to operate a school. Those situations consequently are not within the impact of the above quoted language of sec. 40.08 (1), because that provision is operative only when the neglect to operate a school is in a set of circumstances in which the district is required by law to operate a school. As pointed out in the mentioned opinion, it is only in certain instances, such as emergencies and these particular cases covered by specific provisions, that a school district is authorized to suspend operation of its schools, and in all other instances a school district is required by law to operate a school.

Furthermore, the provision in sec. 40.08 (1) is general and the provisions in secs. 37.10 and 41.42 are special. It is a familiar rule of statutory construction that conflicts between statutes are to be avoided if possible and that in case of conflict a special statute is controlling over the general. Application of this rule would require giving effect to the authorizations in secs. 37.10 and 41.42 and construing any failure to operate a school that was pursuant to such authorization as not within the provision in sec. 40.08 (1).

In addition, while perhaps not necessarily determinative but at the same time reassuring as to the intended effect of the amendment by ch. 127, Laws 1953, we are unable to find that when it was being considered there was any mention of suspensions due to contracts under secs. 37.10 and 41.42. Rather, the discussion all centered around those instances where school districts were sending their children to schools operated by other districts, and it was to meet those situations that ch. 127 was enacted.

It is therefore our opinion that the provision in sec. 40.08 (1), requiring attachment of a nonoperating school district to an operating district where the suspension exists for 2 successive years, is inapplicable where the failure of a district to operate a school is on account of a contract entered into under secs. 37.10 or 41.42.

HHP

*Constitutional Law—Coroner—Funeral Directors and Embalmers*—Bill No. 382, A., which provides that no person shall be eligible to the office of coroner or deputy coroner who is actively engaged as a licensed funeral director or embalmer, or who has a direct pecuniary interest in such business, may be invalid in its present form, but the bill can be reworded in such a way as to accomplish its apparent purpose without constitutional conflict.

March 29, 1955.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 17, A., the assembly has requested the attorney general for an opinion as to the validity of Bill No. 382, A.

This bill as amended by amendment No. 1, A., provides in substance that no person shall be eligible to the office of coroner or deputy coroner who is actively engaged as a licensed funeral director or embalmer or who has a direct pecuniary interest in, or is employed by, a funeral establishment as defined in sec. 156.01, except that this shall not apply to any person serving as coroner on the effective date of the act.

The question has been raised as to whether this would be invalid as an unconstitutional abridgement of the right of any citizen to be elected to and hold a public office.

The office of coroner is a constitutional office. Art. VI, sec. 4, Wis. Const., provides among other things that coroners shall be chosen by the electors of the respective counties once in every two years. See also *Schultz v. Milwaukee County*, (1944) 245 Wis. 111, 13 N.W. 2d 580.

In 42 Am. Jur., Public Officers, § 38, p. 910, the rule is stated to be:

“\* \* \* An enactment defining qualifications for office or a particular office would be invalid where it constitutes class legislation and grants unequal privileges and immunities, or where it applies to a single individual only, or prescribes arbitrary tests. For example, the legislature cannot arbitrarily enact by law that all physicians, or all persons of a particular religious sect, shall be ineligible to exercise certain public trusts.”

Also in the case of *Fordyce v. State ex rel. Kelleher*, (1902) 115 Wis. 608, 614, 92 N.W. 430, our supreme court said:

“\* \* \* The general proposition that the legislature has no power to prescribe arbitrary tests and qualifications for offices created by the constitution is admitted.”

Assuming the correctness of the foregoing statements of the law it would appear to be just as objectionable to bar a licensed funeral director or embalmer from holding a certain public office as it would be to bar a physician or the members of any other profession from such office, particularly where the office was created by the constitution rather than by the legislature.

There is, however, another approach to the problem which it is our duty to call to your attention. For instance, sec. 59.26, Stats., provides:

“No sheriff, undersheriff, deputy or coroner shall appear or practice as attorney in any court, draw or fill up any writ, pleading or proceeding for a party in any action, nor, with the intent to be employed in the collection of any demand or the service of any process, advise or counsel any person to commence an action or proceeding; and for violation of any of the provisions of this section every such officer shall forfeit not exceeding fifty dollars.”

It is to be noted there that the legislature did not attempt to disqualify lawyers from holding the offices mentioned. However, once a lawyer is elected to one of these offices he is barred from performing a substantial part of the type of work he is licensed to perform.

Assuming the validity of sec. 59.26, there would appear to be no reason why a similar approach could not be made to solving the problem that Bill No. 382 A., attempts to solve, without raising the constitutional objection which appears to be present in Bill No. 382, A., as presently drafted.

Bill No. 382, A., was introduced by request of the Wisconsin Funeral Directors Association, and it possibly reflects the view that the duties of the coroner are such that where the office is held by a funeral director he may enjoy an unfair competitive advantage over his professional

brethren in obtaining the funerals in death cases which come to his attention as coroner.

However, we may assume that the major purpose of the bill is to eliminate possible conflicts of interests between the discharge of the duties of the coroner and the mortuary practice of the funeral director or embalmer. Sec. 366.01 requires the coroner to take an inquest at the request of the district attorney if the district attorney has good reason to believe that murder, manslaughter, or homicide has been committed. Without going into detail it is easy to imagine various types of situations where the normal handling of the death case by a funeral director might be at variance with the conscientious performance of the foregoing statutory duty of the coroner.

At least there is the possibility of such conflict, and there is no constitutional reason why funeral directors and embalmers may not be so regulated as to avoid such possibility of conflicts of interest. There can be no question as to the authority of the legislature to make reasonable regulations under its general police power directed toward the business of caring for and disposing of dead human bodies, since this is so closely related to the health and general welfare of the community. See 54 Am. Jur., Undertakers and Embalmers, § 2, p. 507.

In view of the circumstances set forth above we therefore conclude that the legislature may prohibit a coroner or deputy coroner from engaging in the business of a licensed funeral director or embalmer, but that it may not destroy the eligibility of such a person to hold the office of coroner or deputy coroner. In other words, while the legislature may not destroy the funeral director's eligibility to hold the office of coroner, it may nevertheless with propriety direct that he may not practice his calling while he holds such office.

WHR

*Taxation—Income Tax—Distribution of Revenue*—The 3-year period within which a local unit could file a claim for erroneous payment of income taxes under sec. 71.14 (7), Stats., commenced to run from the receipt of the August 15 distribution, both as to amounts distributed in the May 15 and August 15 distributions of that year.

March 31, 1955.

WISCONSIN DEPARTMENT OF TAXATION.

You request an opinion as to whether a claim for asserted erroneous distribution of 1950 income taxes paid by a taxpayer in March, 1951, filed by a city between May 15, 1954, and August 15, 1954, is timely as to the amount of such taxes included in the May 15, 1951 distribution.

As the right to make such a claim is clearly a matter of legislative grant, without which no such right would exist, the provisions providing therefor that were in the statutes at the time of the filing of the claim in question are applicable and controlling. When this claim was filed, the applicable provisions were those in sec. 71.14 (7), Stats. 1953, which read, so far as here material:

“Whenever any county, city, town or village shall have received in final settlement a portion of an income tax that under the income tax law ought not to have been received by such county, city, town or village, but by the provisions of the income tax law should have been received by another county, town, city or village, such portion of the tax shall be paid by the county, town, city or village erroneously receiving the same to the county, town, city or village entitled thereto; provided, however, that no such payment shall be made except on the written approval of the assessor of incomes who made the assessment, or of the department of taxation in the case of assessments made by it, specifying the reasons for such payment, and provided further that a claim for such tax shall have been made within 3 years after the receipt of the tax. \* \* \*”

The remainder of this subsection, which was not in the statutes until 1943, deals with the enforcement of approved claims by providing that if direct payment is not made, your department shall withhold such overpayments from future apportionments and credit them to the local units en-

titled thereto. Such provisions are of no significance upon the question here, except that in a very remote way the elimination of "June 1" in the designation of the apportionments from which your department is to withhold, by ch. 180, Laws 1949, gives recognition to the change made in the distribution system in sec. 71.14 (1), Stats., by that same enactment.

The above quoted provisions have been in the statutes in the identical language since 1927 and consideration of the language thereof is necessary. The proviso stated therein is that a claim for erroneous income taxes distributed to another local unit must "have been made within 3 years after the receipt of the tax." The income taxes of the taxpayer upon whose taxes the claim is founded, were paid in March, 1951. Under the provisions of sec. 71.14 (1), Stats. 1949, pursuant to which the distributions were made in 1951, those taxes so paid were included in the calculation of the May, 1951 distribution. It is suggested therefore, that to the extent such taxes were so distributed there was "a portion of an income tax" erroneously distributed thereby and a "receipt of the tax" by the local unit to which such taxes were attributed in the making of such distribution. From this it is then argued that the 3-year period within which a claim must be made for a refund started when the wrong municipality received such portion of those taxes in that distribution, and as the claim was not filed until after May 15, 1954, which was more than 3 years after the receipt of such May 15, 1951 distribution, it was too late.

Possibly such argument might be of some force if the situation were one that involved a distribution prior to the change in collection of income taxes in 1933, or the modification in the system of distribution of income taxes that was made in the amendment of sec. 71.14 (1) by ch. 180, Laws 1949. As previously noted, the above quoted portion of sec. 71.14 (7), Stats. 1953, was amended to that identical language in 1927 and has remained unchanged all during the intervening years. A forerunner thereof, but in somewhat different language, was in the statutes since 1915. Up until this 1927 amendment it provided a one-year limitation. Prior to 1933, the income taxes were collected by the county treasurer and it appears that the county treasurer made an

initial distribution early in each year and then made regular distributions thereafter, apparently monthly, as additional collections were received. This was the system which prevailed until in 1933, when the payment and collection of income taxes was transferred to the state tax commission and provision was made for distributions thereafter to the local units by the state treasurer on the first day of March, June, September, and December each year. If the case were under those statutes it might be argued with some force that each distribution constituted a separate "receipt" of "a portion of an income tax" and a "final settlement," and therefore the period of limitation for filing a claim as respects taxes apportioned by each distribution would commence at the time of the receipt of such distribution.

However, the system of distribution by the state was changed by said ch. 180, Laws 1949, so that commencing with the year 1950 the state treasurer was to make a distribution on May 15 of 80 per cent of the apportionable net income tax collections received prior to and including the previous March 31 and then on August 15 make a distribution in respect to any income taxes collected after said March 31 and up to June 30, plus the undistributed 20 per cent for the prior period. Consequently, the May 15, 1951 distribution did not effect a full distribution and payment to the wrong municipality of all the taxes paid in March, 1951, by the taxpayer whose taxes are the subject of the claim here involved. To the extent that such taxes entered into that distribution, only 80 per cent was distributed and it was not until the August 15, 1951 distribution that there was a final and full distribution of the taxes so paid by that taxpayer.

This is of moment because of the opening language in sec. 71.14 (7), granting the right of a local unit to receive payment of an erroneous distribution of income taxes. It says that "whenever any county, city, town or village shall have received *in final settlement* a portion of an income tax" that it was not entitled to, the proper municipality shall be entitled to receive the overpayment. Even though as to distributions prior to the 1949 change, it might be said that each distribution made during a year was a "final settlement," upon the correctness of which we express no opinion, cer-

tainly under sec. 71.14 (1), Stats. 1949, the May 15 distribution is not a "final settlement" and no such distribution of income taxes received in the applicable fiscal year would occur until the August 15 distribution. Under the language of sec. 71.14 (7), Stats. 1953, no right to receive payment from a local unit on account of any erroneous distribution of income taxes would accrue to another local unit until the former had received a distribution that constituted a "final settlement" of the income taxes apportioned thereto. Consequently, until a "final settlement" distribution was received, there would be no right to demand or make a claim against another local unit for erroneous payment.

But, it is clear that under the statutory language the local unit is to have a 3-year period during which it may file a claim against another local unit. If no claim could be made against another unit in respect to any distribution made by the May 15 apportionment until after the August 15 apportionment of the same year was received by the other unit, then if, as respects any portion of a tax payment that was included in such May 15 distribution, the 3-year period were to be measured from the time of the receipt of such May 15 distribution, the 3-year period would start prior to the time the local unit would have a right to assert the claim. The effect would be to cut the period to 2 years and 9 months. Clearly, in providing this 3-year period, the legislature intended that the local unit should have that full time in which to file a claim. It would appear that if, between the May 15 apportionment and the August 15 apportionment in any year, a local unit should discover there was an erroneous distribution involved in the May 15 apportionment, it could inform the department of taxation of such error, and if found to be correct, appropriate adjustment would be made in the August 15 distribution.

As there was no "final settlement" distribution of the income taxes paid in the fiscal year ending June 30, 1951, until the August 15, 1951 distribution, it is our opinion that the 3-year period within which a local unit might file a claim in respect to erroneous distributions of the income taxes collected that year, commences to run from the date of receipt by a local unit of the August 15, 1951 apportionment distri-

bution, both as to amounts distributed in the May 15, 1951 distribution and in the August 15, 1951 distribution.

It may be noted, although it is in no way determinative of the question here involved, that by ch. 3, Laws 1955, effective February 20, 1955, the critical language "shall have been made within 3 years after the receipt of the tax" was deleted and there was substituted therefor "distributable on May 15 shall have been made within 3 years of the following August 15 and that a claim for such tax distributable on August 15 shall have been made within 3 years thereof."

HHP

*State Board of Health—Underground Waters*—State board of health has no power under sec. 144.03 (1) and (3), Stats., to apportion underground waters among adjoining landowners. Its control over high capacity wells is limited under sec. 144.03 (6), (7), and (8), Stats., to those situations where the availability of water to a public utility furnishing water to the public is adversely affected.

April 11, 1955.

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

You state that on a number of occasions the construction and operation of large producing wells has resulted in the lowering of the water levels in the adjoining area to the extent that pumping equipment installed in private wells has been unable to deliver water.

Specific examples include a county park well in Milwaukee county, the public utility well in the town of Allouez in Brown county and more recently a well installed by the Suburban Manor Cooperative in the city of Wauwatosa.

In this latter instance it appears that a number of private wells in the vicinity failed to function during the time the cooperative well was being test pumped at the rate of 200 gallons per minute. Property owners have complained to the state board of health and to the governor. In a petition to Governor Kohler for assistance, the property owners claim that the general authority in sec. 144.03 (1) and (3), Stats., vests sufficient authority in the board to govern the installation and operation of wells so as to limit water production of wells to the extent necessary to prevent lowering of the water table to such a degree as to reduce the availability of the water in private wells.

In view of these circumstances we are asked the following two questions:

1. Does the state board of health have authority under secs. 144.03 (1) and (3), Stats., to control production of water wells to the extent necessary to safeguard adjacent private wells against depletion of water?

2. If the board has such power, can it be exercised to prevent the installation of wells of high capacity or must all

action in this regard be delayed until depletion of water in private wells has been demonstrated?

Sec. 144.03 (1) and (3) reads:

"144.03 (1) The state board of health shall have general supervision and control over the waters of the state, drainage, water supply, water systems, sewage and refuse disposal, and the sanitary condition of streets, alleys, out-houses, and cesspools, insofar as their sanitary and physical condition affects health or comfort.

"\* \* \*

"(3) If the board finds that a system or plant is tending to create a nuisance or menace to health or comfort, it shall order the owner or the person in charge to secure such operating results as the board shall prescribe, within a specified time. If the order is not complied with, the board may order designated changes in operation, and if necessary, alterations or extension to the system or plant, or a new system or plant."

So far as we are aware these provisions have never been construed as constituting the state board of health a water control agency with the power and authority to apportion underground waters among adjoining property owners. No standards, guides, or procedures along this line have been provided.

It is to be noted that the powers granted to the board by subsec. (1) are modified or limited by the words "insofar as their sanitary and physical condition affects health or comfort."

Assuming that a well is properly constructed so as not to result in pollution, it would be difficult to say that its sanitary or physical condition affects health or comfort.

The law respecting rights to underground waters is in various stages of development in different jurisdictions. For a rather comprehensive survey of the subject see 1953 Wis. Law Review 491-515. We will take the liberty of drawing upon that survey for some of the observations set forth here. At common law underground water was regarded as a part of the soil in which the person owning the land had a property right. This was based on the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*. That is to say, to whomsoever the soil belongs, he owns also to the sky and to the depths.

This was the view taken in *Huber v. Merkel*, (1903) 117 Wis. 355, 94 N.W. 354, where the court held that the owner of land had a right at common law to sink wells and use the water therefrom in any way he chose, or allow it to flow away, even though he diminished the water of his neighbor's wells, and even though in so doing he was actuated by malicious motives. Such right was held to be a property right which could not be taken away or impaired by legislation, unless by the exercise of the right of eminent domain or by exercise of the police power. The court accordingly held invalid as taking private property for private use without compensation a statute which provided that the owner of an artesian well who permits it to discharge more water than is reasonably necessary for his use, thereby diminishing the flow of water in another artesian well in the same vicinity, shall be liable for all damages sustained by the owner of the other well.

The court considered that the statute was not a proper exercise of the police power in that it did not pretend to conserve any public interest but upon its face its purpose was to promote the welfare of one citizen by preventing his neighbor from using his own property.

The cases, including *Huber v. Merkel*, *supra*, draw distinctions between percolating waters and subterranean waters which flow in defined channels. As to the latter the rules which govern the use of surface streams apply, although the presumption is that waters are percolating waters until it is shown that they are supplied by a definite, flowing stream.

While the *Huber* case has been strongly criticized in other jurisdictions it stands unreversed in Wisconsin, and we must evaluate the statutes here under consideration in the light of that decision.

This would mean that if subsecs. 144.03 (1) and (3) are open to the construction that they authorize the state board of health to promote the welfare of one landowner by preventing his neighbor from using his own property, the statutes would probably be invalid under the doctrine of the *Huber* case. It is elementary that if there is any choice as to construction of a statute, that construction should be adopted which will sustain the statute. *Madison Metro.*

*Sewerage Dist. v. Committee on Water Pollution*, (1951)  
260 Wis. 229, 254, 50 N.W. 2d 424.

Therefore, the contention that subsecs. 144.03 (1) and (3) authorize the state board of health to apportion percolating waters between neighbors should be rejected.

There is still another cogent reason leading to the same conclusion. That is to be found in the language of subsecs. 144.03 (6), (7), and (8) which are *in pari materia* with subsecs. (1) and (3) discussed above and which read:

“(6) It is declared that the public health, comfort, welfare and safety requires the regulation by the state of the use of subterranean waters of the state in the manner provided in this section.

“(7) In order to promote the conservation of underground water supplies, it is provided that no new, additional or reconstructed old wells shall be constructed, installed or operated to withdraw water from underground sources for any purpose or purposes whatsoever where the capacity and rate of withdrawal of any such well or wells singly or in the aggregate, or the total capacity or rate of withdrawal of old, new and reconstructed wells on or for use on one property is in excess of 100,000 gallons a day without first obtaining the approval of the state board of health.

“(8) If the board finds that the proposed withdrawal at a rate of more than 100,000 gallons of water from any such well or wells will adversely affect or reduce the availability of water to any public utility in furnishing water to or for the public; it shall either withhold its approval or grant a limited approval under which it shall impose such conditions as to location, depth, pumping capacity, rate of flow and ultimate use so that the water supply of any public utility engaged in furnishing water to or for the public will not be impaired. The board is empowered to issue such general or special orders as it deems necessary to insure prompt and effective administration of this section.”

These subsections contain the only specific language giving the state board of health any control over the use of subterranean waters. This authority it will be noted relates only to wells of a certain capacity, and the power of the board is restricted to those situations where it finds that the high capacity well will adversely affect, or reduce the availability of water to, any public utility in furnishing

water to or for the public. The board is given no power whatsoever to protect the adequacy of the water supply for private wells. It must be remembered that the state board of health has only such powers as have been expressly granted to it or are necessarily implied, and any power which it seeks to exercise must be found within the four corners of the statute under which it proceeds. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N.W. 2d 27.

Here the only express power to protect wells relates not to private wells but to public utility wells, and under familiar principles of statutory construction, the expression of the one results in the implied exclusion of the other, *expressio unius est exclusio alterius*.

It might also be noted in closing that subsecs. (6), (7), and (8) meet the constitutional test of the *Huber* case in that upon the face of these statutory provisions it appears that they were designed to conserve the public interest and not to promote one citizen's private well by preventing his neighbor from exercising his property rights to the percolating waters in the soil he owns. In other words subsecs. (6), (7), and (8) of sec. 144.03 can be sustained as a legitimate exercise of the state's police power.

While the modern day trend toward conservation of our natural resources may suggest the desirability of a reappraisal of our legislative and judicial approach to regulating the use of underground waters, it is not the function of either the state board of health, the executive department, or the attorney general to usurp a power that does not presently exist by attempting to measure out our diminishing supply of underground water among neighbors in an equitable and just manner.

WHR

*Funeral Directors and Embalmers—License—Reciprocity*—Attorney general will not speculate whether Wisconsin funeral director's and embalmer's licenses could be issued by reciprocity under sec. 156.08, Stats., to a person obtaining a license from the state of Iowa by reciprocity, when it does not appear that Iowa has granted such a license nor that the applicant is qualified to receive an Iowa license.

Requirement of sec. 156.08 (1) that state in which applicant for reciprocal licensure is presently licensed must have "requirements substantially equal to those in this state" is not satisfied if such state requires only a high school education, since sec. 156.045 (1) (b), Stats., requires completion of one year of college.

April 19, 1955.

DR. CARL N. NEUPERT,  
*State Health Officer.*

You have requested an opinion regarding the eligibility of an applicant for licensure as a funeral director and embalmer by reciprocity. The applicant holds licenses from New York and the District of Columbia and also states that he will obtain a license from the state of Iowa on the basis of reciprocity between that state and one or the other of the jurisdictions in which he holds licenses.

Sec. 156.08 provides as follows:

"(1) Any person holding a valid license as a funeral director or embalmer in another state *having requirements substantially equal to those in this state* may, if such state recognizes licenses issued by the Wisconsin board, apply for a license to practice in this state by filing with the board a certified statement from the secretary of the examining board of the state in which the applicant holds a license, showing the qualifications upon which said license was granted, together with his recommendation. Thereupon the board may upon the recommendation of the committee of examiners and payment of the required fee issue such license.

"(3) The board and committee shall have power to make and determine reciprocal agreements with other states."

Under sec. 156.045 (1) (b), a person to be eligible to take the examination for a funeral director's or embalmer's license, after August 3, 1951, must have completed one academic year of instruction in a recognized college or university in a course of study approved by the board, or have equivalent education.

You state that you do not have reciprocal agreements in force with either New York or the District of Columbia principally for the reason that those jurisdictions require only high school graduation, which is not equivalent to one year of college or university.

The requirement for licensure in Iowa since April 3, 1953, includes completion of "one academic year of instruction in a recognized college, junior college, or university in a course of study approved by the board or have equivalent education as defined by the board." After September 1, 1955, the requirement will be two such years of instruction. 9 Ia. Code Ann. (Supp. 1954) § 156.3.

The Iowa statutes provide for entering into reciprocal agreements with other states having "substantially equivalent requirements to those existing in this state [Iowa] for that particular profession." 9 Ia. Code Ann. (1949) § 147.45.

It is also provided by the Iowa statute that examining boards may provide by rule that there shall be no reciprocity unless the applicant furnishes proof of active practice of his profession for a certain period of years to be fixed by the board, or passes a "practical examination" in the practice of his profession as prescribed by such examining board. 9 Ia. Code Ann. (1949) § 147.47.

You state that the Wisconsin state board of health has adopted rule H 16.09 which provides as follows:

"In the event any state reciprocating with the State of Wisconsin under the provisions of sec. 156.08 (1) imposes additional requirements beyond those established for licensure in ch. 156 equal additional requirements will be imposed by this state for licensure through reciprocity for applicants licensed in such state."

Apparently the Iowa board has required, pursuant to § 147.47 of their code, referred to above, that the applicant

for reciprocity must show 5 years practice of his profession. Accordingly the reciprocal agreement with Iowa entered into December 17, 1954, contains the following provision:

“Inasmuch as the State of Iowa has met the requirements of Section 156.08 (1) of the Wisconsin Statutes to the extent that it has agreed to recognize licenses issued by the Wisconsin Board and has requirements substantially equal to those in this state, it is recommended that the State of Wisconsin reciprocate with the State of Iowa subject to these additional requirements: (1) All applicants for licensure through reciprocity from the State of Iowa must have practiced as a licensee for at least five years in that state; (2) All applicants for licensure through reciprocity must submit to and pass a written or oral examination or both in funeral directing or embalming, as the case may be; (3) If the applicant for licensure through reciprocity from the State of Iowa has not practiced as a licensee for at least five years in that state, he may qualify for licensure by submitting to and passing the regular examination in funeral directing or embalming, as the case may be.”

In view of the foregoing situation you have asked two questions, the first of which is as follows: If the state of Iowa enters into a reciprocal agreement with another jurisdiction with which the state of Wisconsin does not currently reciprocate and issues a license by reciprocity, is the board authorized to issue a license through reciprocity to the applicant on the basis of his Iowa license without requiring 5 years of practice as a licensee in Iowa?

It will be observed from the foregoing discussion of the Iowa law that the applicant is no more eligible for a reciprocal license in Iowa than he is for a reciprocal license in Wisconsin on the basis of his New York and District of Columbia licenses. We cannot therefore assume that he will obtain a reciprocal license in that state in apparent violation of law, and it would be idle speculation whether a license could be issued in this state if one were to be granted by Iowa.

For this reason I must respectfully decline to answer your first inquiry. You may resubmit the question if it turns out that Iowa does issue this applicant a license.

Your second question is as follows: Do provisions of sec. 156.08 permit entering into reciprocal agreements with other jurisdictions whose educational requirements are graduation from high school, whereas ours are completion of "one academic year of instruction in a recognized college or university in a course of study approved by the board or have equivalent education"?

It is quite apparent that graduation from high school is not the substantial equivalent of one year of college or university. As a usual proposition graduation from high school is required for entry into a college or university. Twelve years of attendance in grade and high school are the usual requirement for high school graduation, and the first year of college is ordinarily the thirteenth year of education. Twelve is not the substantial equivalent of thirteen and it was the apparent intent of the legislature to require as a condition precedent for reciprocity, that the law of the other state must also require that thirteenth year of education which is provided for by sec. 156.045 (1) (b).

Moreover, the tempo of learning at the college level is such that ordinarily as much ground is covered in one semester as would be covered in a year in equivalent high school courses, so that the one year of college now required for licensure is substantially equivalent to two years in high school, and therefore amounts to a more considerable increase in the educational requirement than would be implied merely by the additional time required. It may well be that the legislature considered that the ability to complete the freshman year of college successfully would require a higher degree of mental aptitude than that required to finish high school, and thus would tend to increase the quality of the applicants for licensure in this field.

The answer to your second question is therefore "No".  
WAP

*Courts—Circuit Court—Clerk's Fees—*42 O.A.G. 332 is withdrawn as to the part concluding that the circuit court clerk's fee is \$2 for filing and docketing a judgment from small claims court. The fee is 25 cents in view of the 1955 history of proposed legislative amendments.

April 19, 1955.

RICHARD W. BARDWELL,  
*District Attorney,*  
Dane County.

Our attention has been directed to an opinion of the attorney general to the district attorney of Kenosha county, 42 O.A.G. 332, November 18, 1953, in which it was concluded that under sec. 59.42 (8), Stats., the circuit court clerk's fee for filing and docketing a judgment from small claims court is \$2, and under sec. 59.42 (3) the circuit court clerk's fee for filing an appeal from small claims court is \$5.

We have been asked to review this opinion in view of a question that has been raised as to the weight that should be given to sec. 254.17, an earlier statute, which provides that the circuit court clerk's fee for filing a transcript of a small claims court judgment shall be 25 cents.

The incongruity between the 25-cent fee provided by sec. 254.17 and the \$2 fee provided by sec. 59.42 (8) (b) was made a subject for consideration by the judicial council, and at its request Bill No. 218, A., was introduced in the assembly on February 11, 1955 by the committee on the judiciary. This bill proposed to amend sec. 254.17 by raising the fee in question from 25 cents to \$2. On March 9, 1955 amendment No. 1, A., was offered by Assemblyman Marotz. This would have amended ch. 138, Laws 1951, relating to the small claims court of Dane county so as to raise the fee from 25 cents to \$2. On March 11, 1955, amendment No. 2, A., was offered by the committee on the judiciary at the request of the legislative committee of the Milwaukee county board of supervisors. The effect of this amendment would have been to call for the filing of the transcript with the clerk of the circuit court where the small claims court is located. Thereafter a transcript could be issued by such circuit court clerk and upon the payment of a filing fee of

\$2 as provided in sec. 59.42 (8) (b) could be filed with the clerk of any circuit court in the state.

On March 16, 1955, both amendments were adopted and the bill was then postponed indefinitely. The adoption of the proposed legislation would have made it clear that the fees provided by sec. 59.42 (8) (b) and sec. 254.17 were intended to be uniform, and the refusal of the legislature to do so provides makes it equally clear that the legislature does not intend that the fees shall be uniform, and this despite the fact that sec. 59.42 (8) (b) specifically provides a \$2 fee for "filing and docketing transcripts from judgment docket of *any court*."

It is true that at the beginning of sec. 59.42 and with at least half a page of statutory material intervening there is a caveat in the form of the words "except as otherwise provided in the statutes." The observation might well be made that this is but little more than a booby trap to catch the unwary, and we might add in passing that we have the assurance of the revisor of statutes that in the 1955 statutes there will be an appropriate note or cross-reference in sec. 59.42 calling attention to the discrepancy between the provisions of subsec. (8) (b) thereof and sec. 254.17 as well as the Dane county small claims court act. In other words, it will be pointed out specifically that sec. 59.42 (8) (b) does not mean literally what it says.

In view of the foregoing discussion, that part of 42 O.A.G. 332 concluding that the circuit court clerk's fee is \$2 for filing and docketing a judgment from small claims court is withdrawn, since the legislature has made it clear that the fee is to be 25 cents. This being so, and since we are in the fortunate position of being able to utilize legislative hindsight on the question, it becomes unnecessary to consider and discuss other rules of statutory construction that might otherwise have been applicable or required in reviewing the situation.

We believe, however, before closing the discussion, some further comment should be made about the opening paragraph in sec. 59.42, since it is obvious that the language of this paragraph is bound to lead to further confusion and that it ought to be reworded in the interests of clarity.

It reads, with emphasis supplied to point up the difficulty :

*“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:”*

The double exception is most confusing. Does the first exception mean “except as otherwise provided in the statutes and except as hereafter excepted?” Is the first exception an exception to the second exception or is the second exception an exception to the first exception, etc.? This is a Janus-faced creature indeed.

The parentheses afford no guide since the subject matter within the parentheses is virtually the same as the subject matter of the entire section.

Sir Winston Churchill once stated that the essential structure of the ordinary English sentence is a noble thing. That is as it should be. On the other hand Justice Cardozo has pointed out that a sentence may be so overloaded with qualifications that it will tumble down of its own weight. That seems to be what has happened here. The purpose of language is to reveal thought, not to conceal it. If the thought in this instance has not been concealed, it at least has become obscured to the point that sec. 59.42 is not a guide to the laymen clerks who must administer it but rather it creates some sort of kaleidoscopic puzzle in the nature of an optical illusion which presents one appearance one minute and perhaps an entirely different appearance the next.

To use the words of an old-time practitioner we have read the opening paragraph of sec. 59.42 three times forward and four times backward and have been unable to make sense out of it in either direction. We take occasion to make these remarks because the need for revision is urgent, as we are aware of no other statutory change in recent years which has given rise to so many requests for opinions of the attorney general. Why shouldn't all of the fees of the clerk of circuit court be collected in one easily found section of the statutes without exceptions and confusing references to other statutory provisions?

WHR

*Child Protection—Detention Home*—Sec. 48.05, Stats., does not prevent establishment of a detention home for delinquent children in the same building with the county home, and if the detention home is established under sec. 48.12 (2) (a) and (3), Stats., it could also be used for dependent and neglected children.

April 22, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have inquired whether a county may "provide suitable and separate facilities for temporary detention of juvenile delinquents in its proposed new county home building," in view of sec. 48.05, Stats., which provides as follows:

"No child under sixteen years of age shall be sent *as a poor person* to any county home for support and care; but the county superintendents or other officers having the care of the poor shall bring all such cases, when brought to their notice, into the juvenile court in the manner provided in section 48.06."

The statute, it will be observed, prohibits only sending a child to the county home "as a poor person." It therefore has no application to a child sent to a detention home located in the same building as the county home, not as a poor person but as a delinquent child.

Sec. 48.12 (2) (a) and (c), Stats., provides as follows:

"(2) Provision shall be made by the county board for the temporary detention of children in one of the following ways:

"(a) In a detention home which shall be conducted as an agency of the court;

"\* \* \*

"(c) The court may arrange with any incorporated institution or agency, maintaining a suitable place of detention for children, that such institution or agency shall receive for temporary care children within the jurisdiction of the court."

Under sec. 48.12 (3), Stats., a detention home established under subsec. (2) (a), *supra* must be in charge of a super-

intendent who, with other personnel, would be appointed by the juvenile court judge. Thus, although located in the same building with the county home, it would really be a separate institution and sec. 48.05 would have no application, even as to children who are not delinquent but are neglected or dependent.

WAP

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*Public Assistance—Penalties—Constitutional Law—Due Process—Definiteness of Statutes—Words and Phrases—Proper Officer or Agency*—The term “proper officer or agency,” as used in sec. 49.12 (6), Stats., means the officer or agency administering the public assistance program in the particular county. It is not so vague and indefinite as to cause the statute to be unconstitutional as a denial of due process of law.

May 2, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have requested an opinion regarding the constitutionality of sec. 49.12 (6), Stats., which provides as follows:

“Where a person is originally eligible for assistance and receives any income or assets or both thereafter and fails to notify *the proper officer or agency* of the receipt of such assets within 15 days after such receipt and continues to receive aid, such failure to so notify *the proper officer or agency* of receipt of such assets or income or both shall be considered a fraud and the penalties as set forth in subsection (1) shall apply.”

You state that certain judges believe that the words “fails to notify the proper officer or agency” are so vague and indefinite as to be unconstitutional on the ground that the assistance recipient does not know to whom he is to make the report. You state that other judges have not felt this difficulty and have passed sentence for frauds committed in violation of this subsection.

In *State v. Stehlek*, (1953) 262 Wis. 642, 645, 56 N.W. 2d 514, the supreme court, after pointing out that statutes are presumed to be constitutional and that the party attacking the statute has the burden of overcoming the presumption, stated as follows :

“The exercise of the power to declare laws unconstitutional by inferior courts should be carefully limited and avoided if possible. The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction. That is especially true where, as in this case, the statute has been in effect for nearly eight years, and has been enforced in innumerable cases.”

The rule relating to the validity of statutes alleged to be void for uncertainty was involved in *State v. Evjue*, (1948) 253 Wis. 146, 157-159, 33 N.W. 2d 305, where the supreme court stated in part as follows :

“This leaves for decision the question whether the statute describes the offense with sufficient definiteness. In a criminal statute there must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act or in regard to the applicable tests to ascertain guilt. *Winters v. New York*, *supra*, 333 U. S. 507, 515, and cases cited. \* \* \*

“\* \* \*

“It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience, that he comes near the proscribed area. *Nash v. United States*, *supra*; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284.”

The court there quoted with approval from the opinion of Mr. Justice Holmes, speaking for the court in *United States v. Wurzbach*, (1930) 280 U. S. 396, 399, in part as follows :

“\* \* \* But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The

precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.' ”

The difficulty in the present instance arises out of the words “proper officer or agency.” As Justice Holmes said in the foregoing quotation, “We imagine that no one not in search of trouble would feel any.” Phrases using the word “proper” have been attacked on constitutional grounds but have been uniformly sustained, and terms such as “proper officer” and “proper official” have been construed by the courts without any suggestion that they are vague and indefinite.

It is quite apparent that the term “proper officer or agency” as used in sec. 49.12 (6) is intended to mean the officer or agency administering the public assistance program in the particular county. Sec. 49.12 (1) provides as follows:

“Any person who, with intent to secure public assistance under any provision of chapter 49, whether for himself or for some other person, wilfully makes any false representations shall, if the value of such assistance so secured does not exceed \$50, be punished by imprisonment not more than 6 months or by a fine not to exceed \$100, and, if the value of the assistance does exceed \$50, by imprisonment not more than 5 years nor less than one year, or by a fine not exceeding \$100.”

The person to whom the false representations are made is not named in the foregoing subsection, but it is apparent that to violate that subsection the person applying for assistance must make the false representations to the officer or agency administering the public assistance program. Persons in search of public assistance have little or no difficulty in finding out where they must make application therefor. After assistance is granted they know where it is coming from and to whom application must be made for an increase in the grant to cover, for example, extraordinary medical expenses. So likewise they know to whom any report of income or assets received by them should be made, and it is a pure sham to pretend otherwise.

In *State v. Chicago & N. W. Ry. Co.*, (1947) 147 Nebr. 970, 25 N.W. 2d 824, 826, the court sustained a statute which required railroad companies to equip all switch stands with "proper lights" as against the contention that it was void for uncertainty. The court held that the meaning of the expression could be ascertained from other parts of the statute.

Similarly in *Jeffersonville Mfg. Co. v. Holden*, (1913) 180 Ind. 301, 102 N.E. 21, 23, the court sustained a statute requiring the owner or person in charge of a factory to have the machinery "properly guarded" stating in part as follows:

"\* \* \* When the language 'shall be properly guarded,' is considered in connection with the other language of that section, and the other sections of the act in question, it is clear that it means a safeguard to protect the life and limbs of employes engaged about dangerous and hazardous machinery and mechanical appliances, where such can be so guarded without impairing their usefulness. What the size or shape of such guard shall be is not specifically stated in the statute which requires only that it shall be proper, and the term 'proper' as thus used means fit, suitable, appropriate."

See, also *Kirchoff v. Hohnsbehn Creamery Supply Co.*, (1909) 148 Iowa 508, 123 N.W. 210.

*State v. Louisville & N. R. Co.*, (1911) 177 Ind. 553, 96 N.E. 340, 343-4, involved a statute requiring railroad locomotives to be "properly" equipped with an "efficient" automatic device, kept in "proper working order," for ringing the bell. The court held the statute was not void for vagueness. "Proper," "properly," and "efficient," the court said, "may in some connections be definite, and specific terms when used in connection with a definite subject matter," and the court cited numerous examples of the use of the word "proper." In this case, the court said, the terms used "can mean nothing else, or more, than a device adapted to the accomplishment of the purpose of ringing such bells automatically \* \* \*."

And in *State v. Persons*, (1946) 114 Vt. 435, 46 A. 2d 854, 855-6, it was held that a statute penalizing cruelty to animals by "unnecessarily failing to provide the animals with

*proper* food and drink” was “not so uncertain and indefinite as to support the respondent’s objection that he is deprived of due process of law.” The court said:

“\* \* \* The words ‘unnecessarily’ and ‘proper’ are to be understood in their ordinary sense, and as here used can only mean that while the respondent could have provided such food and drink he failed to do so. We construe ‘proper’ to be such food and drink as are required to preserve the health of the animals.”

In *Pickle v. Smalley*, (1899) 21 Wash. 473, 58 P. 581, 582 the court considered a statute relating to foreclosure of chattel mortgages, which provided that notice of foreclosure should be placed in the hands of “the sheriff or other proper officer” for service. It was held that this did not include a constable, but meant only the sheriff and his deputies and officers provided by law to act in place of the sheriff when he is disqualified. It was not even suggested that “proper officer” was vague and indefinite. The court said, in part:

“\* \* \* Bouvier defines the word ‘proper’ as ‘that which is essential, suitable, adapted, and correct’; and, as this is its ordinary signification, the ‘other proper officer’ must be one suitable and adapted to the execution of the power conferred.”

In *Fulkerson v. Refunding Board*, (1941) 201 Ark. 957, 147 S.W. 2d 980, 988, the governor had called a special election to vote on a referendum, a petition containing the requisite number of signatures having been filed. The constitution provided that “referendum petitions may be referred to the people at special elections to be called by the *proper* official.” The court said in part:

“It is objected that the [constitutional provision] provides that the election shall be called by ‘the proper official,’ and that there is no designation of the Governor as that person. The answer to that objection is that it can be no person other than the Governor. No other officer has authority to call elections to be held in more than one county. Section 4679, Pope’s Digest.”

I am therefore of the opinion that the meaning of the term “proper officer or agency” can easily be ascertained

from the other parts of the statute; that it means the officer or agency administering the public assistance program in the particular county; that such officer or agency must in the nature of things be well known to the persons affected by the law; and that the statute is not subject to successful attack on the ground that it is vague and indefinite.

WAP

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*Charitable and Penal Institutions—Maintenance of Inmates—Settlement between State and Counties—Statute of Limitations*—There is no statute of limitations which bars the commencement of a proceeding under sec. 46.106 (4), Stats.

Failure to furnish the certification or transcript required by sec. 46.106 (1), Stats., does not prevent the county of legal settlement from being liable for institutional charges.

A county does not have a right, under sec. 46.106 (1), Stats., to collect from the county of legal settlement for the maintenance of persons sentenced to its county jail.

May 10, 1955.

RONALD D. KEBERLE,  
*District Attorney,*  
Marathon County.

You have asked several questions regarding public welfare statutes. The first question is whether there is any statute of limitations applicable to the actions provided for in sec. 46.106, Stats. I understand your question concerns the provisions of sec. 46.106 (4) relating to relief from erroneous charges. There is no statute of limitations which bars the commencement of a proceeding under this section. As you point out, this office has already expressed an opinion to this effect. 24 O.A.G. 360.

You ask whether, under sec. 46.106 (1), the certification of legal settlement to the county clerk of the county of legal settlement is a condition precedent to the recovery of the charges from the county of legal settlement, and whether,

under the same subsection, the submission of a transcript of testimony to the state department of public welfare is a condition precedent to charging the state with the support of a person without settlement. You reason that failure to furnish the certification or transcript in advance of the charges and at the time of the commitment may prejudice the county of legal settlement in its attempts to discover evidence relating to the legal settlement of the person committed. You conclude that furnishing the transcript or certification, as the case may be, is a condition precedent to the recovery of the charges from the county of legal settlement by the committing county. In other words, the failure to furnish the certificate or transcript in advance and timely relieves the county of legal settlement of liability. I do not believe that the legislature intended this result.

Clearly, the furnishing of the transcript or certificate is in the nature of a notice to the governmental unit receiving it so that it can make its own investigation. Sec. 46.106 (1) requires that this certificate or transcript be submitted by the committing or admitting court, judge, magistrate, or board, after the procedure prescribed by secs. 48.06 and 48.07 is complete. This requirement is directory only. It is not jurisdictional. Failure to furnish the certification or transcript would not invalidate the commitment nor would it prevent the county of legal settlement from being liable. See 31 O.A.G. 294, 298, where it is said:

“\* \* \* Accordingly, when a child is found by the proper juvenile court to be neglected and dependent and is committed to the custody of a person other than his parent, the county of his legal settlement becomes liable, by force of statute, for such compensation for the child's support as is approved by order of the court. Under the statute the only circumstances which are made conditions precedent to the existence of county liability are (1) a valid order of commitment of a delinquent, neglected or dependent child to the custody of a person other than a parent; (2) existence of the child's legal settlement in the county; (3) absence of other provision for the child's support. \* \* \*”

In this regard, it should be noted that in the public assistance statutes, as distinguished from the statutes relating to institutional care, the legislature has clearly provided

that liability is to be contingent upon the giving of notice. See sec. 49.11, Stats. In that section it is provided that notice must be given to the county where legal settlement is claimed within 20 days of the granting of relief. The content of the notice is prescribed. Where the notice is not given within the 20-day period but is given later, the county of legal settlement is liable only from the date of the giving of the notice. There is a statute of limitations prescribing the time after which the claim of one county against another is barred. The state department of public welfare is authorized to determine all controversies which arise. Since the legislature has clearly provided that in the case of these relief claims under sec. 49.11 liability is to be contingent upon notice, and has provided a statute of limitations, and the legislature has not provided in the same clear language that in the case of claims for institutional care under sec. 46.106 liability is to be contingent on the furnishing of the certification or transcript, and has not provided a statute of limitations, it is my opinion that, in respect to these latter claims, the failure to furnish the certification or transcript does not relieve the county of legal settlement from liability. If this appears to be unfair or inequitable, or if it appears that the county of legal settlement should be protected by the doctrine of estoppel by reason of the failure to furnish the certification or transcript, it should be remembered that these rights and proceedings are strictly statutory, and equitable doctrines do not apply. *Holland v. Cedar Grove*, (1939) 230 Wis. 177, 188, 282 N.W. 111; *Milwaukee County v. Stratford*, (1944) 245 Wis. 505, 15 N.W. 2d 812.

You also ask whether a right exists to collect from the county of legal settlement for the maintenance of persons committed to county jails, in view of the provisions of sec. 46.106 (1). This section reads in part:

“When a person is committed or admitted to a charitable, curative, reformatory or penal institution of the state or of a county (except tuberculosis patients provided for in ch. 50 and ss. 51.27 and 58.06 (2) the committing or admitting court, judge, magistrate or board shall determine his legal settlement pursuant to s. 49.10, and certify the same to the superintendent of the institution and to the county clerk

of the county of legal settlement. The county of his legal settlement shall be charged with his support as provided by law. \* \* \*

Under this section, whenever a person (except a tuberculosis patient) is committed or sentenced to a state or county institution, the court, judge, magistrate, or board must determine the legal settlement of that person. The county of legal settlement is charged with his support while in that institution as provided by law. The key to this situation is the language "as provided by law." For persons committed to state hospitals, sec. 51.08, Stats., provides the amount of the charges to be paid by the county of legal settlement. For children committed to the state department of public welfare and placed in state schools, sec. 48.18, Stats., provides the amount of the charges to be paid by the county of legal settlement. For persons committed or sentenced to the county jail there is no statute which provides any charges to be paid by the county of legal settlement. It is therefore my opinion that a county does not have a right to collect from the county of legal settlement for the maintenance of persons sentenced to its county jail, because the amount to be paid by the county of legal settlement is not "provided by law." On the contrary sec. 53.33, Stats., provides that the maintenance of prisoners while in the county jail shall be paid by the county, and there is no provision for charging over against another county or the state. Also, sec. 46.106 (1) refers to the "superintendent of the institution" and sec. 46.106 (3) refers to the "trustees of the institution." Sec. 46.106 could not have been intended to apply to county jails because those institutions have no superintendents or trustees.

WAP

*Intoxicating Liquors—Malt Beverages—Restrictions on Brewers, Manufacturers, etc.*—The purchase by a brewer, bottler, or wholesaler of advertising space in publications published by a trade association composed of Class “B” fermented malt beverage and Class “B” intoxicating liquor licensees, or of display or other rental space from such an association, constitutes a furnishing of money and is therefore prohibited by sec. 66.054 (4) (a), Stats.

A manufacturer, rectifier, or wholesaler, as defined in sec. 176.01 (9), (10), and (11), Stats., is similarly prohibited by sec. 176.17 (2), Stats.

May 19, 1955.

THE HONORABLE, THE ASSEMBLY.

This will acknowledge receipt of Resolution No. 15, A., 1955 session, wherein your honorable body requests my opinion as to whether, under secs. 66.054 (4) (a) and 176.17 (2), Stats., brewers, bottlers, and wholesalers of fermented malt beverages and manufacturers, rectifiers, and wholesalers of intoxicating liquor may (1) purchase advertising space in publications which are published by a trade association whose membership is made up of Class “B” fermented malt beverage and Class “B” intoxicating liquor licensees, and which is organized as a voluntary association or as a nonprofit Wisconsin corporation; or (2) purchase display space or other rental space in connection with a meeting, convention, or trade show operated by such trade association so constituted and organized.

You state that the present questions are prompted by my opinion rendered to your honorable body on February 28, 1955 (reported at page 34, this volume) wherein the view was expressed that the above cited statutes control the activities of the persons whose conduct they restrict when dealing with trade associations comprised of certain classes of licensees as well as with the licensees themselves.

The statutory provisions referred to are set out, insofar as they are applicable here, in my earlier opinion. It should be noted that sec. 66.054 (4) (a) contains the language:

“No brewer, bottler or wholesaler shall furnish, give or lend any money or other thing of value \* \* \*.”

Sec. 176.17 (2) reads in part:

“No manufacturer, rectifier or wholesaler shall furnish, give, or lend any money or other thing of value, directly or indirectly \* \* \*.”

Generally, words of a statute are to be construed according to their common and approved usage. Sec. 370.01 (1), Stats.

The word “furnished” in the statute prohibiting fermented malt beverages to be “sold, dispensed, given away or *furnished*” to persons under 18 has been held to cover every transaction consistent with the purpose of protecting the children from obtaining fermented malt beverages. *State v. Graves*, (1950) 257 Wis. 31. It is a very broad term and includes transactions where there is mutual consideration as well as those where the thing “furnished” is a gratuity.

Another clause of the statute which is now sec. 66.054 (4) (a) was construed in 22 O.A.G. 814 (1933). That opinion reads in part:

“It would seem that according to the common and approved usage of the words ‘supply’ and ‘furnish,’ a sale, even though a bona fide sale and for an adequate consideration, whether cash or credit, would be within the purview of the act prohibiting brewers from supplying or furnishing fixtures or equipment to holders of a Class B license. The fact that such sales by brewers to Class B licensees are made independently of and do not involve in any way the purchase of malt beverages or light wines by the purchasers of such furnishings and equipment from the seller thereof, does not make such transaction any less a supplying and a furnishing of such articles by the brewer. \* \* \*” (p. 820)

The purchasing of advertising space or the purchasing of display or other rental space certainly involves the furnishing of money. The fact that the person furnishing the money may get something in return is immaterial for the purposes of the statute. The prohibition is against the named persons furnishing money or a thing of value “to any Class ‘B’ licensee, or to any person for the use, benefit or relief of any Class ‘B’ licensee.” This includes a group

such as the one involved in your questions. (See opinion page 34, this volume.)

A person within the prohibition of the statute clearly could not "furnish" money to a Class "B" licensee in return for advertising space on the licensee's menu, or for a display space in the tavern premises. The statutes in question would be meaningless if they could be avoided in this manner. By the same token, money may not be "furnished" to an association of licensees in return for advertising or display space. Even if it be assumed that the advertising or the display space would be worth every cent the association would charge for it, yet the association would realize a profit from such transactions which would inure to the benefit of its members.

Therefore, the answer to both questions is "No," assuming the purchase in each case is from the trade association.  
SGH

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*Taxation—Tax Sales—Redemption—Minors—*Right of minors to redeem land sold for nonpayment of taxes is limited by sec. 75.03 (1), Stats., to the interest of said minors in such land.

May 20, 1955.

RONALD D. KEBERLE,  
*District Attorney,*  
Marathon County.

In 1950, a tax deed to certain land was issued to your county upon a certificate for the sale of the 1944 taxes. The land was not sold for nonpayment of taxes for 5 or more consecutive years. Certain minors have a 3/54 interest in the land and you ask whether their right of redemption of said land from said tax deed extends to the entire tax deed or only to their 3/54 interest in the land.

The right of redemption generally is given by sec. 75.01 (1), Stats., but sec. 75.03, Stats., grants a special right of

redemption to minors. It is provided in sec. 75.03 (1) as follows:

“The lands of minors or any interest they may have acquired in lands prior to or after the sale of said lands sold for taxes may be redeemed at any time before such minors come of age and during one year thereafter if such lands were not sold for nonpayment of taxes for five or more consecutive years prior to or after such acquisition; but no such redemption shall be construed as redeeming the interest of any other person in such lands. \* \* \*”

The last quoted language makes it absolutely clear that the right of a minor to redeem land from the sale thereof for nonpayment of taxes applies only to such interest as the minor has in the lands, and confers no right in such minor to redeem under his special redemption rights any interest of any other person in the land. Accordingly, we agree with your conclusion that in the stated situation the rights of the minors to redeem from said tax sale and the deed issued to the county thereon, applies and extends only to the 3/54 interest of said minors in said land.

HHP

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*Midwife—Practice without License—Public Health—Infant Blindness—Vital Statistics—Birth Certificate—Except as provided by sec. 147.206, Stats., the practice of midwifery constitutes the practice of medicine and may not be engaged in by an unlicensed person.*

Sec. 146.01 (1), Stats., relating to administration of silver nitrate to prevent infant blindness is applicable only to licensed physicians or licensed midwives attending at the birth of a child.

Sec. 69.30 (2), Stats., does not contemplate the preparation and filing of a birth certificate by an unlicensed physician or unlicensed midwife.

May 23, 1955.

DR. THOS. W. TORMEY, JR., *Secretary,*  
*State Board of Medical Examiners.*

You have called attention to the practice of an unlicensed individual who has apparently been acting as a midwife but

without compensation. It appears that she has filled out birth certificates and that she has neglected to administer silver nitrate as contemplated by law. Our opinion as to the validity of such practice is requested.

Sec. 147.206, Stats., provides:

“Any person who, on May 7, 1953, is practicing midwifery in this state under a certificate of registration issued him by the board may continue so to practice under such certificate but subject to the provisions of ch. 150 of the 1951 statutes as in effect prior to such date and subject to the other provisions of this chapter.”

This section would afford no sanction for the practice of midwifery by a person not previously licensed under ch. 150 of the statutes, which was repealed by ch. 103, Laws 1953.

Such being the case, it becomes necessary to consider whether the practice in question constitutes the practice of medicine.

Sec. 147.14 (1), Stats., provides:

“No person shall practice or attempt to hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term ‘treat the sick’ is defined in s. 147.01 (1) (a), without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute.”

Sec. 147.01 (1) (a) and (b), Stats., provides:

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

“(b) ‘Disease’ includes any pain, injury, deformity, or physical or mental illness or departure from complete health and proper condition of the human body or any of its parts.”

Strictly speaking, pregnancy is not a disease but a normal function of woman. However, and except as provided in ch. 150 mentioned above, it has long been the view of this

office that one not licensed to practice medicine is not authorized to practice obstetrics. See 5 O.A.G. 470-472. Obstetrics is defined as synonymous with midwifery and as being the branch of medical art or science concerned with caring for and treating woman in, before, and after childbirth. American College Dictionary; *Stoike v. Weseman*, 167 Minn. 266, 208 N.W. 993. In *Commonwealth v. Porn*, 196 Mass. 326, 82 N.E. 31, 17 L.R.A. (N.S.) 94, it was considered that although childbirth is not a disease, but a normal function of woman, yet the "practice of medicine" does not appertain exclusively to disease, and obstetrics as a matter of common knowledge has long been regarded as a highly important branch of the science. See also *State v. Houck*, 32 Wash. 2d 681, 203 P. 2d 693.

It should be noted; however, in passing that under our statute, sec. 147.01 (1) (a), compensation, direct or indirect or the expectation thereof, is an essential ingredient which would have to be proved in a prosecution for illegal practice of medicine.

Sec. 146.01 (1), Stats., relating to infant blindness provides:

"(1) For the prevention of ophthalmia neonatorum, or blindness in the new born babe, the state board of health shall, annually, cause to be prepared and put up in proper containers a one per cent solution of nitrate of silver with instructions for its use. These shall be distributed free to local health officers in quantities sufficient to enable them to, and they shall, deliver one to each physician and midwife. The attending physician or midwife shall use the said solution as directed in said instructions."

Sec. 146.01 (3) provides that any person violating sec. 146.01 shall be fined not more than \$100.

It is to be noted that this section specifically mentions the attending physician or midwife. Whether it could be applied to an unlicensed midwife is very doubtful, since penal statutes are strictly construed. If it were construed as applicable to unlicensed persons, then the husband who lends assistance when no doctor is available, or the taxi driver who is unwittingly forced into the role of obstetrician or midwife while rushing the mother to a hospital would be subject to fine. From reading the section as a

whole it is apparent that the legislature intended to make silver nitrate available without charge to licensed physicians and licensed midwives but not to unlicensed persons.

The offense of the unlicensed person who fails to administer silver nitrate in obstetrical cases is that of practicing medicine illegally rather than that of violating sec. 146.01 (1) relating to the administration of silver nitrate.

With reference to birth certificates, sec. 69.30 (2), Stats., provides:

"If there be no attending physician or midwife, then the father of the child, householder or owner of the premises, manager or superintendent of a public or private institution in which the birth occurred shall file a satisfactory certificate of birth with the register of deeds, or city health officer, within 5 days as provided in section 69.09."

This again was no doubt intended to apply to licensed physicians (see sec. 370.01 (28)) and licensed midwives. In the absence of such a licensed person, the husband or one of the other persons named in sec. 69.30 (2) should take care of the birth certificate.

WHR

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*Highways and Bridges—County Trunk—Streets in City or Village*—County has duty to maintain a city street which is a part of the county trunk system to the full width of the street, providing such street is not wider than the portions of the county system connecting with such street. Secs. 83.025 and 83.05, Stats., discussed.

May 23, 1955.

