

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. 45

January 1, 1956, through December 31, 1956

VERNON W. THOMSON
Attorney General



MADISON, WISCONSIN
1956

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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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
LA FAYETTE 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 Jan. 7, 1957

ATTORNEY GENERAL'S OFFICE

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
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RICHARD E. BARRETT-----Assistant Attorney General
GEORGE F. SIEKER*-----Assistant Attorney General
E. WESTON WOOD-----Assistant Attorney General
A. J. FEIFAREK**-----Assistant Attorney General
ROBERT J. VERGERONT***-----Assistant Attorney General

* Leave of absence August 1, 1956.

** Appointed April 1, 1956.

*** Appointed October 1, 1956.

OPINIONS
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ATTORNEY GENERAL
OF
WISCONSIN

VOLUME 45

Athletic Commission—Vice Chairman—State athletic commission may validly create office of vice chairman and designate one of its members as such officer under the provisions of sec. 169.02, Stats.

January 3, 1956.

FRED J. SADDY, *Secretary,*
State Athletic Commission.

You have asked whether the state athletic commission is allowed to have a vice chairman.

Sec. 169.02, Stats., provides in part as follows:

“* * * The commission shall elect a member chairman, shall adopt a seal and shall make such rules and regulations for the administration of the office, not inconsistent herewith, as it deems expedient and may from time to time amend or abrogate the same.”

This section gives the commission control over its internal affairs insofar as such control is not inconsistent with the provisions of the statutes governing the commission.

As I conceive the office of vice chairman of the athletic commission, his duties would be solely to preside at meetings in the absence of the chairman. The creation of such an office and the designation of a member as such officer relates to the internal administration of the commission and is a

matter of the commission's own self-government under sec. 169.02.

The creation of such an office within the commission would not result in the granting of any new or excessive power to the commissioner so designated since the authority of the commission is vested in the commission acting as such, and any one of the commissioners might be designated as presiding officer of the meeting of the commission in the absence of the chairman. The creation of a vice-chairmanship, then, merely provides for the contingency of the chairman's absence and is in no way inconsistent with the statutes creating and regulating the state athletic commission.

SGH

Illegitimacy Proceedings—Taxation of Costs—Costs in illegitimacy proceedings are to be taxed under sec. 353.25, Stats., as in criminal cases. Under this section there is no authority for taxing as costs the expense of blood tests (sec. 52.36, Stats.), or the cost of the transcript of the preliminary hearing.

January 4, 1956.

OLIVER L. O'BOYLE,
Corporation Counsel,
Milwaukee County.

You have asked whether costs in an illegitimacy proceeding should be taxed as in criminal cases or as in civil cases. Since such a proceeding is now clearly recognized as a civil action, you suggest that the civil cost statute should apply, and that blood test fees and reporters' fees for preparation of the transcript of the preliminary examination should be taxable costs.

An illegitimacy proceeding was formerly held to be *quasi* criminal, *State v. Mushied*, (1860) 12 Wis. *561. It is not a criminal prosecution but a statutory proceeding to enforce a civil obligation, the procedure being criminal in form, *State ex rel. Volkman v. Waltermath*, (1916) 162 Wis. 602.

It has characteristics of both civil and criminal proceedings, *Windahl v. State*, (1926) 189 Wis. 424, but the supreme court has clearly stated that it is a civil action, *Ray v. State*, (1939) 231 Wis. 169. The civil and criminal aspects of such a proceeding are fully discussed in *State ex rel. Mahnke v. Kablitz*, (1935) 217 Wis. 231. In *Goyke v. State*, (1908) 136 Wis. 557, 559, discussing the civil and criminal nature of illegitimacy proceedings, the court said:

“* * * It has characteristics of both, and as to such as are similar to those of criminal actions the rules and practice therein are applicable, and as to such as are the same or similar to those of civil actions the rules and practice therein are applicable. * * *”

Since such a proceeding, although of a civil nature, follows procedure which is primarily criminal, it would seem logical that the costs statute relating to criminal actions should apply. We understand that this is the present practice in this state.

The statutes for 1927 specifically covered this matter. Sec. 166.07, Stats. 1927, relating to illegitimacy proceedings, provided:

“* * * and the rule for the taxation and payment of costs therein shall be the same as in criminal proceedings and actions; * * *”

Also sec. 166.10, Stats. 1927, provided:

“If the person so adjudged to be the father of such child * * * shall pay the costs of prosecution * * * he shall be discharged * * *.”

By ch. 439, Laws 1929, the legislature enacted a wholesale revision of the children's code including ch. 166, Stats., on illegitimacy proceedings. Ch. 439 is entitled, among other things, “An act to * * * amend * * * chapter 166.” This amendment renumbered sec. 166.07 to be sec. 166.08 and struck out the language “and the rule for the taxation and payment of costs therein shall be the same as in criminal proceedings and actions.” No substitute provision for this language was made anywhere in ch. 439. However, the language above quoted from sec. 166.10, Stats. 1927, was

changed slightly. This section was renumbered 166.11 and provided:

“If the accused shall be found guilty * * * he shall be adjudged to be the father of such child * * * and shall be ordered * * * to pay to the county the costs of the action * * *”

Prior to this 1929 amendment the supreme court had stated in *Windahl v. State*, (1926) 189 Wis. 424, 426:

“* * * the rule for taxation and payment of costs therein shall be the same as in criminal proceedings except that the accused may not have his witnesses paid or counsel appointed for him (sec. 166.07). * * *”

After the 1929 amendment the supreme court stated in *State ex rel. Mahnke v. Kablitz*, (1935) 217 Wis. 231, 233:

“* * * The rules of taxation and costs in such actions are the same as in criminal proceedings, so likewise are the rules of evidence. *Windahl v. State, supra.* * * *”

Thus after the 1929 amendment we find the court applying the same rule as before, although there was no longer any specific statutory provision on the subject.

This we believe to be the correct rule. The court may have considered that the original provision regarding costs was merely surplusage, so that its subsequent removal without inserting a specific substitute provision did not change the law.

There is also the principle that a revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction. Sec. 370.001 (7), Stats.; *Wis. Gas and Electric Company v. Fort Atkinson*, (1927) 193 Wis. 232, 245.

The *Mahnke* case was decided in 1935. Since that time the legislature has failed to amend the rule therein stated, although a wholesale revision of the children's code was enacted by ch. 575, Laws 1955. This constitutes legislative acquiescence in the proposition that the criminal costs statute was to remain applicable to illegitimacy proceedings after the 1929 amendment. In *Briggs & Stratton Corp. v.*

Department of Taxation, (1946) 248 Wis. 160, 164, the court stated this rule as follows:

“* * * The legislature was well aware that after this court has construed a statute the failure of the legislature to amend the statute amounts to an acceptance by the legislature of the statute with the court’s construction incorporated. * * *”

The current provisions relating to illegitimacy proceedings are found in sec. 52.21 through 52.45, Stats. No change was made in these sections by the 1955 revision of the children’s code. Current statutory provisions relating to costs in illegitimacy proceedings are the following:

“52.22 * * * Private counsel in behalf of the complainant may appear with the district attorney, and reasonable attorney’s fees may be allowed and taxed against the defendant. * * *”

“52.37 * * *

“(2) The accused shall also pay to the county the costs of the action * * *

“(3) All of the foregoing matters shall be ascertained and fixed by the court and, together with such attorneys’ fees as have been allowed, shall be inserted in the judgment * * *.”

The language of these provisions does not specify whether the criminal or civil costs statute is applicable to illegitimacy proceedings.

It is therefore my opinion that the rule of the *Mahnke* case is still applicable and that costs in illegitimacy proceedings are to be taxed as in criminal actions even though a provision to this effect was deleted from the law by ch. 439, Laws 1929. Taxation of costs in criminal actions is governed by sec. 353.25, Stats. This section provides in part:

“(2) The costs taxable against the defendant shall consist of the following items and no other:

“(a) The necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, examination and trial of the defendant, including, in the discretion of the court, the fees and disbursements of the agent appointed by the governor or peace officer in returning the defendant from another state or country.

“(b) Fees and travel allowance of witnesses for the state at the preliminary examination and the trial.

“(c) Fees and disbursements allowed by the court to expert witnesses appointed under section 357.27.

“(d) Fees and travel allowance of witnesses for the defense incurred by the county at the request of the defendant, at the preliminary hearing and the trial.

“(e) Attorney fees paid to the defense attorney by the county.”

Under this statute there is no authority for taxing as costs in illegitimacy proceedings the expense of blood tests and the cost of the transcript of the preliminary examination. It is also persuasive that sec. 52.36, Stats., provides that the persons making the blood tests are to be paid by the county.

WAP

Public Assistance—Proration of Insurance Policy Proceeds—Funds received from an insurance policy assigned to a county by an applicant for old-age assistance are part of the final estate of the decedent and must be prorated between claims of a county for relief and claims for old-age assistance.

January 16, 1956.

STATE DEPARTMENT OF PUBLIC WELFARE.

You have submitted the following statement of facts: B received old-age assistance in M county and had also received relief from M county. B assigned an insurance policy to M county under sec. 49.22 (2) (c) 3, Stats. Upon B's death the department which handles such securities for M county cashed the insurance policy. Upon receipt of the cash from the insurance policy (a funeral being duly provided) the department handling the proceeds from the policy prorated the cash remaining between the relief claim and the old-age assistance claim.

You ask: “Our question is whether the old-age assistance claim has preference by reason of the language in section 49.22 (2) (c) 3, or whether the proceeds from such policy must be prorated with other claims for care given in accordance with section 49.25.”

Your question relates to a period in time prior to the passage of ch. 19, Laws 1955.

The statutes material to a consideration of your inquiry are as follows:

"49.25 On the death of a person who has received old-age assistance, the total amount of such assistance paid (including aid paid under sections 49.30 and 49.40 as old-age assistance) shall be a claim against his estate, but such claim shall not take precedence over the allowances under section 313.15 or over any claim for care or maintenance furnished by the state or its political subdivisions. * **

*"49.26 * * **

"(7a) 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"

*"49.22 * * **

*"(2) * * **

*"(c) * * **

"3. The cash or loan value of a life insurance policy at the date the recipient first received old-age assistance shall be considered a liquid asset subject to the provisions of this paragraph; however, if the recipient owns a policy of insurance on his life within the limitations of this paragraph the county agency may authorize him to retain it and provide for the payment of premiums thereon in his budget, provided that he designates the county as assignee under the policy to the extent of the amount of old-age assistance granted him during his lifetime. Where the county as such assignee receives proceeds from such policy and where less than \$300 had been transferred to it by the recipient for funeral expenses, the county shall allocate from such available proceeds a sum sufficient to provide a fund for funeral expenses not exceeding \$300."

This last section above quoted was created as sec. 49.22 (4) (b) 3, by ch. 337, Laws 1953. This section was later repealed, and sec. 49.22 (2) repealed and recreated by ch. 667, Laws 1953. Its purpose was to repeal the prior provisions of sec. 49.26 (1), Stats. 1951, which allowed an applicant for old-age assistance to retain a cash or loan value not in excess of \$1,000 in a policy of insurance and further to make the insurance policy subject to the act to the extent indicated.

A further obvious intention of the amendment of 1953 was to allow the old-age recipient to retain an interest in

the insurance policy over and above any claim for old-age assistance.

Prior to the amendment of 1953, there appears to be no question that the entire estate of a decedent who had received old-age assistance was to be prorated between the claim for old-age assistance *and* other claims for care and maintenance furnished by the state or its political subdivisions such as counties. This had been true since May 20, 1947, the date of creation of sec. 49.26 (7a) by ch. 121, Laws 1947, and the amendment of sec. 49.25 (concerning personalty) to correspond with sec. 49.26 (7a).

We have previously pointed out to you that under the statutes as they were amended in 1947, in the case of personalty there was no clear statutory direction whether or not a probate proceeding was necessary or whether the county had a right to effect a foreclosure of its pledge in personalty by informal action and to appropriate the funds for the purpose of security. Neither was there any clear direction whether or not the same distribution would be made in the event of an informal foreclosure without probate as would be made in a probate proceeding.

We have also pointed out that under the 1947 statutes there was no clear statutory definition of the exact legal status of personalty conveyed to the county at the time old-age assistance was granted. It appeared that though the county agency obtained both possession and legal title to personalty, such title was in the nature of a pledge and was held for security purposes only, for the reason that the extent of the county's right in such personalty could not be determined until termination of the old-age assistance.

It is on the basis of the foregoing that we concluded that under the laws of 1947, personalty, even though it appeared to be conveyed outright to the county, still had to be accounted for as part of the decedent's estate whether or not there was a probate. It is our information that your department has operated under this interpretation since 1949 through the year 1953.

The question now is whether by the new provisions in regard to insurance policies the legislature intended to repeal the clear provisions of secs. 49.25 and 49.26 (7a) which require the proration of all claims, both those of the

counties for relief and similar items, and those of the county, state, and federal governments for funds advanced for old-age assistance.

Repeals by implication are not favored. If a statute which impliedly repeals another can be harmonized with such other statute, they should be so harmonized and effect given to both if possible.

Taking sec. 49.22 (2) (c) 3 literally, it would appear to confer on the county a right to reimburse *itself* for sums advanced for old-age assistance, without regard to the sums advanced both by the state and the federal governments which had contributed to that assistance.

In my opinion dated August 2, 1954, 43 O.A.G. 227, I advised you that that was not the proper interpretation of the section in question and that the county could not claim the entire sum received under the insurance policy, but that the funds should be prorated.

That opinion is consistent with the theory that the funds advanced are a part of the estate of the decedent and that the policy established by the legislature in 1947 continues.

Under the facts you present to me in the case presently under consideration, the sums receivable from the old-age assistance policy are apparently insufficient to pay off the entire claim for old-age assistance and a claim for relief of Milwaukee county. It appears now that the shoe is on the other foot and the argument is advanced that the entire proceeds of the insurance policy should be devoted solely to old-age assistance and should not be considered as part of the estate of the decedent as they had been under the laws as established in 1947.

It is my opinion that such argument is incorrect and would result in a repeal of the express policy of secs. 49.25 and 49.26 (7a) by implication. Since the legislature did not see fit to create an exception in these two sections and provide that the proceeds of the insurance policy would not be included in the sums subject to the proration thereby required, it is my opinion that the legislature did not intend that the proration policy should be abandoned. Hence the proceeds of a policy assigned by an applicant for old-age assistance to the county should be considered at the time of final accounting as part of the estate of the decedent, and if

the funds available are insufficient to pay off both a prior claim for relief of the county and the claim of the county, state, and federal governments jointly for old-age assistance, the funds available should be prorated between those two claims. That is, the county would get its percentage share on its claim for relief and also get a proper distribution of the percentage of the funds attributed to the claim for old-age assistance.

RGT

Grand Army Home—Maintenance Charges—In computing sums due to the state for maintenance of veterans at the Grand Army Home at King, funds which the veterans are allowed to retain should be charged in full against the veterans' federal pensions and not against other income such as social security, other pensions, or other outside income.

January 16, 1956.

GORDON A. HUSEBY, *Director,*
State Department of Veterans Affairs.

You have asked my opinion of the proper methods for determining the amount of the sums due the state from various sources for the care of disabled veterans at the Grand Army Home for veterans at King.

Your question arises because of a recent reversal by the general counsel of the federal veterans administration of a previous ruling of the comptroller general of the United States. The more recent ruling is set forth in administrator's decision, veterans' administration, No. 957, dated September 15, 1955. The previous ruling is found in decision A-76027, dated July 15, 1936, of the comptroller general of the United States.

Briefly, the sums due to the state of Wisconsin are derived from two sources. These are: (1) Contributions from any income of the veteran in accordance with the provisions of sec. 45.37 (2) (h), Wis. Stats.; and (2) contributions from the United States under the provisions of the act of August 27, 1888, as amended, 24 U.S.C.A. §134.

These sections read:

“45.37 (2) (h) Each member of the home, regardless of the date of his admission, shall pay the following portions of his annual income into the general fund of the state. If husband and wife are both members their incomes shall be combined before applying the rates.

INCOME BRACKETS	RATES
1st \$120 -----	none
2nd \$120 -----	none
3rd \$120 -----	40 per cent
4th \$120 -----	50 per cent
5th \$120 -----	60 per cent
6th \$120 -----	70 per cent
7th \$120 -----	75 per cent
All remaining income -----	100 per cent

Payments of the amounts indicated above shall be made at such time and in such amounts as the board of the department shall provide by rule or regulation * * *. ‘Income’ as used in this section, shall include, without limitation by enumeration, all pensions from state, federal or private sources, annuities, social security payments and recurrent insurance payments from state, federal and private sources but shall not include wages, salary or payment to a member for services rendered to the home as an employe thereof.”

Title 24 U.S.C.A. §134 provides:

“§134 Aid to State or Territorial home

“All States or Territories which have established, or which shall establish, State homes for disabled soldiers and sailors of the United States who served in the Civil War or in any previous or subsequent war who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of \$700 per annum from September 1, 1954.

“The number of such persons for whose care any State or Territory shall receive the said payment under this section shall be ascertained by the Administrator of Veterans’ Affairs under such regulations as it may prescribe, but the said State or Territorial homes shall be exclusively under the control of the respective State or Territorial authorities, and the Administrator shall not have nor assume any management or control of said State or Territorial homes.

"The Administrator of Veterans' Affairs shall, however, have power to have the said State or Territorial homes inspected at such times as it may consider necessary, and shall report the result of such inspections to Congress in its annual report: *Provided*, That no State shall be paid a sum exceeding one-half the cost of maintenance of each soldier or sailor by such State: *Provided further*, That one-half of any sum or sums retained by State homes on account of pensions received from inmates shall be deducted from the aid provided for in this section. No money shall be apportioned to any State or Territorial home that maintains a bar or canteen where intoxicating liquors are sold: *Provided further*, That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid provided for in this section, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained."

The net effect of the state statute, sec. 45.37 (2) (h), is to provide that any veteran receiving \$70 or more a month may retain therefrom \$40.50, and all sums in excess thereof must be paid into the general fund of the state.

The federal statute provides for the payment by the United States government of the sum of \$700 per annum for each disabled soldier or sailor who is cared for in the home, with three provisos which are:

1st proviso: The sum paid the state can never be more than one-half of the cost of maintenance of the veteran in the home.

2nd proviso: One-half of any sums received by the state from the veteran out of any pension paid to the veteran must be deducted from the basic appropriation of \$700.

3rd proviso: One-half of any other amount received from the veteran must also be deducted from the basic appropriation except in the case of state or territorial homes into which the wives or widows of the soldiers are admitted and maintained.

The Grand Army Home for veterans at King is a home in which wives or widows of soldiers are maintained and hence is entitled to the benefits of the exceptions of the third proviso.

You have advised me that you have at all times followed the method for determining the federal contribution set forth in decision A-76027 of the comptroller general of the United States (set forth in Veterans Administration Technical Bulletin TB 10A-291, page 7 which reads:

“h. Half of all amounts deducted by the States or State homes from the pensions or compensation of members of State homes, on whose account Federal aid payments are made, will be deducted from the amount of Federal aid payments to such States (see Decision A-76027, dated July 15, 1936, of the Comptroller General of the U. S.).

“i. For any sum or sums collected in any other manner from inmates of State homes to be used for the support of said homes, a like amount shall be deducted from Federal aid payments, except that this shall not apply to any State home into which the wives and widows of soldiers are admitted and maintained (see Decision A-76027, dated July 15, 1936, of the Comptroller General of the U. S.).”

In the following examples we will use simplified figures for the purpose of demonstrating the legal principles involved rather than the detailed figures set forth in decision No. 957.

An example of your method of computation:

Income

Government pension as veteran of World War I	--\$	75.00
Other income including social security benefits	--	75.00
		\$150.00
Total income	-----	\$150.00

Determination of Monthly Payments to State of Wisconsin

Income Brackets	Rate	Payment to be Made
1st \$10 -----	None-----	-0-
2nd \$10 -----	None-----	-0-
3rd \$10 -----	40%-----	4.00
4th \$10 -----	50%-----	5.00
5th \$10 -----	60%-----	6.00
6th \$10 -----	70%-----	7.00
7th \$10 -----	75%-----	7.50
All remaining Income	-----100%	80.00
		\$109.50
Total	-----	\$109.50
Total payment due home	-----	\$109.50

Formula for Determining Amount to Report to VA Regional Office as Collected from Compensation and Pension.

Total payment collected	\$109.50
Less: Collected from outside income	75.00
	<hr/>
Reportable to VA as pension collected	34.50

You will note that the effect of the foregoing method of computation is to allow the state to charge the entire amount of \$40.50 which the veteran is allowed to retain against his federal pension and retain the entire amount of his outside income without allowing the federal government to share therein in any respect. That is, the result could simply be reached by deducting the sum of \$40.50 which the veteran is allowed to retain from the federal pension of \$75 and showing a report due to the federal government of pension retained of \$34.50, making a total of \$75.

The opinion of the general counsel, on the other hand, in effect asserts that the outside income must bear its proportionate share of the amount that the veteran is allowed to retain. This is in effect a repudiation of the third proviso that sharing in outside income by the federal government is not applicable to those homes in which wives or widows of soldiers are admitted and maintained.

Since the result is somewhat obscured by the odd numbers used in decision No. 957, we are substituting the same round numbers used in the first example herein in the example of computation at pages 3 and 4, decision No. 957.

Example according to decision 957:

Income

Government pension as veteran of World War I ...	\$ 75.00
Outside income including social security benefits	75.00
	<hr/>
Total income	\$150.00

Of the total income the service pension represents
50% and the outside income represents 50%

World War I Pensions	Social Security Benefits	Total
\$75.00—50%	\$75.00—50%	\$150.00—100%
Deductions		
None 1st \$10.00	None	\$
None 2nd \$10.00	None	
\$ 2.00 3rd \$10.00	\$ 2.00	4.00
2.50 4th \$10.00	2.50	5.00
3.00 5th \$10.00	3.00	6.00
3.50 6th \$10.00	3.50	7.00
3.75 7th \$10.00	3.75	7.50
All remaining income		
40.00	40.00	80.00
<u>40.00</u>	<u>40.00</u>	<u>80.00</u>
\$54.75	\$54.75	\$109.50

Total amount collected -----\$109.50
 Less amount collected from outside income -- 54.75

Reportable to VA as pension collected -----\$ 54.75

Now let us assume that the Grand Army Home for veterans at King was not maintaining the wives or widows of soldiers and hence is not entitled to the exception in proviso number 3. In such case, it is clear that the state would have to report one-half of all sums retained from the veteran, a total income of \$150 minus the \$40.50 which he is allowed to retain. In the event the exception to proviso number 3 were not given any effect, then the full sum of \$109.50 would have to be reported as amounts retained from the veteran and one-half thereof, \$54.75, would be deductible from the federal contribution. There the outside income would be bearing a full 50 per cent accountability for the decrease in the amount due the state. In the present case under the method proposed by the general counsel it would bear 18.5 per cent accountability, that is, a deduction of \$20.25 out of the amount due the state from outside income.

There is nothing in the statutes as written which authorizes any charge against outside income for amounts which the veteran is allowed to retain in the case of homes which

admit wives and widows of veterans and hence it would appear that the method of computation set forth in the ruling of the comptroller general is the method which should be followed.

Paragraphs h. and i. taken together clearly indicate that amounts which the veteran is allowed to retain are charged in full against the pension. Only after such charge and in a proper case is a charge necessary against outside income. My advice to you is to continue the method of computation which you have been using.

RGT

Forest Crop Lands—Easement—An easement for purposes not inconsistent with the forest crop law is not a conveyance of property and does not necessitate a withdrawal of lands covered by the easement from the provisions of the forest crop law under ch. 77, Stats.

January 16, 1956.

WILLIAM T. BRADY,
District Attorney,
Juneau County.

You have inquired whether the accomplishment of an easement running from Juneau county to the state of Wisconsin (the adjutant general), for the purpose of providing safety areas for the air to ground gunnery range which is to be a part of the permanent air base training site near Camp Williams in Juneau county, would operate to prevent Juneau county from receiving aid for forest crop land under ch. 77.

The document in question has been examined by this office at the request of the adjutant general.

The adjutant general has informed me that the document has been examined by the proper officials of Juneau county and has their approval, subject to my opinion that it will not jeopardize the rights of Juneau county to obtain aid under the forest crop law.

The document in question is in proper form to convey an easement to the state of Wisconsin for the stated purposes. Further, the document contains a provision whereby the adjutant general may assign the rights of the state of Wisconsin to the federal government upon conditions similar to those contained in the document.

Upon examination, it is my opinion that this document is neither a deed nor a lease nor does it provide for uses inconsistent with the purpose of the forest crop law. Therefore, it is not a transfer of property within the meaning of that law and hence will not necessitate a withdrawal of the Juneau county-owned land from under the provisions of the forest crop law, and Juneau county may continue to receive state aid for such lands under the provisions of ch. 77, Stats.

RGT

Forests—Fires—Civil Liability—Railroad corporations are responsible for the costs of fire suppression for all fires either willfully or negligently set on their right-of-ways.

January 19, 1956.

RAY J. HAGGERTY,
District Attorney,
Price County.

You state that the district forestry division of the conservation department has recently incurred expense in suppressing a forest fire admittedly caused by sparks from a locomotive operated by a railroad in Price county.

You ask the specific question whether the word "set" in sec. 26.14 (8) (b), Stats., which provides for liability for costs of fire suppression, means an *intentional* setting or whether it includes a *negligent* or *accidental* setting.

The applicable provision of this statute reads in part:

"(b) Any person, firm or corporation who shall set fire on any land and allow such fire to escape and become a for-

est fire, shall be liable for all expenses incurred in the suppression of such fire by the state or town in which such fire occurred. * * *

This question was passed upon indirectly in the opinion of the attorney general in 37 O.A.G. 369 (1948). In that opinion it was held specifically that a railroad was liable for the costs of suppression of fires set by the said railroad on its right-of-way.

In my opinion, the word "set" clearly includes both a willful and a negligent setting. This conclusion is based both upon the history and upon the purpose of the statute. Prior to 1947 the previously existing statute, sec. 26.14 (7), provided:

"Any person, firm or corporation who shall willfully or negligently set fire on any land and allow such fire to escape to adjoining land and become a forest fire, shall upon conviction, be liable for all expenses incurred in the suppression of such fire by the state, county or town in which such fire occurred. * * *

This statute was amended into its present form by the provisions of ch. 152, Laws 1947.

The previous statute shows that the word "set" could include both a willful and a negligent setting. When the legislature in amending the statute failed to leave the word "willfully" in the statutes, it is clear evidence of intention that it intended the word "set" to be used in its broadest form.

This is moreover true in the case of railroads because of the provisions of sec. 192.44, Stats., which would make the railroad liable to all owners of property for damages incurred if the fire were not suppressed. The railroad would be responsible for far greater damages under sec. 192.44 than it would be if it did not receive the benefit of the state's services in suppressing the fire.

Since the legislature in amending the statute did not choose to restrict the word "set" to willful setting of fires, we cannot do so by construction. Accordingly it is my advice to you that the word "set" includes both the willful and negligent setting of fires and hence includes a fire started by sparks escaping from a railroad locomotive.

RGT

Fish and Game—Bear—Capture by Use of Hands—
Invading bear's den for the purpose of taking bear cubs therefrom by hand is unlawful under the Wisconsin laws and game orders of 1955.

January 19, 1956.

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

You have requested my opinion whether it is lawful to take or capture bear cubs by taking them from their dens by the use of the hands.

Bear are protected game animals under the laws of Wisconsin, conservation commission order No. G-863, sec. 4 (5) (f), dated September 13, 1955. Hence, it would appear that they may be taken only in those particular manners authorized by the statutes and the proper orders of the conservation commission.

Such regulations provide for taking bear by hunting during the open season which in Sawyer county was November 19 through November 27 of 1955. There was no open season for trapping during the year 1955.

Order No. G-863, sec. 8 (1) (a), provides:

"No person shall hunt game with any means other than the use of a gun discharged from the shoulder or a bow and arrow except .22 rim fire hand guns may be used in the same manner and for the same purposes and subject to the same restrictions as .22 rim fire rifle; * * *"

From the foregoing, it would appear that invading a bear's den and capturing the bear by hand is not an approved method of hunting and hence is unlawful.

While the question was not applicable during the year 1955, you have raised the question whether the use of the hands in taking bear from a den is a lawful means of trapping. Trapping is defined in sec. 29.01 (7), Stats., as follows:

"'Trapping' includes the taking, or the attempting to take, of any wild animal by means of setting or operating any device, mechanism or contraption that is designed, built or made to close upon, hold fast, or otherwise capture

a wild animal or animals. When the word 'trap' is used as a verb, it shall have the same meaning as the word 'trapping' as defined herein.' "

Since the bear is a protected game animal, it does not appear that the legislature ever intended that it should be captured or destroyed by the invasion of its den other than in the course of lawful hunting during the open season with a gun held at arm's length or a bow and arrow or by the use of some artificial contraption into which the bear might be lured at a time when it is outside of its den.

RGT

Real Estate Brokers—Sale of Mining Leases—Person proposing to engage in sale of uranium mining leases must be licensed as a real estate broker under ch. 136, Stats.

January 19, 1956.

WISCONSIN REAL ESTATE BROKERS' BOARD.

You state that an applicant for renewal of a real estate broker's license has stated on his application blanks that he proposes to engage in a sale of mineral oil or natural gas lands. The applicant has further informed you that he proposes to sell mineral leases, particularly uranium leases issued by the state of New Mexico. These leases would run for a period of 3 years, would cover distinct main tracts of real estate 40 acres or more in size, and would be renewable if minerals were discovered thereon during the life of the lease.

You inquire whether such sales require license and are under the appropriate supervision of your department or whether they should be regulated only by the department of securities.

In 14 O.A.G. 263 (1925) it was held that a person who dealt in mining leases was required to have a license as a real estate broker. A similar ruling was made in 9 O.A.G. 293 (1920) as to oil leases.

Your powers of control in this matter are well illustrated by the case of *State ex rel. Durham Corp. v. Wisconsin*

Real Estate Brokers' Board, (1927) 192 Wis. 396, 211 N.W. 292. In this case the court held that your board could properly deny a license to a broker who proposed to sell Florida real estate during the Florida land boom because of his failure to furnish a financial statement.

Under the provisions of the statute which presently controls your activities, that is, sec. 136.02, it is provided in part:

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

It is my opinion that the sales of the leases proposed are sales of real estate within the meaning of the Wisconsin real estate brokers' law and hence cannot be carried on without a real estate broker's license. In view of that conclusion, whether such sales are also subject to the supervision of the securities department need not be answered herein.

Sec. 136.01 (2), Stats. 1955, defines the “real estate broker” as follows:

“(2) ‘Real estate broker’ means any person not excluded by sub. (6), who:

“(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate;

“(b) Is engaged wholly or in part in the business of selling real estate, whether or not such real estate is owned by such person; * * *.”

By the terms of sec. 235.50, Stats., a lease for 3 years with the possibility of extension would clearly appear to be a conveyance and is also clearly an interest in the real estate involved within the meaning of sec. 136.01 (2) (a).

Under this statute you would have power to inquire into the trustworthiness of any proposed dealings of an applicant for license and to assure yourself that they would be conducted in such manner as to safeguard the public.

RGT

State Department of Veterans Affairs—Housing Loans—
The department of veterans affairs has no present statutory authority to make loans for the construction of single car garages.

January 19, 1956.

GORDON HUSEBY, *Director,*
State Department of Veterans Affairs.

You have inquired whether the department of veterans affairs presently has statutory authority to lend funds to veterans for the construction of one-car garages, the cost of which will not exceed \$700.

The department's powers in regard to loans for veterans' housing are established by sec. 45.352 of the statutes. Subsec. (2) (a) thereof reads in part:

"The department may loan not to exceed \$3,500 on the value of the housing accommodation for which it is made
* * *"

Subsec. (2) (b) provides in part:

"* * * In the event that the department determines that the applications for loans shall exceed the funds available, the department shall give priority of loans to the most necessitous cases and take all action necessary to spread the available funds among the maximum possible number of veterans. * * *"

Eligibility of a veteran for loans is established by subsec. (4) (a) which provides:

"(4) A loan under this section shall be granted only to a veteran who:

"(a) Requires the loan for the purchase, improvement or construction of a *home* for himself or family."

Webster's New International Dictionary (Second Edition) defines a "home" as follows:

"One's own dwelling place; the house in which one lives; esp., the house in which one lives with his family; the habitual abode of one's family; also, a dwelling house."

It does not appear there is any definition of a "home" which would include a garage, and accordingly when the

statutes require that the veteran must show he needs the funds advanced in order to purchase a "home" for himself and his family, there is no statutory authority for extending that provision to include a garage for the housing of a car.

RGT

Municipalities—Navigable Waters—Boat Traffic—The legislature has not delegated to towns, cities, and villages the power to charge a fee for the use of navigable waters within their boundaries.

It appears that the legislature has validly and constitutionally delegated to towns, cities, and villages power to pass reasonable safety and traffic regulations for vessels operating upon the navigable waters within the boundaries of such units.

January 19, 1956.

LESTER P. VOIGT, *Director,*
Wisconsin Conservation Department.

You inquire whether towns, cities, and villages have the authority to license and regulate boats using waters within their boundaries. You suggest that they might not possess such powers in view of the power conferred on the conservation commission by secs. 23.09 and 29.174, Stats.

Sec. 23.09 gives the conservation commission broad authority to provide a system for the protection, development, and use of fish, game, and other wildlife resources in the state's lakes, streams, and other water bodies. Sec. 29.174 authorizes the conservation commission to establish open and close seasons on fish and game. You suggest that if the municipalities mentioned have the right to license and regulate boats using waters within their boundaries, they might interfere with or usurp the powers granted to the conservation commission by secs. 23.09 and 29.174.

Your question may be resolved into two subordinate questions:

1. Has the legislature under the existing statutes conferred upon towns, cities, and villages the power to charge a license fee for, or otherwise regulate, boats navigating waters within their boundaries.

2. Can the legislature constitutionally authorize the various towns, cities, and villages to charge such license fees or otherwise regulate boats on the navigable waters within their jurisdiction.

Before passing to a consideration of the various statutes which purport to confer certain powers on towns, cities, and villages, it is of primary importance to consider the provision of the Wisconsin constitution, art. IX, sec. 1, which reads in part:

“* * * the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any *tax, impost or duty* therefor.”

This provision was originally found in the historic northwest ordinance of 1787 and was proposed for the Wisconsin constitution by the Enabling Act of 1846 and thereafter was adopted by Wisconsin when it adopted its constitution.

The quoted provision appears to be a flat prohibition against the adoption by the state itself of any statute levying a “tax, impost or duty,” and it must be assumed that the legislature had this provision in mind when it adopted the various statutes some of which appear on their face to authorize a municipality to charge a license fee for the use of navigable waters.

The importance of our waterways as public highways during the early history of the state was early recognized in the case of *Whisler v. Wilkinson*, (1868) 22 Wis. *572 and *Olson v. Merrill*, (1877) 42 Wis. 203.

It was this importance of our navigable waters as public highways which had inspired the provision of the ordinance of 1787 which was later adopted in our constitution. In the case of *In re Crawford County L. and D. District*, (1924) 182 Wis. 404, at 411, the court quoted with approval from the case of *Economy Light and Power Co. v. U. S.*, 256 U. S. 113, 41 S. Ct. 409, as follows:

“The public interest in navigable streams of this character in Illinois and neighboring states, and the federal authority over such as are capable of serving interstate commerce, arises not from custom or implication but from the declaration of the fourth article of the compact in the Ordinance of July 13, 1787, for the government of the Northwest Territory, that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free, etc.—a principle which was reiterated in later acts of Congress and accepted by Illinois in her constitution at the time of her admission as a state. In so far as the Ordinance of 1787 thus established public rights of highway in navigable waters capable of bearing commerce from state to state, it was no more subject to repeal by a state than any other regulation of interstate commerce enacted by Congress.”

In view of the foregoing and in view of the flat prohibition in the Wisconsin constitution against the levy of any tax, impost, or duty whatsoever, it would appear that any enactment of the legislature should be critically examined to determine if the legislature ever intended to authorize any municipality or town to charge a license fee for the use of waters within its boundaries, or otherwise unreasonably to interfere with the public navigation of those waters.

The statutes critical for a determination of your question are:

“30.06 * * *

“(6) INSPECTION. Every city, town and village is hereby empowered to inspect at least once in every year the hull, boiler and machinery of every vessel propelled by steam, gasoline, naphtha, electricity or any other power other than hand power, which is used within its boundaries upon inland waters of the state and is not subject to the laws of the United States.

“(7) MUNICIPAL ORDINANCES. All cities, towns and villages of this state are hereby empowered to make reasonable safety regulations relating to such vessels and the equipment thereof and to provide and enforce proper and reasonable penalties for the violation or neglect of any such provisions or regulations or ordinances.”

“60.29 * * * Such [town] board is empowered and required:

“* * *

“(35) To regulate or prohibit by ordinance the use, traffic and noise of motor boats on any inland lake or river, during such hours when noises are disturbing to the public or inimical to public safety, morals and health.”

“61.34 (1) Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.”

“62.11 * * *

“(5) Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.”