J. L. MCMONIGAL,  
*District Attorney,*  
Green Lake County.

You have requested my opinion concerning the following question: What is the obligation of Green Lake county, receiving and retaining all state highway aids, with respect to maintenance of a county trunk highway located upon a street within the limits of the city of Berlin?

Sec. 83.025 (1), Stats., provides in part as follows:

“\* \* \* All streets or highways in any city or village over which is routed a county trunk highway or forming connections through such city or village between portions of the county trunk highway system shall be a part of such system unless the governing body of the city or village, by resolution, removes such street or highway from the county trunk system \* \* \*.”

Subsec. (2) of the same section further provides:

“The county trunk system shall be marked and maintained by the county. No county shall be responsible for the construction and maintenance of a city or village street on the county trunk highway system to a greater width than are those portions of such system outside the village or city and connecting with such street. \* \* \*”

There appears to be some confusion between secs. 83.025 (2) and 83.05 in that the latter section limits the responsibility of counties in *paving* streets to 18 feet in cities and villages. Sec. 83.05 is the older section, having been created by ch. 643, Laws 1917, while the pertinent portion of sec. 83.025 was added in 1939. This conflict becomes more apparent when sec. 83.025 (2) is interpreted to mean that the reference to the county trunk system outside of the village or city means the entire highway to the full width of the right-of-way. It is my recommendation that these statutes be clarified by legislative enactment.

However, your problem relates only to maintenance, and it is my opinion that it is the duty of the county under these circumstances to maintain the city street to its full width, providing that such width is no greater than that of the right-of-way of the connecting highways outside the city limits. Highway maintenance extends to the shoulders, ditches, and other parts of the highway, and is not limited to the roadway proper.

REB

*Physical Therapy—License*—One who, pursuant to the prescription of a physician, treats patients by corrective therapy consisting of therapeutic exercises, is required to be licensed as a physical therapist under sec. 147.185, Stats.

May 24, 1955.

DR. THOS. W. TORMEY, JR., *Secretary,*  
*State Board of Medical Examiners.*

You have inquired whether an individual practicing what is known as corrective therapy under circumstances hereinafter set forth is required to be licensed as a physical therapist under sec. 147.185, Stats.

The person in question apparently maintains no office of his own, is not listed in the telephone directory of the city where he lives either generally or in the classified directory under the heading "Physical Therapists" or "Physical Culturists." (Incidentally we do not propose to discuss the status of "physical culturists" in this opinion.)

The individual discussed here is employed by the veterans administration with the title of "Chief of Corrective Therapy Service." In addition to working for the veterans administration he takes care of patients in their own homes. All of these cases are referred to him by physicians pursuant to written prescriptions. The treatments consist of physical exercises, and he continues with the exercises in accordance with the prescriptions until the patient appears to have obtained the maximum of benefit, at which time he calls the physician and reports on all progress or regression. He does not use diathermy, electric stimulation, or hydrotherapy, but employs only exercise and such assisting devices as crutches, canes, wheel chairs, artificial limbs, and the like.

His fee varies with the time spent on the patient and the amount of travel involved. He is a graduate of one of our leading universities in the field of physical education and has had some 9 years of training and practice in various veterans administration hospitals. No question has been raised as to any incompetence or improper handling of patients on his part. He has cooperated fully with the board

in furnishing information, and the sole question raised is whether he must have a physical therapist's license.

At the outset we wish to dispose of one aspect of the problem by reiterating what was said in 43 O.A.G. 152, where it was concluded that persons practicing physical therapy in veterans administration hospitals, who confine their practice to patients whom the federal government has the duty to treat, are not required to be licensed under sec. 147.185. The federal statutes make provision for personnel in such hospitals, including among others physical therapists, occupational therapists, other medical technologists, and other auxiliary employes with such scientific or technical qualifications as the administrator may prescribe. Thus the work done by this individual pursuant to federal law and regulations at this hospital, and whether it be denominated physical therapy or corrective therapy, is beyond the license requirements enacted by the state in the exercise of its police powers.

However, the treatment of non-veterans in their own homes on the prescription of physicians in private practice falls into an entirely different category, and it becomes necessary therefore to determine whether corrective therapy as above described falls within the statutory definition of physical therapy so as to call for a license under sec. 147.185.

The practice of physical therapy is defined in sec. 147.185 (1) (a) as "the treatment of disease as defined in s. 147.01 by the use of physical, chemical and other properties of heat or cold, light, water, electricity, *massage, and therapeutic exercises, including posture and rehabilitation procedures*, but the use of Roentgen rays and radium for any purposes, and the use of electricity for surgical purposes, including cauterization, are not included in the practice of physical therapy."

As near as we can tell from the information furnished, the treatment encompassed by "corrective therapy" would clearly include "therapeutic exercises" if not "posture and rehabilitation procedures" and possibly "massage" in some cases.

One definition of corrective therapy which you have furnished reads as follows:

“Corrective therapy is the application of such patient activity, individually prescribed by the physician and based upon the specific needs and abilities of the patient, as *systematic exercises*, adapted sports and games, and certain physical activities of daily living which aid the patient in achieving physical correction, social adjustment, good general physical condition and an understanding of his physical capabilities and capacities.” (Emphasis supplied.)

Another definition contained in House Bill No. 1873, introduced in the 1952 Massachusetts legislature (we are not advised as to its subsequent legislative history) reads:

“(a) The term ‘corrective therapy’ shall be synonymous with the terms, exercise therapy, corrective physical education and physical reconditioning. \* \* \*

“(b) Corrective therapy is medically prescribed activity directed toward—

“(1) Maintaining or improving the general state of health of the mentally or physically disabled individual by preventing muscular deterioration, conserving and increasing strength and strengthening functions of physical residuals.

“(2) The teaching of activities for daily living, including self-care, health and personal hygiene, training in the use of prosthetic devices and furnishing instruction in crutch ambulation techniques, and gait training following injury, amputation or paralysis.

“(3) Promoting mental rehabilitation by providing opportunity for socially acceptable creative accomplishments, relief of guilt feelings, expressions of aggressions and re-socialization, through physical activity and adaptive sports.”

A “corrective therapist” was defined in sec. 1 (c) of the bill as follows:

“(c) ‘Corrective therapist’ means a person who practices corrective therapy as defined in this act under the prescription, supervision and direction of a person licensed in this state to practice medicine, surgery and psychiatry.”

If “corrective therapy” comes within the statutory definition of “physical therapy,” and we believe it does, no exemption is to be implied merely because such treatment is administered pursuant to the prescription of a physician, because sec. 147.185 (1) (b) specifically provides that:

"No person shall practice or hold himself out as authorized to practice physical therapy, nor shall any person designate himself as a physical therapist, physiotherapist, physical therapy technician, or use the initial 'P.T.,' 'P.T.T.,' or 'R.P.T.' or any other letters, words, abbreviations, or insignia indicating that he is a physical therapist, without certificate of registration issued by the board of medical examiners *nor unless he practices under a prescription and the direct supervision of a person licensed to practice medicine and surgery.* Nothing in this section shall prohibit any person licensed or registered, in this state, under another law, from engaging in the practice for which he is licensed or registered."

In the absence of statutory limitations such as that contained in sec. 147.185 (1) (b) many things may be done by an unlicensed person acting under the supervision and direction of a physician, and, as was said in 41 O.A.G. 23, 27:

"\* \* \* However, to illustrate the extent of the delegation of important and even dangerous tasks to subordinates, mention might be made of the fact that nurses administer anaesthetics, make hypodermic injections and attend to medication of patients pursuant to the physician's directions, and it is immaterial whether the nurse is registered or not except that she may not hold herself out as a registered nurse unless she is registered under ch. 149. See *Nickley v. Eisenberg*, 206 Wis. 265, 239 N.W. 426; 9 O.A.G. 87; 30 O.A.G. 245."

But insofar as the practice of physical therapy is concerned, a practitioner must have (1) a license and (2) the prescription as well as the direct supervision of a physician. The one alone will not suffice, and it would be no defense in a prosecution for the unlicensed practice of physical therapy that the practitioner was operating under the prescription of a physician in caring for his patient. Thus sec. 147.185 (1) (b) operates as a limitation upon the otherwise rather unlimited authority of a physician to treat his patient with the help of an unlicensed assistant under the physician's supervision.

You are therefore advised that a person practicing corrective therapy in the form of therapeutic exercises must be licensed as a physical therapist under sec. 147.185.

WHR

*Automobiles and Motor Vehicles—Width Limitations—*

Where by use of a motor truck or a trailer, a dealer transports new farm machinery from his place of business to a farm for delivery to the farmer purchaser, the motor truck or trailer used to transport same does not thereby become an "implement of husbandry." Accordingly, such dealer must observe the vehicular width limitation of 8 feet imposed by sec. 85.45 (2) (a), Stats. If the cargo of farm machinery extends beyond the statutory width limitation, the carrier must obtain a special permit therefor under sec. 85.53, Stats.

May 31, 1955.

## MOTOR VEHICLE DEPARTMENT.

You request my opinion as to whether a dealer who transports new farm machinery from his place of business to a farm for delivery to the farmer-purchaser is subject to the 8-foot width limitation imposed by sec. 85.45 (2) (a), Stats.; or whether the vehicle in which the machinery is thus transported is exempt from the width limitation by virtue of the exemption accorded to "implements of husbandry" by the statute.

It is inferred from your request that the machinery, when loaded onto the truck or trailer by which it is transported, extends beyond the width of the body of the truck or trailer so as to exceed the 8-foot width limitation.

The pertinent portion of sec. 85.45 (2) (a) reads:

"(2) (a) No vehicle including any load thereon shall exceed a total outside width of 8 feet, *except* that the width of a farm tractor shall not exceed 9 feet and *that the limitations as to the size of vehicle stated in this section shall not apply to implements of husbandry temporarily propelled or moved upon the highway* \* \* \* or to those vehicles operating under special permits issued in accordance with secs. 85.53; \* \* \* and the total width of load of pulp wood or slabs and unplanned dimension material cut therefrom shall not exceed 8 feet 4 inches."

In dealing with a similar question involving an almost identically worded statute, the supreme court of the state of

Iowa, in *Wood Bros. Thresher Co. v. Eicher*, 231 Ia. 550, 1 N.W. 2d 655, 660-661, had this to say:

"II. Is the 'moving' of one or more corn pickers, loaded on a truck over the highways of the state, when the width of the loaded truck exceeds the statutory limit of eight feet, and the distance of transportation is without limit, within the italicized exception of the following Code section, to wit: '5035.02 *Exceptions*. The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the terms of a special permit issued as provided in sections 5035.16 to 5035.19, inclusive.'

"It is our judgment that the Legislature never intended the section to be so construed. The chapter which contains this and other sections covers over 50 pages of the Code. It is entitled 'Motor Vehicles And Law Of Road.' The last four words of the title are indicative of the purpose of the legislation. One of the purposes, if not the primary purpose, of the legislation, is to make travel upon the highways as safe as it can reasonably be made consistent with their efficient use. 'In construing a statute we must never lose sight of its object and intent.' *Beatty v. Cook*, 192 Iowa 542, 545, 185 N.W. 360, 361. Each section of such legislation must be construed with the act as a whole, and with every other section.

"Most of our paved highways are eighteen feet wide. If they have curved and elevated edges, forming modified gutters, the width is lessened somewhat. The extreme importance of each vehicle keeping on its side of such paved roads is evident. With a desire to accommodate traffic as fully as possible, consistent with safety, the Legislature fixed the width of vehicles or any load thereon at eight feet. This clearly indicates that it judged such a width as the limit of reasonable safety, and that any excess in width increased the traveling hazards.

"The Legislature also realized that there were vehicles of a greater width than eight feet, and that at times it is necessary that they move or be moved over the highways. For that reason, there are provisions for securing permits for travel under certain circumstances. Sections 5035.16 to 5035.19, inclusive. Fire apparatus must necessarily travel over the streets, and sometimes over country highways. Road machinery for highway maintenance or construction must also operate over the highways. There are also vehicles or a combination of vehicles requiring a travel permit under section 5035.16. All of these move, travel, or operate on their own wheels, or other instrumentalities for

movement. None of them are intended to be transported on trucks or other carrying vehicles.

“There are implements of husbandry which are wider than eight feet. In the operation of farming, it is often necessary that they move or be moved on the highway either to different parts of the farm or to other farms. During the farm changing season before March 1st, or at other times, all of the implements of a farmer must be moved to the new location. If the implements are to be moved on a railroad car, it will be necessary to pass over the highway to the railroad loading dock. Most farm implements for use in the field operate on wheels. And these reasonably short, temporary movements just mentioned, are ordinarily accomplished in the same manner on the highways. The trip is usually made in daylight. The movements are slow. They are visible at all times to other motorists on the highways. The dangers of any excess encroachment upon the highway are greatly lessened, in conformity with a primary object of traffic legislation. Every reasonable requirement of agriculture is met without unnecessarily adding to those dangers incident to general vehicular traffic. The men, women, and children on the farms of Iowa, in all fair likelihood, use the highways more than any other class of its citizens. Their interest in the safety of those highways is commensurate with such use. Their movement of farm machinery on the highways is a very minor part of their highway travel. Corn pickers will in all probability cost them no more if appellant’s machines are delivered as competing machines are delivered.

“To adopt the construction of section 5035.02, so strenuously contended for by appellant, would substantially increase the dangers of highway travel, and would be of slight, if any, benefit to the farmers. Under this record, corn pickers were being transported from Des Moines to the borders of the state. A part of this traffic would be at night. The excess width would extend beyond the marginal lights of the truck. Appellant speaks of the excess as ‘microscopic.’ But it is sufficient to cause a collision with serious results.

\* \* \*

“It is our judgment that the Legislature never intended the construction of section 5035.02 insisted upon by appellant. It is a well-known rule of statutory construction that any exemption or exception in a statute contrary to its general enacting clause must be strictly construed, and all doubts should be resolved in favor of the general provision rather than the exception. 59 C.J. p. 1092; *Reaves v. State*, 181 Tex.Cr.R. 488, 50 S.W. 2d 286; *Palmer v. State Board of Assessment*, 226 Iowa 92, 94, 283 N.W. 415; *United*

States v. Dickson, 15 Pet. 141, 10 L.Ed. 689. 'Statutes intended for public benefit are to be taken most strongly against those who claim rights or powers under them, and most favorable to the public. \* \* \* Those who claim the exception must establish it as being within the words, as well as the reason thereof.' \* \* \*"

This opinion seems well reasoned and is in conformity with similar cases decided in other jurisdictions. See *Reaves v. State*, (1931) 50 S.W. 2d 286; *Security-First National Bank of Los Angeles v. Pierson*, (1934) 2 Cal. 2d 63, 38 P. 2d 784, 785; *Allred v. J. C. Engelman Inc.*, (1932) Tex. Civ.App., 54 S.W. 2d 352. I have found no contrary holding and accordingly conclude that if litigated, the question would be resolved by our own supreme court in accordance with the foregoing cited authorities.

SGH

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*Constitutional Law—Elections—Presidential Electors—* Bill No. 714,A., 1955 legislature, proposing to create sec. 9.044 of the statutes, providing the privilege of voting for president and vice-president to electors who have moved to other states for a period of 15 months after removal unless they become electors in another state during that period, must be submitted to a vote of the people at a general election in accordance with art. III, sec. 1, Wis. Const.

May 31, 1955.

THE HONORABLE, THE ASSEMBLY.

By resolution No. 23, A., the assembly has requested the attorney general for an opinion on Bill No. 714,A., which provides for the creation of sec. 9.044 of the statutes to read:

"9.044 (1) Each person who is properly registered as an elector in any voting district in this state and has removed to another state shall retain his privilege to vote for presidential and vice presidential electors in the voting district from which he has removed for a period of 15 months after

removal, provided he shall not during such period become an elector in another state. The provisions of this section shall be in addition to and not in substitution for any voting privilege otherwise enjoyed by an elector of this state.

“(2) Votes may be cast in any manner provided for qualified electors of this state, and each vote cast pursuant to this section shall be accompanied by an affidavit certifying that the affiant has moved from this state not more than 15 months prior to the time of casting his vote.”

The resolution calls attention to art. III, sec. 1, Wis. Const., which provides that such a proposal must be approved by a referendum if it extends the right of suffrage to persons not enumerated in art. III, and we are asked whether or not Bill No. 714, A., does in fact extend the privilege of voting to persons not enumerated in art. III, and whether or not a provision for a referendum should be attached to the bill if the right of suffrage is so extended.

Art. III of the Wisconsin constitution so far as material here provides:

“SECTION 1. Every person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election:

“(1) Citizens of the United States.

“(2) Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

“(3) The legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast on that question at such election; and provided further, that the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor.”

It is to be noted that the bill itself provides that “The provisions of this section shall be *in addition to* and not in substitution for any voting privilege otherwise enjoyed by an elector of this state.”

In *State ex rel. Wannemaker v. Alder*, (1894) 87 Wis. 554, 558, 58 N.W. 1045, the supreme court stated:

“\* \* \* By the constitution (art. III, sec. 1) an elector must reside in the election district where he offers to vote.  
\* \* \*”

By adding to the classification of persons enumerated in art. III another classification, namely, of persons who do not reside in the election district where they offer to vote but who have removed to another state, the bill comes within the purview of par. (3) quoted above and cannot become effective as a law “until the same shall have been submitted to a vote of the people at a general election.”

It will therefore be necessary to add a provision to the bill providing for the required referendum.

WHR

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*Constitution—Amendment—Schools and School Districts—Borrowing—Amendment to art. XI, sec. 3, of the constitution was validly adopted. Provision in Jt. Res. No. 18, A., as to its effectiveness held invalid and surplusage as not part of submission.*

May 31, 1955.

THE HONORABLE, THE SENATE.

By Resolution No. 14, S., an opinion has been requested as follows:

“*Resolved by the senate*, That the attorney general is requested to render an opinion to the senate at an early date in regard to the time and manner in which the amendment to article XI, section 3, of the constitution will take effect. The attention of the attorney general is directed to the paragraph on page 3, lines 15 and 16, Joint Resolution No. 18, A., (1955), which provides that the change contemplated shall take effect with the assessment made May 1, 1955, which paragraph is apparently not part of the amendment and is not part of the statutes; and specific inquiry is made as to whether such paragraph is a nullity; and, be it further

*“Resolved, That specific inquiry is made as to whether a school district may forthwith borrow on the basis of the equalized value as last established; and if not, what steps must be taken before such borrowing may be based on the equalized value.”*

This inquiry is occasioned by the content of the second from the last paragraph of Jt. Res. No. 18,A., 1955, that submitted the constitutional amendment involved to the vote of the people at the April 5, 1955 election. It was there approved by the vote of 320,376 to 228,641, as duly canvassed and certified on April 18, 1955. Said Jt. Res. No. 18,A., recited the proposal of the constitutional change by the 1953 legislature; repeated art. XI, sec. 3, as proposed to be amended, exactly the same as it was set out in Jt. Res. No. 17,S., 1953; and expressed agreement thereto by the 1955 legislature. Then following such recitals, Jt. Res. No. 18,A., continued as follows:

*“Resolved, That the foregoing proposed amendment be submitted to a vote of the people at the election to be held on the first Tuesday of April, 1955, and if a majority of the voters voting thereon approve this amendment, it shall become a part of the constitution of the state; and be it further*

*“Resolved, That the change contemplated herein shall take effect with the assessment made May 1, 1955; and be it further*

*“Resolved, That the question of ratification of the foregoing amendment be stated on the ballot as follows:*

*“Shall section 3 of article XI of the constitution be amended so that the limitation on the indebtedness of school districts and cities authorized to issue bonds for school purposes shall be based on the value of the taxable property in such school district or city as equalized for state purposes rather than on the local assessed value of such property, such method of determining equalized value for state purposes to be provided by the legislature?”*

Although both Jt. Res. No. 17,S., 1953, and Jt. Res. No. 18,A., 1955, set out the entire provisions of art. XI, sec. 3, with the proposed additions italicized, the only changes were in the third sentence which provides debt limitations for local governmental subdivisions. As so amended, that sentence was set out therein as follows:

“(Article XI) Section 3. \* \* \* 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 five per centum on the value of the taxable property therein, to be ascertained, *other than for school districts*, by the last assessment for state and county taxes previous to the incurring of such indebtedness *and for school districts by the value of such property as equalized for state purposes*; except that for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not exceed in the aggregate eight per centum of the value of such property *as equalized for state purposes*; *the manner and method of determining such equalization for state purposes to be provided by the legislature.* \* \* \*”

Taken as meaning that the amendment shall not take effect until May 1, 1955, or at some time thereafter, the language in the second from the last paragraph is a legislative declaration as to when the amendment comes into existence. As such it is clearly void and of no effect, for clearly the legislature has no power to prescribe when a constitutional amendment will take effect, except by incorporating the time of effectiveness in the body of the amendment itself.

Our constitution provides for amendments thereto by the provisions in art. XII, sec. 1. It is there provided that if a proposed amendment is agreed to by two successive legislatures pursuant to the procedure therein set forth,

“\* \* \* then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendment separately.”

There would appear to be some diversity in the cases as to when a constitutional amendment takes effect. 12 C.J., Const'l. Law § 79; 16 C.J.S., Const'l. Law § 39b. The gen-

eral rule is that the amendment takes effect immediately upon the approval by the majority vote at the election. In some instances, the phraseology of the particular constitutional provision respecting amendments has been made the basis of holding that the amendment takes effect upon the canvass of the vote or upon the promulgation of the result by some stipulated officer, such as a proclamation by the governor.

It could be argued with some force here, that the amendment here involved took effect on April 18, 1955, when pursuant to the provisions of sec. 6.71 (7), Stats., the state board of canvassers certified the vote and made the determination that such amendment was adopted by a majority of the electors voting thereon. Art. XII, sec. 1, says the proposal shall be submitted "to the people in such manner and at such time as the legislature shall prescribe." In prescribing in Jt. Res. No. 18,A., that this amendment should "be submitted to a vote of the people at the election to be held on the first Tuesday of April, 1955," without specifying any mechanics or machinery to be applied in making such submission, it must be taken that the legislature thereby accepted and intended that it thereby adopted, for use in such submission, all applicable provisions of the statutes respecting the mechanics of elections generally. In effect the legislature would be taken as restating or reaffirming the provisions of sec. 6.80, Stats., for the purposes of this amendment, because it made no provisions as to mechanics or details of the election. This would make all appropriate election statutes applicable and particularly secs. 6.68, 6.71 and 6.72. These statutes embody the concept that an election is not mechanically complete until it is canvassed, and they would carry this quality over to the referendum election here involved.

On the other hand, there are indications in some of the cases that language respecting amendments like that in our art. XII, sec. 1, means just what it says, namely, that an amendment comes into existence immediately upon the casting of the majority vote, and therefore there is no power in the legislature or anyone else to provide for effectiveness at any other time. However, it is not necessary at this time

to resolve that question, as the question here is not whether this amendment went into effect upon the majority vote on April 5, 1955, or not until the certification thereof on April 18, 1955.

The question here is the effect of the mentioned language in Jt. Res. No. 18,A. Except for the possibility that adoption of the generally provided election mechanics with incompleteness of elections until canvassed, or something of a similar purely mechanical nature, might operate so the amendment was not operative until then, the authorities are clear that the legislature has no power to provide when an amendment takes effect. We find no case holding that under language like art. XII, sec. 1, a legislature has any power to provide that an amendment shall take effect at a subsequent time, such as in the second from the last paragraph of Jt. Res. No. 18,A. The cases, *Schall v. Bowman*, (1872) 62 Ill. 321; *Seneca Mining Co. v. Sect'y. of State*, (1890) 82 Mich. 573, 47 N.W. 25; *In Re Advisory Op. to Gov.*, (1895) 34 Fla. 500, 16 So. 410; *City Council v. Bd. of Comsr's.*, (1904) 33 Colo. 1, 77 P. 858; *Kingsbury v. Nye*, (1908) 9 Cal. App. 574, 99 P. 985; and *City and County of San Fran. v. Pac. Teleph. & Teleg. Co.*, (1913) 166 Cal. 244, 135 P. 971, in their holding that an amendment goes into effect on the day of adoption by a majority vote of the people, would appear to negative any power in the legislature to provide otherwise. But, the following cases expressly deny any such power: *State v. Campbell*, (1916) 94 Ohio St. 403, 115 N.E. 29; *Johnston v. Wolf*, (1929) 208 Cal. 286, 280 P. 980.

In *Johnston v. Wolf*, the supreme court of California quoted with approval from a prior case, as follows:

“\* \* \* In *Livermore v. Waite*, 102 Cal. 113, 122, 36 P. 424, 427, it is said that it is beyond the power of the Legislature to submit an amendment ‘that will not, upon its adoption by the people, become an effective part of the Constitution, nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition.’ \* \* \*”

The cited case of *State v. Campbell* is practically a "sorrel-horse case." There the Ohio constitution, in art. 16, sec. 1, relating to amendments, said :

"\* \* \* If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the Constitution."

The amendment there involved provided that women should be eligible to appointment to official boards and positions in state departments and institutions. It was adopted by a majority vote at the November, 1913 election. The resolution of the Ohio general assembly under which the amendment was so submitted contained a provision that if a majority voted favorably the amendment should become a part of the constitution on January 1, 1914. The suit was over the pay of the relator, who was appointed chief matron of the girls' industrial school on December 23, 1913. In an attempt to escape from another provision in the Ohio constitution against change of salary of an officer during the term of office, which relator invoked and the court held was there applicable, it was asserted that she could not invoke the benefit thereof as she was not validly appointed because said amendment making women eligible to appointment to the position in question did not take effect and become a part of the constitution until January 1, 1914. The Ohio supreme court in rejecting this defense and granting the relief the relator sought, said :

"\* \* \* There is nothing in the Constitution which authorizes such a postponement on the part of the General Assembly. The Constitution is positive in its terms and provides that the amendment shall become a part of the Constitution when a majority of the electors voting on the same shall adopt it. The time when an amendment is to become effective can be submitted to the electors, as in the case of the amendments of 1912, wherein it was expressly provided when they should go into effect, but in the case under consideration all that was submitted to the people was :

"Article 15, § 4. Eligibility of women to appointment as members of boards of, or positions in, department and institutions affecting, or caring for, women and children."

"In some of the states the time when an amendment shall go into effect is postponed by the Constitution to a date later than its adoption, as in the state of New York where

it is provided that an amendment shall become a part of the Constitution from and after the 1st day of January next after its approval. There is nothing in the Constitution of this state postponing the operation of an amendment, and it cannot be postponed unless the proposition to postpone is submitted to the electors and is adopted by a majority of those voting thereon. So it is clear to us that the relatrix was eligible to appointment to the office on the 23d day of December, 1913."

The situation is exactly parallel in the situation here at hand. There is nothing in the proposed amended art. XI, sec. 3, as to when in such amended form it will be operative or effective. Likewise, there is nothing as to the time of effectiveness of the change stated in the question as set out in the resolution for submission on the ballot, which was the form in which the proposal was placed on the ballot and submitted to the vote at the April 5, 1955 election. When the people voted at that election they approved the change as embodied in the submitted question and thus in no way made any expression of anything as to when the change they thus approved would take effect. Accordingly, as in the Ohio case, the recitation in Jt. Res. No. 18,A., that the change would take effect with the assessment made May 1, 1955, was no part of the submission to the voters. It was surplusage and is to be disregarded as wholly void and of no effect whatsoever, just as if it were not in the resolution.

Had there been something in the question submitted on the ballot that the change should not take effect until the May 1, 1955 assessment, then the people would have voted thereon and it probably would be controlling even though not incorporated in the language of the amended form of art. XI, sec. 3. But, there being nothing in the question submitted or in the amended language of art. XI, sec. 3, as to when the change is operative, the recitation in Jt. Res. No. 18,A., is wholly ineffective either to restrict the effectiveness of the change to the time stated therein or to render the adoption of the amendment ineffective.

In our opinion this amendment of art. XI, sec. 3 was duly adopted by the majority vote at the April 5, 1955 election, and in its amended form art. XI, sec. 3 has been fully operative at least since the canvass and certification of the

vote on April 18, 1955, by the state board of canvassers, if not from the date of such majority vote on April 5, 1955.

But, there is a question whether the present statutes are adequate to constitute a legislative determination of the manner and method of determining the so-called "equalized value" for state purposes required by the amendment. Nowhere in secs. 70.57 and 70.575, providing for an annual state assessment of the property in counties and the totaling thereof as the state assessment, is "equalized," "equalization," or any similar expression used. They specify respectively that the determinations there provided shall be the "full value" and the "full market value." Similarly, sec. 40.68, which requires the department of taxation to make determinations of the valuation of property in each school district and each part of a joint school district for annual certification to the state superintendent of public instruction, uses "full valuation."

It is true that in places in the present statutes, such as in sec. 67.03 (1) and in the school laws in ch. 40, references are made to the "equalized value" of the property of a local unit. In all probability such use thereof would be construed as meaning the full value determination respecting a county made by the department of taxation under sec. 70.57, or which it would have to make in respect to school districts as a necessary prerequisite to performing its duty of certification under sec. 40.68, as the case might be. However, it remains that neither under sec. 70.57 nor sec. 40.68 is there an express direction for the department of taxation to make a full value determination of the property of a city as a municipality that could be the so-called "equalized value" thereof. A city operating its schools under the city school plan for school administration purposes is a school district, but in borrowing, even when doing so for school purposes, it does so as a city.

To dispel any doubt as to the sufficiency of the present statutory provisions, it is recommended that statutory provisions be forthwith enacted to provide that the last determination made by the department of taxation of the full value of the property of a city or a school district, whether made pursuant to its duties under sec. 70.57 or under sec. 40.68, or as a necessary component part of performing such

duties, constitutes the value of such property as equalized for state purposes. In addition, it would appear advisable to provide that whenever "equalized value" is used in the statutes it refers to the valuation so made.

In expressing the opinion that the amendment of art. XI, sec. 3 of the constitution is in full force and effect, we are not unmindful of some suggestion that this amendment is not effective because submitted at an April election instead of at a November general election. This is predicated on reading the discussion commencing in the middle of page 657 and continuing to the bottom of page 659 of the opinion in *State ex rel. Thomson v. Zimmerman*, (1953) 264 Wis. 644, 60 N.W. 2d 416, as meaning that a constitutional change cannot be submitted to a vote of the people at a spring election.

In the first place, this discussion by the court relative to the statutory provisions, says no such thing. Anyone at all connected with the case or who delves into the briefs, cannot help but recognize that all the court was doing was disposing of any possible effectiveness of the explanation of the amendment which the secretary of state had published. It was contended, and accepted by the court, that the question submitted to the people by the resolution of the legislature and accordingly placed on the ballot was not a sufficiently accurate statement of the proposed change. In defense to such contention it was argued that the explanation or brief statement of the change the amendment would make in the constitution, as made by the secretary of state, stated the proposal correctly and definitely, and that the publication thereof, as a part of the official publications by the secretary of state relating to the proposed submission, fully informed the people in advance of their going to the polls to vote and thus overcame any asserted deficiency in the ballot question. See: Plf's. Brief, pages 18-20; Brief of Junior Bar, Amicus Curiae, pages 13-18.

To dispose of any force in the latter argument, the court pointed out that such explanation or brief statement of the effect of the proposal could not be given any such force because it lacked official character. It merely pointed out that had the submission been at a November election there was

authorization in sec. 6.10, Stats., for the preparation and publication of such a statement by the secretary of state, but that there was no similar provision calling for or authorizing preparation of such a statement or its publication when the submission was at an April election.

Certainly if the supreme court had been of the mind that no constitutional amendment can be validly submitted to the voters at an April election, it would not have hidden it in any such language but would have expressed it plainly as would have been the easy and natural way to do so. This is especially true when it is considered that prior to the submission in 1953, the records show there had been 19 previous submissions of constitutional amendments at April elections and the court must be charged with awareness thereof.

In addition there is not the slightest suggestion in art. XII, sec. 1, of any limitation or restriction upon the time of the holding of an election at which a constitutional amendment is submitted. On the contrary it specifically says that submission shall be "to the people in such manner and at such time as the legislature shall prescribe." This gives to the legislature complete authority and freedom both as to time and mechanics of holding such a referendum election.

In the instant case the 1955 legislature specifically provided in Jt. Res. No. 18,A., that this amendment "be submitted to a vote of the people at the election to be held on the first Tuesday of April, 1955." Where is there anything in art. XII, sec. 1, which could possibly be made the basis for any contention that the legislature has no such power but can only submit an amendment at a November election? Nor is there anything therein which specifies the manner or mechanics to be followed in the election to which the amendment is submitted. The language leaves both the time and conduct of the election for the legislature to determine. What possible merit could there be in a position that the legislature, having prescribed an April election for the submission and the form of the question to go on the ballot as the submission of the question at such election, could not submit the question at such April election because it did not provide that there should be applicable thereto some

prescription which it had made applicable if the submission were to be at a November election? That is where any assertion of invalidity based on the mentioned portions of *State ex rel. Thomson v. Zimmerman* leads. The court there said certain statutory provisions, which by their very terms were expressly limited to a November election at which a constitutional change is submitted, are not applicable when an amendment is submitted at an April election. It then said that therefore when the same acts called for thereunder are done at an April election at which a constitutional amendment is submitted, there being no similar provision applicable to an April election, they lack authorization and therefore cannot be given or accorded the effect that would be given to acts which are officially sanctioned. The court there said that as a result such acts were no part of the submission at the election. To assert invalidity on the basis thereof, it is necessary to say that the decision that statements could not be accorded any effect because they were wholly unofficial in that they lacked statutory authorization and therefore constituted no part of the submission, rendered the submission at an April election invalid because there was no provision which required such statements to be made at an April election at which an amendment is submitted. To say the least this would be absurd, and especially where there not only is no requirement that any such provision be made, but the legislature is accorded complete authority to prescribe the manner to be followed in the submission at an election.

We have no hesitancy in stating that in our opinion this amendment to art. XI, sec. 3, approved by the majority vote at the April 5, 1955 election was validly adopted and is now a part of the constitution. Whether or not it presently can be used because of the possible necessity for legislation to provide for determining the "equalized value" is a different matter, and on that we take the safe course of recommending enactment of the suggested statutory provisions.

HHP

*Counties—County Board—Powers—Ordinance Regulating Parking*—Power of county board to regulate parking on courthouse grounds by authority of sec. 59.07 (1), Stats., discussed.

June 1, 1955.

J. B. MOLINARO,  
*District Attorney,*  
Kenosha County.

You have requested my opinion relative to the authority of a county board to grant special parking privileges on the courthouse grounds. Your county board contemplates the enactment of such an ordinance and you desire to be advised as to the limitations of such an enactment. Specifically, you ask whether special parking privileges may be granted to: (1) Judges and elected county officials; (2) county employes who are compensated by the county for using their cars in performing the duties of their employment; and (3) county employes in general without reference to whether or not they are compensated by the county for using their cars in performing the duties of their employment.

In *Wonewoc v. Taubert*, (1930) 203 Wis. 73, our court acknowledged the right of a village to enact a parking ordinance as a police regulation, and without doubt a county possesses the same power to regulate parking on the courthouse grounds, especially in view of sec. 59.07 (1), Stats. See, also, 22 O.A.G. 404 and 40 O.A.G. 69. In the *Wonewoc* case, however, our court recognized that such an ordinance must be reasonable and is subject to constitutional restrictions as to class regulations.

It is not possible to draw a sharp line and say which grant of privilege would be proper and which would not, for the reason that too much is dependent upon the particular facts which surround each case, and obviously there is bound to be a difference of opinion as to borderline cases. This is the reason for the general rule that legislation will be sustained if it is adopted to secure the purpose for which it is intended and not arbitrary. A classification will not be

disturbed by the courts unless it can be seen that there is no fair reason for the distinctions which are made. The Illinois court so held in sustaining an ordinance relative to the classification of parking garages in the case of *Richard I. Stearns v. Chicago*, 368 Ill. 112, 13 N.E. 2d 63.

If only a small parking area is available, the only reasonable special classification might be limited to emergency vehicles. A somewhat larger area might allow special privileges to certain county officers or employes whose work would most benefit by the convenience of such privilege. Where a very large area is available with ample public parking space a reasonable regulation might include the granting of special parking privileges to all officers and employes.

The answer to your question is that any regulation must be a reasonable one, germane to the purpose of increasing the efficient conduct of county business and serving the needs of the general public having business at the courthouse, with secondary consideration given to personal convenience of county officers and employes. The officials of your county are in the best position to decide the need and details of a restrictive parking ordinance.

REB

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*Constitutional Law—University of Wisconsin—State Colleges—Merger of Facilities—Constitutionality of Bills Nos. 440,A., 595,A., and 603,A., discussed.*

June 3, 1955.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 19,A., you have asked my opinion concerning the constitutionality of the several proposals now before your honorable body in the form of Bills Nos. 440,A., 595,A., and 603,A.

Your request expresses the desire "to resolve any questions as to constitutionality of said proposals prior to action thereon." That is a laudable purpose and a very flat-

tering suggestion that this office is the forum in which constitutional questions may be resolved. Even under factual situations where an imposing volume of decided cases would seem to indicate the correctness of an opinion, this office would with great hesitancy presume to assert with finality a decision which is reserved exclusively for the courts. But the problems presented in the three pending proposals are so complex, so devoid of the essential evidence of the application of the proposed powers, and so new to consideration by our courts, that there exists the most meager guidance from case authority upon which to base any opinion on the many questions involved.

Various phases of these questions have recurrently been before this office and debated in the legislature during the last several decades.

In 1948 a special committee was investigating the educational system and envisioned a single board of education to administer the secondary schools and the institutions of higher learning. The questions then presented were considered by this office in 37 O.A.G. 347 (1948). This opinion considered art. X, sec. 1 of the Wisconsin constitution, which, so far as material here, reads as follows :

“The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. \* \* \*”

It was there indicated that there was nothing of an absolute nature in recorded history of the drafting of the constitution to indicate that the drafters intended that the superintendent of public instruction should have supervision over the state university. It was deemed that in view of the history of the board of regents extending back to 1848, and the provision in the statutes therefor by the legislature, many of whose members participated in the constitutional convention, the existence of the board of regents with its limited functions could not be said to usurp any of the functions which should be vested in the state superintendent.

When we search the record of debates in the constitutional conventions of 1846 and 1848, we find little or noth-

ing which discusses the relation of the state superintendent to the university which was to be established.

The contemporaneous creation of the regents of the university of Wisconsin in 1848 appears to be a clear indication to take the university out of the coverage of the term "public instruction" as used in the constitutional provision above quoted.

There is no such contemporaneous history in respect to institutions now known as "state colleges" which were initially institutions for the training of teachers and which were for long periods of time known as "normal schools." Normal schools were specifically referred to during the constitutional debates. In IV Quaife, *The Attainment of Statehood*, p. 567, it was stated:

"\* \* \* Normal schools are to the common schools what the fountain is to the stream. It is to them that we must look for the means of supplying the common schools with competent teachers. \* \* \*"

Such reference during the debates, together with other references to academies, and the ultimate provision for normal schools and academies in the constitution might indicate that the drafters of the phrase "public instruction" understood that phrase to include all institutions of public instruction within the state other than the university, if it did not also include the university.

Under such construction, just as a single board to supervise all education in the state would probably be violative of art. X, sec. 1, Wisconsin constitution, a single board to supervise all institutions of higher education could be held invalid.

Because of the dearth of evidence as to the actual intention of the draftsmen and any definitive opinion thereon by our court, the enactment of Bill No. 440, A., should be accorded the rule of construction that conflicts with the constitution must be clear and irreconcilable, and doubts resolved in favor of constitutionality. *Madison Metropolitan Sewerage District v. Committee on Water Pollution*, (1951) 260 Wis. 229, 50 N.W. 2d 424; *Ogden v. Saunders*, (1827) 12 Wheat. 213, 6 L.ed. 606; 11 Am.Jur. 783.

A study of the constitutional debates in Quaipe, *The Attainment of Statehood*, discloses that the framers of our constitution were profoundly and primarily interested in common schools and universal education. They were conscious of the cost of education and appeared to be anxious that the establishment of institutions of higher learning would not interfere with, nor impair the availability of, secondary school education. This was emphasized in art. X, sec. 2, Wisconsin constitution, relating to the school funds and providing the order in which the proceeds are to be "exclusively applied to the following objects, to wit:

"1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.

"2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor."

The framers of the constitution appeared equally interested in the establishment of a university at or near the seat of government. Art. X, sec. 6 of the Wisconsin constitution provides:

"Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require. The proceeds of all lands that have been or may hereafter be granted by the United States to the state for the support of a university shall be and remain a perpetual fund to be called 'the university fund,' the interest of which shall be appropriated to the support of the state university, and no sectarian instruction shall be allowed in such university."

This provision by its terms is a positive prescription of duty to the legislature of the type which our court held at an early date is equally binding and imperative upon the legislature as any restraint upon legislative powers contained in other provisions. *Bull v. Conroe*, (1860) 13 Wis. \* 233.

Pursuant to this mandate, the very first legislature which met following the adoption of the constitution did by act establish a university at the seat of government, and that

university has since existed as the university of Wisconsin under a board of regents, a body corporate.

The constitutional direction requiring the establishment of a state university at or near the seat of state government also provided "for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require." The constitutional debates on this subject make difficult a conclusion that the framers of the constitution envisioned the need or desirability of a system of public colleges or universities. There were none then existing, and the seminaries and academies or colleges then functioning were privately supported and operated. But the framers of the constitution apparently wrote no prohibition in the constitution to prevent the creation of other institutions to care for those who might seek higher education. *Manitowoc v. Manitowoc Rapids*, (1939) 231 Wis. 94, 98-99, suggests that the educational system established by the constitution is not exclusive and that the legislature does have power to establish other educational institutions.

The only discussion of the question whether the university of Wisconsin or its colleges may be located in some other community and thus become part of such an extension of the system appears in 14 O.A.G. 194 (1925). The conclusion was reached therein that the constitutional requirement of locating the state university at the seat of government requires all departments and colleges to be in one location. In the opinion, it was stated at p. 195:

"This section has remained unchanged since its adoption in 1848. We find no decision by our supreme court upon the point here involved. It has, however, been held that the location of a university fixed by state constitution determines the location of its departments and colleges. *In re State Institutions*, 9 Colo. 626, 21 Pac. 472; *People ex rel. Jerome v. Regents U. of C.*, 24 Colo. 175, 49 Pac. 286. In view of what is said hereafter, no discussion of these cases is deemed necessary."

The opinion further stated at p. 196:

"The word 'university' has been defined thus:

"A 'university' is, properly speaking, an aggregation or union of colleges. It is an institution in which the educa-

tion imparted is universal, embracing many branches, such as the arts, sciences and all manner of higher learning, and possessing power to confer degrees which indicate proficiency in the branches taught.' 27 R. C. L. 132."

The opinion further stated on p. 196:

"It is thus clear that the university has no existence separate and apart from the departments or colleges of which it is composed. It necessarily follows that it is these departments or colleges that the constitution declares shall be located at the seat of state government. The intent of the framers of our constitution is very clearly disclosed when comparison is made with the constitution and statutes of Michigan, from which our constitution and statutes were in part copied."

Thereafter the opinion proceeded to analyze the phrase of the constitutional provision involved, which stated that the legislature could provide "for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require." Upon analysis it was ruled that the contemporaneous history of this provision showed that it plainly referred only to colleges which had not been established by the state.

Among the provisions of Bill No. 440,A., it appears that on or before January 1, 1957, the board is to merge all of the existing facilities of the state college in Milwaukee and the university of Wisconsin extension center in Milwaukee into a 4-year degree granting institution at Milwaukee to be controlled and operated by the board. Such merger, if designated as a college of the university of Wisconsin, might in itself create an obstacle to the court's sustaining the constitutionality of such an act. Should this merger under the combined boards constitute only an extension of a college system which maintained the identity and integrity of the university of Wisconsin located at the seat of government, the court could adopt an interpretation which would sustain the law.

Both Bills Nos. 595,A., and 603,A., assert an intention that the institution to be established in Milwaukee shall be known as "The University of Wisconsin in Milwaukee" and "The University of Wisconsin—Milwaukee." In Bills Nos.

595,A., and 603,A., the institution is placed under the supervision and control of the regents of the university of Wisconsin; in Bill No. 595,A., the institution is referred to as an integral part of the university of Wisconsin. Whether such institution is administered by a single board provided for in Bill No. 440,A., or by the regents of the university of Wisconsin as provided in Bills Nos. 595,A., and 603,A., the setting apart from the seat of government of one of the colleges of the university raises grave doubt as to whether the court would sustain such act as constitutional.

VWT

RGT

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*Industrial Commission—Architects and Engineers—Practice Defined*—A professional engineer, not also an architect, is limited under sec. 101.31 (2) (d), Stats., in preparation of plans for other than industrial plants and buildings, to the structural members thereof. Sec. 101.31 (14) (b), Stats., does not refer to officials of the industrial commission. The commission may not refuse to approve general plans submitted by a professional engineer for nonindustrial buildings if plans are satisfactory in respect to public welfare and safeguarding of life, health, or property.

June 7, 1955.

**INDUSTRIAL COMMISSION.**

You ask whether, under sec. 101.31 (2) (d), Stats., defining the practice of professional engineering, a professional engineer may prepare general construction plans for buildings other than industrial plants and buildings in excess of 50,000 cubic feet total volume, or whether by the terms of the statute such engineer, in the preparation of plans, is restricted to the structural members of other than industrial buildings. You inquire further as to whether it is the duty of the industrial commission to refuse its approval of such general plans submitted by a professional engineer who is not also an architect.

Sec. 101.31 (2) (d) provides as follows:

“The practice of professional engineering within the meaning and intent of this section includes any professional service, requiring the application of engineering principles and data, wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, industrial plants and buildings, machines equipment, processes, works, and the structural members of other than industrial buildings. \* \* \*”

Use of the word “structures” would, standing alone, encompass both industrial and nonindustrial plants and buildings. However, the section must be construed as a whole and effect given to every part thereof. *State ex rel. Milwaukee v. Mil. E. R. & L. Co.*, (1919) 169 Wis. 183, 190, 172 N.W. 230. The word “structures” cannot embrace nonindustrial buildings if the phrase “and the structural members of other than industrial buildings” is to be accorded any meaning. It would have been unnecessary to specify structural members of other than industrial buildings had the legislature intended the word “structures” to include the whole of such buildings.

By the familiar rule of *noscitur a sociis*, general and specific words in a statute, capable of analogous meaning when associated together, take color from each other, so that here the term “structures” must be restricted to a sense analogous to the less general words used in association with it. The associated words refer specifically to buildings and structures of an industrial character which are closely related to engineering works and processes. In contrast thereto, sec. 101.31 (2) (b), defining the practice of architecture, refers in broad terms to “any private or public buildings, structures, projects, or the equipment thereof.”

The present definition of the practice of professional engineering was adopted in 1935. Sec. 3, ch. 437, Laws 1935. As originally enacted in 1931, the definition related only to the practice of civil engineering. Sec. 101.31 (1) (c), Stats. 1931, read as follows:

“The practice of civil engineering, as covered by this section, embraces engineering investigation, design or responsible supervision of the construction and alteration of bridges, structures and buildings directly connected with engineering work; such as railroads, hydroelectric plants, industrial plants and buildings or the structural members of other buildings, and other civil engineering works and projects, including publicly and privately owned public utilities, except the design of the electrical and mechanical equipment of such utilities.”

It is obvious that the 1931 statute quoted did not authorize a civil engineer to prepare general construction plans for nonindustrial buildings. The limitation of practice with respect to industrial plants and buildings and to the structural members of other buildings has, in substance and effect, been retained in the present definition of professional engineering.

The registration board of architects and professional engineers on November 17, 1950, adopted and subsequently filed its interpretation of the statute in question as follows:

“Whereas Section 101.31—Wisconsin Statutes, Subsection 2 (b) includes in the practice of architecture any professional service related to—as well as the design of—any *private* or *public buildings* and since such buildings are specifically enumerated in Subsection 2 (b) and since such buildings are not specifically mentioned in Subsection 2 (d), which defines the field of practice of the engineer, therefore, it has appeared to the Wisconsin Registration Board that the design of such buildings, except as stated below, is limited to the field of practice of architecture. Inasmuch as Subsection 2 (d) specifically includes the planning, designing, alteration and supervision of construction of industrial buildings and the structural members of other buildings, such buildings and structural members are considered to be within the field of practice of both professions.

“The foregoing differentiation accords with previous interpretations of the Registration Law by this Board and is intended to define the boundaries of the fields of the two professions in the design of buildings.”

Construction of a statute by the proper state officers is entitled to great weight in determining its meaning. *State v. Johnson*, (1925) 186 Wis. 59, 68–69.

Although in *Kuenzi v. Radloff*, (1948) 253 Wis. 575, 34 N.W. 2d 798, the plaintiff, a professional engineer, sued and recovered for services in preparing general plans for a non-industrial building, the question of construction of the words "structures" and "structural members of other than industrial buildings" was not presented to or discussed by the court. Under comparable statutes, courts in other states have ruled that despite overlapping and interrelation of the fields of the two professions, professional engineering practice must relate to engineering problems, projects, or undertakings, and the registered engineer must observe the statutory limitations upon the scope of his practice. *Gionti v. Crown Motor Freight Co.*, (1942) 128 N.J.L. 407, 26 A. 2d 232; *Smith v. American Packing & Provision Co.*, (1942) 102 Utah 351, 130 P.2d 951.

From all of the foregoing, it is my opinion that a professional engineer who is not also an architect is limited by the language of sec. 101.31 (2) (d), in the preparation of plans for other than industrial plants and buildings, to the structural members of such buildings.

You state that the commission is now construing the statute involved as restricting registered engineers to the design of industrial plants and buildings and ask whether sec. 101.31 (14) (b), Stats., gives industrial commission officials authority to enforce the provisions of sec. 101.31 and to refuse approval of general plans for other than industrial buildings submitted by a professional engineer who is not also an architect.

Sec. 101.31 (14) (b) provides:

"It shall be the duty of all duly constituted officers of the law of this state, or any political subdivision thereof, to enforce the provisions of this section and to prosecute any persons violating same. The attorney-general of the state or his assistant shall act as legal advisor of the board and render such legal assistance as may be necessary in carrying out the provisions of this section."

In my opinion the quoted section refers to the district attorney, municipal attorneys, and this office, but does not include officials of the industrial commission. The concern of the commission with respect to planning and construction

of public buildings and places of employment is the protection of life, health, safety, property, and public welfare. Sec. 101.10, Stats. The commission may require submission of proper plans for places of employment and public buildings. Sec. 101.10 (13), Stats. It may not refuse to approve general plans for other than industrial buildings submitted by a professional engineer who is not also an architect unless construction in accordance with such plans will adversely affect the public welfare or fail to safeguard life, health, or property.

If it appears that a registered engineer who prepares certain plans has violated sec. 101.31, Stats., the registration board of architects and professional engineers, which is charged with the administration and enforcement of that section, should be advised, so that whatever action it deems appropriate in the circumstances may be taken.

GS

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*Constitutional Law—Interstate Joint School Districts—* Bill No. 105, S., authorizing the creation of interstate school districts, held invalid absent congressional consent under art. I, sec. 10, United States constitution, and of doubtful validity in any case.

June 7, 1955.

THE HONORABLE, THE SENATE.

You have requested an opinion as to the constitutionality of Bill No. 105, S., relating to the establishment of interstate school districts comprising territory in Wisconsin and territory in an adjoining state. The bill would repeal sec. 40.09, Stats., and recreate that section to provide, in subsec. (1), for an election in the Wisconsin district or districts to determine whether such districts should join a district in an adjacent state. If a majority of the votes cast in each Wisconsin district concerned favored such action, and if the school board of the district in the adjoining state then agreed to the attachment, all of the school boards concerned

would be required by joint action to "issue an order creating or altering the joint interstate district to include such territory."

Subsecs. (2), (3) and (4) of the recreated section would provide:

"(2) GOVERNMENT. The government of the joint interstate school district shall follow the law relating to the organization and operation of school districts in effect in the state in which the high school is located.

"(3) APPORTIONMENT OF COSTS. The taxes for the maintenance, operation, transportation and capital expenditures of such school district shall be apportioned between the areas in each state in such manner as the board shall deem equitable and just, certified to the proper municipal officer in Wisconsin, and the portion of such costs apportioned to the area in Wisconsin shall be levied and collected as are school taxes generally.

"(4) STATE AIDS. For the purpose of computing and apportioning state aids to such districts, that portion of such joint interstate district lying within Wisconsin shall be considered as a school district, and the aids computed and apportioned accordingly."

Subsec. (5) would validate joint interstate school districts created pursuant to ch. 267, Laws 1951.

The question arises as to whether the creation of an interstate school district under this bill would violate the compact clause of the United States constitution, art. I, sec. 10, which provides:

"\* \* \* No state shall, without the consent of Congress \* \* \* enter into any agreement or compact with another state \* \* \*."

Although it is pretty well conceded that the validity of *all* agreements between states does not rest upon the consent of congress, there is no unanimity as to just what agreements do require that consent. Assuming that the dicta of some decisions accurately construe the compact clause and that certain interstate agreements may be valid without congressional consent, still it appears that any agreement between states which affects the political power of the states concerned is not valid until approved by congress.

In *Virginia v. Tennessee*, (1893) 148 U. S. 503, 13 S. Ct. 728, 37 L.ed. 537, the United States supreme court first voiced the opinion that the compact clause did not apply to all agreements between states. The court there said, at 148 U. S. 519:

“Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. \* \* \*”

However, the opinion then quotes with apparent approval from Story, making it clear that the court did not intend to limit the scope of the compact clause to agreements which encroached upon the supremacy of the United States:

“\* \* \* Story, in his Commentaries (§ 1403) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language ‘may be more plausibly interpreted from the terms used, “treaty, alliance, or confederation,” and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges; and that ‘the latter clause, “compacts and agreements,” might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other.’ And he adds: ‘In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.’”

In *Virginia v. Tennessee* the issue was whether Virginia was bound by an agreement with Tennessee made in 1803, settling a boundary dispute. The court held that the agree-

ment would not be enforceable without congressional approval but that such approval was to be implied under the facts of that case. At p. 520 it was said :

“\* \* \* If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary ; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State ; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of States to the general government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other.

“The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. \* \* \*”

While the court indicated that an “important” boundary change might require congressional consent, it was also said that an agreement to mark an existing boundary might not affect the political influence of either state. Between these two extremes lies a vast no man’s land, and subsequent decisions do little to define the limits of those agreements which may be made between states without congressional consent. Decisions of various state courts have given support to the principle that the compact clause requires consent of congress only in the case of agreements which are of a political nature. *Dover v. Portsmouth Bridge*, (1845) 17 N. H. 200 ; *The Union Br. R. R. Co. v. The E. T. & Ga. R. R. Co.*, (1853) 14 Ga. 327 ; *Dixie Wholesale Gro-*

*cery v. Martin*, (1939) 278 Ky. 705, 129 S. W. 2d 181, cert. den. 308 U. S. 609; and *Roberts Tobacco Co. v. Mich. Dept. of Revenue*, (1948) 322 Mich. 519, 34 N. W. 2d 54. We are aware of no case, however, nor of any recognized text, holding that agreements of a political nature between states may be made without consent of congress.

On the other hand there have been many interstate agreements, to which congress has consented, involving such matters as boundary disputes, concurrent jurisdiction over boundary waters and the preservation of fisheries therein, criminal jurisdiction over boundary waters, the right of eminent domain granted to an interstate railroad, construction and operation of an interstate tunnel, tax exemption accorded to a utility plant owned by an adjacent state, etc.

Bill No. 105,S., would, if complementary legislation were passed by an adjacent state, permit the establishment of a subdivision of the two states that would exercise essential governmental powers over territory within each state. The furnishing of public education certainly is a state function. This interstate unit would operate in discharge of that function. It would in effect exercise the power of taxation, and possibly the power of eminent domain. Thus, the creation of such a subdivision—whether it be done by formal compact or pursuant to separate, complementary legislation by each state—in my opinion would appear to be an agreement of a political nature between the states and as such would require the consent of congress before it would be valid.

Although congressional consent may be obtained either prior to, or after, an interstate agreement in some cases—or even may be implied without any express resolution by the congress—it is questionable whether the creation of interstate school districts under this bill could be approved in advance. In *Virginia v. Tennessee* it was held, at 148 U. S. 521, that “the consent of Congress could not have preceded the execution of the compact, for, until the line was run, it could not be known where it would lie and whether or not it would receive the approval of the States.” By the same token, the extent of the interstate school districts which might be formed pursuant to Bill No. 105,S., cannot be determined in advance, and thus it might be necessary to ob-

tain congressional consent for the establishment of each individual district.

There would be uncertainty as to the territory to be included in any such interstate district and also as to essential details in the operation of such a district. For instance, nothing is provided in the bill for any representation of residents of the territory in this state upon the governing board of such interstate district; how such board is to be composed; whether electors in the Wisconsin territory would be eligible therefor; or how, where, or when such Wisconsin residents could exercise a voice in their selection or in the affairs of the district. Furthermore, there is no provision or reservation respecting termination or alteration of such district once it is formed.