In analyzing these statutes it would appear of controlling importance, when the constitutional provision art. IX, sec. 1, is considered, that the specific statute dealing with vessels navigating upon our navigable waters, that is, sec. 30.06, is specifically restricted to safety regulations and says nothing whatsoever about any authority to charge a fee for the use of the water.

The more general statutes, sec. 61.34 (1) dealing with villages and sec. 62.11 (5) dealing with cities, which purport to confer in principle the equivalent of “home rule” power over all municipal activities, do include language which could be construed to authorize the issuance of licenses for the use of navigable waters.

We interpret these general statutes as not controlling over the more specific provisions of sec. 30.06 and merely

as intending to convey the power to license in those fields for which no specific provision is made by the legislature. This interpretation seems necessary; otherwise all other provisions of ch. 61 and ch. 62 could be repealed and the villages and cities would be enabled to regulate their own affairs entirely under the broad grant of power in those two sections.

This construction will harmonize the provisions of sec. 30.06 on the one hand and the provisions of secs. 61.34 (1) and 62.11 (5) on the other. Bearing in mind the presumption that the legislature intends its statutes to comply with the constitution, it would seem that this is the more reasonable interpretation.

Accordingly, while the question is obviously not free from doubt, it is my opinion that there is no clear grant in the present statutes by the legislature to cities and villages to charge license fees for the use of waters within their boundaries.

Referring now to the powers of towns, these are set forth in sec. 60.29 (35). Reading of this provision shows that it does not contain the word license, that is, there is not even the color of statutory authority to charge a license fee and accordingly the same rule should apply to towns as applies to cities and villages.

Passing now to a consideration of the power to pass safety regulations, traffic regulations, and regulations of noise, it is notable first that there is no constitutional prohibition against the enactment of such regulation. It would appear that as long as such regulations are reasonable, they are matters primarily of local concern. While a delineation of the exact line to be drawn between those matters of state-wide concern which can only be regulated by the legislature itself or an agency of state-wide jurisdiction, and those matters which are essentially local and can be delegated to the various local governing bodies, is concededly difficult, *Muench v. Public Service Commission*, (1952) 261 Wis. 492, 515a-515j, it would appear that such a line exists and must be determined by considering the various factual situations as they arise. While there is no definitive decision of our supreme court on this point, it would appear that traffic and safety regulations which are analogous to

the regulations imposed by municipalities on interurban or interstate vehicular traffic moving on the highways passing through their boundaries are both within the powers of the legislature and have been delegated by the legislature to the respective towns, villages, and cities.

In view of the foregoing conclusion that towns, cities, and villages have been given no clear delegation of power by the legislature to charge a fee for the use of navigable waters within their boundaries, it is unnecessary at this time to pass upon the constitutional issue other than to point out that because of the constitutional provision against taxes, impost, or duties, grave doubt as to such power exists. On the other hand, in regard to reasonable safety and traffic regulations, it would appear that the case of *Muench v. Public Service Commission, supra*, is an indication that such regulations, if restricted to matters of local concern, are valid.

RGT

Constitutional Law—Internal Improvements—Dams—
Conservation commission has no power to take over operation of Rush Lake dam solely for preserving and controlling the levels of Rush Lake.

January 20, 1956.

LESTER P. VOIGT, *Director,*
Wisconsin Conservation Department.

You have inquired whether the conservation commission may take over the operation of the so-called Rush Lake dam at the outlet of Rush Lake in Winnebago county. You state that at present this dam is the property of the Izaak Walton League which constructed it in 1949. You state further that the league is now offering the dam, together with a small amount of property, to the conservation commission. You state also that the lands surrounding Rush Lake are private with the exception of approximately 18 acres, which is the property of the state of Wisconsin purchased originally to furnish public access to the lake.

The answer to your question is controlled by my previous opinion to you in regard to Thunder Lake issued June 15, 1955, 44 O.A.G. 148, and the subsequent memorandum in regard to Mirror Lake.

Under the circumstances, operation and maintenance of the Rush Lake dam would engage the state in a work of internal improvement and your commission cannot safely take it over.

RGT

Conservation Commission—Fish and Game—Wild Animals for Park Purposes—The conservation commission has the authority to grant permits to park boards to take wild animals for park purposes and thereafter sell such wild animals or their offspring for park purposes.

The conservation commission has authority to grant permits to park boards to take wild animals in the possession of the commission for park purposes.

January 20, 1956.

LESTER P. VOIGT, *Director,*
Wisconsin Conservation Department.

You have asked my opinion on the following two questions:

1. Do park boards have authority under sec. 29.55 (1), Stats., to capture wild animals for park purposes and thereafter sell such wild animals or their offspring for park purposes?

2. Does the conservation commission have authority to donate wild animals to park boards for park purposes?

The answer to your first question is found in the express words of the statute which reads:

“29.55 (1) The state conservation commission may, on application of any park board, grant permit to take, have, sell, barter, or transport, at any time, live wild animals for park purposes.”

The only qualification found in the statute is the necessity of applying for and receiving a permit from the conserva-

tion commission. The word "take" can only be given its ordinary meaning of taking or capturing from the wild. Again, the statute contains the express word "sell" with the only restriction that the animals in question must be sold for park purposes.

While the answer to your second question is not quite so clear as the answer to your first question, the section above quoted, taken in conjunction with sec. 29.54, Stats., which authorizes the commission to propagate and release game and fish throughout the state, would justify a conclusion that if the conservation commission can authorize a park board to take an animal directly from the wild, it could authorize that same park board to take an animal in the possession of the conservation commission. It would not appear to be a sound or logical interpretation of the law to require that the commission should first release the game in question and then allow the park board to recapture it immediately.

RGT

Public Officers—Compatibility—Town Board Member—Town Fireman—Member of town board may not be employed by town as fireman.

January 20, 1956.

JOHN J. HAKA,
District Attorney,
Portage County.

You have inquired whether a member of a town board who acts and draws compensation as such town officer is entitled to compensation as a member of the town fire department for attending meetings and for services performed at fires.

Sec. 60.29 (18), Stats., which defines the powers of a town board provides in part that the board shall have power "to establish a fire department or fire departments * * *; to appoint the officers and members thereof, and prescribe and regulate their duties; to provide such com-

compensation for the members of the fire department or departments as the town board may determine * * *.”

Since the person in question as a member of the town board would be passing upon his own appointment as a member of the fire department, the two positions are clearly incompatible under the provisions of sec. 66.11 (2), Stats., and hence the member of the town board cannot be a member of the fire department.

This opinion is similar to the opinion in 24 O.A.G. 203 (1935), wherein it was held that members of a town board could not work on a town highway and collect wages therefor.

RGT

Prisons and Prisoners—Presence of Jailer and Matron—

The provisions of sec. 53.42, Stats., requiring that there “shall be a keeper or custodian or attendant present at every jail while there is a prisoner therein” means that there must be a jailer present and awake at all times while a prisoner is lodged therein.

Sec. 53.41, Stats., requiring that there shall be a matron “on duty” in every jail whenever there is a female prisoner confined therein means that there must be a matron present in the jail and awake at all times while there is a female prisoner therein.

January 20, 1956.

WILBUR J. SCHMIDT, *Director,*
State Department of Public Welfare.

You have requested an opinion concerning the standards imposed by secs. 53.41 and 53.42, Stats., which relate to jail matrons and keepers, upon the maintenance of personnel in city and county jails, and you state the following as examples of the type of problem which arises:

“*Situation A.* Jail A has male adult prisoners. The jailer has residence attached to and in the same building as the jail and is present in his quarters. He sleeps at night but

is subject to being awakened to care for such jail problems as may require his attention. There are no other personnel assigned to the jail at night. Does this arrangement satisfy the requirements of secs. 53.42, 340.58 and other pertinent statutes?

"Situation B. Same as Situation A except that the jail is also detaining male juvenile delinquents.

"Situation C. Jail C has female adults and female juveniles detained. A matron employe is sleeping in the jail or in attached quarters. Does this satisfy the requirements of secs. 53.41, 53.42, 340.58 and other pertinent statutes? There are several alternative variations possible in this instance insofar as the location of the male jailer is concerned, depending upon whether he is present at all, whether he is present and awake or whether he is present but sleeping in the jail or attached quarters.

"Situation D. Same as Situation C except that the jailer's wife or other female relative not paid as an employe acts as matron. As an example, the jailer may be the sheriff. Is it necessary that the matron be an employe? If not necessary, can she be charged with neglect, if such occurs, and who is liable?

"Situation E. Is it proper to conclude, within the meaning of the statutes, that the jailer is required to make regular inspection of those sections containing inmates at frequent and regular intervals during the day and night?"

Secs. 53.41 and 53.42, Stats., provide as follows:

"53.41 Whenever there is a female prisoner in any jail there shall be a matron on duty who is wholly responsible to the sheriff or keeper for the custody, cleanliness, food and care of such prisoner.

"53.42 There shall be a keeper or custodian or attendant present at every jail while there is a prisoner therein."

Secs. 53.41 and 53.42 were first created by ch. 519, Laws 1947. The policy of the two sections and the purpose of their enactment can best be determined by examination of the standards of maintenance and care of prisoners required prior to their adoption.

At common law the sheriff is the jailer ex officio of the county. 72 C.J.S. Prisons §8. Sec. 59.23 (1), Stats. 1955, places the charge and custody of county jails in the hands of the sheriff and provides as follows (amended by ch. 330, Laws 1955):

"59.23 (1) Take the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer."

The sheriff is required to perform all duties required of him by law, and he is, generally speaking, liable for his own neglects and those of his deputy, undersheriff, and jailer as well. Secs. 59.22 (1) to (4) and 59.23 (7), (9), Stats.

Prior to the enactment of secs. 53.41 and 53.42, Stats. 1947, statutes relating to the standard of custody and care of prisoners in the jails of a county: (1) Provided for the removal of prisoners for their safety in the event of danger of fire or other casualty, sec. 55.05, Stats. 1943; (2) required the segregation of prisoners according to sex, and whether they were criminal, non-criminal, sane or alleged to be insane, sec. 55.06, Stats. 1943; (3) required the keeper of each jail to keep the jail constantly in a clean and healthful condition, to see to the personal cleanliness of each prisoner and that each prisoner's apparel was properly laundered, to furnish each prisoner with clean water and towels, to serve three wholesome meals every day, and to provide each prisoner with necessary bedding, clothing, fuel, and medical aid, sec. 55.07, Stats. 1943; (4) provided for punishment, by fine or imprisonment, of any person or officer in charge of a prison or jail, who abused, neglected, or ill-treated any person confined in such institutions, sec. 340.58, Stats. 1943.

But in addition to the statutory standard of care as outlined above, the sheriff was bound, and is bound, by a general duty to exercise reasonable care to keep his prisoners safe from injury or death, for the breach of which he incurred civil liability in damages. 46 A.L.R. 94; 61 A.L.R. 569; 14 A.L.R. 2d 353; 41 Am. Jur. Prisons and Prisoners §§9-15, 21-23; 47 Am. Jur. Sheriffs §42; 72 C.J.S. Prisons §§11-13; 80 C.J.S. Sheriffs and Constables §117.

The standard of care required of the sheriff, apart from statutory requirements, is one of reasonable care under the circumstances, and he is civilly liable for his negligence or wrongful act which causes injury or death to the prisoners in his custody. *Smith v. Miller*, (1950) 241 Iowa 625, 40 N. W. 2d 597, 598, 600.

In the absence of statute, it would seem that the question whether leaving a jail unattended while prisoners are confined therein constitutes actionable negligence when injury or death results, is a question of fact and depends upon the circumstances of each case. *Smith v. Miller, supra*; *O'Dell v. Goodsell*, (1948) 149 Neb. 261, 30 N.W. 2d 906, 909. But see *Baker v. Walston*, (1940) Tex. Civ. App., 141 S.W. 2d 409, 411.

It is against this brief and general background of a sheriff's duties and liabilities as a jailer that the provisions of secs. 53.41 and 53.42 must be construed. The statutory standard of custody of prisoners as it existed prior to 1947, discussed above, has been, in substantial effect, retained without change in ch. 53, Stats., except for the addition of secs. 53.41 and 53.42.

No judicial construction of secs. 53.41 or 53.42 has been found. The comment of the interim committee upon each of these sections states simply that each "is a new needed provision." However, it is clear that the addition of these two provisions to existing legislation governing the care and custody of prisoners, evinces a legislative intent to impose a higher standard of care and custody of prisoners than theretofore existed. This standard requires that there be a jailer present and awake at every jail at all times while there is a prisoner confined therein and a matron present and awake in every jail at all times while a female prisoner is confined therein.

Sec. 53.42 requires that a jailer be constantly at the jail. It provides that there "shall be a keeper or custodian or attendant present at every jail while there is a prisoner therein." The term "while" is defined as "pending or during the time that" (Black's Law Dictionary, 3rd Ed. 1933; Cf. *American Steam Laundry Company v. Riverside Printing Co.*, (1920) 171 Wis. 644, 177 N.W. 852), and the term "present" must therefore be taken to mean physically or bodily present. See *H. & S. Pogue Co. v. Fidelity & Casualty Co.*, (1924) 299 F. 243, 245. The purpose of the jailer being "present" at the jail is apparent. Only if he is physically present can he properly see to the security of the prisoners, prevent escape, maintain order, see that medical aid is pro-

vided when necessary, and keep them safe from fire and other casualty, and the like.

Sec. 53.41 provides that whenever "there is a female prisoner in any jail there shall be a matron on duty who is wholly responsible to the sheriff or keeper for the custody, cleanliness, food and care of such prisoner." This section renders the matron responsible for the custody and care of female prisoners to the same extent as the keeper is responsible for all prisoners.

While no judicial construction of this or similar statute has been found, the term "on duty" has been construed in a number of cases in each of which an action for loss due to robbery has been brought upon an insurance policy covering loss due to robbery while there is someone "present on duty" inside the premises. In *H. & S. Pogue Co. v. Fidelity & Casualty Co.*, (1924) 299 F. 243, 245, the term "present on duty" as used within the meaning of such a policy was construed as follows:

"* * * "Present on duty" includes, not only physical or bodily presence at the place, but a certain amount of freedom for the performance of duties. One wholly unconscious, or wholly deprived of liberty of action, could scarcely be held to be present on duty, although perhaps bodily present.
* * *"

To the same effect, see *A. J. Bayless Markets v. Ohio Casualty Co.*, (1940) 55 Ariz. 530, 104 P. 2d 145, 146; *Milkes v. U. S. Fidelity & Guaranty Co.*, (1930) 257 Ill. App. 65, 68-71; *Boesky Bros. Twelfth St. Corp. v. U. S. Fidelity & Guaranty Co.*, (1934) 267 Mich. 628, 255 N.W. 307, 308. See also, 37 A.L.R. 2d 1081, 1097-1099.

Upon the same principle a matron is not "on duty" when asleep in quarters adjoining or attached to the jail. The use of the term "on duty" in sec. 53.41, therefore, requires that a matron be present and awake at all times in every jail while a female prisoner is confined therein.

Each of the examples you gave is therefore answered as follows:

A—There must be a jailer at the jail and awake at all times while a prisoner is confined therein.

B—Except for special provisions relating to segregation of prisoners, sec. 53.36, Stats., and female prisoners, sec. 53.41, Stats., the keeper's duties when juveniles are confined are the same.

C—When a female is confined a jail matron must be on duty at all times. If male prisoners are also confined, a jailer must be present as well.

D—The jailer's wife or other female relative may act as matron, but she is bound to perform the duties of matron with the same care as a regular matron, and is liable for her neglects.

The sheriff is responsible for the proper performance of the matron's duties, and is civilly liable for injury or death resulting from her negligence, sec. 59.22 (1) to (4), Stats., unless the situation falls within the exception of sec. 59.22 (3) or (4).

The matron may be required to execute an official bond according as the provisions of sec. 59.22 (1) to (4), Stats., are applicable to the particular case.

E—There are no specific statutory provisions governing the frequency of inspections of prisoners' quarters, but both the matron and jailer are bound to make inspections at such intervals as are necessary to fulfill the standard of care and maintenance imposed by the statutes, according to the circumstances.

WAP

Dams—Cranberry Culture—Dams across navigable waters for the purpose of aiding in cranberry culture may not be constructed without the permission of the public service commission.

January 23, 1956.

PUBLIC SERVICE COMMISSION OF WISCONSIN.

You have asked for my opinion on the following question:

“In case a dam is constructed under secs. 94.26–94.32, Stats., known as the Cranberry Law, which was enacted originally by ch. 40, Laws 1867, across a navigable water,

is it necessary that the person owning and maintaining such a dam have a permit from the public service commission of Wisconsin as provided in sec. 31.04 and following of the statutes?"

I assume that your question relates to dams constructed after 1915 for the reason that the law appears established that when a dam has once been lawfully constructed with the permission of the state, the state may not require a new permit and impose burdensome conditions thereon. *In re Water Power Cases*, (1912) 148 Wis. 124, 134 N. W. 330.

The question then is whether the owner of lands suitable for cranberry culture may proceed under the provisions of sec. 94.26 to erect a dam on a navigable water traversing his land without the permission of the public service commission under sec. 31.04, etc.

Sec. 94.26 reads as follows:

"Any person owning lands adapted to the culture of cranberries may build and maintain on any land owned by him such dams upon any watercourse or ditch as shall be necessary for the purpose of flowing such lands, and construct and keep open upon, across and through any lands such drains and ditches as shall be necessary for the purpose of bringing and flooding or draining and carrying off the water from such cranberry growing lands, or for the purpose of irrigation, fertilization and drainage of any other lands owned by such person; provided, that no such dams or ditches shall injure any other dams or ditches theretofore lawfully constructed and maintained for a like purpose by any other person."

The quoted section of the statute and the following five sections appear to confer on the owner an unlimited right to erect a dam on navigable waters without the permission or control of any state agency. On the other hand, the provisions of the water power law, ch. 31 of the statutes, first enacted in valid form by the laws of 1915, specifically provides:

"31.04 Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter.

"31.05 Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam

shall file with the commission a written application therefor, setting forth:

“(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

“* * *”

The general rule for the construction of statutes which appear to be in conflict is that they must be harmonized and effect given to both if possible. Such effect can be given if it is recognized that a person constructing a dam for cranberry culture under sec. 94.26, etc., must also secure the permission of the public service commission if the dam crosses a navigable water.

Ch. 31 initially created by the laws of 1915 is the outgrowth of a study by a special legislative committee of the 1909 legislature which was appointed to study water power, forestry, and drainage. The report of this committee resulted in the so-called Water Power Acts of 1911, 1913, and 1915.

Under these respective acts the former railroad commission of Wisconsin, now the public service commission of Wisconsin, was given exclusive jurisdiction and power to issue permits for the construction of dams in navigable waters, certain jurisdiction over dams constructed under the Milldam Act, and responsibility for solving the numerous problems arising from obstructions in navigable water. Kanneberg Law of Waters, 1946 Wisconsin Law Review 359.

In the case of *Chippewa & F. I. Co. v. Railroad Comm.*, (1916) 164 Wis. 105, 159 N. W. 739, the court considered the effect of the adoption of the act of 1915 upon certain rights granted by a previous act, that is, ch. 640, Laws 1911.

The court recognized that repeals by implication of previously existing laws are not favored, that acts directed to a special subject are generally given effect rather than a general act, but pointed out that it was equally true that when the legislative intent to make a general act controlling was apparent such effect would be given. At page 118, the court stated:

“* * * In the present case the act of 1915 seems unquestionably intended to apply to all dams in the state. A general policy applicable to all the navigable waters of the

state was there announced, and we can entertain no doubt of the intention to make it applicable to the reservoir dams operated by the plaintiff. * * *"

In view of the foregoing, it is my opinion that persons constructing dams for cranberry culture under the authority in sec. 94.26, *et seq.*, must secure a permit from the public service commission under the provisions of secs. 31.04 through 31.11 and are further subject to all the provisions of ch. 31.

RGT

Dogs—Damage Claims—Words and Phrases—Worry—
Owners of mink raised in captivity are entitled to all the rights of owners of domestic animals.

Dogs "worry" domestic animals when they run after, chase, or bark at them, and need not attack or tear them with their teeth.

January 23, 1956.

ALBERT J. CIRILLI,
District Attorney,
Oneida County.

You inquire:

1. Are mink raised domestically for fur purposes, domestic animals within the meaning of sec. 174.11, Stats., for which claims for damages may be recovered?

2. Are mink "worried" within the meaning of sec. 174.11 when dogs run around their cages for several hours during the nighttime?

Sec. 343.421, Stats., provides:

"Any person owning or breeding silver, silver black, black foxes, or mutations thereof, or mink which have been raised in captivity shall have the same property rights therein as enjoyed by owners or breeders of domestic animals."

It would appear that the statute speaks for itself. While the mink may not have abandoned their wild traits when

they are kept in captivity and raised in captivity, their owners have the same rights therein as they would in any domestic animal.

Sec. 174.11 (1), Stats., reads in part:

“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. * * *”

It is clear from your statement of facts that the mink were not physically injured by the activities of the dogs in question, and hence the question is whether or not the activities of the dogs may be said to have “worried” the mink.

In the case of *Bass v. Nofsinger*, (1936) 222 Wis. 480, 269 N. W. 303, the court held that a dog which was chasing sheep at a distance of about 300 feet was “worrying” the sheep. At page 483 the court stated “‘worry’, as used in statutes providing that anyone finding a dog, not on the premises of its owner, worrying, wounding, or killing any sheep, may kill the dog, means ‘to run after; to chase; to bark at.’ 8 Words and Phrases (First Series), p. 7526; *Marshall v. Blackshire*, 44 Iowa 475, 477.” The cases on the subject appear clear that worrying does not imply tearing with the teeth, and if a dog pursues and chases any domestic animal it is “worrying” under the provisions of statutes similar to sec. 174.11.

In the case of *Bell v. Gray-Robinson Construction Co.*, (1954) 265 Wis. 652 a claim for damages was made against a contractor who operated a machine near a mink ranch with such excessive noise that a destruction of mink resulted through cannibalization and otherwise. It was held that the contractor was liable for the death of the mink.

From the foregoing it would appear that if the dogs were chasing after, barking at, or assaulting the mink in any manner, the owner has a proper claim under the provisions of sec. 174.11.

RGT

Crime Laboratory—Powers and Duties—Investigative Unit—Ch. 165, Stats., does not authorize the state crime laboratory board to establish an investigative unit as a part of the laboratory's functions.

January 24, 1956.

C. M. WILSON, *Superintendent,*
State Crime Laboratory.

You have requested an opinion whether ch. 165, Stats., authorizes the state crime laboratory board to establish an investigative unit as part of the laboratory's functions.

It is a fundamental rule of statutory construction that the intent of the legislature should be ascertained and given effect. In order to ascertain the legislative intent and the objective the legislature sought to accomplish, the occasion and necessity of the enactment, the defects in former law, and the remedy sought to be provided by the new law are properly considered. *State ex rel. Time Ins. Co. v. Superior Court*, (1922) 176 Wis. 269, 274, 186 N.W. 748. The intent of the legislature is to be determined from the act taken as a whole and not from words and phrases taken out of context. *State v. P. Lorillard Co.*, (1923) 181 Wis. 347, 373, 193 N.W. 613.

In arriving at an answer to your question, therefore, the purpose or leading idea behind the creation of the state crime laboratory must be taken into consideration.

The purpose of the laboratory is stated in sec. 165.01 (3) (a), Stats., as follows:

"The purpose of the laboratory is to establish, maintain and operate a state crime laboratory in order to provide *technical assistance* to local law enforcement officers *in the various fields of scientific investigation in the aid of law enforcement.* * * *"

The foregoing language does not authorize or contemplate the creation of an investigative unit of the type you have in mind. Looking behind the statute, and considering the announced purpose of the laboratory as stated in sec. 165.01 (3) (a), quoted above, it is clear that the felt necessity for the creation of a crime laboratory was based upon the fact that a sheriff, detective, or other enforcement offi-

cer, while qualified and equipped to "investigate" crime, had neither the qualifications nor equipment to conduct the type of scientific inquiry which the laboratory and its staff are equipped and qualified to conduct. In other words, the laboratory was created to provide services in aid of investigation of crime theretofore not provided for by the existing law enforcement structure. The legislative intent was to create an additional arm of law enforcement and not to provide for the duplication of existing services.

Furthermore, an investigative unit, taken in the usual sense of the term "investigation," such as a detective or sheriff might conduct, cannot be fairly considered as coming within the meaning of "technical" assistance in the various fields of "scientific investigation." Evidence of what the legislature intended by those terms is found in the next sentence of sec. 165.01 (3) (a) following the statement of purpose quoted *supra*, wherein such fields of inquiry as ballistics, chemistry, comparative micrography, lie-detector tests, and the like are listed. While the services of the laboratory are not to be limited because of that enumeration, sec. 165.01 (3) (a), the enumeration is nevertheless indicative of the legislative intent with respect to the *type* of service to be provided. In other words, the laboratory is authorized to maintain technical services in fields of scientific investigation not enumerated in the statute, but not in fields which fall outside of the *types* of services enumerated and which are not contemplated by the terms "technical" services in the various fields of "scientific investigation."

The foregoing conclusion is given additional support by the provisions of sec. 165.02 (2), Stats., which provides in part as follows:

"The board shall determine * * * the number of expert scientific employes to be employed within the laboratory and within each field in which the laboratory can feasibly render service to law enforcement agencies, such as ballistics and handwriting experts, chemists, toxicologists, pathologists, lie-detector operators, identification experts, finger print experts, and within such other fields as the board may from time to time determine to be necessary.
* * *

Here again, the enumeration of the services to be maintained by the laboratory, while not limiting the number of services of the same type, nevertheless manifests a clear intention to limit the laboratory's services to fields of the type enumerated. The general words "and within such other fields as the board may from time to time determine to be necessary" do not authorize the board to establish services in fields of a different type from those enumerated, such as an investigative unit, but, on the contrary, limit the services which the board may authorize to the types previously enumerated. This conclusion follows from the familiar principle of *ejusdem generis*, that where general words follow an enumeration of things having a specific meaning, the general words are not to be construed in their widest extent but are to be applied only to things of the same class or kind as those enumerated.

Sec. 165.01 (3) (c), Stats., provides as follows:

"Upon such request the laboratory shall collaborate fully in the complete investigation of criminal conduct including field investigation at the scene of the crime and for this purpose may equip a mobile unit or units including lie detectors or deception test equipment."

While the foregoing provision may by itself seem to carry the implication that an investigative unit would be authorized thereunder, when the leading idea behind the creation of the laboratory is borne in mind and the over-all purpose of ch. 165, Stats., considered, it is clear that such is not the case. Language of a statute which, when viewed only in the light of its *immediate* context, is quite plain and persuasive, must yield in meaning to the over-all context, purpose, and scope of the whole act of which it forms a part, when such scope and purpose are plain and unambiguous and the language in question is susceptible of a meaning consonant with such general scope and purpose. *Estate of Stephenson*, (1920) 171 Wis. 452, 456, 177 N.W. 579.

As has been pointed out, the unambiguous purpose of ch. 165 was to provide technical assistance in various fields of scientific investigation as an aid to existing law enforcement officers in their investigatory work, and not to dupli-

cate or supplement the investigative techniques and procedures of such officers. Sec. 165.01 (3) (c) was intended to provide for a field unit as an aid in investigation, and the term "investigate" as used in that section means merely investigation in the sense that the laboratory investigates and not in the sense of an independent investigative unit.

In view of the foregoing, it is my opinion that the crime laboratory board is not authorized by ch. 165, Stats., to establish an investigative unit as part of the laboratory's functions.

WAP

*Counties—Appropriations and Expenditures—Charitable and Penal Institutions—Private Social Welfare Agency—*County may not under sec. 46.22 (5) (g), Stats., or otherwise, make a voluntary contribution to a privately organized social welfare agency which cares for unwed mothers during confinement and for a short time thereafter and which makes such service available to anyone free of charge regardless of the county of residence and regardless of any appropriation to the agency by the county of residence.

February 6, 1956.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County.

You have inquired whether Manitowoc county may legally make an appropriation to a private agency in Milwaukee county which renders services to unwed mothers during confinement and for a short time thereafter. Apparently such an appropriation has been made for many years by some 18 counties. Some residents of Manitowoc county have from time to time made use of these services without charge, and in some instances county authorities have advised and assisted unwed mothers in going to this agency for care. Apparently the services of the agency are available to anyone in need of such assistance regardless of the

county of residence and regardless of any appropriation to the agency by the county of residence.

In making these appropriations in the past the county seems to have relied upon sec. 59.08 (9a) of the 1953 statutes which grants the county the power to:

“Establish such agencies and employ such personnel as it may deem necessary for the social welfare and protection of mentally defective, dependent, neglected, delinquent and illegitimate children within the county, fix the compensation of personnel so employed, and appropriate money for such agencies and personnel; provided that the personnel authorized to be employed hereunder may include the services of a child welfare agency licensed under section 48.37. Nothing herein shall authorize any departure from any of the provisions of any other statute relating to the social welfare and protection of such children, nor to relieve any county from any obligation imposed by any such statute, but any county board may provide additional facilities and agencies for the social welfare and protection of such children.”

You state that by the enactment of ch. 651, Laws 1955, sec. 59.08 (9a) has been abolished and you find nothing in ch. 651 which would specifically authorize such an appropriation. However, you inquire if such an appropriation would be proper if it were placed in the budget of the county welfare department, which has been authorized to administer child welfare services under the provisions of sec. 46.22 (5) (g), Stats.

So far as material here sec. 46.22 (5) (g) provides:

“(5) The county board of supervisors may provide that the county department of public welfare shall, in addition to exercising the mandatory functions, duties, and powers as provided in sub. (4), have any or all of the following functions, duties and powers and such other welfare functions as may be delegated to it by such county board of supervisors:

“* * *

“(g) To administer child welfare services including services to children who are mentally defective, dependent, neglected, delinquent, or illegitimate, and to other children who are in need of such services. In administering child welfare services the county agency shall be governed by the following:

"1. The county agency may avail itself of the co-operation of any individual or private agency or organization interested in the social welfare of children in such county.

"2. The county agency shall administer and expend such amounts as may be necessary out of any moneys which may be appropriated for child welfare purposes by the county board or donated by individuals or private organizations."

The language of 1 and 2 quoted above seems to fall short of furnishing the necessary authorization.

The fact that the county agency may avail itself of the co-operation of a private agency of this sort is not a grant of authority to make a gift to such agency, and the authority to expend amounts that may be *necessary* does not mean that money may be expended if it is not necessary. Here the expenditure is not necessary since the services are available whether or not any appropriation is made by the county.

It is elementary that duties and powers relating to disbursement of county funds are regulated by statute and disbursement may be made only by the officer, in the manner, and for the purposes, designated by statute. Also statutes authorizing counties to expend funds raised by taxation are subject to the strictest construction and the authority therein must be clear and convincing before an appropriation order or resolution will be upheld. See 20 C.J.S. 1115-16.

You are therefore advised that the county may not make a voluntary contribution to a privately organized charitable or social agency regardless of its worthy character and even though the agency renders a valuable social service without charge to persons seeking its assistance.

WHR

Register of Deeds—Certified Survey Maps—Certified survey maps recorded or filed with the register of deeds under sec. 236.34 (2), Stats., as created by ch. 570, Laws 1955, are to be kept in a bound volume and are not to be copied and returned to owner. Fee is \$1.50 under sec. 59.57 (1) (b), Stats.

February 7, 1956.

WILLIAM T. BRADY,
District Attorney,
Juneau County.

Our attention is called to sec. 236.34, Stats., as created by ch. 570, Laws 1955, and which relates to the recording of certified survey maps.

You have inquired whether a certified survey map when presented to a register of deeds should be copied and the original document returned to the person who presented it, as is done with deeds, mortgages, and similar instruments, or whether a certified survey map is to remain in the possession of the register of deeds and filed, as has been done in the past with plats.

Sec. 236.34 (2) as created by ch. 570, Laws 1955, provides:

“(2) RECORDING. Certified survey maps prepared in accordance with sub. (1) shall be numbered consecutively by the register of deeds and shall be recorded in a bound volume to be kept in the register of deeds office, known as the ‘Certified Survey Maps of ————— County.’”

Sec. 236.11 (1) of the 1953 statutes provided in part:

“(1) The register of deeds shall accept and bind as a permanent record into bound volumes, properly indexed, the original of any final plat made, certified, indorsed, acknowledged, approved and presented as prescribed in this chapter. No plat of any addition to an existing plat shall be accepted for record unless the streets and alleys shown thereon shall practically conform in width, location and direction to those of the existing plat. All written or printed matter attached to the plat shall form a part of the recorded document. Any facsimile of the original whole record, made and prepared by the register of deeds or under his direction shall be deemed to be a true copy of the final plat.”

Ch. 570, Laws 1955, repealed and recreated ch. 236, Stats. The substance of former sec. 236.11 (1) quoted above is now to be found in new sec. 236.25 (4).

Sec. 59.51 (6), Stats., makes it the duty of the register of deeds to:

“(6) Safely keep and return to the party entitled thereto, on demand within a reasonable time, every instrument left with him for record not required by law to be kept in his office.”

The question is whether the legislature when it used the words “recorded in a bound volume to be kept in the register of deeds office” in sec. 236.34 (2) intended that the original should stay with the register of deeds. The difficulty arises out of the looseness with which the verb “record” is so often used. Sometimes it is used where the verb “file” would be more appropriate. To “record” means to make a record of by setting down in writing or the like; to set down or register in some permanent form; to preserve the memory of by committing to writing; and “recording” has been judicially defined to mean copying an instrument to be recorded into public records in a book kept for that purpose by or under the superintendence of the officer therefor. *White v. Stennis*, 151 Miss. 765, 118 S. 902. Ordinarily it does not carry with it any connotation of permanent custody of the original instrument from which the record is made.

On the other hand, the word “file” is used where papers are methodically arranged for preservation and reference. In *State v. Lewis*, 49 La. Ann. 1207, 22 S. 327, “to file” was held to mean to place on file, or more generally to deposit papers in official custody for orderly systematic safekeeping. There are cases, however, holding that “recording” and “filing” are used interchangeably. *Haverell Distributors v. Haverell Mfg. Corp.*, 115 Ind. App. 501, 58 N.E. 2d 372.

It is to be noted that the proper distinction is observed in the statutes relating to the filing of chattel mortgages. Sec. 59.51 (11) relates to their filing and subsec. (12) requires them to be kept.

However, when we come to sec. 236.34 (2) as created by ch. 570 there are good reasons for concluding that the legislature used the word "recorded" interchangeably with "filed" and that it meant that the originals of survey maps were intended to be kept or "filed" as the word is ordinarily used rather than copied and "recorded" in the usual sense. Otherwise, the effect would be to impose an almost intolerable burden on a register of deeds who has no photostating equipment. He would almost have to qualify as a skilled surveyor or professional engineer and be skilled in the use of mechanical drawing equipment if he were required to make a true and accurate copy or "record" of the original map. Sec. 236.34 (1) (a) requires that the map be prepared by a qualified surveyor or professional engineer. This requirement was obviously made for the purpose of insuring greater accuracy. The purpose would be thwarted if the official record were to consist of a poorly made copy of the map by some unskilled register of deeds or clerk in his office, while the carefully prepared original would go back to some individual who would be free to deny access to it and could destroy it at his convenience.

We are unwilling to subscribe to any interpretation of sec. 236.34 which would defeat its obvious purpose and lead to absurd or unreasonable results. When the literal meaning of a statute, though apparently plain and unambiguous, is absurd or unreasonable, ambiguity arises, the presumption being that such literal meaning does not correctly voice the legislative purpose. *Pfingsten v. Pfingsten*, (1916) 164 Wis. 308, 159 N.W. 921.

Accordingly we conclude that the legislature meant that certified survey maps should be kept permanently in a bound volume by the register of deeds, the word "recorded" having been used loosely or interchangeably with the word "filed," which word would have been more accurate under the circumstances.

You have also inquired what fee the register of deeds should charge for "recording" or filing a certified survey map under sec. 236.34.

These maps are not plats, the recording of which is now covered by sec. 236.25, and hence the charge provided by

sec. 59.57 (10) for recording plats would not be applicable. Sec. 59.57 (11) provides a charge for recording exhibits or sketches, attached to or incorporated in any deed or other instrument, and sec. 59.57 (11a) provides a charge for recording exhibits, drawings or plats, attached to any deed or other instrument. The difficulty here is that these certified survey maps are not attached to or incorporated into any other instrument. They are *sui generis* and constitute something new under the law, for which there has been no separate recording fee provided. Such maps could not very well be offered for recording under sec. 236.34 as being attached to a recordable deed or other instrument, since such original documents are returned to the owners, and we have just indicated that maps offered under sec. 236.34 must be kept by the register of deeds. There is no authority for tearing off and keeping the map while returning the deed, and it should be noted further that sec. 236.34 makes no provision for recording such a map when it is attached to a deed or other instrument.

This being true, it follows that the only classification in the recording fee schedule of the register of deeds provided by sec. 59.57 which would appear to be applicable is sec. 59.57 (1) (b) which provides a \$1.50 charge "for any other instrument."

WHR

Appropriations and Expenditures—Counties—Officers and Employes—Association Membership Dues—Under sec. 59.15 (3), Stats., county board may in its discretion reimburse county officials for membership dues in such organizations as Wisconsin district attorneys association, Wisconsin county clerks association, Wisconsin clerks of circuit court association and institute, Wisconsin county judges association, and Wisconsin county superintendents of schools association.