If it is legally possible to provide for the establishment of interstate school districts through the enactment of complementary legislation in adjoining states, with subsequent congressional approval obtained prior to the creation of specific districts thereunder, it would appear that such complementary legislation would have to be sufficiently detailed to cover all material aspects. This, Bill No. 105,S., does not do.

However, in my opinion, considering the complications that would arise in the event of invalidity in proceeding in such manner, the only safe course would be to embody the compact for establishment of a specific interstate district in complementary legislation, such as was done in ch. 222, Laws 1947, and then obtain congressional consent to such specific agreement.

In this opinion no consideration has been given to limitations provided by state constitutions, such as the debt limitation in art. XI, sec. 3, of our constitution which might restrict the state's power to enter into an agreement of this nature, even though congress might approve. By their very nature questions of that character can be considered only as respects a specific situation or compact when it arises. They would require careful study of the laws of both states as applied to that situation and thus could not be passed upon in advance.

HHP

EWV

*Juvenile Court—Adoption—Termination of Parental Rights*—Where neglected children have been committed to the department of public welfare “until further order of the court” with such children being placed by such department temporarily in licensed foster homes in other counties, and the parents are living in another state but have refused to consent to adoption under sec. 322.04 (1), Stats., parental rights may be terminated by said court under sec. 48.07 (7), Stats., upon proper notice where statutory grounds for such termination are proved.

June 8, 1955.

WILLIAM T. BRADY,  
*District Attorney,*  
Juneau County.

You have inquired as to the jurisdiction of the county court of Juneau county to hear a petition by the state department of public welfare to terminate the parental rights of the parents of three children who were found to be “neglected children” by said court in 1949 and who were committed to the state department of public welfare “until further order of the court.” The parents are now residing in another state. Two of the children have been placed by the state department of public welfare in foster homes in Adams county and the third in a foster home in Milwaukee county.

The purpose of the petition for termination of parental rights is to qualify the children for adoption, since the parents will not give their written consent to adoption of the children under sec. 322.04 (1), Stats.

Among other things, sec. 322.04 (3), Stats., provides for adoption of minors whose permanent care, custody, or guardianship has been judicially transferred to the state department of public welfare on consent of such department.

Sec. 48.01 (2) (a), Stats., provides that all courts of record in this state shall have original jurisdiction of all cases of neglected, dependent, and delinquent children, and we assume that the county court of Juneau county has been designated the juvenile court of that county to hear such matters under sec. 48.01 (2) (b).

Sec. 48.01 (5) (a), Stats., with certain exceptions not material here, gives the juvenile court exclusive jurisdiction over the termination of parental rights under sec. 48.07 (7), Stats.

Sec. 48.07 (7) (a) sets forth the grounds upon which parental rights may be terminated, and we are assuming for purposes of this opinion that the factual situation is such as to support a finding by the court of the existence of one or more of such grounds.

Sec. 48.07 (7) (am) sets forth the procedure. It requires a hearing upon notice to the parents "personally at least 10 days prior to the date of hearing or if to the satisfaction of the court personal service cannot be obtained, *then by publication thereof in a newspaper in the county once a week for 3 weeks prior to the date of hearing.*" Here it will be necessary to serve the parents by such publication since they are outside the state and cannot be served personally. While the statute makes no specific mention of service by publication in the manner presented by sec. 262.13 (2), Stats., it would also be advisable to mail copies of the notice to the nonresident parents if their postoffice address is known or can with reasonable diligence be ascertained. See *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U. S. 306, 70 S.Ct. 652, 94 L. ed. 865, which holds that publication alone does not afford due process where notice by mail could also easily be given.

Thus no insurmountable problem is presented from the standpoint of due process so far as notice to the parents for the purpose of terminating their parental rights is concerned.

You have indicated some apprehension, however, of the problem of acquiring jurisdiction over the persons having custody of the children.

This again presents no great difficulty. The legal custodian of the children is the state department of public welfare to which the children have been committed until further order of the court. The foster homes where the children are residing are merely agencies selected by the state department of public welfare to assist it in exercising its jurisdiction over the children, and, of course, the state department of public welfare submits itself to the jurisdic-

tion of the juvenile court when it comes in with its petition to terminate parental rights. The foster home has no standing or status in the matter independent of that conferred upon it by the state department of public welfare. No such home can exist without a permit from such department or from a licensed child welfare agency, and a child welfare agency cannot issue a permit to operate a foster home except when designated so to do by the department and upon terms prescribed by said department. Sec. 48.38 (3), Stats.

The situation is clearly distinguishable from that considered in the case of *In re Aronson*, (1953) 263 Wis. 604, 58 N.W. 2d 553, to which you have referred. In the *Aronson* case, the child had been placed by its mother in the custody of a woman whose son claimed to be the father of the child, although the child's mother was lawfully married to another man at the time and still is.

Here we have no problem arising out of the rights of the putative father of a child claimed to be illegitimate nor of other persons with whom the child may have been placed by the mother or the putative father.

There may be situations in which notice to the foster home would be essential.

Sec. 48.38 (1) provides:

“(1) The term ‘foster home’ as used in sections 48.35 to 48.42 shall mean the place of residence of any person or persons who receive therein a child or children for control, care and maintenance, with or without transfer of custody;  
\* \* \*”

If custody had been transferred to the foster home by order of the court, then sec. 48.06 (2), Stats., if proceedings were under that section, would require the court to summon “the person or persons who have the custody or control of the child to appear personally and bring the child” to court. However, this section goes on to provide “that whenever a proceeding involves dependency, neglect, or application for termination of parental rights, if the court is satisfied that the child is within the jurisdiction of the court, the presence in court of such child may be waived by the court.”

Sec. 48.01 (5) (a) 1, relating to the jurisdiction of the juvenile court refers to delinquency, neglect, or dependency of "children residing within the county," and we assume that the children must have been residing within the county at the time when the court's jurisdiction was originally invoked.

As we understand the facts here, the custody of the children was not transferred by the court in the original proceeding to any foster home, but they were committed to the state department of public welfare "until further order of the court." Thus the court retained jurisdiction over the children as well as the department, and the department itself is submitting itself to the continued jurisdiction of the court by coming in at this time with a petition for termination of parental rights under sec. 48.07 (7).

You are therefore advised that under the facts stated the court will have jurisdiction to terminate parental rights.  
WHR

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*Constitutional Law—Equal Protection of the Laws—Schools and School Districts—Reorganization—Referendum—Bills Nos. 271,S., and 272,S., amending sec. 40.03, Stats., to provide special voting in referendums upon county school committee orders in Milwaukee county would be unconstitutional.*

June 10, 1955.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 20,A., an opinion has been requested as to the constitutionality of Bills Nos. 271,S., and 272,S. These bills propose the amendment of Sec. 40.03, Stats., to provide, under certain circumstances, a different method of referendum approval of an order of a county school committee in a county of 500,000 or more population than that applicable under the section in the case of counties under that population.

Sec. 40.03 (6) (a), Stats., now provides generally that upon petition of the requisite number of signers specified therein an order of a county school committee shall not become effective until submitted to and approved by a vote of the electors of the territory composing the school district that will result from such order. In order to be approved it must receive a favorable vote of a majority of electors residing in territory that is in a city or village and a majority of the electors residing in the rural area.

Bill No. 271,S., proposes to amend such provision so that in case of such a referendum upon an order of a county school committee of a county of 500,000 or more population, where the order proposes a reorganized school district which includes school districts in which at least 80 per cent of the territory to be included is within incorporated municipalities, the required referendum vote shall be different. In such case a favorable vote of a majority of the voters in the city or cities included, voting as a unit, would be necessary, and also a favorable majority vote of the voters from both the non-city territory which is to be included in the proposed district and from the territory of any school district from which territory is taken, voting as a unit.

Bill 272,S., proposes that where a reorganized school district as proposed by a county school committee order includes a school district or any part thereof which is in a county of a population of 500,000 or more, which operates under the so-called "city school plan," secs. 40.80 to 40.827, Stats., such order is not effective until approved by both a majority vote of the electors in such school district and a majority vote of the electors in the remainder of the proposed school district.

The question is whether such proposals would be valid, if enacted, in providing special provisions that will apply only in respect to county school committee orders affecting school district reorganizations that include territory in Milwaukee county. The uniformity requirement in sec. 3, art. X of the Wisconsin constitution relative to school districts, is inapplicable to the means by which they are established and their boundaries fixed. *State ex rel. Zilisch v. Auer*, (1928) 197 Wis. 284, 221 N.W. 860. However, under well recog-

nized principles, in order for the special treatment thus proposed to be valid, it must be based upon a proper classification. Otherwise, it offends against the principles of equal protection of the laws. For a classification to be valid it must meet certain standards, among which are that it must be based upon a substantial difference and that it must be germane to the purpose of the law. *State ex rel. Ford Hopkins Co. v. Mayor*, (1937) 226 Wis. 215, 276 N.W. 311.

Number is a proper factual basis for the purpose of classification if it bears a real relation to the object of the law. *Brennan v. Milwaukee*, (1953) 265 Wis. 52, 60 N.W. 2d 704. But, neither the size of the population of a county nor the existence of a larger number of instances therein in which the matter covered by the law could arise, is a sufficient basis, standing alone, to support a classification. *State ex rel. Milw. S. & I. Co. v. R. R. Comm.* (1926), 174 Wis. 458, 465, 183 N.W. 687.

Therefore, just because there are more incorporated municipalities in Milwaukee county, more school districts therein which are coterminous with, or contain territory in, an incorporated municipality, or more such municipalities or school districts therein whose territory could be included by county school committee order in a reorganized district along with the territory of a city which operates its school on the so-called "city school plan," furnishes no basis for special treatment unless in some way germane to the object and purpose of the law involved. We fail to see any reason that supports a departure in Milwaukee county in the instances prescribed in these bills from the procedure prescribed by sec. 40.03, Stats., where those same situations arise in some other county.

The situations in which these bills would make an exception if they arise in Milwaukee county could just as well arise in other counties in the state. For instance, the cities of Madison and Green Bay, and others, have several incorporated municipalities adjacent thereto. Those cities operate under the so-called "city school plan." As said in *State ex rel. Milw. S. & I. Co. v. R. R. Comm.*, *supra*, we fail to find anything in respect to the factual situation in Milwaukee county in this regard that is different from that in at least some other counties in the state. Therefore, the classi-

fication attempted is not based on characteristics which legitimately distinguish school districts or school district territory in Milwaukee county from school districts and school district territory in other counties. The same factual situation as in Milwaukee county exists elsewhere.

The object and purpose of the referendum provisions in sec. 40.03, Stats., is to accord the electors residing in the territory that is to compose a school district as the result of a county school committee order, a voice as to the composition of the district. Considering this purpose, we fail to perceive any reason for according a particular effect to the vote of an elector at such referendum where the territory is in Milwaukee county that is not equally applicable where the territory is in some other county. See: *Hjelming v. La Crosse County*, (1926) 188 Wis. 581, 194 N. W. 468. For this reason, it is our opinion that these bills do not rest upon a valid classification.

The requirements of proper classification stem from the equal protection of laws provisions of our constitution and the 14th amendment. It is true our court has held that no person has any constitutionally protectible property right in the composition or boundaries of a school district. *State ex rel. Zilisch v. Auer, supra*. However, in *State ex rel. Morgan v. Dornbrook*, (1925) 188 Wis. 426, 206 N.W. 55, the court considered a contention that a statutory provision relating to alteration of school districts was invalid as not based upon a proper classification, and held the classification a valid one. It said, "It is true that the classification adopted must be germane to the purpose of the law." Also, in *Union F. H. S. Dist. v. Union F. H. S. Dist.*, (1934) 216 Wis. 102, 256 N.W. 788, it considered and passed upon the validity of a classification contention in reference to a statute pertaining to school districts.

Furthermore, here the matter involved is not any right which persons residing or owning property in the affected area have as incident to such property. It is their right to indicate their choice as to the composition of the district by voting at an election thereon, which is a privilege that is accorded or granted to them by the referendum provisions of sec. 40.03, Stats. In the absence of such provisions, they

have no such right or privilege. In the case of *Christoph v. Chilton*, (1931) 205 Wis. 418, 237 N.W. 134, it is indicated that where a statute grants to one class rights or privileges denied to another class under the same or substantially similar conditions and circumstances, it offends against the principles of equal protection. Such is the result here. People residing in territory in Milwaukee county which is involved in a school district reorganization order of a county school committee are accorded different privileges as respects voting at referendums thereon than are accorded residents of territory in some other county under like circumstances.

The holding in *State ex rel. Binner v. Buer*, (1921) 174 Wis. 120, 182 N.W. 855, that there is no violation of equal protection in providing different methods of conducting elections in certain counties from that provided in others, since equal protection is accorded in that all within the same election district are given equal privileges, is inapplicable here. All residents of Milwaukee county are not given the same privilege. Where the territory involved in a county school committee order would not come within the terms of these two bills, the votes of the electors at a referendum would have the effect conferred generally by sec. 40.03 (6) (a), Stats. This is a different effect than would be accorded the votes in cases falling within the particular situation set up by these bills.

The conclusion on the basis of the above that these bills would be invalid if enacted makes it unnecessary to give consideration to the proposition that a county school committee is a part of the county government, and to provide differently in respect thereto or as to the effectiveness of orders thereof in some but not all counties would constitute a violation of the provision in sec. 23, art. IV for one uniform system of town and county government.

HHP

*Constitutional Law—Membership Fees of Cooperative Telephone Associations*—The legislature may constitutionally authorize membership corporations engaged on a cooperative basis in furnishing telephone services to charge a membership fee subject to the jurisdiction of the public service commission.

June 10, 1955.

THE HONORABLE, THE ASSEMBLY.

You have submitted to me Resolution No. 22,A., which requests my opinion on the constitutionality of Bill No. 591,A. The resolution reads:

“Resolved by the assembly, That the attorney general is requested to render to this body an opinion as to the constitutionality of Bill No. 591,A., particularly with respect to the provisions authorizing a co-operative association incorporated under chapter 185 of the statutes to furnish telephone service in rural areas to require its patrons to be members of and to contribute membership fees or other form of capital to such co-operative association, in addition to service charges.”

Bill No. 591,A., proposes to create sec. 196.605 of the statutes which would accomplish the following:

(1) A cooperative association incorporated under ch. 185 to furnish telephone service would be authorized to require each of its members to pay or deposit with the association a membership fee;

(2) The amount of the fee, any classification, and the manner of collecting the fee will be subject to the jurisdiction of the public service commission.

Sec. 196.605 (1) refers to the proposed cooperative telephone association as a public utility. This reference is in accord with existing law. Sec. 196.01 (1) includes in the definition of “public utility” corporations organized for the conveyance of telephone messages. It does not exclude from the definition of a public utility cooperative telephone associations, while it does exclude cooperative electric associations.

In the case of *Commonwealth Telephone Company v. Carley*, (1927) 192 Wis. 464, 213 N.W. 469, the court held that

an organization which described itself as a mere private corporation known as a farmers' mutual company, was a public utility, and hence was subject to the jurisdiction of the public service commission.

In the case of *Hotel Pfister v. Wisconsin Telephone Company*, (1930) 203 Wis. 20, 233 N.W. 617, the court held that a private telephone system owned and operated by the Hotel Pfister, which maintained telephones in each guest room and in private dining and sample rooms of the hotel, together with a switchboard operated by hotel employes, was under the jurisdiction of the public service commission. The court stated that the commission was not concerned with the charge that the hotel might make for intrahotel service, but that when calls were made from the hotel by interconnection with a public utility system, such calls were rendered as a public service and a charge for them was a charge for public service under the jurisdiction of the commission.

It is further my understanding that the persons concerned with organizing cooperative telephone associations recognize that they are subject to the jurisdiction of the public service commission. Hence the reference in Bill 591,A., to the cooperative telephone associations as "public utilities" creates no problem.

It is further my opinion that there is no provision of the constitution which would prohibit the legislature from authorizing such associations to charge a membership fee as a condition of obtaining service. Such membership fee may properly be regarded as an advance payment for services to be rendered. Under the presently existing statutes such associations could sell stock to raise any necessary share capital, and then pay dividends within the statutory limitation to its stockholders. In that event the telephone patron would have to pay a higher rate for service in order to cover the necessary dividend expense which the public service commission undoubtedly would allow as a legitimate expense of operation. By organizing on a membership basis and charging advance membership fees, the patrons, because of the method of doing business of cooperative associations whereby the profits are refunded to the patrons, can look forward to obtaining a lower monthly charge for

telephone services than they would be required to pay if they were also paying a sum to cover dividends on outstanding stock. Any possible doubt as to the constitutionality of charging such a fee is removed by the fact that such membership fees are subject to the continuing jurisdiction of the public service commission, which has the power to insure that they are fair and reasonable.

While the subject is not covered by your request, it is my further opinion that there is no conflict between the provisions of the proposed Bill 591,A., and the provisions of ch. 184, Stats., governing securities of public service corporations, or the provisions of ch. 189, Stats., the general securities law. In fact, sec. 189.07 (2) exempts from the provisions of ch. 189 the sale of its memberships by domestic nonprofit corporations organized without capital stock.  
RGT

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*Constitutional Law—Municipalities—Licenses and Permits—Real Estate Brokers—*Licensing of real estate brokers is a matter of state-wide concern within the meaning of art. XI, sec. 3, Wis. Const., and ch. 136 of the statutes. Municipalities may not validly enact ordinances setting up local licensing provisions for such brokers and agents.

June 13, 1955.

WISCONSIN REAL ESTATE BROKER'S BOARD.

You have called our attention to the fact that a Wisconsin city has adopted or proposes to adopt an ordinance licensing real estate agents and builders.

We are asked if a real estate broker licensed by your board under ch. 136 of the statutes may be required by a city to take out an additional license as provided in a city ordinance.

It is your conclusion, with which we agree, that a city may not set up licensing requirements for real estate brokers and agents, as that is a matter of state-wide concern. Art. XI, sec. 3, Wis. Const., among other things empowers

cities and villages to determine their local affairs and government subject to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village, and the method of such determination is to be prescribed by the legislature.

The obvious purpose of ch. 136 providing for the licensing of real estate brokers and agents by the state is to protect all of the people of the state from incompetency and untrustworthiness on the part of those engaged in the real estate business. The evils aimed at are very great. See *Payne v. Volkman*, (1924) 183 Wis. 412, 419, 198 N.W. 438.

In *Van Gilder v. Madison*, (1936) 222 Wis. 58, 267 N.W. 25, 268 N.W. 108, it was held that the power granted to cities and villages by the home-rule amendment of the constitution referred to above, is the power to determine their local affairs and government but that no power was thereby conferred on them to deal by charter ordinance with matters primarily of state-wide concern.

There are situations where there is in effect a legislative determination that licensing of some types of activities may be a local affair as well as a matter of state-wide concern. A good example of this is to be found in ch. 129, Stats., relating to licensing of peddlers, transient merchants, etc., by the state motor vehicle department. Sec. 129.07 provides:

"This chapter does not in any way limit or interfere with the rights of any town, city or village to further license truckers, hawkers, peddlers, or transient merchants to trade within the corporate limits thereof except in the case of ex-soldiers, as provided in section 129.02."

If the legislature had seen fit to permit the same type of local licensing for real estate brokers it could easily have so provided, and the fact that it has done so in the one instance but not in the other gives rise to the application of the rule of statutory construction that the expression of the one results in the implied exclusion of the other, *expressio unius est exclusio alterius*.

In addition to the foregoing, it should also be noted that the general rule is to the effect that a municipal corporation's power to license an occupation or privilege is not an inherent power but may be exercised only where it is plainly

conferred by the state. See 53 C.J.S. 477. Note also *Janke v. Milwaukee*, (1930) 202 Wis. 214, 231 N.W. 261, where it was held that a manufacturer of soda-water beverages licensed by the state department of agriculture and markets was not required to procure a license from the municipality in which it operated.

You are therefore advised that one licensed under ch. 136 is not required to obtain a similar license under a municipal ordinance and that such an ordinance is in excess of the city's powers.

WHR

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*Constitutional Law—Internal Improvements—Dams—An appropriation of state funds for the preservation of levels of a lake by the maintenance of a dam, when none of the land fronting on the lake is in state ownership, is a prohibited work of internal improvement.*

June 15, 1955.

THE HONORABLE, THE ASSEMBLY.

You request an opinion relative to the constitutionality of Bill No. 538, A., if enacted into law. The bill would appropriate a fund for reconstruction and repair of a dam at Thunder Lake in the town of Three Lakes, Oneida county, to comply with orders of the public service commission respecting maintenance of the water level of said lake.

According to the findings of the public service commission, the dam was originally constructed under the sponsorship of Oneida county, as a WPA project, to restore the lake level which had been lowered in connection with the operations of a drainage district. The land adjacent to which the dam is located was later transferred from Oneida county to the town of Three Lakes. Following an inquiry from the water regulatory board as to the adequacy of the dam, the public service commission found that a certain level of Thunder Lake was required in the interest of public rights in the waters of the lake, and to promote safety, life, health, and property. It ordered that the dam be repaired to maintain such level.

In connection with the proposed appropriation of state funds, there are two facets of the Wisconsin constitution which are of primary concern. One element is that relating to uniformity of taxation and to appropriation of state funds. The general principles have been several times pronounced by our supreme court that appropriations of state funds may be made only for "public" as distinct from private purposes; and that since taxes are to be spent at the level at which they are raised, such appropriations are to be made for purposes of state-wide concern rather than for purely local purposes. *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 60 N.W. 2d 763; *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, 235 Wis. 443, 293 N.W. 161; *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 277 N.W. 278, 280 N.W. 698; *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 268 N.W. 238; *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 88 N.W. 596, 90 N.W. 1067, 58 L.R.A. 739. The court has said, however, that "the question of whether an expenditure of public funds constitutes a public purpose is largely within the discretion of the legislature." *State ex rel. Thomson v. Giessel*, *supra*, loc. cit. 265 Wis. 216.

It was pointed out in *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, *supra*, that the fact that the particular activity involved is to be carried out "in but one city will not render the public purposes served thereby merely local, instead of state-wide." Loc. cit. 235 Wis. 456. See, also, *The State ex rel. New Richmond v. Davidson*, *supra*.

The state is the owner of the beds of the navigable lakes in this state in trust for the public, as was pointed out in 39 O.A.G. 230, where Wisconsin cases on the subject are extensively discussed. In *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W. 2d 514, the supreme court recognized that one of the public governmental purposes which the state is obligated to serve is the preservation of navigable waters for public use in hunting, fishing, enjoyment of natural scenic beauty, and the like.

There would seem to be little question under the foregoing authorities that the preservation of the level of a navigable lake, so as to preserve the rights of the public for the

enjoyment of such lake, constitutes a public purpose of state-wide concern even though the lake itself is geographically located in only a small area of the state.

The facet of the constitution restricting state participation in works of internal improvement was fully discussed in an opinion of this office, 36 O.A.G. 264 (1947).

In that opinion it was stated at page 266:

"In our opinion, the foregoing cases conclusively establish that the erection of any dam by the state, under circumstances wherein there is such a possibility of pecuniary profit that the work might be undertaken by private promoters, is a work of internal improvement and prohibited except insofar as it might be justified under art. XI, sec. 3a.

"Art. XI, sec. 3a was construed by the supreme court in *State ex rel. Hammann v. Levitan*, 200 Wis. 271 to constitute express authority to the legislature to adopt the statute creating the Horicon marsh. The court ruled that the Horicon marsh could properly be considered a park in the broad sense of the term, and that the power to establish the park included the power to construct and maintain a dam for the improvement of the park.

"We consider the foregoing principles of primary importance as establishing that the state has no general power to construct dams and the only exception to the prohibition against engaging in a work of internal improvement is found in the case of dams which are used to improve public parks."

In that opinion the further statement was made that under the existing statutes at that time the conservation commission did have power to take over the operation and maintenance of dams on wholly-owned state land. Upon a review of the statutes, it seems implicit that the rules governing operation and maintenance of an existing dam are in no wise different from the rules governing the construction of a dam, and hence it would appear that there must be some public benefit in the nature of an existing park, and that the benefits cannot accrue wholly to private riparian owners on the body of water either created or maintained.

It is a matter of common knowledge that, particularly in the northland, lands which border on navigable lakes sell for as much per front foot as upland areas sell for per acre, and hence the construction or maintenance of any dam in-

herently involves the possibility of pecuniary profits so that the work might be undertaken by private promoters.

I am informed that the state does not own any frontage whatsoever on Thunder Lake and that such frontage is all privately owned. Under the circumstances, maintenance of Thunder Lake could not be said to be incidental to maintaining a state park, and hence is a prohibited work of internal improvement.

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*Constitutional Law—Towns—Uniform Town and County Government—Special and Private Laws—Bill No. 314,S., creating sec. 60.81, Stats., for incorporation of fourth class cities in towns of over 5,000 population adjacent to a city of the first class and having an equalized valuation of over \$20,000,000, appears on its face to be in possible conflict with art. IV, secs. 23 and 31, Wis. Const.*

June 17, 1955.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 28,A., the assembly has requested the attorney general to render an opinion to the assembly on the question of whether Bill No. 314,S., if enacted, would be valid because of being inapplicable to towns adjacent to cities other than those of the first class and because of the probable result in many cases of changing into cities areas which do not have the characteristics of cities.

Bill No. 314,S., proposes to create sec. 60.81 of the statutes relating to incorporation of certain towns as fourth class cities.

Its application is limited to towns of over 5,000 population adjacent to a city of the first class and containing an equalized valuation in excess of \$20,000,000. If 100 or more persons petition for the submission to the electors of the question of becoming a fourth class city, and the petition contains the signatures of at least one-half of the owners of real estate in said town, the town board is to provide for a

referendum. In answering the question presented here it is unnecessary to set forth and discuss other features of the bill relating to the procedure to be followed where such a petition is initiated.

Art. IV, sec. 31, Wis. Const., reads in part:

“The legislature is prohibited from enacting any special or private laws in the following cases:

“\* \* \*

“9th. For incorporating any city, town or village, or to amend the charter thereof.”

Art. IV, sec. 32, Wis. Const., provides:

“The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state.”

In *State ex rel. Risch v. Trustees*, (1904) 121 Wis. 44, 98 N.W. 954, it was held that the classification of cities must reasonably comply with the following rules:

1. Classification must be based upon substantial distinctions which make one class really different from another.
2. Classification must be germane to the purpose of the law.
3. Classification must not be based upon existing circumstances only.
4. The law must apply equally to each member of the class.
5. The characteristics of each class should be so different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

As the court stated in this case the above rules are very general—so much so as not to furnish a very definite test. This makes very difficult the application of the rules to specific situations, so that the opinion of one lawyer or another as to what a court might hold is but little more than an “educated guess,” at least in the case of some of the rules above enumerated.

The *Risch* case as well as other cases make it quite clear that distinctions in classification based on population are valid. Hence there would appear to be no valid objection to those features of the bill limiting its application to towns exceeding 5,000 in population, and by the same token it may be that there is nothing constitutionally objectionable to setting up a classification of towns adjacent to cities of the first class. There are, however, cases holding that there can be no proper classification of cities and counties except by population. *Commonwealth ex rel. Fertig v. Patton*, 88 Pa. St. 258.

In *Wagner v. Milwaukee*, (1902) 112 Wis. 601, 88 N.W. 577, it was held that a law making a classification based on assessed valuation was invalid. There ch. 310, Laws of 1899, authorized the county board of supervisors to construct a viaduct over any gully, river, or valley for the purpose of connecting streets or highways, provided such a viaduct should not be less than 1,000 feet long, 60 feet wide, and 18 feet high, and the cost should not be less than \$80,000, and the amount of bonds issued therefor should not exceed one-fifth of 1 per cent of the taxable property of the county.

This was held to violate art. IV, sec. 18 and sec. 23, Wis. Const., reading as follows:

“Sec. 18. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.”

“Sec. 23. The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable.”

It should be noted, however, that the uniformity required is of the plan or scheme, not the method adopted in any case for organizing a town or county, and that absolute uniformity is not required. *Chicago & N.W. R. Co. v. Langlade County*, (1883) 56 Wis. 614, 14 N.W. 844. Also a statute requiring counties having a population of 500,000 or more to provide hospitalization for indigents, which is applicable only to Milwaukee county, is not invalid on the ground of lack of uniformity, in view of the fact that the situation in Milwaukee county is such that a uniform system of govern-

ment in this respect is not practicable. *Milwaukee County v. City of Milwaukee*, (1937) 223 Wis. 674, 271 N.W. 399.

The resolution asking for an opinion from the attorney general raises the question of whether or not the probable result of the operation of Bill No. 314,S., if enacted, will be to change areas into cities in many cases where the areas in question do not have the characteristics of cities.

That is a question which may well arise when proceedings are instituted under the statute, if it is enacted, but it is difficult if not impossible to conjure up all the situations which may be presented when steps are taken to invoke the provisions of such a proposed statute. The supreme court of Wisconsin has had occasion to go into various phases of this general problem in the cases of *State ex rel. Holland v. Lammers*, (1902) 113 Wis. 398, 86 N.W. 677, 89 N.W. 501, and *Fenton v. Ryan*, (1909) 140 Wis. 353, 122 N.W. 756.

In the first of these cases the court made reference to art. IV, sec. 23, Wis. Const., which provides that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable, defined what a village was understood to mean at the time of the adoption of the constitution, and held:

- “\* \* \* (1) That if the law authorizing the incorporation of villages, as properly construed, permits rural territory possessing none of the attributes of villages to change from town to village government at will, it cannot be sustained. (2) That the law providing for the incorporation of villages fixes no limitation as to the maximum size of the territory that may be incorporated, except that it must be part of a town or towns, and prescribes no restriction as to density of population, except that it shall contain a resident population of not less than a stated number. (3) That a village means an assembly of houses less than a city, but nevertheless urban or semiurban in its character, and having a density of population greater than can usually be found in rural districts, and that this was the understood meaning of what constituted a village at the time the constitution was adopted. (4) That if the law providing for the incorporation of villages contains no restriction upon the size or density of population of the territory sought to be incorporated, a restriction must be implied from the name of the corporation and the purpose for which it is incorporated. (5) That only territory urban in character, with such ad-

jacent lands as are naturally connected with and are reasonably appurtenant and necessary for future growth in view of the surroundings and circumstances of the location and prospects of future prosperity, may be incorporated in the village. (6) That the territory seeking admission as a village must be harmonious with the idea of what a village actually is. It may not include large areas of rural or agricultural lands sparsely settled or widely distributed. It may only include lands having the distinct characteristics of a village, and such additions as have a natural connection with and seem reasonably appurtenant to and necessary for future growth. (7) That it is a question of fact, to be determined in each case as the question arises, whether the provisions of the constitution referred to may be violated by including territory within the limits of the village which should not be included therein. Such inquiry is judicial, not legislative, at least in the absence of any legislative declaration on the subject. (8) That the right to incorporate a village under sec. 854 is limited to such territory as possesses the characteristics mentioned. It must be a village in fact, with a reasonably compact center or nucleus of population, and not a mere agricultural community. If territory beyond the thickly settled limits is included, such territory ought reasonably to possess some natural connection with and adaptability to village purposes and seem reasonably to be necessary for future growth and development. (9) That in the absence of some specific legislation the courts must meet and determine in each given case the fact as to whether these restrictions have been overstepped." *Fenton v. Ryan*, 140 Wis. 353, 357-8.

What was said here with reference to the incorporation of a village would appear to apply with equal if not greater force to the incorporation of a city since the distinctions between rural area and a city are at least as great and probably greater than the distinctions between rural area and a village.

In the *Lammers* case the court had under consideration the provisions of sec. 854 of the statutes of 1898 under which proceedings were had to determine the validity of the incorporation of the village of Cedar Grove in Sheboygan county, and the court held that if the territory beyond the thickly settled limits were included, such territory must reasonably possess some natural connection with and adaptability to village purposes and seem reasonably necessary for

future growth and development. So construed, it was held that the statute did not conflict with art. XI, sec. 3, Wis. Const., empowering the legislature to provide for the organization of cities and villages nor, with art. IV, sec. 23, mentioned above.

In *Fenton v. Ryan, supra*, it was held that the inclusion in a new village of territory, in excess of one-half of a square mile, consisting of sparsely settled rural or agricultural lands not having the distinctive characteristics of a village or any natural connection therewith, and not reasonably appurtenant and necessary for the future growth of the village, would be an invasion of the uniformity in town and county government required by art. IV, sec. 23, Wis. Const.

Again in the case of *In re Town of Hallie*, (1948) 253 Wis. 35, 33 N.W. 2d 185, it was held that where territory comprising a town consisted of agricultural land of about 15,000 acres, a residential area of about 1,000 acres, a commercial area of about 27 acres, and an industrial area of about 1,000 acres, with a total population of less than 1,500, and the residential, commercial, and industrial areas were principally along both sides of a highway in a strip less than a mile wide and about 9 miles long, and the land lying on either side of this strip was practically all agricultural except some summer cottages and a few permanent homes, the territory in question did not have the characteristics of a village and hence was not subject to incorporation as a village.

We have no means of knowing what petitions might be presented for formation of fourth class cities under the provisions of Bill No. 314,S., if it is enacted, but according to one newspaper account we have read, one of the areas which is expected to avail itself of the provisions of this law, if enacted, does not presently have the characteristics of a village and presumably would fall even further short of having the characteristics of a fourth class city.

Whether or not, in a given case, the territory proposed to be incorporated in a city may properly be included therein, is a question for the courts. See *Fenton v. Ryan, supra*.

We cannot, in advance of the passage of the bill and in advance of steps that may be taken to utilize its provisions

and in advance of knowing what areas may or may not be included in a petition to incorporate, predict the answers which the courts might give on factual situations which are not presently before us for consideration.

It might be noted in passing that problems of this type have arisen elsewhere, and in the case of *Town of Forest Acres v. Town of Forest Lake*, (S.C. 1954) 85 S.E. 2d 192, the rule was expressed that it is well settled that in the absence of constitutional limitations, the legislature has plenary power over municipalities, including the right to regulate the manner in which the boundaries of such governmental units may be extended or diminished. In that case it was held that a statute pertaining to annexation, even though expressed in general terms, which because of population limitation could refer to only one county in the state, and which was a radical departure from the general law on the same subject, was violative of a constitutional inhibition against special legislation and that the question is to be decided not by the letter but by the spirit and practical operation of the act involved.

Our own court has stated the rule somewhat similarly in the case of *State v. McKune*, (1934 )215 Wis. 592, 597, 255 N.W. 916, to the effect that where there is an attempt to institute special legislation which would otherwise be prohibited, by using language, general in its terms, but specifying such restrictions and qualifications that it is apparent on the face of the act that none but a particular individual or an unwarrantedly restricted class can ever be affected by it, the law will be declared invalid.

Does Bill No. 314,S., fall afoul of the rule as so expressed?

As was pointed out in *State ex rel. Risch v. Trustees*, *supra*, at p. 54, the rules do not furnish a certain test by which the constitutionality of a general legislative class may be determined, but the particular facts of each particular situation must necessarily be considered, it being kept in mind that the necessity and propriety for classification are primarily legislative questions.

Following up this thought the idea was expressed in 1941 Wis. Law Rev. 396, 408, that the solution in each case, then,

does not lie in legal concepts. "Citation and discussion of all the cases in the books will prove no more than the simple proposition that there must be some rational basis for treating this 'class' in this manner, as far as the 'germane to the purpose' requirement is concerned. This obviously cannot be a rule of thumb capable of mechanical application to each case. Ultimately the problem is resolved into the question of what facts in each case are sufficiently important to justify exclusion and inclusion."

We have already made reference to *Milwaukee County v. City of Milwaukee*, (1937) 223 Wis. 674, 271 N.W. 399, in which a classification applicable only to Milwaukee county and requiring the furnishing of hospitalization in cases of communicable diseases was sustained on the grounds that by reason of population Milwaukee county was so situated that it was impracticable to deal with the problem of communicable diseases in the same way that it would be in more remote and sparsely settled regions of the state.

However, we are unable to say that the same logic necessarily applies to the formation of fourth class cities in towns of a certain population, having a certain equalized valuation, and being adjacent to cities of the first class.

In the absence of such facts as might on a given petition make out a proper case, we conclude that Bill No. 314,S., may well be in conflict with the rules expressed in the cases cited above in that on its face the bill appears to be an attempt to institute special legislation relating to the incorporating of fourth class cities by using language, general in its terms, but specifying such restrictions and qualifications that none but an unwarrantedly restricted class can ever be affected by it, so as to be in possible conflict with art. IV, sec. 23 and sec. 31, Wis. Const.

WHR

*Criminal Law—District Attorney—Powers and Duties—Employment of Investigator*—Except as provided in secs. 59.46 (3) and 59.88, Stats., district attorney has no authority to employ investigator to investigate unsolved crime. County board member may be employed as investigator in proper case, as no question of incompatibility of offices arises, provided the compensation does not exceed \$1,000 in any one year pursuant to sec. 348.28 (2), Stats.

July 7, 1955.

JOHN J. HAKA,  
District Attorney,  
Portage County.

You state that your predecessor retained a town chairman to assist the sheriff and the state crime laboratory in investigating a crime which had been committed in a tavern located in his town. This employment was not made pursuant to sec. 59.88, Stats. However, the district attorney had a fund appropriated to him by the county board for miscellaneous expenses of his office and for investigation purposes, and it is from this fund that the compensation of the town chairman as investigator is sought to be paid.

No question of incompatibility is presented, because the position of investigator (except possibly in Milwaukee county—see sec. 59.46 (3), Stats.) is an employment, not an office. Incompatibility applies only to offices.

Nor is there any question of malfeasance, since sec. 348.28 (2) exempts contracts "not exceeding \$1,000 in any one year," and we understand the compensation involved here to be within that limit.

However, it appears that the district attorney exceeded his authority in retaining an investigator. The district attorney himself has no statutory duty of investigation until a person accused is held for trial, at which time his duty is prescribed as follows in sec. 355.17, Stats.

"355.17 (1) The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime *whereon the defendant has been held for trial* and file an information setting forth the crime committed, according to the evidence on such examination."

The district attorney may conduct investigations on behalf of a grand jury, or in preparation for trial, in which case the fund prescribed by sec. 59.88, Stats., is available for his expenses, but no such situation is presented here. He has no authority to obligate the county to pay money for an investigator outside the provisions of sec. 59.88. 12 O.A.G. 47; 14 O.A.G. 549; 16 O.A.G. 552. See 18 O.A.G. 295.

It is the duty of the sheriff and of municipal police departments to investigate crimes, *Andreski v. Industrial Comm.*, (1952) 261 Wis. 234, 240; and of course the district attorney should guide and advise those officers. The supreme court has stated as follows in *State v. Peterson*, (1928) 195 Wis. 351, 359:

\* \* \* It is his [the district attorney's] duty to interview all who he has reason to believe may know any fact material to any criminal prosecution whether the person interviewed be an attorney retained by those interested in the prosecution or any other witnesses. This conclusion does not absolve any citizen from the duty of informing the district attorney of the facts known to him with reference to any violation of the law, whether such citizen is a layman or a member of the bar representing those interested in the prosecution.

"In his investigation of any alleged offense the district attorney must of necessity consult those who know the facts,—the parties who may have been wronged and their attorneys, if they have employed them. In all such cases the district attorney acts in a *quasi*-judicial capacity and determines what course should be pursued in view of the facts disclosed by his investigation."

Moreover, the district attorney may cause witnesses to be subpoenaed and may examine them in John Doe proceedings. Sec. 354.025, Stats. And he may call upon the state crime laboratory for the services which it is set up to perform. Sec. 165.01 (3) (b), Stats. In addition to the crime laboratory, the state furnishes the services of trained investigators in specialized fields of criminal activity, such as arson (secs. 200.19 to 200.21, Stats), gambling, prostitution, and liquor law violations (sec. 73.035, Stats.) and game law violations (sec. 23.10, Stats.), all of which are available to district attorneys.

District attorneys are, therefore, not without facilities for investigation, and they are rightly expected by the public to take an active part in the investigation and suppression of crime over and above their statutory duties. It may be that they should have authority to employ investigators in such a case as is involved here, but that is a legislative question. In Milwaukee county the legislature has authorized the county board to provide for investigators appointed by the district attorney (sec. 59.46 (3), Stats.), but in other counties the only provision is sec. 59.88, which applies only to investigations by grand juries or in preparation for trial and does not cover investigations of unsolved crimes not the subject of a grand jury inquiry.

In my opinion, therefore, the claim for services in this case should be denied.

WAP

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*Pensions—Police*—A policeman in a city of the second or third class who joined the department on or after January 1, 1948, and who is under the Wisconsin retirement fund rather than the police pension fund created pursuant to sec. 62.13 (9), Stats., is entitled to vote for three members of the board of trustees of the latter pension fund.

July 11, 1955.

J. B. MOLINARO,  
*District Attorney,*  
Kenosha County.

You have requested my opinion as to whether a subordinate of the police department who was appointed to his position after January 1, 1948, and who neither contributes anything to, nor receives any benefit from, the pension fund created pursuant to sec. 62.13 (9), Stats, is entitled to vote in an election which will determine the membership of the board of trustees of such fund.

Sec. 62.13 (9) (a) 1, Stats., requires each city of the second and third class to have a police pension fund. Sec. 62.13 (9) (b) 1 provides:

“(b) *Board of trustees.* 1. The mayor, treasurer, comptroller, and the chief and three active subordinates of the department, shall be the board of trustees of the said pension fund. The three subordinates from the department shall be elected annually, by ballot, at least three days before the annual election of officers of the board. Each subordinate of the department shall be entitled to vote for such three members of the board upon one ballot, and the three persons receiving the highest number of votes shall be elected. \* \* \*”

Ch. 206, Laws 1947, created sec. 62.13 (9) (e) of the statutes which reads as follows:

“(e) *Second and third class cities.* No person who, prior to January 1, 1948, had not contributed to a police pension fund established pursuant to this subsection shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the police department in a city of the second or third class, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a police pension fund established pursuant to this subsection, and who can otherwise qualify, shall be, or become, a participating employe under sections 66.90 to 66.918. \* \* \*”

Secs. 66.90 to 66.918 referred to in the foregoing statute embrace the provisions of the Wisconsin retirement fund, a retirement system for employes of the state and certain municipalities of Wisconsin. Under the aforesaid sec. 62.13 (9) (e) a policeman who was employed for the first time in a city of the second or third class on or after January 1, 1948 is excluded from membership in the police pension fund created by sec. 62.13 (9) and becomes subject to the provisions of the Wisconsin retirement fund when he has met the qualifications specified in sec. 66.901 (4), Stats.

It seems to you that it would be fairer if only those members who contributed to the police pension fund created pursuant to sec. 62.13 and who have an interest therein should

be allowed to participate in the management of the fund and the choice of the three active subordinates of the police department who serve on the board of trustees of the fund. You point out, however, that a literal reading of the statutes quoted above could lead to the conclusion that subordinates coming into the force after January 1, 1948 eventually could elect the three subordinates to this board of trustees and could even be members of such board to the exclusion of those actually participating in the fund.

The fact remains, however, that sec. 62.13 (9) (b) 1 gives "each subordinate of the department" the right to vote for three members of the board. A policeman who joined the force on or after January 1, 1948, and who is subject to the provisions of the statutes relating to the Wisconsin retirement fund and excluded from the fund created pursuant to sec. 62.13 (9), is nevertheless a "subordinate of the department" and entitled to vote. The statute does not provide that membership in the fund created pursuant to sec. 62.13 (9) is a prerequisite to such right to vote.

Sec. 62.13 (9) (b) 1 is clear and unambiguous. In such a case there is no room for the application of any rule of statutory construction.

"\* \* \* Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction. *Gilbert v. Dutruit*, 91 Wis. 661, 65 N.W. 511. It is only when there exists an obscurity, ambiguity, or other fault of expression that it becomes necessary to interpret the law in order to discover its true meaning." *Julius v. Druckrey*, 214 Wis. 643, 649, 254 N.W. 358.

"There is no ambiguity, uncertainty, or doubt about the meaning of the statute, therefore it admits of no construction, and we must apply it as written. \* \* \*" *Schaut v. Joint School District*, 191 Wis. 104, 108, 210 N.W. 270.

Sec. 62.13 (9) (b) 1 which grants the right to vote to each subordinate of the department cannot be construed to except from its provisions a policeman who became a member of the department on or after January 1, 1948 and hence is under the Wisconsin retirement fund rather than the police pension fund created pursuant to sec. 62.13 (9).

In the case of *Ditsch v. Finn*, 214 Wis. 305, 311, 252 N.W. 562, in speaking of a certain statute, the court said: "Exceptions to its plain language may not be written into it by judicial decree."

JRW

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*Licenses and Permits—Collection Agencies—Adjustment Service Companies*—Under sec. 218.02, Stats., relating to debt adjustment companies, the commissioner of banking may properly refuse such a license to a collection agency or to the wife of the operator of a collection agency.

July 20, 1955.

JOHN F. DOYLE, *Supervisor,*  
*Division of Consumer Credit,*  
*State Banking Department.*

You have inquired whether under sec. 218.02, Stats., the commissioner of banks may properly deny the issuance of adjustment service company licenses in the following instances:

1. The applicant is a licensed collection agency under sec. 218.04, Stats., and proposes to conduct a debt adjustment service in the same office.

2. The applicant is a stockholder in a collection agency company. Her husband conducts the collection agency and owns practically all of the stock. She proposes to conduct a debt adjustment service business in an office adjoining the collection agency and will dispose of her stock in the collection agency if she is granted a debt adjustment service license.

Sec. 218.02 (1) (a), Stats., defines a debt adjustment company as follows:

"(a) 'Adjustment service company,' hereinafter called company, shall mean a corporation, association, partnership or individual engaged as principal in the business of pro-rating the income of a debtor to his creditor or creditors, or of assuming the obligations of any debtor by purchasing

the accounts he may have with his several creditors, in return for which the principal receives a service charge or other consideration."

Sec. 218.02 (3), Stats., relating to the conditions of the issuance of licenses provides:

"(3) CONDITIONS OF THE ISSUANCE OF LICENSES. The commissioner shall issue a license to the applicant to conduct such business at the office specified in the application in accordance with the provisions of this section, if the commissioner shall find:

"(a) That the applicant has filed the required application and paid the required fees.

"(b) That the financial responsibility, experience, character and general fitness of the applicant, and of the members thereof if the applicant be a partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly and efficiently within the purposes of this section.

"(c) That allowing such applicant to engage in business will promote the convenience and advantage of the community in which the business of the applicant is to be conducted."

Sec. 218.02 (4), Stats., relating to orders denying applications reads:

"(4) ORDER DENYING APPLICATION. If the commissioner is not satisfied as to all of the matters specified in subsection (3) he shall enter a special order denying the application for a license and shall return to the applicant his license fee. The commissioner shall make findings of fact as part of and in support of his order denying any application for a license."

Sec. 218.02 (6), Stats., sets up the following grounds for revocation of licenses:

"(6) \* \* \*

"(a) If the licensee has failed to pay the annual license fee or to maintain in effect the bond required under the provisions of this section;

"(b) If the licensee has violated any provisions of this section or of any lawful order issued hereunder;

"(c) If any fact or condition exists which, if it had existed at the time of the original application for such license,

clearly would have warranted the department in refusing to issue such license;

“(d) If the licensee has demonstrated untrustworthiness or incompetency to act in such business in a manner to safeguard the interests of the public.”

Further powers are granted the commissioner in sec. 218.02 (7), Stats., as follows:

“(7) POWERS OF COMMISSIONER. It shall be the duty of the commissioner and he shall have power, jurisdiction and authority to investigate the conditions and ascertain the facts with reference to such companies and upon the basis thereof:

“(a) To issue general or special orders in execution of or supplementary to this section, but not in conflict therewith, to protect debtors from oppressive or deceptive practices of licensees;

“(b) To regulate advertising and solicitation of business by licensees, and to prevent evasions of this section;

“(c) At any time and so often as the commissioner may determine to investigate the business and examine the books, accounts, records and files used therein of every licensee. The actual cost of such examination shall be paid to the commissioner by every licensee so examined within 30 days after demand therefor by the commissioner, and the state may maintain an action for the recovery of such costs in any court of competent jurisdiction;

“(d) To determine and fix by general order the maximum fees or charges that such companies may make.”

It will be seen that the commissioner has rather wide powers in the first instance as to the granting of licenses to debt adjustment service companies. He must find general fitness on the part of the applicant. The circumstances of the applicant must be such as to warrant the belief that the business will be operated honestly, fairly, and efficiently and that it will promote the convenience and advantage of the community. He also has the power to issue general or special orders to protect debtors from oppressive or deceptive practices and to make such rules as may be necessary to enforce the law.

In order to discuss your problem intelligently it is necessary to give some consideration to the nature of the collection agency business and the debt adjustment business.

The nature and purpose of collection agencies are pretty well understood. They solicit delinquent accounts for collection, and endeavor to collect the same, usually on a commission basis. They discharge a recognized and essential function in the business world. In Wisconsin they are licensed by the commissioner of banks under sec. 218.04. In a decision of the Wisconsin supreme court on June 28, 1955, in the case of *H. A. Meyers et al. v. Guerdon M. Matthews, Commissioner of Banks*, 270 Wis. 453, it was pointed out that the collection agency law was created by ch. 358, Laws 1937, and that the records of the banking department show that after the passage of the law the principal vices aimed at by the legislature have ceased.

The relationship of the licensed collection agency to creditors whose accounts it is collecting is that of principal and agent. Such relationship is a fiduciary one, and it is the duty of the agent, in all transactions affecting the subject matter of the agency, to act with the utmost good faith and loyalty to further the principal's interests. It is immaterial in the application of this rule that the agency is one coupled with an interest, or that the compensation given the agent is small or nominal, or even that it is a gratuitous agency. See 3 C.J.S. 6-7.

The function of the debt adjustment service company is directly contrary to that of the collection agency. Its place in our economy is predicated upon the proposition that there are many debtors who somehow lack the knack of being able to satisfy their creditors and who can be helped, for a price or commission, by some persuasive negotiator who attempts to prorate the debtor's available earnings among the various creditors, secured and unsecured, impatient and otherwise, and also to scale down the debts where the debtor's circumstances make such procedure imperative. Again the relationship between the debtor and the prorater is that of principal and agent.

While there is only one licensed debt adjustment company in Wisconsin, the activities of these concerns throughout the country has occasioned considerable discussion in recent months, most of it adverse. The fees of some of these agencies outside Wisconsin run as high as 25 per cent with additional charges for monthly bookkeeping. Other agencies

charge a \$25 retainer fee plus an over-all fee of 15 per cent of the amount disbursed to creditors with a penalty of 7½ per cent of the balance not liquidated in case the debtor defaults. Under that arrangement the prorater could earn a substantial fee for not adjusting the debts.

A rapid glance around the country reveals the following:

We are informed that the state of Maine has just passed a statute prohibiting the budget planning business and providing a penalty for engaging in such business, senate amendment "A" to H.P. 1157, L.D. 1375, Bill "An Act Defining and Regulating the Collection Agency Business and the Budget Planning Business."

There is a bill in the Illinois legislature, senate Bill 250, to regulate prorater companies, and some ten other states have similar bills pending. Ohio has two bills, one a prohibitory and the other a regulatory measure. No doubt some of these have been disposed of by this time either one way or the other. In 1954 the Bar Profession Act of the province of Quebec was amended so as to classify debt adjusting or prorating as unauthorized practice of law.

In Philadelphia one of these concerns was recently convicted of violating the collection agency law and in Chicago two firms have been indicted on a charge of committing fraud by radio, fraud by mail, and conspiracy. The operators of Peoria Debt Counselors were named in a warrant charging them with embezzlement in a confidence game at Peoria, Illinois. Two of their clients had paid in \$741.54 during a 12-month period of which only \$289.96 had been distributed to creditors.

Investigations are being conducted in Flint, Michigan, and in Ohio at Lima and Toledo. An investigation is under way by the attorney general of New York and in Boston fourteen complaints were made in one day to the district attorney's office. It is alleged that in that area poor families have been victimized of some half million dollars by these concerns. At Detroit two finance company operators have been arraigned on charges of conspiracy to defraud factory workers facing garnishment of their wages by creditors on instalment payment contracts. In a poll conducted by the St. Louis Better Business Bureau 90 per cent of the mem-

bers stated that debt adjusters performed no useful services, and 70 per cent stated they do not make an agreement with debt adjusters, and over 87 per cent reported that debt adjusters did not pay promptly the funds turned over to them for creditors. And so the story goes. See *Unauthorized Practice News*, Vol. 21, No. 1, March 1955, pp. 38-42, and Vol. 21, No. 2, June 1955, pp. 48-54 (published by American Bar Association Committee on Unauthorized Practice of Law).

Whatever may be the merits or demerits of the debt pro-rating business, it is obvious that such an agent owes his undivided loyalty to the debtor who retains his services and that he cannot therefore at the same time properly be an agent for creditors of such debtors. The debtor's interests require that the debts be scaled down in amount and paid over a long period of time. The creditor's interests are to have his debts collected as fully and as promptly as possible. Otherwise he may not be in business very long. The two positions are diametrically opposed.

"No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." VI Matthew 24

This precept, as stated before in other language, is fundamental to the law of agency and is sedulously applied so that an agent's acts which tend to violate his fiduciary duty are considered in the light of frauds upon confidence bestowed, and are not only invalid as to the principal, but are also against public policy. 3 C.J.S 7.

We accordingly have no hesitancy in concluding that it is not only the right but the duty of the commissioner of banking to refuse to issue a debt adjustment service company license to a collection agency, and that where the wife of a collection agent applies for such a license there are grounds for concluding that such an application does not warrant the belief that the business will be operated fairly within the meaning of sec. 218.02 (3) (b), Stats. The statute is couched in such language that the burden is on the applicant to warrant belief on the part of the commissioner that the business will be so operated, and the burden is not

met by the disclosure at the outset that the family income is to be derived through serving conflicting interests, one by the husband and the other by the wife.

WHR

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*Register of Deeds—Signature*—Under sec. 59.51 (4), Stats., relating to the recording of instruments with the register of deeds, the signature of the register of deeds on the certificate indorsing the time and the volume and page of recording may be made by rubber stamp.

July 20, 1955.

JAMES D'AMATO,  
*District Attorney,*  
Waukesha County.

You have inquired whether the register of deeds may indorse her signature upon instruments left for filing by the use of a rubber stamp of her signature.

Sec. 59.51 (4), Stats., provides that the register of deeds shall:

“(4) Indorse upon each instrument or writing received by him for record his certificate of the time when it was received, specifying the day, hour and minute of reception and the volume and page where the same is recorded, which shall be evidence of such facts.”

In 12 O.A.G. 68 the opinion was expressed that the state treasurer could lawfully sign state checks with a rubber stamp. Reference was made in that opinion to the case of *Dreutzer v. Smith*, (1882) 56 Wis. 292, 14 N.W. 465, where it was held that the county clerk or treasurer could stamp his name and title on assignments of tax certificates where the statute provided that the assignment should be “by writing his name in blank on the back thereof, with his official character added.” Earlier opinions cited by the attorney general in support of his conclusion were 7 O.A.G. 419 and 9 O.A.G. 82, 86.

In *Mezchen v. More*, (1882) 54 Wis. 214, 11 N.W. 534, it was held that the name of the attorney on a summons may be typewritten although the statute said "shall be subscribed," and *Garton Toy Co. v. Buswell L. & M. Co.*, (1912) 150 Wis. 341, 348, 136 N.W. 147, is to the effect that a typewritten signature to a contract is a sufficient compliance with the statute of frauds. See also 23 O.A.G. 728 stating that the county clerk may use a facsimile rubber stamp signature on county checks issued in payment of W.E.R.A. and other relief bills.

Your question is accordingly answered in the affirmative.  
WHR

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*Cosmetology—Licenses and Permits*—Cosmetic services rendered to patients in county mental hospitals by nurses and attendants incidental to psychiatric treatment are exempt from regulation under the cosmetology law by virtue of sec. 159.01 (11) (a), Stats.

July 20, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have inquired whether the cosmetology statutes limit the care which may be given to patients in county mental hospitals by hospital attendants, such care being a recognized part of psychiatric nursing and including care of the hair, permanent waves, manicures, application of cosmetics, and the like.

The attendants receive no extra compensation for this work and the patients pay nothing for it. Where they are able to pay at all they are liable only for the actual per capita cost under sec. 46.10 (2), Stats.

It is considered that one of the basic steps in treating regressed and depressed mental patients is to arouse an interest in personal appearance. This is particularly true of female patients. Interest in personal appearance is best stimulated by attempting to make the patient attractive. This type of therapy is regarded as somewhat akin to occu-

pational and recreational therapy in a complete and balanced program so that it should be classified as part of psychiatric nursing care rather than the practice of cosmetology in your opinion.

The answer to your question is found in sec. 159.01 (11) (a), Stats., which you have called to our attention. This states that the provisions of ch. 159 shall not apply to:

“Persons authorized under the laws of this state to practice medicine and surgery and the branches thereof, chiroprodists, masseurs, *hospital attendants, nurses and student nurses.*”

It would be difficult to state the exemption in clearer language. Quite obviously a county mental hospital is not a beauty salon and is not patronized as such.

You are therefore advised that nurses and hospital attendants performing the services above described are not required to be licensed to practice cosmetology, and the hospital is not subject to supervision and inspection as a beauty salon under ch. 159.

WHR

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*Taxation—Collection of Taxes—Semiannual Payment—Time—Computation—*Opinion in 38 O.A.G. 389 superseded by 1951 and 1955 amendments of sec. 370.001 (4), Stats., so that when the last date for payment of taxes or a portion thereof without interest or penalty falls on Sunday, such taxes may be paid on the following secular day without interest or penalty.

July 21, 1955.

CORLISS C. KENNEDY,  
*District Attorney,*  
Richland County.

You note that July 31 this year will fall on Sunday and ask whether the opinion in 38 O.A.G. 389, that where the last date for the payment of the second instalment of real estate taxes under sec. 74.03, Stats., falls on Sunday, such taxes may not be paid on August 1 following without interest, is presently applicable.

At the time of that opinion, the only statutory provision authorizing something to be done on the next secular day where the last day falls on Sunday, was in sec. 331.23 (2), Stats. 1949. The supreme court in *Estate of Brust*, (1947) 252 Wis. 528, had specifically held such provision applicable only to court proceedings and therefore not effective to extend the time for payment of taxes. The opinion was based upon that statute as so interpreted in that case.

However, subsequent thereto, ch. 469 and ch. 734, sec. 33, Laws 1951, created a new provision in sec. 370.001 (4), which is applicable to all statutory provisions, providing that if the last day for doing an act or taking a proceeding falls on Sunday or a legal holiday, it may be done or taken on the next secular day. This new provision rendered obsolete the conclusion reached in the opinion in 38 O.A.G. 389.

Ch. 307, Laws 1955, published on July 6, 1955, and effective the following day, incorporates this same provision into its revision of sec. 370.001 (4). As a result, sec. 370.001 (4) (b), Stats., presently reads as follows:

“If the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday the act may be done or the proceeding had or taken on the next secular day.”

In this connection, it may also be pointed out that said ch. 307, Laws 1955, also creates a sec. 370.001 (4) (c) which takes care of the situation where an office of the state or of any county, city, village, town, school district, or other subdivision of the state, is *officially* closed on Saturday. If the last day for paying any money to or serving upon or filing a document with such an office falls on Saturday, such payment may be made to or document filed with it on the next secular day.

It is our opinion that, under the present statutes, when July 31 falls on Sunday, the second instalment of real estate taxes under sec. 74.03, Stats., may be paid on August 1 without interest or penalty, to the same effect as if the same had been paid on or before July 31.

HHP

*Lobbying—Reports—Criminal Law—Lobbying Offenses*  
—A lobbyist who gives cards to members of the legislature and others entitling the bearers to a quantity of a product manufactured by members of an incorporated association which is the lobbyist's principal, which cards are delivered to wholesalers in return for the product and are ultimately redeemed by the manufacturers from the wholesalers, is not required to report such transactions by sec. 346.245 (1), Stats.

Whether the association is required by sec. 346.25, Stats., to report the expenditures of its members in redeeming such cards depends upon whether or not the association reimburses the manufacturers or gives credit on their membership dues.

District attorney has no authority to proceed under sec. 346.21 (2), Stats., unless a written verified complaint is filed with him. Meaning of "engaging in practices which reflect discredit on the practice of lobbying or the legislature" in sec. 346.205 (3), Stats., considered.

July 22, 1955.

RICHARD W. BARDWELL,  
*District Attorney,*  
Dane County.

You have requested an opinion relative to the following facts:

A licensed lobbyist representing the Wisconsin State Brewers Association (which was interested in a number of bills before the present and past sessions of the legislature) has been giving members of the legislature and other persons cards entitling the bearer to two cases of canned beer. The beer is obtained by presenting the card to the beer distributor named therein, who in turn sends it to the brewery which he represents and the latter pays him the wholesale price, either by check or by crediting his account. Each card is for beer of one of three Milwaukee breweries who are members of the association and they are issued roughly in proportion to the annual dues of the three breweries (which depends upon their volume of business) so that the

burden is equitably shared among those three, though not among all the members of the association.

You have verbally informed this office that no record of the recipients of the beer is kept by the distributors, who treat the transactions as though they were cash sales. Since distribution of the cards is not limited to legislators, the breweries redeeming them have no way of knowing what part if any of the money paid is for the benefit of legislators.

The lobbyist has not included the distribution of these cards in his reports filed pursuant to sec. 346.245 (1), Stats. You inquire whether such failure to report constitutes a violation of the statute, which provides as follows:

“346.245 (1) Every lobbyist required to have his name entered upon the docket shall, within 10 days after the end of each calendar month of any regular or special session of the legislature, file with the secretary of state a sworn statement of *expenses made and obligations incurred by himself or any agent* in connection with or relative to his activities as such lobbyist for the preceding month or fraction thereof, except that he need not list his own personal living and travel expenses in such statement.”

It will be observed that the statute in question does not prohibit the making of gifts to members of the legislature. If a corrupt intent can be proved, to influence the vote of any member by means of such gift, the bribery statute, sec. 346.06 (1), furnishes the basis for prosecution. But it does not appear from your question that you consider there is any foundation for such a charge.

Hence we are concerned only with the interpretation of a *regulatory* statute requiring *reporting* of expenditures and obligations incurred. The question in such a case is not whether the situation comes within the spirit of the law; it is whether it comes within the letter of the statute, which, moreover, must be strictly construed. Moral turpitude and criminal intent are not involved. The simple question is whether the facts fall within the strict letter of the statute.

There is no question that the distribution of the cards to legislators was “in connection with or relative to his

activities as such lobbyist." *State v. Hoebel*, (1950) 256 Wis. 549, 554.

But does such distribution fall within the language, "expenses made and obligations incurred by himself [the lobbyist] or any agent"? It will be observed at once that the lobbyist pays nothing for the beer, nor, apparently, does his principal, the association. The beer is paid for by the brewers who made it, and is probably charged off to promotion expense.

It is apparent, therefore, that the lobbyist has "made" no "expense" nor has he "incurred" any "obligation." The question then is whether the breweries, who have incurred expense, can be regarded as the lobbyist's "agents" within the meaning of the statute. An argument along that line was made by the office 5 years ago in the *Decker* case, discussed below. The supreme court rejected the argument and its decision, of course, is binding upon this office and the district attorneys as well as the trial courts.

In *State v. Decker*, (1950) 258 Wis. 177, it was alleged that a lobbyist was required to report room rent and other expenses incurred in connection with maintaining a suite of hotel rooms occupied for conferences and for entertaining guests, both members of the legislature and friends. It appeared that the items were all billed to the principal, the city of Milwaukee, and paid by it. The city then included the items in its report made after the close of the session pursuant to sec. 346.25. A demurrer to the complaint was sustained and the state appealed.

Upon appeal the attorney general contended that the city should be held to be the "agent" of the lobbyist for purposes of these expenditures and therefore he should have reported them. If this contention had prevailed, it would follow that the breweries would be the agents of the lobbyist in the present situation, and he would be required to report their expenditures. However, the supreme court summarily disposed of the argument as follows (p. 180) :

"We know of no law which sanctions such strained construction under any circumstances, and certainly not in the interpretation of a statute penal in its nature."

In that case the principal had reported the expenditures pursuant to sec. 346.25, Stats., and the court held that was all that was required. In this case not even the principal (the association) has apparently made any expenditures or incurred any obligation. Sec. 346.25 provides as follows:

“Within 30 days after the sine die adjournment of the legislature, every principal whose name appears upon the docket or who has employed any person to engage in any activity permitted under section 346.27 shall file with the secretary of state a complete and detailed statement verified under oath by the person making the same, or in the case of a corporation by its president or treasurer, of *all expenses paid or incurred by such principal* in connection with the employment of lobbyists or in connection with promoting or opposing in any manner the passage by the legislature of any legislation affecting the pecuniary interest of such principal. The accounts shall be rendered in such form as shall be prescribed by the secretary of state. Such accounts shall be open to public inspection.”

To be certain that it is in compliance with sec. 346.25 the association may report the expenditures of its members, if the figures can be obtained, but I am not prepared to say that failure to do so is a violation without further information regarding the organization's agreement with the breweries regarding this beer. The association is a corporation and hence is a legal entity separate from its members. So far as now appears, it pays nothing for the beer, either directly or as a credit against the dues of the members who furnish it.

Your next question is whether the facts show “unprofessional conduct” within the meaning of sec. 346.21 (2), Stats., which provides in part as follows:

“*Upon verified complaint in writing* to the district attorney of Dane county charging the holder of a license with having been *guilty of unprofessional conduct* or with having procured his license by fraud or perjury or through error, the district attorney is hereby authorized to bring civil action in the circuit court for Dane county against the holder and in the name of the state as plaintiff to revoke the license. \* \* \*

“Unprofessional conduct” is defined as follows in sec. 346.205 (3), Stats.:

“A violation of any of the provisions of sections 346.19 to 346.28, or soliciting employment from any principal, or instigating the introduction of legislation for the purpose of obtaining employment in opposition thereto, or attempting to influence the vote of legislators on any measure pending or to be proposed by the promise of support or opposition at any future election, or by any other means than a full and fair argument on the merits thereof, or by making public any unsubstantiated charges of improper conduct on the part of any other lobbyist or of any legislator, or *engaging in practices which reflect discredit on the practice of lobbying or the legislature.*”

Since there is involved no specific violation of the lobbying statutes, the question would be whether the matter falls within the final clause, “engaging in practices which reflect discredit on the practice of lobbying or the legislature.”

There are, so far as we know, no formal canons of ethics governing the practice of lobbying. However, conduct not expressly prohibited by the lobby law, clearly immoral, could come within the definition. For example, any corrupt or fraudulent conduct connected with lobbying activities, whether or not it amounted to a crime, would be sufficient.

Is the conduct here in question so manifestly corrupt as to reflect discredit on the practice of lobbying or the legislature? The circumstances under which the gifts were made do not appear, so we are uninformed of the extent of the practice or whether they were given in consideration, express or implied, of votes cast or to be cast on bills in which the brewers were interested or merely in the general hope of building good will toward the industry. Small gifts and favors to legislators by lobbyists or others, not amounting to outright bribery, do not appear to be regarded as immoral, and indeed they are impliedly tolerated by the statute which requires only that expenditures for such purposes by lobbyists must be reported. See *State v. Hoebel*, (1950) 256 Wis. 549, 553. At any rate, it would require more specific language than is contained in the statute as it now exists, to warrant the conclusion that the legislators intended to prohibit all gifts of whatsoever nature made to themselves.

According to sec. 346.21 (2), Stats., your authority to commence proceedings for revocation of a lobbyist's license

depends upon the filing of a written verified complaint with you. *State v. Hoebel*, (1950) 256 Wis. 549, 555. You do not say that you have such a complaint, so it is probably premature to consider the question.

WAP

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*Pharmacy—Drug Store Permit*—Under sec. 151.02 (9), Stats., when a druggist moves his drug store from one location to another the new store must be inspected and registered and the proper fees paid therefor regardless of the distance from the old store location to the new store location and regardless of the fact that the druggist has just renewed his annual registration of the old store.

July 27, 1955.

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

You have called our attention to the fact that frequent cases arise where there is a change in drug store location shortly after the payment of the annual registration fee under sec. 151.02 (9), Stats., which provides so far as material here:

“\* \* \* For the registration of every new drug store or any drug store upon a change of ownership herein required to be registered, there shall be paid an inspection fee of \$15 together with a registration fee of \$10. Upon annual renewal of registration all places shall pay a fee of \$10, payable on June 1 of each year. \* \* \*”

As illustrative of these changes in location you mention the situation where a druggist moved from one floor of a building to a higher floor in the same building; in other cases a drug store was moved a few doors away on the same street, and two hospital pharmacies were moved into new wings of the same building.

In considering the problem presented it must be kept in mind that sec. 151.02 (9) relates to the licensing of the

pharmacy premises rather than to the licensing of the pharmacist. Annual registration of pharmacists is regulated by sec. 151.02 (3), Stats., and such a registration entitles the pharmacist to practice anywhere in the state.

The obvious purpose of sec. 151.02 (9) is to protect the public in the matter of the adequacy and sanitary conditions of the drug store where drugs are compounded and dispensed. The inspection and regulation fee paid for one location clearly has no relationship to an entirely different location, and it is conceivable that in the absence of the safeguards provided by this section a druggist who had perfectly adequate quarters on the third floor of a building might move to wholly inadequate and unsanitary quarters on the fourth floor of the same building. The shortness of the distance from the first location to the second bears no relationship whatsoever to public health and safety. Whether it is 150 feet or 150 miles is accordingly wholly immaterial, and even if the legislature were to attempt an exemption in favor of the druggist who is merely moving across the street or upstairs it is doubtful that such an exemption or classification would meet constitutional tests.

Since in all these cases the stores are in fact new stores at new locations they must be inspected and registered as required by sec. 151.02 (9), and the fees therein provided must be paid even though the druggist has just renewed the registration of the store from which he is moving. If this is considered to be an undue hardship on drug store operators the answer should come in the form of some sort of amendment of the statute whereby the druggist would be granted a proportional refund for the unexpired part of the registration year at the old location. Such a refund, however, could not be made by the board without legislative sanction, since no money may be paid out of the state treasury except in pursuance of an appropriation by law. Art. VIII, sec. 2, Wis. Const.

WHR

*Public Assistance—Proration of Claims*—Proration of estate among claims for old-age assistance, relief, and institutional care, discussed. Where old-age assistance was applied for, by husband and wife individually, before 1945, this act severed a joint tenancy and converted it to a tenancy in common. Thereafter, claims for the support and care of each of them individually receive prorated shares of their separate estates.

July 27, 1955.

HERBERT J. MUELLER,  
*District Attorney,*  
Winnebago County.

You present the following facts: Prior to 1937 the city of Oshkosh furnished relief to Mr. A. Commencing in 1937, Winnebago county furnished old-age assistance to both Mr. A. and his wife; this assistance continued to Mr. A. until his death in 1944 and to Mrs. A. until 1953, since which time she has been institutionalized at state expense. The sole property of the beneficiaries consists of a home held in joint tenancy (as yet untermiated) and used as a homestead until the institutionalization of the wife, and valued at about \$3,000. Old-age assistance liens were duly filed by the county authorities.

There are now three claims against this property:

1. The claim of the city of \$1,111.96 for relief furnished to Mr. A. prior to 1937.
2. The dual claim of the county (in which the state and federal governments have a pro rata interest) for old-age assistance granted to Mr. A. from 1937 to 1944 and to Mrs. A. from 1937 to 1953.
3. The claim of the state for institutional care to Mrs. A. since 1953.

Your question is: How do these claims share—if at all—in the \$3,000 which can be raised by the sale of the real estate?

Sec. 49.26 (7a), Stats., created by ch. 121, Laws 1947, reads as follows:

“NONPRIORITY OF LIEN. The old-age assistance lien shall not take precedence over any claim for care or maintenance

furnished by the state or its political subdivisions, but all such public claims when allowed by the court shall share pro rata."

To the extent that this applies, it produces the result that the public assistance claims against each estate, if proper, share pro rata in the proceeds of such estate.

The fact that sec. 49.26 (7a) was created subsequent to the maturing of several of these claims and subsequent to the death of the husband would not affect its application to the instant case. It has been ruled that this section is retroactive in its application since it is essentially remedial in nature and does not involve impairment of vested rights protected by the constitution. See 37 O.A.G. 295, citing *Prey v. Allard*, (1941) 239 Wis. 151.

Sec. 49.08, Stats., reads in part as follows:

"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. In such action the statutes of limitation shall not be pleaded in defense \* \* \*."

That this right of recovery is not defeated by the homestead exemptions is discussed in the opinion rendered in 36 O.A.G. 143, wherein it is stated *inter alia* that the doctrines relating to claims for the support of the insane and for old-age assistance should be equally applicable to the recovery of sums furnished as direct relief. This is based, in part, on the reasoning that under the statutory and case law, citing particularly *Johnson v. Door Co.* (1914), 158 Wis. 10, and 20 O.A.G. 638, the claim for reimbursement is not a debt but an action in rem against the property.

Sec. 316.01 (2), Stats., is a statute of limitations. *Scholl v. Adams*, (1931) 206 Wis. 174. Hence, it cannot be pleaded against the city's claim arising out of relief payments, regardless of the age of the claim.

Under the doctrine enunciated in *Estate of Feiereisen*, (1953) 263 Wis. 53, the effect of the individual requests of husband and wife for old-age assistance prior to the amendment of sec. 49.26 (4), Stats., in 1945, was to sever their

joint tenancy in the real estate in question. Thus, the property in question now vests half in the estate of Mr. A. and half in Mrs. A., and the claims against these respective beneficiaries can be asserted against their respective interests.

The claim of the city is against the estate of Mr. A. since he was the person who applied for and received the relief. That he undoubtedly used part of this relief for supporting his wife, as he was legally bound to do, does not convert his application and his receipt into application and receipt by her. Although *Estate of Hahto*, (1940) 236 Wis. 65, and *State Department of Public Welfare v. Shirley*, (1943) 243 Wis. 276, are distinguishable from the instant case in that they do not relate to relief, their reasoning tends to support this position. This same reasoning applies to the state's claim against Mr. A.'s estate for institutional care furnished his wife long after his death.

On the basis of this reasoning and these authorities, we conclude as follows:

1. The proceeds from Mr. A.'s one-half interest in the real estate could be prorated between the old-age assistance lien, based upon the assistance he received, and the claim of the city of Oshkosh for relief furnished him.

2. The proceeds from Mrs. A.'s one-half interest should be prorated between the old-age assistance lien based upon the assistance furnished her and the state's claim for her institutional care.

These conclusions must be qualified by the possibility that the claims against the husband's estate are subject to being disallowed by the court in whole or in part to permit the estate to be used to support the wife.

GFS

*Unemployment Compensation—Counties— Elected Officers*—Defeated county officer is not entitled to unemployment compensation benefits where county board did not elect to include employment as an elected or appointed public officer and have such election approved by the industrial commission pursuant to sec. 108.02 (5) (f), Stats.

July 27, 1955.

ALLEN C. WITTKOPF,  
*District Attorney,*  
Florence County.

Ch. 108, Stats. 1939, related to unemployment compensation. Sec. 108.02 (4) (f) provided in part:

“Any political subdivision of the state, not otherwise subject to this chapter, who files with the commission its written election to become an ‘employer’ subject hereto \* \* \* shall, with the written approval of such election by the commission, become an ‘employer’ fully subject to this chapter, as of the date and under the conditions stated in such approval. \* \* \*”

On August 18, 1939, the county board of Florence county took action, pursuant to this statute, for the purpose of having said county become an “employer” within the meaning of the unemployment compensation act. On August 24, 1939, the then county clerk of Florence county filed the following written election with the industrial commission of Wisconsin:

“The undersigned political subdivision of the State of Wisconsin, by resolution of its *County Board*, duly adopted on *August 18, 1939*, hereby elects to become an ‘employer’ subject to the Unemployment Compensation Act (Chapter 108 of the Wisconsin Statutes), as follows:

“1. This election is duly made in accordance with Sec. 108.02 (4) (f) of the statutes, set out below.

“2. This election shall, when approved by the Industrial Commission of Wisconsin, be effective as of July 17, 1939, and shall have the same effect (for all the purposes of Chapter 108) as if the undersigned had remained an ‘employer’ under Chapter 108 continuously throughout 1939.”

On September 15, 1939, this election was approved by the industrial commission pursuant to the aforesaid sec. 108.02 (4) (f), Stats. 1939.

Sec. 108.02 (5) (f), Stats. 1939, provided in part:

“(f) The term ‘employment,’ as applied to work for a governmental unit, shall not include:

- “1. Employment as an elected or appointed public officer;
- “2. Employment by a governmental unit on an annual salary basis;”

By sec. 1 of ch. 288, Laws 1941, the introductory paragraph to sec. 108.02 (5) (f) was amended to read:

“The term ‘employment,’ as applied to work for a governmental unit, except as such unit duly elects otherwise with the commission’s approval, shall not include:—”

By sec. 1 of ch. 483, Laws 1953, sec. 108.02 (5) (f) 2 of the statutes was repealed and recreated to read:

“Employment, of a professional or consulting nature, paid on a per diem or retainer basis.”

Said ch. 483, Laws 1953, also made numerous other changes in the statutes relating to unemployment compensation. Said act was published July 21, 1953. Under date of July 22, 1953, the industrial commission issued a memorandum to Wisconsin government units subject to the unemployment compensation law in which it indicated the changes made by ch. 483, Laws 1953. The following quotations are taken from said memorandum:

“\* \* \*

“b. More public employes will earn U.C. benefit rights.

“The amended law no longer excludes employment ‘on an annual salary basis.’ That exclusion has been repealed, as to any work done by such employes—after July 25, 1953—for any government unit.

“Such annual-salary employes are rarely laid off; so providing U.C. rights for them shouldn’t cost much—in actual benefit payments.

“\* \* \*

“A. Coverage of Government Units.

“1. By law:—Each state department; and the City of Milwaukee.

"2. By election:—Any other government unit may elect to be covered, for 3 calendar years or more; and may thereafter terminate its election in any month (but cannot thereby recover any of its U.C. account).

"Any such unit may limit its election to one or more of its operating units—under s. 108.02 (4) (f), as recently amended.

"Any such unit may elect to cover any type of government employment excluded by s. 108.02 (5) (f).

"B. Coverage of Public Employes.

"1. Public employes are covered only if their government unit is covered.

"2. And various types of government employment—listed by s. 108.02 (5) (f) of Wisconsin's U.C. law—are excluded (for instance:—public officers; teachers; etc.), unless the government unit elects otherwise.

"\* \* \*

"4. Employment by any government unit 'on an annual salary basis' is newly covered, as to any work done after July 25, 1953.

"\* \* \*

J. Next Steps—for Government Units.

"\* \* \*

"3. Some cities or counties, covered by election, may want to consider ending their election, or limiting it to one or more operating units, or changing it to cover one or more excluded employments.

"\* \* \*

"5. Each government unit should include an estimated amount for unemployment compensation, in its next budget."

On August 21, 1953, the county board of Florence county adopted a motion to the effect that "Florence county continue under the unemployment compensation law as amended by the 1953 session of the Wisconsin legislature, and that salaried as well as hourly employes be covered."

It does not appear that Florence county ever notified the industrial commission of Wisconsin of the aforesaid action taken on August 21, 1953, nor that said commission ever approved such action.

Upon the basis of the foregoing facts, you inquire whether a defeated county officer would be eligible to claim unemployment compensation benefits.

The exact purpose of the action taken by the county board of Florence county on August 21, 1953, is speculative.

It is possible, as the result of the aforesaid memorandum from the industrial commission, that someone suggested that the county should "consider ending their election" to be an employer within the meaning of the unemployment compensation law and that the county board passed the aforesaid motion on August 21, 1953, to indicate its desire to continue as an employer under said law.

It is also possible that the county board thought that it was necessary to take affirmative action in order to provide unemployment compensation coverage for its public employes who were employed "on an annual salary basis."

In any event, the reason for the action is immaterial.

At the time of such action, sec. 108.02 (5) (f) of the statutes, as amended by ch. 483, Laws 1953, provided:

"(f) The term 'employment,' as applied to work for a governmental unit, except as such unit duly elects otherwise with the commission's approval, shall not include:

"1. Employment as an elected or appointed public officer;  
"\* \* \*"

The motion passed by the county board on August 21, 1953, did not purport to provide unemployment compensation coverage for "an elected or appointed public officer." Even if it had attempted to do so, such coverage could have been provided only with the approval of the industrial commission which, under sec. 108.02 (2), is the "commission" referred to in said statute.

As indicated above, the aforesaid action taken by the county board was not submitted to the industrial commission for approval and was not approved by said commission. Hence, even if the purpose of said action had been to provide unemployment compensation coverage for public officers of Florence county, the action never became effective to accomplish this purpose.

Therefore, the former county officer of Florence county who was defeated for reelection is not entitled to unemployment compensation benefits.

JRW

*Counties—Surety Bonds—Veterans' Service Commission and Officer—Statutes—Effective Date—Ch. 312, Laws 1955,* relating to the requirement of individual bonds for members of the county veterans' service commission and the county veterans' service officer is presently effective.

August 10, 1955.

CORLISS C. KENNEDY,  
*District Attorney,*  
Richland County.

You have asked for my opinion concerning the effective date of ch. 312, Laws 1955. This law amends sec. 45.12 (2) of the statutes, relating to the county veterans' service commission. Prior to the passage of this chapter the law required the county judge to require the members of the commission together with the county veterans' service officer, "to execute to the county a joint and several bond, with sufficient sureties to be approved by him, in a sum equal to the tax levied in the current year for expenditure by the commission." The law as amended reads as follows:

"45.12 (2) Such commission shall be organized by the election of one of their number as chairman. Said judge after the expiration of the terms of those first appointed shall annually appoint one person as a member of such commission for the term of 3 years. He shall require each member of the commission and the county veterans' service officer, to execute to the county an individual surety bond, with sufficient sureties to be approved by the county judge, each such bond to be in an amount equal to the tax levied in the current year for expenditure by the commission. Each such bond shall be filed with the county clerk."

You ask whether the bonds must be posted at this time or whether it is not necessary to require the bond until the beginning of the next fiscal year.

Sec. 370.05, Stats., states that every law or act which does not prescribe the time when it takes effect shall take effect on the day after its publication. There is nothing in the wording of the new law which in any way indicates intent of the legislature to keep it from becoming effective until

some future date, and any attempt to construe the statute in this manner would be very strained. It is therefore my opinion that the requirement as to individual bonds of the county veterans' service commission and the county veterans' service officer is now in effect.

REB

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*State Investment Board—Wisconsin Retirement Fund—Common Stock Investments—Words and Phrases—Admitted Assets—*While municipality prior service obligations are assets of the Wisconsin retirement fund they are not "admitted assets" within the meaning of secs. 25.17 (2b) and 206.34 (1) (m), Stats.

In determining the percentage of the admitted assets of the Wisconsin retirement fund which may be invested in common stocks, the common stock assets of said fund may be valued at market value rather than book value.

August 10, 1955.

ALBERT TRATHEN, *Chairman,*  
*State Investment Commission.*

Sec. 25.17, Stats., relates to the powers and duties of the state of Wisconsin investment board and provides in part:

"25.17 \* \* \* The board shall have power and authority and it shall be its duty:

"\* \* \*

"(2) To invest any of the funds specified in subsections (1) and (2a) in loans, securities and any other investments authorized by section 206.34 \* \* \*.

"(2a) To have exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from the Wisconsin retirement fund created by ss. 66.90 to 66.918.

"(2b) To invest the funds of the state retirement system and the Wisconsin retirement fund in loans, securities or investments in addition to those permitted by any other section of the statutes, provided that the aggregate of the

loans, securities and investments made under this subsection shall not exceed 15 per cent of the admitted assets of each of said funds, and provided further that all of the common stocks or preferred stocks purchased pursuant to authority conferred by this subsection shall qualify as investments under the applicable provisions of section 201.25 (1) (ff), (fg) and (fh).” (As amended by ch. 59, Laws 1955)

Sec. 206.34 (1), Stats., provides in part:

“206.34 (1) Every life insurance company organized under the laws of this state may invest its assets as follows:

“\* \* \*

“(m) In loans, securities or investments in addition to those permitted in this subsection whether or not such loans, securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this section or under other sections of the statutes; provided, that the aggregate of such company’s loans, securities and investments under this paragraph shall not exceed 5 per cent of such company’s admitted assets.”

You have requested the opinion of this office upon the following two questions:

1. Are prior service obligations of municipalities properly considered part of the admitted assets of the Wisconsin retirement fund?

2. For the purpose of determining what percentage of admitted assets may be invested in common stocks, are the said common stocks to be valued at market value or book value?

Secs. 66.90 to 66.918, Stats., relate to the Wisconsin retirement fund. The following portions of said statutes are relevant to the questions which you have asked:

“66.901 The following words and phrases as used in ss. 66.90 to 66.918, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

“\* \* \*

“(7) PRIOR SERVICE. The period beginning on the first day upon which any participating employe first became an employe of the municipality by which such employe was employed on the effective date of participation of such municipality, and ending on such effective date, excluding

all intervening periods during which such employe was separated from the service of such municipality following a resignation, dismissal, lay-off, or expiration of any term of appointment or election as certified by the governing body of such municipality."

"66.904 (1) CREDITS TO EMPLOYEES. (a) For the purpose of determining the amount of any annuity or benefit to which an employe or beneficiary shall be entitled, each participating employe shall be credited with the following amounts, as of the dates specified:

"1. For prior service, each participating employe who is an employe of a participating municipality on the effective date, shall be credited, as of such date, with a prior service credit of an amount equal to the accumulated value, as of such date, of the contributions which would have been made during the entire period of prior service of such employe, in accordance with s. 66.902 (3), assuming the earnings of such employe to have been uniform during such period of prior service and equal to the monthly earnings obtained by dividing the total earnings during the period of the 3 calendar years immediately preceding the effective date, by the number of months in such period during which any earnings were received by such employe; the rate of contribution to have been the prior service contribution rate applicable to such employe; the contributions for each calendar year to have been made at the end of such year; and the contributions to have accumulated with interest at the rate of 3 per cent per annum compounded annually. In computing such prior service credits normal contribution rates of 5 and 7 per cent shall be used in lieu of 3 and 5 per cent respectively as set forth in s. 66.903 (2) (a) 1, from which shall be deducted any contributions to the federal old-age and survivors insurance system for any such prior service." (As amended by ch. 262, Laws 1955)

"66.905 (1) Except as provided in s. 66.905 (7), each participating municipality shall make contributions to the fund as follows:

"(a) Municipality contributions of the percentages, as specified in this section, of each payment of earnings made to each participating employe. \* \* \*

"\* \* \*

"(2) Each such percentage shall be the rate computed as necessary to provide, as of the beginning of such year, the total of the following:

"(a) The uniform annual amount required, after allowance for anticipated employe separations, at 3 per cent interest per annum, to amortize, over the remainder of the period of 40 years following the effective date, the amount,

as of the beginning of such year, of the obligation for the prior service credits granted to the employes of the municipality." (As amended by ch. 55, Laws 1955)

"66.915 (1) For the purposes of determining the amounts of the obligations of municipalities, each participating municipality shall be charged with the following amounts, as of the dates specified:

"(a) For prior service credits, a prior service obligation of an amount equal on the effective date of participation, to all prior service credits granted to the employes of such municipality in accordance with s. 66.904 (1) (a) 1, as of such effective date." (As amended by ch. 55, Laws 1955)

"66.912 (1) The board shall have, in addition to all other powers and duties arising out of sections 66.90 to 66.918 not otherwise in this section specifically reserved or delegated to others, the following specific powers and duties. The board is authorized and directed to:

"\* \* \*

"(m) Have the accounts of this fund audited at least annually by the department of state audit.

"\* \* \*

"(3) The actuary shall be the technical advisor of the board and in addition to general advice shall specifically be responsible for, and it shall be his duty:

"\* \* \*

"(b) To determine the proper rates of municipality contributions in accordance with section 66.905.

"(c) To make an annual valuation of the liabilities and reserves required to pay both present and prospective benefits.

"(d) To compute and certify the actuarial figures on the annual financial statements of the board.

"\* \* \*"

In the case of *National Life Insurance Co. of United States v. Haines*, (1917) 255 Pa. 599, 100 A. 517, the court said, at p. 519:

"\* \* \* The evidence shows that 'admitted assets' of a casualty company are such investments as are authorized for such companies by Act June 1, 1911 (P. L. 573, 574) §§ 19, 20, also cash, and certain other items which may be regarded as equivalent to cash. They are such assets as will be 'admitted' by the insurance commissioner as legal investments of the capital and surplus of such a company in determining solvency. Any other property or investments which it may hold are termed 'nonadmitted assets.' Duebills and unpaid checks, even though carried by the company as cash, are 'nonadmitted assets.'"

In MacLean on Life Insurance, Fourth Edition, the author states, at p. 296:

*"The Assets.*—In order to show the true assets or, as they are called in the convention blank, the *admitted assets* it is necessary to *add* to the ledger assets items due to the company but not yet entered on the ledger, because they have not yet been received, and called *non-ledger assets* and to *deduct* from the total *gross assets* so obtained any items appearing as assets on the company's ledger but *not admitted* as good assets for the purpose of a balance sheet by the State insurance departments.

*"Ledger Assets.*—The composition of the amount shown as ledger assets, corresponding with the amount which has already been obtained by adding to the previous year's ledger assets the ledger income and deducting the ledger disbursements, is first shown in detail. The amount is made up of invested assets, cash assets, and miscellaneous items. The invested assets are real estate, mortgage loans, collateral loans, policy loans, premium notes, bonds, and stocks, all entered at the values shown in the company's ledger. The cash assets consist of cash in the company's offices or in the hands of its representatives, cash on deposit in banks, and cash in transit. Other ledger assets are the value of the supplies on hand and any debts due to the company.

*"Non-ledger Assets.*—The non-ledger assets comprise chiefly (1) interest and rent due and accrued; (2) net amount of uncollected and deferred premiums; (3) excess of market values of real estate, bonds, and stocks over the ledger (book) value.

\* \* \*

"The third group of non-ledger assets is the excess of market or amortized values of securities over their book values. As explained in the previous chapter, 'market value,' in the case of non-amortizable securities, may mean either the actual market value or the special convention values when such special values have been authorized by the state authorities. In the case of amortizable securities the amortized value is, of course, the same as the book value.

"Since the true measure of the value of invested assets is considered to be the market value, the addition of the excess, if any, of market values of real estate, non-amortized bonds, and stocks over book (ledger) values is necessary in order to show the assumed *real* value of the company's property as distinguished from the values entered on the company's books. In the same way if the ledger values of these assets are in excess of the market values

it is necessary to make a deduction which appears among the *assets not admitted*.

*Assets Not Admitted.*—Besides the item just mentioned (the excess of the ledger value of real estate, non-amortizable bonds, and stocks over market value), the assets not admitted include supplies, furniture, cash in the hands of officers or agents, loans on personal security, accounts collectible, and interest due or accrued on bonds in default. Some of these, although not allowed, are good assets.

\*\*\*

*Admitted Assets.*—The amount of the admitted assets, *viz.*, the ledger assets increased by the non-ledger assets and diminished by the assets not admitted, represents the real worth of the company's assets, including the values of all items to be received and after deducting all worthless items (or items considered worthless for statement purposes) appearing on the books. The admitted assets are the assets which one must compare with the liabilities in order to determine the solvency of the company and the amount of its surplus."

Pursuant to the provisions of sec. 66.912 (1) (m) quoted above, the board of trustees of the Wisconsin retirement fund has the accounts of the Wisconsin retirement fund audited annually by the department of state audit. Each annual audit report submitted by the department of state audit contains a determination of the prior service obligations of all of the municipalities which are included under the Wisconsin retirement fund.

Pursuant to sec. 66.912 (3) quoted above, the actuary for the Wisconsin retirement fund annually makes a determination of the prior service obligations of all the municipalities under the fund.

The following tabulation shows these prior service obligations as determined respectively by the audit report and by the actuarial report at the end of the calendar years 1948 to 1953, both inclusive.

	<i>Audit Report</i>	<i>Actuarial Report</i>
12-31-48 -----	\$48,444,691.94	\$40,092,076.46
12-31-49 -----	47,540,643.26	39,416,397.05
12-31-50 -----	47,696,524.03	39,591,769.48
12-31-51 -----	45,908,025.69	38,890,885.40
12-31-52 -----	44,859,707.11	36,459,278.25
12-31-53 -----	43,241,203.09	35,319,871.20

An actuarial report and survey of the Wisconsin retirement fund prepared by Nelson and Warren, consulting actuaries, dated June 8, 1953, contains the following explanation of the reason for the difference in the figures found in the two reports:

“The prior service obligation of each municipality on the books of the Fund, the ‘Audit Obligation’, reflects the prior service credits applicable to all its employees. Since some of the employees having prior service credits will be separated prior to eligibility for retirement, and hence will forfeit their prior service credits, it is not necessary to require municipality prior service contributions of the entire amount of the obligation. Moreover, as long as death benefits are charged to the pooled death account, it is not necessary for municipalities to contribute on account of the prior service credits of employees expected to die in service. The prior service contribution rates are intended to provide sufficient contributions only for the prior service credits of employees who will eventually retire. The audit obligation reduced by the discount made on account of the probability of separation or death is considered the present value of the municipality’s obligation for prior service credits and is called the ‘Actuarial Obligation.’” (p. 14)

From the foregoing it is apparent that the municipalities will not be compelled to pay into the Wisconsin retirement fund the amount of the prior service obligation shown in the audit report for any particular year. The prior service obligation as discounted by the actuary is more realistic and more closely represents the amount which the municipalities probably will have to pay. This “actuarial obligation” results from the use of survival rates and discount procedures which are deemed to produce reasonably accurate and satisfactory results. In the final analysis, however, it must be admitted that they are estimates. In the aforesaid actuarial report and survey prepared by Nelson and Warren, dated June 8, 1953, said actuaries were of the opinion that the survival rates and procedures used by the then actuary for the fund resulted in an overstatement of the municipality prior service obligation to the extent of approximately \$700,000. This variation was not substantial or alarming in view of the size of the municipality prior service obligation, but it does indicate the unreliability of

any figure which might be alleged to represent the exact municipality prior service obligation account at a particular time.

In computing the municipality contribution rates, which include a factor for the purpose of liquidating the municipality prior service obligation account, the actuarial obligation rather than the audit obligation is used. Sec. 66.905 (1) quoted above, specifies that the municipalities must make municipality contributions which shall include an amount to amortize the prior service obligation with interest. This is an obligation imposed upon the municipality by statute. The municipality prior service obligation is shown in both the audit report and actuarial report as an asset of the Wisconsin retirement fund and I do not question the propriety of doing so. However, it is my opinion that while the municipalities under the Wisconsin retirement fund eventually and undoubtedly will discharge their respective prior service obligations in full, such obligations which are indefinite in amount and which are not only uncollected and unavailable to pay debts but not yet due cannot be considered the equivalent of cash or as "admitted assets" within the meaning of sec. 25.17 (2b) or sec. 206.34 (1) (m), Stats.

The foregoing quotation from MacLean on Life Insurance indicates that the excess of the market value of securities over their book value constitutes a non-ledger asset which properly may be included as an "admitted asset." Hence, it is my opinion that in determining what percentage of admitted assets may be invested in common stocks, the common stock assets are to be valued at the market rather than the book value.

JRW

*Child Protection—Adoption—Foreign-Born Children—* Charitable or fraternal organization not licensed as a child welfare agency is prohibited by sec. 48.37 (1), Stats., from making study of proposed adoptive home and sending favorable report thereon to a foreign country in order that a passport may be issued by that country for a child to be placed in such home for adoption in Wisconsin.

County department of public welfare administering child welfare services pursuant to sec. 48.315, Stats., is without authority to make home study and favorable report to a social agency of a foreign country in support of an adoption of a child in the foreign country by Wisconsin residents.

August 11, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have requested my opinion on two questions, the first of which may be stated as follows:

The department of external affairs in Ireland (Eire) will not issue a passport for an Irish child to be placed in the United States for adoption without a letter of approval from a Catholic charities agency of the diocese in which the adoptive family resides. The application for passport together with the letter of approval is submitted to the appropriate archbishop in Ireland, and if he approves, the department of external affairs has agreed to issue a passport. In effect, then, the Irish child is thus placed in an American home for adoption. The question is whether a Catholic agency in Wisconsin furnishing such letter of approval of a Wisconsin family must be a licensed child welfare agency, not merely a general Catholic charitable or fraternal society.

Sec. 48.37 (1), Stats., provides as follows:

“No person, other than the parent or legal guardian, and no firm, association or corporation, and no private institution shall place, assist, or arrange for the placement of any child in the control and care of any person, with or without contract or agreement, or place such child for adoption, *other than a licensed child welfare agency.*”

It seems apparent that the agency furnishing the letter of approval is assisting “the placement of a child in the

control and care of any person \* \* \* for adoption." 37 O.A.G. 403, 408. The authorities in Ireland undoubtedly expect that the Wisconsin agency will make a home study before writing the letter of approval, which is a necessary prerequisite to the placement. No doubt also, it is contemplated that the agency will supervise the home during the probationary period preceding adoption. These functions require the services of experienced case workers of the kind employed by child welfare agencies who are authorized to place children for adoption. The law therefore wisely limits such activities to licensed child welfare agencies and prohibits other persons and agencies, however well intentioned they may be, from engaging in them.

Your second question is as follows: Section V, public law 203, 83rd congress, known as the refugee relief act of 1953, provides for admission to the United States of certain eligible orphans who have been legally adopted abroad by United States citizens. This section does not outline the procedure for adoption, and many children are being adopted through proxy procedure. One foreign agency that is using this procedure has advised that they do not arrange for a proxy adoption unless they have a favorable recommendation from a social agency in the adoptive family's state of residence. You inquire whether a county department of public welfare administering child welfare services has authority to make a home study and give such recommendation to the foreign agency.

In the first place, it will be observed that in the situation involved in this question there is no "placement" of a child "for adoption." Hence sec. 48.37 (1), Stats., quoted above, has no application. The only question is whether the county agency is authorized by law to make a home study and report, in furtherance of a foreign adoption by Wisconsin residents of a child who is not and has not been in Wisconsin.

Sec. 48.315, Stats., provides as follows:

"If the county board of supervisors of any county having a population of less than 500,000 shall decide to have child welfare services administered by the county department of public welfare under the provisions of s. 46.22 (5) (g), then such county department of public welfare shall have

the additional powers and duties given county children's board under s. 48.30 (1) to (8) (introductory paragraph not to apply) and shall have and exercise all the powers and duties that are authorized for licensed child welfare agencies under ss. 48.35 to 48.38, except that such county welfare department shall not have authority to accept permanent care and custody of any child or to place children for adoption. Such county department shall not be required to be licensed or approved by the state department of public welfare to issue permits to foster homes under s. 48.38 or to function as an authorized child welfare agency; but any such permit to a foster home may be revoked by the state department of public welfare pursuant to s. 48.39 (2)."

A careful examination of the provisions of secs. 46.22 (5) (g), 48.30 (1) to (8) and 48.35 to 48.38, Stats., fails to reveal any statutory provision authorizing such activity on the part of a county department of public welfare. The nearest thing to it is sec. 48.30 (6) which provides as follows:

"To make such reports to the state department of public welfare as it may request upon any matter or situation within the county concerning any child in which said department is interested;"

It will be observed that the requirement of making reports is limited to reports to the state department of public welfare, requested by the latter, and which concern a child in which the state department is interested. If it were intended that such county agencies should make reports to agencies in foreign countries about any matter or situation within the county concerning a child in which the foreign agency is interested, such authority would have been spelled out in the statute.

Therefore, although the county department would not be illegally assisting in the placement of the child for adoption in violation of sec. 48.37 (1), Stats., it would be acting in excess of the authority vested in it by statute if it were to make a home study and report to a foreign agency in support of an adoption to be completed in the foreign country.

WAP

*Appropriations and Expenditures—University*—Appropriation by sec. 20.419 (3), Stats. 1953, may not be used to pay cost of construction of an addition to the biology building other than preparation of plans and specifications for such addition.

August 11, 1955.

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

An opinion has been requested as to the provisions in sec. 20.419 (3), Stats. 1953, which read:

“(3) There is appropriated on July 1, 1951, from the post-war construction and improvement fund to the regents of the university, \$3,554,384 for the construction, remodeling, repair, equipment and acquisition of land for needed buildings and improvements, including:

“Remodeling of and equipment for the Wisconsin general hospital.

“Central portion of the home economics building.

“Extension division offices at the north end of the stadium.

“Remodeling of various buildings.

“Constructing a bacteriology building. Constructing greenhouses. Plans for addition to biology building.”

You ask whether funds appropriated by such provisions may be legally used for the construction, remodeling, repair, equipment, and acquisition of land for buildings and improvements other than the projects specifically listed therein. Then, you state that this question arises in respect to the suggestion that a part of this \$3,554,384 appropriation be used to supplement an allotment by the state building commission from the state building trust fund for the construction of an addition to the university biology building known as Birge Hall, which allotment is insufficient to pay the cost of such proposed addition.

If this subsec. (3) contained merely the broad general language in the forepart, that is, an appropriation to the regents of this sum “for the construction, remodeling, repair, equipment and acquisition of land for needed buildings and improvements” there would be no problem. But,

that language is followed by the word "including" and then a list of more or less specific projects, among which is "plans for addition to biology building." The problem thus is what effect is to be given to this use of the word "including" followed by this listing of specific projects. It resolves down to whether or not the legislature intended it as a word of limitation, meaning thereby to limit the construction, remodeling, repair, equipment and acquisition of land through the use of such appropriated funds to those projects set out in the list.

It is stated in 42 C.J.S. 526:

"'Including' is the participial form of the verb 'include,' and like that word, is also susceptible of different shades of meaning, sometimes being used as a term of restriction and sometimes of enlargement. It is in the nature of an adjective and is a modifier, which often governs the subject under consideration, and used in the same sense as 'inclusive of.' It is generally employed as a term of enlargement, and not as a term of limitation or of enumeration; and it may imply that something else has been given beyond the general language which precedes it. It has been said, however, that its use as a term of enlargement is exceptional; and under some circumstances, or in some connections, the term may be used as a word of limitation or enumeration, that is, to the effect that certain specific things mentioned comprise all of the class designated by some general expression. Again, the term is sometimes used merely to specify particularly that which belongs to the genus; or to refer only to those things which form a part of the principal thing mentioned. The term may also be used as a word of addition, in the sense of 'and' or 'also,' or 'comprising,' rather than one of specification, that is, it is sometimes used to add to the general class a species which does not naturally belong to it, or to indicate something not otherwise included."

In seeking some guide to the intention of the legislature in the enactment of the provisions in sec. 20.419 (3) by ch. 711, sec. 12, Laws 1951, there is the fact that instead of round figures, such as \$3,600,000, the amount is particularized down to less than \$10. As we are informed that estimates of the cost of those projects added up to the

\$3,554,384, this would seem to indicate that the legislature had in mind supplying funds only for the specifically mentioned projects. In the absence of something further this might be controlling.

However, resort to the history of Bill No. 321, S., which became said ch. 711, and to the drafting file in the legislative reference library, sheds a somewhat different light on the intent of the legislature. As originally introduced, Bill No. 321, S., did not create the appropriation provisions of sec. 20.419 (3) and the companion provisions now in secs. 20.162, 20.173 (3), 20.225 (3), 20.346 (3), 20.391 (3) and 20.433 (3), Stats. 1953, all of which also made appropriations of specific sums from the post-war construction and improvement fund. The provisions creating sec. 20.419 (3) and these other companion appropriation measures were added by subst. amend. No. 1, S., to the bill.

In the first draft of the substitute amendment the proposed sec. 20.419 (3) read as quoted herein through the appropriation figure, except that the amount was then \$4,907,994, and then it read "for the following projects." The same projects were then listed as are now in the provision in the 1953 statutes except that the last line read only, "Constructing *biology* building." (Emphasis ours) Also, in such first draft, the proposed secs. 20.173 (3), 20.391 (3) and 20.433 (3) all read "for the following projects," and the proposed secs. 20.162, 20.225 (3) and 20.346 (3) merely said "for" the items contained therein. However, in preparation of the final draft that became the substitute, the wording "construction, remodeling, repair, equipment and acquisition of land for needed buildings and improvements, including" was inserted in pencil in the context of each of said mentioned provisions in a copy of the typewritten first draft.

Then, by amendment No. 1, S., to subst. amend. No. 1, S., the amount in sec. 20.419 (3) was reduced from \$4,907,944 to the present \$3,554,384; the word "bacteriology" was substituted for "biology" in the last line; and "constructing greenhouses" was added at the end. Of note is the fact that said amendment No. 1, S., also similarly reduced the

amount of the appropriation to the board of health in the proposed sec. 20.433 (3) from \$197,650 to \$97,650 and deleted "laboratory of hygiene at the state sanatorium" which had previously been listed with the two specified projects now in sec. 20.433 (3).

Amendment No. 2, S., to subst. amend. No. 1, S., inserted in the proposed sec. 20.419 (3) the language "plans for addition to biology building" now therein. The substitute amendment with amendments Nos. 1, S., and 2, S., thereto, together with some additional amendments not here material, became said ch. 711.

The above points both ways. The insertion of the language "for the construction, equipment, remodeling, repair, equipment and acquisition of land for needed buildings and improvements, including" in sec. 20.419 (3) in place of the restrictive language "for the following projects" would only be motivated by an intention not to limit the use of such funds to those projects. There is also the fact that the past practice of providing specific amounts for each project, along the lines in sec. 20.431, had not been too satisfactory because of the impossibility of accurate estimates, price changes, and emergencies and unanticipated needs. In the main, the problem has been one of financing and applying limited funds to the greatest need. It is in this climate that said Bill No. 321, S., was enacted. On the other hand, the change to construction of a bacteriology building from construction of a biology building, with the insertion of merely plans for a *biology* building and construction of greenhouses, at the same time that the appropriation was reduced by \$1,353,560, might be taken as indicative of an intention to provide only for the specified projects or items mentioned.

In the construction of statutes it is the rule that, if possible, every word, clause and sentence thereof must be given effect. *State v. Columbian Nat. Life Ins. Co.*, (1910) 141 Wis. 557, 124 N.W. 502. To put it another way, a statute ought, upon the whole, to be so construed that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant. *Harrington v. Smith*, (1871) 28 Wis. 43.

The general language in the provision would authorize the use of the funds for any purpose coming within its terms. At the same time the listing of the projects that are set out would be consistent with limitation to such projects. Some effect must be given to the listing of such projects and the wording thereof. It is therefore our opinion that under the mentioned rules of construction and the circumstances in this instance, it was not intended by sec. 20.419 (3), Stats. 1953, to appropriate \$3,554,384 to be used exclusively for the projects mentioned but that such fund could be used for anything coming within the general language used, provided, however, that it was intended by such listing of projects to exclude the use thereof for any of the subjects therein covered except as specifically set forth in such list. In this connection we are impelled to admonish that the ambiguous use of general language of this nature followed by "including" and an enumeration of things, be eliminated in future legislation so as to preclude any possibility of interpretation contrary to what the legislature actually had in mind. Where it is intended to include only the enumerated things, this can be accomplished by using the words "for the following," in lieu thereof. If it is not intended to limit to subsequent listed matters, the use of "among other things," or "without limitation by enumeration," following the word "including," will make that clear.

You are therefore advised that in our opinion no part of the appropriation in sec. 20.419 (3), Stats. 1953, is available for expenditure to construct an addition to Birge Hall, the biology building, because among the listed projects are "plans for addition to biology building." This language must be given some effect. While it authorizes the use of the appropriated funds to pay the cost of preparation of plans and specifications for an addition to the biology building, at the same time it precludes any other use thereof in respect to the biology building.

HHP

*Counties—County Board—Ordinances, Resolutions, and Orders*—Action of a county board in merely adopting a recommendation of a committee of the board rather than a resolution to the same effect, is valid.

If it is clear that the county board by adopting a resolution intends that a former resolution be rescinded, that intention will control and the former resolution need not be specifically rescinded.

August 23, 1955.

CHARLES B. AVERY,  
*District Attorney,*  
Langlade County.

This is in reply to a request from your office dated May 3, 1954.

You have presented the following facts: On February 8, 1950, the county board, by resolution 103, set up a schedule of salaries for certain county employes. On February 10, 1954, the county board adopted a recommendation of a committee of the board that certain of these salaries be raised. Thereafter the board, by resolution, granted a raise to another employe without specifically rescinding or amending resolution 103, as would be required by Robert's rules of order. Your questions are:

1. Was the action of the board on February 10, 1954, invalid, in that it merely adopted a recommendation of a committee rather than a resolution raising salaries?

2. Is a resolution granting a salary increase valid if no action is taken to rescind a former resolution which fixed salaries?

Your first question is answered in the negative. Where a county board adopts the recommendation of one of its committees, this action has the same effect as passing a resolution. If the intent of the board in adopting the committee's recommendation can be discerned, the courts will give effect to such intent. Failure to comply strictly with the rules of parliamentary law will not defeat this intent. In *Hark v. Gladwell*, (1880) 49 Wis. 172, 176, the court said:

"It is suggested that it does not appear that the board acted favorably on the report of the committee by agreeing to and adopting it. The evidence as to the proceedings of the board shows that at the meeting of June 14, 1878, Supervisor Hemmelsbach moved that the report of the 'road committee be accepted, and the committee discharged, which motion was carried.' This may not be the language which one experienced in parliamentary proceedings would use in a resolution for adopting the report as the act of the board; but there can be no doubt that this was the intent and object of the resolution. The whole proceedings of the committee in respect to changing the road, causing a survey thereof to be made, and making an order for laying out the new road, were all before the board for consideration, and were approved and adopted. It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men, not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body. In this case the obvious intent was to adopt the report of the committee in changing the road, and confirm its acts, which was equivalent to giving the committee full authority to make the change in the first instance."

In *Bartlett v. Eau Claire County*, (1901) 112 Wis. 237, the county board voted to adopt the recommendation of a committee of the board. At page 245, the court said:

"\* \* \* If it can reasonably be deduced from the record that the members of the county board by vote declared themselves in favor of specific fixing and regulation of those fees, it is the duty of the courts to give effect to such decision, for therein spoke the legislative power of the state. All reasonable liberality must be accorded the minor deliberative bodies of the state; notably county boards, town meetings, school-district meetings, and the like, where, by reason of the character and vocation of the men comprising such bodies, the technicalities of procedure are not strictly enforced, nor perhaps fully understood. We must not expect nor demand that the records of such meetings should be made up with the accuracy and technicality of those of monetary corporations, conducted under the direction of skilled counsel; nor, indeed, of the legislature itself. *State ex rel. Bruce v. Davidson*, 32 Wis. 114; *State ex rel. Rochester v. Sup'rs of Racine Co.* 70 Wis. 543, 553; *Ryan v. Outagamie Co.* 80 Wis. 336. It is generally considered in deliberative assemblies that the adoption of a report of a com-

mittee containing recommendations constitutes a sufficient declaration of the body itself in favor of those recommendations. Thus Mr. Spofford declares: 'When the report of a committee is adopted or agreed to, it becomes thereby the act of the assembly.' Spofford, Manual Parl. Rules, 57. And Mr. Haines: 'After a report is adopted, the recommendation of the committee becomes the sense of the assembly.' Haines, Parl. Law, 145. Mr. Waples, in discussing the effect of action upon a committee report, says: 'When a committee is appointed to devise some plan, and reports a plan, the assembly may adopt the report, or, more accurately, adopt the plan, by a motion to that effect.' Waples, Handbook on Parl. Law, 79. \* \* \*

Your second question is answered in the affirmative. Where it is apparent that by adopting a resolution the county board intends to rescind, whether in whole or in part, a former resolution, the court will give effect to that intention.) In *State ex. rel. Smith v. Outagamie County*, (1921) 175 Wis. 253, the county board had adopted the provisions of a statute establishing a special municipal court. By a later resolution the board resolved that the members of the board "are in favor of abolishing this court." At page 262 the court said:

"It is contended by the appellant that the resolution of December 10, 1917, was inoperative because it did not follow the language of the statute, but merely registered a sentiment favorable to the abolition of the court and instructed the clerk to withhold payment of salary and expenses. The statute does not prescribe the form of the resolution to be adopted by the board in rescinding its action. It seems clear to us that although the resolution might have been framed in more appropriate language, the clear intention was to rescind the former action of the board. In the case of *Burgess v. Dane Co.* 148 Wis. 427, 134 N.W. 841, in the opinion by Mr. Justice Vinje it was said, page 436:

"Presumably the board intended to comply with the provisions thereof and to make the change as the statute required. Such presumption must prevail unless the language used is wholly inconsistent therewith. In the case of minor deliberative bodies such as county boards, the language of their resolutions will receive a liberal construction in order to effectuate their evident intent. No technical grammatical interpretation will control. *Hark v. Gladwell*, 49 Wis. 172, 5 N.W. 323; *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 1, 13, 50 N.W. 937."

In relation to your second question, it would seem clear that by establishing a new salary schedule the county board intended to rescind the old salary schedule. Under the above cited case this intention should be given effect.

GFS

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*Intoxicating Liquors—Minors*—Premises operated under both a Class “A” intoxicating liquor license and a restaurant permit are not exempt from the prohibition against permitting minors to enter or be on such premises under sec. 176.32 (1), Stats.

August 26, 1955.

HERBERT J. MUELLER,  
*District Attorney,*  
Winnebago County.