February 8, 1956.

CEYLON M. MEISNER,
District Attorney,
Dunn County.

Your office states that the right of the county board to pay claims of its officials for membership in the associations hereinafter enumerated has been challenged by a member of the county board as constituting a possible illegal expenditure. The associations in question are as follows: Wisconsin district attorneys association, Wisconsin county clerks association, Wisconsin clerks of circuit court association and institute, Wisconsin county judges association, and Wisconsin county superintendents of schools association.

We are asked whether the payment of such membership fees is proper, it being your conclusion that such payments are proper under sec. 59.15 (3), Stats., as reimbursement to elective officials for expenses incurred in the discharge of their duties.

Sec. 59.15 (3), as amended by ch. 651, sec. 13, Laws 1955, reads:

“(3) REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, including without limitation because of enumeration, traveling expenses within or without the county or state, and the board may establish standard allowances for mileage, room and meals, the purposes for which such allowances may be made, and determine the reasonableness and necessity for such reimbursements, and also establish in advance a fair rate of compensation to be paid to the sheriff for the board and care of prisoners in the county jail at county expense.”

It has long been considered that participation in the activities of such associations is of value in enabling the members thereof to better perform their technical duties. See 34 O.A.G. 362, 365. The force of this observation is becoming increasingly important with the constant growth of the complexities of the duties of the officers mentioned.

Without attempting to analyze each of the associations in detail, information as to the activities of these several associations and the programs of their meetings over the years shows that they are organized for the purpose of in-service training to facilitate more adequate discharge of the duties of each officer and to more effectively coordinate his activities with those of like officers of other counties where coordination and standardization of procedures are indicated, and that they have accomplished that end.

With reference to one of these associations, the district attorneys association of Wisconsin, with which association we happen to be most familiar, it was said in 12 O.A.G. iv:

"The District Attorneys' Association of Wisconsin was organized in 1921, by the district attorneys of the state in cooperation with the members of the attorney general's office.

"The purpose of this association is to facilitate the work of the district attorneys and the association is very helpful to the attorney general in the performance of his duty 'to consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office.'

"Every district attorney in the state should endeavor to be present at and take part in the meetings of the association. These meetings provide the best possible opportunity for consultation by the attorney general and the members of his staff with the district attorneys on questions that arise in the performance of official duties.

"The information which is brought together at these conferences will undoubtedly save a great amount of time and expense on the part of district attorneys as well as the attorney general's office, and will enable both to perform their duties with greater certainty and satisfaction.

"A district attorney who travels to attend these meetings does so in the performance of his official duties, and is entitled to reimbursement for the expense thereof, under the provisions of par. (b), subsec. (1), sec. 59.15, Stats. This situation probably has not been generally understood

and district attorneys have hesitated to attend at their own expense."

Again in 21 O.A.G. 249 it was concluded that the district attorney is entitled to reimbursement for his expenses in attending the convention of the association of district attorneys if, in connection therewith, he consults and advises with the attorney general with respect to matters within the scope of his duties. The reasoning of the opinion was that since the district attorney is entitled to consult the attorney general, the district attorney is entitled to reimbursement for the necessary travel expenses incurred for such consultation. Therefore, if his purpose in attending the convention is to consult the attorney general, the expense of attending should be reimbursed. That reasoning leads to a much more restrictive rule than the earlier statement from 12 O.A.G. iv, previously quoted.

The district attorney of, say, Sauk or Iowa county can consult the attorney general at Madison with a minimum of travel expense and without any dues payment to the district attorneys association. Why, then, should he be entitled to reimbursement for his association dues and for traveling considerably farther than Madison for the same consultation? If it be suggested that consulting the attorney general in his office in the capitol is not as beneficial as attendance at the association convention, then also it must be admitted that the value of the latter is from its in-service training rather than from the opportunity to seek advice from the attorney general upon a specific problem facing the district attorney.

Furthermore, if the district attorney may be reimbursed for the expense of attending the convention only when he does so to consult the attorney general, the district attorney, who attends part of a convention but does not attend any of the sessions in which the attorney general participates could not be reimbursed. Also, since the district attorney is entitled to consult the attorney general anyway, there would be scant reason for the county to pay association dues for a right which already exists.

It is our conclusion that the propriety of expending public money for the attendance of district attorneys at these

conventions must be sustained, if at all, upon a broader basis than that suggested in 21 O.A.G. 249.

From observations extending over many years, this office is prepared to state that the district attorney who attends and conscientiously participates in these instructive programs, receives very valuable training and information which would be difficult if not impossible, to acquire in any other way and which greatly enhances his effectiveness as an official of the county.

So far as we have been able to discover, no attempt has been made in any of our opinions to break down and analyze individual items of expense such as association dues, but it is our understanding that such dues are customarily paid by the counties, since these dues make possible the holding of the meetings, rental of a meeting place, hiring of speakers and experts to supply the technical instruction given, and the like. Presumably no one would be admitted to such educational sessions without payment of membership dues, and there seems to be no valid reason for distinguishing between dues and travel expenses, insofar as reimbursement of county officers is concerned.

The legality of expending public funds to reimburse public officers for the expenses of attending such conventions, in the absence of statutes expressly prohibiting or allowing such expenditures, has been attacked principally upon the ground that such expenditures serve no public purpose. Some courts have held that public officers are presumed to be qualified to perform their duties and that, therefore, expenditures for further training cannot be made from public funds. *City of Phoenix v. Michael*, (1944) 61 Ariz. 238, 148 P. 2d 353; *Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, (1937) 269 Ky. 768, 108 S.W. 2d 810; and *Lake County v. Neuenfeldt*, (1922) 78 Ind. App. 566, 136 N. E. 580.

The clear majority of those courts which have ruled upon the question within recent years, however, supports the legality of these expenditures of public funds. *Green v. Kitchen*, (1948) 229 N.C. 450, 50 S.E. 2d 545; *State ex rel. McClure v. Hagerman*, (1951) 155 Ohio St. 320, 98 N.E. 2d 835; *Ward v. Frohmler*, (1940) 55 Ariz. 202, 100 P. 2d 167; *People ex rel. Schlaeger v. Bunge Bros. Coal Co.*, (1945) 392

Ill. 153, 64 N.E. 2d 365; *Hays v. Kalamazoo*, (1947) 316 Mich. 443, 25 N.W. 2d 787; *Lindquist v. Abbett*, (1936) 196 Minn. 233, 265 N.W. 54; and *City of Roseville v. Tulley*, (1942) 55 Cal. App. 2d 601, 131 P. 2d 395. The *City of Phoenix* case, *supra*, has been overruled by *City of Glendale v. White*, (1948) 67 Ariz. 231, 194 P. 2d 435, and the *Jefferson County* case, *supra*, has been limited by *Louisville and Jefferson County Board of Health v. Steinfeld*, (1948) 308 Ky. 824, 215 S.W. 2d 1011.

The reasoning of the majority cases is stated by the Illinois supreme court in the *Schlaeger* case, *supra*, at page 371 as follows:

“* * * It seems clear that the discussion, by mayors and other city officials, of problems affecting the well-being of their respective cities, and the study of conditions affecting taxpayers of municipalities, are public purposes, and moderate appropriations for those purposes are justified. * * *”

To similar effect is the following statement of the United States supreme court in *Green v. Frazier*, (1920) 253 U. S. 233, 240, 40 S. Ct. 499, 64 L. ed. 878, relied upon by the California court in the *Tulley* case, *supra*:

“* * * Courts, as a rule, have attempted no judicial definition of a ‘public’ as distinguished from a ‘private’ purpose, but have left each case to be determined by its own peculiar circumstances. * * * ‘Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subservive the general well-being of society, and advance the present and prospective happiness and prosperity of the people.’ Cooley, Justice, in *People v. Salem*, 20 Michigan, 452. * * *”

If attendance at these conventions serves a public purpose—and we assume that it does—then the officer attending may be reimbursed for his expenses unless it can be said that such attendance is beyond his statutory duties and therefore the county has no authority to reimburse him.

Sec. 253.30, Stats., expressly makes it the duty of the county judges to attend meetings of the board of county

judges and provides for reimbursement for their travel and hotel expenses. Consequently, the county not only may, but must, reimburse the county judge for such expense in carrying out his mandatory, statutory duty. The statutory duties of the other officers which you name neither expressly include nor exclude attendance at their association conventions, although sec. 39.10 (4), Stats., makes it the duty of the county superintendent of schools to keep informed upon new techniques and procedures of instruction.

In *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 11 N.W. 2d 348, the court held that a county could not reimburse its county superintendent for expenses of attending national conventions of the National Educational Association, since the officer had no duty to attend the conventions. Sec. 39.01 (3), Stats. 1941, provided that the county superintendent should be allowed his necessary expenses for travel incurred in the discharge of his duties, and sec. 39.04, Stats. 1941, expressly made it his duty annually to attend at least one convention called by the state superintendent. The court construed the two provisions together and concluded that the only convention expenses for which the superintendent might be reimbursed were those incurred for attending conventions called by the state superintendent.

While the *Kaiser* case was pending, ch. 392, Laws 1943, was enacted, amending sec. 39.01 (3), Stats. 1941, so as to provide for reimbursement for travel expenses of the county superintendent for travel outside of his county and outside the state, and expressly empowering the county board to authorize him to travel outside of the state at public expense. The amendment was not retroactive, and the court so stated, leaving room for the inference that under the amended statute the county might reimburse the officer for his expenses in attending future conventions of the National Educational Association.

Sec. 59.15, Stats., was repealed and recreated by ch. 559, Laws 1945, and subsec. (3) of the current statute has been quoted previously. Formerly, under sec. 59.15 (1) (g), Stats. 1943, reimbursement was limited to traveling expenses, and the statute was silent as to travel outside of the county, except that sec. 59.15 (1) (c), Stats. 1943,

provided for reimbursing the district attorney for expenses of travel "within and without his county in the performance of his official duties."

From the specific provision in the 1943 law regarding the district attorney, it might then have been argued that county officers generally could not be reimbursed for expenses of travel outside their respective counties. There is no room for such a contention under the present law. The special provision regarding travel expense of the district attorney has been eliminated and the county board is now authorized to reimburse any county officer for any "out-of-pocket" expense incurred in the discharge of his duties "including without limitation because of enumeration, traveling expenses within or without the county or state." The quoted language obviously comprehends reimbursement for expenses other than travel expense, and the recreated section considerably broadens the county board's discretion in the matter of reimbursing county officers for expenses incurred by them.

Prior to the 1945 change it might have been argued that a county officer could not have been reimbursed for his expenses in traveling to some metropolitan center to investigate the practicality of certain office machines which he contemplated installing in his office. Under the new law there seems no question but what the county board may, if it wishes, reimburse the officer for such expenses; yet there have been no changes in the express statutory duties of, for example, the county clerk or the clerk of circuit court, from which could be implied a duty to investigate the relative merits of various office machines.

An analogous problem often arises in workmen's compensation cases where the issue is whether or not the injury occurred while the claimant was performing services growing out of and incidental to his employment. In *Voswinkel v. Industrial Comm.*, (1939) 229 Wis. 589, 282 N.W. 62, the court upheld a claim for compensation for injuries sustained by a Tomah city librarian while the claimant was in Madison for the purpose of seeking advice from the director of the library school regarding plans for the Tomah library. The librarian had neither obtained nor sought permission to make the trip, and the industrial commission

held that the trip was outside the scope of her employment. In reversing the judgment of the lower court, which affirmed the commission, the supreme court quoted with approval, at p. 598, the following language of Justice Cardozo:

“* * * The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose though the business errand was undone, the travel is then personal, and personal the risk.”

If the test adopted in the *Voswinkel* case is applied to a county clerk who attends a convention of the county clerks association for the purpose of receiving training and information regarding the conduct of his office, it seem obvious that he would be performing services growing out of and incidental to his employment. If the services are incidental to his employment, they must also be within the scope of his duties and therefore he could be reimbursed for his expenses.

We are unable to subscribe to the narrow view that the public official of a county has no duty to take advantage of those opportunities which are being provided cooperatively by like officers in the other counties of the state through a common organization dedicated to the improvement of the services which such officers are required to perform. The public is the beneficiary, and if such a duty as we are here discussing is not express, it is reasonably to be implied.

While it is unnecessary here to enter upon any prolonged or academic discussion of the ultimate refinements or limitations implied in the discharge of official duties, it might be mentioned in passing that when an officer takes the official oath of office he swears that he will discharge the duties of the office to the best of his ability. See sec. 19.01, Stats.

This is not to suggest that a county officer who refuses to become a member of, and attend the conventions of, an

association such as you name would be guilty of nonfeasance. If, however, he does take the necessary and reasonable steps to make the best of his ability available, it follows logically that in so doing he has merely been discharging his duty; and the expense incident thereto could be made a subject for reimbursement under sec. 59.15 (3).

The trend of the views hereinbefore discussed as to what may be incidental or implied in the discharge of official duties is in rapport with thinking that has been expressed by some text writers. By way of illustration, 43 Am. Jur., Public Officers, §250, reads in part as follows:

“Incidental and Implied Powers.—The prescription of official duties by statute or ordinance is not an exclusive test of authority, when neither express provision nor implication from the nature of the office calls for it. The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to, or serve to promote or benefit, the accomplishment of the principal purposes. But these implications are not to be extended beyond the fair inferences to be gathered from the circumstances of each case.”

We do not mean to imply by what has heretofore been said that any and all expense which might conceivably be incurred by a county officer by way of self-improvement, training, or additional education may be made a mandatory charge against the county.

The legislature has very wisely set up a safeguard against possible abuses in reimbursing expenses of county officers by making sec. 59.15 (3) discretionary with the county board rather than mandatory. Note that the statute says that the county board *may*, not *shall*, provide for reimbursement of expenses incurred in the discharge of duties. It should be noted also that in furtherance of the discretion granted to the county board and in line with your conclusion, the statute reads, “*including without limitation because of enumeration, traveling expenses within or without the county or state.*”

Thus the county board has complete control of the situation and while it may, as indicated above, properly reim-

burse county officers for membership fees in the associations in question, it may also refuse to pay the same irrespective of the merits of such membership or of possible benefits to the county. Its determination is final in the absence of any clear abuse of discretion.

WHR
EWW

Teachers—Pensions—Social Security—Sec. 218 of the federal social security act and sec. 66.99, Wis. Stats. (as amended by ch. 114, Laws 1955), permit a school district to initiate proceedings whereby its employes rendering service in positions under the state teachers retirement system may be included under social security.

Resolution of governing body of political subdivision initiating such proceedings, and including a request for a referendum, should be submitted directly to the governor by such governing body.

Resolution initiating proceedings which is submitted to governor by the governing body must: (a) Clearly determine to include under OASI employes specifically defined as a "coverage group" under federal and state law; (b) clearly state the effective date of inclusion of such coverage group; and (c) request the governor to conduct a referendum upon the question of such inclusion.

Documents submitted by a certain school district were not submitted to proper official or in proper form to initiate proceedings to bring teachers of such district under social security.

February 17, 1956.

FREDERICK N. MACMILLIN, *Director,*
Public Employes Social Security Fund.

You have submitted to this office the following two documents which were sent to you by joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county) :

"Moved by W. E. Fieting that in compliance with the provisions of Sec. 66.99 (3a) of the Wisconsin Statutes, the Board of Education goes on record as favoring Social Security for all teachers of the integrated district, and that a request be submitted to the Executive Director of the Wisconsin Retirement Fund to conduct a referendum therefor.

"Further moved that if majority vote favorably agreement to bring employees under Social Security be made retroactive to January 1, 1955.

"Seconded by Stewart North. Passed unanimously.

"STATE OF WISCONSIN }
 COUNTY OF MONROE } SS:

"I, Mrs. Martin Tonn, District Clerk of Joint School District No. 2, City of Tomah, et al, do hereby certify that the copy hereto annexed has been compared by me with the original resolution favoring Social Security for teachers in the integrated district, and authorizing the transmittal of said resolution to the Executive Director of the Wisconsin Retirement Fund, which is now on file and of record in my office, and required by law to be kept in my legal custody, and that the same is a true copy of said resolution.

"In Witness Whereof, I have hereunto set my hand and seal at the city of Tomah, in said county, this 27th day of September, 1955.

/s/ Mrs. Martin Tonn
 /t/ MRS. MARTIN TONN—District Clerk
 Joint School District No. 2,
 City of Tomah, et al"

In connection with these documents you have inquired:

1. Whether it is possible for the school district in question to initiate proceedings which could result in bringing under the old-age and survivors insurance system those employes of said school district who are in positions included under the state teachers retirement system.

2. Whether the aforesaid documents are in proper form to initiate such proceedings, if the first question is answered in the affirmative.

Sec. 218 of the social security laws (42 U.S.C.A., §418) provides in part as follows:

"(a) (1) The Secretary of Health, Education and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this title to services per-

formed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

“* * *

“(b) For the purposes of this section—

“* * *

“(4) The term ‘retirement system’ means a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof.

“(5) The term ‘coverage group’ means (A) employees of the State other than those engaged in performing service in connection with a proprietary function; (B) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function; (C) employees of a State engaged in performing service in connection with a single proprietary function * * * .

“(c) (1) An agreement under this section shall be applicable to any one or more coverage groups designated by the State.

“(2) In the case of each coverage group to which the agreement applies, the agreement must include all services (other than services excluded by or pursuant to subsection (d) or paragraphs (3), (5), or (6) of this subsection) performed by individuals as members of such group.

“* * *

“(4) The Secretary of Health, Education, and Welfare shall, at the request of any State, modify the agreement with such State so as to (A) include any coverage group to which the agreement did not previously apply, or (B) include, in the case of any coverage group to which the agreement applies, services previously excluded from the agreement; but the agreement as so modified may not be inconsistent with the provisions of this section applicable in the case of an original agreement with a State. * * *

“* * *

“(d) (1) No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system * * * .

“* * *

“(3) Notwithstanding paragraph (1), an agreement with a State may be made applicable (either in the original agreement or by any modification thereof) to service performed by employees in positions covered by a retirement system (including positions specified in paragraph (4)

* * *, if the governor of the State certifies to the Secretary of Health, Education, and Welfare that the following conditions have been met:

“(A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;

“(B) An opportunity to vote in such referendum was given (and was limited) to eligible employees;

“(C) Not less than ninety days’ notice of such referendum was given to all such employees;

“(D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and

“(E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section.

An employee shall be deemed an ‘eligible employee’ for purposes of any referendum with respect to any retirement system if, at the time such referendum was held, he was in a position covered by such retirement system and was a member of such system, and if he was in such a position at the time notice of such referendum was given as required by clause (C) of the preceding sentence * * *.

“(4) For the purposes of subsection (c) of this section, the following employees shall be deemed to be a separate coverage group—

“(A) All employees in positions which were covered by the same retirement system on the date the agreement was made applicable to such system (other than employees to whose services the agreement already applied on such date);

* * *

“(6) If a retirement system covers positions of employees of the State and positions of employees of one or more political subdivisions of the State, or covers positions of employees of two or more political subdivisions of the State, then, for purposes of the preceding paragraphs of this subsection, there shall, if the State so desires, be deemed to be a separate retirement system with respect to any one or more of the political subdivisions concerned

* * *

* * *

“(f) Any agreement or modification of an agreement under this section shall be effective with respect to services

performed after an effective date specified in such agreement or modification; except that—

“* * *

“(2) In the case of an agreement or modification agreed to after 1954 but prior to 1958, such date may not be earlier than December 31, 1954; * * *.”

Sec. 66.99, Wis. Stats., (as amended by ch. 114, Laws 1955) provides in part:

“66.99 Inclusion of public employes under social security.

(1) As used in this section:

“(a) ‘Public agency’ means * * * any * * * school district or other unit of government, or agency or instrumentality of one or more thereof which is eligible for inclusion under the federal old age and survivors insurance system.

“(b) ‘Federal regulations’ means the provisions of section 218 of Title II of the social security act enacted by the congress of the United States as amended by the 83rd congress, and applicable regulations adopted pursuant thereto, and applicable provisions of the U.S. internal revenue code.

“(c) ‘Coverage group’ has the meaning given that term by federal regulations.

“(d) ‘Director’ means the executive director of the Wisconsin retirement fund.

“(2) Each public agency * * * may determine to be included under the federal old age and survivors insurance system through the adoption of a resolution by the governing body thereof with respect to the coverage groups specified in such resolution, which shall also state the effective date of coverage.

“* * *

“(3a) Notwithstanding the provisions of subs. (2), (3) and (4) the persons included under any retirement system, or any coverage group therein permitted under federal law, may be included under the federal old-age and survivors insurance system pursuant to a referendum held in conformity with section 218 (d) (3) of the federal social security act and a certification by the governor pursuant thereto, and the governor is authorized to take any and all actions which may be required in connection therewith. In the case of each public agency other than the state, a referendum shall be conducted only upon, and in conformity with, a request submitted by the governing body thereof. The agreement with the secretary of health, education and welfare may be modified to cover any such coverage group.

“(4) The director with the approval of the governor shall * * * upon the submission to him of a certified copy

of a resolution adopted by the governing body of any public agency in accordance with sub. (2), execute upon behalf of the state an agreement or modification of an agreement, with the secretary of health, education and welfare for the inclusion of a coverage group of the employes and officers of such public agency under the federal old-age and survivors insurance system established by federal regulations in conformity with such resolution * * * and in conformity with federal regulations. * * * each public agency included under such agreement or modification thereof shall be bound by federal regulations * * *."

In connection with the first question you have pointed out that:

(1) Except for state personnel, sec. 66.99, Stats., did not specifically exclude from OASI coverage persons included under the state teachers retirement system.

(2) Sec. 218 (d) (1) of the federal social security act as it existed prior to the "Social Security Amendments of 1954" operated to exclude all persons in positions covered by existing public employe retirement systems except that sec. 218 (m) of said act permitted the inclusion of employes in positions covered by the Wisconsin retirement fund.

(3) "The Social Security Amendments of 1954" amended sec. 218 of the social security act and created subsec. (d) (3) thereof which provides procedure whereby certain persons in positions included under public employe retirement systems may be brought under OASI.

Doubt is then expressed whether the legislature intended to abandon the policy of legislating for employes under the state retirement system on a state-wide basis and whether it intended to make it possible to have a referendum in each of several thousand school districts and also in cities operating under the city school plan upon the question of including their respective teachers under OASI. The following are suggested for consideration in respect thereto:

(1) By ch. 477, Laws 1955, the legislature directed that a comprehensive study of certain public employe retirement systems, including the state teachers retirement system, be made by a governor's commission and specifically directed that one of the subjects to be studied is the relationship of the retirement system to OASI.

(2) In directing the study of certain public employe retirement systems pursuant to ch. 477, Laws 1955, the legislature probably was aware of the fact that the federal social security law permits retroactive coverage of public employes to January 1, 1955 based upon action taken at any time prior to January 1, 1958.

(3) When the employes under the Wisconsin retirement fund were included under OASI the legislature decreased the benefits under the Wisconsin retirement fund so that the two systems were complementary rather than supplementary to each other.

(4) When the employes under the conservation warden pension fund were brought under social security by ch. 484, Laws 1955, the legislature integrated these two systems also by decreasing the benefits under the conservation warden pension fund.

(5) The legislature refused to pass Bill 366, S., in the 1955 session of the legislature which would have superimposed OASI benefits upon benefits under the state teachers retirement system for state personnel under said system.

These last mentioned matters might possibly be of some significance in construing the legislation involved to ascertain the intended effect thereof, if the provisions were ambiguous and therefore subject to construction. But, the questions raised as to the application of this legislation arise from the intricacies of the old-age and survivors insurance system and the extremely complex provisions of the federal and state enactments providing therefor, rather than ambiguity in the language used therein. As indicated hereinafter, careful study of the several provisions and a fitting of the language of our statutes into the federal provisions resolves the questions.

Furthermore, these suggested considerations are not necessarily inconsistent with enabling local school districts to bring their employes under the old-age and survivors insurance system. Any additional cost or expense thereof would not be paid by the state, as would be the case in respect to persons directly employed by the state. In addition, they are essentially matters of policy.

It is also stated by you that the assistant general counsel of the United States department of health, education, and welfare concluded that Bill 232, S. (which became ch. 114, Laws 1955) was not required for public agencies other than the state and that the existing statutes would permit the state to proceed under the "Social Security Amendments of 1954" for public agencies other than the state. Without the benefit of any such opinion or conclusion set down in writing, it appears probable to us that it was no more than an expression that so far as the federal statutes are concerned the federal agency would permit such additional coverage regardless of the provisions previously in our statute. In other words, this was merely saying that it was up to the state to determine whether its statutes authorized such coverage as a matter of state law, and if the state determined that they did, the federal agency would not interpret our statutes to the contrary.

If the chief purposes of ch. 114, Laws 1955, were as you suggest:

(a) To eliminate the prohibition applicable only to state personnel in sec. 66.99 (3), Stats.

(b) To change the references to the internal revenue code which were made in said sec. 66.99, Stats., to conform to congressional amendments.

(c) To substitute in sec. 66.99, Stats., the name of the new federal authority (secretary of health, education, and welfare) for the former federal authority (federal social security administrator)

and there was no intent to do more than effect those ends, appropriate language restricting the enactment thereto could and should have been used. Instead, the composition of the new subsec. (3a) is clearly much broader, as it is couched in all-inclusive language that bears no such limitation. As there is nothing in this statute to indicate any intent that it is limited in its scope, it must be given the application which its language requires.

Ch. 60, Laws of Wisconsin for 1951, created sec. 66.99 of the statutes, subsecs. (1), (2) and (4) of which then read substantially as quoted above. Said ch. 60 also created sec. 66.99 (3) which read as follows:

“(3) Every state employe and state officer while employed in any position which is not included under any retirement system established by statute shall be included under the agreement authorized by subsection (4) if eligible for inclusion, and all participating municipalities which have acted pursuant to section 66.902 to be included under the Wisconsin Retirement Fund shall be included when the participating employes thereof are eligible.”

Said ch. 60 was published April 12, 1951. Pursuant to the authority granted thereby, on June 13, 1951, an agreement was entered into between the state and the social security administrator which brought certain employes of the state and certain employes of political subdivisions of the state under social security pursuant to sec. 218 (a) (1), (b) (5) and (c) (1) of the social security act. However, in accordance with sec. 218 (d) (1) of the social security act, service in positions covered by a retirement system performed by employes of both the state and the political subdivisions thereof as members of the coverage groups included under the agreement, was automatically excluded from social security coverage.

Pursuant to the provisions of sec. 218 (c) (4) (A) of the social security act quoted above, the state of Wisconsin entered into agreements with the federal social security administrator whereby the original agreement dated June 13, 1951 was modified to include other coverage groups. On November 19, 1952, Modification or Amendment No. 21 was executed which brought under social security a coverage group consisting of the employes of joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county). The resolution to bring the employes of said school district under social security which was adopted by the school board pursuant to the provisions of sec. 66.99 (2), Wis. Stats., did not provide for the exclusion of service rendered by any of the employes of said district, all of whom constituted a coverage group under the social security act and sec. 66.99 (1) (c), Wis. Stats. However, pursuant to sec. 218 (d) (1) of the social security act quoted above, service performed by employes of such coverage

group in positions covered by a retirement system was automatically excluded. This excluded service performed by those of its employes who were in positions covered by the state teachers retirement system.

Public Law 279 of the 83rd congress which was signed August 15, 1953, created sec. 218 (m) of the social security act which provided as follows:

“(m) (1) Notwithstanding * * * subsection (d), the agreement with the State of Wisconsin may, subject to the provisions of this subsection, be modified so as to apply to service performed by employees in positions covered by the Wisconsin retirement fund.

“(2) All employees in positions covered by the Wisconsin retirement fund at any time on or after January 1, 1951, shall, for the purposes of subsection (c) only, be deemed to be a separate coverage group; except that there shall be excluded from such separate coverage group all employees in positions to which the agreement applies without regard to this subsection.”

Under the aforesaid act all of the employes in positions covered by the Wisconsin retirement fund at any time on or after January 1, 1951 were declared to be “a separate coverage group” for the purposes of sec. 218 (c) of the social security act which relates to “services covered.” Pursuant to authority conferred by said Public Law 279 of the 83rd congress, sec. 218 (c) (4) of the social security act, and sec. 66.99 (2) of the Wisconsin statutes, on September 30, 1953 the state and the social security administrator executed Modification No. 45 of the original agreement dated June 13, 1951 whereby “service performed by employes in positions covered by the Wisconsin retirement fund” was brought under social security effective January 1, 1951.

Effective January 1, 1955, the “Social Security Amendments of 1954” added paragraphs (2), (3), (4), (5) and (6) of sec. 218 (d) of the social security law. Sec. 218 (d) (3) of the social security act quoted above provides that notwithstanding the provisions of sec. 218 (d) (1) which excluded “any service performed by employees as members of any coverage group in positions covered by a retirement system” an agreement with the state could be made appli-

cable "to service performed by employees in positions covered by a retirement system * * * if the governor of the State certifies to the Secretary of Health, Education, and Welfare" that certain specified conditions have been met. The conditions include the holding of a referendum by secret ballot under the supervision of the governor or his designee upon at least 90 days' notice, in which voting shall be limited to "eligible employees" defined in the law, and at which referendum a majority of the eligible employees shall have voted in favor of including service in positions covered by their retirement system under an agreement between the state and the secretary of health, education, and welfare, extending social security coverage.

As indicated previously, although those employees of joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county) who performed services in positions covered by a retirement system were excluded from social security coverage by sec. 218 (d) (1) of the social security act when Modification No. 21 of the social security agreement was executed November 9, 1952, such employees nevertheless were members of the coverage group which consisted of all of the employees of said political subdivision. Consequently, when it was decided to permit the extension of social security coverage to employees in positions covered by a retirement system, the social security amendments of 1954 created new coverage groups. Sec. 218 (d) (4) (A) provided that for the purposes of subsec. (c) of said sec. 218 "all employees in positions which were covered by the same retirement system on the date the agreement was made applicable to such system" "shall be deemed to be a separate coverage group."

Since the state teachers retirement system includes employees of the state and many other political subdivisions thereof as well as the employees of joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county), sec. 218 (d) (4) (A) of the social security act which says

that "all employees in positions which were covered by the same retirement system" shall be deemed to be a separate coverage group, said law, in itself, does not provide that the employes of such school district who are performing services in positions included under such retirement system may be treated as a separate coverage group.

However, sec. 218 (d) (6) of said social security act states that:

"If a retirement system covers positions of employees of the State and positions of employees of one or more political subdivisions of the State, or covers positions of employees of two or more political subdivisions of the State, then, for purposes of the preceding paragraphs of this subsection, there shall, if the State so desires, be deemed to be a separate retirement system with respect to any one or more of the political subdivisions concerned * * *."

The preceding paragraph (3) which authorizes the inclusion of persons covered by a retirement system after a referendum, and the preceding paragraph (4) which designates new separate coverage groups are both "preceding paragraphs" of subsec. (d) of sec. 218 of the social security act.

Since the state teachers retirement system covers positions of employes of the state and positions of employes of many political subdivisions therein, it appears that under sec. 218 (d) (6) of the social security act "if the state so desires" it may treat the state teachers retirement system as a separate retirement system in joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county).

In other words, under sec. 218 (d) (4) and (6) of the social security act, the state could treat the employes of said school district in positions under the state teachers retirement system as a separate coverage group. The question is whether the state has indicated its desire to do so.

Sec. 66.99 (3a), Wis. Stats., (as created by ch. 114, Laws 1955) which was published May 18, 1955, and hence was enacted after the social security amendments of 1954 were

adopted, provides in part that "the persons included under any retirement system, or any coverage group therein permitted under federal law, may be included under the federal old-age and survivors insurance system pursuant to a referendum held in conformity with section 218 (d) (3) of the federal social security act and a certification by the governor pursuant thereto, and the governor is authorized to take any and all actions which may be required in connection therewith. * * * The agreement with the secretary of health, education and welfare may be modified to cover any such coverage group."

As indicated above in sec. 66.99 (1) (c), Wis. Stats., the state has specified that "coverage group" in sec. 66.99 has the meaning given to that term under the social security act as amended by the 83rd congress.

It is my opinion that sec. 66.99 (3a), and (1) (c), Wis. Stats., must be interpreted as an expression of desire by the state that the state teachers retirement system shall be deemed to be a separate retirement system within said school district, since the employes of such school district in positions covered by such retirement system are a "coverage group therein permitted under federal law."

Sec. 218 (c) (4) authorizes the secretary of health, education, and welfare and the state to modify the agreement with the state to "(A) include any coverage group to which the agreement did not previously apply, or (B) include, in the case of any coverage group to which the agreement applies, services previously excluded from the agreement." This law and the last sentence of sec. 66.99 (3a), Stats., (as created by ch. 114, Laws 1955) would authorize the modification of the original agreement with the state provided there has been compliance with the conditions precedent specified in both the social security law and sec. 66.99, Wis. Stats.

Sec. 66.99 (3a), Wis. Stats., (as created by ch. 114, Laws 1955) provides that OASI coverage "may" be extended to persons included under any retirement system or any coverage group therein permitted under federal law "pursuant to a referendum held in conformity with section 218 (d) (3) of the federal social security act and a certification by

the governor pursuant thereto, and the governor is authorized to take any and all actions which may be required in connection therewith."

Sec. 66.99 (3a), Wis. Stats., states that the governor "is authorized" to take any and all actions which may be required in connection with the extension of social security to the persons included under any retirement system or coverage group and sec. 218 (d) (3) of the social security act specifies that such extension may be accomplished only if the governor of the state certifies to the secretary of health, education, and welfare that the conditions therein specified have been met. As previously indicated, the conditions included the holding of a referendum by secret ballot "under the supervision of the governor or an agency or individual designated by him."

In connection with the second question you have called my attention to the fact that the resolution which was adopted by joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county) :

(1) Does not set forth the proper legal title of the school district.

(2) Does not provide for the coverage of all eligible positions and offices under the state teachers retirement system.

(3) Does not set forth the date when the resolution was adopted.

(4) Does not request the governor to provide for the conduct of a referendum as required by federal law.

(5) Refers to coverage pursuant to sec. 66.99 (3a) instead of pursuant to sec. 66.99 (2).

It appears that the documents submitted may also be open to other objections. For example, the certification does not specify that the resolution actually was adopted by the school board of the school district or that such resolution has not been amended and is still in full force and effect. It likewise appears that the language "goes on record as favoring Social Security" is ambiguous. It might also be contended that the last paragraph of the resolution contemplated that the teachers should vote, not upon the question

of including the service performed by them under social security, but upon making such inclusion retroactive to January 1, 1955, which retroactive inclusion is permissible under sec. 218 (f) (2) of the social security law quoted above, provided proper action is taken between now and 1958.

It may be that some of the aforesaid objections to the form of the documents submitted might be resolved in favor of the validity thereof. It appears, however, that under the provisions of sec. 66.99 (2) and (3a), Wis. Stats., and sec. 218 (d) (3) of the social security law the resolution adopted by the governing body should:

(a) Unambiguously determine to include under OASI employes specifically defined as a "coverage group" under federal and state law.

(b) Unambiguously state the effective date of inclusion of such coverage group.

(c) Request the governor to conduct a referendum upon the question of such inclusion.

In my opinion the documents submitted by joint school district No. 2 of the city of Tomah and towns of Adrian, Byron, Clifton, Oakdale, Ridgeville and Tomah (Monroe county), Kingston (Juneau county), Knapp and Bear Bluff (Jackson county) do not meet these minimum requirements and would not authorize the holding of a referendum even if they had been submitted to the right official. Incidentally, under sec. 66.99 (3a) it appears that the request for a referendum which must be included in the aforesaid resolution should be submitted by the governing body directly to the governor rather than to you either as executive director of the Wisconsin retirement fund, which was done in the present instance, or as director of the public employes social security fund.

JRW

Counties—Tuberculosis Sanatoriums—County Hospitals
—Under sec. 49.16, Stats., county may establish a county hospital in a portion of a county tuberculosis hospital with the same individual acting as superintendent of each institution, provided proper accounts and records are kept so as to accurately reflect the cost of operating and maintaining each unit, including shared costs, and provided that each unit is operated in all respects in compliance with the respective statutory provisions applicable to each.

February 29, 1956.

JOHN H. CHISHOLM,
District Attorney,
Douglas County.

You have inquired whether a portion of a county tuberculosis sanatorium may be used as a county hospital under sec. 49.16, Stats. It is proposed that the superintendent of the tuberculosis sanatorium would also act as superintendent of the county hospital but that proper accounts and records would be kept so as to accurately reflect the cost of operating and maintaining each section, including shared costs. The county hospital would meet the standards imposed by sec. 46.17, Stats.

Sec. 49.16 (1) provides that each county may establish a county hospital for the treatment of dependent persons, pursuant to sec. 46.17.

Sec. 46.17 (1) among other things provides that the state department of public welfare shall fix reasonable standards and regulations for the design, construction, repair, and maintenance of county hospitals. Subsec. (2) requires approval of the department for selection of the site, the plans, specifications, and erection of buildings, and subsec. (3) provides for inspection.

Reference is made to 43 O.A.G. 338 wherein it was concluded that when authorized by the county board, a portion of a county tuberculosis sanatorium may be used as a unit of the county home for the aged, provided that, as required by sec. 46.18, Stats., responsibility for management and operation of each section is separate, and proper

accounts and records are kept which fairly and accurately reflect the cost of maintaining and operating each section, including costs shared.