You have requested an opinion whether premises which are operated under both a Class “A” retail intoxicating liquor license and a restaurant permit, where the principal business conducted therein is that of a restaurant, is exempt from the provisions of sec. 176.32, Stats., prohibiting the presence of minors. Sec. 176.32 (1) provides in part as follows:

“Every keeper of *any place, of any nature or character whatsoever*, for the sale of any intoxicating liquor, who shall either directly or indirectly suffer or permit any person of either sex under the age of 21 years, unaccompanied by his or her parent, guardian or spouse, of whom one shall be 21 years of age, or suffer or permit any person to whom the sale of any such liquors has been forbidden in the manner provided by law, who is not a resident, employe, or a bona fide lodger or boarder on the premises of such licensed person, to enter or be on such licensed premises for any purpose, excepting the transaction of bona fide business other than amusement or the purchase, receiving or consumption of edibles or beverages, shall, for every such offense, be fined not exceeding \$250 or imprisoned not exceeding 60 days \* \* \*. *This section shall not apply to hotels,*

drug stores, grocery stores, bowling alleys, cars operated on any railroad, regularly established athletic fields or stadiums *nor to premises operated under both a 'Class B' license and a restaurant permit where the principal business conducted therein is that of a restaurant.* \* \* \*

The prohibition of the statute applies to all premises on which intoxicating liquor is sold and clearly includes Class "A" retailers (who may sell only in original containers and for consumption off the premises) as well as to Class "B" retailers (who are authorized to sell by the drink for consumption on the premises).

The last sentence of the statute is in the nature of a proviso and is therefore subject to the rule of strict construction. It will be observed that all hotels, drug stores, grocery stores, bowling alleys, etc., are exempted from the prohibition of the statute, whether the liquor is sold under a Class "A" or a Class "B" license or even a wholesaler's permit, and whether sales are made for consumption on or off the premises, until we come to the exemption for restaurants, *which is limited to Class "B" licensees only.*

It follows that if a restaurant has a Class "A" license, it does not come within the strict terms of the exemption. The legislature has industriously limited the exemption to Class "B" licensees, and the legislative intent is clear. To construe this statute as applying also to premises on which liquor is sold under a Class "A" license would be to read into the statute language which the legislature purposely left out.

Suppose the proprietor were to be prosecuted for permitting minors to be on the premises unaccompanied by parent, guardian, or spouse and he wished to defend on the ground that he had a restaurant permit and his principal business was that of a restaurant. He could not bring himself within the exemption because he would have to show in addition to the restaurant permit, a Class "B" license for the premises.

You point out that it may be more detrimental to minors to be in a restaurant where liquor is sold by the drink than to be in one where it is sold in the original container only. However, that is a question for the legislature to determine. It is apparent that the legislature considered that a great many restaurants serve intoxicating liquors in connection

with meals, and that it may be necessary for minors to visit such restaurants in order to have their meals. However, the sale of liquor by the bottle is in no way related to the restaurant business, and there is no apparent reason for permitting the two businesses to be conducted together and then exempting them from the law relating to presence of minors.

WAP

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*Motor Carriers—Interstate Commerce—Certificates and Licenses*—Applications for amendments to certificates and licenses, and payment of filing fees, are required under secs. 194.03, 194.04, and 194.20, Stats., from interstate motor carriers which have been authorized by the interstate commerce commission to extend their routes outside of Wisconsin or to transport additional commodities.

September 2, 1955.

EDWARD T. KAVENY, *Secretary,*  
*Public Service Commission.*

You request an opinion upon the following questions:

1. When an interstate motor carrier who holds authority to serve between a Wisconsin point and a point in another state receives from the interstate commerce commission additional authority to serve between the same Wisconsin point and an additional point in such other state, must the carrier file an application with your commission under secs. 194.03 and 194.20, Stats.?
2. When an interstate motor carrier who holds authority to transport certain specified commodities between a Wisconsin point and a point in another state receives authority from the interstate commerce commission to transport additional commodities between the same points, must the carrier file an application with your commission under secs. 194.03 and 194.20, Stats.?
3. If either or both of the above questions are answered affirmatively, must the carrier pay a filing fee under sec. 194.04, Stats.?

The pertinent portions of the statutes which you cite are:

"194.03 (1) This chapter shall apply to motor carriers engaged in interstate and foreign commerce upon the public highways of this state, in all particulars and provisions lawful under the constitution of the United States.

"(2) Fees and taxes provided in this chapter shall be assessed against operations in interstate and foreign commerce and collected from the carriers performing such operations, as partial compensation for the use of the highways and policing of the same."

"194.04 (1) AUTHORITY TO OPERATE. (b) Every application for a certificate shall be accompanied by a filing fee of \$40. Every application for approval of an assignment or lease of a certificate or for an amendment to a certificate which shall involve establishing service at any city or village incorporated or unincorporated shall be accompanied by a filing fee of \$40. No fee shall be required for an application for abandonment of service.

"\* \* \*

"(c) Every application for a license or for approval of assignment or lease thereof or for an amendment thereto shall be accompanied by a filing fee of \$25. Only one fee shall be required when an application for assignment and application for amendment are filed simultaneously by one applicant."

"194.20. Motor carriers operating in interstate and foreign commerce shall obtain certificates and licenses, amendments thereto, and approval of the assignment thereof, as provided in ss. 194.18, 194.25 and 194.34, but the issuance thereof shall not be predicated upon findings in respect to public convenience and necessity. Certificates, licenses, amendments thereto and approval of assignments thereof which involve operations in interstate and foreign commerce may be denied by the commission if it finds that the record and experience of the applicant evinces a disposition to violate or evade the laws or regulations of the state applicable to the operations proposed by him."

You state that it has been the practice of your commission to require an application and a fee from any interstate contract motor carrier who has received from the interstate commerce commission authority to serve an additional origin or destination point outside of Wisconsin, irrespective of whether there was any change in the points served within Wisconsin. Also, you have required an application

and a fee from an interstate contract motor carrier who has received from the interstate commerce commission authority to haul an additional commodity to or from Wisconsin points already served by the carrier, regardless of whether there is any change in the authorized routes in Wisconsin or elsewhere.

Sec. 194.03 (1) and (2), Stats., makes interstate motor carriers, both contract and common, subject to the same application and fee requirements as are imposed upon contract and common motor carriers in intrastate commerce, unless it can be said that to apply the same rules to interstate carriers would be beyond the jurisdiction of the state.

It is clear that the state has power to require a license for the conduct of interstate motor carrier operations within Wisconsin. In *Fry Roofing Co. v. Wood*, (1952) 344 U. S. 157, 162, 73 S. Ct. 204, 97 L. ed. 168, the court said:

“\* \* \* our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden. It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and enforce them. At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state’s highways.”

The application fees imposed by sec. 194.04, Stats., are neither exorbitant nor discriminatory as applied to interstate carriers. Also, those fees are expressly imposed as partial compensation for the use of the highways and policing of the same. Therefore, the application and fee requirements do not unduly burden interstate commerce, and the answers to your questions must be found within the specific statutory provisions requiring applications and imposing application fees.

Common motor carriers are required, by sec. 194.23, Stats., to operate in accordance with the terms of their certificates. If the certificate of an interstate common motor carrier authorizes only the transportation of general commodities between Madison and Chicago, the carrier cannot legally transport within Wisconsin a shipment which the

same carrier is transporting from Madison to South Bend, Indiana. The Wisconsin portion of a single-line service from Madison to South Bend would be part of a service not authorized by the certificate, and the carrier would have to apply for an amendment of the certificate before performing such service.

In the above situation the carrier also would have to pay the filing fee provided by sec. 194.04 (1) (b), Stats., since that fee is to be paid with every "application for \* \* \* an amendment to a certificate which shall involve establishing service at any city or village incorporated or unincorporated." The additional authority sought would involve the establishment of service at a city—namely, a single-line service between the city of Madison and South Bend.

The same reasoning is equally applicable to a common motor carrier who is authorized to transport only certain commodities between Madison and Chicago and who wishes to transport additional commodities between the same points. The inclusion of new commodities would involve establishment of service which had not previously been offered.

Contract motor carriers are required, by sec. 194.34, Stats., to operate in accordance with the terms of their licenses. If an interstate contract motor carrier wishes to serve additional points outside of Wisconsin, or to transport commodities not covered by the existing license, the carrier must file an application for amendment of the license, pursuant to sec. 194.34 (1), Stats., and must pay the filing fee required by sec. 194.04 (1) (c), Stats. The reasoning is the same as that applied to common motor carriers, with the additional factor that sec. 194.34 (4), Stats., expressly provides that applications "for additional authority shall be treated as applications for amendments to the contract motor carrier license."

The language of the statutes seems sufficiently clear as to leave no room for construction. If statutory construction were necessary, however, the legislative history of sec. 194.04 (1) (c), Stats., would buttress my conclusion. The same section in 1949 required payment of a filing fee with every application for amendment of a license "to include

service at municipalities at which the carrier is not already authorized to serve." By ch. 712, Laws 1951, this limitation upon the requirement of a fee was omitted, with the obvious purpose of imposing a fee upon every application for amendment to a license.

It is my conclusion that the first two questions must be answered in the affirmative and that in each case the carrier must pay the filing fee.

EWV

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*Pharmacy—Drug Store Permit*—Licensed pharmacist who operates a drug store in leased premises, in this case located in a factory, should apply for drug store registration and permit under sec. 151.02 (9), Stats., and the permit should not be issued to the owner of the real estate who will have nothing to do with the operation of the store.

Where the owner of the property, however, proposes to hire the pharmacist and control the operations he should apply for the permit rather than the pharmacist employe.

The fact that the factory owner proposes to furnish the drugs free of charge to employes is immaterial and does not furnish grounds for denying a drug store permit.

September 2, 1955.

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

You have called our attention to the fact that a drug store permit has been requested of the board of pharmacy involving circumstances quite unlike those which are characteristic of the usual drug store permit application, so much so that the board is reluctant to issue the requested permit. Accordingly you have requested the advice of this office as to the proper processing of such application.

It appears that a large industrial plant proposes to have a pharmacy located on its premises for the benefit of its employes, and it is willing to adopt either one of the following two plans, as may be agreeable to the board.

The plans are:

Plan 1. The operation of a pharmacy in the plant by an independent operator, one who would rent the space from the company and would operate his own pharmacy independently in the ----- Company.

Plan 2. A pharmacist hired to dispense and package the drugs which now are given to the employes without cost. There would be no sale of medication by the pharmacist to the individual. The pharmacist's duties would be to assume responsibility of the pharmacy and dispense those medications ordered by the physician. The ----- Company would not be engaged in the sale of drugs to its employes. It would have a pharmacist in charge of the drugs such as cough medications, headache tablets, tablets used in menstrual disturbances, and other drugs not of a dangerous character.

Sec. 151.02 (9), Stats., provides in part that no pharmacy shall be opened until it has been registered with, and a permit therefor shall have been issued by, the state board of pharmacy. Every pharmacy must be conducted under the supervision of a registered pharmacist, and the registration fees for the store are prescribed.

Sec. 151.02 (10), Stats., in substance provides that every pharmacy shall be equipped with proper pharmaceutical utensils. The board, with the advice and consent of the faculty of the university of Wisconsin school of pharmacy, is directed to prescribe the minimum standards of such professional and technical equipment. No permit may be issued unless the provisions of this subsection have been met, and failure to maintain a pharmacy equipped with proper sanitary appliances or in a clean and orderly manner constitutes grounds for denial, suspension, or revocation of a pharmacy permit.

It is assumed in discussing your problem that all of the requirements of sec. 151.02 (9) and (10) are to be fully met under whatever plan is followed, and the question then narrows itself down to the proposition of whether or not there are statutory provisions in ch. 151, or otherwise, which may be violated under either of these plans, and if so, whether such provisions are to be enforced by the phar-

macy board through the medium of denying a drug store permit.

One section of the statutes which has been discussed by the board in this connection is sec. 348.54 prohibiting the sale of certain merchandise by employers to employes and providing a penalty. Subsec. (1) contains the prohibition, and subsec. (2) provides the penalty.

Subsec. (1) provides:

“(1) No person, firm or corporation engaged in any enterprise in this state shall by any method or procedure directly or indirectly by itself or through a subsidiary agency owned or controlled in whole or in part by such person, firm or corporation, sell or procure for sale or have in its possession or under its control for sale to its employes or any person any article, material, product or merchandise of whatsoever nature not of his or its own production or not handled in his or its regular course of trade, excepting meals, candy bars, cigarettes and tobacco for the exclusive use and consumption of such employes of the employer, and excepting tools used by employes in said enterprise and such specialized appliances and paraphernalia as may be required in said enterprise for the employes' safety or health and articles used by employes or other persons which insure better sanitary conditions and quality in the manufacture of food or food products. The provisions of this subsection shall not apply to lumber producers, loggers and dealers nor to any co-operative association organized under chapter 185. This section shall not be construed as authorizing the sale of any merchandise at less than cost as defined in section 100.30.”

It is to be noted that there is excepted from the prohibition “such specialized appliances and paraphernalia as may be required in said enterprise for the employes' safety or health and articles used by employes or other persons which insure better sanitary conditions and quality in the manufacture of food or food products.”

Drugs for internal use or external application are probably neither “appliances” nor “paraphernalia.” They may be “articles” but this particular firm is not engaged in the manufacture of food or food products so as to be able to claim the exemption of “articles” used by employes engaged in that type of enterprise.

Hence, it may well be that sec. 348.54 (1) prohibits the sale of drugs by this concern to its employes. However, as we read the plans, in neither program will the company be engaged in the sale of drugs to its employes or otherwise, assuming that there is no subterfuge or misrepresentation in the plans as stated.

Under plan No. 1 the manufacturer merely rents space to a registered pharmacist so that the relationship is that of landlord and tenant. If such is the case no reason suggests itself for having the lessor rather than the lessee make the application for the drug store permit, since the lessor is not the operator of the pharmacy. The board is not concerned with the ownership of the real estate. Probably the majority of the drug stores today, particularly in the larger cities, are operated on leased premises. This being true, we conclude that the board is justified under plan No. 1 in denying the application of the manufacturer for a drug store permit on premises which it is leasing to an independent pharmacist who will operate the pharmacy and be responsible for the same. The application should be made by the operator.

Under plan No. 2 the relationship between the company and the pharmacist is entirely different. It is a relationship of employer and employe rather than that of landlord and tenant. As an employe the pharmacist will be subject to the control of the employer and the responsibility for operation of the drug store rests with the employer rather than the employe. In that situation the application for the permit must come from the employer rather than the employe just as it does where any corporation operates a drug store such as Walgreen, Liggett, etc.

The only thing unique about plan No. 2 as we understand it is that the drugs will be furnished free of charge to factory employes either directly by the manufacturing company or through a charitable foundation which the company has set up.

The employes of the company now receive free medical service from the physician employed by the company as medical director. May they also receive free drugs?

Sec. 348.54 (1) quoted above prohibits an employer from selling or procuring for sale or having in its possession

or under its control for sale to its employes products or merchandise not handled by the employer generally, and as said before, we believe this would include drugs. However, a "gift" is not a "sale" and a "sale" is not a "gift." See *Territory v. Hu Seong*, 20 Haw. 699 and *Nye v. Bradford*, (1946) 144 Tex. 618, 193 S.W. 2d 165, 169 A.L.R. 1, 5, where the court said: "A gift of property is not a sale."

A contrary conclusion would mean that sec. 348.54 (1) would prohibit an employer from giving an employe a ham or a turkey for Christmas or a watch or other present after 25 years of faithful service, etc. Sec. 348.54 (2) was apparently not intended to discourage sincere generosity but rather to protect retail merchants from the unfair competition which results where employers use their discount buying power to acquire merchandise for employes at cut-rate prices.

At any rate it is not the function of the pharmacy board to anticipate violations of sec. 348.54 or other penal statutes relating to fair trade practices. 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*, (1944) 245 Wis. 440, 15 N.W. 2d 27. That is not to say that any member of the board must remain silent when he observes the violation of a law which it is not the specific duty of the board to enforce. Like any other conscientious citizen he should report the violation to the proper enforcement authority.

It is to be observed, however, that the pharmacy board has no general disciplinary authority over the holders of drug store permits issued under sec. 151.02 (9). Sec. 151.02 (9) and (10) sets up the standards to be observed, and nowhere are there any guides or grant of authority to the board to exercise regulatory powers over the prices to be charged for drugs or the giving away of drugs, it being assumed that all other statutory requirements by the applicant for drug store registration have been met.

There is perhaps one further point which deserves a bit of discussion, and that is whether a place where drugs are

given away rather than sold is in fact a drug store or pharmacy within the meaning of sec. 151.02 (9) and (10) so as to require a permit.

It has been held that a "drug store" is a place where drugs are sold. *Carroll Perfumers v. State*, (1937 Ind.) 7 N.E. 2d 970, 972; *Department of State v. Kroger Grocery & Baking Co.*, (1942 Ind. App.) 40 N.E. 2d 375, 378. However, neither of these cases involved or contained any consideration of the subject of giving away drugs as contrasted with the sale of drugs, and the practice of giving away drugs is so rare that it would be difficult to find much law on the subject.

The problem might be a serious one for the board if the contention were made that no drug store permit is required where drugs are given away rather than sold. Here, however, the applicant proposes to submit voluntarily to the jurisdiction of the board, and it may well be urged that the people who are to receive the free drugs are as much entitled to such protection as sec. 151.02 (9) and (10) affords as is true where the drugs are purchased. The public health and safety factors are the same in both situations. It is better that a trained pharmacist be in charge of the drugs than it would be to have the plant physician attempt to dispense the drugs through untrained personnel without the safeguards of sanitation and adequacy of equipment required by sec. 151.02 (10) in the case of a registered drug store. The board is well aware of the abuses that arise and the friction that results between pharmacists and physicians when these safeguards are disregarded. See 41 O.A.G. 23, and *Wisconsin Pharmaceutical Asso. v. Lee*, (1953) 264 Wis. 325, 58 N.W. 2d 700. Hence, it should be remembered that if a drug store permit is issued under sec. 151.02 (9) a licensed pharmacist must be in charge, whereas such would not be the case if the permit were denied and the plant physician assumed the burden of dispensing the drugs by some untrained office girl acting under his direction and supervision.

We hasten to add at this point that we are casting no reflections on the very fine medical director of the plant nor do we wish to be understood as indicating that he would ever be guilty of laxity or carelessness in dispensing or

supervising the dispensing of drugs. However, this is a responsibility which apparently he has wisely concluded should be delegated to a licensed pharmacist. In that way the doctor will be better able to concentrate upon his primary professional interest of practicing medicine.

You are therefore advised in conclusion that where a drug store is to be located on leased premises, the lessee who proposes to operate the drug store rather than the owner of the real estate is the proper party to make application for a drug store permit under sec. 151.02 (9), and that in any event the granting or denying of a permit is not to be made contingent upon the consideration or lack thereof which will be received for drugs dispensed in the store.

WHR

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*Tuberculosis Sanatoriums—Maintenance Charges—Wisconsin General Hospital*—Under sec. 50.07 (2), Stats., the cost of routine chest surgery for treatment of tuberculosis patient in county sanatorium is part of the patient's maintenance. If it is to be furnished at Wisconsin general hospital, patient should be sent there at the expense of the sanatorium, not discharged from the sanatorium and admitted to Wisconsin general hospital through proceedings before the county judge of the patient's county of legal settlement pursuant to ch. 142, Stats.

September 19, 1955.

WALTER T. NORLIN,  
*District Attorney,*  
Bayfield County.

You have asked a number of questions relative to the conditions under which a patient in a county tuberculosis sanatorium may be admitted to the Wisconsin general hospital for surgical and post-operative treatment of tuberculosis, which is not available at the county institution.

Sec. 50.07, Stats., relating to county tuberculosis sanatoriums, provides for three kinds of patients: (1) Full-pay

patients; (2) indigent patients, all or part of whose care is charged to the public, but who are liable to repay it later if able; and (3) free-care patients who, by reason of meeting legal settlement or residence requirements, are entitled to have the full cost of their care paid by the public without liability for repayment. The great majority of the patients fall within the third class. The cost of care is referred to in the statute as "maintenance," and subsec. (2) provides in part:

"\* \* \* Such maintenance shall include necessary traveling expenses including the expenses for an attendant when such person cannot travel alone, necessary clothing, toilet articles, *emergency surgical and dental work, and all other necessary and reasonable expenses incident to his care in such institution.*"

Your primary concern is whether the patient may, or should, be admitted to Wisconsin general hospital by action of the county judge under the provisions of ch. 142, Stats., or at the cost of the county tuberculosis institution under ch. 50, Stats. The practical difference to the patient is that if he is admitted pursuant to ch. 142, sec. 46.10, Stats., makes him, his property, and certain designated relatives, liable for repayment of the hospital charges; whereas, if he is admitted under sec. 50.07 (2a), Stats., the so-called "free-care" law, there is no such liability. Moreover, if his legal settlement is in another county he must go there to obtain an order of the county judge, and if he has no legal settlement the procedure under ch. 142 is not available to him. 20 O.A.G. 632; 27 O.A.G. 708; 40 O.A.G. 78.

You indicate that some counties follow the practice of discharging the patient from the county sanatorium and having him make application to the county judge for admission to the Wisconsin general, whereas other counties send the patient at the charge of the county institution and include the charge as a maintenance cost. The latter practice was recognized as proper in the following words of the opinion in 42 O.A.G. 213, 215:

"However, it does not follow that the patients may not be sent to Wisconsin general hospital for treatment. Even before the opinion in 32 O.A.G. 154 referred to above, it

was considered that where a sanatorium patient required medical or surgical care which could not be provided at the sanatorium, it was proper to send the patient temporarily to another hospital at the expense of the sanatorium.  
\* \* \*

The foregoing opinion did not discuss in detail the provisions of ch. 50 which you indicate in the following portion of your letter have caused some county judges to question the right to include the Wisconsin general treatment under the "free-care" provisions of ch. 50.

"\* \* \* it is argued that Section 50.07 (2) of the statutes calls upon the sanatorium to furnish only *emergency* surgical work, and that the surgical work required by these patients is not of an emergency nature, but under present TB treatment procedures is clearly routine surgery, and that since the sanatorium is not equipped to give such treatment, it cannot be considered as obliged to do so by the provisions of Section 50.07 as presently worded, and to have the cost thereof charged to the sanatorium as a part of the *maintenance* of such patients. County judges holding this view insist that since the sanatorium cannot provide the treatment necessary in a given case, it is perfectly proper to discharge the patient, the county court [judge] of the patient's legal settlement thereupon making an order committing [certifying] the patient to Wisconsin General as the best equipped place for such treatment."

This view is out of harmony with the purpose of the tuberculosis treatment law and completely overlooks the history of the statute. The purpose of the law is, by segregating victims of tuberculosis, and, if possible, curing or arresting their illness, to wipe out the disease, once known as the "white plague." The purpose of the free-care law is to induce patients willingly to submit to sanatorium treatment and to aid in their cure by relieving their minds of anxiety regarding the financial burden of long and expensive hospitalization and treatment.

County institutions for the treatment of tuberculosis were first authorized by ch. 457, Laws 1911, which provided for the erection, with consent of the state board of control, of "a building or shack, for the treatment of persons suffering from tuberculosis, in the advanced or second-

ary stages." Sec 1421-9, Stats. 1911. Although the act provided for payment at a rate not to exceed "the actual cost of maintenance therein," sec. 1421-14, Stats. 1911, it did not define "maintenance."

The law was amended by striking out the words "in the advanced or secondary stages" by ch. 544, Laws 1915, and to provide for state aid and for the admission of patients from other counties and the manner of payment for their "support" and "maintenance" by ch. 346, Laws 1919.

"Maintenance" was defined for the first time, in exactly the same language as is above quoted from sec. 50.07 (2), Stats., by ch. 403, Laws 1921. At that time treatment consisted mainly of bed rest and plenty of fresh air. Pneumothorax treatment had been introduced but there was as yet no drug for the disease and *no surgical treatment had been developed*. Chest surgery for tuberculosis, now routine in many cases, came along 5 or 6 years later.

But it was the obvious legislative intent that the care of patients should include such methods of treatment of the disease as might be developed in the future, just as it then included pneumothorax treatment. Accordingly, when streptomycin therapy became an accepted treatment for tuberculosis it became the duty of the sanatoriums to furnish it when indicated and to include the expense in the per capita cost of maintenance. It came within the clause in sec. 50.07 (2), "all other necessary and reasonable expenses incident to his care in such institution." 37 O.A.G. 280.

Similarly, when chest surgery became an accepted form of treatment it became the duty of the sanatoriums to furnish it when indicated and to include the cost in calculating the per capita. This is because it is a necessary and reasonable expense incident to the patient's care, not because it is "emergency surgical \* \* \* work."

It is plain that when the legislature in 1921 required the furnishing (as "maintenance") of "emergency surgical and dental work" it did not have in mind routine chest surgery constituting part of the tuberculosis treatment, for there was no such thing at the time. Should it be developed later, it was adequately provided for in the "necessary

and reasonable expenses" clause, since it would be "incident to his care in such institution."

The purpose of including "emergency surgical and dental work" was to require, as part of the patient's maintenance, operations and dental work to relieve such conditions as appendicitis and toothache to which tuberculosis patients are subject the same as other people. Such attention might not be regarded as "incident to his care in" the sanatorium, so to insure that patients would receive the treatment when necessary without separate arrangements for payment it was expressly included in "maintenance."

It was no excuse for failing to provide such surgery that the sanatorium had no operating room and employed no surgeon. With one or two exceptions, county sanatoriums do not have operating rooms and surgical personnel because the amount of such work does not justify the investment and expense. For obvious reasons, a patient requiring an appendectomy is sent to a general hospital at the expense of the sanatorium.

While the patient was in the general hospital, the sanatorium originally was not entitled to state aid, 32 O.A.G. 154, but this was cured by the creation of sec. 50.07 (3) (c), Stats. 1945 (ch. 244, Laws 1945) as follows:

"When any patient is temporarily transferred from any institution mentioned in this subsection to a county hospital or to a local hospital where the entire cost of care is borne by the sanatorium for surgical or medical care or both, the state credit provided in this section shall continue to be granted during the period of such transfer."

And when it was ruled that Wisconsin general was not a "county" or "local" hospital within the meaning of the foregoing statute, 42 O.A.G. 213, the legislature cured that immediately by inserting after "local hospital" the words, "the Wisconsin general hospital or to the Wisconsin orthopedic hospital for children." Ch. 129, Laws 1955.

So the use by county sanatoriums of the facilities and services of general hospitals in furnishing treatment which they themselves cannot economically supply is thoroughly established in the law. The sanatorium is to pay the hospital the time the patient is temporarily out of the sanatorium. And, presumably, the surgeon, and state aid is given for

Therefore, the argument cannot be justified that because the sanatorium is not itself equipped to provide services to which the law contemplates the patient is entitled as part of his maintenance, the sanatorium may summarily discharge him and let him seek other means of getting the necessary treatment (possibly at his own expense, immediately or ultimately). Whether it be routine chest surgery for the tuberculosis or emergency surgery for appendicitis or a tumor, the sanatorium is bound to furnish it, if necessary by paying for it at another hospital.

The answer to your question is that if the patient requires chest surgery available at Wisconsin general he may and should be transferred there by the sanatorium at its expense, not discharged and then admitted to Wisconsin general through proceedings under ch. 142, Stats., before the county judge of the county of his legal settlement.

Wisconsin general admits such patients at the clinic rate, according to information from the superintendent.

You also inquire about the mechanics of the transfer. Arrangements may be made between the superintendents of the sanatorium and the hospital for admission of the patient when space is available. Transportation and, if necessary, an escort, should also be arranged by and at the expense of the sanatorium.

BL  
WAP

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*Counties—Park Commission—Appropriations and Expenditures*—County park commissions may expend county funds for the construction of landing places on lakes within federal forest areas where consent is granted by letter authority from proper federal source.

September 19, 1955.

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

You have requested my opinion as to whether the Vilas county park commission may expend county funds to build a public landing place on Lac Vieux Desert in Vilas County.

The land to be used is national forest park land. You state that the national forest service has given a letter grant of authority to the county for this purpose. You question whether such expenditure is proper in view of the fact that sec. 27.05 of the statutes contemplates that the land used for county parks must be acquired by the county "by purchase, land contract, lease, condemnation, or otherwise."

It is my opinion that such expenditure would be proper. Title 16, sec. 497, of the United States code, authorizes the granting of permits for the use of land areas no larger than 5 acres in forest park lands on such terms as the federal authority may deem proper for the construction of "summer homes, hotels, stores, or other structures needed for public recreation or public convenience."

Assuming that the letter of authority is executed through the proper channels of federal government, this permit, in my opinion, constitutes a franchise for the use of the land. Our supreme court has stated that a franchise is a privilege to do anything not a matter of common right but referable either directly or indirectly to sovereignty as the grantor. *Calumet Service Co. v. Chilton*, (1912) 148 Wis. 334. The state or its citizens should not deal with the federal government at arm's length. Perhaps the letter authority or franchise would not be desirable in ordinary private conveyancing, but such limited grants are in common use in the regulation of federal lands. Our federal government has become too large and complex to expect the grant of ordinary easements, leases, or sales of small parcels as we are concerned with here. A franchise granted does, in my opinion, comply with the broad general term used in sec. 27.05, Stats.—"or otherwise" acquire.

REB

*Register of Deeds—Destruction of Records—Sec. 59.51 (14), Stats.*, relating to the destruction of obsolete records of chattels antedated by 5 years, and as amended by ch. 253, Laws 1955, is permissive rather than mandatory. It should be used by the register of deeds with caution and upon legal advice of the district attorney.

September 19, 1955.

WILLIAM T. BRADY,  
*District Attorney,*  
Juneau County.

You have directed our attention to sec. 59.51 (14), Stats., as amended by ch. 253, Laws 1955, to read:

“(14) The county board of any county may upon request of the register of deeds, authorize the destruction of all obsolete documents pertaining to chattels antedating by 5 years, including final books of entry.”

The purpose of the statute is, no doubt, as you have suggested, to enable the register of deeds to secure needed space for filing and recording of documents. However, you call attention to the fact that conditional sales contracts and chattel mortgages are frequently prepared in such a manner as to include a promissory note signed by the debtor and that if such instruments could be destroyed after 5 years, creditors' rights would be lost in the case of a note which under the statute of limitations is collectible within 6 years or even 20 years if under seal.

Also attention is called to the fact that bills of sale filed with the register of deeds are often important to purchasers for a period of more than 5 years as a means of establishing ownership, and that even in the case of an unrenewed chattel mortgage there could be foreclosure as between the original parties after 5 years.

Under the circumstances you have advised the register of deeds to refrain from securing authority of the county board to destroy any records, and you have asked for our opinion and views on the matter.

Since the statute is permissive rather than mandatory, the problem you have posed is one of policy and it is no

doubt advisable to err, if at all, on the side of excess caution. If the register of deeds has no immediate or pressing need for space, there is no reason why he should arbitrarily classify as "obsolete" records of the sort you have described merely because they are more than 5 years old.

On the other hand, the public is charged with knowledge of the existence of sec. 59.51 (14) and its possible use by the register of deeds and county board. Since laws are designed to aid the vigilant rather than those who sleep on their rights, and adding to the balance the public convenience and necessity of adequate filing space in recording offices, we view, for instance, with something less than alarm the predicament of a creditor on a note under seal which while long past due is still a year or two short of having reached its 20th birthday.

We grant that the authority to destroy "obsolete" records places a rather substantial burden on the register of deeds in determining which records are "obsolete" and which are not. Certainly this is an area in which he should seek the legal advice of the district attorney, and we are sure that with such assistance the register of deeds who is harassed with the need for additional filing space can find a substantial number of records more than 5 years old which could be destroyed with very little likelihood, if any, of serious loss to the parties involved.

A disposition to avoid responsibility can be as culpable as the usurpation of power, and in the case of this statute as with all other statutes there is no substitute for intelligent and responsible administration.

Presumably the legislature was aware of the dangers herein suggested, but if it is felt that sec. 59.51 (14) should be more definitive in scope, the situation can be called to the legislature's attention.

WHR

*Superintendent of Public Instruction—Schools and School Districts—High School Districts*—Requirement in secs. 40.12 (1) and 40.12 (4) (c), Stats. 1953, of approval of state superintendent of public instruction of establishment of a high school district is inapplicable to creation of a high school district by county school committee order. Where applicable such approval is not of the regularity of procedure but as to the need and feasibility of such district.

September 21, 1955.

G. E. WATSON,

*State Superintendent of Public Instruction.*

You ask whether your approval is required before a high school district created by an order of a county school committee has existence, and if so, does such approval pertain only to procedural requirements or does it involve exercise of judgment as to the need and feasibility of such district.

An opinion was given March 29, 1951, 40 O.A.G. 62, that a county school committee could not create a high school district without the approval of the plat thereof by the state superintendent of public instruction. This opinion was based upon the provisions of sec. 40.64 (1), Stats. 1951, which read as follows:

“(1) A high school district may be established in any contiguous compact territory with an assessed valuation of \$1,250,000 or more, and the plat of the territory to be included in the proposed district approved by the state superintendent of public instruction. A high school district or a consolidated free high school district may also be established in any township comprising only island territory. The clerks of each governmental subdivision affected by the establishment of such district shall submit jointly a plat of the territory proposed to be included therein. No election shall be held in such territory unless the state superintendent of public instruction has approved such plat.”

The essence of the opinion was that sec. 40.64 (1), Stats. 1951, set forth requirements for high school districts generally and therefore, unless there was something to indicate a contrary intention, such standards were applicable regardless of the method or procedure by which such a dis-

trict was created. A review of the history of the county school committee law (then sec. 40.303, but subsequently revised and renumbered to present secs. 40.02 and 40.03) disclosed no evidence of any intent in the enactment thereof that such general requirements in sec. 40.64 (1) were not to be applicable to a high school district created by a county school committee. Accordingly, it was concluded that the legislature intended that the general requirements that a high school district consist of contiguous compact territory, that its assessed valuation be at least \$1,250,000, and that the plat of the territory to be included have the approval of the state superintendent, be observed as well when a high school district is created by county school committee order as when one is created by the procedures provided in sec. 40.64.

However, subsequent to that opinion the provisions of sec. 40.64 (1) were revised and renumbered sec. 40.12 (1) by chs. 90, 507, 599, 611 and 631, Laws 1953, and now read:

“(1) A union high school district may be established in any territory with an assessed valuation of \$2,500,000 or more. A high school district may also be established in any township comprising only island territory. At the time of filing the petition mentioned in subs. (2) and (3), the petitioners shall submit to the state superintendent, and to the clerk of each municipality affected by such proposed districts, a legal description and map of the territory proposed to be included in the district. Except as to such districts established by the county school committee pursuant to s. 40.03 (1), no election on the establishment of such district shall be held in such territory unless the state superintendent has approved such territory. A copy of such description and map, with the approval of the state superintendent indorsed thereon, shall be submitted to the clerk of each governmental subdivision affected by the establishment of such district.”

The changes so made are significant. In the revision and renumbering by ch. 90, sec. 38, Laws 1953, the previous language “and the plat of the territory to be included in the proposed district approved by the state superintendent of public instruction” in the first sentence of sec. 40.64 (1) Stats. 1951, was deleted and such omission indicated by asterisks. Were this the only modification in language of the subsection, the statement that, “The meaning of the

1951 statutes revised by this bill is not intended to be changed unless the new language shows clearly an intent to make a change (sec. 370.001 (7), Wis. Stats.)," included in the prefatory note to Bill No. 1, S., which became said ch. 90, might be the basis for concluding that approval of the plat by the state superintendent still existed as a general requirement for the establishment of a high school district.

But, said ch. 90, sec. 38, made further changes in the language of the subsection relative to approval of the plat, so that as it remained thereafter, the only language in that regard provided for and dealt with submission of the plat for approval in connection with creation of a high school district through petition under that section. None of such provisions could have any application to the creation of such a district by county school committee order.

Then ch. 507, Laws 1953, expressly took out the previous requirement of "contiguous compact" territory in the first sentence, by deleting those words. Ch. 599, Laws 1953, then added "Except as to such districts established by the county school committee pursuant to s. 40.303 (4) (b)," to precede, and as part of, the provision that "no election on the establishment of such district shall be held unless the state superintendent has approved such territory." Ch. 611, Laws 1953, increased the assessed valuation requirement from the previous \$1,250,000 to \$2,500,000. To assure that these several changes were all effective, ch. 631, Laws 1953, was passed embodying all of them. The note to the bill so states.

Taken together these several changes in 1953 evidence that the legislature addressed itself to a consideration of the general standards in the subsection. The subsection as it finally emerged must be read as a composite that expresses the final legislative intent. Accordingly, although the reasoning of the prior opinion is still applicable to the present provisions of this statute, the conclusion in the prior opinion does not follow. The only general requirement in sec. 40.12 (1), Stats. 1953, which is therefore applicable to high school districts regardless of what method is used in the creation thereof, is that the territory thereof must have at least an assessed valuation of \$2,500,000. The overall requirement of approval of the plat by the state superintendent is no longer in the statute. The only provision

therein that requires submission of the plat for such approval contains an express exception that it is inapplicable in the case of establishment of a high school district by an order of a county school committee.

Thus, if approval of the state superintendent is required in such instance, some provision must be found elsewhere to that effect. As stated, the basis of the prior opinion is that generally stated standards for establishment of high school districts are requirements to be observed in all instances, except in such instances as it is indicated they are inapplicable. The provisions in sec. 40.12 (4) (c), Stats. 1953 (formerly 40.64 (4) (c)), relating to approval are not of that character. They are applicable only in the case of an election as a part of the establishment of a high school district by the methods and procedures of that section, i.e., by the filing of a petition with the appropriate municipal clerk and the submission of the proposal to a referendum vote conducted as provided in subsecs. (2), (3) and (4).

That the provisions in sec. 40.12 (4) (c) are of such limited scope and do not have any application to the establishment of a district by a county school committee order, even though a referendum may have been had in respect to such order pursuant to sec. 40.03 (6), Stats., appears from the fact that a county school committee order can create a district without any referendum being held thereon. It is only if, within 30 days after the issuance of a county school committee order, a petition for a referendum thereon is filed, the county school committee itself orders a referendum, or the city council, if a city is included in the territory, adopts a resolution calling therefor, that a referendum is held on such an order. Thus, if none of those actions was taken within such 30 days, there would be no referendum election and therefore nothing to which the last sentence in sec. 40.12 (4) (c), Stats., could apply. If not intended to apply where no referendum election has been held, and certainly it could not by its very terms, it could not have been intended to apply and require approval of the state superintendent only in the case of the creation of high school districts by county school committee orders that had been approved by a majority vote of the electors at a referendum thereon.

Upon the further review involved in the foregoing, it is presently concluded that the statement in the last paragraph of the opinion in 40 O.A.G. 62 that it cannot safely be assumed that a high school district is established by a county school committee order unless a certificate of establishment is issued under sec. 40.64 (4) (c) (now sec. 40.12 (4) (c)) is unsupportable. It is therefore our opinion that under the present statutes a high school district can be established by a county school committee order without any approval by the state superintendent of the establishment of such district and that sec. 40.12 (4) (c), Stats., does not require the approval and issuance of a certificate of establishment by the state superintendent as a condition precedent to the existence of a district so created.

The above renders unnecessary that your second question be answered. It would appear advisable, however, to point out for your guidance in those instances where the mentioned statutes do require your approval, that in *State ex rel. McKenzie v. Brown*, (1921) 174 Wis. 498, the supreme court had before it the very question under these same statutes, although the phrasing was somewhat different at that time. It there said at page 501:

"If the law vests in the state superintendent no discretion, it is difficult to discover the legislative intent in requiring the organization to be with the advice and consent of the state superintendent and his approval to be evidenced by the issuing of a certificate of establishment. The provisions of sec. 40.47 confer no power, nor do they attempt to confer power, upon the state superintendent to review the regularity of the proceedings had pursuant to its provisions. Assuming that such authority might constitutionally be conferred upon the state superintendent, no such power is conferred by sec. 40.47, and in that respect it is the same as sec. 497, now a part of sec. 39.01. [citing cases]

"It is the intent and purpose of the statute to confer upon the state superintendent, in the exercise of the supervisory control vested in him by sec. 1, art X, of the constitution, the power to determine whether or not the educational interests of the community involved will be best served by the incorporation of the proposed union free high school.

\* \* \*"

HHP

*Tuberculosis Sanatoriums—Maintenance Charges—Appropriations and Expenditures—Highway Commission—Institution Roads*—In the computation of charges for the maintenance of patients in state tuberculosis sanatoriums, money expended from the highway appropriation provided in sec. 20.420 (73), Stats. (formerly sec. 20.49 (2)), should not be considered.

September 21, 1955.

STATE BOARD OF HEALTH.

You ask whether the cost of road improvements for state tuberculosis sanatoriums covered by the appropriation under sec. 20.420 (73) (formerly sec. 20.49 (2)), Stats., should be considered in computing the cost of maintenance of patients, which is chargeable one-half to the state and one-half to counties of legal settlement.

Sec. 50.03 (3), Stats., reads:

“The support, maintenance and necessary traveling expenses including the expenses for an attendant when such patient cannot travel alone, and emergency surgical and dental work of every patient supported in said institution at public charge shall be paid by the state; but the state shall charge over, as provided in subsection (2) of section 50.11, to the county in which such patient has his legal settlement one-half the cost of his maintenance in the institution and the entire amount of all other expenses.”

Sec. 20.420 (73) makes an appropriation of \$100,000 to the state highway commission for the purposes provided in sec. 84.27, Stats., namely, for improving highways forming the most convenient connection between certain state institutions and the state trunk highway system, or to construct roadways under or over state trunk highways that pass through the grounds of such state institutions and to construct and maintain certain driveways on state property. State charitable institutions are included in the provisions of this section and there is no doubt that state tuberculosis sanatoriums fall within this classification.

There is an opinion in 40 O.A.G. 356 which discusses certain items that should be considered in determining the

per capita cost of maintenance in state sanatoriums. This opinion indicates and cites authority to the effect that such items as food, clothing, and care may be considered. Apparently, capital expenditures for a new construction are not proper items of "maintenance." The question of maintenance of existing facilities appears to me must be decided by the particular statutes which govern them and cannot be regulated by a rule of thumb.

Sec. 20.49 (2), Stats., was, in my opinion, to be in the nature of an outright grant to institutions that might benefit thereby. The appropriation is made to the highway commission and there is no provision for repayment to this fund if any amount is collected as "maintenance," which I believe would have been made had the legislature intended to have any of the amount expended reimbursed to the state.

I am informed by the highway commission that the appropriation is only a fractional part of the money actually needed for road construction and maintenance at state institutions and that almost all is spent for construction, and, also, that it would be exceedingly difficult to draw the line on an accounting basis on what amounts should be charged to "maintenance" and what sums for "new construction." For example, the blacktopping of an existing gravel road would fall into a very doubtful category. The highway commission has administratively construed this appropriation as an outright grant.

In the most strict sense "maintenance" may be said to include all governmental expenses incurred in connection with the operation of charitable institutions; but it is apparent that such an approach would involve complicated accounting study and is unrealistic in the absence of specific legislative direction. It is therefore my opinion that money expended from the appropriation statute (sec. 20.420 (73)) is not chargeable as "maintenance" of a patient.

REB

*Adjustment Service Companies—Unauthorized Practice of Law*—Preparation and presentation of petitions and orders in circuit court proceedings for voluntary amortization of debts of wage earners under sec. 128.21, Stats., constitutes practice of law, and such services may not be lawfully performed by a corporation licensed to adjust debts under sec. 218.02, Stats. Such activity constitutes grounds for license revocation under sec. 218.02 (6) (d), Stats.

September 21, 1955.

JOHN F. DOYLE, *Supervisor,*  
*State Banking Department.*

You have called our attention to the activities of a debt adjustment company licensed under sec. 218.02, Stats. For purposes of convenience we will hereafter refer to this company as the "licensee." It appears that the licensee solicits business in local newspapers and trade union papers by urging debtors to make use of its services in consolidating and amortizing their debts. Moreover direct mail solicitations are sent to persons whose wages have recently been subjected to garnishment proceedings. Court records are consulted in order to obtain such mailing lists. It appears that in many instances prospective clients are urged to make use of sec. 128.21, Stats., relating to circuit court proceedings by wage earners for voluntary amortization of debts.

The provisions of sec. 128.21 are quite lengthy but in brief and so far as material here this section provides that a wage earner may file a petition with the circuit court stating that he is unable to meet his current debts but is able to make regular payments on account sufficient to amortize his debts over a period of not more than 2 years. Creditors are listed including those who have levied executions, attachments, or garnishments, and the court orders a stay during the pendency of proceedings under sec. 128.21. No similar actions by other creditors may be enforced during the voluntary amortization proceedings. The filing fee is \$10 and the court appoints a disinterested trustee who calls in creditors for the purpose of working out

an amortization program. The trustee reports to the court either that no such program is feasible or needed or he recommends an amortization plan of not to exceed 2 years in which case the court enters an order approving the plan. The trustee distributes payments made by the debtor pro rata among the creditors after deducting a commission fixed by the court at not to exceed 7 per cent if the payments are made by wage assignment to the trustee, and not to exceed 10 per cent if there is no assignment. In addition the trustee is reimbursed for postage and out-of-pocket expenses. He also receives the \$10 filing fee upon satisfactory termination of the proceedings.

It appears that during the period from May 11, 1955, to June 1, 1955, out of 44 voluntary petitions filed in the circuit court of Milwaukee county, the licensee was appointed as trustee in 21 cases.

In those instances where circuit court proceedings are instituted the licensee prepares the petition and the stay order for the court as well as a notice to creditors with a consent for amortization attached for the creditor's signature.

You have inquired whether a licensee under sec. 218.02 may lawfully perform the services described above.

It is our opinion that the preparation and filing of the amortization petition and order as well as the legal advice furnished in connection therewith constitutes the practice of law. Such services may be rendered only by a licensed attorney, and the relationship of attorney and client must exist between him and the person for whom the services are rendered. In other words, no lay agency may perform such services either directly, or indirectly, by peddling the services of a licensed attorney.

Sec. 256.30 (1) and (2), Stats., provides:

"256.30 (1) Every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law, shall practice law within the meaning of subsection (2) of this section, or hold himself out as licensed to practice law as an attorney within the meaning of subsection (3) of this section, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty nor more than five

hundred dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, in addition to his liability to be punished as for a contempt.

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

In *State ex rel. Junior Association of Milwaukee Bar v. Rice*, (1940) 236 Wis. 38, 294 N.W. 550, it was held in a case involving the activities of a lay insurance adjuster that a lay person may not engage in a business which involves the rendering of legal service and then claim immunity because the giving of professional legal advice was incidental to his usual or ordinary business, and that he cannot appear in a representative capacity before a justice of the peace. However, the court said that he may properly ascertain the facts and negotiate settlements or adjustments, but cannot advise parties as to their legal rights.

It might be mentioned at this point that while sec. 256.30 makes the illegal practice of law a criminal offense, the judiciary has inherent power to control the practice of law. See *In re Cannon*, (1932) 206 Wis. 374, 240 N.W. 441; *Integration of Bar Case*, (1943) 244 Wis. 8, 11 N.W. 2d 604, 12 N.W. 2d 699; *In re Opinion of the Justices*, (1935) 289 Mass. 607, 194 N.E. 313. In other words, a criminal statute enumerating and penalizing acts of illegal practice of law does not define for all purposes the practice of law nor take the matter out of the control and supervision of the supreme court. An act may constitute a violation of the criminal law and at the same time justify the use of the court's equity or contempt power notwithstanding the punishability of the conduct as a crime. *Rhode Island Bar Association v. Automobile Service Association*, (1935) 55 R.I. 122, 179 A. 139, 100 A.L.R. 226.

In the Massachusetts case cited above the court said with respect to the preparation of pleadings, at p. 316:

“So far as the practice of the law relates to the performance of the functions of an attorney or counsellor at law before the courts, it comprises mastery of the facts and law constituting the cause of action or legal proceeding of whatever nature, *the preparation of pleadings, process, and other papers incident to such action or proceeding*, and the management and trial of the action or proceeding on behalf of clients before judicial tribunals.” (Emphasis supplied.)

In the case of *In re Collins*, (1938) 7 N.Y.S. 2d 188, it was held that one engaged in the business of preparing petitions and precepts in dispossession cases was practicing law unlawfully and was subject to punishment for contempt. Also in the case of *Bump v. District Court of Polk County*, (1942) 232 Iowa 623, 5 N.W. 2d 914, it was held that the preparation of pleadings, management of litigation for clients, advice to clients of their legal rights, performance of services in a court of justice in any pending matter throughout its various stages and in conformity with the adopted rules of procedure, and all actions taken connected with the law by one not a member of the bar, constitute the illegal practice of law.

As we have previously indicated the licensee could not render these services indirectly by providing the attorney. This would amount to the indirect practice of law by a corporation and would also subject the attorney to contempt proceedings for illegal practice. *Rhode Island Bar Association* case, *supra*. It is to be noted also that Canon 35 of the Canons of Professional Ethics of the American Bar Association provides that the professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer, and Canon 47 provides that no lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate. See also *In re Lyon*, (1938) 301 Mass. 30, 16 N.E. 2d 74, and *Richmond Association of Credit Men, Inc. v. Bar Association of City of Richmond*, (1937) 167 Va. 327, 189 S.E. 153.

The Iowa court pointed out in the *Bump* case, *supra*, that every man is entitled to be served disinterestedly by a lawyer who is his lawyer, not motivated or controlled by a divided or outside allegiance, quoting at p. 922 from reports of the American Bar Association Standing Committee on Unauthorized Practice of Law as follows:

“Unauthorized practice of law is the attempt by laymen and corporations to make it a business for profit of giving the public, as a substitute, the services of unqualified and unprofessional persons, or to employ and furnish for profit, directly or indirectly, the services of lawyers who may be willing to sabotage professional ethics in order to secure employment.

“In either case, the public is cheated; either by receiving incompetent and unethical advice, or by being served by lawyers who are not disinterested, whose real client is not the person advised but the entrepreneur furnishing the services.’”

And further:

“\* \* \* It [the public] is entitled to skillful, competent and disinterested advice from persons of character, qualified by prescribed courses of study, and who, by reason of their office, are devoted disinterestedly to the person receiving their legal services. No employee of a corporation or layman pursuing a private business objective of its, or his own, can possibly qualify to give such disinterested advice, however expert he may represent himself to be in any specialized field.’”

While not before us for consideration here, it may well be that, exclusive of the preparation and filing of pleadings in circuit court, there may be in the normal course of the debt adjustment business many situations which tend to involve the rendering of legal services and advice. In order to deal intelligently with the claims of creditors in working out compromise settlements, it may be necessary to determine what claims are barred by various statutes of limitation, what contractual obligations must be in writing to be enforceable, what claims have priority under the law, what claims are validly secured claims, and what are not, when bankruptcy proceedings are advisable, etc., to mention but a few of the situations which cannot be intelligently han-

dled in the best interest of the debtor without performing services which may constitute the practice of law.

There appear to be no decided cases of courts of last resort on the question of whether debt adjustment service *per se* constitutes the practice of law, and we do not wish to be understood as attempting to dispose of the question here. It all depends in any given situation upon the particular facts and circumstances. In some ways the type of service rendered parallels that of a collection agency, although the services are rendered on behalf of the debtor instead of the creditor. See our opinion to you under date of July 20, 1955. The services of a collection agency under certain circumstances may constitute the practice of law, as in the case of *In re Shoe Manufacturers Protective Association, Inc.*, (1936) 295 Mass. 369, 3 N.E. 2d 746, where it was held that the practice of directing and managing the enforcement of legal claims and settlement of legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving and furnishing legal advice as to such rights and methods as an occupation, or the drafting of documents by which such rights are created, modified, surrendered, or secured, are aspects of the "practice of law." There a corporation conducted a collection business which, through its president, who was not an attorney, and through attorneys employed by the corporation, gave legal advice and drew documents, determined whether legal proceedings should be instituted, and exercised full discretion as to settlements and compromises. The court held it to be improperly engaged in the practice of law.

However, without foreclosing ourselves from further inquiry as to factual considerations not presently before us, we nevertheless have no hesitancy in concluding that the preparation and presentation of petitions and orders in circuit court proceedings for the voluntary amortization of debts of wage earners under sec. 128.21, Stats., constitutes the practice of law and may not be lawfully done by a corporation licensed to adjust debts under sec. 218.02, Stats.

Having in mind the importance of protecting the public from unauthorized practice of law, it would logically follow

that a licensee under sec. 218.02, Stats., who indulges in such practice has thereby demonstrated his untrustworthiness to engage in the business of debt adjusting so as to justify revocation of his license pursuant to the provisions of sec. 218.02 (6) (d), which authorizes revocation "if the licensee has demonstrated untrustworthiness or incompetency to act in such business in a manner to safeguard the interests of the public."

WHR

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*Barbers—Committee of Examiners—Constitution—Public Officers—Extra Compensation—Art. IV, sec. 26, Wis. Const., which prohibits increase of compensation of a public officer during his term, would preclude members of the committee of barber examiners from receiving during their present terms the increased compensation provided by sec. 158.05 (3), Stats., as amended by ch. 449, Laws 1955. If they resign and are reappointed they would still be serving the same terms for which they were appointed and would be ineligible for the increased pay during the balance of such terms.*

September 21, 1955.

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

You have called our attention to ch. 449, Laws 1955, which amended sec. 158.05 (3), Stats., relating to the pay of the barbers examining committee so as to increase the per diem from \$15 to \$25.

As amended this subsection provides:

"(3) Members of the committee of examiners shall be appointed and hold office for terms of 3 years each. All such terms shall expire on December 31 of the third year next following such appointment. No member shall succeed himself for more than one term and each member shall hold office until his successor is appointed and qualified. Any

vacancies on said committee shall be filled by appointment for the unexpired term. Each member of the committee of examiners shall receive a per diem of not to exceed \$25 per day for the actual number of days he is engaged in the performance of his duties including necessary travel time and in addition thereto his actual and necessary expenses."

Because under art. IV, sec. 26, Wis. Const., the increase is not available to those holding office at the time the increase was provided, the present members of the committee have all resigned, and the question is raised as to whether these same individuals may be reappointed and receive the increased pay.

Art. IV, sec. 26, Wis. Const., provides:

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

It has been held that a prohibition against changing the compensation of an officer during his term cannot be avoided by the resignation of the incumbent and his reappointment at the increased salary. 67 C.J.S. 343; *Kearney v. Board of State Auditors*, (1915) 189 Mich. 666, 155 N.W. 510.

The Michigan constitutional provision considered in the *Kearney* case was quite similar to ours, and the court said at p. 512:

"An attribute of the office to which relators were appointed is a fixed term. The statute creating the office gives appointees a vested right as incumbents for a stated period, and provides that, when appointed and qualified, they 'shall hold office six years,' and until successors are appointed and qualify. Relators were first appointed for the full term in which they are yet serving, and, after their resignations, were at once reappointed for the 'unexpired term' of the period of time included in their earlier appointment. While the word 'term' applies to the office, rather than the person holding it, after his election or appointment the right of tenure for the term attaches to him, and in common thought and parlance the office and term together become an attribute of and characterize the incumbent during the time for which he is entitled to the office. To hold that he may ac-

quire added rights by simply withdrawing from and again resuming his incumbency for that term, through whatever agency, is subversive of the spirit, if not the letter, of this constitutional provision and contrary to the fundamental principles of public policy underlying constitutional and statutory restrictions of this character."

The language of the Michigan court quoted above also in effect answers your second question which is predicated upon the assumption of reappointment of the incumbents who just resigned. The question is whether a reappointment to fill the unexpired term would result in two terms for such officer so as to preclude him from any further reappointment under the language of sec. 158.05 (3) that "no member shall succeed himself for more than one term."

The answer is "No," since if reappointed such officer would merely be serving out his own unexpired term, which is the same reason why he cannot have the increase in pay without being in violation of the constitutional provision that his compensation may not be increased "during *his* term of office."

WHR

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*Taxation—Tax Deeds—Notice*—Where the owner of record title to tax delinquent lands holds title subject to right of re-entry for a condition which has been broken, the holder of the right of re-entry is not the owner of record for the purpose of service of notice of application for tax deed, under sec. 75.12, Stats.

September 21, 1955.

JACOB J. AMENT,  
*District Attorney,*  
Lincoln County.

You request my opinion as to the validity of tax deeds issued under the following circumstances:

A railroad company obtained its right-of-way by deeds containing a clause which provided that if, after the construction of the track, the railroad company should perma-

nently abandon the use thereof and remove the same from the premises, then the premises should revert to the grantors and their representatives. The railroad line was abandoned and the tracks removed some years ago. The county then obtained tax deeds to the several parcels after serving notices of application for tax deeds upon the railroad company but not upon any of the grantors or their assigns or legal representatives.

You state that some of the parcels have been used by the owners of the abutting lands (presumably the grantors or their assigns) for piling logs or for grazing purposes.

Prior to 1943 sec. 75.12 (1), Stats., required that a notice of application for tax deed be served upon the "owner or one of the owners of record" in a case where the land was not occupied and, if the land were occupied, required that notice be served "upon the owner or upon such occupant."

As repealed and recreated by ch. 250, Laws 1943, sec. 75.12 (1), Stats., now provides, so far as here material:

"No tax deed shall be issued on any lot or tract of land which has been or shall hereafter be sold for the nonpayment of taxes, unless a written notice of application for tax deed shall have been served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated. If such lot or tract be improved by a dwelling house, or building used for business purposes, or a building used for agricultural purposes, and in any of said cases, such building has been actually occupied for the purpose specified for 30 days immediately prior to the date of service of the notice of application for tax deed, or if such lot or tract of land has been occupied and cultivated for agricultural purposes for 30 days within the period of 6 months immediately prior to the date of service of the notice of application for the tax deed, then notice of application for tax deed shall be served upon the occupant or one of the occupants thereof. \* \* \*"

The meaning of the language used in the present statute is clear, leaving no room for construction. The owner to be served is the owner "of record in the office of register of deeds." From the facts you have supplied, the railroad company must be considered the owner of record in the office of register of deeds.

If statutory construction were necessary or permissible, the legislative history of the section would lead to the same conclusion. By adding the words, "in the office of register of deeds," after the words, "owners of record," the 1943 legislature has emphasized that what is meant is the owner according to the records in the register's office. That is the only *owner* upon whom service must be made.

Of course, the present sec. 75.12 (1), Stats., also requires service of the notice upon the occupant whenever the property has been "actually occupied and cultivated for agricultural purposes" in accordance with the statutory test. In order to be entitled to notice of application for tax deed to land containing no buildings, the occupant must have both occupied the land and cultivated it for agricultural purposes. This presents a question of fact in each case, although the facts you have submitted would indicate that probably none of the parcels involved have been occupied and cultivated within the meaning of the statute. The county has a ready means of obtaining a judicial settlement of this question by bringing an action to bar former owners, under the provisions of sec. 75.39, Stats.

You also ask whether, in the event the county does not have good title to the lands, the back taxes, interest and penalties can be collected from the owners if they wish to acquire clear title to the premises. If some of the parcels involved have been occupied and cultivated within the meaning of sec. 75.12, Stats., so as to entitle the occupant to notice of application for tax deed, then, of course, the tax deed acquired by the county is invalid since the statutory notice was not served upon the occupant. In such a case the county should proceed to obtain a new deed pursuant to sec. 75.18, Stats., provided, of course, that the tax certificates are still valid under sec. 75.20, Stats.

EWV

*Public Assistance—Old-Age Assistance—District Attorney—Corporation Counsel—Fees for Enforcement of Lien*  
—Where a county agency administers an estate to enforce an old-age assistance lien under sec. 49.26, Stats., the county is not entitled to fees for services of its corporation counsel as attorney for the administrator.

September 21, 1955.

RAYMOND P. DOHR,  
*Corporation Counsel,*  
Outagamie County.

You ask whether a full-time county corporation counsel is entitled to fees out of an estate which is administered by a county welfare agency for the purpose of enforcing the county's lien under sec. 49.26, Stats., such fee to be paid into the county treasury.

Since your question arises in connection with disallowance made by the state department of public welfare in its audits under sec. 49.38, Stats., I am assuming that you are concerned only with insolvent estates where the allowance of fees would reduce the funds available for repayment of the amounts contributed for old-age assistance by the United States, the state, and the county, respectively.

You indicate that it is not contemplated the fees are to be retained by the corporation counsel but that they are to be paid into the treasury of the county, and so your question is primarily concerned with the respective rights and obligations of the county and state in administration of the old-age assistance plan. It is, accordingly, governed to a large extent by the principles enunciated in *Holland v. Cedar Grove*, 230 Wis. 177, 189-190, 282 N.W. 111, 448. The question involves public assistance of "purely statutory origin," with respect to which "the legislature has very large powers," so that it "may impose duties and liabilities upon its creatures, the various municipal corporations of the state, in accordance with its discretion." The court pointed out that municipal corporations "have no private powers or rights as against the state," but that "they hold their powers from the state and they can be taken away by the state at pleasure."

The term "municipal corporations" was used in the foregoing case, and a county is not such a corporation in the strictest sense; but counties are also creatures of the state, without prerogatives independent of statute. *Spaulding v. Wood County*, 218 Wis. 224, 260 N.W. 473; *Richland County v. Richland Center*, 59 Wis. 591, 18 N.W. 497; *Fred-erick v. Douglas County*, 96 Wis. 411, 71 N. W. 798. Where the perquisites of a county office are fixed by statute, they cannot be altered by a county board except as the legislature authorizes it. *Reichert v. Milwaukee County*, 159 Wis. 25, 150 N.W. 401.

Your question, then, requires an examination of the statutory provisions relating to the functions of the corporation counsel or district attorney in the old-age assistance program. Sec. 59.08 (61) of the statutes provides that the county board may employ a corporation counsel, whose duties shall be limited to civil matters. It also provides, in part, that whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties presently conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel.

To the extent that a county has transferred to a corporation counsel duties of a district attorney in collection of old-age assistance claims, the corporation counsel is subject to the statutory provisions relating to such collections by the district attorney. It was pointed out in the opinion in 42 O.A.G. 231 that the duty of a district attorney under sec. 59.47, to prosecute civil actions in which the state or county is interested or a party, obligates him to furnish such legal service as is necessary to carry out the administration of social security aids with which the county has been charged. Furthermore, it is expressly provided in sec. 49.26 (3) that the district attorney "shall take the necessary proceedings and represent the county in respect to any matters under this section." The duties appertain to the office, so that they must be performed for the compensation fixed for the office without additional allowance, unless the statute provides to the contrary. The legislature provided in

sec. 49.26 (3) (a), as amended by ch. 160, Laws 1955, that "the county court in which the estate is probated may authorize the payment of a collection fee of 10 per cent but not in excess of \$50 for the services of the district attorney in estates where the district attorney does not act as the attorney for the administrator or executor unless collection is made from sources other than the estate, which fee shall be paid into the county treasury." The legislature, having made express provision for allowance to the county of a limited collection fee under certain conditions, has by implication negated an intent that the county should have further compensation for services necessary to effect collection. Neither the county nor the corporation counsel is entitled to compensation not authorized by statute. It was said in 34 O.A.G. 172, 176:

"As you have indicated, sec. 49.26 (7) makes no allowance for attorney fees in obtaining a certificate of heirship. In line with our previous opinions on the subject of compensation for the district attorney in connection with old-age assistance liens, it is apparent that neither the full time nor part time district attorney is entitled to any compensation out of the proceeds of the property for any services which he may render in collecting the county's claim.  
\* \* \*"

BL

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*Savings and Loan Associations—Mortgages—Savings and loan associations under the provisions of ch. 143, Laws 1955, may sell G. I. mortgages and FHA mortgages to any person.*

September 23, 1955.

C. P. DIGGLES,

*Commissioner of Savings and Loan Associations.*

You have asked for my opinion on the following two questions:

1. Under existing statutory provisions, does a savings and loan association have the authority to originate, buy,

or sell G. I. mortgage loans or FHA mortgage loans secured by real estate situated outside of the state of Wisconsin?

2. Under existing statutory provisions, does a savings and loan association have the authority to originate, buy, or sell G. I. mortgage loans or FHA mortgage loans secured by real estate more than 50 miles distant from the office of the association?

The term "G. I. mortgage loan" is a common trade expression for loans guaranteed by the veterans' administration under the provisions of the servicemen's readjustment act of 1944, United States public law 346, 78th congress, and the acts amendatory thereof. The term "FHA mortgage loan" again is a common trade expression for loans guaranteed by the federal housing administration under the national housing act approved June 27, 1934, and the acts amendatory thereof.

Your present question arises because of the passage of ch. 143, Laws 1955, by the 1955 session of the legislature. Under the previous opinions of this office, 26 O.A.G. 481 (1937), 36 O.A.G. 595 (1947), and 37 O.A.G. 563 (1948), it appears established that the ordinary restrictions which apply to conventional loans originated or purchased by Wisconsin savings and loan associations do not apply to G. I. mortgages or to FHA mortgages.

Under the existing statutes conventional mortgages must be secured by real estate located within the state of Wisconsin and within 50 miles of the office of the association. Sec. 215.22 (1), Stats. Further, while the association under sec. 215.20 (1) (f), Stats., has power to make loans only to its members, this section of the statutes is in effect rendered nugatory by the provisions of sec. 215.12, Stats., which provides that any person who borrows money from the association thereby becomes a member.

On the other hand, investments in G. I. mortgages or FHA mortgages even prior to 1955 were not subject to the restrictions on conventional mortgages because of the provisions of secs. 219.01 and 219.03, Stats., which are discussed in the opinions above referred to.

Sec. 219.01 specifically authorizes a savings and loan association to invest its funds in G. I. mortgages and FHA

mortgages, and sec. 219.03 again specifically provides that no other provision of the statute restricting or defining the nature of the security shall apply to loans or investments made pursuant to this chapter, meaning thereby ch. 219.

However, prior to 1955 there was no provision similar to the provisions of ch. 219 in regard to the sale of various securities by a savings and loan association. Hence, G. I. mortgages and FHA mortgages were subject to the same restrictions upon sale as conventional mortgages. In view of the fact that a savings and loan association as a chartered corporation has only such powers as are lawfully conferred upon it under the existing statute, express authority in the statutes must be found in order to authorize a sale.

Under the provisions of sec. 215.20 (5), Stats., an association was authorized to dispose of any or all of its assets, but only to other associations and only with the approval of the commissioner of savings and loan associations.

Under the provisions of sec. 215.20 (17), Stats., an association was authorized to sell its mortgages *without* the approval of the commissioner of savings and loan associations, but only to the organizations named in subsec. (17). These organizations were: (a) The state of Wisconsin investment board, (b) any of the funds whose investments are supervised by the state of Wisconsin investment board, (c) the federal home loan bank, and (d) any other instrumentality of the United States.

By the amendment made to sec. 219.03 by the provisions of sec. 8, ch. 143, Laws 1955, the statutes now provide in regard to G. I. mortgages and FHA mortgages, that no provision of the statute limiting the right of an association to buy, sell, or assign mortgages shall be deemed to apply to loans or investments made pursuant to this chapter, meaning again ch. 219.

Hence, it would appear that a similar amendment made to sec. 215.20 (17) (e), authorizing the sale of mortgages to certain additional named institutions but only with the approval of the commissioner, does not apply to G. I. mortgages and FHA mortgages, and hence under the authority of sec. 219.03 as amended by ch. 143, Laws 1955, such mort-

gages may be sold to any person and without the approval of the commissioner of savings and loan associations.

In summary, the answer to both of your questions is, "Yes."

RGT

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*Villages—Counties—Highways and Bridges—County Aid*  
—Sec. 83.05 (3), Stats., does not allow highway construction of curbs, gutters, and storm sewers on county trunk highways in villages. Secs. 83.025 (2) and 83.03 (1), Stats., discussed.

September 23, 1955.

LEROY J. HAGEMANN,  
*District Attorney*  
Pierce County.

You have requested my opinion on two questions relative to the authority of your county to aid in highway construction on portions of county trunk highways within villages. The first of these questions is whether the county may properly grant aid to a village for the construction of curbs, gutters and storm sewers, and further, for the "blacktopping" of a county trunk highway where the width is approximately 22 feet.

Sec. 83.05 of the statutes provides that counties may aid cities and villages in the *paving* of county trunk highways within the corporate limits of these municipalities. In the case of both cities and villages, *pavement* costs to the county are limited to 18 feet; but in the case of cities a formula is provided for the costs of "grading, draining, and appertaining structures." See sec. 83.05 (2), Stats. Sec. 83.05 (3), which applies to villages, has no such reference to "grading, draining, and appertaining structures." This statute was originally passed in 1917 and its interpretation must be viewed in the light of the situation which existed at that time. The state and county highway systems were then just beginning to take shape, and construction of rural highways, even within villages, was done on a simple

basis and was not as involved as the construction of urban streets. This probably accounts for the difference between the city and village provisions of the law.

In a previous opinion of this office, it was stated that the costs of curbs, gutters, and storm sewers are to be considered as a share of grading, draining, and appertaining structures, which is permissible as to a city project. See 38 O.A.G. 477. To be consistent with this view, which appears to be correct, it must follow that since reference to grading, draining, and appertaining structures is absent as to villages, expenditures for the purpose of curbs, gutters, and storm sewers are not allowable.

There is an apparent conflict between sec. 83.025 (2), Stats., and the section above discussed. This was noted in an opinion dated May 23, 1955, 44 O.A.G. 97, where the suggestion was made that these sections should be clarified by legislative action. Sec. 83.025 (2) states that the county trunk system shall be marked and maintained by the county and that "no county shall be responsible for the *construction* and maintenance of a city or village street on the county trunk highway system to a greater width than are those portions of such system outside the village or city and connecting with such street."

Sec. 83.03 (1), Stats., states:

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

All of these statutes are *in pari materia*. They must be considered together. The only reasonable interpretation that suggests itself is that sec. 83.05 is a limitation on secs. 83.025 and 83.03 (1). Sec. 83.05 is a specific statute on *paving* and is controlling over the other general statutes. See 25 O.A.G. 675. In other words, the county can construct a highway to its width outside of villages but not pave it. Thus, if the blacktopping you speak of is of permanent paving material, such as bituminous concrete, the county may not pay for pavement costs in villages to a greater width than 18 feet, but could pay for the maintaining of a street with road oil or some other stabilizing substance, the use of which would not result in a paved surface.

No doubt distinctions are extremely hard to make in many instances but the present statutes lend themselves only to this construction or to the position that reconciliation is impossible, and that position should not be taken as long as some reasonable interpretation can be reached.

The second question you ask is whether upon a finding of emergency flood conditions the county could construct curbs, gutters, and storm sewers on county trunk highways in villages. This must be answered in the negative in view of the result reached above and because there is no provision in the statute which would allow any deviation because of emergency flood conditions.

REB

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*Adoption—Foreign-Born Child—Vital Statistics—Birth Certificate—Sec. 69.33 (1) and (7), Stats., does not authorize registration of birth of foreign-born child adopted by Wisconsin residents in the country of the child's nationality. Subsec. (1) applies only to adoptions in Wisconsin and subsec. (7) applies only if the child was born in the United States. "State" as used in subsec. (7) probably does not include a foreign nation.*

September 26, 1955.

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

You have requested an opinion whether the state board of health is authorized to issue a birth record pursuant to sec. 69.33, Stats., where a Wisconsin resident in service with the United States army in Germany, and his wife, also a Wisconsin resident, adopted a child who was a German born national, the adoption proceedings having been conducted in a German court.

Sec. 69. 33 (1), Stats., as amended by ch. 26, Laws 1955, provides as follows:

“On being advised pursuant to s. 322.05 of the adoption of any child whose birth has previously been registered or pursuant to s. 245.36 of the legitimation of any child by the marriage of the parents, the state registrar of vital statistics shall file a new birth certificate filled out and signed by himself or his authorized representative. In this new certificate reference shall be made to this section by number only. In all other respects the certificate shall be the same as other birth certificates and shall contain nothing else to differentiate it therefrom. In case such adopted child was born elsewhere a new certificate may be filed as herein provided if the adoptive parent shall file with the state registrar a certified copy of the original birth certificate or satisfactory proof that the birth was not recorded. The place of birth may be given as the place where the adoption order was made and the date of birth shall be taken from the original certificate, or, in the absence thereof, from the adoption order except that if the child was born outside the United States, the actual place of birth shall be given whether or not the natural parents were United States citizens, but if they were not, the certificate shall not be issued until proof of naturalization of the child has been furnished to the registrar.”

Sec. 69.33 (7), Stats., provides as follows:

“Whenever a *child born in the United States* shall have been adopted *in another state* by residents of this state, the adoptive parent may file an authenticated copy of the order or judgment of adoption with the state registrar, together with a certified copy of the original birth certificate, if any. Thereupon the state registrar shall proceed as provided in subsections (1), (2) and (5) so far as the same may be applicable. The residence of the adoptive parents may be recorded as the place of birth.”

Sec. 370.01 (40) 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:

“\* \* \*

“(40) STATE. ‘State,’ *when applied to states of the United States*, includes the District of Columbia and the several territories organized by congress.”

This adoption does not come within the provisions of sec. 69.33 (1) above quoted, since that can apply only to

adoptions in Wisconsin courts pursuant to ch. 322, Stats. This is made plain by the reference in the statute to advice "pursuant to s. 322.05." No court of Germany or of any state of the United States is governed by sec. 322.05, Stats., which provides that the clerk of the adoption court shall "promptly mail a copy [of the order of adoption] to the state bureau of vital statistics and furnish any additional data needed for the corrected birth certificate." Ch. 322 is a procedural statute governing adoptions in Wisconsin courts only and can have no effect upon courts of other states or nations.

Neither does this case come within sec. 69.33 (7), which applies to "a child born in the United States \* \* \* adopted in another state by residents of this state." In the first place, the child in question is a German-born national, and subsec. (7) applies only to children born in the United States. In the second place, it appears that the phrase "adopted in another state" very probably would not be construed to include adoption proceedings in a foreign country.

Sec. 370.01 (40) above quoted does not aid in determining this question because it defines "state" only "when applied to states of the United States," which is the very question to be determined.

The word "state" when used in statutes is sometimes held to include foreign nations, and this may be true even though the nation in question is at the time under military occupancy by a foreign power. 40 Words and Phrases (Perm. ed.) 13-15; *Acheson v. Wohlmut*, (App. D. C. 1952) 196 F. 2d 866, 868. But in this context, where the statute deals with the adoption of "a child born in the United States," it would appear that the legislature had in mind adoption proceedings in the states of the United States.

However, it is not necessary to determine that question, since the case is, in any event, not within the statute by reason of the child's foreign birth.

WAP

*Public Welfare Department—Charitable and Penal Institutions—Funds of Inmates—Responsibility of state department of public welfare for care of funds of inmates held by it pursuant to sec. 46.07, Stats., discussed.*

September 28, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have requested my opinion as to whether a part of the total of inmate funds held pursuant to sec. 46.07 of the Wisconsin statutes may be placed in an interest-bearing savings account and how the interest should be handled. The pertinent part of sec. 46.07, Stats., reads as follows:

“(1) PROPERTY DELIVERED TO STEWARD; CREDIT AND DEBIT. All money and other property delivered to an officer or employe of any institution for the benefit of an inmate shall forthwith be delivered to the steward, who shall enter the same upon his books to the credit of the inmate. Such property shall be used only under the direction and with the approval of the superintendent or warden and for the benefit of the inmate. \* \* \*”

The relation of your department to the inmate is unquestionably one of bailor-bailee. A bailment need not be created by contract nor need there be an actual meeting of the minds. It is the element of lawful possession, however created, and the duty to account for the property of another that is essential. *Burns v. State*, (1911) 145 Wis. 373; *Matta v. Katsoulas*, (1927) 192 Wis. 212. I am further of the opinion that your department is in the position of a gratuitous bailee, since the bailment is solely for the benefit of the inmate. As such, you are responsible only for gross negligence under the law in this state. *Willard v. Giles*, (1869) 24 Wis. 319; *Smith v. Poor Hand Maids of Jesus Christ*, (1927) 193 Wis. 63.

You are not required as bailee to return the bailed property in specie to the owner. *State v. Dohn*, (1934) 216 Wis. 367. In your case this would mean that money could be deposited in a bank for safekeeping. This opinion should not be construed to include the conversion into cash of

property other than money since this question was not asked and is not here considered.

The statute requires that you hold the property "for the benefit of the inmate." This means that it would be improper to use any interest earned in any savings account for any other purpose than for the direct benefit of the individual inmate. The practice of using the interest of a savings account composed of the lumped sums of the inmates for the institutional canteen or some similar enterprise would be improper, no matter how beneficial this practice may be for the inmates at large. The case of *State v. McFetridge and others*, (1893) 84 Wis. 473, involved a former state treasurer who had deposited state money in banks for safekeeping, and while he accounted for the principal he kept the interest as his personal property. In holding that such action was illegal the court said: "Gains of money in interest paid for its use belong to the owner of the money unless he makes another disposition of it himself."

I am mindful of the fact that it would pose a serious administrative problem to compute the interest as to individuals having deposited trifling amounts into one large savings account, but you have no choice under the present statute if a lumped sum savings account is used. While this method is legally permissible, perhaps the only practical way to handle the funds would be through a checking account composed of all of the funds or through individual savings accounts. You have no absolute duty to place the money at interest, but if you do, each individual is entitled to the full benefit of his property under the statute and this would include any interest, no matter how trifling, his money earns.

REB

*Public Assistance—Support of Dependents—Counties—Courts—Suit Tax*—Under sec. 59.42 (2), Stats., counties are subject to suit tax imposed by sec. 271.21, Stats., in proceedings brought under ch. 52, Stats., to enforce the liability of relatives to support dependent persons.

September 28, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have inquired whether a county welfare agency, in proceedings under ch. 52 of the statutes to require the support of a dependent person by relatives, is obligated to pay the \$5 suit tax provided by sec. 271.21, Stats., inasmuch as public funds supplied by the county, state, and federal governments are used in paying the tax.

Sec. 271.21 provides:

“271.21 In each action, special proceeding and cognovit judgment in a court of record having civil jurisdiction there shall be levied a tax of \$5 which shall be paid to the clerk at the time of the commencement thereof, which tax on such matters in the circuit court shall be paid into the state treasury and form a separate fund to be applied to the payment of the salaries of the circuit judges; and which tax in other courts of record the salaries of the judges of which are wholly paid by the counties or by any county and city jointly shall be paid to the county treasurer to create a fund to be applied to the payment of the salaries of such judges.”

Sec. 52.01 (1), Stats., imposes liability on the parent, spouse, or child of a dependent person for support, and upon the failure of relatives to provide such support subsec. (2) provides that the authorities in charge of the dependent or the board in charge of the institution where the dependent is shall submit a report to the district attorney. The district attorney within 60 days thereafter applies to the county court for an order to compel such maintenance. Under subsec. (3) 10 days' notice of the hearing is served upon such relatives in the manner provided for the service of summons in courts of record.

Sec. 52.01 (4), Stats., provides that the county court shall in a summary way hear the allegations and proofs of

the parties and by order require maintenance if the relatives are of sufficient ability. Such an order may be modified on application of a party, and obedience to an order may be enforced by proceedings as for a contempt. Subsec. (5) provides that an aggrieved party may appeal from such an order.

The county court is a court of record, sec. 253.08, Stats., so as to come within the purview of the suit tax statute, sec. 271.21 quoted above.

Sec. 260.02, Stats., provides:

“Remedies in the courts of justice are divided into:

“(1) Actions.

“(2) Special proceedings.”

Sec. 52.01 (4) clearly provides a remedy for enforcing the liability of relatives to support indigents, and it becomes unnecessary to determine here whether such remedy is an action or a special proceeding. It must be one or the other under sec. 260.02 and the suit tax is payable in either category.

This then leaves for consideration the question of whether any exemption from the payment of the suit tax is to be implied by virtue of the fact that counties are reimbursed with state and federal money on a percentage basis for their administrative costs in administering social security aids.

In actions or special proceedings where the state itself or one of its agencies is a party no suit tax is paid. Note sec. 59.42 (2). Moreover, statutes in general terms, such as sec. 271.21, do not affect the state if they tend in any way to restrict or diminish its rights or interest. See *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 121 N.W. 642, where the court said at page 37 that the state in its sovereign capacity “is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as ‘universal trustee’ for his people.”

Likewise, the federal government and its agencies are exempt from suit tax. A state cannot tax the means or instrumentalities employed by congress to carry into execution powers conferred upon it by the federal constitution. See 25 O.A.G. 401 and cases there cited.

However, neither the state nor the federal government is a party to any of the proceedings under ch. 52 to enforce the liability of relatives, and we are aware of no instances where the state's or the federal government's immunity from suit tax has been extended to situations where they share in the administrative costs of the county or other entity which brings the proceedings.

A county is definitely required to pay suit tax by reason of the provisions of sec. 59.42 (2) relating to the fees of clerk of court. In setting up the clerk's fees in civil actions under subsec. (2) of sec. 59.42 the legislature inserted the following language:

“\* \* \* (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):”

You are accordingly advised that counties are subject to the suit tax imposed by sec. 271.21 in proceedings brought under ch. 52 to enforce the liability of relatives to support dependent persons.

WHR

*Counties—County Board—Powers—Power of county board to hire and fire county employes under sec. 59.15 (2), Stats., discussed.*

October 3, 1955.

HARRY E. WHITE,  
*District Attorney,*  
Marinette County.

You state that over the years the county board of your county has made provision for various positions in the county offices including clerks, typists, bookkeepers, stenographers, and the like. Such positions as well as the positions of deputies for elected county officials were included in a county civil service ordinance adopted in 1948 pursuant to the provisions of sec. 59.074, Stats.

However, at the 1954 annual meeting the county board repealed the civil service ordinance. Since then there have been many disputes at board meetings as to where the authority to hire and fire county employes rests. Some of the board members contend that sec. 59.15, Stats., gives the board the right to create or abolish positions, fix salaries, and to actually hire and fire county employes.

In 1950 the county board did adopt an ordinance pursuant to sec. 83.016, delegating to a specified committee the authority to appoint and employ traffic patrolmen, and that ordinance is still in effect. However, no ordinance has ever been adopted establishing rules and regulations of county employment pursuant to sec. 59.15, and no ordinance has been adopted under sec. 59.21 (8) relating to the appointment of deputy sheriffs.

The result is that since the repeal of the civil service ordinance there is no prescribed method of appointing persons to any position of county employment other than in the case of county patrolmen.

At the July 1955 meeting of the board the position was taken by the majority of the members that the board had the right to pass upon all positions of county employment, and the board voted to disapprove of the appointment of a particular person as deputy sheriff and turnkey, instructing the sheriff to make a new appointment, which he refused to do.

An attempt to pass a clarifying resolution failed at the September board meeting after considerable debate in which some members contended that the board has the power to do the actual hiring and firing, including deputies of elected officials, and that no appointment either of a deputy or of an employe can be effective until confirmed by the county board.

You have reached the conclusion that the only control which the county board may have in the matter is that of control of salaries paid out of the county treasury, and it is therefore your opinion :

"1: That the authority vested by statute in elective county officials to appoint deputies is not subject to ratification or confirmation by the county board and that the board has no legal authority to require such confirmation or ratification.

"2: That as to positions of county employment (such as clerks, typists, stenographers, etc.) within departments of county government or county offices headed by an elective official, the authority to make appointments to such positions is vested in the elective official legally responsible for the performance of the duties of that department or office and that the county board has no legal authority to require confirmation or ratification of such appointments by the board.

"3: That as to positions of county employment within county departments created by the county board (such as the county abstractor department) for which no elective official is legally responsible, the authority to make appointments to such positions is vested in the county board and that such authority may be delegated by the board either to the head of that department or to a designated committee of the board.

"4: That as to positions of county employment within the county department of public welfare, the authority to appoint the director and other employes is vested in the county board of public welfare, subject to the provisions of section 49.50 of the statutes and subject also to the rules and regulations of the state department of public welfare promulgated thereunder.

"5: That the authority vested in the county board by section 59.15 of the statutes does not include the power to directly hire or fire persons holding positions of county employment within the county department of public welfare or within any department or office headed by an elective

official who is legally responsible for the work of that department or office.

"6: That an ordinance establishing rules and regulations for county employment, adopted under section 59.15, may not include provisions which:

"(a) authorize the county board to directly hire or fire county employes in positions within the welfare department or within any department or office headed by an elective official who is legally responsible for the work of that department or office.

"(b) require confirmation by the county board of appointments to such positions.

"(c) require confirmation by the county board of appointments of deputies by elective officials where such appointments are either required or authorized by statute."

Our official opinion is requested on the correctness of these conclusions.

The statute which applies generally to appointive officials, deputy officers, and employes is sec. 59.15 (2) which provides:

"(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYES. (a) Notwithstanding the provisions of any general or special law to the contrary the county board shall have the powers set forth in section 59.15 (2) and (3) as to any office, board, commission, committee, position, or employe in county service (other than elective offices included under section 59.15 (1), county board members and circuit judges) created by or pursuant to any special or general provisions of the statutes, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

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

"(c) The county board at any regular or special meeting may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to

the tenure of the incumbent (except as provided in paragraph (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish rules and regulations of employment for any or all persons paid from the county treasury, but no action of the county board shall be contrary to or in derogation of the rules and regulations of the state department of public welfare pursuant to section 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or the provisions of sections 16.31 to 16.44.

“(d) The county board at any regular or special meeting or any board, commission, committee, or any agency to which the county board or statutes has delegated the authority to manage and control any institution or department of the county government may enter into contracts for the services of employes setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.”

1. This would not supersede any statute which for instance confers upon an elective officer the power to appoint a deputy, but it does confer upon the county board the power to fix the number of deputies, for example, that a county clerk shall employ. See 39 O.A.G. 579.

2. There is nothing in sec. 59.15 (2) quoted above which gives the county board the direct power to hire and fire individual clerks, typists, stenographers, etc., in county departments of government. If the legislature had wanted to confer such power it would have been easy for it to say so. This does not mean, however, that the county board cannot abolish positions under sec. 59.15 (2) (b) or transfer duties.

3. As to positions which are purely of county board creation the situation is otherwise. For instance, sec. 59.58 (1), Stats., provides in part that the county board may create a department known as an abstract department and may appoint a competent person as county abstractor for a 2-year term. Sec. 59.58 (4), Stats., provides that the county board shall fix the salary of the abstractor, provide such clerical assistance as may be necessary, and fix their compensation. If the county board is to provide the assistance it could presumably name the individuals to be employed. Also, there would be no reason why the board could not

delegate to a committee or to the county abstractor the task of hiring such help.

4. As you have indicated under sec. 49.50, Stats., the county welfare department is on an entirely separate basis. Under sec. 46.22 (2), Stats., the county board elects the county board of public welfare, which board in turn appoints a county director of public welfare subject to sec. 49.50 (2) to (5), Stats., and the rules and regulations promulgated thereunder. He in turn under sec. 46.22 (3) recommends to the county board of public welfare the appointment and fixing of salaries of employes necessary to administer the functions of the department subject to the provisions of sec. 46.22 (6) and sec. 49.50 (2) to (5) and the rules and regulations promulgated thereunder. Thus the matter of the director and employes of the county welfare department has been pretty effectively removed from the direct control of the county board of supervisors.

5. As already indicated, the hiring and firing of employes of either the county welfare department or of elective officers is not the responsibility of the county board under sec. 59.15. In fact the elective offices are specifically excluded from the scope of sec. 59.15 (2) by its very language.

6. It would follow that the county board may not adopt an ordinance under sec. 59.15 which would:

(a) Authorize the county board to directly hire or fire county employes in positions within the welfare department or within any department or office headed by an elective official who is legally responsible for the work of that department or office.

(b) Require confirmation by the county board of appointments to such positions.

(c) Require confirmation by the county board of appointments of deputies named by elective officials in those instances where such officials are required or authorized by statute to make appointments.

In closing, we call attention to the fact that a "shot-gun" opinion of this type attempting to answer half a dozen hypothetical questions and subdivisions thereof with no specific factual situations presented is most difficult, and that if a thorough job were to be done it would require an exhaustive analysis of the statutes relating to every county

officer and department, along with all of the prior opinions and court decisions relating thereto. Such an opinion would run to an unwarranted length and much of it would, no doubt, be unnecessary for your purposes.

However, if there is a specific fact situation actually pending with reference to any office or department which requires a detailed analysis of the law relating to such office or department, we will be glad to help you upon receiving a full and complete statement of all of the material facts.

WHR

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*Constitutional Law—Equal Protection—Intoxicating Liquors—Regulation of Closing Hours—Secs. 66.054 (10) (a) and 176.06 (6), Stats., which provide different closing hours for Class “B” intoxicating liquor taverns in Milwaukee county from those prevailing elsewhere in the state, are constitutional.*

October 6, 1955.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 32, A., you have requested my official opinion “on the constitutionality of the statutes providing different closing hours for taverns, based on population.”

Sec. 66.054 (10) (a), Stats., relating to Class “B” retailers’ licenses for the sale of fermented malt beverages, 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.”

Sec. 176.06 (6), Stats., relating to Class “B” licenses for the sale of intoxicating liquor, provides in part as follows:

“In any county *having a population of 500,000 or more*, if a retail “Class B” license, the closing hours, during which no patron or guest shall be permitted to enter or remain in

the licensed premises except as provided in paragraph (e), shall be as follows:

- "(a) On Sunday, between 3:30 a. m. and 10 a. m.
- "(b) On week days, between 2 a. m. and 6 a. m.
- "(c) On January 1 of each year, no closing.
- "(d) On any election day, during such hours as the polls may be open."

As a result of the foregoing statutes, all Class "B" taverns located outside of Milwaukee county are required to be closed between 1 a. m. and 8 a. m., and on election days until the closing of the polls. In Milwaukee county, however, Class "B" taverns holding only a fermented malt beverage license have no closing hours, and those holding an intoxicating liquor license are required to be closed only between 2 a. m. and 6 a. m. on weekdays, between 3:30 a. m. and 10 a. m. on Sundays, not at all on January 1, and on election days during such hours as the polls may be open.

These statutes were held to be constitutional in *State v. Potokar*, (1944) 245 Wis. 460, 15 N. W. 2d 158.  
WAP

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*Criminal Law—Lotteries*—Radio program entitled "Let's Quiz the Mrs." in which information necessary to win is broadcast and is also printed on the package in which the sponsor's product is sold, has the element of consideration necessary to constitute it a lottery, prize and chance being present.

October 7, 1955.

FRED E. FROELICH,  
*District Attorney,*  
Outagamie County.

You have requested an opinion whether or not a radio program called "Let's Quiz the Mrs." violates sec. 348.01, Stats. You describe the program as follows:

The show is conducted over a local radio station. Phone calls are made during the program direct to homes in the area; the announcer asks the party (man or woman)

answering the phone if he or she can tell him anything about the current recipes attached to the family size package of Blue Star potato chips.

The first call is worth \$2 in groceries from a store of the winner's selection. Each additional call is worth \$1 and is added to the jackpot until the announcer finds someone that can tell him something about one of four current recipes. When he does she is declared a winner. If there is \$15 in the jackpot the money is paid to the grocer of her selection and she makes her own choice of groceries for \$15.

A consolation letter is sent to the non-winner entitling the party answering the phone to a 39-cent package of Blue Star potato chips by presenting the letter to her favorite store.

At the time the announcer declares the housewife a winner, the store of her selection is given some free publicity over the radio.

All of the Blue Star potato chip packages contain recipe tabs which are numbered consecutively such as 82, 83, 84, 85, etc. Each number represents a new recipe each week. To be a winner the housewife has only to tell the announcer anything about any one of the four recipes asked for by the announcer.

On Thursday of each week the oldest numbered recipe is dropped and a new number is added. The latest current recipe is read over the air each day, which should be recorded in the log of the radio station; therefore the housewife need not go near the grocery store in order to learn what is on the various recipes. There is no requirement for proof of purchase of Blue Star potato chips, nor any outlay of cash.

It is clear that the foregoing program involves two of the three elements of a lottery, namely prize and chance. The only question which requires discussion in this opinion is whether the third element is present, namely, consideration.

Sec. 348.01 (2), Stats., enacted by ch. 463, Laws 1951, 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."

Prior to the enactment of that section the attorney general had issued three opinions to the effect that certain radio and television programs in which prizes were given persons determined by chance, were lotteries. On December 30, 1949 an opinion was given regarding a program called "Crack the Safe," in which clues to the combination of a safe were broadcast from time to time by a radio station, and whoever could open the safe would receive valuable prizes. 38 O.A.G. 657.

Chance and prize being present, the attorney general stated in part as follows regarding consideration:

"The purpose of the scheme is to attract listeners to the radio program. *An audience is a necessary adjunct of a radio station and in my opinion the enticement of an audience under the inducement of winning a prize by chance is consideration accruing to the station and to the sponsors of the program.* Without an audience the station has nothing to sell and the advertiser receives no benefit from the program. It has been held that 'advertising and the sales resulting thereby, based upon a desire to get something for nothing' constitute a consideration for a lottery. *Brooklyn Daily Eagle v. Voorhies*, (C.C.E.D.N.Y. 1910) 181 Fed. 579, 581-2. (Italics supplied.)

"\* \* \*

"The fact that persons who have not listened to the program are permitted to try their luck at opening the safe is immaterial on the question of consideration. In the first place it may be assumed that their chance of working the combination is less than that of persons who have listened to the program and heard the clues. At least that is the inference which the sign on the safe would leave with the reader. In the second place the fact that some persons are permitted to participate who have not contributed to the consideration flowing to the promoter does not change the character of the scheme as a lottery. *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153, 158-9."

And on January 10, 1950, an opinion was given that "Musical Tune-O," a form of bingo played by means of radio, was a lottery. 39 O.A.G. 15.

The attorney general stated in part:

"Prize, chance and consideration are the three elements necessary in a lottery. All appear to be present. Usually a scheme such as this attempts to eliminate one particular element through some subterfuge. The only possible argument that could be made is that consideration is absent. In the case of *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 132, it is said that consideration may consist of an advantage to one person or a disadvantage to another. Here it is obviously of advantage to the advertiser to have his ad studied by the person participating. He also has a further advantage of the possibility of having players come to his store to get additional cards, and it is likely that the advertiser's name might be mentioned on the song broadcast. The fact that a person may possibly copy the chart of another and may never actually see the advertisers' names and that it is possible to broadcast the program without mentioning the sponsors, does not validate the scheme. I doubt that consideration could be thus eliminated. Even if it could be said that consideration was not present as to a few participants, courts will look behind such means of evasion and ascertain the true manner in which a scheme such as this is intended to be operated."

Finally, on October 18, 1950, the attorney general analyzed a number of programs including "Tello-Test" and "Stop the Music," and concluded that all of them were lotteries. 39 O.A.G. 374.

On the question of consideration, reference was made to the two earlier opinions and the following was added:

"In determining whether consideration is present, each program must be analyzed to determine whether members of the radio audience are enticed to listen to the program in the hope of participating in the distribution of prizes or to enhance their chances of winning, or whether, on the other hand, the listeners are attracted by the entertainment value of the program without any reference to actual participation therein. In determining this question, this department cannot set itself up as a judge of what constitutes good entertainment. A wholly objective test must be applied. It would have to be assumed that curiosity alone would impel persons to listen to programs in order to find out what other persons have been the beneficiaries of the sponsor's largesse in any case where the program on its face did not offer the listener any clues or any improved chance of winning. The listener as such would then be a mere 'kibitzer,' not a potential participant.

"It is the opinion of some that the slightest inconvenience required to participate in a give-away scheme is sufficient consideration to constitute such scheme a lottery. According to this view, the mere effort required to answer a telephone, or the inconvenience of remaining at home in the hope of being called rather than going some place else, would be a sufficient consideration. I do not here adopt that view. It is my view that where the inconvenience to the participant is slight *and is of no benefit to the station or the sponsor*, it falls within the maxim *de minimis non curat lex*.

"Neither do I consider that the mere fact that the participant's name is read over the radio constitutes a consideration."

Thereafter the legislature enacted sec. 348.01 (2), Stats., quoted above, with the evident intent of overruling those opinions. The foregoing statute was construed by the attorney general upon the assumption that it was constitutional but subject to a strict construction because it was a proviso, and for the further reason that it came close at least to violating the prohibition of the Wisconsin constitution, art. IV, sec. 24, which provides that "the legislature shall never authorize any lottery." 40 O.A.G. 282, 284.

Subsequently an opinion was issued relating to the game of "Banko" played on a television station. The game was a variation of the well known gambling game of "Bingo," with the numbers selected and broadcast from the television station. The forms on which the game was played were obtainable at the grocery stores operated by the sponsor and at a few other business places, at the television station, or by writing to the sponsor requesting that a blank be sent by mail. The attorney general expressed the opinion that the element of consideration was present under the rule of *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 294 N.W. 491. 43 O.A.G. 324.

Thereafter the question of the legality of the game of "Banko" was presented to the Wisconsin supreme court in the case of *State v. Laven*, (1955) 270 Wis. 524. The game involved in that case was played essentially in the same manner as described above but in an effort to eliminate consideration the sponsor added a further feature by permitting the players to make their own entry blanks, mail-

ing a duplicate to the sponsor before the broadcast each week. The sponsor refunded the amount of the postage to any entrant who either wrote in requesting an official blank or mailed in a home-made blank. The supreme court held that the game was a lottery and moreover that sec. 348.01 (2) purporting to authorize it was unconstitutional. At p. 529 the court stated in part as follows:

“\* \* \* In 1951, as appellant points out, the legislature enacted sec. 348.01 (2), Stats. This is, indeed, a peculiar statute. ‘Banko’ in itself, is an admitted lottery, illegal as such under sec. 348.01 (1), but when the voices and images of the players are picked up and broadcast by radio or television, sub. (2) purports to work a transformation. What was a lottery a moment before ceases to be one when the electric current is turned on. Or, if it is still a lottery it is one which has the approval of the legislature.

“\* \* \*

“Our conclusion is, then, that sec. 348.01 (2), Stats., authorizes some lotteries under some conditions and is void because it violates sec. 24, art. IV of the state constitution. This leaves the remainder of the statute as it stood when the *Cowie* and *Regez Cases*, *supra*, were decided. Under the stipulation of facts and appellant’s own admission, ‘Banko’ is so similar to the schemes which we considered in those cases that it constitutes the operation of a lottery and the judgment of the court and resulting sentence must be affirmed.”

The result of this decision is to reinstate the earlier opinions of this office quoted above. The program described in your letter must therefore be tested in the light of the principles stated in those opinions.

It will be observed that the last current recipe is read over the air each day. This tends to attract an audience whose members are enticed to listen to the program in the hope of participating in the distribution of prizes and to enhance their chances of winning. The information necessary to win can be obtained by listening to the program, and for the reasons stated in the opinions above quoted, that is an element of consideration.

Moreover, the information necessary to win is printed on the package and will undoubtedly cause customers to purchase the potato chip package to enable the purchaser to obtain this information. This is clearly an element of mone-

tary consideration and even if the attraction of an audience to the radio station were held not to be consideration, the purchase of the sponsor's product by some of the prospective participants would furnish the element of consideration. The fact that some participants may obtain their chances without consideration, while others give consideration, does not make a scheme any the less a lottery. *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153, 159.

WAP

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*Public Welfare Department—Diagnostic Center—Maintenance of Patients*—Under sec. 46.04 (3), Stats., created by ch. 244, Laws 1955, the charge to the patient or relative for maintenance at the Wisconsin diagnostic center is the same as for maintenance at the institution from which the patient was transferred.

The county of legal settlement is to be charged at the rate of \$5 per week for maintenance of patients in the Wisconsin diagnostic center pursuant to sec. 51.08 (1), Stats., and any amount collected from a patient or relative is to be prorated with the county on that basis. There is no authority for a charge to the county whose juvenile court has referred a minor to the diagnostic center for precommitment study, unless the minor has legal settlement in that county.

October 14, 1955.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have requested an opinion with reference to the liability and rates to be charged to counties and to patients (or responsible relatives) under sec. 46.04, Stats., as amended by ch. 244, Laws 1955, relative to the Wisconsin diagnostic center.

Sec. 46.04 (1) and (2), Stats., as amended provides as follows:

“(1) There shall be constructed near the Wisconsin general hospital a *hospital type* building to be known as the

'Wisconsin Diagnostic Center' which shall be equipped and serviced for the *temporary residence* and *diagnosis* of persons committed to the services or institutions under the jurisdiction of the state department of public welfare, except that those patients committed to the Mendota state hospital and the Winnebago state hospital may be transferred to the diagnostic center only upon recommendation of the superintendent of such hospital and approval of the department director. The department director may also authorize the center to receive any minor for *precommitment study* upon request of the judge of any juvenile court in which a case is pending. The diagnostic center and its services shall be administered by the state department of public welfare and shall be staffed in its *diagnostic services* by professionally qualified persons appointed from the teaching staff of the medical school of the university by the dean of the medical school of the university.

"(2) The diagnostic center shall be so administered as to furnish a complete *physical and mental inventory* of an individual committed to the care and custody of the department of public welfare upon referral by the director, thereby assuring placement in the institution best suited to care for the particular case, development of the most effective curative or rehabilitative procedures in such case, and the most effective coordination of all the institutional facilities provided by the state. For the purposes of coordination between the department of public welfare and the medical school of the university an administrative committee is created to be composed of the president of the university, the chairman of the state board of public welfare, the dean of the medical school, and the director of public welfare."

Ch. 244, Laws 1955, creates sec. 46.04 (3), which reads as follows:

"Liability of a *patient or relative* under s. 46.10 for care and maintenance at the diagnostic center shall be at the same rate as charged for the institution from which the patient was transferred, and *any collections shall be prorated with the county of legal settlement* based on such rate. When a patient is transferred directly from the diagnostic center to the Wisconsin general hospital the provisions of s. 46.115 shall apply."

So far as the charge to the patient or relative is concerned, subsec. (3) above quoted makes it clear that the rate being charged by the institution from which the

patient was transferred is to be continued during the time the patient is in the diagnostic center.

The more serious question is what, if any, charge may be made to the county of legal settlement in the case of persons transferred to the center from services or institutions under the jurisdiction of the department, and to the county whose juvenile court refers a minor for precommitment study. Sec. 46.04 (3) expressly covers the matter of charges to patients and relatives, but only by implication deals with charges to counties.

Sec. 48.18, Stats., fixes a rate of \$5 per week to be charged to the county of legal settlement for each child committed to the state department of public welfare and placed in either the school for boys, the school for girls, or the child center, "during its residence in such institution or a boarding home." This section does not apply while the child is temporarily residing in the diagnostic center, since at that time he is not "residing" in the institution or a boarding home. Sec. 46.04 (1), Stats., quoted above. See for analogous situations 32 O.A.G. 147, 32 O.A.G. 154.

Sec. 51.08 (1), Stats., provides in part:

"The expense of maintenance, care and *treatment* of each patient in any state *hospital* shall be at the rate of \$5 per week \* \* \*. Such charge shall be adjusted as provided in section 46.106 \* \* \*."

The reference to sec. 46.106 indicates that the rate of \$5 per week is to be charged to the county of legal settlement.

Whether sec. 51.08 (1) above quoted applies to patients in the diagnostic center depends upon whether that institution is a "hospital." Reference to sec. 46.04 (1) discloses that it is a "hospital *type* building \* \* \* for the temporary residence and *diagnosis* of persons committed to the services or institutions under the jurisdiction of the state department of public welfare" and for "precommitment study" of minors whose cases are pending in juvenile court.

Can such an institution properly be brought within the term "hospital"? Funk and Wagnall's New Standard Dictionary (1941) defines hospital as follows:

"An institution for the reception, care, and medical treatment of the sick or wounded; also the building used for that purpose."

This definition was recognized in *Noble v. First Nat. Bank of Anniston*, (1941) 241 Ala. 85, 1 So. 2d 289, 290.

In *McNichols v. City and County of Denver*, (1949) 120 Colo. 380, 209 P. 2d 910, 913 the court said, "The word 'hospital' in its ordinary usage means an institution for the medical or surgical care of the sick, the injured or the infirm. Such, in substance, is the definition of the word in the dictionaries and in the adjudicated cases. [Citing cases.] Words presumably are used and understood according to their ordinary usage. The burden is on one asserting otherwise so to show."

Webster's New International Dictionary gives the following definition:

"3. a An institution or place in which patients or injured persons are given medical or surgical care, often in whole or in part at public expense or by charity; also, a place for the cure or treatment of sick or injured animals. \* \* \*"

A Dictionary of American English (1942) volume 3, defines hospital as follows:

"1. An institution for the care of the sick and wounded. \* \* \*

"3. An institution for the shelter of persons unfit to live in normal society; an insane asylum."

Although the diagnostic center is a hospital *type* building, it does not completely fulfill the definition of hospital as set out above because its function is limited to diagnosis, and it is apparently not contemplated that any *care* or *treatment* will be afforded to the "patients." Diagnosis is, of course, a part of the practice of medicine and in the medical practice act the words "treat the sick" are defined as follows in sec. 147.01 (1) (a):

"(1) The 'basic science law' is sections 147.01 to 147.12, inclusive, and as used therein:

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

The definition of "disease" in sec. 147.01 (1) (b) includes mental illness and any "departure from complete health

and proper condition of the human body or any of its parts.”

It therefore appears that the diagnostic center is a hospital type building in which a branch of the practice of medicine, namely diagnosis of mental illness, or at least diagnosis of a departure from complete mental health, is carried on. The diagnosis so made in each case is used to guide the treatment of the patient in another institution—either a hospital or a penal or correctional institution—or to guide the juvenile court in making proper disposition of a case pending before it.

It is a close question, to say the least, whether such an institution is a hospital. However, it is clear that the legislature assumed that a charge would be made to the counties for the maintenance of patients in the center, which can be done only on the theory that it is a hospital. Sec. 46.04 (3), Stats., above quoted, provides that any collections made from a patient or relative “shall be prorated with the county of legal settlement.” Unless charges were being made to the county of legal settlement, there would be no occasion to prorate the collections between the state and the county. In order to give effect to this legislative intent, it must be assumed that the legislature regarded the center as a hospital.

You are therefore advised that the county of legal settlement is to be charged at the rate of \$5 per week under sec. 51.08 in the case of persons transferred from services or institutions under the jurisdiction of the department and also in the case of minors sent to the center for precommitment study by juvenile courts. I find no authority for making any charge to the county whose juvenile court has referred the case, if that county is not the county of legal settlement. The opinion was expressed in 34 O.A.G. 414 that the hospital expense incurred for observation of the accused in a criminal case under sec. 357.12, Stats. (now 357.27), should be charged to the county and treated as a part of the costs of the criminal case. This, however, was based on sec. 353.25, Stats., which relates to costs in criminal cases and has no application to juvenile court cases.

WAP

*State Board of Health—Drinking Water—Wells—Drilling Regulations*—Where a foreign corporation not registered under sec. 162.04, Stats., assumes the obligation to drill a water supply deep well by contract procured from a municipality by low bid, and proposes to assign said contract to another registered well driller for a valuable consideration, said corporation has “engaged in the industry of well drilling” within the meaning of that term as used in sec. 162.04 (4), Stats. Further, the foreign corporation “held itself out” as a well driller in violation of sec. 162.06, Stats.

Validity of the assignment is a question of law for the legal advisor of the municipality. Sole concern of the state board of health is that the person or firm which actually does the work has complied with sec. 162.04, Stats.

October 20, 1955.

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

You request my opinion upon a question arising out of the following statement of facts: The village of St. Croix Falls, Wisconsin, contracted for the drilling of a water supply deep well with the Tri-State Drilling Company, a Minnesota corporation. Upon ascertaining that it could not qualify for registration and permit under ch. 162, Stats., the latter corporation proposed to assign its contractual rights for valuable consideration to the Fisher Well Drilling Company, a Wisconsin corporation which is registered and holds a permit to engage in well drilling under ch. 162, Stats. Tri-State Drilling Company procured the contract initially by low bid. Your questions are these:

“1: By submission of a bid for drilling of a well in Wisconsin, has sec. 162.04 been violated by the Tri-State Well Drilling Company? This company is not registered nor is it eligible for a permit under terms of 162.04 (3).

“2: Can the State Board of Health accept the attached assignment between the unregistered Tri-State Drilling Company and the Fisher Well Drilling Company, the latter being registered in accord with provisions of sec. 162.04, as satisfaction of the Board’s supervisory responsibilities established in Chapter 162?”

Sec. 162.04 (4), Stats., provides as follows:

“Except as herein otherwise provided, no person, firm or corporation shall engage in the industry of well drilling or pump installing for compensation in this state without having duly registered and obtained a permit therefor as herein provided. No permit shall be required of any person for driving, digging or otherwise obtaining ground water supply on real estate owned or leased by him, but such well and the work done thereon shall comply and be in conformity with the law and the rules and regulations prescribed by the board.”

Sec. 162.06, Stats., provides as follows:

“Any person, firm or corporation who engages in or follows the business or occupation of, or advertises or holds himself or itself out as or acts temporarily or otherwise as a well driller or pump installer without having first secured the required permit or certificate of registration or renewal thereof, or who otherwise violates any provision of this chapter, shall be fined not less than \$10 or more than \$100 or imprisoned not less than 30 days, or both. Each day during which a violation continues shall constitute a separate and distinct offense, and may be punished separately.”

By bidding on the contract and having its bid accepted, the Minnesota corporation did “engage in the industry of well drilling” within the meaning of that term as used in sec. 162.04 (4). Further, the submission of a bid on the contract clearly constitutes a “holding out” as a well driller in violation of sec. 162.06. Your first question is therefore answered in the affirmative.

Your primary duty, so far as the actual drilling of the well is concerned, is to be certain that the person or firm which performs the work is registered and holds a permit under sec. 162.04. The Fisher firm is so registered and holds such permit so that it is legally qualified to do the work.

You ask whether you may “accept” the assignment from the unregistered Tri-State Drilling Company to the Fisher Well Drilling Company. In my opinion the question of the validity of the assignment is one of municipal law for the village attorney of St. Croix Falls to answer. That involves a consideration of whether the contract for the drilling

must be let by bid under some applicable statute or village ordinance, and if so, whether such contracts are assignable. It involves the legal relationship between the contractor and the village. If it is represented to you by the village that it intends to have the Fisher firm do the work, and the Fisher firm actually does the work, your interest ends there. You have no duty to pass on the validity of the contract (assignment) between the village and the contractor.

SGH

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*Automobiles and Motor Vehicles—Words and Phrases—Motorcycles*—Motor driven cycles as defined in sec. 85.10 (4), Stats., are either two or three-wheeled vehicles designed with one seat to carry one rider. A three-wheeled vehicle with a bench seat designed to carry two or more people is not a motor driven cycle, and must be registered as an automobile under sec. 85.01 (1a) (a) and (b), Stats. Where such vehicles are designed to carry a load commercially, they should be registered as trucks.

October 20, 1955.

MOTOR VEHICLE DEPARTMENT.

You request my opinion as to the classification of certain three-wheeled vehicles for registration purposes. You furnished some advertising folders containing photographic reproductions and other descriptive material which cannot be incorporated into this opinion, but they will be sufficiently identified herein to enable you to apply our conclusions to similar vehicles for which applications for registration may be made.

Your questions read as follows:

“Chapter 85.10 (4) defines motor driven cycles and a part of that definition states, ‘having a seat for the use of the rider.’ From this wordage are we to interpret the statutes to mean that if this vehicle has seats for two or more persons it is not a motor driven cycle? Also this section states that motor driven cycles are motor vehicles designed to travel on not more than three wheels. Are we

then to assume that any three-wheeled vehicle is a motor driven cycle? However, Chapter 85.01 (1a) (a) and 85.10 (3) does not demand that an auto have any certain number of wheels and there are three-wheeled automobiles, so named by the manufacturer."

Motorcycles were formerly defined in sec. 85.10 (4), Stats. 1945, as:

*"Every motor vehicle designed to travel on not more than three wheels in contact with the ground except any such motor vehicle as may be included within the term tractor as herein defined."*

Such definition rendered all three-wheeled vehicles motorcycles. Thus, in 36 O.A.G. 391 the opinion was expressed that a three-wheeled motor-propelled vehicle constructed for operation by children on sidewalks was a motorcycle.

However, the legislature reconsidered motorcycles and similar vehicles in ch. 605, Laws 1947, and under said chapter sec. 85.10 (4) was repealed and recreated to define motorcycles as follows:

"(4) MOTOR DRIVEN CYCLES. Motor driven cycles are motor vehicles designed to travel on not more than 3 wheels in contact with the ground, having a seat for the use of the rider, including motor cycles, power driven cycles, and motor bicycles, but excluding tractors as herein defined. Motor cycles, power driven cycles and motor bicycles are further defined as follows:

"(a) A power driven cycle is a motor driven cycle, weighing between 100 and 300 pounds avoirdupois, fully equipped, without gasoline or oil, designed to travel not over 35 miles per hour, with a 150-pound rider on a dry, level, hard surface with no wind, having brakes as specified in section 85.67 and having lights as specified in section 85.06.

"(b) A motor bicycle is a bicycle to which a motor has been added to form a motor driven cycle as distinguished from a power driven cycle or motor cycle in which the motor is an integral part of the original vehicle.

"(c) A motor cycle, or motorcycle, is a motor driven cycle not otherwise classified."

The addition of the words "having a seat for the use of the rider" must be given some significance since the legislature cannot be deemed to have done a vain thing. The

only reasonable construction that can be put on the amendment is that the legislature was limiting the definition to those vehicles which it considered properly classifiable as motorcycles, i.e., a vehicle which in the absence of a sidecar is designed to carry but one person. The use of the singular "the rider" impels this conclusion.

Also worthy of consideration is the fact that the increase in popularity and practicability of three-wheeled vehicles for the carrying of more than one person or of considerable amounts of freight is of recent development. It is quite likely that the legislature felt that the all-inclusive classification of three-wheeled vehicles which had formerly been serviceable was no longer adequate.