It would appear that like reasoning should be applicable to using a portion of the county tuberculosis sanatorium for a county hospital.

Attention is called to ch. 223, Laws 1955, which created sec. 50.065 of the statutes authorizing joint county home and county tuberculosis sanatorium. As indicated in 43 O.A.G. 338 the general authority to do this probably existed without the necessity of any additional legislation, although it is to be noted that ch. 223 sets up quite a number of additional sanitary and health safeguards designed to minimize the hazards of contamination of the county home section by the tuberculosis section. Sec. 50.065 as created by said ch. 223 also spells out in considerable detail the yardstick that is to be applied in apportioning particular costs.

We do not read ch. 223 as creating a power which did not already exist but rather as a regulatory guide to be followed in the exercise of an existing power, although the power is specifically stated, which had not been the case prior to the enactment of ch. 223.

It should be noted further that the county tuberculosis sanatorium or hospital unit is subject to inspection by the state board of health under sec. 50.06 (8), so that there should be ample controls so far as health and sanitary considerations are concerned.

Lastly, some mention should be made of that part of the proposal which contemplates that the same individual will act as superintendent of the county hospital and of the county tuberculosis sanatorium. There appears to be no statutory conflict here as long as the management of the two is kept separate and distinct by the person who acts as superintendent of each of the institutions. One individual can manage two separate and distinct activities if there are no conflicts of interest or legal prohibitions. In 39 O.A.G. 543 we pointed out that the sheriff could not serve as superintendent of the county home, but this was because art. VI, sec. 4, Wis. Const., prohibits the sheriff from holding any other office. Sec. 46.19 (1), Stats., provides that

the trustees shall appoint a superintendent of each institution and may remove him at pleasure. Sec. 46.19 (2) provides that the trustees shall prescribe the duties of the superintendent and that he shall execute and file an official bond. Here he would presumably have to file a separate bond for each office. See 38 O.A.G. 158 to the effect that the trustees of county institutions may appoint one individual as superintendent for the county poorhouse and farm and another as superintendent for the county insane asylum, or may in their discretion appoint a single person as superintendent of both institutions. See also 28 O.A.G. 19.

Your question is therefore answered in the affirmative.

WHR

Automobiles and Motor Vehicles—Minors—Traffic Violations—Forfeitures—Civil court imposing forfeiture on child for traffic violation pursuant to sec. 48.36 (2) (b) and (c) of the children's code, Stats. 1955, is required by sec. 288.09 (1), Stats., to add the costs to the amount of the forfeiture. In cases of moving traffic violations covered by sec. 48.36 (2) (a) where no forfeiture may be imposed, the court should tax costs pursuant to secs. 307.01 and 307.02, Stats. Provision of sec. 288.09 (1) for sentence to county jail for nonpayment of forfeiture does not apply to juveniles prosecuted under sec. 48.36 (2) (b) and (c) of the children's code, Stats. 1955.

March 2, 1956.

GEORGE W. PETERSON,
District Attorney,
Polk County.

You have requested an opinion on the following question :

"A question has arisen in connection with Section 48.36 (2) of Chapter 575 of the Laws of 1955, which will take effect on July 1st, 1956. In that section, no provision is made as to whether or not minors shall be compelled to pay court costs in connection with forfeiture cases. I would appreciate your opinion in that regard."

You have not stated your own opinion nor the research on which it is based as required by the rules of this office

with reference to opinion requests. However, your question is not difficult and I am therefore pleased to give you the answer.

Sec. 48.36 (2), Stats. 1955, which is a part of the new children's code provides as follows:

"(2) If a civil court finds that a child has violated a county or municipal ordinance enacted under s. 85.84, it shall dispose of the case in the following manner:

"(a) In cases of moving vehicle violations, it shall not impose a forfeiture but shall suspend the child's motor vehicle operator's license for not less than 30 days nor more than 1 year by taking immediate possession of the license and mailing it with a report of the violation to the state motor vehicle department. But s. 85.08 (29) shall not be applicable to the first such suspension unless the court so orders.

"(b) In cases of nonmoving vehicle violations, it may impose a forfeiture in accordance with the terms of the ordinance and may enforce payment of the forfeiture by suspension of the child's motor vehicle operator's license until payment is made.

"(c) In case of moving traffic violations during a period of suspension under par. (a), it may impose a forfeiture in accordance with the terms of the ordinance and may enforce payment of the forfeiture by an extension of the period of suspension for not to exceed one year, or until payment of the forfeiture."

The next section, 48.37, provides as follows:

"48.37 No costs shall be assessed against and no fines shall be imposed on any child *in the juvenile court.*"

Sec. 288.09 (1), Stats., which is in the chapter entitled "Collection of Forfeitures," provides as follows:

"288.09 (1) Where judgment is recovered pursuant to this chapter *it shall include costs* and direct that if the same be not paid the defendant (if an individual) shall be imprisoned in the county jail for a specified time, not exceeding six months, or until otherwise discharged pursuant to law. The commitment shall issue, as in ordinary criminal actions, and such defendant shall not be entitled to the liberties of the jail."

Sec. 307.01, Stats., relating to civil actions in justice court, provides in part as follows:

“307.01 Justices are entitled to the following fees and may tax the same as costs *in all actions* when applicable.”

There follows a list of justices' fees.

Sec. 307.02, Stats., provides in part as follows:

“307.02 The justice *shall* also tax the following as costs in favor of the party recovering judgment:”

There follows reference to various disbursements for fees of attorneys, officers, witnesses, jurors, etc.

The fact that sec. 48.37 above quoted prohibits the imposition of costs by the juvenile court, without mentioning the cases processed in “civil courts” and “criminal courts,” shows that the question of costs was considered by the draftsmen and by the legislature, and that costs in cases not processed in juvenile court were left to be determined according to general rules of law. *Expressio unius est exclusio alterius*.

It will be observed that under sec. 48.36 (2) (a) no forfeiture shall be imposed on a child under 18 for a moving vehicle violation, except that under par. (c) a forfeiture may be imposed for such a violation if committed during a period when the child's operator's license was suspended. Under par. (b) the court may impose a forfeiture for a nonmoving violation.

Sec. 288.09 requires the judgment for a forfeiture “recovered pursuant to this chapter” to include costs. It follows that if the court imposes a forfeiture in cases coming under sec. 48.36 (2) (b) and (c), it is required by sec. 288.09 (1) to add the costs to the amount of the judgment.

But even in cases under sec. 48.36 (2) (a), where the court is prohibited from imposing a forfeiture, costs should be taxed against the offender in connection with the judgment suspending his motor vehicle operator's license. Such a case is clearly within secs. 307.01 and 307.02, Stats., quoted above.

The judgment for costs in such case may not be worth much unless the child or his parent or a friend is willing to pay it. But it should be entered and docketed the same as any other money judgment and eventually it may be collectible by execution or garnishment.

The foregoing reasoning necessarily raises another question which you have not asked but which may well be disposed of here. Sec. 288.09 (1) requires, in addition to costs, that the court sentence the defendant to imprisonment in the county jail for a period not exceeding 6 months for nonpayment of the forfeiture, the same as in criminal cases where a fine is imposed. The question is whether the court imposing a forfeiture on a child pursuant to sec. 48.36 (2) (b) or (c) is authorized or required to impose a jail sentence for nonpayment of the forfeiture. Both of those paragraphs provide for enforcement of the forfeiture by suspension of the child's motor vehicle operator's license until payment is made, and it appears that that method of enforcement in the case of children was intended to be exclusive and to eliminate enforcement by a body execution effected by sentence to a period of imprisonment.

The new statute does not make this as clear as it perhaps might have. However, a note to bill 444, S., which created the new children's code states with reference to sec. 48.36 (2) (b): "In regard to nonmoving vehicle violations, there is no change in the disposition of the case by the civil court * * *." Sec. 48.01 (5) (ar), Stats. 1953, provides as follows:

"(ar) Except in counties having a population of 500,000 or more courts of civil jurisdiction shall have concurrent jurisdiction with the juvenile court in proceedings against children under 18 years for forfeitures for violations of county or municipal ordinances enacted in conformity with section 85.84, *provided that the sole penalty in civil court for nonpayment of any forfeiture shall be suspension of the child's driver's license* which the court is hereby empowered to decree. Such suspension shall not be stayed during the pendency of any appeal."

Since the statute just quoted made it clear that the suspension of the driver's license was the sole method of enforcement of the forfeiture and the bill creating the new statute contains a note indicating that no change is intended, the new statute must be given a similar construction. See *George Williams College v. Williams Bay*, (1943) 242 Wis. 311, 315-316, 7 N.W. 2d 891.

WAP

Civil Service—Veterans—In order to qualify for a veteran's preference under sec. 16.18 (1), Stats., a veteran's service must have occurred during the period from December 7, 1941, to December 31, 1946, or within the period from June 27, 1950, to July 27, 1953.

March 13, 1956.

BUREAU OF PERSONNEL.

You have asked whether it is the intent of sec. 16.18 (1), Stats., that a preference be granted to all honorably discharged veterans who were in service on and subsequent to December 7, 1941, or whether there are specific dates between which a veteran must have served to qualify for a veteran's preference.

Your question is raised by the language of sec. 16.18 (1), which reads in part:

“* * * a preference shall be given in favor of veterans of any of the wars of the United States. * * *”

The answer to the question is reached by determining during which periods subsequent to December 7, 1941, there was in existence a “war of the United States.”

The meaning of the term “wars of the United States” as it is used in this section can be gleaned from an examination of the cases which sought to determine the period of World War I under civil service statutes which employed similar language. The weight of authority is that World War I terminated with the cessation of hostilities on November 11, 1918, rather than with the ratification of the peace treaty in 1921. In *Scott v. Comm. of Civil Service*, (Mass. 1930) 172 N.E. 218, the court gave as its reasons for holding that World War I ended with the armistice, under a statute granting a preference to those who served “in time of war or insurrection,” that it was generally recognized that the war ended at that time, that the president and governor both had made statements to that effect which were to be accorded great weight, and that there were extrinsic aids to that conclusion from the Bonus Act and the Military Aid Act which treated the war terminated by the armistice. Thus the court indicated that the term of the

war, for the purposes of the statute is co-extensive with the period of hostilities, and that the time of the ending of hostilities is to be determined by looking to the enumerated points. This conclusion is borne out by *Zinno v. Marsh*, (N.Y. Sup. Ct. 1942) 36 N.Y.S. 2d 866, which, in following the *Scott* case added that the preference is for those who risked their lives in wartime and should not be extended to those who served in peacetime.

With regard to World War II, the final agreement to end hostilities with an enemy was signed on September 2, 1945. However, the hostilities which mark the period of a war may continue after agreements to end hostilities are signed just as they may close before treaties of peace are signed. In the final analysis the question of when hostilities ended is one of fact; and in the case of World War II it is indicated that hostilities continued until December 31, 1946, by the fact that it was not until that date that the president of the United States proclaimed the cessation of hostilities.

This presidential proclamation was held to mark the termination of World War II in *Burger v. Employees' Retirement System*, (Cal. 1951) 226 P. 2d 38. This case, in construing a suspension of a portion of the San Francisco city charter for a period until "6 months after termination of said war," held that the termination occurred with the "termination of hostilities" on December 31, 1946, *per* the presidential proclamation, and cited the cases holding that World War I ended November 11, 1918, *Scott v. Comm.*, and *Zinno v. Marsh, supra*.

Further extrinsic aids to the conclusion that the presidential proclamation of December 31, 1946, determined the cessation of hostilities marking the period of World War II, may be found in 38 U.S.C.A., §704, wherein congress has provided that the president prescribe the date of the beginning and termination of wars, service within which shall be deemed "wartime" service for the purpose of pension provisions of the act; and in 38 U.S.C.A., Ch. 12A, Reg. No. 10, part IV, which provides that the term "veteran of any war," with regard to World War II, shall include any person who served before "the termination of hostilities in the present war as determined by proclama-

tion of the President or by concurrent resolution of the Congress." The congress thus provided that the president make the factual determination of the end of hostilities in World War II.

On June 27, 1950, the president of the United States, pursuant to the United Nations Security Council's calling upon its members to take military action, ordered the United States air force and navy to give cover to the South Korean army, and July 1 found United States troops in Korea. In the subsequent conflict, this country committed vast numbers of men and great amounts of its goods to battle against the armies of North Korea and Communist China.

The early cases on the question of whether the "Korean action" constituted a war disclose a conflict arising from the fact that, although the commitment of men and resources and consequent casualties were on a scale comparable to the efforts expended in a formally declared war, and though the popular concept of a war was fulfilled, *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420, and *Stanbery v. Aetna Life Ins. Co.*, 98 A. 2d 134, there was no declaration of war by congress to give official status to the situation. I believe that the conflict between the actual extent of our commitment, together with the recognition in the public mind of the fact of war, and the need for an official declaration of war by congress was resolved in *Western Reserve Life Ins. Co. v. Meadows*, (1952) 261 S.W. 2d 554, in which it was held that congress had in fact recognized the existence of a state of war by its acts, citing the Mutual Security Act of 1951, the draft, the increase of defense appropriations, the Servicemen's Indemnity Act, and the extension of the G.I. Bill; and that, if legislative sanction be necessary to constitute a conflict as a technical or legal war the referred to acts of congress gave the sanction to constitute the Korean action a technical or legal war.

The "Korean War" then is to be considered a "war of the United States," and its duration as determined by the criterion of the duration of actual hostilities, embraces the period from June 27, 1950, to July 27, 1953, on which date the truce ending hostilities was signed.

Accordingly, in order to qualify for a veteran's preference under sec. 16.18 (1), Stats., a veteran's service must have occurred during the period from December 7, 1941, to December 31, 1946, or within the period from June 27, 1950, to July 27, 1953.

SGH

Appropriations and Expenditures — State Board of Health — In-Service Training — Appropriations to state board of health under sec. 20.410 (1), Stats., and sec. 20.410 (42), Stats., are broad enough to cover expenditure for instruction of hotel and restaurant division personnel and their supervisor, as well as of sanitarians in division of environmental sanitation, at 5-day university of Wisconsin extension division instruction course in matters relating to the discharge of their duties.

March 23, 1956.

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

You have inquired whether the payment of registration fees by the state board of health for instruction of employes and for travel expense of out-of-town employes is permissible under the state board of health appropriation statutes.

The course or institute in question extends over a 5-day period and is given by the university of Wisconsin extension division at Madison. The following topics are to be covered along with others:

Monday, April 2, 1956

10:30 The Changing Role of the Sanitarian

Walter F. Snyder

Executive Director

The National Sanitation Foundation

11:00 Review of Basic Wisconsin Food and Drink
Sanitation Laws

Douglas Milsap

State Department of Agriculture

- 1:00 The Nature of Diseases Caused by Micro-organisms
Dr. Milton B. Feig
State Board of Health
- 2:00 Principles of Disinfection and Their Applications
William B. Sarles
Professor of Bacteriology
University of Wisconsin
- 3:20 Disinfection as Applied to Water Supplies and Sewage Treatment
G. A. Rohlich
Professor of Civil Engineering
University of Wisconsin

Tuesday, April 3, 1956

- 8:30 General Food Sanitation
E. M. Foster
Professor of Bacteriology
University of Wisconsin
- 10:00 Sanitation in Meat Processing, Handling and Marketing
John Eckstein
Sanitary Engineer
Oscar Mayer
- 11:00 Fish and Fowl Sanitation
Beatrice Donaldson
Professor of Home Economics
University of Wisconsin
- 1:30 Milkbourne Diseases
C. K. Luchterhand
Milk Sanitarian
State Board of Health
- 3:00 Cleaning and Sanitizing Milk Equipment—New Sanitation Methods
Myron Dean
Professor of Dairy and Food Industries
University of Wisconsin

Wednesday, April 4, 1956

8:30 Sanitation in Food Service Operations

W. L. Mallmann

Professor of Bacteriology

Michigan State University

10:00 Demonstration of Sanitizing Solutions

1:30 General Ventilation

Dr. William Lea

State Board of Health

2:45 Principles of Local Exhaust Ventilation

Edward Otterson

State Board of Health

3:45 Calculation of Ventilation Requirements

Thursday, April 5, 1956

10:15 Sanitation in Public Areas

1:30 Control and Inspection of Swimming Pools

Dr. M. Starr Nichols

State Laboratory of Hygiene

3:00 Public Relations in Public Health

R. E. Sullivan

Chairman Commerce Dept.

University Extension Division

The charge for the instruction amounts to \$5 per day per person and the following voucher has been submitted:

“Section 20.410 (1) General Administration -----	\$ 75.00
Section 20.410 (42) Hotel & Restaurant Division -----	450.00
Total -----	<u><u>\$525.00”</u></u>

This covers the registration of 21 persons, 18 of whom are sanitarians or inspectors for the hotel and restaurant division of the state board of health. Two of the men are new employes of the division of environmental sanitation

of the state board of health and the other man is a personnel officer of the state board of health in charge of supervision of the hotel and restaurant division.

Sec. 20.410 (1), Stats., makes a general administration appropriation to the state board of health "for administration of its functions" among other things.

Sec. 20.410 (42), Stats., is a revolving appropriation of 88 per cent of all moneys received by the state board of health under the provisions of chs. 145, 156, 158, 159, and 160 to be used for the purposes provided in those chapters. Ch. 160 is the hotel and restaurant chapter. Its administration is under the state board of health and it contains provisions for issuance of hotel and restaurant permits upon payment of annual fees:

Sec. 160.05 provides:

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

Sec. 160.06 provides:

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

Sec. 160.21 provides that the board may refuse or withhold issuance of a permit or may suspend or revoke a permit for violation of any provisions of ch. 160 or any rule, regulation, or order of the board.

Numerous rules and orders for the sanitary operation of hotels and restaurants have been adopted by the board under sec. 160.05, and obviously a trained field force is necessary to pass upon the facilities of applicants for permits, to supervise the enforcement of the rules and regulations,

and to make the investigations incidental to permit suspension or revocation.

Today it is a standard practice in employment generally to provide some sort of instruction as to duties at the outset of the employment as well as in-service training subsequent thereto.

Presumably no question is raised as to the right of any state agency to train its own personnel, and the fact that the training is delegated to a qualified instructional agency such as the extension division of the university of Wisconsin involves no deviation from the basic principle involved.

Recently this office rendered an exhaustive opinion on the use of public funds by counties in paying membership dues of the county in associations devoted to in-service training of county officers. See 45 O.A.G. 51, opinion of February 8, 1956, to District Attorney Meisner of Dunn county. A copy is herewith enclosed.

A considerable body of case law was reviewed in this opinion. Some courts have adhered to the view that a public officer or employe is presumed to be qualified for his position and that, therefore, expenditures for further training cannot be made from public funds. However, this view has now been pretty well exploded, and the clear majority of the courts supports the view that such expenditures are legal.

It must be remembered that the sole purpose of the state board of health and its restaurant and hotel division is to protect the public health. If at all possible the statutes ought not to be so construed as to deprive the public of the protection which can be afforded by proper instruction of restaurant and hotel inspectors on the latest techniques and controls in sanitation. The responsibility which the legislature has placed upon the state board of health in protecting the public health in restaurants and hotels should be held to include all those duties which fairly lie within the scope of the protection intended to be afforded and which are essential to the accomplishment of the obvious objectives of ch. 160. See 43 Am. Jur., Public Officers, §250.

The primary responsibility in exercising the discretion as to how ch. 160 can be most effectively administered rests with the state board of health, and the statutory words in

the appropriation made by sec. 20.410 (1) "for administration and execution of its functions" and in sec. 20.410 (42) "for the purposes provided in said chapters" (including ch. 160) are not to be broken down into items which are not specifically mentioned. The language is necessarily broad and includes everything reasonably incidental and germane to the accomplishment of the public health purposes heretofore mentioned.

This is not to say or imply that the appropriations are open to all expenses which might be incurred by any unreasonable or far-stretched flights of imagination. There is always the possibility of attempted abuse of discretion by any agency which has an appropriation for administration of its functions. For example, an agency might put through a voucher for ten new typewriters when it needs only one or more.

It is not the function of the department of budget and accounts to supplant the judgment of an agency which spends its appropriation unwisely as long as the expenditure is of a character falling reasonably within the scope of its functions, and in this case we are certainly not in a position to characterize the proposed expenditure as either unwise or illegal.

It is one thing to provide instruction in matters directly relating to the duties of employes and quite a different thing to provide an extended course of graduate instruction leading to a higher academic degree primarily for the benefit of the individual and helpful only indirectly in the discharge of his duties. Conceivable borderline situations of a doubtful character might arise but such does not appear to be the case here.

So far as we are able to determine, the training to be offered here is directly related to and reasonably essential to the proper discharge of the duties of the persons directed to attend the courses, and it is our conclusion that the requisitions may be properly honored and travel expense may be allowed for those compelled to travel from another city to attend such institute.

WHR

Schools and School Districts—High School Tuition Claims—Statutes—Prospective or Retrospective Operation—Ch. 552, Laws 1955, providing that audit statements accompany claims for nonresident high school tuition and transportation under sec. 40.91 (4), Stats., is inapplicable to claims filed prior to its effective date of August 12, 1955. As applicable to claims filed thereafter, it is construed as not requiring such accompanying audit statement unless the county clerk's request is made or the taxpayers' petition filed prior to the filing of the school district claim.

March 27, 1956.

WARD WINTON,
District Attorney,
Washburn County.

Two school districts filed claims with your county clerk pursuant to sec. 40.91 (4), Stats., for nonresident high school tuition for the school year 1954-1955, one on August 1, 1955 and the other prior thereto. Upon reference thereof to the county school committee, they were returned to the county clerk without any action thereon on the basis that ch. 414, Laws 1955, was in effect and had deleted from sec. 40.91, Stats., the previously existing provisions imposing a \$6 per week maximum and requiring approval of such committee for the allowance of any amount in excess thereof. On November 6, 1955, after the county clerk had apportioned such claims and certified the amounts to the clerks of the municipalities, a petition for an audit in respect to such claims was filed with the county clerk by more than 10 taxpayers of the county. Notice thereof was then given to each of the school districts and the county clerk was advised by one of the districts that it would be impossible to have the audit made so as to file a certified statement on January 1, 1956, and none was filed by such date.

You first ask whether ch. 414, Laws 1955, which amended sec. 40.91 (4) (a) and (5) (a), Stats., by deleting both the ceiling on nonresident high school tuition claims and the provision for approval by the county school committee of amounts in excess thereof, is applicable to claims for tui-

tion for the school year 1954-1955 and particularly the two claims filed with your county clerk as stated above.

Said ch. 414, Laws 1955, was published July 22, 1955 and under the provisions of sec. 370.05, Stats., it took effect the following day. Under the language of sec. 40.91 (4) (b), Stats., school districts have until August 1, 1955 in which to file their claims. As the provisions existed prior to said ch. 414, the county school committee would wait until August 1 to meet to pass on any claims in excess of the ceiling limitation. It was required to do so not later than August 15. By those dates there was no longer in existence any statutory provision authorizing a county school committee to act in respect to claims for nonresident high school tuition because when it took effect on July 23, 1955, ch. 414 operated immediately to remove from the statutes the pre-existing ceiling limitation and the provision for approval by the county school committee. Therefore, in our opinion, claims for the school year 1954-1955, which would include the two claims filed with your county clerk, are not subject to any ceiling limitation or to any approval by the county school committee.

You next ask whether ch. 552, Laws 1955, which inserted in sec. 40.91 (4) (b), Stats., provisions that in specified circumstances claims for nonresident high school tuition and transportation must be supported by a certified statement that an audit has been made of the costs upon which the claims are based, is applicable to claims for the school year 1954-1955. Said ch. 552, amended sec. 40.91 (4) (b) as follows:

“40.91 (4) (b) Before August 1 in each year, beginning with the year 1947, the school clerk shall file with the clerk of each county and municipality from which any tuition pupil was admitted, a sworn statement of claim against the county setting forth the residence, name, age, date of entrance and the number of weeks attendance, during the preceding school year, of each person admitted from such county, the average daily attendance of the high school for the year, the statement of the cost of operation and maintenance of the high school as computed in accordance with this section, the amount of tuition to which the district lays claim for each pupil, and the aggregate sum for tuition due the district from the county. This statement shall be ren-

dered on a form prescribed by the state superintendent. *Whenever the total claim for tuition and transportation made by any school district exceeds \$7,000 and request is made by the county clerk or upon petition of 10 taxpayers of the county filed with the county clerk, the claim to each county must be accompanied by a certified statement that an audit has been prepared by a certified public accountant or other qualified accountant showing that the true and accurate costs on which the claims are based are as set forth in the statement. If the audit report cannot be completed by August 1, it shall be filed with the county clerk not later than the next January 1, and the county clerk shall make necessary adjustments for the claims of the school in the subsequent year. Within 10 days of the receipt of such statement the clerk of each municipality receiving the same shall make return to the county clerk of any suggested corrections therein together with all necessary factual information in support of such corrections."*

It is suggested that upon the basis of *State ex rel. Prahlow v. Milwaukee*, (1947) 251 Wis. 521, 30 N.W. 2d 260, this amendment by ch. 552 should be given applicability to claims for the school year 1954-1955. However, in that instance there was language in the enacted provisions there involved which expressly made them applicable to the filing of claims in the year of the enactment. While by the time it was published late in August, 1947, some of the dates specified therein for things to be done had already passed, the use of the words "beginning with the year 1947" in the body of the amendment was held to constitute a clear and inescapable statement by the legislature that such provisions were intended to apply to that year. In the present instance there is nothing in ch. 552 or in the amendatory language that is at all comparable or in any way constitutes a clear expression of legislative intent that the provisions thereof shall apply to claims filed in 1955 for the school year 1954-1955.

As there is nothing stated in ch. 552 respecting when the new requirements thereby imposed shall be applicable, the legislative intent in that regard is to be deduced from the context. The rule is that legislative acts are to be given prospective operation only, unless there is a clear indication by the legislature otherwise. Under the provisions of sec.

370.05, Stats., ch. 552 did not take effect until on August 12, 1955, the day following its publication.

The amendment made by ch. 552 did nothing in respect to the provision in sec. 40.91 (4) (b) that the claims shall be filed "before August 1 in each year." Thus this provision is retained and continued in the amended statute as the legislative prescription respecting the time for the filing of claims. However, the amended language provides that in certain circumstances a claim "must be *accompanied* by a certified statement" as to an audit of the costs upon which the claim is based. The word "accompany" means along with, or to occur in association with something. Thus, the effect of the amendatory language is that when prescribed circumstances exist which require that an audit statement accompany a claim, the filing of a claim will not be met by merely presenting just the verified claim itself, but also either the specified certified statement of an audit or one that the audit cannot be completed by August 1, must accompany the claim and be filed with it. Yet, when school districts by filing their claims by August 1, 1955 for the school year 1954-1955, complied with this retained legislative prescription as to the time for filing claims, there existed no provision that the filing of a claim include an accompanying statement respecting an audit.

Accordingly, as of August 1, 1955, all claims then filed were in conformity with the time prescription of the statute and all other provisions thereof then existing. A school district having so filed its claim had done everything that was required of it and there was a completed filing of its claim. To attempt to apply ch. 552 to such a claim would require according to it a meaning that upon its taking effect on August 12, 1955, a requirement would be imposed that, should thereafter the county clerk request or taxpayers petition for a certified audit statement, such claims would be disallowed unless thereafter either the specified certified statement of an audit or one that such audit could not be completed by August 1 (which date had already passed) were filed with the county clerk. But this is not what the amendment states. It does not provide that whenever a county clerk makes a request or a taxpayers' petition is filed, a statement respecting an audit shall be furnished to

the county clerk, and if not, the claim shall be disallowed. What the statute as amended provides is that the statement respecting the audit shall "accompany" the claim.

Furthermore, under the language of the amendment every claim is not required to be "accompanied by" a statement respecting audit. It is only when a request is made by the county clerk or a petition of 10 taxpayers is filed with the county clerk that a claim "must be accompanied by" a statement relating to an audit. The language of the amendment is devoid of anything specific as to the time within which the county clerk shall make such request or the taxpayers' petition shall be filed. As the requirement of a statement as to an audit arises only if a request therefor is made by the county clerk or a taxpayers' petition is filed, the statutory language that the audit statement must "accompany" the claim, when read in conjunction with the retained provision that the claim shall be filed before August 1, must mean that the necessity for a school district to accompany its claim by a statement respecting an audit exist at or before the expiration of the time for the school district to file its claim. In other words, an application of this amended statute as contemplating that a request by the county clerk or the filing of a taxpayers' petition, which will require a claim to be "accompanied by" a statement respecting an audit, must be made or filed, as the case may be, in advance of, or at least not later than, August 1, the date prescribed in the statute by which claims shall be filed, gives effect to all of the provisions of the statute as amended. In the absence of such a request or petition, a school district would comply with the statute if it filed its claim by August 1 and did not accompany it with any statement respecting an audit. It would fully comply with the statute providing that it should file its claim before August 1. It would also comply with the provisions respecting a statement relative to an audit because if by then no county clerk request was made and no taxpayers' petition filed, the statutory prerequisites for accompanying the claim with such statement did not exist.

Unless the foregoing is deemed to be the legislative intent in the insertion of the language by ch. 552, there is no limitation as to when the county clerk may make his request or

a taxpayers' petition may be filed. The request could be made or the petition filed even after the county clerk had made the apportionment and certification to the municipalities as provided in sec. 40.91 (5) (a), Stats. It seems obvious from the language of the amendment that it contemplated that the request must be made or the petition filed before August 1 of the year to which it relates because of the provision that if the audit report or statement, when required by either a demand of the county clerk or the filing of a taxpayers' petition, cannot be completed by August 1, the date specified in the statute for filing the claims, the certified audit statement shall be filed not later than the next January 1.

It is therefore our opinion that it was not intended by this amendment to provide for the making of a request by the county clerk or the filing of a taxpayers' petition after August 1 in respect to claims which were filed by that date, and that for such a request or petition to be operative to require that an audit statement accompany claims filed prior to August 1, such request must be made or such petition filed, as the case may be, by August 1.

Upon the basis of the opinion in 24 O.A.G. 635 and the case of *Appleton v. Outagamie County*, (1928) 197 Wis. 4, 220 N.W. 393, it would appear that the provision in sec. 40.91 (4) (b) that the claims shall be filed before August 1 in each year is directory, so that if a claim is filed thereafter that would not be fatal to its allowance. Nevertheless, when such claim is filed, if by then a request has been made by the county clerk or a taxpayers' petition filed for the accompaniment of such claim by an audit statement, there would then arise a necessity that in filing such claim it be so accompanied by the required statement. Notwithstanding that the school district had not filed its claim by August 1, it had a continuing duty to do so all the time from that date up to the time of actual filing. On the same basis as our conclusion as respects claims filed by August 1, any request or taxpayers' petition to be applicable and require that such a statement accompany a claim filed on or after August 1 would likewise have to be made or filed, as the case might be, prior to the actual filing of such claim.

In this last connection, even though the provisions for filing claims before August 1 in each year may be directory, it would seem quite clear that a claim would not be timely if filed on or after August 1 unless filed prior to the making of the apportionment and certifications by the county clerk pursuant to sec. 40.91 (5) (a). If filed after that time, it would be too late to be included in the apportionment. Accordingly, as the taxpayers' petition in your case was not made until after your county clerk had made the 1955 apportionment and certifications to the local municipalities under sec. 40.91 (5) (a), it is our opinion that the amendment by ch. 552 is inapplicable to the two claims filed so as to require an audit statement in respect to either of them because such petition was not filed prior to the filing of the claims.

It is therefore our opinion that ch. 552, Laws 1955, is not applicable to nonresident high school tuition and transportation claims for the school year 1954-1955 which were filed prior to its effective date of August 12, 1955, which would, of course, include claims filed before August 1, 1955. Had the legislature intended, as in the case of the 1947 amendment involved in *State ex rel. Prahlow v. Milwaukee*, *supra*, that if ch. 552 might not become effective in time to be operative as to claims filed before August 1, 1955, the date retained in the amendment for school districts to file their claims, and as to other claims filed prior to the date on which it might take effect, specific language should have been included in the amendment to make it applicable to previously filed claims. Since this was not done, the effectiveness of the amendment must be taken as applicable only to claims filed after the amendment took effect.

HHP

Criminal Law—Insane—Parole—Sec. 51.21 (6), Stats., does not authorize parole of persons committed pursuant to ch. 51, Stats., or of persons removed to central or Winnebago state hospital pursuant to sec. 51.21 (3) (a), Stats.

Sec. 51.21 (6) authorizes parole of persons committed to central or Winnebago state hospital pursuant to secs. 357.11 or 357.13, Stats, within the state.

Persons committed to central or Winnebago state hospital pursuant to secs. 357.11 or 357.13 cannot be paroled for supervision without the state under sec. 51.21 (6).

March 29, 1956.

WILBUR J. SCHMIDT, *Director,*
State Department of Public Welfare.

Your department has requested an opinion as to whether parole may be granted for supervision within or without the state under sec. 51.21 (6), Stats., with regard to the following classes of inmates: (1) Patients not charged with crime or sentenced, but held only pursuant to ch. 51, Stats.; (2) persons held under secs. 357.11 or 357.13, Stats.; and (3) prisoners under sentence but removed to central or Winnebago state hospital under sec. 51.21 (3) (a), Stats.

Sec. 51.21 (6) provides as follows:

“If in the judgment of the superintendent of the central or Winnebago state hospital or the Milwaukee county hospital for mental diseases any person committed under s. 357.11 or 357.13 is not in such condition as warrants his return to the court but is in a condition to be paroled under supervision, the superintendent shall report to the department and the committing court his reasons for his judgment. If the court does not file objection to the parole within 60 days of the date of the report, the superintendent may, with the approval of the department, parole him to a legal guardian or other person, subject to the rules and regulations of the department.”

You will notice that the provisions of this section relate only to “any person committed under s. 357.11 or 357.13,” making no reference to persons not charged with a crime and committed pursuant to ch. 51, or to persons under sentence but removed under sec. 51.21 (3) (a), Stats. It follows that sec. 51.21 (6) is applicable only to persons com-

mitted pursuant to secs. 357.11 or 357.13, Stats., and the answer to questions (1) and (3) is therefore "No." Release and parole of persons confined pursuant to the provisions referred to in your questions (1) and (3) are governed by other provisions of the statutes. See for example, secs. 51.13 (1), (2), 51.21 (3) (e), (4), and 51.22 (4).

Your second question is whether persons committed pursuant to secs. 357.11 or 357.13, Stats., can be paroled within or without the state pursuant to sec. 51.21 (6).

Sec. 51.21 (6) specifically applies to persons committed pursuant to secs. 357.11 or 357.13, and there is no question but that such persons can be paroled upon the conditions specified in sec. 51.21 (6) within the state. Such persons, however, cannot be paroled outside of the state.

Sec. 357.11 provides the procedure to be followed with respect to persons found insane at the time of the crime. It requires that if such person is found insane at such time the defendant must be committed to the central state hospital or an institution designated by the department of public welfare, "*there to be detained until discharged in accordance with the law.*" Sec. 357.11 (3). The defendant may thereafter apply to the committing court for reexamination, and no such person can be discharged unless the committing court finds him sane and mentally responsible and finds as well that the defendant is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for the insanity or mental irresponsibility would be crimes. Sec. 357.11 (4).

Sec. 357.13 provides the procedure to be followed where the accused is insane at the time of the trial, and requires that if found insane he be committed to central state hospital or other institution designated by the department of public welfare and his trial indefinitely postponed. He may apply for reexamination, and upon recovery he is to be remanded to the custody of the sheriff for further proceedings in the case. He cannot be discharged except upon the order of the court which committed him. Sec. 357.13 (2), (3), (4).

The legislature has thus made it crystal clear that the jurisdiction of the committing court is to be preserved over persons found insane pursuant to secs. 357.11 and 357.13,

Stats., and that such persons can be finally discharged only upon the approval of such court. See 27 O.A.G. 229. The legislative policy in this respect has been expressed in 35 O.A.G. 322, 323, as follows:

“* * * To permit the transfer of the criminal insane to hospitals outside of and not subject to the laws of this state or the jurisdiction of its courts would be a most radical departure from the long established policy of the state.”

And see, 37 O.A.G. 531.

While sec. 51.21 (6) authorizes parole of persons adjudged insane pursuant to secs. 357.11 and 357.13, control of the committing court is preserved here also by providing for notice to such court of intention to parole and giving the court the power to overrule any such intended parole. It is of significance that prior to 1947 the department of public welfare was vested with the final decision and was authorized to grant parole, even though the committing court objected. Sec. 51.234, Stats. 1945. This power of final decision in the department was withdrawn by amendment (ch. 485, Laws 1947) and the final decision whether such person should be paroled vested in the court, if the court determines to exercise its veto. By this amendment the legislative policy of preserving the jurisdiction of the committing court over persons adjudged insane pursuant to secs. 357.11 and 357.13 is positively demonstrated.

Parole of a person adjudged insane pursuant to sec. 357.11 or 357.13, without the state, would be a practical surrender of jurisdiction over such person. The jurisdiction of the committing court runs only to the territorial limits of the state. The rules and regulations of the department of public welfare, to which such parolee is required to be subject, have no effect beyond state boundaries.

The provisions of ch. 57, Stats., relating to probation and parole, and specifically sec. 57.13, relating to out-of-state parole, have no application to parole under sec. 51.21 (6), Stats.

Consequently, parole without the state under sec. 51.21 (6) would result in a practical loss of jurisdiction over the person and is therefore unauthorized.

While ch. 365, Stats. (extradition for persons of unsound mind), may provide a means for the return to this state of persons paroled for supervision without the state pursuant to sec. 51.21 (6), that chapter is not regarded as authorizing such parole. Ch. 365 is remedial and cannot be regarded as effecting a substantive amendment to secs. 357.11, 357.13 and 51.21 (6).

WAP

Civil Defense — Public Officers — Compatibility — Sec. 21.02, Stats., the state civil defense law, considered as it relates to mutual aid contracts between counties and municipalities and the compatibility of the offices of county coordinator and municipal civil defense director. Sec. 66.30, Stats., discussed.

March 30, 1956.

RICHARD W. BARDWELL,
District Attorney,
Dane County.

You point out that prior to the revision of the state civil defense law (sec. 21.02 of the statutes) by ch. 377, Laws 1955, the city of Madison entered into an agreement with Dane county relative to civil defense.

The essence of this agreement is that the city and county will maintain a joint office, headed by a "director of civil defense" and share equally in amounts expended for salary of necessary personnel and the cost of supplies. This contract states that it was entered into pursuant to secs. 66.30 and 21.024 (4), Wis. Stats. Sec. 66.30 is found in the general provisions of municipal law and states that any city, village, town, county, or school district may, by appropriate action, enter into an agreement with any other such governmental unit or units or with the state or any department or agency thereof for the joint or cooperative 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. Sec. 21.024 (4), as it existed

prior to ch. 377, Laws 1955, provided that local organizations for civil defense could be organized by any town, city, or village and that each local organization should have a director responsible for the organization, administration, and operation of the local organization for civil defense, subject to the direction and control of the chief municipal officer or governing body. It further provided that every "political subdivision" of the state by action of its governing body could contract with other political subdivisions of this state or any bordering state for the giving or receiving of services in civil defense matters. The 1955 act allows "municipalities and counties" to contract for civil defense services. The term "political subdivision" is no longer used.

One of the chief changes in the civil defense law of 1955 is to require that each county board appoint a "county co-ordinator" who shall "co-ordinate all civil defense matters within the county and shall have the duty of integrating with the state plan the facilities contained within the county and the facilities of the county government and who shall co-ordinate the local civil defense organizations with respect to the integration of those functions of such local civil defense organizations with the state plan and shall assist and co-operate in providing such integration." In the present civil defense law a "'municipality' * * * shall include a town, city or village unless the context shall plainly indicate otherwise."

You ask as follows: Under the new civil defense statute, sec. 21.02, may one person act in the dual capacity of county co-ordinator and municipal director of civil defense?

In answer to your first question, I wish to point out that the county co-ordinator and the municipal director have separate jobs to do. Further, the county co-ordinator is responsible to the county board, while the municipal director is subject to the control of the chief executive and governing body of the municipality. The framework of our state government has been used by the legislature in setting up the civil defense authority so that the county co-ordinator is the chief civil defense officer in the county. It appears doubtful that the legislature ever intended to have a complete chain of absolute command as is used in the organizations of the military. Apparently it chose to rely

on cooperation between the county co-ordinator and the municipal directors in securing a civil defense plan. Nevertheless, the county co-ordinator is superior in his position to that of a municipal director. I point out that a situation could easily develop where a county co-ordinator could adopt a plan that would favor the municipality that also retained him as municipal director. It can also be said here that the consolidation of the two offices reduces the number of persons responsible for the civil defense affairs of the state. The statutes above cited pertaining to agreements between the municipalities and the counties are not applicable here because they are general in their terms and cannot be said to authorize plans which would upset the overall framework of the state organization of civil defense.

The rule as to incompatibility of public offices is stated in McQuillin, *Municipal Corporations*, Vol. 3, §12.67, p. 265, as follows:

“Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.
* * *”

In the case of *State v. Jones*, (1907) 130 Wis. 572, 575-576, our court said:

“* * * The consolidation in one person of the offices of county judge and justice of the peace diminishes the number of examining magistrates by one. There is some conflict in the instances mentioned by the learned circuit court between the duties of county judge and those of justice of the peace. It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. [citing cases] * * *”

The compatibility of public offices is a matter for judicial determination and therefore my opinion can in no way be conclusive, but based upon the foregoing considerations, I

believe that the offices of county co-ordinator and municipal director of civil defense are incompatible.

Your second question is as follows: May Dane county and the city of Madison continue to operate a joint civil defense facility through the present contract under the language of sec. 21.02 (3) (g), Stats.?

This section, as stated above, allows contracts between municipalities and counties for the giving or receiving of services, or both, in civil defense matters. It is my opinion that your contract goes beyond the giving and receiving of services in that it purports to set up a single office under one director, controlled by a joint civil defense committee composed of members of the common council of the city and the county board of supervisors. The city is required by statute to have a civil defense director under the control of the city government and its chief executive officer. The county is required to have a county co-ordinator who is appointed by the county board. Since, as pointed out above, I believe these two offices to be incompatible, it would be improper for the county and city to attempt to combine the two offices and it would also be improper to attempt to control them through a joint committee since this is contrary to statute.

REB

Counties — Wisconsin General Hospital — Recovery of Charges for Care and Maintenance—County (with exception of Milwaukee county) may not recover from patient sent to Wisconsin general hospital under ch. 142, Stats., or from his responsible relatives, the net cost to the county of such hospital care and maintenance. Under sec. 46.10 (1) and (2), Stats., state department of public welfare is sole collecting agency.

Contract by patient with county for reimbursement of county is unenforceable for lack of consideration.

Towns, cities, and villages may not legally contract with county to accept charge-backs by county for hospitalization under ch. 142.

March 30, 1956.

HARRY E. WHITE,
District Attorney,
Marinette County.

You have asked the following questions:

1. May a county recover from a patient sent to Wisconsin general hospital under ch. 142, Stats., or from his responsible relatives, the net cost to the county of such hospital care and maintenance: (a) Where the patient comes within the county quota as fixed by sec. 142.04, Stats.; (b) where the patient is one of those in excess of the county quota as fixed by sec. 142.04?

2. If a county has a right to recover in either or both of the above situations, may it institute its own action to recover such cost or is that authority vested exclusively in the state department of public welfare?

3. If a county has no right to recover in either of the above situations, may the patient legally contract with the county to reimburse the county for such cost, or is such a contract void as being contrary to public policy?

4. May the towns, cities, and villages located within a county legally contract with the county to accept charge-backs for such hospitalization furnished to persons having legal settlement therein, or is such an agreement void as being contrary to public policy?

1. The answer to both parts of the first question is "No," except as to Milwaukee county.

As was pointed out in 32 O.A.G. 57, to which you refer, the right of recovery in matters of this nature is a statutory right. *Estate of Pelishek*, (1934) 216 Wis. 176, 256 N.W. 700. You have called attention to the fact that at the time the foregoing opinion was rendered by this office sec. 142.08 (1) contained a provision reading:

"The county board may in its own name collect from such patient the total net cost of such care, and after deducting its share of the cost of such care pay the balance so collected to the state."

This provision was repealed by ch. 268, Laws 1947, and since that time there have been no provisions in ch. 142 authorizing a county to recover from the patient all or any part of the cost to the county of the hospitalization provided by Wisconsin general hospital.

Sec. 46.10 (1), Stats., provides that liability for maintenance of patients in the institutions specified in sec. 46.10 and the collection and enforcement of such liability is governed exclusively by that section, and subsec. (2) specifically includes the Wisconsin general hospital. The department of public welfare is made the collecting agency by subsec. (2). There is an exception, however, in the case of Milwaukee county. See the last sentence of sec. 46.106 (1) and the last sentence of sec. 51.08 (1).

The repeal in 1947 of that portion of sec. 142.08 (1) quoted above, was in keeping with the philosophy that collection in welfare cases should be handled by the state, a philosophy which had already been accorded legislative acceptance in situations other than those arising under ch. 142. Note the following language taken from p. 24, *A History of the State Board of Control of Wisconsin and the State Institutions (1849-1939)*, by Bennett O. Odegard and George M. Keith:

"Previous to 1935, there was no uniform system. State institutions had no methods of making investigations of the ability of the patient to pay. Patients sent to the state sanatorium were, it is true, admitted as full pay, part pay and no pay cases, but regular statements were not rendered.

Some counties made no effort to collect, others were unduly severe. Some people were forced to mortgage their farms or homes to pay public institution bills, while at the same time, neighbors living a mile away, across the county line, in much better financial condition, were receiving institutional care at the expense of the taxpayers. Where collections were made by the superintendent or trustee of a county institution, it was only on cases from the county operating the institution. No effort was made to collect from patients from other counties, because the institution received full cost from the state. The state had no legal right to recover any part of the more than \$2,000,000 aid given annually for the care of these patients. Surveys disclosed that hundreds of estates were being probated yearly in which the claims of the state and county for care and maintenance were never filed.

"The State Emergency Board and the Joint Finance Committee realizing these conditions and knowing the results of the collection activities in 1934, were successful in having the legislature unanimously enact Chapter 336, Laws of 1935, providing for collection from patients in county institutions. * * *"

2. The second question is predicated upon the assumption of an affirmative answer to question 1. Since both parts of that question were answered in the negative (except as to Milwaukee county, which does not concern you), there is no point in discussing the second question hypothetically.

3. As previously indicated, the entire subject of public welfare is *ex statuto* and not *ex contractu*.

If the patient wants to reimburse the county voluntarily there would be no objection, but no legally binding contract could be made to reimburse the county since such a contract would be without consideration in that the patient is already entitled under the law to whatever provisions ch. 142 contains for his benefit. It is well settled that ordinarily consideration is an essential element of a simple contract, and want or lack of consideration is an excuse for nonperformance of a promise. See 12 Am. Jur., Contracts, §72.

On the other hand, sec. 59.07 (17), Stats. 1955 (ch. 651, Laws 1955), provides that the county board shall have the power to accept donations, gifts or grants for any public governmental purpose within the powers of the county. The

powers of the board are to be broadly and liberally construed and are to be limited only by express language. See sec. 59.07 as repealed and recreated by ch. 651, Laws 1955. Hence the patient could donate the cost of his care if he so desired. The problems likely to arise in this respect will no doubt be minimal.

Also attention should be called to the fact that the proper negotiating agency on repayment of cost of care by gift or otherwise is the state department of public welfare. Sec. 46.10 (8) (c), Stats., makes it the duty of the department to investigate the financial condition and needs of patients and relatives liable for their maintenance for the purpose of ascertaining the ability of a patient or relative to make payment in whole or in part for the care of patients. See also sec. 46.10 (8) (d) and (e) as to compromise and as to agreements with responsible relatives who may be willing to assume the cost of maintenance.

Since the state department of public welfare is the legal collecting agency, as was pointed out in answering your first question, any moneys received by the county through voluntary payments made by the patient to the county would be subject to an accounting in settlements between the state and county under sec. 46.106, Stats.

4. The answer to the fourth question has already been indicated in the answer to the third question, although here there is still a further reason for a negative answer. Not only would such contracts be without consideration and hence unenforceable, but in addition thereto, towns, cities and villages lack the power to make contracts calling for the expenditure of public funds for services already provided by law. Public officials may not give away the money of the taxpayers or contract to do so. This would clearly be contrary to public policy and might subject the officers concerned to prosecution for malfeasance and injunctive proceedings by taxpayers. See 38 Am. Jur., Municipal Corporations, §399, on payment of gratuities and unmeritorious claims by a municipal corporation and §401 on giving financial aid or lending credit. See also 23 O.A.G. 439 to the effect that hospitalization under ch. 142 may not be charged back to a town.

WHR

Pharmacy—Apprenticeship—Person desiring to engage in training for registration as a pharmacist as required by sec. 151.02 (2) (a), Stats., must first register as an apprentice with the Wisconsin state board of pharmacy. Apprentice training must be supervised by a pharmacist registered by the Wisconsin board.

March 30, 1956.

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

You have requested an opinion whether experience of a candidate for licensure as a registered pharmacist, obtained in Illinois following the completion of the sophomore year in a school or college of pharmacy or a department of pharmacy of a university, without his being registered as an apprentice in Wisconsin, may be credited by your board toward the 48 months of pharmaceutical training required by sec. 151.02 (2), Stats.

Sec. 151.02 (1), Stats., provides for applications for examination for registration as pharmacists and sets certain general qualifications which all applicants must possess.

Sec. 151.02 (2) (a) provides as follows:

“(2) Every such applicant for examination and registration as pharmacist must, in addition, file with the secretary proof satisfactory to the board, of having had at least 48 months of pharmaceutical training consisting of:

“(a) Graduation from a school or college of pharmacy or a department of pharmacy of a university, which is recognized by the board and which requires for graduation at least a 4-year course. Credit for actual time of attendance at the school, college or department of pharmacy of a university shall be given on the required 48 months of pharmaceutical training; the remainder of the 48 months must be practice and experience in a retail pharmacy or drug store *under the direction and supervision of a registered pharmacist*, which practice and experience shall be predominantly work directly related to the selling of drugs, preparing and compounding of pharmaceutical preparations and physicians' prescriptions, and keeping of records and making of reports required under state and federal statutes. The said practice and experience shall include an aggregate of 12 calendar months commencing not earlier

than the close of the sophomore college year. Credit for such periods of practice and experience shall be allowed in the discretion of the board in accordance with such regulations as it may from time to time adopt. *There shall be a fee of \$1 for registration of apprentices under this subsection.*"

In the first place it must be pointed out that the foregoing statute, if looked upon as the foundation of a system of apprenticeships, is meager indeed. Much is left to inference.

The following seem to be clear:

(1) The applicant for registration must file with the secretary proof "satisfactory to the board" showing 48 months of pharmaceutical training.

(2) This proof must show satisfactory completion of a 4-year course of college or university training in the field of pharmacy. Presumably this 4-year course does not actually occupy 48 months.

(3) The time actually spent taking the 4-year course counts toward the 48 months.

(4) The balance of the 48 months consists of in-service training under the direction and supervision of a registered pharmacist. This in-service training must aggregate at least 12 months.

(5) The in-service training may not commence earlier than the close of the sophomore year of college training.

(6) The board has authority to make regulations concerning the terms on which credit will be given for in-service training.

In addition to the foregoing, it may be inferred from the last sentence of par. (a) that the law contemplates that persons taking in-service training will be registered as apprentices by the board upon the payment of a fee of \$1. Nowhere does the statute expressly say, however, that a person not registered as an apprentice cannot receive credit for time spent in in-service training, nor does it specify any qualifications for registration. Other professional registration and licensing statutes customarily provide for such matters in considerable detail. Compare secs. 156.095, 156.10, 158.09 and 159.12.

The casual reference in the pharmacy statute to registration of apprentices must be held to imply that such registration is a necessary prerequisite to one's entering upon the period of in-service training required by the statute. And it would follow as a necessary corollary that training received by one who is not registered cannot be counted. This conclusion is based upon two considerations:

First, the purpose of registering apprentices is to enable the board to know who the persons are who are preparing for registration as pharmacists and to keep a record of their progress in their training. This purpose would be defeated if persons could enter upon a period of training without first registering.

Second, sec. 151.04 (2), Stats., prohibits anyone but a registered pharmacist (or, under some circumstances, a registered assistant pharmacist) from doing the things which are required in the course of the training of the apprentice. Sec. 151.04 (2) provides as follows:

"No person shall sell, give away, barter, compound or dispense drugs, medicines or poisons, nor permit it, in a town, village or city with a population of 500 or more unless he be a registered pharmacist, nor institute nor conduct a place therefor without a registered pharmacist in charge, except that a registered assistant pharmacist may do so under the personal supervision of a registered pharmacist, and may have charge during the pharmacist's necessary absence, not to exceed 10 days. If the population is less than 500, only a registered assistant pharmacist is required."

The foregoing statute has been held to prohibit "any but registered pharmacists or assistant registered pharmacists under the personal supervision of registered pharmacists, from selling or compounding drugs." *State v. Maas*, (1944) 246 Wis. 159, 165, 16 N.W. 2d 406. It will be observed that the statute contains no exemptions for persons taking the 12-months training period required by sec. 151.02 (2) (a), which requires them to do "work directly related to the selling of drugs, preparing and compounding of pharmaceutical preparations and physicians' prescriptions" under the direction and supervision of a registered pharmacist. Since the trainees are required to do work which would otherwise be prohibited by the criminal provisions of sec.

151.04 (2), they must be taken to be impliedly exempted from those penal provisions (so long as they are working "under the direction and supervision of a registered pharmacist") and as evidence of such exemption they must be registered as apprentices.

It follows that the proper construction of the statute is that the apprentice must register with the board at the inception of his training period and that one who is not so registered cannot have his training counted toward the period required by the statute.

Your inquiry also raises the question whether the period of in-service training could be performed in Illinois. The statute requires the training to be under the direction and supervision of a "registered pharmacist." Can this mean a person registered under the laws of another state, or is it limited to pharmacists registered by the Wisconsin board? Ordinarily, a statute referring to a member of a licensed or registered profession means a person licensed or registered by the state whose statute is in question. See for example, *Brown v. Elwell*, (1875) 60 N. Y. 249 ("licensed pilot" in New York statute does not include pilot licensed by New Jersey).

Frequently statutes contain definitions making this meaning clear. Thus, sec. 990.01 (28), Stats. (sec. 370.01 (28), Stats. 1953), defines physician, surgeon and osteopath as follows:

"(28) 'Physician,' 'surgeon' or 'osteopath' means a person holding a license or certificate of registration from the state board of medical examiners."

Indeed, the dangerous drug act, sec. 151.07 (1) (f), defines "pharmacist" as follows, but the definition applies only to that section and not to the rest of ch. 151:

"'Pharmacist' means a person duly registered with the state board of pharmacy as a compounder, dispenser and supplier of drugs."

Clearly, the term "registered pharmacist" as used in sec. 151.04 (2) quoted above means a person registered by the Wisconsin board since otherwise persons registered in other states might engage in their profession in Wisconsin

without having become registered in Wisconsin either by examination or by reciprocity. It must be assumed that the legislature used the term "registered pharmacist" in the same sense in sec. 151.02 (2) (a). Therefore, the training of the applicant for registration must have been under the supervision of a person who is a registered pharmacist under the Wisconsin law, not the law of some other state.

However, this would not prevent the apprentice from taking his training in another state if the pharmacist supervising the training holds a Wisconsin registration, provided that the apprentice has duly registered with the Wisconsin board.

WAP

Dogs—Damage Claims—Owner of dog attacked by other dogs may not properly file a claim for damages under sec. 174.11, Stats.

April 3, 1956.

RAYMOND P. DOHR,
Corporation Counsel,
Outagamie County.

You have inquired whether the county board may allow a claim under sec. 174.11, Stats., for damage done to dogs by other dogs, two such claims having recently been submitted to your board, one for \$150 for the death of a beagle hound killed by a dog and one for \$43.65 for veterinarian's services in caring for bodily injuries sustained by a dog attacked by another dog or dogs.

As indicated in your letter, sec. 174.11 has been the subject of a number of opinions of the attorney general.

In 17 O.A.G. 625 it was ruled that the liability of a county for injury to domestic animals by dogs under sec. 174.11, should be confined to the domestic animals specified in subsec. (4) and that it does not include deer in a park. At that time sec. 174.11 (4) contained the following language: "The amount allowed by the county board upon any such claim shall in no case exceed one hundred dollars for each horse, mule, or bovine, or thirty dollars for each sheep, goat or swine, or three dollars for each fowl."

In 18 O.A.G. 116 the foregoing opinion was followed in ruling that rabbits were not included within the term "domestic animals" as used in sec. 174.11 (1) and the same reasoning was applied to dogs for the first time in 18 O.A.G. 207. In 22 O.A.G. 47 a similar conclusion was reached with respect to pheasants. This opinion was modified in 29 O.A.G. 357 in which it was indicated that the county would be liable in the case of pheasants raised as poultry on farms licensed for that purpose under sec. 29.574, Stats., but not as to pheasants raised for hunting on farms licensed under sec. 29.573.

In 32 O.A.G. 61 there was a change in the ruling on rabbits as previously discussed in 18 O.A.G. 116. This change resulted from the fact that by ch. 79, Laws 1939, sec. 174.11

(1) and (4) was repealed and recreated so as to drop out of subsec. (4) the specification as to particular types of domestic animals. The result was to eliminate the prior limitation on the broad general meaning of the term "domestic animals" as used in subsec. (1), and it was accordingly concluded that rabbits of the variety not found in a wild state but developed and used by man for food are domestic animals within the meaning of sec. 174.11 (1). Another significant conclusion reached in this opinion was that sec. 174.11 does not impose an absolute liability upon owners of dogs injuring domestic animals, but makes provision for payment of claims by counties for injuries to animals in cases where owners of dogs causing such injuries are otherwise liable therefor.

In 35 O.A.G. 416 it was concluded that the county board may allow a claim for damages filed under sec. 174.11 even though the assessor's record does not contain the assessed valuation of the injured animals, or any similar animals. This construction arose out of that part of sec. 174.11 (1) requiring investigation of claims. The report of the investigation made to the county clerk is to include, among other things "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 was pointed out in this opinion in support of the conclusion reached that instances could be conceived wherein there could be no valid assessment of the injured animals or any similar animals, as where the injured animals or all those of similar kind in a municipality had been acquired after the date upon which they would have been assessable for tax purposes.

This raises a question that is of considerable relevancy here, and which is not answered by merely determining whether a dog is a domestic animal under sec. 174.11. That may be conceded without solving the problem. You have cited 2 Am. Jur., Animals, §7, p. 693, to the effect that dogs are now generally considered as domestic animals. Dictionary definitions are in accord. See also 13 Words and Phrases,

Domestic Animals, under heading "Dog." *Skog v. King*, (1934) 214 Wis. 591, 254 N.W. 354, is cited to the effect that a dog is not a "domestic animal" within the meaning of sec. 174.01. However, as you point out, that decision which mentions 18 O.A.G. 207, antedated the 1939 amendment which had the effect of greatly broadening the definition of the term "domestic animal" in a way which would not now result necessarily in the exclusion of dogs from that category.

There is still a limitation on the unrestricted meaning which would otherwise now be applicable to the term "domestic animal" as used in the statute, arising out of the fact that the language of sec. 174.11 (1) referred to in 35 O.A.G. 416 mentioned above implies that the animal injured must be of a class assessable as personal property, although as pointed out in 35 O.A.G. 416 it is not necessary that the particular animal shall have been so assessed.

Dogs are not valued and assessed as personal property. Sec. 174.05, Stats., provides for a dog license tax. The license tax is collected in the same manner as personal property tax. Sec. 174.06, Stats. However, there are no assessed valuations. The license tax or fees fixed by sec. 174.05 are arbitrary and bear no relationship whatsoever to the value of the dog even though they are carried on the personal property assessment roll under sec. 174.06.

We therefore conclude, as you have concluded, that even though a dog may be a domestic animal it is nevertheless not such a domestic animal as has an assessed value for claim purposes under sec. 174.11 (1), Stats., and that the claims in question should therefore be denied. The right to an allowance under sec. 174.11 of a claim for damages caused by dogs is purely statutory, and statutes authorizing county boards to expend public funds are subject to the strictest construction. The authority must be clear and convincing before an appropriating order or resolution will be upheld. 20 C.J.S. 1115-16. See also 44 O.A.G. 14 where it was concluded that there must be strict compliance with the statute in the filing of claims under sec. 174.11 and that the county board has no authority to waive defects in a claim which does not comply with the provisions of this section.

WHR

Salaries and Wages—Counties—Board Members—Sec. 66.195, Stats., as created by ch. 66, Laws 1955, constitutes an exception to the salary limitations otherwise applicable to county board supervisors under sec. 59.03 (2) (f), Stats.

April 9, 1956.

HARRY E. WHITE,
District Attorney,
Marinette County.

You state that at the 1955 adjourned annual meeting of the Marinette county board of supervisors on March 14, 1956, a resolution was adopted, effective April 1, 1956, which increased the compensation of county board members from an \$8 per diem to a \$12 per diem.

We are asked: Does sec. 66.195, Stats., as created by ch. 66, Laws 1955, override the restrictive provisions of sec. 59.03, Stats., to the extent that it authorizes a county board to fix the per diem compensation of its members at an amount exceeding the \$8 maximum prescribed by sec. 59.03 (2) (f) ?

Sec. 59.03 (2) (f) so far as material here reads:

“Each supervisor shall be paid \$4 per day by the county for each day he attends a meeting of the board. However, any board may, at its annual meeting, by two-thirds vote of all the members, fix the compensation of the board members to be next elected at any sum not to exceed \$8 per day.
* * *”

Sec. 66.195 as created by ch. 66, Laws 1955, reads:

“EMERGENCY SALARY ADJUSTMENTS. During the period commencing February 27, 1951, and ending December 31, 1957, the governing body of any county, city, village or town may, during the term of office of any elected official whose salary is paid in whole or in part by such county, city, village or town, increase the salary of such elected official in such amount as the governing body may determine. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary, except that the exercise of such power shall be governed by s. 65.90 (5).”

While the present sec. 66.195, Stats., was created by ch. 66, Laws 1955, a former sec. 66.195 in identical wording, except as to dates, and which was later repealed, was considered in 40 O.A.G. 148 mentioned in your letter.

In that opinion we concluded that the provisions of sec. 66.195 were applicable to county board members, although, as you have pointed out, the salaries as increased by the county board resolution there considered were within the maximum set by sec. 59.03 (2) (f), and we discussed the problem of whether the salary increase adopted on April 2 was applicable to supervisors elected on April 3.

As was stated in 40 O.A.G. 148, there appears at first glance to be a conflict between sec. 59.03 (2) (f) and sec. 66.195, but we resolved the conflict by stating that the former section sets up the permanent legislative policy with respect to compensation of county supervisors, whereas the latter constitutes an exception thereto as an emergency salary adjustment provision expiring December 31, 1953, which was the date specified in sec. 66.195 as created by ch. 6, Laws 1951. The expiration date is now December 31, 1957, under the present sec. 66.195, but this does not change the reasoning expressed above in 40 O.A.G. 148 and the view there taken is still valid.

You are therefore advised that the special provisions of sec. 66.195 which constitute an exception to the general provisions of sec. 59.03 (2) (f) are controlling here and that the county board was not prohibited from raising the per diem of its members from \$8 to \$12. However, if the provisions of sec. 66.195 are not extended by the 1957 legislature the effectiveness of the resolution for the increase cannot be extended beyond December 31, 1957. Attention is also called to the fact that the exercise of such power is governed by sec. 65.90 (5), Stats.

WHR

*Counties—Salaries and Wages—Sheriffs—*Sec. 59.15 (1) (a), Stats., prohibits decrease in sheriff's compensation during his term of office, and where the ordinance establishing his compensation permits him to retain fees in civil cases, the county board may not arbitrarily and incorrectly classify county traffic ordinance violations as criminal so as to deprive the sheriff of those fees which he was entitled to retain under the salary ordinance in effect when he took office.

April 18, 1956.

MARK H. HOSKINS,
District Attorney,
Grant County.

You state that at the November 1945 meeting of the Grant county board of supervisors a resolution was adopted for compensating the sheriff on a straight salary basis. However, the sheriff was permitted to retain all fees received by him in civil cases.

Since January 1, 1951, Grant county has had a county traffic ordinance following substantially the language of ch. 85 of the statutes, except that it provides for forfeitures in case of violations instead of fines. The sheriff has been receiving and retaining fees in these proceedings upon the theory that they are civil rather than criminal in nature. *South Milwaukee v. Schantzen*, (1950) 258 Wis. 41, 44 N.W. 2d 628, and *State ex rel. Keefe v. Schmiede*, (1947) 251 Wis. 79, 28 N.W. 2d 345.

At the November 1955 meeting of the Grant county board another resolution was passed, providing that all cases in which the county proceeds for collection of forfeitures are deemed to be criminal in nature so far as the compensation of the sheriff is concerned.

You have inquired whether this latest resolution has the effect of diminishing the sheriff's compensation during his term of office contrary to sec. 59.15 (1) (a), Stats.

The resolution would appear to have such effect. Since traffic ordinance violations are civil rather than criminal in nature under the doctrine of the cases cited above, the sheriff was entitled to receive and retain the fees in con-

nection therewith on the basis that these are civil cases within the meaning of the November 1945 county board resolution.

In attempting to reduce the compensation by denominating such proceedings as criminal in nature the board has sought to diminish the compensation to which the sheriff was legally entitled when he took office. Such compensation may be increased under sec. 66.195 of the statutes as created by ch. 66, Laws 1955, but it may not be diminished by virtue of the last sentence of sec. 59.15 (1) (a) which provides in effect:

“* * * The compensation established [prior to the earliest time for filing nomination papers for any elective office to be voted on in the county] shall not be * * * diminished during the officer’s term * * *.”

WHR

Register of Deeds—Conveyances—Forms—The matter of approval by the Wisconsin state register of deeds association under sec. 235.16 (1), Stats., of forms without provision for signature of witnesses discussed.

Forms approved under sec. 235.16 (1) are limited to 60 in number.

The fact that a form is made recordable under sec. 235.16 (1) has nothing to do with the validity or legal effect of the instrument, although the association ought not to adopt forms containing clauses of questionable validity.

April 24, 1956.

WILLIAM T. BRADY,
District Attorney,
Juneau County.

You have called our attention to sec. 235.16 (1), Stats., as amended by ch. 660, Laws 1955, and which reads:

“(1) The several forms of deeds, mortgages, land contracts, assignments, satisfactions and other conveyancing instruments prepared or approved by the Wisconsin state

register of deeds association, denominated 'State of Wisconsin' forms and numbered 1 to 60, both inclusive, and filed with the secretary of state, are approved and recommended for use in the state of Wisconsin. Such forms shall be kept on file with and preserved by the secretary of state as a public record."

We are asked several questions, the first being whether or not the register of deeds association may properly approve a form which omits any provision for the signature of witnesses.

I.

The essential change effected by the amendment of sec. 235.16 (1) is that as the section formerly read it related to forms "heretofore prepared by the Wisconsin state register of deeds association" and "now on file with the secretary of state." This created a closed class of forms beyond the power of the association to amend or change as the need might arise. By changing the language to apply to forms prepared or "approved" by the association and "filed" with the secretary of state, the door has been opened for such changes in form as may occur to the association from time to time.

However, as we understand it, the purpose of the statute was to provide some uniformity in conveyances. This goes back to the days before photostating was common and it was necessary for the register of deeds to copy instruments in longhand or by the typewriter. By using standard forms the register of deeds was able to purchase and use bound volumes which had the essential parts of the instruments already printed in them, and he then had to write or type in only the descriptions, names of parties, and signatures. Hence it would seem that sec. 235.16 was not intended, despite its broad wording, to be construed as a blanket warrant of authority to be exercised by the register of deeds association in such a way as to do violence to the statutes and established legal concepts relating to conveyancing and recording.

It should be pointed out that at early common law attestation was not essential to the validity of a deed. 16 Am.

Jur., Deeds, §101. In *Slaughter v. Bernards*, (1894) 88 Wis. 111, 59 N.W. 576, it was held that the formalities of witnesses and acknowledgment are necessary only to give notice to subsequent purchasers, the deed taking effect to pass title upon its execution and delivery, and not when it is attested and acknowledged. As a matter of fact our supreme court has held valid a deed wherein the grantor was unable to sign her name but held the top of the pen while her brother mistakenly wrote his own name instead of hers. *McAbee v. Gerarden*, 187 Wis. 399, 204 N.W. 484.

The difficulties arise in determining what instruments must be witnessed in order to be recordable.

A partial answer to this question is to be found in the provisions of sec. 235.19 (13), Stats., which reads:

“ABSENCE OF SEAL OR WITNESSES. The absence of a seal or of witnesses to an instrument which is acknowledged in the manner and form provided by subsections (7) (a) to (d) and (8) to (11) shall not render the instrument unrecordable.”

There is a revisor's note at the end of sec. 235.19, Stats., reading:

“235.19 (13) (old 329.14) was not in the uniform acknowledgments act. The legislative intent in adding it by amendment when the legislature adopted the uniform act in 1943 (Am. 1-S to Bill 203-S, which became ch. 289, Laws 1943) cannot now be ascertained. The amendment now made preserves the law as it now exists. It would be better either to repeal this provision or to make it apply to all acknowledgments. (Bill 353-S)”

Let us assume for instance that an unwitnessed instrument is not acknowledged in the manner and form provided by subsections (7) (a) to (d) and (8) to (11) of sec. 235.19. Is it recordable? The answer would appear to be “No,” under the doctrine of *expressio unius est exclusio alterius*, unless an answer to the contrary can be spelled out of other statutes which we will discuss later.

Moreover, there are a number of special statutes relating to various types of conveyances which if unwitnessed may possibly be either invalid or unrecordable or both.

Sec. 60.04, Stats., relating to conveyances by a town reads:

“Whenever any real estate belonging to a town shall be sold in pursuance of any order of the town the conveyance thereof shall be executed by the town clerk in his official capacity, under his hand and seal, and such conveyance, *duly witnessed* and acknowledged, shall convey to the grantee therein named all the right, title, interest and estate which the town may then have in and to the real estate so conveyed.”

Query, is such a deed unwitnessed of any legal effect, and if not, is it recordable?

Sec. 75.14 (1), Stats., relating to tax deeds, states among other things “and such deed *duly witnessed* and acknowledged shall be presumptive evidence of the regularity of all the proceedings,” etc. If unwitnessed such a deed would carry with it no presumptions as to regularity, without our attempting to determine here whether it would be valid and recordable.

Sec. 190.11, Stats., relating to the execution and recording of railroad conveyances, provides:

“Every conveyance or lease, deed of trust, mortgage or satisfaction thereof made by any railroad corporation shall be executed and acknowledged in the manner in which conveyances of real estate by corporations are required to be to entitle the same to be recorded, and shall be recorded in the office of the secretary of state, provided such documents have plainly printed or typewritten thereon the names of the grantors, grantees, *witnesses* and notary, who shall indorse thereon his certificate, specifying the day, hour and minute of its reception and the volume and page where recorded, which certificate shall be evidence of such facts. Every such record shall from the time of reception of the instrument have the same effect as to any property in this state described therein as the record of any similar instrument in the office of a register of deeds has as to property in his county, and shall be notice of the rights and interest of the grantee, lessee or mortgagee by such instrument to the same extent as if it were recorded in all of the counties in which any property therein described may be situated.”

Does this mean that such an instrument must be witnessed or does it merely mean that if the document is wit-

nessed the names of the witnesses must be printed or typewritten?

Sec. 235.45, Stats., provides:

“Every bond or contract for the sale or purchase of lands or concerning any interest in lands, made in writing, under seal, *attested by two witnesses* and acknowledged, may be recorded in the office of the register of deeds of the county where the lands lie.”

Does this mean that an unwitnessed land contract may not be recorded, or does sec. 235.19 (13), the general statute quoted above, make it recordable if it is acknowledged in the manner and form therein mentioned?

Sec. 235.46, Stats., relating to recording of affidavits reads:

“Affidavits, witnessed by *two subscribing witnesses*, stating facts as to possession of any premises, descent, heirship, date of birth, death or marriage, or as to the identity of a party to any conveyance of record, or that any such party was or is single or married, or as to the identification of any plats or subdivisions of any city or village, may be recorded in the office of the register of deeds in any county where such conveyance is recorded, or within which such premises or city or village is situated, and the record of any such affidavit, or a certified copy thereof, shall be *prima facie* evidence of the facts touching any such matter, which are therein stated.”

May an unwitnessed affidavit be recorded, and if so, would it be *prima facie* evidence of the facts therein stated?

Sec. 236.05 (3), Stats. 1953, relating to affidavit requirements to entitle a final plat to be recorded provides:

“(3) The owner’s certificate shall be signed or consented to in writing on the plat by all persons holding an interest in the fee of record or by being in possession and if the land is mortgaged by the mortgagee. *These signatures shall be witnessed and acknowledged to entitle them to registration.*”

Can the italicized language be disregarded, and what is the effect if such a plat is recorded without being witnessed?

Sec. 276.36, Stats., relating to the right of a party to a partition action to a gross sum in lieu of inchoate dower

and other rights of a similar nature states among other things:

“* * * The written consent, sealed, *witnessed* and acknowledged as a conveyance of such party to receive such gross sum, must be filed at or before the filing of the report of sale; * * *”

If such consent is unwitnessed, is it effective for any purpose?

An attempt was made to answer the questions arising under the foregoing special statutes by Bill No. 317, S., in the 1955 legislature. This would have amended secs. 60.04, 75.14 (1), 190.11, 235.45, 235.46, 236.05 (3) and 276.36, Stats., by eliminating the requirements as to witnesses. This bill was introduced on February 24, 1955, by the committee on judiciary at the request of the Milwaukee Bar Association. The bill was referred to the committee on judiciary the same day and indefinite postponement was recommended by the committee on April 15. The bill was indefinitely postponed on April 20, 1955.