That the legislature conceived a motorcycle to be a vehicle designed for the carriage of a single person is borne out by the fact that a distinction is made, in determining registration fees in sec. 85.01 (4) (b), Stats., between a motorcycle and a motorcycle equipped with a sidecar. Sec. 85.01 (4) (b), Wis. Stats., provides:

*"Motor cycles.* For the registration of each motor cycle, a fee of five dollars. For the registration of each motor cycle equipped with a side car, a fee of eight dollars."

This indicates that a motorcycle when equipped with a side car is considered to be something more than a motorcycle.

It is my conclusion that sec. 85.10 (4), as recreated, defines motor driven cycles as only those two or three-wheeled vehicles designed with one seat to carry one rider. A three-wheeled vehicle with a bench seat designed to carry two or more people is not a motor driven cycle and is not excluded from the definition of an automobile under sec. 85.01 (1a) (a) and (b), Stats., and must be registered as an automobile.

It also follows, of course, that it can no longer be assumed that every three-wheeled vehicle is a motor driven cycle.

While motor driven cycles are specifically excluded from the term "automobile" by sec. 85.01 (1a) (b), there is no similar exclusion from the term "truck" in either sec. 85.01 (4) (c), or in sec. 85.10 (5), Stats. It seems to me that those three-wheeled vehicles used for commercial purposes

and designed to carry a load fall squarely within the definition of a motor truck, and in the absence of an exclusion from such classification they are properly to be registered as trucks. I make this observation without knowing the practice of the department, but the notations on the pictures transmitted with the request indicate that the department intended to register many three-wheeled load-carrying vehicles at the \$5 fee applicable to motorcycles.

SGH

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*Counties—Charitable and Penal Institutions—Administration—Sec. 46.18 (1), Stats., authorizes county board to adopt such regulations relating to the management of the county home and hospital as will result in priority of admission for indigents and recipients of public assistance.*

October 20, 1955.

EDWARD A. KRENZKE,  
*Corporation Counsel,*  
Racine County.

You state that Racine county has established an institution known as the Racine county hospitals and home for care of the mentally ill, chronically ill, and the aged and infirm. No regulations have been adopted limiting the number of persons who may apply for entry as voluntary paying patients. It has now developed that by reason of lack of space caused by the unrestricted entry of paying patients, it is necessary on occasion to place indigent persons and those receiving public assistance in private hospitals when hospitalization is required. This has resulted in a higher per capita cost to the county than would be the case if these persons were hospitalized at the county institution.

We are asked whether the county board has the authority under sec. 46.18 (1), Stats., to adopt a regulation which would limit the power of the board of trustees in admitting voluntary paying patients to such a point that the county

would be assured of space available for indigent persons and for the recipients of public assistance.

Sec. 46.18 (1) provides in part:

“46.18 (1) TRUSTEES. Every county home, infirmary, hospital, tuberculosis hospital or sanatorium, or similar institution, house of correction or workhouse, established by any county whose population is less than 500,000, shall (*subject to regulations approved by the county board*) be managed by 3 trustees, electors of the county, elected by ballot by the county board. \* \* \*”

Sec. 49.16 (1), Stats., provides that each county may establish a county hospital for the treatment of dependent persons, pursuant to sec. 46.17, Stats., and sec. 49.14 (1), Stats., authorizes counties to establish county homes for the relief and support of dependent persons. These are governed pursuant to secs. 46.18, 46.19 and 46.20, Stats. See sec. 49.14 (2), Stats. Sec. 49.15 (2), Stats., provides that any person upon application to the board of trustees may be admitted to the county home upon such terms as may be prescribed by such board. Sec. 49.17 (1), Stats., which relates to admissions to county hospitals is to the same effect.

There is no conflict between the powers of the county board and the powers of the board of trustees if these provisions are properly construed.

Sec. 46.18 (1) in effect appears to say that the policies in the form of regulations that are to be followed by the board of trustees in managing the institution are to be laid down by the county board itself, but that the actual administration of the institutions within the framework of the regulations established by the county board is to be left to the board of trustees.

The terms which the trustees may prescribe for admission under secs. 49.15 (2) and 49.17 (1) in individual cases would have to conform to and not conflict with the policy regulations enunciated by the county board under sec. 46.18 (1).

There is no statutory duty on the part of the county to maintain an institution for accepting voluntary pay patients. This being true, the county board under its authority to establish regulations for county institutions under

sec. 46.18 (1), as well as under its general powers in sec. 59.07 (1), Stats., to make such orders concerning the corporate property of the county as the county board may deem expedient, would clearly be justified in making a regulation subordinating the admission of voluntary pay patients to the needs of space for the non-paying patients, whose hospitalization the county is obliged to provide or for which it must otherwise pay in private hospitals at greater cost. It would appear to be very poor business indeed to accept pay patients if the result is higher per capita cost in paying for indigents in private hospitals. Why not let the voluntary patients go to the private hospitals and absorb the higher costs while saving for the county the cheaper facilities of its own institution in taking care of these patients for whom the county must pay?

We therefore concur in your conclusion that the county board has the power under sec. 46.18 (1) to adopt regulations limiting the admission of pay patients in such a way that the county can make full use of its own institution for the purpose of taking care of the hospitalization of indigents and those who are recipients of public assistance.

WHR

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*Taxation—Collection of Taxes—Time—Computation—*  
Payment mailed on the last day for payment of real estate taxes but not received by the county treasurer until the following or a subsequent day is not timely payment and may not be accepted by the county treasurer as full payment without charging delinquent interest as provided in sec. 74.03 (6), Stats.

October 20, 1955.

FRANCIS L. EVRARD,  
*Corporation Counsel,*  
Brown County.

An opinion is requested as to whether your county treasurer may accept as full payment of postponed real estate taxes due on July 31, without charging the delinquent inter-

est provided in sec. 74.03 (6), Stats., checks not received by him by mail until August 2 and 3 but which were mailed to him on August 1 as shown by the postmarks on the envelopes.

You mention that your treasurer received checks and cash on August 1 in payment of postponed taxes and that in accordance with our opinion of July 21, 1955, he accepted them without charging the delinquent interest. That opinion states that, by virtue of the provisions of sec. 370.001 (4), Stats., as created in 1951 and revised by ch. 307, Laws 1955, when the last day prescribed in the statutes for the payment of real estate taxes falls on Sunday they may be paid the next day without penalty. You also refer to the honoring by the United States internal revenue service of federal income tax returns as timely if postmarked by midnight of the last day for filing the same. These references are taken as evidencing that your concern is solely as to the timeliness of the receipt of such checks by your treasurer on August 2 and 3, and this opinion is accordingly limited to that question.

The timeliness of these receipts by mail on August 2 and 3 is a question that is wholly independent from the above stated statutory provision permitting payments without penalty on the following day when the last day otherwise specified falls on Sunday. The question would be the same if it were a year in which July 31 does not fall on a Sunday, such as next year when it is on a Tuesday, and these checks were mailed on that date to the county treasurer but not received by him until August 1 or 2 in that year. The mentioned statutory provisions merely extend the last date of payment for another day. The question is whether the mailing of payment to the county treasurer on the last day upon which taxes may be paid without penalty or interest, with receipt of such mail remittance by the county treasurer on the next or a subsequent day, constitutes payment of such taxes on the day of mailing.

Quite clearly the statutes respecting payment of the taxes require that payment of the prescribed amount be made to the proper official on the day specified therein. Payment is used in such tax statutes in its ordinary legal

sense and means actual or constructive delivery of money, or something accepted as its equivalent, to the designated official. 48 C. J. 585, §1; 70 C. J. S. 210, §1. Payment is not effectuated by sending the amount of the taxes to the county treasurer by mail until such remittance actually gets into the hands of the county treasurer. 48 C. J. 594, §9; 70 C. J. S. 218, §7.

Sec. 74.03, Stats., sets forth specific dates by which tax payments are to be made and provides that if they are not paid by those dates, certain penalties shall attach. Therefore, the required amount of money, or something acceptable as its equivalent, must be in the hands of the local treasurer or the county treasurer, as the case may be, to whom the payment is to be made, on or before the specified date, except as there is some provision in the statutes which provides otherwise. There is no general provision in the statutes to the effect that mailing payment on the last date therefor is timely payment. Nor is there any statute that authorizes the county treasurer to accept the placing of a remittance in the mail on the last day for transmission to him as the equivalent of actual delivery thereof to him on that date.

Acceptance by the United States internal revenue service of income tax returns and payment of income taxes as timely if placed in the mail and postmarked before midnight of the last day for the filing or payment thereof, is either pursuant to federal statute or administrative regulation promulgated pursuant to statutory authorization by statute covering the same. Such result can be effected by statutory provision or authorized administrative practice, and the provisions in secs. 71.10 (13) and 73.01 (6) (a), Wis. Stats., are illustrative. They specifically provide that mailing by midnight is sufficient in respect to state income taxes. Likewise, sec. 78.67 contains a similar provision in respect to motor fuel tax matters. But we find no such provision in our statutes in respect to real estate tax matters and nothing authorizing the county treasurer in that regard.

Accordingly, in our opinion, the county treasurer may not accept remittances received by him after the last day

specified by the statutes for the payment of real estate taxes as timely payment thereof and not charge a delinquent interest, even though mailed to him on the last day as shown by the postmark on the envelope.

HHP

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*Restaurants—Licenses and Permits*—No restaurant permit is required under secs. 160.01 (2) and 160.02 (1), Stats., for preparation and sale of hot or cold food sold by the pound, quart, dozen, etc., by food stores, delicatessens, and catering establishments. A catering establishment which prepares, serves, or sells food, hot or cold, in the form of individual meals or lunches at stated prices for such meals or lunches, to transients or the general public, must have a restaurant permit.

October 21, 1955.

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

You have inquired whether under ch. 160 of the statutes restaurant permits are required of the following three types of food handlers:

“1. Food stores which prepare, cook, and sell hot food for consumption off the premises.

“2. Food stores, grocery stores, and delicatessens which prepare, cook, and sell largely cold food such as potato salads, cold slaw, cold meats, etc., for consumption off the premises.

“3. Catering establishments which prepare, cook, sell, and serve both hot and cold foods off the premises at picnics, private parties, and so on.”

In this connection you state that it has been the custom for many years not to require permits in these cases. This was partly due to the fact that the department of agriculture licenses bakeries and regulates the sale of many food products handled by grocery stores and delicatessens. However, the number of such food handling establishments which sell cooked food has been increasing rapidly and some concern has been expressed as to whether the public is

being adequately protected against the dangers inherent in the handling of cooked food.

Sec. 160.01 (2), Stats., provides that as used in ch. 160:

“(2) ‘Restaurant’ means and includes any building, room or place wherein meals or lunches are prepared or served or sold to transients or the general public, and all places used in connection therewith. ‘Meals or lunches’ shall not include soft drinks, ice cream, milk, milk drinks, ices and confections. The serving in taverns of free lunches consisting of popcorn, cheese, crackers, pretzels, cold sausage, cured fish or bread and butter shall not constitute such taverns to be restaurants.”

Sec. 160.02 (1), Stats., provides:

“(1) No person shall conduct, maintain, manage or operate a hotel, restaurant or tourist rooming house as defined in s. 160.01 which has not been issued an annual permit by the state board of health.”

In analyzing the problems you have presented, some consideration should be given to the meaning accorded to the words “meals or lunches” as contained in sec. 160.01 (2).

When interpreting the statutes words and phrases are to be construed according to their common and approved usage, although technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning. Sec. 370.01 (1), Stats.

The generally accepted concept of a “meal” is that it not only consists of a larger quantity of food than that which ordinarily comprises a single “sandwich,” but that it usually consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which could not conveniently be consumed while one was standing or walking about. *Treasure Island Catering Co. v. State Board of Equalization*, (1941) 19 Cal. 2d 181, 120 P. 2d 1.

On the other hand “lunch” has been construed much more broadly, and in 34 O.A.G. 355 as well as in 38 O.A.G. 345 the term was construed to include sandwiches.

It should be noted, however, that the preparing or serving or selling of meals or lunches alone does not necessarily bring the transaction within the scope of the restaurant permit law. See 40 O.A.G. 201 wherein it was concluded

that the term "restaurant" as defined in sec. 160.01 (2), does not include churches or clubs which occasionally serve meals to organizations pursuant to previous arrangements, on terms not available to the public generally.

With this more or less general background we will take up the three types you have mentioned.

The only difference we can see between the first and second categories is that the food is hot in the first instance and is cold in the second. This is a distinction which the statute does not reach. Presumably a meal or a lunch can be either hot or cold.

You have enclosed an advertisement of a food store which lists barbecued spareribs, barbecued chickens, and barbecued pork loin, all of which are sold hot at a stated price per pound. The advertisement also provides in part:

**"VISIT OUR DELICATESSEN**

featuring a complete variety of prepared foods

**FRESH FROM OUR OWN KITCHEN**

**GENUINE HICKORY SMOKED HOT HAM**

**German Potato Salad, Fruit Salad, Mayonnaise Potato  
Salad, Ham Salad, Coleslaw, Hot Corned Beef,  
Vegetable Salad, Fresh Rolls"**

We have gathered from the foregoing advertisement that all of the items sold are sold by some such unit as the pound, or the dozen in the case of rolls, and not at a stated price for any particular combination of the separate ingredients designated as either a "meal" or a "lunch."

We accordingly have no hesitancy in concluding that a pound of spareribs, chicken, pork loin, ham, corned beef, ham salad, or a quart or a pound of potato salad (German or mayonnaise), fruit salad, coleslaw, vegetable salad, or a dozen or half-dozen rolls, whether sold hot or cold was not intended to constitute a "meal or lunch" under the definition of "restaurant" in sec. 160.01 (2).

This appears to be in accord with the long-standing administrative interpretation of the statute by your department. It has been held that the practical construction, long-continued, given to a statute by those entrusted with its

administration is of great weight and is oftentimes decisive in determining its meaning. *State ex rel. Green v. Clark*, (1940) 235 Wis. 628, 294 N.W. 25. Also it must be remembered that violations of the restaurant permit law subject the violator to criminal prosecution, and if there is a fair doubt as to whether the act charged is embraced in the prohibition of such a statute, that doubt is to be resolved in favor of the defendant. *State ex rel. Dinneen v. Larson*, (1939) 231 Wis. 207, 284 N.W. 21.

The situation with respect to the catering establishment may well be different, although unfortunately we have not been furnished with any specific factual situations which would enable us to state a definitive answer.

To "cater" according to the dictionary (Funk and Wagnall's New Standard Dictionary) means "to furnish provision or food," or as Webster puts it, "to provide a supply of food." As we have already indicated, the preparation and sale of food, hot or cold, by the pound, the quart, the dozen, etc., is not the preparation, serving, or sale of a "meal or lunch" within the meaning of the restaurant law. However, it is our understanding that catering establishments do in some instances prepare, serve, and actually sell meals and lunches at a stated price per meal or lunch. If this is done for transients or the general public and not just for a private party, club, or church organization pursuant to previous arrangements, on terms not available to the public generally, so as to come within the opinion set forth in 40 O.A.G. 201, a restaurant permit would be required.

WHR

*Conservation Commission—Fish and Game—County Fish Hatcheries—Ch. 579, Laws 1955, which amends sec. 59.08 (7m), Stats., does not affect the regulatory powers of the conservation commission over county fish hatcheries.*

October 25, 1955.

EUGENE R. JACKSON,  
*District Attorney,*  
Chippewa County.

You have requested my opinion as to whether or not the conservation commission has any authority to control or inspect a fish hatchery operated by the county pursuant to sec. 59.08 (7m), Stats. That subsection gives the county boards special power to:

*“Appropriate money for the establishment and maintenance of fish hatcheries and operate such fish hatcheries within the county for the propagation of fish.”*

The language italicized above was added by ch. 579, Laws 1955. Other than this one amendment, the subsection has not been altered since it was enacted by ch. 257, Laws 1927.

As originally introduced, Bill No. 388, A., which became ch. 579, Laws 1955, would have amended sec. 59.08 (7m) to read:

*“Appropriate money for the establishment and maintenance of fish hatcheries. Any fish hatchery may be operated by the county directly or by contract, and such hatchery is not required to obtain any permit, consent or license for the taking of spawn, hatching, rearing or distributing of any game fish. The state conservation department, its wardens, officers and employes, shall give advice and co-operate in the management of such hatchery, and may make complaint, criticism or suggestion to the county board, or a committee thereof, but shall not arrest, harass, obstruct or annoy any person engaged in the operation thereof. The distribution of fish fry from a county hatchery shall not prejudice such county or be considered in determining the distribution from any state fish hatchery.”*

Had Bill No. 388, A., been adopted in its original form, clearly your question would have to be answered in the negative. Instead of adopting the language of the original

bill, however, the legislature adopted a substitute amendment which contains no provision exempting county fish hatcheries from regulation by the conservation commission. Such a drastic change in the language of the bill indicates that the legislature did not intend the same results as did the author of the original bill.

The records of the conservation commission reveal that the Marshmiller hatchery in Chippewa county is the only fish hatchery maintained by a county or other governmental unit of this state and has been the only such hatchery for 17 years. In each of those years the commission has issued a permit to the county for the operation of the hatchery and has assigned a departmental employe to inspect and regulate the operation of the hatchery in many details. For example, the permit issued in 1944, which is typical, provided that only walleyed pike and northern pike should be spawned and hatched at the Marshmiller hatchery and that the state would keep an inspector at the hatchery with "full authority over all spawning, hatching, and distribution activities."

Prior to the establishment of the Marshmiller hatchery, Chippewa and Rusk counties for several years jointly maintained a fish hatchery which was operated under permit of the conservation commission. For over 20 years the only publicly owned fish hatcheries within the state, except the state hatcheries themselves, have been operated under permit of, and subject to control by, the conservation commission.

Sec. 29.51, Stats., provides, so far as here material:

"(1) STATE FISH HATCHERIES. The state conservation commission shall have general charge of the following matters, and all necessary powers therefor, namely:

"(a) The propagation and breeding of fish of such species and varieties as they deem of value."

This provision antedated sec. 59.08 (7m), Stats., by several years, and clearly the legislature intended to delegate to a single state agency general supervision over the propagation of fish throughout the state. It is obvious that the commission cannot exercise this general supervision if the various governmental subdivisions are free to propagate and distribute such fish as they desire, and it is under ch. 29,

Stats., that the commission has for 20 years regulated all the fish hatcheries in the state, both public and private.

While sec. 59.08 (7m) is silent as to regulation by the commission, that section is the only one which authorizes counties to maintain or operate fish hatcheries. It is axiomatic that counties have only those powers expressly granted by or necessarily implied from the statutes, and a reasonable doubt as to an implied power is fatal to its being. *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 11 N.W. 2d 348; *Spaulding v. Wood County*, (1935) 218 Wis. 224, 260 N.W. 473.

In view of the foregoing principle and the long period of administrative interpretation of the pertinent provisions of ch. 29, Stats., it cannot be said that sec. 59.08 (7m), as it read prior to ch. 579, Laws 1955, gave the county power to operate a fish hatchery without supervision and control by the commission. The question then is whether the legislature intended by ch. 579, Laws 1955, to free a county hatchery from such control.

In my opinion the 1955 amendment of sec. 59.08 (7m) cannot be construed to affect the commission's regulatory powers over county hatcheries. As previously pointed out, the original form of Bill No. 388, A., would have done so; but the legislature adopted the substitute amendment which contains no mention of commission regulation nor any language which suggests an intent to upset the administrative interpretation of the past 20 years. This long period of legislative acquiescence in the construction placed upon sec. 29.51 by the administrative agency concerned is entitled to great weight. *Dunphy Boat Corp. v. Wis. E. R. Board*, (1954) 267 Wis. 316, at 326, 64 N.W. 2d 866. That construction should not be rejected because of an amendment to sec. 59.08 (7m) which does not even infer that county hatcheries are to be removed from commission control.

EWV

*Dentistry—Dental Hygienists*—Status of dental hygienists under sec. 152.07 (1) to (7), Stats., and of public health dental hygienists under sec. 152.07 (8), Stats., compared and discussed .

October 25, 1955.

DR. S. F. DONOVAN, *Secretary,*  
*State Board of Dental Examiners.*

You have requested our opinion on a number of points relating primarily to the distinction, if any, which exists under the law between the practice of a dental hygienist in a dentist's office and the practice of a dental hygienist employed by official agencies such as school boards, local boards or departments of health, or county boards, in any public health or educational capacity.

Sec. 152.07 (4), Stats., provides among other things that a dental hygienist "may be employed in any dental office only under the direct supervision of one or more licensed dentists, and not exceeding the number of licensed dentists operating therein."

This provision is clear and express. It presumably means what it says and is just another way of stating that in a dental office there cannot be more dental hygienists than dentists.

However, you will note that under sec. 152.07 (4), the same limitation does not apply to the dental hygienist employed by boards of education of public or private schools, county boards, boards of health, or public or charitable institutions. As to these the limitation is only that they must operate "under the direct supervision of one or more licensed dentists as provided in subsection (8)." There is no limitation as in the case of dental offices that the number of such hygienists "may not exceed the number of licensed dentists operating therein."

A question is raised also as to what is meant by "direct supervision." It would seem that such "direct supervision" could not very well be furnished during the prolonged absence of the supervising dentist or dentists. Admittedly it is a little bit difficult to lay down a rule in advance which would cover all possible situations. We had occasion a number of years ago to go into a somewhat similar problem

arising under the pharmacy law which requires a pharmacy to be conducted under the supervision of a licensed pharmacist. In this opinion, dated June 26, 1939, 28 O.A.G. 395, 397, we said:

"It is true that short absences by the pharmacist may occasionally be necessary. In XIX Op. Atty. Gen. 337, it was pointed out in construing secs. 151.02, subsec. (9) and 151.04, subsec. (2) that to be 'in charge' of an enterprise does not ordinarily connote the continuous presence of the person in charge. However, it was stated that to have a drug store for an entire day or longer without a pharmacist or assistant pharmacist in charge, would constitute a violation and that even shorter periods of absence might also be held to constitute a violation if indulged in as a regular practice as a means of thwarting the purpose of the statute. See also, *State v. Levine*, 173 Minn. 322, 217 N.W. 342, where under a somewhat similar statute the court indicated that it was permissible for the registered pharmacist to step outside the store for meals or other temporary errands of a few minutes duration."

We assume that the foregoing is about what the dental board had in mind when it adopted section 1 (6a) of its rules reading:

"(6a) A dental hygienist employed in a dental office must practice only under the direction and supervision of the licensed dentist or dentists of such office. Such dental hygienists shall not practice during a prolonged absence of the dentist or dentists."

While the board made this applicable only to dental hygienists employed in private dental offices, it would seem that the same standard exists by way of implication in the statutory language that the hygienist can operate only under the direct supervision of one or more licensed dentists when engaged in public dental health work under sec. 152.07 (4), Stats.

Subsec. (8) of sec. 152.07 relates to public health dental hygienists and sets up procedures for determining their qualifications by a committee of three examiners, one selected by the state board of health, one member of the state board of dental examiners, and one selected by the state superintendent of public instruction. Provision is made for a certified list to be kept by the state board of

health. Candidates recommended by the committee of examiners are to be certified by the state board of health to the local appointing board upon request and appointment is to be made from the certified list. Monthly reports must be made by public health dental hygienists or instructors, one to the employing board, one to the local directing committee or officer, and one to the state board of health.

It should be noted that sec. 152.07 (8) was not a part of the original law relating to dental hygienists. Sec. 152.07 (8) was created by ch. 112, Laws 1941, whereas most of the law relating to dental hygienists generally, now covered by sec. 152.07 (1) to (7) inclusive, was created by ch. 454, Laws 1921, as sec. 1410*l*, Stats., which has since been renumbered and amended in some particulars from time to time.

Sec. 152.07 (8) to a considerable extent covers a somewhat different subject matter than the first seven subsections of sec. 152.07. Sec. 152.07 (8) (a) provides that:

"The term public health dental hygienists shall include all dental hygienists, licensed in this state, employed by official agencies such as school boards, local boards, departments of health or county boards, *in any public health or educational capacity.*"

Paragraph (b) speaks of:

"The qualifications of all public health dental hygienists or *instructors in dental hygiene \* \* \**"

This type of work is distinguishable from that performed by a dental hygienist in a dental office whose certificate under sec. 152.07 (1), Stats., authorizes the holder "to remove calcareous deposits, accretions and stains from the surfaces of teeth, and apply ordinary washes of a soothing character, but not to operate otherwise on the teeth or other tissues of the oral cavity."

When engaged on the other hand in strictly educational work relating to public dental health there would appear to be less need for the direct supervision of a dentist than in the case where the hygienist is actually working on an individual patient in the dentist's chair. If a dentist must be present when the public health dental hygienist is talking to a class of school children on proper care of the teeth,

it would be much simpler and less expensive if the dentist himself did the instructing and the public health dental hygienist were discharged. We do not read subsec. (8) as some sort of a "feather-bedding" statute to make work for otherwise unemployed dentists who presumably would have to be well paid to sit day after day listening to hygienists give talks which the idle dentists are better qualified to give.

There is some difficulty in attempting to harmonize the provisions of subsec. (8) with those of subsec. (4). Subsec. (4) provides that dental hygienists may be employed by boards of education of public or private schools, county boards, boards of health, or public or charitable institutions "operating only under the direct supervision of one or more licensed dentists *as provided in subsection (8) of this section.*"

There is absolutely nothing in subsec. (8) about operating under the direct supervision of one or more licensed dentists. Hence the legislature could not have been following the familiar rule of syntax that qualifying phrases are to be referred to the next preceding antecedent when it placed the italicized words above immediately after the words "under the direct supervision of one or more licensed dentists." However, since, if possible, we must give effect to every word and phrase used in a statute we can only come up with the conclusion that if an ordinary dental hygienist (not a public health dental hygienist certified under subsec. (8)) is to do the things contemplated by subsec. (8) she must be under the supervision of a dentist, although as previously pointed out there does not have to be one dentist for every hygienist. This is required only when working on patients in private dental offices.

To summarize the discussion thus far we have three situations:

1. The dental hygienist working in a private dental office. She must operate under the direct supervision of a licensed dentist and the number of hygienists cannot exceed the number of dentists in the office.

2. The dental hygienist who is doing public health and educational work but who has not been certified as a public health dental hygienist under sec. 152.07 (8). She must do

this type of work under the supervision of a licensed dentist, but one dentist may supervise a number of such hygienists.

3. The public health dental hygienist certified under sec. 152.07 (8). She may carry on public dental health and educational work without any supervision by a licensed dentist as long as she does not work on individual patients.

Next we come to the language contained in sec. 152.07 (8) (f) which is somewhat confusing when we attempt to apply it. It provides: "This subsection shall not apply to cities of the first class."

Milwaukee is the only city of the first class, since sec. 62.05 (1) (a) provides that cities of 150,000 population and over shall constitute cities of the first class.

The language is clear enough. It means that sec. 152.07 (8) does not apply to the city of Milwaukee. This being so, there are no public health dental hygienists employed as such by official agencies in the city of Milwaukee pursuant to sec. 152.07 (8).

This does not mean, however, that public dental health hygiene and instruction cannot be carried on in the city of Milwaukee, since sec. 152.07 (4) authorizes this to be done by any licensed dental hygienist provided it is under the direct supervision of a licensed dentist, although as stated above, for this type of work a dentist may supervise more than one dental hygienist.

There appears to be some question raised as to why the city of Milwaukee should occupy a different status in matters relating to public health than is occupied by cities of other classes. In other words is the classification a proper one?

We seldom attempt to pass upon the constitutionality of statutes and believe whenever possible declarations on that subject should be left to the courts, although we do advise the legislature and the executive department on the constitutionality of bills when such information is sought as an aid in enacting legislation. See 42 O.A.G. 160, 161. However, it might be mentioned in passing that in determining the constitutionality of class legislation based on population the courts do recognize that there are distinctions between large and small communities and that such differ-

ences are relevant to some purposes of legislation. See, for example, *State v. Evans*, (1907) 130 Wis. 381, 110 N.W. 241, where the court upheld a statute which required drugs to be dispensed by a registered pharmacist in municipalities having 500 population or more while in smaller places this could be done by an assistant pharmacist or under his charge, even though it was strenuously argued that the life and health of the public in a little hamlet is just as important as it is in a great city.

By way of further information on the history of the administration of sec. 152.07 (8), we are informed that the committee referred to in sec. 152.07 (8) (b) met only once shortly after the enactment of the statute and set up the following requirements for public health dental hygienists:

- "I. High school graduation or its equivalent.
- "II. Licensed as a dental hygienist in the state of Wisconsin.
- "III. Not less than 12 semester college credits in education and public health or educational equivalents acceptable to the certification committee.
- "IV. Applicants must appear before the certification committee for oral examination."

It is our understanding further that such public health dental hygienists seldom, if ever, work on individual patients. The only places where more than one such hygienist is employed is in the city of Milwaukee and by the state board of health, and in each instance they are supervised by the dental director of the employing agency.

WHR

*Public Assistance—Old-Age Assistance—Sec. 49.22 (2) (c) 1, Stats.*, does not require a county to turn over to an old-age assistance recipient the sum of \$500 out of the proceeds of the sale of such person's home where the county's lien under sec. 49.26, Stats., exceeds the sale price, but the county's lien may be released in whole or in part under sec. 49.26 (8), Stats., if the facts so warrant.

October 28, 1955.

C. M. MEISNER,  
*District Attorney,*  
 Dunn County.

You have asked for our opinion on the following:

"Mr. 'A' and Mr. 'B' are recipients of Old Age Assistance from the Dunn County Public Welfare Department. They are the owners of their own home which they sell for \$2500.00. The amount of assistance granted each recipient exceeds \$2500.00. A lien for the Old Age Assistance granted was filed with the Register of Deeds of Dunn County in 1940. Neither recipient has \$500.00 liquid assets at the time of the sale.

"*Question:* From the proceeds of the sale of this real estate, must Dunn County release from the provisions of their lien the sum of \$500.00 and said \$500.00 be paid to each recipient free from the control of the Welfare Department?"

It is your conclusion that the county is under no obligation to pay \$500 to each of these recipients and you have pointed to the statutes which in your judgment are controlling.

Sec. 49.22, Stats., defines the persons eligible for old-age assistance. Sec. 49.22 (2) was amended by ch. 19, Laws 1955. It provides so far as material here that a person shall be considered dependent 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) 1. \$500 in liquid assets which may be retained by the recipient free of the control of the county agency."

Sec. 49.26 (4), Stats., provides:

"(4) CERTIFICATE OF LIEN, FILING. All old-age assistance paid to any beneficiary (including aid paid under sec-

tions 49.30 and 49.40 as old-age assistance) constitutes a lien as hereafter provided and remains a lien until satisfied. When old-age assistance is granted, the name and residence of the beneficiary, the amount of assistance granted, the date when granted, the name of the county, and such other information as the department requires, shall be entered on a certificate, the form of which shall be prescribed by the department. The county agency shall file such certificate, or a copy thereof, in the office of the register of deeds of every county in which real property of the beneficiary is situated."

Sec. 49.26 (5) provides:

"(5) LIEN, COVERAGE, EXCEPTIONS; JOINT TENANCY. Upon such filing the lien herein imposed attaches to all real property of the beneficiary including a house trailer used as an abode presently owned or subsequently acquired (including joint tenancy and homestead interests) in any county in which such certificate is filed for any amount paid or thereafter paid under ss. 49.20 to 49.38 and 49.40, and remain such lien until satisfied. Such lien shall not sever a joint tenancy nor affect the right of survivorship except that the lien shall be enforceable to the extent that the beneficiary had an interest prior to his decease. The county court may order sale of such realty free and clear of the lien and the lien shall attach to the net proceeds of such sale after taxes, prior encumbrances and the costs of the sale have been deducted. Such lien shall take priority over any lien or conveyance subsequently acquired, made or recorded except tax liens and except that the amounts allowed by court in the estate of any deceased beneficiary and remaining unpaid after all funds and personal property in the estate have been applied according to law, for administration and funeral expense, for hospitalization, nursing and professional medical care furnished such decedent during his last sickness, not to exceed \$300 in the aggregate, shall be charges against all real property of such deceased upon which an old-age assistance lien has attached, and which in such order shall be paid and satisfied prior to such lien out of the proceeds derived from such real property upon liquidation of such old-age assistance lien. The certificate need not be recorded at length by the register of deeds, but upon the filing thereof all persons are hereby charged with notice of the lien and of the rights of the county."

Sec. 49.26 (7), Stats., provides for enforcement of the lien in the manner provided for the enforcement of

mechanics' liens. The only limitation here is that no lien shall be enforced against the homestead of the beneficiary while it is occupied by the surviving spouse or by any surviving minor children, or any incapacitated adult children of the beneficiary.

Sec. 49.26 (8), Stats., relating to release of liens reads:

“(8) LIENS, RELEASE. When the county agency of the lienor county is satisfied that collection of the amount paid as old-age assistance will not thereby be jeopardized or that the release of the lien in whole or in part is necessary to provide for the maintenance of the beneficiary, his spouse, or minor children, or incapacitated adult child, it may release the lien as to all or any part of the real property of the beneficiary (including a house trailer as in sub. (5)), which release shall be filed in the office of the register of deeds of the county in which the certificate is filed. The beneficiary, his heirs, personal representatives or assigns may discharge such lien at any time by paying the amount thereof to the treasurer of the proper county who, with the approval of the county agency, shall execute a satisfaction which shall be filed with the register of deeds.”

As previously indicated, sec. 49.22 relates to eligibility for old-age assistance, and an applicant for assistance who is otherwise eligible is permitted by sec. 49.22 (2) (c) 1 to retain \$500 in liquid assets which shall be free of the control of the county agency.

The term “liquid assets” was apparently used in an accounting sense to mean cash or materials that can be used but once, as distinguished from “permanent” or “fixed” assets such as land, buildings, machinery, and the like, which can be used repeatedly. See Webster's New International Dictionary “Assets.” See also 42 O.A.G. 234, 237, where liquid assets were construed as cash or such as can be promptly converted into cash.

The provision made by sec. 49.22 (2) (c) 1 therefore has no reference to real estate owned by the old-age assistance applicant. On the other hand, none of the statutory provisions relating to liens on real estate of old-age assistance recipients made any reference to a \$500 allotment to such recipient out of the proceeds of the sale of real estate to which a lien has attached where the amount of the lien exceeds the sale price of the real estate.

If the legislature had intended to exempt the first \$500 in value of an old-age pensioner's home from the lien provisions of sec. 49.26, it could readily have done so, and no such exemption is to be implied because of the \$500 exemption contained in another section of the statutes relating to liquid assets (which by definition does not include real estate). Moreover, after the payment of the county's lien out of the proceeds of the sale, there is no \$500 for the old-age assistance recipient to retain. He never receives the \$500 so as to be able to retain it.

This is not to say, however, that the lien itself may not be released in a proper case pursuant to the provisions of sec. 49.26 (8), quoted above.

However, the exercise of the authority granted by sec. 49.26 (8) is in no way dependent upon the provisions of sec. 49.22 (2) (c) 1. In other words, the powers granted by sec. 49.26 (8) could be exercised even if sec. 49.22 (2) (c) 1 did not exist. Whether there are facts and circumstances involved in the case under discussion which would warrant the release of the county's lien in whole or in part in the discretion of the county agency is a matter upon which we are not sufficiently informed to express an opinion.

You are therefore advised that sec. 49.22 (2) (c) 1 does not require the county agency to turn over to an old-age assistance recipient the sum of \$500 out of the proceeds of the sale of such person's home where the county's lien under sec. 49.26 (4), Stats., and following, is in excess of the sale price of the property, but the county's lien may be released in whole or in part under sec. 49.26 (8) if the facts so warrant and without regard to the provisions of sec. 49.22 (2) (c) 1.

WHR

*Automobiles and Motor Vehicles—Driver's License*—The exemption from Wisconsin driver's license requirements conferred by sec. 85.08 (4) (c), Stats., upon nonresidents holding licenses issued by the states of their residence does not extend to persons whose privilege to operate in Wisconsin has been revoked and who have not complied with conditions imposed by Wisconsin law for restoring such privilege.

October 31, 1955.

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

You request my opinion upon a question arising out of the following set of facts.

A Wisconsin resident, holder of a motor vehicle operator's license issued by your department, was convicted of operating an automobile upon a Wisconsin highway while intoxicated. His operator's license was duly revoked pursuant to sec. 85.08 (25), Stats. The subject was formerly a resident of the state of Michigan where he had held a Michigan operator's license prior to his taking up residence in Wisconsin. After his conviction he returned to, and became a bona fide resident of, the state of Michigan. After expiration of the original period of revocation, but within the period of filing proof of financial responsibility, as required under sec. 85.09 of the Wisconsin statutes, the subject was apprehended operating a Michigan-registered motor vehicle upon a Wisconsin highway.

You request my opinion as to whether the subject violated sec. 85.09 (32) (a) and sec. 85.08 (34), Stats., or whether he is entitled to operate under the exemption provisions of sec. 85.08 (4) (c), Stats.

Sec. 85.09 (32) (a), Stats., reads:

"Any person whose license or registration or nonresident's operating privileges has been suspended or revoked under this chapter and who, during such suspension or revocation or thereafter but before filing proof of financial responsibility drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this section, shall be deemed guilty of a misdemeanor and be fined not less than \$10 nor more than \$500 or imprisoned not exceeding 6 months, or both."

Sec. 85.08 (34), Stats., provides as follows:

“Any resident or nonresident whose license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this section, shall not operate a motor vehicle in this state under a license, permit or certificate of registration issued by any other jurisdiction or otherwise during such suspension or revocation until a new license is obtained when and as permitted under this section.”

Sec. 85.08 (4) (c), Stats., dealing with persons exempt from license, provides as follows:

“(4) PERSONS EXEMPT FROM LICENSE. The following persons are exempt from licenses hereunder:

“\* \* \*

“(c) A nonresident who is at least 16 years of age and who has in his immediate possession a valid license issued to him in his home state or country may operate a motor vehicle in this state;”

The public policy of this state respecting suspension and revocation of nonresidents' motor vehicle operating privileges is laid down in sec. 85.08 (22) (a), Stats. It provides:

“(a) The privilege of operating a motor vehicle on the highways of this state given to a nonresident hereunder shall be subject to suspension or revocation by the commissioner in like manner and for like cause as a license issued hereunder may be suspended or revoked.”

It is my opinion that the subject is not entitled to operate a motor vehicle upon Wisconsin highways under the exemption statute, sec. 85.08 (4), quoted above, but is required to file proof of financial responsibility in compliance with sec. 85.09, Stats., as a condition precedent to restoration of his driving privileges. He therefore has violated secs. 85.09 (32) (a) and 85.08 (34), Stats.

I reason thus: In *State v. Stehlek*, 262 Wis. 642, 646, our supreme court follows the weight of authority to the effect that the driving of an automobile upon the public highways of this state is a privilege and not a property right; and is subject to reasonable regulation under the police power in the interest of public safety. Sec. 85.08 (3), Stats., prohibits all persons, except those expressly exempted, from operating a motor vehicle upon our highways without a

license. This subsection clearly speaks in terms of persons whose privilege to drive has not been suspended or revoked. This is so because the last sentence of said subsection states: "After revocation or cancellation a new license can be obtained *only as permitted in this section* after the period of revocation has terminated."

The subject operator was a Wisconsin licensee at the time his privilege to operate was revoked. Immediately that occurred, the provision of sec. 85.08 (3) quoted above restricted the method by which he could have the privilege restored. That provision clearly precludes him from going to another state and taking out a license as a means of restoring his privilege to drive on Wisconsin highways. If the subject were a Michigan resident in the first instance, operating under a Michigan operator's license, his privilege to operate on Wisconsin's highways under his Michigan license would have been revocable for the same offense by virtue of sec. 85.08 (22) (a) quoted above. In such event, as a validly licensed operator under Michigan law, he would have had to comply with sec 85.09, Stats. That being true, the legislative intent to confer exemption under sec. 85.08 (4) (c) could not logically be extended to the subject in the present case.

When read together, the several statutory provisions which comprise the Wisconsin motor vehicle operators' licensing law evince the legislative intent that the grounds for suspension or revocation of drivers' licenses are to apply with equal force to nonresident as well as resident operators. The licensing law is comprehensive and all inclusive, and (with certain other exceptions provided for in sec. 85.08 (4), but inapplicable here) is framed to reach all operators of motor vehicles on Wisconsin highways. There is no hiatus in the structure of these statutes. An operator may regain his driving privileges only by complying with the requirements laid down by our legislature, and not by applying to another state for renewal of an expired license. The exemption afforded to nonresidents under sec. 85.08 (4) (c) means nonresidents whose privilege to operate in Wisconsin has not previously been revoked and stands unrestored.

SGH

*Savings and Loan Associations—Office Building*—Approval of the commissioner of savings and loan associations is necessary any time the directors of an association desire to alter or remodel the association office building. Such approval is necessary whether the association owns its office or occupies it under a leasehold.

November 4, 1955.

C. P. DIGGLES, *Commissioner,*  
*Savings and Loan Department.*

You have asked my opinion on the following two questions:

1. Whenever an association desires to remodel its building at some future date after purchase, is it necessary for the directors to secure approval from the savings and loan department to make alterations or to remodel?

2. Is a savings and loan association required to secure permission from the savings and loan department to remodel or modernize its office under a leasehold?

The answer to both of your questions is found in sec. 215.45 (6), Stats., which reads:

“With the approval of the commissioner, any association may invest not exceeding an amount equivalent to one-half of the total of its general reserves and undivided profits for the purchase, construction, remodeling and modernization of a building to be occupied by the association as its office.”

This section appears to be clear and unambiguous and hence there is no need for applying any canons of statutory interpretation.

The statute by its terms applies to the four subjects: (1) Purchase, (2) construction, (3) remodeling, and (4) modernization.

The four purposes for which funds may be expended are clearly inconsistent, and hence the word “and” in the statutes is properly given a disjunctive meaning just as though it had been written “or.” The courts have stated that these words are interchangeable and that one may be read in place of the other in deference to the meaning of the context. *State ex rel. Wisconsin Dry Milk Company v. Circuit Court of Dodge County*, (1922) 176 Wis. 198, 186 N.W.

732; Sutherland, *Statutory Construction*, (3rd ed.) volume 2, § 4923.

It would appear obvious that an association which was purchasing a building could not at the same time be constructing the building, and further that if an association were constructing a building it would not at the same time be either remodeling or modernizing the building. Hence, if money is expended for any one of the four purposes, it is subject to the requirement of the approval of the commissioner under the terms of the controlling statute.

In your first question you use the word "alteration" in addition to "remodel." It would appear for the purposes of this statute that these two terms are synonymous. Webster's *New International Dictionary*, 2nd edition, defines "remodel" (which is the statutory word) as "to model anew, to reconstruct." The same dictionary defines "alter" as "to change in one or more respects but not entirely; to vary; to modify; to change in any way." Under these definitions it would appear that the association could not make any alterations without at the same time remodeling the building in some degree, and hence the approval of the commissioner is necessary.

The statute specifically requires the approval of the commissioner for either remodeling or modernizing any office which the association may have, and hence that provision is applicable whether it owns the office or whether it occupies it under a leasehold.

RGT

*Public Assistance—Old-Age Assistance—Circumstances under which a county agency might discontinue payment of premiums on an insurance policy under which it is the beneficiary pursuant to sec. 49.22 (3) (b) and (c), Stats., or permit a change in beneficiary, discussed.*

November 9, 1955.

WILBUR J. SCHMIDT, *Director,*  
*State Department of Public Welfare.*

Your several questions deal with the provisions of sec. 49.22 (3) (b) and (c), Stats., as created by ch. 19, Laws 1955, relating to that portion of the requirements for eligibility for old-age assistance which involves insurance policies owned by the beneficiaries.

As you point out, these particular subsections provide for designation of the county agency administering old-age assistance as beneficiary of an insurance policy owned by an old-age-assistance recipient if the agency is requested to pay the premiums. Your first question is:

“1. If the owner of the policy is no longer receiving old-age assistance may or must the county agency continue to make payment of the premiums?”

Sec. 49.22 (3) (b) provides in part:

“Any person applying for or receiving old-age assistance who owns an insurance policy with a cash value not to exceed \$1,000 and requests the county welfare agency to provide for payment of premiums thereon shall name the county welfare agency as beneficiary of the policy and in naming the county welfare agency as beneficiary shall provide that the beneficiary so named can not be changed nor such policy cashed without the written consent of said beneficiary. \* \* \*”

The remainder of subsec. (b) directs how the proceeds of such a policy shall be allocated, i.e., for funeral expenses, to repay the county for aid furnished, and any excess to be disposed of as provided by the insured.

Sec. 49.22 (3) (c) reads in part:

“The county agency granting old-age assistance to a person who has named the county agency beneficiary of a life insurance policy under par. (b) shall provide for the pay-

ment of the premiums on the policy. Such premiums may be included in the grant of the recipient within the maximum limitations of sub. (1) or paid directly to the insurance company without regard to the maximum limitation imposed by sub. (1) and if paid directly to the insurance company the county agency shall be entitled to deduct and retain as reimbursement for the amount so expended as premiums from the recovery made from the policy before reporting the balance as a recovery under s. 49.25."

It is significant that the last quoted subsection uses the mandatory term "shall" in directing payment of the premiums by the county. While it is true that the term "shall" and "may" are sometimes used interchangeably, the primary meaning of the former is mandatory unless there is something in the context to indicate that the legislature intended to use it in a permissive sense.

Since the primary purpose of the legislature in requiring that the county welfare agency be named beneficiary, is to provide security both for repayment of premiums and of old-age assistance granted, it is logical to assume that the legislature intended to impose upon the county agency whatever duties and functions are necessary to preserve the security. If payment of premiums were discontinued without repayment to the county for expenditures previously made, the security might be lost. It is my opinion that when the legislature provided that the county "shall" provide for payment of premiums, and further provided that such premiums might be paid directly to the insurance company, it intended that the county should continue paying the premiums so long as necessary to preserve the security for repayment of earlier expenditures, even though assistance should be discontinued.

Your second question has three parts:

"2. If the owner of the policy is no longer receiving assistance, can he require the welfare agency to permit a change in the beneficiary named in the policy:

"a. If the county agency has been paid for all assistance theretofore furnished the owner?"

Since sec. 49.22 (3) (b) of the statutes provides that any proceeds of the policy in excess of the amount needed to pay the claim for old-age assistance shall be disposed of as

provided by the insured, the county's interest in the policy is limited to the amount it has expended for premiums and for old-age assistance. If its entire claim has been paid and the owner of the policy is no longer an applicant for, or recipient of, old-age assistance, the county has no further rights in the policy under the terms of the statute. In such case, the county agency should permit a change in the name of the beneficiary in order to comply with the expression of statutory intent that the disposition of the policy after payment of the county's claim should be as provided by the insured.

"b. If the owner repays the amount of the premiums paid by the agency?"

Since the county's claim extends not only to the repayment of premiums, but also to old-age assistance furnished, it could not be required to permit a change in the beneficiary on repayment of the amount of premiums so long as the county still had a claim for assistance furnished. The insured could not require a change in beneficiary until the claim for which the policy is security has been paid in full.

"c. If the owner makes no repayment?"

Since the answer to subdivision b of your question is in the negative, the answer to subdivision c must even more obviously be "No."

"3. Would your answers be any different to the above questions if the face value of the policy were \$300 or less, thereby probably precluding a recovery on the policy by the agency after payment of funeral expenses?"

I do not believe the answers to the foregoing questions would be different if the face value of the policy were \$300 or less. While it is true that the statute allocates the first \$300 of the proceeds for funeral expenses, the public has an interest in preserving assets for such purpose to avoid the use of public assets for such expenditures.

Sec. 49.22 (3) (b) makes no exception, with respect to the requirement for naming the county as beneficiary, in cases where the face value of the policy does not exceed \$300. On the contrary, it is inclusive of any insurance policy "with a cash value not to exceed \$1,000."

So long as the county has a claim, either for premiums or for assistance, it has an interest which obligates it to see that assets allocated by statute for funeral expenses are preserved, in order to insure that further payments out of the public treasury are not required for such a purpose.

"4. Would your answers to the above questions be any different if the owner of the policy continued to receive old-age assistance but had obtained some way to pay the premiums himself and requested the agency to discontinue further payment of the premiums?"

The foregoing question is answered, in substance, by the discussion of your first question. Where circumstances existed under which the designation of a county as beneficiary under sec. 49.22 (3) (b) is required, there can be no change in beneficiary until the payment of the entire claim designed to be secured by the arrangement. Not only the county agency, but the state and federal governments, have an interest in the claim.

Since your questions are not related to specific cases but are submitted on an anticipatory and abstract basis, the foregoing answers and discussion can serve for purposes of general guidance only. It may be that in the administration of the law unusual circumstances will arise under which a continuance of payment of premiums by a county agency would be more costly than to forego collection of its claim, or under which there might be other grounds which would warrant compromise. The circumstances under which a public official is warranted in making a compromise are discussed in 30 O.A.G. 480. Generally speaking, a public official may not release a lien or claim in favor of the public in the absence of statutory authority or of some substantial question affecting the claim's enforceability. See 42 O.A.G. 182, 29 O.A.G. 221.

BL

*Counties—Appropriations and Expenditures—University Extension Center*—Under sec. 59.08 (50), Stats., created by ch. 269, Laws 1955, county may not in any one 10-year period appropriate more than one-tenth of 1 per cent of the equalized valuation of taxable property in the county for construction, remodeling, etc., of facilities for university of Wisconsin extension center. This may be raised in any 1 or 2 years of the 10-year period and may be financed by bonds issued under authority of sec. 67.04 (1) (a), Stats.

November 14, 1955.

RONALD D. KEBERLE,  
*District Attorney,*  
Marathon County.

You have referred to the provisions of ch. 269, Laws 1955, creating sec. 59.08 (50), Stats., authorizing counties to provide facilities for university extension centers. It provides:

“59.08 (50) UNIVERSITY EXTENSION CENTERS. To appropriate money in an amount not to exceed one-tenth of one per cent of the equalized valuation of the taxable property in the county as reported by the state department of taxation for the construction, remodeling, expansion, acquisition or equipping of land, buildings and facilities for a university of Wisconsin extension center the operation of which in the county has been approved by the board of regents. No such appropriation shall be made for more than 2 years in any 10 years.”

Our opinion is requested on three questions as follows:

“Assuming that one-tenth of 1% of the equalized valuation of the taxable property in the county is \$500,000, does Chapter 269 permit the appropriation of that amount of money each year for two years, or only the total appropriation of that money over a ten-year period? In other words, the appropriation of \$250,000 for each of two years.

“The second question is as to whether or not a building or the raising of such money could be financed by a bond issue. In checking Chapter 67 of the Wisconsin Statutes relating to borrowing, I was unable to discover any permission granted for a bond issue for such purpose.

“The third question is, in the event it is decided to construct a new building, and such building is to cost originally

the total sum of \$500,000, and \$500,000 being the total amount which could be appropriated by the county board under Chapter 269, would it be proper to expend further sums of money during the ten-year period following the appropriation of the sum of money for remodeling or equipping, or any of the uses mentioned in Chapter 269."

1. The over-all authority to make the appropriation in question is "to appropriate money in an amount not to exceed one-tenth of one per cent of the equalized valuation of the taxable property in the county." That authorization having once been exhausted, no power to make a further appropriation exists until the 10-year period has elapsed. However, the last sentence of the section grants an option to spread the total appropriation over a 2-year period if the county board decides not to appropriate the total amount permitted in any one year. Also the 2 years would not necessarily have to be successive years so far as the language of the statute goes.

The only other possible construction which suggests itself is that there could be two different appropriations of the full amount in separate years. This, however, is negatived, to some extent at least, by the use of the word "appropriation" in the singular, although it is true that this interpretation is not necessarily conclusive under all circumstances, since words importing the singular number extend and may be applied to several persons or things. Sec. 370.001 (1), Stats.

Usually statutes which authorize the imposition of taxes should be strictly construed, however, so as to relieve the taxpayer of the burden in case of doubt. In other words, where there are two or more reasonable meanings of the statute, rendering it uncertain, the one which does not impose the burden should be adopted, although if the one sustaining the tax is more reasonable it should be accepted. *Abbot v. City of Milwaukee*, (1912) 148 Wis. 26, 134 N.W. 137. In *Wadham Oil Co. v. State*, (1933) 210 Wis. 448, 246 N.W. 687, it was held that a tax cannot be imposed without clear language imposing it, and ambiguity must be resolved in favor of the person sought to be taxed.

Applying the logic of the foregoing cases we conclude that the total appropriation is limited to one-tenth of 1 per cent

of the equalized valuation of the taxable property in the county in any 10-year period but that this may be spread over any 2 years in any such 10-year period.

2. In answering the second question we are assuming that the building in question will be a county building and that title to the property will at all times be in the county rather than in the university regents. We understand that the present center belongs to the county and was formerly a county normal school and take it that no change in ownership is contemplated in the event the present building or buildings are remodeled or are replaced by new construction.

This being true, the power of the county to finance the program by a bond issue exists under sec. 67.04 (1) (a), Stats., which reads:

“67.04 Municipalities are empowered to borrow money, subject to the general limitation of amounts prescribed by section 67.03, and subject in some specific cases to the further limitations prescribed by this section, and to issue bonds therefor, for the purposes enumerated in this section. Such bonds may be issued:

“(1) By any county:

“(a) To acquire sites, to equip and to otherwise generally provide joint county normal school buildings, *county buildings*, including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses and houses of correction; but all outstanding unpaid bonds for these purposes shall not exceed in amount at one time one and one-half per cent of the value of the taxable property in such county.”

See 39 O.A.G. 367, 369-70, for discussion and interpretation of words “county building.”

3. As previously explained, when the county has appropriated money in an amount not exceeding one-tenth of 1 per cent of the equalized valuation of the taxable property in the county in any 10-year period, its authority is exhausted, and no further money can be appropriated during such period for any of the items mentioned, whether “construction, remodeling, expansion, acquisition or equipping of land, buildings and facilities.”

WHR

*Bureau of Purchases—Bids—*Westinghouse Electric Corporation is the manufacturer of Ken-Rad brand electric lamps.

Whether Ken-Rad brand lamps meet federal specifications is a question of fact which must be determined by the bureau of purchases.

November 18, 1955.

F. X. RITGER,

*Director of Purchases.*

You have asked whether a bid of the "X" Company to supply Ken-Rad brand lamps to the state of Wisconsin qualifies under paragraph 2 of the state's specifications for contracts to supply electric lamps. This paragraph 2 reads as follows:

"2. *Quality.* Only such bids shall be considered as qualifying hereunder which propose to furnish lamps made by manufacturers whose lamps meet the latest U. S. Government specifications for incandescent electric lamps, and who, during the last twelve months, have been awarded or who have contracted to furnish incandescent electric lamps to the Federal Government under Federal specifications. Satisfactory evidence of qualifications hereunder must be furnished with bid."

Under this paragraph there are two requirements the bidder must meet. First, the lamps of the manufacturer must meet the latest United States government specifications for incandescent electric lamps. Second, the manufacturer must have contracted within the last 12 months to furnish incandescent electric lamps to the federal government under federal specifications.

We have determined that Ken-Rad Lamp Division is an unincorporated division of Westinghouse Electric Corporation. The legal effect of this is that Westinghouse Electric Corporation is the manufacturer of Ken-Rad brand electric lamps. It also appears from the federal supply schedule that Westinghouse Electric Corporation does have a current contract to furnish electric lamps to the federal government. It is therefore my opinion that the bid of the "X" Company does meet the requirement that the manufacturer of the lamps must have a federal contract.

The remaining question is whether Ken-Rad brand lamps meet the latest United States government specifications. This is not a legal question but a question of fact which we cannot determine. This is a question which must be determined by you on the basis of the evidence available. Under paragraph 2 of your specifications the bidder must submit satisfactory evidence to show that the lamps he proposes to supply meet the latest federal specifications. If the bidder does not furnish such evidence, you would be justified in refusing to award the contract to him.

HHP

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*Criminal Law—Embezzlement—Trust Receipts*—A trustee (automobile dealer) under a trust receipt, made pursuant to the Uniform Trust Receipts Act (secs. 241.31–241.50, Stats.), which provides that the trustee upon sale of the automobiles shall hold the proceeds in trust, separate from his own funds, and immediately pay them over to the entruster (finance company), is guilty of embezzlement under sec. 343.20, Stats. 1955, if he fraudulently converts the proceeds to his own use.

But in such a case if the entruster by words or conduct permits the trustee to use the proceeds as his own money, the trust relationship is waived and there is no embezzlement of such proceeds.

November 23, 1955.

ROBERT E. KOUTNIK,  
*District Attorney,*  
Manitowoc County.

You have requested an opinion whether one who is financed under a trust receipt, whereby he agrees to hold the proceeds of sales of financed property "in trust" for the finance company, is guilty of embezzlement if he has appropriated such proceeds to his own use and is unable to pay his indebtedness to the finance company.