Just where this leaves the law on the situation is a matter for conjecture. However, it should perhaps be noted at this point that the 1955 legislature by Joint Resolution No. 75, S., has directed the legislative council to study the laws relating to real property, mentioning the fact that over the years numerous amendments have been adopted but that no co-ordinated effort has been made to re-examine important parts of the field of real estate law.

Aside from the special situations mentioned above, some reference should be made to other general statutes.

Sec. 59.51 (1), Stats., relating to the duties of the register of deeds, provides that he shall:

“(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose, provided such documents have plainly printed or type-written thereon the names of the grantors, grantees, *witnesses* and notary.”

This provision is certainly open to the argument that witnesses are not necessarily required in all cases but if

witnesses are used their names must be printed or typewritten. If sec. 59.51 (1) were construed as requiring witnesses in all cases it would be in conflict with sec. 235.19 (13) discussed above.

Sec. 235.01 (1), Stats., provides:

“(1) Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney. Conveyances may be acknowledged and may be executed in the presence of 2 witnesses who shall subscribe their names as such. The absence of such acknowledgment or witnesses does not affect the validity of a conveyance, but compliance with the provisions of s. 235.39 is required before a conveyance is entitled to be recorded.”

This section has been the subject of considerable recent legislation.

In the 1949 statutes it read as follows:

“(1) Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved as directed in this chapter, without any other act or ceremony whatever.”

By ch. 703, Laws 1951, it was amended to read:

“235.01 (1) Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney * * *. *Conveyances shall be acknowledged * * * and shall be executed in the presence of 2 witnesses who shall subscribe their names as such.*”

By ch. 428, Laws 1953, sec. 235.01 (1) was amended to read as first quoted above.

Whether sec. 235.01 (1) is to be so construed as to eliminate the necessity of witnesses so far as recording is concerned in all cases whatsoever and without regard to the somewhat limited implications of sec. 235.19 (13) discussed above and without regard to the rather positively stated re-

quirements as to witnesses in the numerous special statutes hereinbefore mentioned, is a question we do not feel called upon to answer here.

Perhaps the doubts could be eliminated by so amending sec. 235.19 (13) as to provide that despite any prior general or special statutes to the contrary, no instrument otherwise recordable should be deemed unrecordable because of the absence of witnesses, and a word as to validation of prior recorded but unwitnessed instruments would do no harm.

However, we do not mean to say that a court would be precluded from giving sec. 235.01 (1) the very broad and controlling construction suggested above, and the question could readily be determined in an appropriate test case.

Your question is directed solely to the question of policy to be followed by the register of deeds association in approving forms which omit provisions for the signature of witnesses, and we merely want to indicate that the foregoing problems should be considered by the association in connection with the adoption of whatever policy it selects. Since the submission of this question to the attorney general's office, we have received several communications and telephone calls from attorneys representing various segments of the bar and from a representative of the register of deeds association. There is a considerable variance in the views expressed, and we believe that in the light of the foregoing discussion the register of deeds association might well keep in mind the following points in considering the matter:

1. The power of approval conferred by sec. 235.16 (1) should be exercised with considerable caution.
2. One possibility is to make no change with reference to witnesses. If no witnesses are required on a given instrument, no harm can result from the blank spaces, and they will be there for the benefit of cautious conveyancers who may want to use them. Witnesses can be very helpful in proving conveyances. See secs. 235.34, 235.35, 235.36 and 235.37, Stats. Also they can be very important in cases where conveyances are attacked as having been made under duress, or by grantors alleged to be incompetent, etc.

3. If it is decided to approve a form without provision for witnesses it would appear as a matter of policy that such form should not be extended to include instruments covered by special statutes which are so worded as to require witnesses. In making this suggestion we do not wish to be understood as attempting to rule either one way or the other on the various questions that arise in attempting to assess the legal effect of unwitnessed conveyances under these sections.

II.

Your second question is whether the association may approve forms additional in number of those now numbered 1 to 60.

Sec. 235.16 (1), Stats., as amended retains the restriction "numbered 1 to 60, both inclusive." This sets the limit at 60, and if any new forms are devised they will have to take the place of some now in existence.

III.

Your third question is whether the association may properly approve a mortgage form containing an "advance or future indebtedness clause."

In this connection you call attention to Bill No. 114, S., which failed of passage in the 1955 legislature. Among other things this bill provided that "A real estate mortgage containing a future indebtedness clause which sets forth the maximum amount to be secured under said clause shall not be invalid by reason of its securing an indebtedness not in existence."

It is your view that the association has no legislative power and could not properly make a change in the form of an instrument which would create a liability not approved by the legislature and which you believe is not in accord with the common law.

It would seem that the statement of the question and suggested answer confuses form and effect. No doubt many invalid obligations have been written on standard forms approved by the register of deeds association and this will probably continue.

It is doubtful that the legislature ever intended by sec. 235.16 (1), Stats., to delegate to the register of deeds association the judicial power to determine what instruments are valid either in whole or in part or to vest the association with the authority to say that a particular form adopted by it will successfully withstand attack in the courts, except and save only as to whether the instrument is recordable. In other words, sec. 235.16 (1) goes only to the *recordability* of an instrument. The extent of the legal liability created by the document is something entirely different and presents a judicial question which we do not feel called upon to discuss under sec. 235.16 (1).

It is not the function of the association to save parties to a mortgage from their own folly as to terms relating to future indebtedness. While it might be unwise for the association to adopt a mortgage form containing a clause relating to future indebtedness, its stamp of approval on such a form, which it has the statutory power to grant, would merely make it recordable and not necessarily valid to the extent contemplated by the parties.

This opinion supersedes an opinion to you under date of February 6, 1956, covering the same subject matter.

WHR

Circuit Court—Illegitimacy Proceedings—Clerk's Fees—
While costs in illegitimacy proceedings are to be taxed under sec. 353.25, Stats., as in criminal cases, the clerk's fee for filing an illegitimacy settlement agreement made under sec. 52.28, Stats., is that provided by sec. 59.42 (2) (a), Stats., relating to civil actions.

May 8, 1956.

RONALD D. KEBERLE,
District Attorney,
Marathon County.

In your letter of April 27, 1956, you refer to an attorney general's official opinion of January 4, 1956 (45 O.A.G. 2) to the corporation counsel of Milwaukee county in which

it was concluded that costs in illegitimacy proceedings are to be taxed under sec. 353.25, Stats., as in criminal cases. You also refer to an informal opinion of November 14, 1955, relating to the fees payable to the clerk of the circuit court in connection with the filing of illegitimacy agreements. Sec. 59.42 (2) (a), Stats., was considered to be applicable.

You have accordingly inquired whether the fees are different in those cases where costs are taxed upon entry of judgment.

There is no conflict between these opinions, since the one relates to the taxation of costs and the other relates to the proper clerk's fee. Both opinions apply.

Sec. 353.25 (2) (a), relating to the taxation of costs against the defendant in criminal cases, includes the necessary disbursements and fees of officers allowed by law. One of these would be the item of clerk's fees under sec. 59.42 (2) (a), Stats., mentioned in the informal opinion of November 14, 1955, the amount being \$6 plus state tax.

It is true that sec. 59.42 (2) relates to civil actions, but the opinion of January 4, 1956, does not say that an illegitimacy proceeding is to be treated as a criminal case for all purposes. As a matter of fact, care was taken in the opinion to quote cases to the effect that such a proceeding has the characteristics of both criminal and civil actions. To the extent that the proceeding partakes of the nature of a civil action, the rules and practice relating to civil actions are applicable, and to the extent that the proceeding partakes of the nature of a criminal action, that type of procedure is applicable.

Obviously sec. 59.42 (1), Stats., relating to clerk's fees in criminal actions, would not apply to the filing of an illegitimacy agreement, since the fees in criminal cases are limited to the following: (a) If there is a dismissal or plea of guilty or *nolo contendere*; (b) if there is a plea of not guilty and a trial before the court without a jury; and (c) if there is a plea of not guilty and a jury trial.

On the other hand, sec. 52.28, Stats., relating to settlement agreements in illegitimacy cases, provides among other things for the filing of a consent to entry of judgment in accordance with the terms of the settlement agreement.

In *State ex rel. Ullrich v. Giese*, (1950) 257 Wis. 242, 43 N.W. 2d 18, it was held that such an agreement entered into under sec. 166.07, Stats., is a contract and subject to the law of contracts. It is a contract coupled with a consent to entry of judgment in case of default. It partakes of the nature of a cognovit note containing the written authority of the debtor for entry of judgment. As such, when filed it comes under the heading in sec. 59.42 (2), "At time of filing initial document required for commencement of action or proceeding" and the fee is \$6 as for a cognovit. Obviously the judgment could not be entered without the filing of the agreement. It is the initial document and in fact the only moving paper upon which the subsequent consent judgment can be predicated.

Hence, this particular phase of an illegitimacy proceeding clearly partakes of the nature of a civil action or proceeding and the clerk's fees relating thereto are applicable, especially when it is noted, as mentioned above, that the provisions relating to clerk's fees in criminal actions are so worded as to be clearly inapplicable.

Thus where there is a default on the part of the defendant in fulfilling the terms of the settlement agreement and judgment pursuant to the consent provisions of the agreement is entered, costs would be taxable under sec. 353.25 and such costs would include the necessary disbursements made in the initial filing of the agreement entered into under sec. 52.28, including the clerk's fee of \$6 under sec. 59.42 (2) (a).

WHR

County Court—Register in Probate—Fees—Sec. 253.29, Stats., as amended by ch. 346, Laws 1955, provides for no fees for filing petitions for discharge of bonds for maintenance, discharge of mortgages, and the like.

May 9, 1956.

ROBERT E. KOUTNIK,
District Attorney,
Manitowoc County.

You have referred to ch. 346, Laws 1955, which amends sec. 253.29 (2) (a), (b), (d) and (h), Stats., and which creates sec. 253.29 (2m) of the statutes, relating to county court fees.

In this connection you have inquired whether a filing fee is required in certain special proceedings such as the discharge of bonds of maintenance, discharge of mortgages, etc., and if there is a filing fee, how much it is.

The principal filing fees set up by sec. 253.29 (2) are those contained in par. (a) "for filing a petition whereby any proceeding in estates of deceased persons is commenced."

Once this fee is paid there appear to be no further fees required in the ordinary course of probating an estate for the filing of the various papers which are incidental thereto except in these special situations covered in the paragraphs which follow.

Par. (b) sets up a fee for terminating a life estate or homestead interest but specifically provides that the fee is not payable where such termination is consolidated with probate or administration proceedings.

Par. (c) provides a fee for a certificate or judgment of descent of lands.

Par. (d) provides a fee under certain circumstances for the filing of an objection to the probate of a will.

Par. (e) sets up a \$1 fee for receiving a will for safe-keeping.

Par. (g) provides a 50-cent fee for each certificate issued by registers in probate or county judges.

Par. (h) relates to required fees for copies of records and papers and for comparison and attestation of copies.

Par. (i) provides a 25-cent fee for filing claims against an estate with certain exceptions.

Sec. 253.29 (2m) merely sets up the formula to be followed in determining the amount of the fees under the schedule provided in sec. 253.29 (2). It is possible that additional fees might be required under sec. 253.29 (2m) (e) if the proceedings you mention occurred subsequent to entry of final judgment in an estate, but we cannot assume the existence of facts which have not been supplied.

Thus it will be observed that there is nothing in sec. 253.29 (2) or (2m), either prior or subsequent to the changes supplied by ch. 346, Laws 1955, which provides for any fee in county court for the filing of petitions for the discharge of bonds of maintenance or mortgages or other special proceedings not specifically covered in the fee schedules contained therein.

The express provision for the charging of filing fees in certain instances results in the implied lack of authority for charging filing fees in other instances under the familiar doctrine of *expressio unius est exclusio alterius*. The statute discussed here is a revenue measure, and a tax cannot be imposed without clear and express statutory language for that purpose. *Wis. Dept. of Taxation v. Berry*, (1951) 258 Wis. 544, 46 N.W. 2d 757.

You are therefore advised that no filing fees are to be charged under ch. 346, Laws 1955, in the absence of facts bringing the papers in question within one of the categories discussed above.

WHR

Counties—Appropriations and Expenditures—Charitable and Penal Institutions—Private Social Welfare Agency—45 O.A.G. 44, relating to donations by county to a private welfare agency, reviewed and reaffirmed.

May 10, 1956.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County.

Under date of February 6, 1956, we issued an official opinion at your request, 45 O.A.G. 44, to the effect that a county may not under sec. 46.22 (5) (g), Stats., or otherwise, make a voluntary contribution to a privately organized social welfare agency which cares for unwed mothers during confinement and for a short time thereafter, such service being available to anyone free of charge regardless of the county of residence and regardless of any appropriation to the agency by the county of residence.

At the instance of the agency in question you have asked us to review the opinion in the light of some additional statutory provisions not previously called to our attention.

The particular sections to which reference is made are secs. 48.57 and 48.80 set forth in ch. 575, Laws 1955.

Sec. 48.57 (1) provides in part:

“The county agency specified in s. 48.56 (1) to provide child welfare services shall administer and expend such amounts *as may be necessary* out of any moneys which may be appropriated for child welfare purposes by the county board or donated by individuals or private organizations.
* * *”

This phraseology prompts the same discussion made in the opinion of February 6, 1956, where we said in discussing the provisions of sec. 46.22 (5) (g) that the words “as may be necessary” did not mean that the county may expend money where it is not necessary, and no necessity for the appropriation exists where the services in question are made available to any county regardless of whether it contributes to the agency furnishing the service.

Sec. 48.57 (2) provides:

“(2) In performing the functions specified in sub. (1) the county agency may avail itself of the co-operation of any individual or private agency or organization interested in the social welfare of children in the county.”

The fact that the agency may avail itself of the co-operation of a private agency or organization interested in the social welfare of children (which presumably would include an illegitimate baby) falls short of being an authorization to make a gift to such private organization. It is immaterial that such organization is rendering a most needed and worthy social service and is doing it in an admirable manner.

Sec. 48.80 reads:

“(1) Any municipality is hereby authorized and empowered to sponsor the establishment and operation of any committee, agency or council for the purpose of co-ordinating and supplementing the activities of public and private agencies devoted in whole or in part to the welfare of youth therein. Any municipality may appropriate, raise and expend funds for the purpose of establishing and of providing an executive staff to such committees, agencies or councils; may levy taxes and appropriate money for recreation and welfare projects; and may also receive and expend moneys from the state or federal government or private persons for such purposes.

“(2) No provision of this section shall be construed as vesting in any youth committee, council or agency any power, duty or function enjoined by law upon any municipal officer, board or department or as vesting in such committee, council or agency any supervisory or other authority over such officer, board or department.

“(3) In this section municipality means a county, city, village or town.”

Taken out of context there is language in subsec. (1) which might authorize the proposed donation. Among other things this subsection states that “any municipality * * * may levy taxes and appropriate money for * * * welfare projects.” This language standing alone is very broad and could conceivably authorize a donation to a private welfare agency located outside the county.

However, a statutory provision is to be construed in the light of the whole of the act of which it forms a part. *Ekern*

v. McGovern, (1913) 154 Wis. 157, 142 N.W. 595. Also in construing a statute, effect must be given if possible to every word, clause, and sentence thereof. *State v. Columbian Nat. Life Ins. Co.*, (1910) 141 Wis. 557, 124 N.W. 502.

Here the first part of the subsection relates to authorization for the sponsoring and operation of a committee or agency to co-ordinate and supplement the activities of public and private agencies devoted to the welfare of youth in the municipality. The next step is the authorization of the expenditure of funds for an executive staff to such committees, agencies, or councils, and finally there is the authority to appropriate money for recreation and welfare projects.

The subject matter of the subsection appears to be youth welfare and recreation, and it would appear doubtful that the legislature ever intended or considered the rendering of assistance to unwed mothers in connection with the birth of illegitimate babies to be a proper adjunct or necessary corollary to the recreation and welfare of youth.

This conclusion is fortified by the fact that the subject of county child welfare services is treated in another part of ch. 48, Stats. Sec. 48.57 (1) quoted above makes specific reference in par. (a) to illegitimate children. It authorizes the county welfare agency:

“(a) To investigate the conditions surrounding mentally defective, dependent, neglected, delinquent, and illegitimate children within the county and to take every reasonable action within its power to secure for them the full benefit of all laws enacted for their benefit. This duty shall be discharged in co-operation with the juvenile court and with the public officers or boards legally responsible for the administration and enforcement of these laws;”

However, as has already been pointed out in discussing sec. 48.57 (2), the authority to make use of the co-operation of a private agency in performing the functions authorized by sec. 48.57 (1) (a) does not include the power to make donations.

Perhaps another point which might be stressed is the fact that the private agency in question is not within the county. Once it is conceded that a donation can be made to an agency outside the county on the theory that such agency

has in the past or may in the future render a useful social service to a Manitowoc county resident unfortunate enough to need such service, then there could also be valid donations to such agencies in Chicago, New York, or even a foreign country on the same theory. In view of the strict rule as to expenditure of county funds stated in our opinion of February 6, 1956, it is concluded that more express statutory authority to make a donation must be found than has thus far been called to our attention, and such opinion is therefore reaffirmed. See also 20 C.J.S. 1120 to the effect that in the absence of express statutory authority to do so, a county board cannot appropriate county funds for other than county purposes.

However, in closing we wish to suggest a possible solution of your problem. We are advised by the office of the corporation counsel for Milwaukee county that they handle the problem in that county by agreement with the agency in question on an individual case basis. This is done under the authority of secs. 49.19 (4) (g) and 49.40 (1), Stats. The former provision reads:

“49.19 (4) (g) Aid shall be granted to a mother during the period extending from 6 months before to 6 months after the birth of her child, if her financial circumstances are such as to deprive either the mother or child of proper care. The aid allowed under this paragraph may be given in the form of supplies, nursing, medical or other assistance in lieu of money.”

Sec. 49.40 (1), among other things, also provides for medical care for recipients of aid to dependent children. It is our understanding that the payments made by the county to the agency vary according to the assistance rendered but usually are in the neighborhood of \$150 per case. We are sure that the Milwaukee county corporation counsel's office will be glad to furnish you with further information concerning the working details of this arrangement.

WHR

Counties—County Board—Town Boundaries—The power of county boards to change the boundaries of towns within their county under sec. 59.08 (1), Stats., can be effected only by ordinance under sec. 59.08 (5), Stats., and not by resolution. An attempt to do so by resolution is void and ineffectual.

May 17, 1956.

ALBERT J. CIRILLI,
District Attorney,
Oneida County.

You have requested an opinion as to the effect of a certain resolution passed by your county board on November 13, 1946, purporting to change two town boundaries within your county by transferring certain territory from one town to the other. The resolution, a copy of which you enclosed, reads as follows:

“RESOLVED by the Board of Supervisors of Oneida County Wisconsin, That WHEREAS the following parcels of land to-wit: Lot #1 and Lot #7 Sec. 24-36-7# are at present in the Town of Woodboro and there is no possible access by land to these properties except through the Town of Crescent,

NOW THEREFORE BE IT RESOLVED by the County Board of Supervisors that these lands be withdrawn from the Town of Woodboro and be placed in the Town of Crescent same to become effective Jan. 1st, 1947.”

In your letter, you imply that the above resolution has never been published. You do not state definitely whether or not the resolution has actually been in effect since January 1, 1947, as provided.

You ask the following two questions based on the above resolution:

1. May a county board by resolution only, duly adopted, detach parcels of land from one town and attach same to an adjoining town, and thereby change the town boundaries?

2. If the above action and resolution by the county board was unauthorized and void, would any statute of limitations pertain?

The following statutes cover this situation :

"59.08 In addition to the general powers and duties of the several county boards enumerated in section 59.07 special powers are conferred upon them, subject to such modifications and restrictions as the legislature shall from time to time prescribe, to :

"(1) TOWNS, ORGANIZATION, BOUNDARIES. Set off, organize, vacate and change the boundaries of the towns in their respective counties * * * .

"(5) POWERS, EFFECTED BY ORDINANCE. When any of the special powers and duties conferred by this section upon county boards shall be exercised by the legislature, it shall be a restriction upon the county board so far as the legislature shall exercise such power. All powers conferred upon county boards by this section shall be carried into effect by the enactment of ordinances, which shall be in the ordinary form of laws passed by the legislature, and shall commence as follows: 'The county board of supervisors of the county of . . . do ordain as follows.'

The answer to both your questions is "No." It is clear from that part of sec. 59.08 (1) quoted above that county boards have the legislative power to change town boundaries within their county. See also, *State ex rel. Hawes v. Pierce*, (1874) 35 Wis. 93; *State ex rel. Rosander v. Lippels*, (1907) 133 Wis. 211, 113 N.W. 437; *State ex rel. Ervin v. County Board of Supervisors of Vilas County*, (1916) 163 Wis. 577, 158 N.W. 338. However, it is also clear from sec. 59.08 (5), quoted above, that such power must be exercised by ordinance. See also 43 O.A.G. 295, 296; 28 O.A.G. 367, 368; 22 O.A.G. 170, 171-172. It is elementary that counties must exercise their powers substantially in the manner prescribed by statute or their actions are void. *State ex rel. Hawes v. Pierce*, (1874) 35 Wis. 93; *Smith v. Sherry*, (1882) 54 Wis. 114, 11 N.W. 465; 20 C.J.S., Counties, §§87, 92; 87 C.J.S., Towns, §23.

The resolution in question cannot be deemed to be in substantial compliance with sec. 59.08 (5). It is designated a resolution and has all the attributes and language of a resolution. It fails to commence with the ordaining clause called for in sec. 59.08 (5). Furthermore, your letter implies that this resolution has never been published. Sec. 59.09 (1),

Stats., requires all ordinances passed by the county board to be published. The authorities have held these publication requirements mandatory as applied to county ordinances purporting to change town boundaries, so that the failure to publish such ordinances renders them void and ineffectual. *State ex rel. Hawes v. Pierce*, (1874) 35 Wis. 93, 99; *Smith v. Sherry*, (1882) 54 Wis. 114, 120-121, 11 N.W. 465.

In view of the foregoing reasons, the resolution in question is void and ineffectual to accomplish its intended purpose. The legal boundaries of the towns involved remain the same as before the passage of the resolution. In this latter regard it should be pointed out that your letter and the enclosed resolution indicate that before the passage of this resolution the town of Woodboro was composed of non-contiguous territory, since the parcels involved were not accessible to the rest of the town except through the town of Crescent. If so, the town of Woodboro would be an illegally constituted town, since towns must be composed of contiguous territory. *The Chicago & Northwestern Railway Company v. The Town of Oconto*, (1880) 50 Wis. 189, 6 N.W. 607.

In effect, the above reasoning requires that your second question also be answered in the negative. Mere passage of time does not render valid an ordinance that is void *ab initio*. I am unable to discover any statute of limitations which would bar the respective towns or other parties involved from challenging the validity of the resolution in question. The general rule is that towns and other municipal corporations are not impliedly within ordinary general limitation statutes, especially when acting in their public or governmental capacity. See, *McQuillin, Municipal Corporations*, §§7.43, 49.05 and 49.06.

As stated previously, you do not state definitely whether or not the above resolution was actually put into effect on January 1, 1947, as provided. If it has been in effect since then, there may be certain valid rights and obligations of a *de facto* nature arising out of such period. *Gilkey v. The Town of How*, (1899) 105 Wis. 41, 81 N.W. 120. This opinion does not presume to consider such questions, since it is not the policy of this office to either anticipate questions or

speculate as to possible additional facts. For similar reasons, this opinion does not address itself to the possibility of laches or estoppel barring the right of the towns and other parties involved to challenge the resolution.

RGT

Soldiers, Sailors and Marines—Holidays—Memorial Day
—Sec. 256.16, Stats., requires granting of a full day's leave with pay to veterans regardless of whether other employes are required to work that day or not.

May 18, 1956.

C. M. MEISNER,
District Attorney,
Dunn County.

You have requested my opinion as to the proper interpretation of sec. 256.16 of the Wisconsin statutes relative to granting of leaves of absence with pay to veterans on Memorial day. This section reads as follows:

“256.16 (1) The head of every department of the state government and of every court of the state, every superintendent or foreman on the public works of the state, every county officer, and the head of every department or office in any town, village, or city, or other political subdivision, shall give leave of absence with pay for twenty-four hours on the thirtieth day of May of each year, or on such other day as may by law be designated as ‘Memorial Day,’ to every person in the employ of the state or any county, town, village or city therein, who has at any time served in and been honorably discharged from the army, navy, or marine corps of the United States. A refusal to give such leave of absence to one entitled thereto, shall constitute neglect of duty.

“(2) In all cities, however organized, where the nature of the duties of the several departments of government of such cities is such as to necessitate the employment of members of such departments on Memorial day, the head of each such department shall arrange and assign such necessary work in such a manner as to permit the largest possible numbers of employes of such department to be off duty either the whole or part of Memorial day.”

You state that it is the practice of the highway department of your county not to require any employes to work on Memorial day and that no special compensation to the employes who are veterans has been allowed.

I do not believe it is necessary here to resort to the rules of statutory construction to ascertain the legislative intent. The statute clearly states that a leave of absence with pay must be granted for Memorial day and there does not appear to be any indication, either express or implied, that any other meaning was intended, or that the statute would not apply if a full day of leave is granted to other employes.

It has long been the custom in this state to observe Memorial day in honor of our war dead, and most public and private offices are closed on that day. I believe, therefore, that had the legislature intended to allow a full day's leave with pay only where other employes were required to work, it would have so expressed itself.

REB

Taxation—Exemptions—Department of Veterans Affairs—Housing Properties—Real estate acquired by the Wisconsin department of veterans affairs in realizing upon any security and not contracted to be sold is exempt from local real estate taxes.

May 21, 1956.

GORDON A. HUSEBY, *Director,*
State Department of Veterans Affairs.

You have inquired whether housing properties acquired by the state of Wisconsin department of veterans affairs on foreclosure of mortgages made to the department under the provisions of the veterans housing law and the veterans rehabilitation loan law are exempt from local real estate taxes.

In my opinion, such properties are exempt from the local real estate tax.

Such properties are acquired by the department of veterans affairs for the purpose of protecting the state's investment and for ultimate repayment upon liquidation into the rehabilitation fund.

The statute governing this situation provides as follows:

"70.11 The property described in this section is exempted from general property taxes:

"(1) PROPERTY OF THE STATE. Property owned by this state except land contracted to be sold by the state. This exemption shall not apply to land conveyed after September, 1933, to this state or for its benefit while the grantor or others for his benefit are permitted to occupy the land or part thereof in consideration for the conveyance; * * *"

In the case of *State ex rel. Wisconsin University Building Corporation v. Bareis*, (1950) 257 Wis. 497, 44 N.W. 2d 259, our court held that real estate owned by the Wisconsin University Building Corporation was exempt from taxation even though some of the property was presently being rented to tenants pending its use for university purposes. The court pointed out that the "Regents of the University of Wisconsin" is an agency or arm of the state and that even when it operates through a wholly owned nonprofit corporation authorized to acquire real estate for the exclusive use and benefit of the university of Wisconsin, it is entitled to exemption upon its property under the above quoted provision.

Likewise the department of veterans affairs is an arm or agency of the state and entitled to the same exemption. The case would appear even stronger in the case of the department of veterans affairs since it is not organized as a separate and independent corporation but is a branch agency of the state itself.

Of course, when you dispose of the property by selling it under land contract, it should properly be placed back on the tax roll. I am informed that it is the customary practice to require the purchaser under land contract to assume the obligation of paying the taxes on the property.

There is nothing contrary to the foregoing in the provisions of sec. 70.114, Stats., created by ch. 643, Laws 1955, which require the payment of taxes on certain publicly

owned lands. By the express terms of sec. 70.114 (1) the tax thereby imposed is limited to residential properties which are held for the use "of a public educational institution." It is obvious that the department of veterans affairs does not come within the definition of a public educational institution and hence, except as to properties contracted to be sold, properties which it owns are exempt from the local real estate tax.

RGT

State—Officers and Employes—Civil Service—Military Leave—Members of the national guard and of the reserve components of the armed forces of the United States or the state of Wisconsin are entitled to up to 15 days' military leave for the purpose of attending an annual encampment with pay, whether or not they are full-time employes of the state of Wisconsin.

Military leave pay is not prorated in the manner that annual leave pay is prorated.

May 21, 1956.

VOLMER H. SORENSEN,
Director of Personnel.

You have requested my opinion on the following questions:

1. Does sec. 16.275 (4), Stats., provide for a military leave "with pay" for all officials and employes of the state regardless of employment status? Classified personnel are employed on the following basis: Emergency, 10 days; provisional, 30 days; temporary, 3 months; seasonal, less than 1 year; probationary, less than 6 months; and permanent, more than 6 months.

2. Are employes entitled to 15 days' leave "with pay" regardless of the length of their employment, or is their military leave "with pay" to be prorated on the same basis as their annual leave?

While there is some overlapping of your questions they will be answered separately.

Sec. 16.275 (4), Stats. 1955, reads as follows:

“(4) Officials and employes of the state who are duly enrolled members of the national guard, the state guard, the *officers' reserve corps, the enlisted reserve corps, the naval reserve, the marine corps reserve, or any other reserve component of the military or naval forces of the United States or the state of Wisconsin now or hereafter organized or constituted under federal law*, are entitled to leaves of absence without loss of time in the service of the state, to enable them to attend military *and naval* schools, field camps of instruction *and naval exercises* which have been duly ordered held but not to exceed 15 days, excluding Sundays and legal holidays, in the calendar year in which so ordered and held. There shall be no deduction from or interruption in the pay from the state for the time spent in such attendance, irrespective of whether or not they receive separate pay for and identified with the attendance. The leave granted by this section is in addition to all other leaves granted or authorized by any other provision of law and the time of the leave granted under this section shall not be deemed a part of any leave granted or authorized by any other provision of law. For the purpose of determining seniority, pay or salary advancement the status of the employe shall be considered as though not interrupted by such attendance.”

The italicized language was added to the act by the provisions of ch. 509, Laws 1955. Prior to this addition the benefits of a military leave for 15 days had been extended principally only to members of the national guard. Under the previous statute as it existed prior to 1955, you have informed me that there was no administrative construction which would indicate that other persons than full-time employes were denied military leave or were granted military leave only on a prorated basis. In fact for the two departments where information was available the policy was to grant national guard leave regardless of the classification of the employe.

It is my opinion that sec. 16.275 (4), as amended, by its express terms states without qualification that “officials and employes of the state” are entitled to a military leave up to 15 days without any deduction from or interruption in their

pay. Hence it must be given effect as it is written, and any person who is on the state pay roll and is included in the enumerated classes, which now include not only the national guard and the state guard but all of the reserve components, is entitled to his full leave to attend proper encampment with pay.

While this conclusion obviously can result in anomalous situations under some circumstances in the case of employes who are hired only for short periods, there is nothing on the face of the act that would authorize a proration of pay for the leave of such persons or would authorize a denial of leave.

The situation on military leave is distinct from the situation on annual leave as shown by the following quotation from sec. 16.275 (1), Stats. :

*“(1) Appointing officers shall grant to each subordinate employed subject to the provisions of this chapter a non-cumulative leave of absence without loss of pay, at the rate of 3 weeks for a full year’s service. * * *”*

Under the italicized portion of the foregoing statute it is of course necessary to allow persons other than full-time employes to accumulate leave only in proportion to the period of time in which they are actually in the state service. However, since the legislature did not see fit to condition the length of the leave for military purposes upon a full year of service, we cannot do so by construction.

It is the policy of the state to encourage membership and service in the national guard and the various reserve forces of the United States and prevent private employers from discriminating against persons because of their membership in the national guard. Accordingly, it is my opinion that all persons who are on the state pay roll at the time they are ordered to an annual encampment or the equivalent thereof, are entitled to leave for the full period of the encampment up to 15 days with pay.

RGT

*Counties—Appropriations and Expenditures—Salaries and Wages—Retroactive Pay Increases—*Sec. 59.15 (2) (c), Stats., does not specifically authorize retroactive salary increases for county employes, and such increases may not be granted except under special circumstances, e.g., where there is a prior agreement with the employes that when a future pay raise is granted it will be effective as of some prior agreed date.

May 22, 1956.

FRANKLIN MOORE, JR.,
District Attorney,
 Winnebago County.

You have directed our attention to a county board resolution reading as follows:

“WHEREAS, There is presently being conducted a survey relative to Salary Schedules of Winnebago County employes by the State Bureau of Personnel, and

“WHEREAS, said survey has not been completed, although it was the intent of the Winnebago County Board of Supervisors to act upon such report on or about January of the year 1956,

“NOW, THEREFORE, BE IT RESOLVED, that in the event the Winnebago County Board of Supervisors shall favorably consider said report that any salary increases authorized by said Board thereunder shall be in full force and effect from the 1st day of May, 1956, and shall apply to all earned income of said employes subsequent to said first day of May, 1956, as authorized by said Board, until further change by said Board, any excess over present salaries as of the effective date to be re-imbursed to said employes as soon as practicable.”

We are asked whether the board has the authority to grant a retroactive increase of salaries to county employes as distinguished from county officers.

Art. IV, sec. 26, Wis. Const., prohibiting extra compensation after the services have been rendered or the contract entered into does not relate to county employes or officers. *Sieb v. Racine*, (1922) 176 Wis. 617, 187 N.W. 989; *Dandoy v. Milwaukee County*, (1934) 214 Wis. 586, 254 N.W. 98; 32 O.A.G. 51.

The general rule seems to be that unless forbidden by constitution or statute, the compensation of any officer or employe of a municipal corporation may be increased or diminished during his term or period of employment. *Dandoy v. Milwaukee County, supra.*

Sec. 59.15 (2) (c) relating to appointive officials, deputy officers and employes provides in part that the county board at any regular or special meeting may change the salary or compensation of employes.

However, none of the authorities or the statute cited above reach the question of whether a retroactive increase of salary is permissible.

Assuming for the moment that your board were to adopt the resolution in question at its meeting commencing on May 15, it would be clear that as of that date all services rendered by the employes in question for the first half of the month would already have been performed under the prior salary schedule. Any extra compensation to which the employes were not legally entitled when the services were rendered could be considered in the nature of a gift, since it would be in excess of the payment called for under the contract, whether the contract be express or implied.

As above indicated, the rate of compensation may be altered for services to be rendered after the change is to be made, but after the services have been rendered under a resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. See 43 Am. Jur. 140.

As was said in *State ex rel. Larson v. Giessel*, (1954) 266 Wis. 547, 551-552,

"It is a well-established principle of law of this state and elsewhere that public funds may be expended only for a public purpose, and that an expenditure of such funds for a private purpose is unconstitutional. *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 207, 216, 60 N.W. (2d) 763; *Heimerl v. Ozaukee County* (1949), 256 Wis. 151, 158, 40 N.W. (2d) 564; *State ex rel. Martin v. Giessel* (1948), 252 Wis. 363, 369, 31 N.W. (2d) 626; *State ex rel. Wisconsin Development Authority v. Dammann* (1938), 228 Wis. 147, 175, 277 N.W. 278, 280 N.W. 698. * * *"

Disbursement of county funds may be made only for the purposes and in the manner provided by statute. Such statutes are subject to the strictest construction and the authority therein must be clear and convincing before an appropriation order or resolution will be upheld. See 20 C.J.S. 1115-16.

Thus if the resolution is to be regarded as a voluntary contribution to employes for past services rendered by such employes, in addition to the regular compensation called for under salary schedules in effect at the time the services were rendered, the resolution would appear to be invalid.

However, the discussion of the problem cannot properly be closed without some consideration of the question of whether the retroactive pay increase rather than being a gift is in fact intended as an inducement to county employes to continue in service. Conceivably a retroactive pay increase applicable to those remaining in service could be sustained if a discernible purpose can be discovered in the resolution of holding out a reward for current and future services of the employes affected. See *State ex rel. Thomson v. Giessel*, (1952) 262 Wis. 51, 53 N.W. 2d 726.

If the action of the municipality is to be interpreted as a grant of additional salary it is valid, but if it is a gratuity it is not. See, for example, *Attorney General v. Woburn*, (1945) 317 Mass. 465, 58 N.E. 2d 746.

In *James v. Mayor of New Bedford*, (1946) 319 Mass. 74, 64 N.E. 2d 638, it was held that an ordinance raising salaries and wages of city employes from January 11 was not to be deemed retroactive so as to include the first 11 days of the year during which employes had worked at lower rates then in force, since the city could not give them a gratuity on account of work already performed.

Under certain circumstances the compensation may be viewed as a deferred payment rather than a retroactive payment. For instance a grant of a retroactive pay increase to employes pursuant to an agreement is not a gift since it is considered to be supported by valid and legal consideration. See Vol. 15, *McQuillin, Municipal Corporations* (3d ed.) §39.30, p. 97, and *Timmermann v. City of New York*, (1946) 69 N.Y.S. 2d 102. In the *Timmermann* case the un-

ion had requested a wage increase and had threatened to strike. The employes were advised that it would be the policy of the transportation board so far as practical to make adjustments effective as of July 1, and on September 9 salary increases were recommended to be effective as of July 1 "if retroactivity is legally permissible." A taxpayer's action was brought to restrain the payment, and the court held that no gift was involved under the circumstances, saying at p. 108: "This is not a case where, *without any previous agreement on the subject of compensation*, additional compensation is granted for services previously rendered." (Emphasis supplied by the court.) The court went on to say that there was in effect an agreement that the employes would continue working after July 1 on condition that any increase of compensation would be made retroactive to July 1. Thus the employes by continuing to work after July 1 and by foregoing their right to quit their jobs, furnished ample legal consideration for the board's promise to make any increases retroactive to July 1, if practical.

Another case on all fours with the *Timmermann* case, *supra*, is that of *Christie v. Port of Olympia*, (1947) 27 Wash. 2d 534, 179 P. 2d 294, where the court held that no gift of public money or extra compensation was involved in paying retroactive additional compensation, retroactive overtime compensation and retroactive vacation pay for longshoremen's services rendered pursuant to the port manager's agreement that if the members of the local union would continue to work for the port, the port would conform to the conditions of a contract being negotiated by the international union with an association of private employers.

It is our understanding, however, that in the case of your county no agreement has been made between the county and the employes that any future salary raise would be retroactive. Hence, neither of the last two cases cited can be relied upon as authority for the validity of the resolution in question.

It is true that in the case of *State ex rel. Dudgeon v. Levitan*, (1923) 181 Wis. 326, 193 N.W. 499, it was held the teacher's retirement act did not involve a grant of extra compensation for past services. There the court found that

the legislature intended to induce experienced teachers to remain in service. Such a long-range program as a pension system is, however, distinguishable in degree if not in principle from a salary raise granted on May 15 to be effective as of May 1, and we discover no language in the resolution from which it can reasonably be inferred that the county board deems the retroactive pay increase to be an inducement for future service rather than payment for past service, or that it was viewed as being not extra compensation but only an additional payment which when combined with payment under the previous scale totals only an adequate and full compensation, or that there was ever any separate contract or agreement whereby the employes had promised to give up their legal rights to leave county employment in return for its promise of payment.

You are accordingly advised that the resolution in question is of doubtful validity.

WHR

Motor Vehicle Department—Licenses and Permits—Motor Vehicle Salesmen—If motor vehicle commissioner has reasonable cause to doubt the financial responsibility of an applicant for motor vehicle salesman's license or that applicant will comply with the provisions of sec. 218.01, Stats., the commissioner may require the applicant to furnish a bond as provided in sec. 218.01 (2) (h), Stats.

June 5, 1956.

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

You request my opinion as to whether sec. 218.01 (2) (h), Stats., authorizes you to require an applicant for a motor vehicle salesman's license to furnish and maintain a bond upon the terms and conditions set forth therein. Sec. 218.01 provides generally for the licensing of various classes

of persons engaged in the manufacture, distribution, and sale of motor vehicles. Included in the enumerated classes are automobile salesmen. Sec. 218.01 (2) sets forth your powers and authority to grant licenses. Sec. 218.01 (2) (h) provides as follows:

“Provided the licensor has reasonable cause to doubt the financial responsibility or the compliance by the applicant or licensee with the provisions of this statute the licensor may require such applicant or licensee to furnish and maintain a bond in such form, amount and with such sureties as it shall approve, but not less than \$5,000, nor more than \$15,000, conditioned upon such applicant or licensee complying with the provisions of the statutes applicable to the licensee and as indemnity for any loss sustained by any person by reason of any acts of the licensee constituting grounds for suspension or revocation of his license hereunder. The bonds shall be executed in the name of the state of Wisconsin for the benefit of any aggrieved parties, but the penalty of said bond shall not be invoked except after a court adjudication thereof. The above bonding requirements shall not apply to manufacturers, factory branches, and their agents.”

A cursory reading of the whole of sec. 218.01 (2) clearly shows that paragraph (h) quoted above includes salesmen. The only classes of licensees excluded are stated in the last sentence of the quoted paragraph. The statute is clear and without any ambiguity.

You are therefore clearly authorized and empowered to require an applicant for automobile salesman's license to furnish a bond under sec. 218.01 (2) (h) if you have reasonable cause to doubt his financial responsibility or compliance with the provisions of sec. 218.01.

SGH

Municipalities—Police—Sheriffs—Roadblocks—Liability
—Police officers, sheriffs and their deputies, traffic officers, and other peace officers have inherent authority to set up roadblocks in a reasonable manner when necessary to effect the lawful arrest of law violators, and the nature of the violation does not affect this power. For this purpose they may call upon private persons for aid under sec. 59.24, 61.28, 61.31, or 62.09 (13) (a), Stats., and may commandeer vehicles or other property. The officer must use due care for the protection of users of the highway and of commandeered property used in the roadblock by giving adequate warning of the roadblock and will be liable for any negligence in this regard.

Pursuant to Wis. Const., art. VI, sec. 4, the county is not and cannot be made liable for the acts of the sheriff or his undersheriff or deputies. But the state, county, or other municipality is liable under sec. 270.58, Stats., for damages caused by other officers in negligently setting up a roadblock, if done in good faith. Such officer cannot bind his governmental unit by promising that it will take care of any damages to commandeered property.

June 5, 1956.

LEROY J. GONRING,
District Attorney,
Washington County.

You have requested an opinion upon the following questions:

1. Does a law enforcement officer, traffic patrolman, and deputy sheriff, have lawful authority to set up a roadblock for the purpose of apprehending a fleeing violator?

Does the nature of the offense committed by the violator affect the legality of the use of the roadblock?

2. What liability, if any, exists on the part of Washington county for damages done to a vehicle commandeered by such officer to block the highway, where the fleeing violator crashes into the commandeered vehicle?

You submit the following facts in connection with your questions:

"A Washington County Traffic Patrolman and also Deputy Sheriff who is under the Washington County Sheriff's Department stopped an individual at around 11:50 P.M. on April 29, 1956 on U. S. Highway 41 (not a divided highway in the subject facts). The individual was exceeding the speed limit by traveling in excess of 55 miles per hour, to-wit: 74 miles per hour. The officer gave the individual a summons to appear at a later date. The individual got into his car and started out with a burst of speed spraying gravel over the officer's car. The officer, noting that the individual was again exceeding the speed limit, gave pursuit. He tried to catch him at various spots along the highway and at various times was traveling 85 miles per hour. According to the officer's statement, the individual was weaving in and out of traffic all along the highway. At first he was unable to get close to the individual but finally was able to pull alongside of him after he sped up to 95 miles an hour. The officer states he used the siren and the red light at various times but the individual would pay no attention to his signals. The officer further states that the individual pulled to the left as the squad car approached almost forcing the squad car off the road, at which time the officer nearly lost control of his vehicle. The officer then radioed ahead and requested another officer to set up a road block further down the highway in order to stop the individual. The other officer stopped a tractor and trailer and asked the driver to park it across the highway, the officer telling the driver that "we'll take care of any damages." The entire highway was then blocked. The driver of the tractor and trailer together with a companion driver and the officer swung red signals back and forth in front of the parked tractor and trailer. The red flasher on the officer's vehicle was also operating. After checking the area, the officer who commanded the tractor and trailer states that it and the red signals should have been visible for three-quarters of a mile up the road. The pursuing officer also affirmatively states that the red signals were visible from three-quarters to one mile up the road. The individual driving the vehicle apparently made no effort to stop but did turn sideways just a little bit before hitting the tractor and trailer."

Law enforcement officers, including sheriffs and their deputies, county and state traffic patrolmen, possess lawful authority to set up roadblocks for the apprehension of fleeing violators. The roadblock device has been utilized by police for many years. It is a recognized police practice and has become a fairly specialized technique. See 21 FBI Law

Enforcement Bulletin, (June, 1952) No. 6, pp. 2-11; 24 *id.*, (October, 1955) No. 10, pp. 18-23; 25 *id.*, (May, 1956) No. 5, p. 5. You point out in your letter that it is taught in police schools. Nevertheless, there appears to be a dearth of authority on the point. The absence of litigation may well be due to general recognition of such authority.

Authority to utilize the roadblock device necessarily results from the powers and duties of law enforcement officers. They are charged with the duty to prevent crime, enforce the laws, and apprehend its violators. No citation of authority seems necessary to sustain the principle that they may use such measures as are reasonably necessary under the circumstances, to effectively discharge those duties. See for example, *Krueger v. State*, (1920) 171 Wis. 566, 580-583, 177 N.W. 917. The roadblock is one such method.

For the purpose of apprehending any person for a felony or breach of the peace, sheriffs, their deputies and undersheriffs, coroners, and constables have the power to call private citizens and such "power of their county as they may deem necessary" to their aid. Sec. 59.24, Stats. And see, sec. 62.09 (13) (a), Stats. See also, Baker, One Hundred Questions and Answers on Traffic Law Enforcement, 30 J. Cr. L. & Crim. (1939-1940) 546.

Law enforcement officers have the power to arrest for traffic violations not committed in their presence upon the request of any other such officer in whose presence the offense occurred. Secs. 83.016, 110.07 (1), Stats. See, 42 O.A.G. 93; sec. 954.03 (1), Stats.

They have the power to stop motor vehicles and require the drivers to exhibit their driver's license. Secs. 85.08 (14) (a), 110.07 (1), Stats. Traffic officers, as defined in sec. 85.10 (19), Stats., have the duty to enforce the provisions of secs. 85.10 to 85.86 and 85.91, Stats.; are authorized to direct traffic, and in emergencies may direct traffic as conditions require. Sec. 85.12, Stats. It is unlawful for any person to refuse or fail to comply with any lawful signal, order, or direction of such officers. Sec. 85.12 (2), Stats.

The power of state enforcement officers to set up a roadblock to apprehend a fleeing violator has been tacitly acknowledged. *Freedman v. State*, (1950) 195 Md. 275, 73

A. 2d 476; *Anderson v. Nincehelser*, (1950) 152 Neb. 857, 43 N.W. 2d 182; *Anderson v. Bituminous Cas. Co.*, (1952) 155 Neb. 590, 52 N.W. 2d 814; *Gulbrandson v. Town of Midland et al.*, (1949) 72 S.D. 461, 36 N.W. 2d 655; *Love v. Bass*, (1922) 145 Tenn. 522, 238 S.W. 94; and see, Statutes of Nevada, Ch. 262 (1954-55).

The nature of the offense committed by the violator does not affect the authority to use the roadblock device, if established in a reasonable manner under the circumstances. It is to be observed, however, that similar to the use of force in making arrests and overcoming resistance to arrest, the roadblock may be used only in such a manner as, according to the circumstances, is reasonable.

We do not here attempt to define the various circumstances in which a roadblock is reasonable. Obviously there are different types of "roadblocks." They may consist, for example, of blocking the entire highway, of blocking only one lane of traffic, or of flashing lights at the side of the highway leaving all lanes open to traffic. What might be reasonable under some circumstances may not be reasonable under others. At all events, when used, it must be set up in such a manner and with such appropriate warning signals, that the safety of the traveling public is protected. See *Byers v. U. S.*, (D. N. Mex. 1954) 122 F. Supp. 713, rev'd. (10th Circ. 1955) 225 F. 2d 774; Statutes of Nevada, Ch. 262 (1954-55).

From the foregoing it is clear that a roadblock was authorized upon the facts you have submitted. I express no opinion whether or not there was negligence in the manner in which it was established or maintained. The question remains whether the county is liable for the damage to the commandeered vehicle.

Sheriffs, their undersheriffs and deputies, constables, coroners, police and other peace officers have the power to call upon private citizens and such power of their county as they deem necessary, to apprehend law violators. Secs. 59.24, 61.28, 61.31, 62.09 (13) (a), 346.38, Stats. 1953; sec. 946.40, Wis. Crim. Code. See, *Krueger v. State*, (1920) 171 Wis. 566, 580-583, 177 N.W. 917; *Shawano County v. Industrial Comm.*, (1935) 219 Wis. 513, 517-519, 263 N.W.

590; *Vilas County v. Industrial Comm.*, (1930) 200 Wis. 451, 452-453, 228 N.W. 591; *Village of West Salem v. Industrial Comm.*, (1916) 162 Wis. 57, 60, 155 N.W. 929. See also, 1 Anderson, Sheriffs, Coroners and Constables §141 (1941); 142 A.L.R. 657.

It is unlawful to disobey a lawful command to render aid. Secs. 346.38, 62.09 (13) (a), Stats. 1953; sec. 946.40, Wis. Crim. Code. See New York Penal Law, sec. 1848, which also provides for indemnity for injury resulting in the course of giving such aid.

While not spelled out in specific terms by statute, the foregoing reciprocal powers and duties of law enforcement officers, *vis-a-vis* the private citizen, and the citizen's duties under the ancient "hue and cry," sustain the power of law enforcement officers to commandeer private property when the occasion demands. *Babington et al. v. Yellow Taxi Corp.*, (1928) 250 N.Y. 14, 164 N.E. 726; *Berger v. City of New York*, (1940) 260 App. Div. 402, 22 N.Y.S. 2d 1006, *affd.* (1941) 285 N.Y. 723, 34 N.E. 2d 894.

In *Berger v. City of New York*, *supra*, the court said at 22 N.Y.S. 2d 1008, in part:

"It is conceded that the officer not only had the right to commandeer the car (Penal Law, §1848), but that it was his duty to do so. *Matter of Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726, 61 A.L.R. 1354. 'An officer may not pause to parley about the ownership of a vehicle in the possession of another when there is need of hot pursuit.' Cardozo, Ch. J., in *Matter of Babington v. Yellow Taxi Corp.*, *supra*, 250 N.Y. page 17, 164 N.E. page 727, 61 A.L.R. 1354."

While statutory authority of county traffic officers to call upon private citizens for aid and to commandeer private property is less clear, such power would nevertheless seem to flow from their duty to enforce traffic laws and maintain order upon or near the highways.

If the officer who commandeered the vehicle was a deputy sheriff or undersheriff the county is not liable in any event. Art. VI, sec. 4, Wis. Const., provides in part: "* * * but the county shall never be made responsible for the acts of the sheriff."

Accordingly statutes waiving the immunity of the state and its political subdivisions for the actionable conduct of its officers while engaged in governmental functions do not apply to counties for the conduct of the sheriff. *Larson v. Lester*, (1951) 259 Wis. 440, 446, 49 N.W. 2d 414. See sec. 85.095 (6), Stats.

The actionable acts of the sheriff's deputies and undersheriff are the acts of the sheriff. *Russell v. Lawton*, (1861) 14 Wis. *202, *Sprague v. Brown*, (1876) 40 Wis. 612, 618-619; *Dishneau v. Newton*, (1895) 91 Wis. 199, 201, 64 N.W. 879. See also, *Butler v. Milwaukee*, (1903) 119 Wis. 526, 829, 97 N.W. 185; 40 O.A.G. 41.

Though the sheriff is by statute exempted from liability for the actionable conduct of his deputies and undersheriff in some instances (sec. 59.22 (3), (4), Stats.) such exemption does not alter the rule to be applied as to the constitutional provision in question.

While no Wisconsin case deciding the question has been found, it has been held in New York, under an identical constitutional provision (N.Y. Const., art. IX, sec. 5) that the county is not liable for the acts of the sheriff's deputies. *Thomas v. Ontario County*, (1946) 187 Misc. 711, 65 N.Y.S. 2d 257; *Farley v. Stone*, (1955) 207 Misc. 934, 140 N.Y.S. 2d 579; *Isereau v. Stone*, (1955) 207 Misc. 938, 140 N.Y.S. 2d 582; *Isereau v. Stone*, (1955) 207 Misc. 941, 140 N.Y.S. 2d 585. See also, *Flaherty v. Milliken*, (1908) 193 N.Y. 564, 86 N.E. 558, 560.

It is therefore concluded that the county is not liable for damage to the commandeered vehicle if the vehicle was commandeered by a deputy sheriff.

If the officer who commandeered the vehicle was a county traffic officer but not a deputy sheriff, the county may or may not be liable, depending upon the circumstances.

Sec. 270.58, Stats., provides as follows:

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

This provision includes county traffic officers, and renders the county liable for "an act done in his official capacity." 43 O.A.G. 230, 232; *Larson v. Lester*, (1951) 259 Wis. 440, 444-445, 49 N.W. 2d 414; *Matczak v. Mathews*, (1953) 265 Wis. 1, 60 N.W. 2d 352. See also 41 O.A.G. 103; sec. 85.095, Stats.

In view of the foregoing, the opinion in 19 O.A.G. 628, rendered prior to the enactment of sec. 270.58, Stats. (Wis. Laws 1943, ch. 377), and prior to the amendment to sec. 85.095, Stats. (Wis. Laws 1947, ch. 183) to the effect that the county is not liable for the tortious or unlawful acts of county traffic patrolmen, is no longer applicable.

The officer's promise to the owner that "we'll take care of any damage" was ineffectual. He has no power to thus bind the county. An act or agreement of an agent of the county in excess of his powers is not binding on the county. *Raube v. Christenson*, (1955) 270 Wis. 297, 308, 70 N.W. 2d 639. See also, *Maynard v. DeVries*, (1937) 224 Wis. 224, 228, 272 N.W. 27.

Sec. 85.095, Stats., is inapplicable since the injury was not caused by the negligent operation of a county-owned vehicle.

Whether the county is liable under sec. 270.58, Stats., depends upon whether or not a cause of action lies against the officer, other than the sheriff or his deputies, who commandeered the vehicle. I express no opinion on this question.

You are therefore advised that the county should not admit liability.

WAP

Indians—Automobiles and Motor Vehicles—By virtue of the enactment of Public Laws 280 and 661, 83rd congress (18 U.S.C.A., §1162), trucks and automobiles belonging to the Menominee Indian tribe or to individual Indians are required to be licensed under sec. 85.01 (1), Wis. Stats., if operated on Wisconsin state highways 47 and 55. The drivers of such vehicles are required to be licensed under sec. 85.08, Stats. Menominee Indians operating on Wisconsin highways 47 and 55 are subject to prosecution for offenses such as reckless driving and operating automobile while intoxicated. Ch. 194, Stats., governs “for hire” transportation of logs by someone other than a tribal member upon said state highways. Upon the facts stated in the opinion, certain logging roads therein described, built by the tribe and not generally open to the public, are not public highways.

June 5, 1956.

MOTOR VEHICLE DEPARTMENT.

You request my opinion upon the following five questions:

1. Must the trucks and automobiles belonging to the Menominee Indian tribe or to individual Indians be licensed under sec. 85.01 (1), Stats., if operated on Wisconsin highways 55 and 47?
2. Must the drivers be licensed under sec. 85.08, Stats.?
3. Are the logging roads which were built by the tribe classified as public roads?
4. If the trucking of logs by someone other than a tribal member is a “for hire” haul, do the laws under ch. 194, Stats., apply?
5. Can a Menominee Indian be arrested by a state officer on highways 47 and 55 within the boundary of the reservation for offenses such as operating automobile while intoxicated and reckless driving?

Title 18, United States Code, §1162, as a result of Public Laws 280 and 661, 83rd congress, reads in part as follows:

“(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the

State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

“State of _____ Indian country affected

“* * * _____ * * *

“Wisconsin_____ All Indian country within the State”

Subsec. (b) of said §1162 contains the proviso that:

“Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.”

It follows from this grant of jurisdiction to the state over offenses committed on Indian lands that state traffic officers now have the right to require the Menominee Indians to comply with chs. 85 and 194, Stats., except where such enforcement would affect property held in trust by the United States in a manner prohibited by 18 U.S.C. §1162 (b). The requiring of a license for vehicles and drivers operating upon state highways 47 and 55, where the vehicle is owned by an individual Indian, would not come under the exception. The answer to questions one and two is therefore “Yes.”

The federal district court for the eastern district of Wisconsin ruled in *In re Fredenberg*, (1946) 65 F. Supp. 4, that Wisconsin lacked the necessary jurisdiction over state highway 47 within the Menominee Indian reservation to require an Indian who hauled logs upon that highway, but solely within the reservation, to register his vehicle under sec. 85.01, Wis. Stats. The sole basis for the ruling was that congress had never granted jurisdiction over that area for such purposes. In *State v. Tucker*, 237 Wis. 310, the supreme court of Wisconsin reached a contrary decision, however.

In *Ex parte Konaha*, (CCA 7th) 131 Fed. 2d 737, the question was left open, but the court hinted that the decision of the Wisconsin supreme court in the *Tucker* case, *supra*, could be justified but did not apply to the crime with which Konaha was charged. In any event, the question is now resolved by Public Laws 280 and 661, 83rd congress, enacted in 1953 and 1954, which respectively grant this jurisdiction.

The answer to questions four and five is also "Yes" as a result of this grant of jurisdiction.

Question three relates to the character of logging roads on the reservation. The following is the summary of log hauling operations enclosed with the letter :

"Log hauling trucks on the Menominee Indian Reservation are owned by individual Indians. Under contract with the Menominee Indian Mills they haul logs from the forest (the tribally owned forest) to the tribally owned saw-mill at Neopit. Log hauling is performed over Mills-Indian Service forest truck trails and logging roads. These latter mentioned forest trails and roadways were laid out, constructed and paid for, (and are maintained), from tribal funds. They are private tribal-company roadways. The public, while it may travel on same to some extent for incidental purposes, does so only on a permissive basis. The roadways can be and are oftentimes closed to public access; much in the same manner in which State forest and truck trails may be closed to the public. All Mills-Indian Service roadways, fire trails and truck trails occupy and traverse only the tribally owned forest real estate. The tribally owned forest real estate is held in trust by the United States Government for the benefit of the Menominee Tribe of Indians."

It should be noted from this summary that the public uses these logging roads only on a permissive basis, that such roads traverse only real estate held in trust by the United States for the Indians and that the roads were constructed with and are maintained with tribal funds.

Chs. 85 and 194 regulate activities on "highways." Highway is defined in sec. 990.01 (12), Wis. Stats., as follows :

" 'Highway' includes all public ways and thoroughfares and all bridges upon the same."

and in sec. 194.01, Wis. Stats. :

“‘Public highway’ means every public street, alley, road, highway or thoroughfare of any kind, except waterways, in this state while open to public travel and use.”

Sec. 85.10 (21) (a), Stats., as amended by ch. 475, sec. 2, Laws 1955, defines highway as follows:

“A highway is every way or place of whatever nature open to the use of the public as a matter of right for the purposes of vehicular travel. The term ‘highway’ shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions, except upon property under the jurisdiction of the board of regents of state colleges.”

The Wisconsin supreme court in *State ex rel. Happel v. Schmidt*, (1947) 252 Wis. 82, 86, quoted the following from 25 Am. Jur., Highways, p. 339, §2:

“A highway is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand, and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel upon it is not material. If it is open to all who desire to use it, it is a public highway although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others.”

Two of the criteria for a highway under this authority are not present in the instant situation. First, the logging roads are not open to all who desire to use them, and second, the public has no duty to maintain them. The validity of this second criterion is in doubt in view of *Weirich v. State*, (1909) 140 Wis. 98, where it was held that a toll road operated by a private corporation was a public highway. However, the first criterion requires a negative answer to question three.

The following quoted from headnote 1 to *Langer v. Chicago, M., St. P. & P. R. Co.*, (1936) 220 Wis. 571, negatives

any argument that the tribe should be estopped from denying that the logging roads are public highways :

“A road which was entirely within a railroad company’s right-of-way lines, and which was used by farmers with the permission of the railroad company in connection with a depot, and which was not worked as a public highway, was not a public highway * * *.”

SGH

*Architects and Engineers—Partnership or Corporation—Signature and Seal Requirements—*Under sec. 101.31 (7) (a), Stats., plans, sheets of design and specifications furnished by a corporation engaged in the practice of architecture must bear the signature of the registered architect in responsible charge, and under Rule A–E 1.04 of the board there must also be affixed the seal or rubber stamp of such architect.

June 11, 1956.

W. A. PIPER, *Secretary,*

Wisconsin Registration Board of Architects and Professional Engineers.

You have inquired whether a firm of architects incorporated in Wisconsin may use a seal bearing the firm name on plans, specifications, and designs, and whether if this is done such documents must also carry the seal of an individual architect.

Sec. 101.31 (7) (a), Stats., provides :

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

Sec. 101.31 (4) (d), Stats., relating to the powers of your board, provides among other things that the board may make all bylaws and rules, not inconsistent with the constitution and laws of this state, which may be reasonably necessary for the proper performance of the board's duties and the regulation of proceedings before it.

The board has adopted Rule A-E 1.04 entitled "Registration Seals." Subsec. (1) sets up a suggested design for the seal of an individual architect containing his name, address, and the words "Wisconsin Architect."

Subsec. (2) of the rule reads:

"(2) All plans, documents and specifications for architectural or professional engineering practice shall be sealed by the principal in responsible charge of the work, who shall provide himself with a seal that complies with the specifications of the board."

Subsec. (3) of the rule reads:

"(3) Rubber stamps, identical in size, design and content with the approved seals may be used by the registrant at his option."

We assume that Rule A-E 1.04 was not intended to make it possible for an architect to use such a seal in lieu of his signature required by the underscored language in sec. 101.31 (7) (a), quoted above, since the board has no power to adopt a rule that is inconsistent with the laws of this state.

Thus, we wish to make it clear at the outset in answering your question that the requirements of sec. 101.31 (7) (a) of the statutes as to signatures cannot be dispensed with by a board rule to the contrary. However, there would appear to be no sound reason why the use of a seal or rubber stamp may not be required by the board in addition to the signature. Since good handwriting is a lost art, it is virtually a necessity today to have signatures translated or clarified, and a seal or rubber stamp should serve the purpose very well. The purpose of sec. 101.31 (7) (a) could to a large extent be defeated by the use of indecipherable signatures, and Rule A-E 1.04 therefore implements the purpose of the statute and aids in its enforcement.

Coming now to the question of whether a firm seal may be used, we are not quite sure by this whether you mean the corporate seal of this particular corporation or whether you mean a seal not of a corporate character but designed along the lines of an individual architect's seal as required under Rule A-E 1.04 but containing the names of all of the members of the firm or at least the names of those appearing in the corporate name.

The result is the same in any event. Neither the statutes nor the rules of the board provide for any seal other than that of an individual architect to be used on plans, sheets of design and specifications. If the corporate seal or a special seal containing the names of more than one architect were used it would be mere surplusage and a matter of only passing interest to anyone. In other words, the use would be immaterial.

The important thing to remember, and the only important thing so far as your present inquiry is concerned, is that such papers must bear the signature of the registered architect who is in responsible charge, because sec. 101.31 (7) (a), Stats., requires it, and that the papers must also bear the seal or rubber stamp of the same person because Rule A-E 1.04 requires it.

WHR

Counties—Officers and Employes—Salaries and Wages—
Under sec. 66.195, Stats., salaries of elected county officers may be increased during the term of office within the limitations therein prescribed, but may not thereafter be decreased during such term because decreases are prohibited under sec. 59.15 (1) (a), Stats. Cost of living bonuses and county board action changing the same must be taken into account in determining whether there has been an increase or decrease in compensation.

June 14, 1956.

HERBERT W. JOHNSON,
District Attorney,
Door County.

You have furnished us with information relating to salary changes of eight county officers going back to the October 9, 1951 meeting of the county board of supervisors. These changes have given rise to a number of questions upon which you have requested our opinion.

I. Power to Increase Salaries During Term

The first question you have asked is whether the county board may, during the term of office of elective county officials, change the salary formula where the over-all change (including salary and cost of living bonus) has the effect of increasing the salary.

This question is answered in the affirmative.

Sec. 59.15 (1) (a), Stats., relating to the salaries of elective county officials, provides in part that the county board shall, prior to the earliest time for filing nomination papers for any elective office, establish the total annual compensation, which when established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

However, the effectiveness of the foregoing provision has been pretty well canceled for the present, so far as increases are concerned, by the provisions of sec. 66.195, Stats., which reads:

“66.195 During the period commencing February 27, 1951, and ending December 31, 1957, the governing body of

any county, city, village or town may, during the term of office of any elected official whose salary is paid in whole or in part by such county, city, village or town, increase the salary of such elected official in such amount as the governing body may determine. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary, except that the exercise of such power shall be governed by s. 65.90 (5)."

The only limitation on the increase is that the action taken under sec. 66.195 must be during the period commencing February 27, 1951, and ending December 31, 1957. While the present sec. 66.195 was created by ch. 66, Laws 1955, a former sec. 66.195 in identical wording, except as to dates, was created by ch. 6, Laws 1951. This was amended by ch. 675, Laws 1953, so as to extend the last date from December 31, 1953, to December 31, 1954. Sec. 66.195 was repealed by ch. 10, Laws 1955, and was created again in its present form by ch. 66, Laws 1955, as mentioned above. Thus sec. 66.195 has been effective from February 27, 1951, the effective date of ch. 6, Laws 1951, to the present time except for a short interval early in 1955 between the date of its repeal by ch. 10, Laws 1955, effective March 23, 1955, and May 12, 1955, when ch. 66 became effective.

Once timely action has been taken under sec. 66.195 to increase the salary of an elective county officer, the increase so granted would remain effective for ensuing terms unless changed by the board, in view of the provision to that effect contained in sec. 59.15 (1) (a). That is to say, sec. 66.195 supersedes sec. 59.15 (1) (a) only to the extent that it is inconsistent therewith. Moreover, the increase having once been granted under sec. 66.195, it cannot thereafter be decreased again during the same term, by reason of the provisions of sec. 59.15 (1) (a). In other words, there can be increases but no decreases.

II. The County Judge

Your second question poses a somewhat different problem. This deals with the county judge who was re-elected in the spring of 1955 for the term commencing January 1, 1956. Under the 1951 resolution his salary was fixed at \$5,840 plus a cost of living bonus of \$30 per month. On

November 12, 1954, his salary was changed to \$6,600 plus a cost of living bonus, the change being effective January 1, 1955. However on November 8, 1955, you state the board took action which had the effect of decreasing his then salary because the cost of living bonus was then computed at \$33 per month. Prior thereto it was to be adjusted on the basis of the rise and fall of the consumer's price index on specified dates four times a year. If this index had fallen the result would have been an increase which, as pointed out above, would have been permissible under sec. 66.195. Since there had been an increase in the index the result you state is a decrease in pay of \$3 per month during a part of the term the judge is now serving.

Sec. 66.195 authorizes increases during the term but it does not authorize decreases. As to decreases, the provisions of sec. 59.15 (1) (a) are still controlling as suggested above. Hence, the county judge would appear to be entitled to a restoration of the amount lost by pegging the cost of living bonus instead of leaving it flexible. It is true that he received a raise in salary on November 12, 1954, which would more than offset the loss he sustained by pegging the cost of living bonus on November 8, 1955, as of January 1, 1956, and had the two changes occurred simultaneously there would be no problem of decreasing the salary during the term of office. However, the salary increase came first, and having once been made it could not be subsequently decreased during the term. On the other hand, the last action of the board affecting the bonus only had the effect of cutting the total salary and bonus set a year earlier.

III. The Register of Deeds

With reference to the register of deeds a still different problem is presented.

On October 9, 1951, his salary was fixed by the board at \$3,300 plus a flexible cost of living bonus of \$30 per month. On May 12, 1955, the board added the duties of the tax listing office to the register of deeds office effective June 1, 1955, and increased the salary \$50 per month. On November 8, 1955, the board relieved the register of deeds of his additional duties and revoked the \$50 per month increase.

At the same time the bonus was reduced from \$33 per month, the amount the register of deeds was then receiving, to \$30 per month, and the \$30 per month was added to the base pay. The base pay was also increased by \$25 per month.

We do not consider that any problem of increase or decrease of salary is involved where duties not germane to the office are added and additional compensation is provided or where the same duties are taken away along with the same amount of compensation that was provided for the performance of the additional duties. See 43 Am. Jur., Public Officers, §353.

Leaving this part of the situation out of the picture, it is clear that the net result so far as the register of deeds is concerned is an increase. While there was a slight decrease in that part of the salary measured by the bonus, this was more than offset by the \$25 monthly increase, which was permissible under sec. 66.195. It is immaterial whether the compensation is called salary or salary and bonus. Otherwise, statutory provisions relating to compensation could be set at naught by a gloss of words.

IV. The District Attorney

In the case of the district attorney the salary was set on October 9, 1951, at \$2,400 plus a \$30 per month flexible cost of living bonus. Effective January 1, 1955, the county board added a \$60 per month secretarial allowance, not subject to payroll deductions. Here again the \$3 decrease in the cost of living bonus revocation of November 8, 1955, was more than offset by the \$60 per month additional compensation. However, this occurred after the \$60 per month increase, effective January 1, 1955, and the result again is a violation of sec. 59.15 (1) (a). The fact that the increase was for clerk or secretarial hire does not change the picture. See 11 O.A.G. 388.

V. The Clerk of Court

The clerk of court's salary was fixed on October 9, 1951, at \$3,300 plus a \$30 per month flexible cost of living bonus. On December 9, 1954, the board added to this office the duties of the clerk of the justice court branch of the county court and fixed the compensation for the extra duties at \$50

per month. Here again there was a reduction in compensation of \$3 per month, being the difference between the cost of living bonus at that time and the \$30 per month base pay which was substituted. It is to be noted that the county board action which resulted in the reduction took place on November 8, 1955, which was subsequent to the increase of salary of \$50 per month resulting from the county board action on December 9, 1954.

Thus, as in the case of the county judge and the district attorney there was a decrease of \$3 per month for a part of the term contrary to the provisions of sec. 59.15 (1) (a).

VI. The County Clerk

The county clerk's salary was fixed on October 9, 1951, at \$3,600, plus fees, plus a flexible \$30 per month cost of living bonus. On November 8, 1955, he received a \$25 per month increase in salary and at the same time the \$30 per month bonus became a part of the base pay. This resulted in a \$3 per month reduction from the flexible cost of living bonus formula which produced a \$33 per month figure at that time. However, when offset against the \$25 per month salary increase granted at the same time, the over-all result is an increase of \$22 per month which is permissible under sec. 66.195.

VII. The County Treasurer

On October 9, 1951, the county treasurer's salary was fixed at \$3,600 plus a flexible cost of living bonus of \$30 per month. On November 8, 1955, he received a \$25 per month increase in salary, and the bonus situation in his case is identical with that of the county clerk discussed above. The net result is the same, and there is no prohibited decrease in violation of sec. 59.15 (1) (a).

VIII. The Sheriff

The sheriff's salary was fixed at \$3,600 with a flexible cost of living bonus of \$30 per month on October 9, 1951. He received no salary increase on November 8, 1955, but suffered a \$3 per month decrease in compensation as a result of making the bonus a part of the base pay with no

flexibility as to amount. His compensation was therefore decreased contrary to sec. 59.15 (1) (a).

IX. The County Superintendent of Schools

On October 9, 1951, the salary of the county superintendent of schools was fixed at \$4,500 plus a \$30 per month flexible cost of living bonus which in effect was reduced \$3 per month by the county board action of November 8, 1955, which transferred all bonuses into base salaries with no adjustments to the rise or fall of the consumer's price index. However, at the same time the board increased his salary to \$6,000 per year effective January 1, 1956, the same date when all bonuses became a part of the base pay. The superintendent is elected every four years. He was elected in 1953 and comes up for re-election in 1957.

Here there is an over-all substantial increase during the term which is permissible under sec. 66.195.

WHR

*State Historical Society—Pensions—Wisconsin Retirement Fund—*Employes of the state historical society are "employes" within the meaning of sec. 66.901 (4), Stats., and properly have been included under the Wisconsin retirement fund.

June 20, 1956.

F. N. MACMILLIN,

Executive Director,

Wisconsin Retirement Fund.

Secs. 66.901, 66.902, and 66.903, Wis. Stats. 1947, provided in part as follows:

"66.901 Definitions. The following words and phrases as used in sections 66.90 to 66.919, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

"(1) FUND. The Wisconsin retirement fund.

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

district, 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.

"(3) PARTICIPATING MUNICIPALITY. Any municipality included within the provisions of this fund.

"(4) EMPLOYEE. Any person who:

"(a) Receives earnings out of the general funds of any municipality or out of any special fund or funds controlled by any municipality as payment for personal services.

"(b) Whose name appears on a regular pay roll of such municipality.

"(c) Is employed in a position normally requiring actual performance of duty during not less than 600 hours a year in such municipality, and

"(d) Has completed at least 6 months continuous service or 12 months total service for the municipality by which such person is employed when such person otherwise first becomes eligible for participation in the fund.

"* * *

"(6) PARTICIPATING EMPLOYEE. Any person included within the provisions of this fund.

"* * *

"(9) EARNINGS. An amount equal to the sum of the total amount of money paid on a regular pay roll by a municipality to an employe for personal services rendered to such municipality * * *.

"* * *

"(16) * * * For the state of Wisconsin there shall be a governing body for each department, board or commission thereof which governing body shall be, for each such department, board or commission, the respective head thereof, who shall be certified in writing to the board of trustees by the director of the bureau of personnel for the state of Wisconsin.

"(17) EFFECTIVE DATE. The date upon which the provisions of this fund become applicable to any participating municipality as provided in section 66.902.

"* * *

"66.902 Municipalities included and effective dates. (1) Any municipality, except a city of the first class, a county having a population of 500,000 or more and the state of Wisconsin, shall be included within, and shall be subject to, the provisions of this fund by so electing, in accordance with this section. The effective date of participation of any such municipality shall be January 1 of the year after the year in which proper official notice of election to be included

has been received by the board. The state of Wisconsin is hereby included, effective January 1, 1948. * * *

“* * *

“66.903 Employees included; effective dates; contributions by employes. (1) EMPLOYES INCLUDED AND EFFECTIVE DATES. (a) All persons subject to sections 66.90 to 66.919 shall be included within, and shall be subject to, the provisions of this fund, beginning upon the dates hereinafter specified:

“1. All such persons who are employes of any municipality on the effective date of participation of such municipality as provided in section 66.902, beginning upon such effective date.