You also inquire whether, assuming an embezzlement charge will lie under such circumstances, a defense of waiver can occur.

Your question has arisen in connection with trust receipt financing under the Uniform Trust Receipts Act, secs. 241.31-241.50, Stats., whereby a finance company finances (or "floor plans") cars to a dealer and the dealer (trustee) signs a trust receipt which gives the dealer power to sell the cars but requires him to hold the proceeds of sale "in trust," separate from his own funds, and immediately to pay them over to the finance company (entruster). The trust receipt in question provides, in part:

"The undersigned (herein called Trustee) holds in trust for Rock Finance Company (herein called Entruster) the following described property with all attachments and equipment (herein collectively called Property), and the undersigned, for value received, promises, three months after date, or (at Entruster's option) on earlier demand, to pay Entruster, the following Net Amount together with interest from date and charges:

"A security interest in accordance with the Uniform Trust Receipts Act, (Chapter 114 Wis. Stats.) [Chapter 241 Wis. Stats.] shall remain in Entruster in the Property and all proceeds thereof to secure the Net Amount above stated, together with interest and charges, and all other obligations of Trustee to Entruster, heretofore or hereafter incurred. To establish or confirm such security interest, Trustee hereby sells, assigns and transfers the Property to Entruster, and, in case Entruster has a previously acquired security interest or title, Trustee, for the new value given in reliance on this receipt, hereby confirms Entruster's security interest and title in and to the Property. \* \* \*

"Trustee agrees to hold the Property in trust \* \* \*

"Trustee's possession of the Property shall be for the purpose of selling the same, but only as follows: So long as Trustee is not in default hereunder Trustee may, in the ordinary course of trade, sell the several items of the Property for cash or on terms approved in advance by Entruster, for not less than the minimum sales price set opposite the item sold plus a pro rata part of all interest and charges accrued hereunder. *Trustee agrees in case of sale to hold in trust for Entruster the proceeds of such sale (including money, instruments, security, documents and property taken in trade) separate from Trustee's funds and property and immediately to pay over, assign and deliver said proceeds to Entruster.* [Emphasis supplied.]

"Trustee shall be in default hereunder upon breach of any agreement or warranty in this trust receipt made, or upon non-payment when due, or when demanded by

Entruster before maturity, of any indebtedness secured hereby, or in case of insolvency, bankruptcy, receivership, assignment for benefit of creditors, filing of a tax or other lien, or any other proceeding affecting Trustee or Trustee's property, or upon concealment of the Property or any part thereof or removal thereof from Trustee's regular place of business, or upon cessation of Trustee's business as a going concern. In event of any such default, Entruster may, at its option without notice, declare all indebtedness of Trustee to Entruster secured hereby, including the net amount stated on the face hereof and interest and charges and all other obligations of Trustee to Entruster heretofore or hereafter incurred, to be immediately due and payable. Trustee agrees to pay interest at ten percent per annum after maturity on the unpaid balance of such indebtedness and reasonable attorney's fees of fifteen percent of the unpaid balance of such indebtedness, if an attorney shall be employed by Entruster for collection or protection of Entruster's interests. \* \* \*

In substance then, the situation is that the trustee (dealer) borrows money from the entruster (finance company) to purchase cars, and upon purchase, conveys title to the cars to the entruster as security for the loan. The trustee, however, is given a power of sale and can confer a valid title upon a purchaser. Upon sale, the security for the loan is the proceeds of sale which the trustee agrees to hold "in trust," separate from his own funds, and immediately to pay over to the entruster. Manifestly, by the terms of the trust receipt, if the trustee appropriates the proceeds of sale to his own use, in the absence of a consent or waiver by the entruster, he is guilty of a breach of contract. Is such an appropriation of the proceeds an embezzlement?

I. Are the proceeds of the sale of entrusted property subject to embezzlement by the trustee?

Whether an appropriation of proceeds by the trustee of a trust receipt is embezzlement depends upon whether he is within one of the classes of persons enumerated in the embezzlement statute, sec. 343.20 (1). The statute requires that the person occupy a particular relationship to the owner or the property, and while the enumerated relationships are broad in scope, conceivably "some newly created relationship will not fall within any of the enumerated

classes." Melli and Remington, *Theft—A Comparative Analysis of the Present Law and the Proposed Criminal Code*, 1954 Wis. L. Rev. 253, 259-260. In other words, persons not specifically enumerated in the statute are excluded. *Expressio unius est exclusio alterius*. Furthermore, a mere debtor-creditor relationship is not a basis for a charge of embezzlement. *Hanser v. State*, (1935) 217 Wis. 587, 259 N.W. 418.

It follows that to support a charge of embezzlement the person charged must be more than a mere debtor of the fund or property and he must also fall within one of the classes of persons enumerated in the statute.

Sec. 343.20 (1), Stats. 1953, enumerates the classes of persons who may embezzle as follows:

"\* \* \* any factor, carrier, warehouseman, storage, forwarding or commission merchant, or any *bailee*, executor, administrator, guardian, or any *trustee*, agent, clerk \* \* \*."

While the statute does not contain general language such as "or other persons acting in a fiduciary capacity" (see 41 A. L. R. 474, discussing the scope of such language) it is clear that either of the terms "trustee" or "bailee" is sufficiently broad enough in scope to include the "trustee" of a trust receipt.

The trust receipts act specifically provides that the use of the term "trustee" in the act "shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence other than as provided by ss. 241.31 to 241.50." Sec. 241.31 (14), Stats. However, there is no such limitation upon the term "trustee" as used in the embezzlement statute and it is well established that it is not ordinarily limited to trustees of an express trust, but is frequently used to include fiduciary relations which fall far short of express trusts. Cf. *Merton v. O'Brien*, (1903) 117 Wis. 437, 442, 94 N.W. 340; *Woodmansee v. Schmitz*, (1930) 202 Wis. 242, 246, 232 N.W. 774; see 42A Words and Phrases, Trustee.

Even if not a trustee, the dealer is a bailee, to say the least, within the meaning of the embezzlement statute. In *Burns v. State*, (1911) 145 Wis. 373, 380, 128 N.W. 987,

a prosecution for larceny by bailee, the supreme court said in part:

“\* \* \* No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances,—he is a bailee. *It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment*, regardless of whether such possession is based on contract in the ordinary sense or not.” (Emphasis supplied.)

Furthermore, it is not necessary that property be received to be returned in specie to constitute a bailment. If goods are received to be sold, a bailment is created by which the bailee is obligated to pay over either the goods or the proceeds. In such case both the goods and the proceeds are the subject of a larceny. *State v. Dohn*, (1934) 216 Wis. 367, 370-371, 257 N.W. 21.

The trustee in a trust receipt transaction is therefore within the embezzlement statute, either as a bailee or as a trustee.

It may be argued that in view of the debtor-creditor relationship existing between the trustee and the entruster, there can be no embezzlement under the rule of *Hanser v. State*, (1935) 217 Wis. 587, 259 N.W. 418. The rule in question means only that one who becomes the owner of money or property cannot embezzle it even though he is obligated to repay the money or pay for the goods. The property embezzled must be property “of,” or “belonging to,” another. Sec. 343.20, Stats. 1953; 2 Wharton, Criminal Law (12th ed. 1932) §§ 1258, 1282. The actor must have mere possession or custody; but if he is entitled to treat the money or property as his own, his failure to pay the debt when due subjects him to a civil action but does not make him an embezzler. (He may be subject to prosecution for having obtained the property by false pretenses in the first place, depending upon the facts, but that is another story.)

For purposes of analysis the trust receipt agreement may be regarded as imposing two distinct obligations on the dealer trustee: (1) His obligation with respect to the *debt*; and (2) his obligation with respect to the *security*. See Heindl, Trust Receipt Financing Under the Uniform Trust Receipts Act, 26 Chicago-Kent L. Rev. 197, 220-221. Heindl describes the relationship between the immediate parties to a trust receipt agreement as follows:

"The rights and duties of the entruster and trustee arising from a trust receipt transaction must, of necessity, be segregated into two classes: (1) those created by the fact that the trustee is indebted to the entruster, and (2) those created by the fact that the security for that obligation is in the possession of the trustee. The first represents nothing more than a debtor-creditor relationship, and the terms of the obligation, such as the maturity date, the amount owed, and the rate of interest, are the items which determine their rights and duties with respect to the indebtedness. \* \* \*

"As the primary interest in any discussion of trust receipts revolves around the rights of the parties with reference to the trust receipt property, it is essential to determine the origin of these rights. The trust receipt itself has always been one source. \* \* \* Since there are provisions governing the right of the parties with regard to (1) repossession of the trust receipt property, and (2) default, the statute functions as a second source, supplanting the terms of the trust receipt in these two instances."

Looking first to the trustee's obligation with respect to the money advanced to him to purchase the cars, there does exist a debtor-creditor relationship. The trustee is required to pay interest on the loan, and a rate of interest and maturity date for the loan are fixed by the trust receipt. These are the terms of his obligation with respect to the debt, and as to that obligation there is established a debtor-creditor relationship. See *Milwaukee Theater Co. v. Fidelity & Casualty Co.*, (1896) 92 Wis. 412, 414-415, 66 N.W. 360.

But this does not conclude the question. With respect to the security he is something more than a *mere* debtor.

By the terms of the trust receipt, the trustee is required to hold the proceeds of sale in trust and immediately to pay over such proceeds to the entruster. The trustee's duty

in this respect is spelled out in positive terms in the trust receipt.

Furthermore, sec. 241.40, Stats., provides in part:

"Where, under the terms of the trust receipt transaction, the trustee \* \* \* having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, \* \* \* *the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:*

"\* \* \*

"(3) *To any other proceeds of the goods \* \* \* which are identifiable.*"

The equivalent provision of the Uniform Trust Receipts Act (hereinafter referred to as UTRA), sec. 10 (c), provides for the entruster's right to proceeds as follows, the italicized words having been omitted from the act as adopted in Wisconsin:

"(c) to any other proceeds of the goods \* \* \* which are identifiable, *unless the provision for accounting has been waived by the entruster by words or conduct; and knowledge by the entruster of the existence of proceeds without demand for accounting made within ten days from such knowledge, shall be deemed such waiver.*" 9A, U.L.A. 309. (Emphasis added.)

In their comments on sec. 10 (c) the commissioners on uniform laws state:

"It [UTRA] defines failure by the entruster to insist on accounting for 10 days after the entruster has knowledge that proceeds exist, as a waiver of any duty to account specifically for proceeds. Sec. 10 (c). *This may often mean a good defense to possible criminal proceedings for embezzlement.*" Commissioners' Prefatory Note to the Uniform Trust Receipts Act, 9A, U.L.A. 280 § D, par. 2. (Emphasis added.)

The foregoing comment makes it clear that the commissioners assumed that in the absence of waiver an appropriation by the trustee of the proceeds of sale would constitute an embezzlement. While the italicized portion of sec. 10 (c) of UTRA is omitted from the Wisconsin statute, that relates only to waiver. Apart from the waiver

question the commissioners' assumption is based upon identical language in sec. 241.40 (3) of the Wisconsin statute.

The conclusion inevitably follows that in the absence of waiver the proceeds of sale are the property of the entruster, see *Mershon v. Moors*, (1890) 76 Wis. 502, 513-515, 45 N.W. 95, and that a fraudulent appropriation of such proceeds by the dealer to his own use or the use of another is a breach of duty under the contract and an embezzlement as well.

The numerous Wisconsin cases which have decided questions relating to the rights of parties in connection with the *sale of mortgaged chattels* have not been overlooked.

*Southern Wisconsin Acceptance Co. v. Paull*, (1927) 192 Wis. 548, 213 N.W. 317, and *Bernhagen v. Marathon Finance Corporation*, (1933) 212 Wis. 495, 250 N.W. 410, were both replevin actions in which the issue was whether a chattel mortgagee had a right to *possession* of the mortgaged chattels as against purchasers for value without actual notice, when the mortgagee had permitted the mortgagor to hold himself out as the owner and sell the chattels to the general public upon the mortgagor's promise to apply the proceeds of sale to the debt. In each case the supreme court held that as against the purchaser for value, the mortgagee's act of permitting the mortgagor to sell the mortgaged chattels was a waiver of his lien on the *chattels* and that the purchaser took free of the mortgage lien.

Those cases concern only the rights of purchasers for value and *do not concern the rights of the immediate parties to the agreement, in and to the proceeds of the sale of the goods*. While there is language in both cases to the effect that the consent by the mortgagee to the sale, upon the agreement of the mortgagor to apply the proceeds of sale to the debt, amounts to a substitution of the *personal promise* of the mortgagor for the mortgage security, that language is *dictum* and not relevant to the issues presented in the cases.

*Kramer v. Burlage*, (1940) 234 Wis. 538, 541, 291 N.W. 766, was a garnishment action in which the issue was whether a chattel mortgagee had a right to the *proceeds* of sale of the mortgaged chattel as against a creditor of the mortgagor who had garnished the proceeds at the sale,

where the mortgagee had agreed to the sale at public auction, with an agent of the mortgagee to act as clerk, and where the proceeds were to be applied to the mortgage debt. The supreme court held that as against the garnishment creditor the mortgagee was entitled to the proceeds, distinguishing *Southern Wisconsin Acceptance Co. v. Paull, supra*, and holding that the mortgagor's promise to turn the proceeds of sale over to the mortgagee operated as an equitable assignment of the proceeds conferring title therein to the mortgagee to the extent of the mortgage debt. A number of cases were cited as controlling.

The *Kramer* case, and cases cited therein as controlling on the issue, though distinguishable from the present situation because they relate to chattel mortgages and not to trust receipts, nevertheless support the conclusion that a trustee under a trust receipt commits embezzlement when he converts the proceeds of sale, for they show that a security interest *can* attach to proceeds and that a creditor is not necessarily left to a mere personal promise of the debtor by authorizing a sale of the primary security. The agreement, the court said in the *Kramer* case, operates as an equitable assignment of the proceeds conferring title thereto upon the mortgagee to the extent of the amount secured by the mortgage.

Furthermore, it is to be noted that the entruster's right in and to the proceeds of sale under a trust receipt is superior to the interest which a mortgagee has in the proceeds of the sale of a mortgaged chattel. Under the trust receipt agreement sale of the property is expressly authorized *by the contract*. The entruster's right to the proceeds of the sale, and the trustee's duty to hold the proceeds in trust and to pay over and account for them, are specifically provided for *by the terms of the agreement*. The trustee's obligation with respect to the proceeds arises after the sale, and the entruster's right to proceeds is recognized by sec. 241.40 (3), Stats. It is therefore apparent that an authorized sale could not be construed as a waiver of rights to proceeds where such rights of the entruster and correlative duties of the trustee are separately and distinctly provided for by the contract in the event of such sale.

Under such circumstances there is no doubt that the proceeds of sale are the property of the entruster. It follows that when the trustee fraudulently converts them to his own use he commits embezzlement.

II. Can the entruster either expressly or by a course of conduct waive his right to proceeds to the extent of relieving the trustee of criminal liability for embezzlement?

To support a charge of embezzlement, the defendant must fraudulently convert the property "to his own use or to the use of any other person except the owner thereof." Sec. 343.20 (1), Stats. 1953. Whether the act of appropriation of the property constitutes a fraudulent conversion depends upon the facts of the particular case. See Melli and Remington, *op. cit. supra*, 1954 Wis. L. Rev. 253, 261-263. In this connection, sec. 343.21, Stats. 1953, defines certain acts as *prima facie* evidence of embezzlement.

While the embezzlement statute does not expressly so provide, it is obvious that if the owner has consented to the appropriation a charge of embezzlement will not lie. See, *Boyd v. State*, (1935) 217 Wis. 149, 156, 258 N.W. 330; *McGeever v. State*, (1941) 239 Wis. 87, 93, 300 N.W. 485; 29 C. J. S. 685, §11, d. Such consent may be express or it may be inferred by a course of conduct. In either event such consent would give rise to a waiver of the owner's rights to the property to the extent that the appropriation of the property in such case would not constitute embezzlement.

Waiver assumes the existence of a preexisting right. It is apparent therefore that whether or not a waiver has occurred depends upon the facts of the particular case, and that to determine what acts or conduct result in waiver it is necessary to determine first the nature and conditions of the obligation out of which the right being waived arises. For these reasons it is not possible to specify with particularity what conduct by an entruster under a trust receipt amounts to a waiver which relieves the trustee of criminal liability for embezzlement.

Certain generalizations can be made, however, the first and most obvious being that, as noted above, waiver is a question of fact. Since the entruster's right to proceeds arises out of the agreement by the trustee to hold the pro-

ceeds in trust, separate from his own funds, and immediately to pay them over to the entruster, a factual waiver would undoubtedly occur where the entruster has knowledge that the trustee is dealing with the proceeds as his own and acquiesces therein.

Although the entruster's right to proceeds is recognized by sec. 241.40 (3), Stats., it seems clear that a factual waiver may nevertheless occur under the circumstances indicated, at least to the extent of relieving the trustee of criminal liability for embezzlement. See *Hanser v. State*, (1935) 217 Wis. 587, 259 N.W. 418.

Such a waiver might occur, for example, if the entruster knowingly permits the trustee to use the proceeds as his own over a period of time so as to permit the trustee reasonably to infer that his right to do so in all cases is recognized by the entruster. Such conduct could negative the inference of an intent to defraud based upon a conversion of the money. Of course, even in such circumstances an intent to defraud might be inferred from other facts, such as absconding to another state with the proceeds, but if the trustee merely became bankrupt from the usual hazards of business he would not be guilty of embezzlement under the circumstances indicated.

A similar course of dealings might also result in the creation of a mere debtor-creditor relationship as to the proceeds. In 18 Am. Jur., *Embezzlement*, §20, it is said:

"\* \* \* whether the relation of debtor and creditor exists depends upon the facts of the particular case. Where a principal acquiesces in his agent's practice of depositing rents collected, on his general account, and of treating the deposits as his own, such a course of dealings may divest the principal of his specific property in the deposits and establish the relation of creditor and debtor between him and his agent." (Citing *State v. Kent*, (1875) 22 Minn. 41, 21 Am. Rep. 764.)

How long a course of dealings must continue whereby the entruster permits the trustee to appropriate the proceeds to his own use before a waiver or debtor-creditor relationship results cannot be stated here with definiteness. There are undoubtedly two extremes with an uncertain twilight zone between, but a definite line cannot be drawn by this opinion. One thing that is clear, however, is that a

waiver relieving the trustee of criminal liability for embezzlement can occur. See *Hanser v. State*, (1935) 217 Wis. 587, 259 N.W. 418; Cf. *Mays v. State*, (1926) 33 Okla. Crim. 185, 242 P. 580.

Sec. 10 (c) of UTRA provides:

“\* \* \* to any other proceeds of the goods, documents or instruments which are identifiable, *unless the provision for accounting has been waived by the entruster by words or conduct; and knowledge by the entruster of the existence of proceeds, without demand for accounting made within ten days from such knowledge, shall be deemed such a waiver.*” 9A, U.L.A. 309. (Emphasis added.)

The italicized portion of this section has been omitted from the Wisconsin act. However, this does not mean that a waiver cannot occur under our statute. The omission of this part of section 10 (c) UTRA from the Wisconsin act merely prevents the statutory waiver from occurring but does not prevent the occurrence of a factual waiver.

WAP

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*Motor Vehicle Department—Traffic Officers—Detention of Vehicle and Cargo*—Absent a statute authorizing same, an officer making an arrest of a truck driver may not seize or hold the truck or its cargo as security for personal appearance, or as bail, or as security for payment of a fine. Seizure of truck, or cargo, or both, under special circumstances is provided by secs. 363.04, 110.10 (11) and 110.16 (3) (b), Stats. Where, as a consequence of arrest and detention of truck driver, the truck and cargo will in effect be held in police custody, such consequence does not militate against the power of an officer to arrest driver and hold him to bail. Considerations of personal liability of officer for safekeeping of truck and cargo discussed.

November 25, 1955.

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

Your enforcement officers are confronted from time to time with the practical consideration of what to do with motor trucks and cargoes (particularly where a cargo is of

a perishable nature) when making arrests for violation of laws which your department enforces. You have requested my opinion upon the following questions:

"1. May officer hold vehicle apprehended in violation until court convenes or until bond has been posted: (a) If owned and operated by same company; (b) If owned and operated by another, and leased to operator?

"2. May officer hold cargo on vehicle, assuming cargo not perishable: (a) With vehicle; (b) Without vehicle?

"3. Will police officer be liable if he holds a perishable load and the cargo spoils?

"4. If vehicle and cargo are released without posting of bond and prior to convening of court, as might be the case where a perishable commodity is concerned, and the company fails to answer summons, has the police officer the right to stop another vehicle of the company and hold it until bond is posted or appearance is made in court on behalf of defendant, when vehicle is: (a) Owned and operated by the company; (b) Owned by another and leased to the operator?

"5. If vehicle and load are in violation, but are placed in compliance by driver or owner before again attempting to proceed, may the vehicle and load be detained until bond has been posted?"

Generally speaking, in the absence of a statute expressly authorizing the same, there is no authority for an officer to seize or hold either a motor truck or its cargo, or both, as security for personal appearance, or as bail, or as security for payment of a fine. There is no statute in Wisconsin authorizing the detention of motor trucks or cargoes for these purposes. To the extent, therefore, that questions 1, 2, 4 and 5 imply that the sole purpose of holding a truck and/or its cargo is to force the posting of security for personal appearance, or as bail, or to compel payment of a fine, the answer to all four such questions (including their subdivisions) is "No."

Of course, situations will arise where the vehicle and cargo will, in effect, be held in custody as a consequence of the arrest and detention of the driver who is the sole person on the truck, and the owners of the truck and cargo are located at such distance that they are unable to take custody of same. This should not militate against the power of an officer to arrest the driver and hold him to bail. The

law in this regard is well stated by the Iowa court in *Folson v. Piper*, (1922) 192 Ia. 1056, 186 N.W. 28, 30:

“\* \* \* The primary duty of an officer in the absence of statute in making an arrest is not ordinarily to be subordinated to the responsibility of caring for the property of his prisoner. Circumstances may arise in which an officer in the exercise of common sense and ordinary prudence should either undertake to care for the property of the person arrested, or permit the latter to arrange for its care. Under ordinary circumstances, however, no such duty is imposed and law enforcement requires the negation of such a rule.  
\* \* \*”

It will be noted that the above quoted language recognizes a duty to take care of the property of the defendant when “common sense and ordinary prudence” should dictate it. The Iowa court indicates that under the facts of that case the duty to care for the defendant’s vehicle would have arisen if it had been apparent to the officer that the vehicle was being left in a particularly unsafe place or if the violator had made a request for protection of the vehicle. Thus an officer’s liability for damage to a vehicle or its load is predicated only upon negligent conduct. If an officer has, or should reasonably have, knowledge that there is a danger of theft or spoilage, he should take such steps as are reasonable and necessary to protect the vehicle and load. It is suggested that the officer consult with the driver and inform the owner of the vehicle that the driver is being held. Beyond this, the determination of what care would be reasonable will depend in each situation upon the circumstances and available facilities.

The answer to your third question is, therefore, that in the event that an officer should hold property without authority, he would be liable for the damages arising from such illegal detention, including the damages due to spoilage occasioned thereby. If the holding of the cargo is authorized by law, the officer is protected by his authority from liability. In this connection, it is to be noted that a holding of a truck and/or cargo is authorized by statute for certain purposes other than those suggested by your questions. Sec. 363.04, Stats., authorizes the seizure and detention of any property (which would include a truck or

its cargo) when the same is needed as evidence upon a trial. Further, sec. 110.10 (11), Stats., authorizes the holding of the truck of an itinerant merchant trucker operating without a license. While the statute is silent respecting the holding of the cargo, it would seem implicit that unless the driver or owner is able to make other arrangements for disposition of the cargo, it would necessarily have to remain on the truck. Sec. 110.16 (3) (b) expressly authorizes "deputized subordinates" to seize the cargo carried in a motor vehicle of a peddler who has not paid a license fee or forfeiture imposed by ch. 129. If the cargo is properly held as evidence under sec. 363.04 the fact that the cargo is perishable cannot affect the validity of the holding, and if it should spoil, the officer cannot be held liable, in view of the statutory direction to hold such property. Where the goods carried by an unlicensed peddler are seized under the provisions of sec. 110.16 (3) (b) and are in danger of spoiling, consideration should be given to taking such steps as would make applicable the provisions of sec. 266.14, Stats., in regard to disposition of perishable property under attachment.

SGH

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*Counties—Park Commission—Recreation Director—* Under secs. 27.015 (7) (f) and 27.03 (2), Stats., the county park commission is authorized to employ personnel to promote recreational activities at parks supervised by the commission. If the county board wishes to establish a recreational program extending beyond the limits of the parks, this may be done pursuant to the provisions of secs. 59.07 (26) and 59.87 (10), Stats.

December 5, 1955.

JAMES D'AMATO,  
*District Attorney,*  
Waukesha County.

You have asked this office to clarify the right of the Waukesha county park and planning commission to employ a recreation director. We understand that this commission is

the county park commission provided for by sec. 27.02, Stats. The powers of this commission are provided by secs. 27.03 and 27.05, Stats. Also, sec. 27.015 (13), Stats., provides that the county park commission shall have the powers of the county rural planning committee provided in sec. 27.015.

The principal duties of the county park commission are to plan for the future development of public parks and to supervise the maintenance and operation of such parks. Sec. 27.015 (7) (f) provides in part:

"It may under the direction of the county board, operate a county park or parks for tourist camping and general public amusement, and may establish fees, concession privileges and grants and employ such help as is needed to operate the park or parks for the best county interests. \* \* \*"

Sec. 27.03 (2) provides as follows:

"It may also appoint such other agents and employes as may be necessary to carry out its functions, and may remove them at pleasure, and make all rules and regulations concerning its work."

Sec. 27.05 provides that the county park commission shall have charge and supervision of all county parks.

Clearly, under the above statutes the county park commission has the authority to employ personnel to promote recreational activities in such parks. In 27 O.A.G. 710, 712, this office quoted from a Minnesota case as follows:

"\* \* \* A park is a pleasure ground for the recreation of the public to promote its health and enjoyment. A public golf course is for the same purpose. Parks are used for public recreation by indulgence in tennis, pitching horse-shoes, croquet, baseball, kitten ball, golf, walking, horse-back riding, picnicking, skating, bathing and general outdoor exercise. \* \* \*"

Where such activities are carried on in a park the park commission would be justified in concluding that employment of a recreation director to direct these activities is in the best interest of the people of the county.

A recreation director appointed pursuant to secs. 27.015 (7) (f) and 27.03 (2) could clearly supervise all recreational activities associated with the public parks. However,

a question might arise as to whether such director could supervise recreational activities not associated with public parks, such as dances, bazaars, dramatic productions, and games held in other places such as church basements or school auditoriums or gymnasiums, or YMCA facilities. We will not attempt to answer this question at this time.

It would appear that if the county board wishes to provide a county-wide recreational program not limited to park activities it may appoint a county recreation committee pursuant to sec. 59.07 (26) (formerly sec. 59.08 (20)) or sec. 59.87 (10) (formerly sec. 59.87 (3a)) as amended by ch. 651, Laws 1955. The latter section, as amended, reads as follows:

"The board may raise moneys for the employment of a county recreation director. Such moneys will be disbursed by the treasurer on orders from the clerk which have been approved by the special committee on agriculture, and shall not be expended for any other purposes, and are to be used for such director's salary and the necessary expenses. Such recreation director may be employed on a full-time or part-time basis or may be a full-time employe as provided elsewhere in this section, who may be directed to devote a portion of his time to recreation work. The duties of the director shall be to promote, organize and supervise recreation activities. He shall work under the supervision of the special committee on agriculture, submit an annual report to the board, co-operate with existing units of government, agencies and organizations in the promotion, organization and supervision of recreation activities, and organize institutes and provide for the training of volunteer leaders to conduct recreation programs. The special committee on agriculture may appoint an advisory committee from among citizens and organizations interested in recreation to assist in selecting the county recreation director and in setting up a county recreation program. Supervisors from any city or village providing a municipal recreation program shall have no part in any determination under this section, and no part of any expense incurred under this section shall be levied against any property in such city or village."

GFS

*State Athletic Commission—Boxing*—Boxing or sparring for training purposes does not constitute a boxing or sparring exhibition within the sense of those terms as used in ch. 169, Stats., and is not subject to the regulatory powers of the state athletic commission. Said commission accordingly has no jurisdiction over the charging of fees to the public for witnessing gymnasium training which includes boxing or sparring for training purposes.

December 12, 1955.

STATE ATHLETIC COMMISSION.

You have asked my opinion upon the following question: "Is it permissible (for the proprietors thereof) to charge a fee at gymnasiums where boxers train for their bouts? The usual fee, where such admission charges are allowed, is 25¢, 50¢, or \$1.00."

There is no statute which gives your commission jurisdiction over the business of operating or conducting gymnasiums where boxers train. If the public is willing to pay a price to witness boxers in training, there is no reason so far as I have been able to discover why the proprietor of such a gymnasium may not make a charge therefor. In making this answer I assume that the activities of the boxers in such gymnasiums are for bona fide training purposes and not a guise for participating in a boxing or sparring exhibition that would otherwise fall within your regulatory powers under secs. 169.05 and 169.13, Stats.

While it is true that boxers in training do engage in sparring and boxing, the primary purpose thereof is to develop their skill and endurance in preparation for a regulation boxing or sparring exhibition. Sparring for training purposes, even though viewed by paying spectators, is not an exhibition in the sense that boxing and sparring exhibitions are intended to be regulated under ch. 169, Stats. The regulations there provided, among other things, call for limitation upon the length and number of rounds, compulsory rest period between rounds, physical examination of participants by a physician, restrictions on size of gloves, and many other things which would be wholly impracticable when applied to gymnasium boxing or sparring. For

example, sham matches are prohibited by secs. 169.18 and 169.19, Stats. In gymnasium boxing or sparring, certain forms of practice punching and blocking could in a sense be described as "sham" in that the participants go through certain movements by pre-arrangement to develop experience in coping with certain offensive and defensive tactics. But certainly the legislature never intended to prevent that. Again, in training, a lightweight boxer often is called on to spar with a heavyweight to develop the latter's speed. But under the statutes such a match for exhibition purposes would not be allowed for obvious reasons. Further the boxers in training may wish to box longer than three minutes for the purpose of building their endurance. Or they may take less than a full minute rest period. All of these departures from the standards observed in regulated exhibitions are traditional practices followed by boxers in training and at least up to now have never been regulated.

Having concluded that boxing or sparring for training purposes does not constitute an exhibition within the sense of the latter term as used in ch. 169, Stats., your commission cannot regulate same and accordingly has no jurisdiction over the charging of fees to the public for witnessing training practices.

SGH

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*Adjutant General—National Guard—Civilian Guards—Firearms—*Civilian guards at national guard installations may bear weapons other than automatic weapons as long as they are not concealed.

The adjutant general as quartermaster general, under his duty to preserve all arms and equipment furnished to the Wisconsin national guard, may direct that civilian employe guards bear arms.

December 12, 1955.

RALPH J. OLSON,

*Adjutant General.*

You have asked for my opinion concerning the extent of your powers to arrange for the protection of classified materiel, that is, radar and gunsight equipment, which is

installed on aircraft in the possession of units of the air national guard of Wisconsin stationed at Truax Field and General Mitchell Field.

You state that under federal security regulations classified materiel such as this radar and gunsight equipment must at all times be kept under close surveillance of an armed guard or secured in a locked vault. Further, since this equipment is not readily detachable from the aircraft for storage, it must remain in place on the aircraft, and hence armed guards for the aircraft are necessary.

Provision for such armed guard has been made by the national guard bureau, by the allotment of federal funds to the state for paying the salary of employes who are known as "air technician security guards." While these guards must be enlisted members of the air national guard of Wisconsin in order that they may receive a security clearance, they are not considered as being on active duty in either a federal or state military status, but on the other hand are classed as civilian employes.

On the basis of the foregoing facts you have asked the following:

1. Are the provisions of sec. 164.20, Stats., sufficient to authorize the carrying of the arms therein specified by the security guards when on duty as such?
2. Is the adjutant general representing the state empowered to issue such orders as are necessary to the security guards, including the carrying of arms, to protect properly the interests of the state in the federal property issued to the state?

In answer to your first question, it appears that the guards cannot be armed with automatic weapons such as are defined in ch. 164, Stats., without the permission of the appropriate chief of police or county sheriff, since these guards as civilian employes are not civil enforcement officers within the meaning of sec. 164.20 ( 3). The exemption of national guardsmen in that section does not apply, since at the time of performing their duty of guarding the airplanes they are not on military duty under federal or state orders. It does not appear possible for the governor to order these men to duty on a state status under sec. 21.09, because the conditions in that section are not met. Further, if it

were possible to order them to duty on a state status, they would be paid under the provisions of sec. 21.48 as amended by ch. 68, Laws 1955, and not under the civilian employes' pay scale.

However, the guards may be armed with sidearms or repeating or semi-automatic rifles or shotguns, provided that they observe the restriction in sec. 340.69 that the weapon may not be concealed. Referring particularly to sidearms, such arms should be carried in a holster which is outside of all clothing worn by the guards while on duty.

In answer to your second question, it appears that you have necessary authority under the existing statutes to take all reasonable measures for the preservation and protection of arms and equipment furnished by the federal government for the use of the Wisconsin national guard and the air national guard.

Under the provisions of sec. 21.03 of the statutes, the governor himself receives the arms and equipment furnished by the United States government for the purpose of arming and equipping the national guard. Under the statutes you are, of course, designated as chief of staff for the governor, and in addition under sec. 21.19 you are also designated as quartermaster general. Sec. 21.19 (7) as renumbered and amended by sec. 21 of ch. 68, Laws 1955, reads in part:

"The adjutant general as quartermaster general shall have charge of all the military property of the state, and carefully preserve, repair and account for the same \* \* \*."

In the course of your duty to preserve all government property, you have already provided in all the armories of the state for a locked and barred room in which the ordnance equipment of the state is kept; and presumably at General Mitchell Field and Truax Field there are available locked vaults in which the radar and gunsight equipment necessary for the operation of the aircraft under your control could be stored.

It would appear reasonable when the federal regulations so require, that armed guards be provided for classified materiel at such times as it is not kept in the said locked vault.

While the question is not directly raised in your request for an opinion, we point out to you that persons in a private status as well as duly authorized public officers have the right to make an arrest for a felony or an attempted felony committed in their presence, and that it is generally established, although there is no specific Wisconsin case on the point, that a private individual can make an arrest for a misdemeanor which constitutes a breach of the peace committed in his presence. In 6 C. J. S. 606 it is stated:

“A private person may, ordinarily, arrest without a warrant one who is committing, or it attempting to commit, a felony in his presence.”

and at page 607 it is stated:

“A private person may, ordinarily, arrest without a warrant one committing a breach of the peace in his presence.”

The rule is further stated in 6 C. J. S. 612:

“While an officer or private person may use such force as is necessary to make an arrest, he cannot use force or violence disproportionate to the nature and extent of the resistance offered.”

The rule as to arrests by private persons without warrant for a felony is stated in *Bergeron v. Peyton*, (1900) 106 Wis. 377, 82 N.W. 291.

The Wisconsin cases further indicate that even an officer cannot arrest for a misdemeanor falling short of a breach of the peace without a warrant, unless the misdemeanor can be treated as having been committed in his presence. *Mantei v. State*, (1932) 210 Wis. 1, 245 N.W. 683; *Edwards v. State*, (1926) 190 Wis. 229, 208 N.W. 876.

It is established that deadly force cannot be used to apprehend a person for a misdemeanor. 6 C. J. S. 614.

In summary it would appear that under the existing statutes you have authority to direct that armed guards be provided for classified materiel in the possession of the Wisconsin national guard, and while automatic weapons may not be carried without the approval of the appropriate chief of police or sheriff, civilian employes may be armed with other weapons as long as they are not concealed.

RGT

*Taxation—Assessor's Plats—Register of Deeds—Sec. 70.27 (3), Stats., as amended by ch. 95, Laws 1955, is not applicable to certificates of termination of joint tenancy, certificates of heirship, or judgments assigning real estate in probate or administration proceedings.*

December 13, 1955.

WILLIAM T. BRADY,  
*District Attorney,*  
Juneau County.

Our attention is directed to ch. 95, Laws 1955, which amended sec. 70.27 (3) of the statutes as follows:

*"(3) Reference to any land, as it appears on a recorded assessor's plat \* \* \* is deemed sufficient for purposes of assessment and taxation. Conveyance may be made by reference to such plat and shall be as effective to pass title to the land so described as it would be if the same premises had been described by metes and bounds. Such plat or record thereof shall be received in evidence in all courts and places as correctly describing the several parcels of land therein designated. After an assessor's plat has been made and recorded with the register of deeds as provided by this section, all conveyances of lands included in such assessor's plat shall be by reference to such plat. \* \* \* Any instrument dated and acknowledged after September 1, 1955, purporting to convey or mortgage any such lands except by reference to such assessor's plat shall not be recorded by the register of deeds."*

You have inquired whether the amending language italicized above is applicable to such instruments as certificates of termination of joint tenancy and of heirship or judgments assigning real estate in administration or probate proceedings.

It is your view, in which we concur, that the words "convey or mortgage" do not refer to any of the instruments mentioned above, and in this connection you refer to 18 C. J. S. 87-88, where it is stated that the word "convey" implies the transfer of property from one person to another by means of a writing and other formalities and not by wills which are only quasi conveyances, or by descent. You have therefore advised the register of deeds that if the legislature had intended to include instruments of the char-

acter mentioned above, it could easily have listed them, and that therefore the statute should be applied only to deeds and mortgages.

It is scarcely necessary to elaborate at any great length upon the soundness of your well stated conclusion.

Real estate, whether an estate is testate or intestate, vests immediately in the heir or devisee, subject to divestiture only in case it must be sold to pay debts, charges or expenses. Gary, Wisconsin Probate Law (5th ed.) §634. See also *Neelen v. Holzhauser*, (1927) 193 Wis. 196, 214 N.W. 497, 53 A.L.R. 359.

As was held in *Latsch v. Bethke*, (1936) 222 Wis. 485, 269 N.W. 243, the final decree of the county court distributing the estate of a testator does not itself transfer title to property, but merely determines the persons entitled thereto and their respective interests therein. It has been held, for instance, that the formal closing of an estate is not necessary in order to establish title to real estate in a devisee. *Sundermann v. Heinrich*, (1939) 230 Wis. 538, 284 N.W. 532.

Thus a certificate of heirship issued under sec. 237.09, Stats., does not transfer title, but under that statute, when the certificate is recorded, it becomes *prima facie* evidence of the facts therein recited. The descent of lands occurs by operation of law, and sec. 237.01, Stats., prescribes the manner of descent where one dies seized of lands, not having lawfully devised the same. Under the doctrine as to descent of lands explained above the result would, of course, be the same whether a certificate of heirship were used or whether there were administration proceedings culminating in a judgment assigning the real estate.

An estate held in joint tenancy is one which the cotenants enjoy equally during their lives and which goes wholly to the survivor on the death of either of them. No statutes of descent are involved in the devolution of property held in joint tenancy, since the devolution of such property is an incident of joint tenancy, and the property does not pass to the survivor by inheritance nor according to any laws of descent. See *Estate of King*, (1951) 261 Wis. 266, 52 N.W. 2d 885. Again the certificate of the termination of the tenancy and of survivorship under sec. 230.47,

Stats., is, when recorded, merely *prima facie* evidence of the facts therein recited.

In other words, none of the instruments which you have advised the register of deeds are not subject to sec. 70.27 (3), Stats., are in and of themselves conveyances of any kind. In these instances the transfer of title occurs by operation of law and the documents themselves are merely evidence thereof.

WHR

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*Automobiles and Motor Vehicles—Driver's License—Revocation*—Where holder of occupational driver's license is convicted of operating in violation of the license restrictions, sec. 85.08 (25c) (d), Stats., makes revocation of his license mandatory, neither commissioner of motor vehicle department nor judge having any discretion in the matter, and a new license may not be issued until one year after the date of revocation, under sec. 85.08 (30), Stats.

December 13, 1955.

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

You have requested my opinion as to whether a conviction for operating a motor vehicle in violation of restrictions imposed in an occupational license makes it mandatory upon the commissioner, under sec. 85.08 (25c) (d), Stats., to revoke the occupational license; and if so, whether the revocation precludes the issuance of a new license within a period of one year following the date of such revocation.

Sec. 85.08 (25c) (d), Stats., provides:

“In the event that an occupational licensee is convicted for operating in violation of his restrictions, or of a serious traffic violation, or if the judge does not, upon the facts, see fit to permit such person to retain such occupational license, the commissioner shall, upon receipt of notice thereof, revoke the occupational license. Such revocation shall be effective as of the date of such violation, conviction or withdrawal order and shall continue with the same force and effect as other revocations made by the commissioner under sub. (25).”

A question has been raised as to whether or not the foregoing statute empowers the judge to permit the holder of an occupational license to retain that license after being convicted for operating in violation of the license restrictions. It has been suggested that the above quoted provision expressly authorizing the judge to order the revocation of an occupational license necessarily implies that the judge may, conversely, order that the occupational license be continued despite the conviction. I can see no basis for such a contention.

The statute requires revocation of an occupational license upon the happening of any one of three separate things, among which is included a conviction for operating in violation of the restrictions set forth in the occupational license. The provision authorizing the judge, if he does not see fit to permit the driver to retain the occupational license, to order the revocation of that license is an entirely separate ground for revocation. That provision neither expressly nor by implication confers any discretionary power upon anyone to *relax* the other revocation provisions of the law. The three circumstances which call for revocation are stated disjunctively, and upon the occurrence of any one of those three "the commissioner shall \* \* \* revoke the occupational license."

The statute also provides that the revocation shall have the same "effect as other revocations made by the commissioner under sub. (25)." The latter subsection makes it mandatory for the commissioner to forthwith revoke a "regular" license upon the licensee's conviction of any of certain specified offenses. In the case of such a conviction, the revocation is effective immediately, and the license cannot be reinstated unless the conviction is set aside, reversed, or vacated. The taking of an appeal from a judgment of conviction for one of the specified offenses cannot operate to stay the commissioner's revocation order. Sec. 85.08 (25a) Stats.; *State v. Berres*, (1955) 270 Wis. 103, 70 N.W. 2d 197; and 37 O.A.G. 23 (1948).

Another effect of a revocation under sec. 85.08 (25), Stats., is that a new license may not be granted "until the expiration of one year after the date of such revocation." Sec. 85.08 (30), Stats. Since a revocation of an occupa-

tional license under subsec. (25c) (d) has the same effect as a revocation under subsec. (25), the one-year provision of subsec. (30) also is applicable to the revocation of an occupational license.

EWV

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*Taxation—Motor Fuel Tax*—Original invoice for the sale of motor fuel which does not on its face give the name of the seller so as to clearly identify the one who made the sale will not support a claim for refund of motor fuel taxes under sec. 78.75, Stats.

December 19, 1955.

WISCONSIN DEPARTMENT OF TAXATION.

You present the following situation:

A, a Wisconsin corporation, is duly licensed under sec. 78.09, Stats., and engages in business in the state as a refiner and wholesaler of motor fuel. It is the original supplier of motor fuel and makes sales thereof on its own invoice forms to B, another Wisconsin corporation. C is another Wisconsin corporation that owns two separate properties, but presently is inactive so far as motor fuel business is concerned and leases the two properties to B. One of them is a combination bulk plant and retail service station which B operates and there resells motor fuel to the public, including D, using an invoice form in so doing which bears the name of C as the seller. The other property is solely a retail service station which B subleases to D, an individual, who operates it as a sole proprietor. In his sales from said service station, D also uses invoices which bear the name of C as the seller. In addition to being the operator of this service station, D also operates an airplane on gasoline which he takes from his own storage tanks at the service station. He has filed claims for refund of motor fuel tax therefor and supports them by invoices showing C as the seller to him as the buyer.

You ask whether under the circumstances such invoices comply with the requirement in sec. 78.75 (1) (c), Stats., that the supporting original invoices shall contain the

“name and address of seller,” and the “name and address of purchaser (which name must be the name of the claimant).”

Sec. 78.75, Stats., so far as here material provides:

“(1) (a) Any person who consumes motor fuel or special fuel, upon which has been paid the tax required to be paid under this chapter, for any purpose other than operating a motor vehicle upon the public highways, shall be reimbursed and repaid the amount of the tax so paid upon making and filing a duly certified claim, witnessed by 2 witnesses or acknowledged before a notary public, with the department, upon forms prescribed and furnished by it.  
\* \* \*

“(b) \* \* \*

“(c) The seller, upon request, shall furnish each purchaser with the original invoice prepared at the time of delivery, and the purchaser shall send such original invoice to the department when making claim for refund. \* \* \* The original invoice shall be printed or rubber stamped with the words ‘Original Invoice’ and shall in addition contain the following information: 1. date of sale, 2. name and address of seller, 3. name and address of purchaser (which name must be the name of the claimant, 4. number of gallons purchased and the price per gallon, 5. amount of Wisconsin motor fuel or special fuel tax paid as a separate item, 6. receipt for payment. \* \* \* A separate original invoice must be used for each sale and delivery. The original invoice shall be legibly written and shall comply with the foregoing requirements. \* \* \*”

In the recited facts there is an existing C corporation, although it is not doing the business of a dealer in motor fuel either as a wholesaler or retailer. It would appear that it would have an exclusive right to its name and, if it so desired, by appropriate legal proceedings could preclude B and D from using its name. But it does not appear to be complaining and, as the considerations involved in your question would be the same if there were no existing C, for the purposes hereof the situation will be considered as if it were non-existent. The assumed situation thus is that B corporation is doing business in operating a combination bulk plant and service station under an assumed or trade name which is different from its official corporate name and that D is doing business in the operation of a service station as a sole proprietor using the same assumed trade name that is used by B.

It might appear that there is applicable the frequent statement that, except as prohibited or required otherwise by statutory provision, corporations and individuals may do business under an assumed or trade name which is different from their legal name so that contracts, deeds, and other transactions made in such assumed or trade name will be binding and effective. 45 C. J. 376; 65 C. J. S. 9; 14 C. J. 308; 18 C. J. S. 561; 7 R. C. L. 127; 13 Am. Jur. 270; *Woodrough & Hanchett Co. v. Witte*, (1895) 89 Wis. 537, 62 N.W. 518; *Luebke v. Watertown*, (1939) 230 Wis. 512, 284 N.W. 519; 20 O.A.G. 830. The cases cited in support of this proposition are to the effect that transactions are valid and binding between the real parties notwithstanding they were entered into under an assumed or trade name. The essence of them is that it is a matter of identity, and upon an identification of the corporation or individual as the one who was the party to the transaction, it is valid and binding thereon, the same as if the regular or legal name of the party had been used.

Also, in all recitations of this general proposition, is the qualification that there be no statutory prohibition or requirement otherwise. Moreover, it is suggested that the proposition is one that is applicable only as respects the parties and that, considering the corporation statutes and the ramifications thereof, the state, by appropriate proceeding asserted by proper state authority, could successfully maintain that a corporation be confined to doing business exclusively under the name set forth in its incorporation. It is not necessary here at this time to pass upon whether or not such suggestion is meritorious. But certainly, where the state by statutory provision specifies particularly that in a report or some other transaction with the state the name of the party be given, the rationale which might, and apparently does, support the general proposition as respects private parties, would not support use of an assumed or trade name in the transaction with the state rather than the true and legal name of the party.

Accordingly, there would not appear to be any merit in saying that where the state by statute requires a private individual or corporation to set forth its name, and state authorities insist that this be the correct or legal name of

the party, such party could then use an assumed or trade name in respect to such dealing with the state. The provisions in sec. 78.75 that the invoice contain the name of the seller are of this character and are for the purpose of positive identification of the seller by whatever is set forth in the invoice document. The provisions of sec. 78.75 in this regard are clear and unambiguous in requiring that the invoice give the name of the seller. Thus, in the invoice there must be a use of the name which thereby identifies the seller as the one who made the purported sale.

In this respect, the provisions of sec. 78.75 (1) (c) are of the same character as the provisions of the statutes relating to registration of motor vehicles which was the subject of an opinion in 34 O.A.G. 370. It was there stated that the motor vehicle involved must be registered in the name of the owner and that there must be a complete disclosure of the real name of the party who is the owner of the vehicle. In the instant situation, however, there are two separate businesses which issue invoices and make sales of motor fuel under the trade name or assumed name of C corporation. Thus, when C corporation is set forth on an invoice as the seller, there is no disclosure as to whether that particular sale was made by B corporation doing business under that trade name or by the individual D operating under that same trade name. Under those circumstances there is no identification in the invoice of who made the sale represented by the invoice. As the purpose of the statute is to identify the seller for record keeping purposes, a presentation of an invoice showing C corporation as the seller would not comply with the identification purposes of the statutory provision requiring that the name of the seller be given on the invoice. As it is impossible to tell which of the two businesses that were doing business under such a trade name made the sale involved, there is a failure to comply with the requirements of the statute.

Certainly, under this statute, D could not support a claim for refund for gasoline which he has used in his airplane by an invoice from himself to himself for gasoline which he has taken out of his own service station tanks. There would be no sale in that case because a person cannot make a sale to himself. In order for D to obtain a refund for gaso-

line which he has used in his airplane, it is necessary that he present and support his claim by an invoice which shows a sale of gasoline to himself from someone other than himself. In our opinion, under the circumstances, the presentation by him of an invoice showing C as the seller to him as buyer does not give the name of the seller because of the fact that it cannot be told therefrom whether or not it was an invoice issued by D himself under the trade name or one issued by B to D.

Whether or not B or D, or both, may have made filings as provided in sec. 343.722, Stats., is of no moment, assuming the provisions thereof are applicable to corporations as well as individuals, as to which there may be some question in view of the purpose thereof and the recitation of it in 22 O.A.G. 359. At best, it is only penal in character. Non-compliance therewith has no effect on the validity of a transaction made under an assumed trade name that should be registered thereunder. *Wakem v. Schneider*, (1927) 192 Wis. 528, 213 N.W. 328. Even if it might be said the provisions thereof are in recognition of the existence of a right to do business under a trade name, still they confer no right to avoid a specific statutory requirement that the name of a party be stated, such as in provisions respecting motor vehicle registration, sec. 78.75, and other statutes. Certainly no one would suggest that compliance with sec. 343.722, Stats., would confer a right to file a state income tax under an assumed trade name.

HHP

*Historical Society—Unemployment Compensation—State* historical society of Wisconsin is exempt from the provisions of the unemployment compensation act under sec. 108.02 (5) (g) 7, Stats., unless with the industrial commission's approval it elects to come under the act.

December 20, 1955.

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

You have inquired whether the state historical society comes within the exemption to the unemployment compensation act provided by sec. 108.02 (5) (g) 7, Stats.

This provision reads:

"(g) The term 'employment,' except as a given employer elects otherwise with the commission's approval, shall not include:

"\* \* \*

"7. Employment of any person by a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

The state historical society of Wisconsin was incorporated as "a body politic and corporate" by ch. 17, Laws 1853.

Among other things sec. 2 of this act provided:

"The object of the society shall be to collect, embody, arrange and preserve in authentic form, a library of books, pamphlets, maps, charts, manuscripts, papers, paintings, statuary, and other materials illustrative of the history of the state; to rescue from oblivion the memory of its early pioneers, and to obtain and preserve narratives of their exploits, perils, and hardy adventures; to exhibit faithfully the antiquities, and the past and present condition, and resources of Wisconsin; and 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."

It is obvious from the foregoing that the state historical society is a corporation organized exclusively for literary or educational purposes.

Ch. 17, Laws 1853, provided that the society should have all of the faculties of a corporation. These powers and privileges are contained in sec. 44.01 of the present statutes, which also provides that the society shall be an official agency and the trustee of the state. Its various functions, powers, and duties as enumerated in secs. 44.01 and 44.02, Stats., are still exclusively literary or educational in character.

While the purposes of the society are largely of a public character, it is nevertheless a private corporation. See 36 O.A.G. 285, 290; 42 O.A.G. 333, 336; 43 O.A.G. 55, 57; *State ex rel. W.D.A. v. Dammann*, (1938) 228 Wis. 147, 172; *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 185, 196, 60 N.W. 2d 873.

Sec. 44.01, among other things, provides in effect that there shall continue to be a board of curators of the society constituted with substantially the same powers as existed at the time of the enactment of that section and that the governor, secretary of state, and state treasurer are to be ex officio members to see that the interests of the state are protected. The remaining members of the board of curators are chosen by the society itself. These, of course, constitute the majority of the 36-member board. Twelve curators are elected at each annual meeting by the members. The officers are chosen by the board, and it might be mentioned that the president of the university is also a permanent ex officio member of the board. See 1954 Wisconsin Blue Book 338. Thus there can be no question as to the private control of the society, subject to the provisions provided by law.

Not only was the society organized as a corporation exclusively for literary or educational purposes, as we have already indicated, under the terms of ch. 17, Laws 1853, but the society is being presently so operated, and we understand that no part of its net earnings inure to the benefit of any member or individual and that no substantial part of its activities consist of carrying on propaganda or of attempting to influence legislation. The fact that the state has made the society its official agency in carrying on cer-

tain literary and educational activities in no way destroys the status of the society as a private corporation, and the supreme court has so indicated in the two decisions mentioned above.

It should perhaps be pointed out in closing that the society under sec. 108.02 (5) (g) quoted above nevertheless may elect to come under the unemployment compensation act with the approval of the industrial commission, but in the absence of such election or further legislation on the subject you are advised that the society comes under the exemption provided by sec. 108.02 (5) (g) 7.

WHR

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*Marketing and Trade Practices—Unfair Sales Act—The advertising and giving of gifts not contingent upon or tied to sales does not constitute a sale below cost in violation of sec. 100.30, Stats.*

December 22, 1955.

DAVID WEBER,  
*District Attorney,*  
Sheboygan County.

You state in your letter that certain merchants in your county have advertised free goods to adult persons entering their stores in order to entice prospective customers to their respective places of business. You state further that it is not necessary to buy anything in order to receive such goods, although most persons entering the store for that purpose do in fact make purchases of varying amounts according to their needs or desires. An example of such an advertisement reads:

“Free Tonight, Tuesday and Wednesday, Cello Package of Finest California Carrots. Nothing to buy—just present this coupon at our checkout. One coupon per family. Adults only. Cash value 1/20 of a cent.”

You ask whether such action constitutes a violation of sec. 100.30, the unfair sales act.

Sec. 100.30 (2) (j) and (3), as amended by ch. 460, Laws 1955, reads as follows:

“(2) \* \* \*

“(j) When one or more items are advertised, offered for sale, sold or offered as a gift, or given tied in or combined with the sale of one or more other items, the price of all items shall be subject, on the basis of aggregate cost, to the requirements of par. (a) or (b).

“(3) Any advertising, offer to sell, or sale of any item of merchandise either by retailers or wholesalers, at less than cost as defined in this section 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.”

This law does not apply to gifts as such but to sales, specifically sales below cost. It would appear from the subsections quoted that the cost of an item given away free is to be considered in determining the total cost of items sold *when the gift is tied to or contingent upon the purchase*. In effect the “gift” is treated as part of the sale. It follows that this section does not apply where there is no such tie-in or contingency. *Expressio unius est exclusio alterius*.

That the legislature did not contemplate that gifts used for advertising purposes and not tied to sales should be treated as sales, is apparent from the fact that the same act which amended sec. 100.30, namely ch. 460, Laws 1955, also legislated on the subject of advertising gifts when it created the new sec. 100.18 (2). This prohibits, *inter alia*, advertising as free any item, the giving of which is contingent upon a purchase, without clearly stating that fact, but says nothing about non-contingent gifts. Thus, gifts and sales have been treated as different transactions, as they should be if these words are to be given their normal and usual meanings. Consequently, I can find no basis for treating non-contingent gifts as sales within the meaning of the unfair sales act and am of the opinion that it does not apply to them. To hold otherwise would be to substantially prohibit non-contingent or outright gifts by merchants, since all gifts must cost the original giver something. This would be clearly contrary to the results contemplated from the enactment of ch. 460 and must be presumed to be contrary to the legislative intent.

GFS



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Wisconsin retirement fund. See Pensions.

## WORDS AND PHRASES

Admitted assets—Municipality prior service obligations are assets of Wisconsin retirement fund but not "admitted assets" within the meaning of 25.17 (2b) and 206.34 (1) (m). In determining percentage of admitted assets of the fund which may be invested in common stocks, the common stock assets of said fund may be valued at market rather than book value ----- 189

Motorcycles—Motor-driven cycles as defined in 85.10 (4) are either two or three-wheeled vehicles designed with one seat to carry one rider. Three-wheeled vehicle with bench seat to carry two or more people must be registered as an automobile. If designed to carry a load commercially, it should be registered as a truck ----- 281

Proper officer or agency—As used in 49.12 (6) means the officer or agency administering the public assistance program in the particular county. It is not so vague and indefinite as to cause the statute to be unconstitutional as a denial of due process of law ----- 82