“2. All such persons who become employes of any participating municipality after the effective date of participation of such municipality as provided in section 66.902, beginning upon the date any such person becomes an employe.

“* * *”

Pursuant to the provisions of sec. 66.901 (16), Stats. 1947, quoted above, the director of personnel certified Dr. Clifford L. Lord as the head of a department of the state government known as the state historical society. Since January 1, 1948 when the state of Wisconsin came under the Wisconsin retirement fund in accordance with the provisions of sec. 66.902 (1), Stats. 1947, the reports submitted to the Wisconsin retirement fund over the signature of Dr. Lord, covering employes of the state historical society, have been accepted by the Wisconsin retirement fund, and the employes of the state historical society have been deemed to be included under the Wisconsin retirement fund as state employes.

In an opinion to the director of the state historical society found in 44 O.A.G. 350, it was stated with respect to said society, “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.”

It was held in said opinion that the state historical society was exempt from the provisions of the unemployment compensation act under sec. 108.02 (5) (g) 7, Stats., unless

said society elects to come under the act with the approval of the industrial commission.

You have assumed that said opinion establishes the fact that the state historical society is not a department, board, or commission of the state government and hence, that its employes have been included under the Wisconsin retirement fund as state employes erroneously because the statutes relating to the Wisconsin retirement fund do not authorize the inclusion thereunder of the personnel of private corporations. You have requested my opinion as to whether the employes of the state historical society are properly under the Wisconsin retirement fund.

“The state historical society of Wisconsin was chartered by the legislature by ch. 17, Laws 1853, published March 4, 1853. This corporation was the successor to the Wisconsin historical society established without charter in October 1846 and which was reorganized without charter as the historical society of Wisconsin on January 30, 1849. Chapter 17, Laws 1853, provided that certain individuals therein named, ‘and their present and future associates, and their successors, be and they are hereby constituted and created a body politic and corporate, by the name of “The State Historical Society of Wisconsin,” and by that name shall have perpetual succession with all the faculties and liabilities of a corporation’ * * *” (36 O.A.G. 285, 286)

In the case of *State ex rel. W.D.A. v. Dammann*, 228 Wis. 147, 277 N.W. 278, and *State ex rel. Thomson v. Giesel*, 265 Wis. 185, 60 N.W. 2d 873, it was strongly implied that the state historical society was a private corporation with a public purpose, although neither of those cases dealt primarily with the history, nature, or functions of the state historical society. 36 O.A.G. 285 at 290 holds that “the state historical society is a private corporation for a public purpose.”

It may or may not be that these cases and certain opinions of the attorney general refer to the state historical society as “a private corporation” because of the fact that ch. 17, Laws 1853, constituted it as “a body politic and corporate * * * with all the faculties and liabilities of a corporation” and because sec. 44.01, Stats., states that it shall continue to have the powers and privileges conferred by

said act. However, as pointed out in 25 O.A.G. 668 it has never been incorporated under the general corporation laws. By sec. 3, ch. 81 of the revised statutes of 1858, the legislature constituted the society a trustee for the state. From time to time the legislature has acted to change or modify the powers which the society ordinarily would have had as a private corporation and in other ways has exercised a great amount of direct control over it.

Ch. 44, Stats., relates to the state historical society and local historical societies. Sec. 44.01, Stats. 1955, provides in part:

“The state historical society of Wisconsin, organized under an act of the legislature approved on March 4, 1853, shall continue to possess the powers and privileges thereby conferred, subject to the provisions of this chapter and such laws as shall hereafter be enacted, and its acceptance of the benefits herein granted and renewed shall be conclusively deemed its complete acquiescence therein. Said society shall be an official agency and the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; and shall not sell, mortgage, transfer or dispose of in any manner, or remove, except for temporary purposes, from its building or buildings any article therein without authority of law; * * *. There shall continue to be a board of curators of said society, constituted with substantially the same powers as at present, of which the governor, secretary of state and state treasurer shall be ex officio members and take care that the interests of the state are protected. * * *”

42 O.A.G. 333 at 336 states:

“* * * While it is still a private corporation with a public purpose, it has become more and more an agency of the state, and to the extent that it is a state agency it falls within the orbit of the rule that such an agency has only those powers expressly granted to it or that are necessarily implied from the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440. At any rate the legislature has recognized the implications of the above rule to the extent that it has deemed it necessary to give the society from time to time specific powers which ordinary corporations exercise without special grant.”

In 43 O.A.G. 55 at 57, it was stated: "It should be noted that the state historical society is both a private corporation and an official agency of the state."

In 36 O.A.G. 285, it was held that the state historical society was required to deposit with the state treasurer all funds which it received by grant, bequest or otherwise and that it was specifically limited by statute with respect to the handling of its property.

In 39 O.A.G. 110, it was held that the state historical society has no liability for the negligent operation or maintenance of elevators which could properly be made the subject of public liability insurance. This opinion gave the state historical society the benefit of the rule under which the sovereign is not liable for tortious acts of its employes in the absence of specific statute.

In 43 O.A.G. 166, it was held that the state historical society, as an arm or agency of the state, was not liable for damages for copyright infringement. This conclusion also was reached by application of the common law doctrine of sovereign immunity.

In the opinion in 36 O.A.G. 237, 238, it was said:

"The fact that from time to time there has been special legislation, as above noted, excepting from the classified service certain members of the professional staff and that at the present time there is a bill pending in the legislature to place the director, chief librarian, chief curator and research specialists of the society in the unclassified service would seem to indicate a legislative intent that employes of the society are deemed to be in the classified service of the state except as specifically exempt therefrom."

In 41 O.A.G. 303, 305, it was stated:

"Among the determining factors in answering the question of whether or not the state historical society partakes of the state's immunity from suit for the negligence of its officers and agents were the following as discussed in 39 O.A.G. 110:

"1. The governor, secretary of state, and state treasurer are *ex officio* curators under the society's articles.

"2. Sec. 44.01, Stats., provides that the society shall be an official agency and trustee of the state and shall hold all its present and future collections and property for the state.

"3. All moneys received by it are deposited in the state treasury and reappropriated to the society. Secs. 20.78 and 20.785, Stats.

"4. The committee for disposition of state records, which committee is composed of the director of the society, the attorney general, and the state auditor, is established under the state historical society. Sec. 44.08 (1), Stats.

"5. The society as trustee for the state is the ultimate depository of the archives of the state. Sec. 44.08 (6), Stats.

"6. *The employes of the society are state employes under civil service.*

"7. Its printing is done by the state printer.

"8. The society is supported in part by state appropriations and it can expend no funds except pursuant to legislative appropriation.

"No attempt was made in 39 O.A.G. 110 to evaluate the importance of any one of the above factors in answering the question there considered and none will be made here. Suffice it to say that taken in the aggregate these factors left no doubt in the mind of the attorney general as to the status of the society as a state agency." (Emphasis added.)

A high percentage of the income of the state historical society is derived from legislative appropriation made from the general fund of the state by sec. 20.430, Stats. The employes of the state historical society are paid with state checks issued in the same manner as other state checks and charged to the aforesaid appropriation made by sec. 20.430. The state is unquestionably the principal if not the sole beneficiary of the services of the employes of the society. As said in the case of *State ex rel. Wisconsin University Building Corporation v. Bareis*, 257 Wis. 497, 44 N.W. 2d 259, "the court always looks to the substance and not to the form."

Hence, in my opinion the salaries paid to these employes are for services rendered to the state. Thus they receive earnings out of funds controlled by a municipality as payment for personal services as required by sec. 66.901 (4) (a), Stats., since the definition of "municipality" found in sec. 66.901 (2) includes the state of Wisconsin.

The names of the employes of the state historical society appear on a regular pay roll of the state of Wisconsin in the same manner as the names of employes of other state departments, as required by sec. 66.901 (4) (b).

No question has been raised but what these employes meet the requirements of sec. 66.901 (4) (c) and (d).

The employes of the state historical society have been deemed by the industrial commission and by the attorney general to be employes of the state of Wisconsin within the meaning of the workmen's compensation act.

From the foregoing it will appear that it has been the administrative determination of numerous state departments that the employes of the state historical society are employes of the state of Wisconsin.

The practical construction of a statute is entitled to great weight. *State v. Krause*, 186 Wis. 59, 202 N.W. 319; *Mariette, T. & W. R. Co. v. Railroad Comm.*, 195 Wis. 462, 218 N.W. 724; *Mauel v. Wis. Automobile Ins. Co., Ltd.*, 211 Wis. 230, 248 N.W. 121.

This is particularly true where the practical construction has endured for a long period of time. *Scanlan v. Childs*, 33 Wis. 663; *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N.W. 78; *State ex rel. State Association of Y.M.C.A. v. Richardson*, 197 Wis. 390; *State ex rel. Milwaukee County Republican Committee v. Ames*, 227 Wis. 643, 278 N.W. 273.

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 v. Johnson*, 186 Wis. 59, 69, 202 N.W. 319; *State ex rel. Green v. Clark*, 235 Wis. 628, 294 N.W. 25.

"* * * Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it. *McKean v. Delancy's Lessee*, 5 Cranch, 22; *Edwards' Lessee v. Darley*, 12 Wheat., 206, 210; *Morrison v. Barksdale*, Harper, 101; *Attorney General v. Bank of Cape Fear*, 5 Iredell's Eq.; *Rogers v. Goodwin*, 2 Mass., 475; *Packard v. Richardson*, 17 Mass., 144; *Opinion of the Justices*, 3 Pick., 517, 518.

"* * * The concurrent opinion and advice of these attorneys general and of the other commissioners, extending through a period of so many years, ought, it would seem, to be some evidence of what the law is; and some persons might be disposed, perhaps, to think, evidence equal to a decision of this court. The supreme court of the United

States has on more than one occasion paid great respect to such evidence on questions of statutory construction. *Union Insurance Company v. Hoge*, 21 How., 36, 66; *Havemeyer v. Iowa County*, 3 Wallace, 294. In the former case the court say, speaking of the practical construction of an act of the legislature of the state of New York by the public officers of that state, including the attorney general, that it is deserving of consideration, and although it cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt or where the error is not plain." *Harrington v. Smith*, 28 Wis. 43, 68-69.

In the case of *Estate of Week*, 169 Wis. 316, 172 N.W. 732, the court said that an administrative interpretation which had prevailed for many years "evidences a practical construction which only the legislature should change."

The foregoing principle was specifically applied to statutes relating to a retirement system in *State ex rel. Koch v. Retirement Board*, 244 Wis. 580, 13 N.W. 2d 56.

The practice of giving great weight to administrative interpretations is followed not only by the Wisconsin court but also by the federal courts. In *Wisconsin v. Illinois*, 278 U.S. 367, the court discussed the construction which had been given to a federal act by the war department for many years and said, at page 413:

"* * * Nothing is more convincing in interpretation of a doubtful or ambiguous statute. *United States v. Minnesota*, 270 U.S. 181, 205, 70 L. ed. 539, 548, 46 Sup. Ct. Rep. 298; *Swendig v. Washington Water Power Co.* 265 U.S. 322, 331, 68 L. ed. 1036, 1040, 44 Sup. Ct. Rep. 496; *Kern River Co. v. United States*, 257 U.S. 147, 154, 66 L. ed. 175, 179, 42 Sup. Ct. Rep. 60; *United States v. Burlington & M. River R. Co.* 98 U.S. 334, 341, 25 L. ed. 198, 200; *United States v. Hammers*, 221 U.S. 220, 228, 55 L. ed. 710, 715, 31 Sup. Ct. Rep. 593; *Logan v. Davis*, 233 U.S. 613, 627, 58 L. ed. 1121, 1128, 34 Sup. Ct. Rep. 685."

Moreover, the private rights which the employes of the state historical society presumably have acquired as state employes on the basis of many years of service should not be overturned for any but the most clear and compelling reasons.

It is my opinion, therefore, that the employes of the state historical society meet the definition of "employee" within the meaning of sec. 66.901 (4), Stats., and properly have been included under the Wisconsin retirement fund, notwithstanding the fact that said society may have a dual character as both a private corporation and a state agency.

Your request contained numerous other questions, all of which were predicated upon a negative answer to your first question. Since that answer is in the affirmative, none of the other questions need to be answered.

JRW

Housing Authorities—Pensions—Wisconsin Retirement Fund—Municipal housing authority created under sec. 66.40, Stats., and employes thereof, are not eligible for inclusion under Wisconsin retirement fund by virtue of the enactment of ch. 682, Laws 1955.

June 29, 1956.

FREDERICK N. MACMILLIN,
Executive Director,
Wisconsin Retirement Fund.

In 37 O.A.G. 626 it was held that the property of a municipal housing authority which was created pursuant to sec. 66.40 *et seq.*, Stats. 1947, was not insurable in the state insurance fund. It was decided in that opinion that a housing authority was not an arm, department, or agency of the city which created it. In the opinion it was said at pp. 627 to 629:

"While under the provisions of sec. 66.40, Stats. 1947, a municipal housing authority exists by virtue of the adoption of a resolution by the council of the city, the commissioners are appointed by the mayor subject to confirmation by the council, and the commissioners are removable by the mayor for inefficiency, neglect of duty, or misconduct in office, neither the mayor nor the council has any other control, supervision or power over such housing authority. It

is specifically provided that such housing authority constitutes a public body and is a body corporate and politic. It is an independent autonomous unit which may sue and be sued, may have a seal, and enjoys perpetual succession. It is given power to make by-laws, rules and regulations; to own, hold and improve property; to acquire, lease and operate housing properties; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise or otherwise any real or personal property or any interest therein; to contract for sale and sell property; to execute contracts of sale and conveyances; to invest its unused funds; and to issue bonds, notes, debentures and other evidences of indebtedness which shall not be debts or charges against any city, county, state or other governmental authority. Its property is declared to be public property and exempt from taxation. Specifically it does not have any power to levy any tax or assessment.

“* * *

“* * * Title to the real estate and other property of the housing authority is taken and stands in its own corporate name. All conveyances, contracts or indebtedness by the housing authority or its properties are made by it in its own separate capacity and in its corporate name.

“From an over-all view of the provisions relative to municipal housing authorities it is our opinion that the legislature did not intend to create them as an arm, department or agency of the city of origin but as independent entities entirely separate and distinct from such city. * * *

“Of primary influence in arriving at this conclusion is the provision that bonds, notes and indebtedness of a municipal housing authority are not a debt or charge of any city, county, state or other governmental unit. * * *

“It is also of significance that the city has no control over the activities of a municipal housing authority; cannot control the officers of the authority; and has no right, title or interest in its property, and the title to its property stands in the name of the authority. Furthermore, the provision in sec. 66.404 (4) that any other city or village not in its original area of operation may authorize it to operate in such other city or village shows an intended existence which is independent of and separate from the city of its origin. * * *”

Sec. 66.901 (1), (2) and (3), Stats., provides:

“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:

“(1) FUND. The Wisconsin retirement fund.

“(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.

“(3) PARTICIPATING MUNICIPALITY. Any municipality included within the provisions of this fund.”

Sec. 66.902 (1) provides that “Any municipality * * * shall be included within, and shall be subject to, the provisions of this fund by so electing, in accordance with this section.”

Since a municipal housing authority created pursuant to sec. 66.40 of the statutes was held to be an independent entity entirely separate and distinct from the city which created it, instead of being an arm, department, or agency of the city government, and the definition of “municipality” given by sec. 66.901 (2) does not specifically include a municipal housing authority, it has been the administrative determination that a municipal housing authority and its employes cannot be included under the Wisconsin retirement fund.

You inquire whether the status of a municipal housing authority as determined in 37 O.A.G. 626 has been altered by ch. 682, Laws 1955, so that such an authority, created under sec. 66.40, and its employes, are eligible for inclusion under secs. 66.901 to 66.918 relating to the Wisconsin retirement fund.

Ch. 682, Laws 1955, creates sec. 66.40 (25), Stats., and provides in substance:

1. That any city council or village board or the electors may provide that the municipal housing authority shall liquidate and dispose of a particular housing project held and operated under secs. 66.40 to 66.404.

2. That whenever such liquidation and disposal of a project is provided for, the housing authority shall sell the project to the highest bidder or transfer it to a state public body authorized to acquire it.

3. That the arrangements for the liquidation and disposal of a project shall include provision for payment and

retirement of outstanding obligations incurred in connection with the project.

4. That any proceeds, after payment of such obligations, shall be distributed in accordance with any applicable federal law, or in the absence of such a law, shall be paid to the city or village.

5. That if the highest bid received for the project is insufficient to pay the aforesaid outstanding obligations, the project shall not be sold unless the city provides sufficient additional funds to discharge such obligations.

The aforesaid ch. 682, of course, does give a city council power to decide that a particular housing project shall be liquidated. Even in the event of the exercise of such power, however, the legislature has provided the manner in which the liquidation shall be accomplished. All of the reasons for holding that a municipal housing authority is not an arm, department, or agency of the city which were given in the above quoted portion of 37 O.A.G. 626 are as valid now as they were at the time that opinion was written.

Since said opinion was issued the statutes which relate to a municipal housing authority have been amended by ch. 392, Laws 1949, to give more autonomous power to it. That act created sec. 66.40 (9) (s) which authorizes a municipal housing authority to acquire sites and operate certain housing projects without the approval of the city council which is required by sec. 66.40 (4) (a) for the operation of certain other housing projects.

Ch. 356, Laws 1953, created sec. 66.40 (9) (t) which granted a municipal housing authority power "to participate in an employe retirement or pension system of the city which has declared the need for the authority and to expend funds of the authority for such purpose."

Since neither said ch. 356, Laws 1953, nor any other act amended sec. 66.901 (2) to include a municipal housing authority as a "municipality" within the meaning of secs. 66.901 to 66.918 relating to the Wisconsin retirement fund, or amended sec. 66.902 (2) to provide the procedure for including such an authority under said fund, it is at least very doubtful whether a municipal housing authority created pursuant to sec. 66.40, and its employes, could be in-

cluded within the Wisconsin retirement fund under the existing statutes. In any event, ch. 356, Laws 1953, indicates that the legislature realized and intended that employes of the municipal housing authority created by the council of a city did not automatically participate in the retirement system in which such city and its employes are included.

The conclusions set forth in 37 O.A.G. 626 were reached despite the fact that the city council had the right to create the municipal housing authority in the first instance. In my opinion such conclusions are not altered by the fact that the legislature has now granted the city council the right to decide that a particular housing project should be liquidated. Hence, I am of the opinion that neither a municipal housing authority created pursuant to sec. 66.40, nor the employes of such an authority, are eligible for inclusion under the Wisconsin retirement fund as a result of the enactment of ch. 682, Laws 1955.

JRW

Motor Vehicle Department—Motor Carriers—Drivers' Hours of Labor—Motor vehicle department has no authority to prescribe hours of labor for drivers of private motor carriers. Its powers under sec. 194.38, Stats. 1955, relate solely to drivers of vehicles operated under common and contract motor carrier permits. Rule of *Gardner Baking Co. v. Public Service Commission*, 224 Wis. 588, is still the law.

August 7, 1956.

MELVIN LARSON, *Commissioner*,
Motor Vehicle Department.

You request my opinion as to whether the decision of our supreme court in *Gardner Baking Co. v. Public Service Commission*, 224 Wis. 588, which held that the Motor Vehicle Transportation Act, sec. 194.01 *et seq.*, Stats. 1935, did not authorize the public service commission to fix the hours of service of drivers of private motor carriers, is applicable to your department with respect to the promulgation of rules and regulations as to the hours of labor of drivers of private motor carriers.

I have examined the statutes of 1935 which were involved in the *Gardner Baking Company* case, *supra*, and compared them with the 1955 statutes now in force, and find no material change which would likely result in a different ruling by the court. Sec. 194.18 (8), Stats. 1935, empowered the public service commission to prescribe rules and regulations as to the hours of labor of drivers of motor vehicles operated under *common* carrier permits. Sec. 194.36 (3), Stats. 1935, empowered the public service commission to prescribe rules and regulations as to the hours of labor of drivers of motor vehicles operated under *contract* motor carrier permits. Both of these sections were subsequently incorporated into what is now sec. 194.38, Stats. 1955. Aside from transferring the rule-making power from the public service commission to the motor vehicle department, there was no material change in language.

In the *Gardner* case, the court pointed out that while the legislature expressly conferred the power to fix hours of service in the case of common and contract carriers, it did not do so with respect to private carriers, and that that

omission evidenced a legislative intent that the public service commission should not thus regulate private carriers. The court further pointed out that the withdrawal of a proposal to prescribe hours of labor for drivers of private carriers in the 1935 legislature (substitute amendment to Bill No. 312, S.) indicated that the legislature was opposed to the proposal. The legislature has not since supplied the statutory authority which the court pointed out was absent in the *Gardner* case. The rule of the *Gardner* case, therefore, is still the law, and your department may not prescribe hours of labor for drivers of private motor carriers.

SGH

*Insurance—Group Life, Health and Accident—Unauthorized Insurer—*Payments by employers, pursuant to collective bargaining agreement, to be used to provide group life insurance for local union employes with insurer not authorized to do business in the state constitutes violation of sec. 206.41 (2), Stats. Group accident and health insurance is not within sec. 206.41 (2). It is not certain that delivery of group insurance beneficiary certificates is not within sec. 201.44 (1), Stats.

August 15, 1956.

PAUL J. ROGAN,

Commissioner of Insurance.

A written collective bargaining agreement between the employers in a certain industry in a county and a local labor union which is chartered by an international union affiliated with the A. F. of L., contains, among other things, provisions relative to welfare benefits. The local union agrees to provide its members employed by such employers with the benefits of a welfare plan set out in a trust indenture of even date executed by the local union and said employers. Each employer is obligated to pay \$5.42 per month for each union employe for use solely for the purposes stated in the trust indenture. Payment is to be made monthly by delivery of a check therefor to the local union payable to the trustees of the social security department of the international union, the office of which is outside Wisconsin. After checking and

auditing by the local union, the check is then forwarded to such trustees. It is provided that insurance provided under the trust indenture shall be procured through an insurance carrier licensed to do business under the laws of the states of Indiana and Wisconsin. It is specifically stated that the employers shall not be liable or responsible for the acts of the local union or the trustees in administering the program, but that their sole liability under the welfare provisions of the agreement is to make the monthly payments.

The trust indenture, after reciting the establishment of said social security department by the international union and providing for trustees thereof, states that the trustees shall secure for the union members specified hospitalization, surgical, medical expense, loss of time indemnity, dismemberment and accidental death benefits by obtaining a group or blanket policy of insurance therefor from an insurance company duly licensed and authorized to do business in the states of Indiana and Wisconsin. It is further provided in the indenture that said social security department shall pay a death benefit of \$1,000 to the beneficiary or beneficiaries of a deceased union member covered by the agreements and that from the funds paid in by the employers it shall set aside and maintain a reserve for the payment of said death benefits on the same basis as is required of life insurance companies for similar benefits.

It appears that said social security department has entered into a contract of group insurance providing for the specified hospitalization, surgical, medical expense, loss of time indemnity, dismemberment and accidental death benefits with an out-of-state life insurance company. Either that contract or another contract of group life insurance of the social security department with the same insurance company provides for the \$1,000 death benefit provided in the indenture. The life insurance company is not licensed to transact business in the state of Wisconsin. It is proposed that the requirement that the insurance be placed with a company licensed to transact business in Wisconsin be waived or deleted from the agreement and the indenture. An opinion is requested as to whether in such case the providing of the benefits under such a collective bargaining agreement and trust indenture through group insurance

with an insurance company not authorized to do business in the state is in violation of the laws of the state of Wisconsin.

Sec. 206.41 (2), Stats. 1955, provides:

“(2) ACTING FOR UNAUTHORIZED COMPANIES PROHIBITED.

(a) No person, partnership or corporation shall, within this state, solicit, procure, receive or forward applications for life insurance or annuities, or issue or deliver policies for, or in any manner secure, help or aid in the placing of any contract of life insurance or annuity for any person other than himself, directly or indirectly, with any insurer not authorized to do business in this state.

“(b) Any person, partnership or corporation shall be liable, personally, for the full amount of any loss sustained on any contract of life insurance or annuity made by or through him or it, directly or indirectly, with any insurer not authorized to do business in this state.”

While this quoted provision is a part of sec. 206.41, Stats., which deals with licensing of life insurance agents, its wording, which is clear and unambiguous, is all-inclusive in its prohibitions and in no way restricts its application to a licensed life insurance agent. If there be any need for clarification in that respect, it is supplied in the last sentence of the penalty provisions in sec. 206.41 (13), Stats., which provides that if the offender is a licensed insurance agent then, in addition to the otherwise applicable fine or imprisonment, such license shall be suspended or revoked. Sec. 206.41 (13) reads as follows:

“PENALTY. Any person, partnership, association or corporation violating any of the provisions of this section shall, in addition to any other penalty provided by law be fined not more than \$500 or imprisoned not more than 6 months, or both, each such violation being a separate offense. In addition, if such offender holds a license as a life insurance agent, such license shall be suspended or revoked as hereinbefore provided.”

Under the recited facts, each employer in making the required monthly remittances does so, not only with full knowledge and expectation, but pursuant to the requirement in the agreements, that such contributions are to be used to pay the premiums on a policy or policies of insur-

ance taken out by the social security department of the international union with an insurance company or insurance companies covering the specified group accident and health benefits mentioned or the \$1,000 death benefits, or both, or for the social security department itself to pay such \$1,000 death benefits. This is the purpose for which the employers make the payments and the agreement requires them to be so used. Likewise, the local union and its official officers, agents, and employes have the same knowledge and expectation when they receive the monthly checks from an employer, do the checking and auditing thereof, and then transmit them out of state to the social security department of the local of the international union. They, too, are equally aware of the purpose for which such payments must be used.

To the extent that the ultimate use of the money so contributed is for the effectuation of life insurance on the lives of the members of the local union with an insurer not authorized to do business in Wisconsin, the supplying of money pursuant to an agreement that it will be used to produce that end result clearly constitutes helping or aiding, if not directly then certainly indirectly, in the placing of such life insurance for the union members with an unauthorized insurer. Of like effect are the acts of the local union, its officers, agents, and employes in the receiving, checking and auditing, and forwarding of the employer payments under the recited circumstances. The acts of the employers in making the said payments and of the local union, its officers, agents, and the employes, in receiving, checking and auditing, and sending them on to the international union, being performed within the state of Wisconsin, would violate sec. 206.41 (2), Stats., and subject each to the liabilities and penalties of sec. 206.41 (2) (b) and (13).

The indenture does not provide that the social security department shall procure insurance for the payment of the separate \$1,000 death benefit, as it does in respect to the specified accident and health benefits. Rather, it provides that the social security department shall set aside and maintain from the employers' contributions a reserve for the payment thereof by it directly. Apparently, such provisions are deemed susceptible of interpretation as providing

that it shall obtain a group insurance contract with an insurance company providing for such death benefit. If not, then the group life contract with the insurance company in effect is a re-insurance of the direct liability of the social security department. In either situation the employers and the local union, its officers, agents, and employes violate sec. 206.41 (2), as indicated above. In one instance the life insurance is placed with the life insurance company, and in the other with the social security department, which by its own direct obligation to pay the death benefits is engaging as a principal in the life insurance business. Neither the insurance company nor the social security department is authorized to do an insurance business of any kind in this state.

The payment of such \$1,000 death benefit is clearly life insurance. Therefore, to the extent of the payment of premiums to the insurance company, or of retention by the social security department, as the case may be, for the payment of such death benefit, there would be the violation of sec. 206.41 (2), as indicated above. As to the part of the monthly payments that is allocable to payment of the premium to the insurance company on the group contract providing the hospitalization, surgical, medical expense, loss of time indemnity, dismemberment and accidental death benefits (hereinafter referred to as "accident and health" or "disability" benefits), there would be a like violation of sec. 206.41 (2) if insurance providing therefor is life insurance.

The various kinds of insurance are set forth in sec. 201.04, Stats., which so far as here material, are:

"(3) Life Insurance.—Upon the lives or health of persons, and every assurance pertaining thereto, and to grant, purchase or dispose of annuities and endowments.

"(3a) Group Life Insurance.—Of the forms described in section 206.60.

"(3b) Industrial Life Insurance. * * *

"(4) Disability Insurance.—Against bodily injury or death by accident, and upon the health of persons."

The language in subsec. (3) of sec. 201.04 would appear to be broad enough to include accident and health benefits in the category of life insurance, so that when written by

an insurance company doing a life insurance business as therein defined, such benefits would constitute life insurance. This would seem to be the effect of sec. 206.03, Stats., specifically authorizing a life insurance company to write a disability insurance, which is the kind of insurance set forth in subsec. (4) and by its terms includes such accident and health benefits. The effect of subsec. (4) would be that a company need not do a life insurance business under subsec. (3) and could be licensed to sell the kind set out in subsec. (4) without being licensed under subsec. (3).

However, it appears that for many years your department has consistently taken the position that accident and health insurance, being covered by subsec. (4), is not included in subsec. (3). As a result, a company licensed to do a life insurance business, which would be under subsec. (3), has been required to have also a license to do business under subsec. (4) in order for it to write accident and health insurance. Also, an agent holding a license to sell life insurance has been required to also obtain, and pay an additional fee for, a license covering the kind of insurance in subsec. (4) before he sells accident and health insurance. Such was the administration of the law when sec. 206.41, Stats., was enacted in 1949.

In view of this long administrative construction of the statutes, it is our opinion that it could not now be successfully maintained that the words "life insurance" as used in sec. 206.41 (2), Stats., include accident and health insurance. Therefore, the prohibitions therein are inapplicable to insurance contracts providing for that kind of benefits, even when entered into by a life insurance company. Consequently, there would be no violation of sec. 206.41 (2), except in respect to the part of the employers' monthly payments, which is allocable to providing the separate death benefit payment.

Consideration must be given to the provisions of sec. 201.44, which so far as here material provides:

"(1) No policy of insurance shall be solicited, issued or delivered in this state, except through an agent lawfully authorized as to the kind of insurance effected by such policy. * * *

"* * *

“(5) Any company or person soliciting or placing insurance without complying with this section shall be liable upon the policy to the same extent as the company issuing the same.

“* * *

“(7) Any company or agent violating this section shall be subject to the penalty provided by subsection (10) of section 201.53.”

Although not stated in the recited facts, it is assumed that the master group contract of insurance providing for the accident and health benefits, entered into between the out-of-state insurance company and the said social security department to carry out the provisions of the indenture, was executed and delivered either at an office of the insurance company or the office of the social security department, both of which are outside this state. It is also assumed that issuance of individual beneficiary certificates to covered employes is provided in the master contract, and that upon issuance thereof by the insurance company the individual beneficiary certificate of each covered employe is sent by the insurance company by mail to the local union and by it delivered or distributed to such employe. If these assumptions are incorrect and there is issued to each covered employe an individual contract of insurance, then the delivery thereof through the local union by its officers, agents, or employes, would violate the provisions of sec. 201.44, Stats., unless such officers, agents, or employes as effect the delivery thereof in this state are duly licensed agents of the company. In the instant situation they could not be, as it is a prerequisite thereto that the company itself be licensed in this state.

This assumed situation presents the question of whether the individual beneficiary certificates are a part of the contract of insurance providing the accident and health benefits to the covered employes, so that the delivery thereof in this state constitutes the delivery therein of a “policy of insurance.” As used in our insurance statutes, sec. 201.01 (3), Stats., says that “‘Policy’ includes every kind and form of contract of insurance.” This is broad enough to cover such individual beneficiary certificates if they are part of the insurance contract. It cannot be doubted that

the purpose of our insurance statutes is to protect residents of this state in respect to insurance upon their lives, health, and property, and to exercise the state's police powers to accomplish that objective in part by the regulation of the effectuation of insurance within the state.

It was in furtherance of this protection that the above quoted language of sec. 201.44 (1) was put into the statutes in 1911. We cannot conclude otherwise than that at that time it was intended to be so all inclusive as to include the delivery within the state of all instrumentations that might be involved in completing insurance coverage upon property and the lives and health of persons within the state. Construction of this language so as to give it the over-all intended effect would encompass within it the delivery in this state of individual beneficiary certificates issued pursuant to group insurance contracts as we know them today. If they were in use at that time it is hardly conceivable, having in mind the purpose of this statute, that the legislature would not have specifically covered them by a similar provision if it did not intend that the language used was sufficient to include them.

However, our supreme court has not passed upon the scope of this provision as respects individual beneficiary certificates. In the recent case of *Riske v. National Casualty Co.*, (1954) 268 Wis. 199, 67 N.W. 2d 385, the court took note of *Boseman v. Conn. Gen. Life Ins. Co.*, (1937) 301 U.S. 196, 57 S. Ct. 868, 81 L ed. 1036, 110 A.L.R. 732, which has been followed in a number of cases, as holding that where a master contract is entered into providing insurance for a group with a provision for issuance of merely beneficiary certificates to the individuals covered thereunder, such individual certificates are not part of the contract of insurance but merely evidence thereof. But as stated in the *Riske* case, there is a division of authority on the point. Our court did not find it necessary to hold in the *Riske* case that the beneficiary certificate is part of the insurance contract, but did hold that the coverage set out in the certificate being different from that in the master policy, the certificate was controlling by estoppel.

It is thus not at all certain that our court would not hold, where necessary to the decision of the case, that an indi-

See:-
Jensen v.
John Hancock
Mutual
 (1954) 266 Wis 595,
 64 N.W.2d 183

See also:-
 206.01 (6)+(8)
 "Definition of
 'Insured' and of
 'Policy'"

vidual beneficiary certificate issued to a resident of this state pursuant to a master group insurance agreement is a part of the contract of insurance. Until there is a decision of our court to the contrary, we are constrained to give this statute a construction that effectuates its apparent purpose of protecting insureds in this state against the possibility of loss arising out of the operations of unlicensed insurers. In this status of the law it cannot be said with any assurance that the delivery in this state of such an individual beneficiary certificate is not within the purview of the quoted provision of sec. 201.44 (1), Stats., and that those making the actual delivery thereof would not be subject to the penalties provided for a violation of that provision.

HHP

Public Assistance—Medical Care—Proposed plan described in the opinion for setting aside in county treasury a fund to be used for payments of medical care for categorical aid recipients pursuant to sec. 49.40 (1), Stats., and charging to each such recipient's account a per capita share of said fund, is not "prepayment of medical care" in the contemplation of that statute. If it were a prepayment of medical care it would constitute doing an insurance business which the county is not authorized to engage in either by sec. 59.07 (2), Stats., or by any other statute.

August 17, 1956.

GEORGE E. RICE,

Assistant Corporation Counsel,

Milwaukee County.

You have requested an opinion relative to the legality of a proposed plan for handling payments of medical care furnished recipients of categorical aids in Milwaukee county. The statute involved is sec. 49.40 (1) which provides as follows:

"The county agency administering aid to the blind, aid to dependent children, old-age assistance and aid to totally and permanently disabled persons may provide for medical care needed by recipients of such aids. A person shall be

considered a recipient if at the time such care is authorized aid to the blind, aid to dependent children, old-age assistance or aid to totally and permanently disabled persons is being granted to him. The provisions of s. 49.11 shall not apply to this section. Medical care shall, as necessary, be authorized and paid for by such county agency in addition to or in lieu of money payments made within the amounts allowed by ss. 49.18 (1) (a), 49.19 (5), 49.22 and 49.61 (6) (a). Medical care provided under this section includes hospitalization, home care when prescribed by a physician and nursing home care; physicians', dentists', and nurses' services; drugs, medical supplies and equipment, prosthetic appliances and other medical services as each is prescribed by a physician; optometrical services; transportation to obtain medical care; *and prepayment of medical care.*"

The proposed plan which is summarized below is sought to be justified as a form of "prepayment of medical care." It should be stated at this point that the italicized words at the end of the foregoing statute were included in the definition of "medical care" created by Laws 1951, ch. 725, sec. 23m, for the purpose of enabling county agencies to pay the premiums on existing policies of hospital, medical, and surgical insurance, such as the Blue Cross Plan of the Associated Hospital Service, Inc., the Blue Shield Plan of the Wisconsin Physicians Service, and like forms of insurance, which had previously been procured by aid recipients.

Your proposed plan may be summarized as follows: By action of the county board, the Milwaukee county department of public welfare would be empowered to administer the plan. It would deposit monthly in a special fund established in the office of the county treasurer an amount of money calculated by multiplying the number of categorical aid recipients in the previous month by a per capita cost ascertained on the basis of experience during the previous six months or one year. Each aid recipient would be furnished with a "medical care entitlement" card to be "used for identification and for informing the recipient that his medical care has been prepaid at the County Hospital and Dispensary."

A recipient in need of care would present the card to the county general hospital or the county dispensary and would then receive such medical care as is contemplated by sec.

49.40, except nursing home care, which would be handled separately. The hospital or dispensary would then file a claim against the fund in the county treasury, which would be paid when approved by the county director of public welfare.

The per capita cost would be added to each recipient's ledger account each time a deposit was made to the fund, which would mean monthly. The per capita cost thus included in each grant of aid would be submitted to the state department of public welfare for reimbursement of the state's share, whether or not the particular recipient received medical care during the month.

The county board is expected to appropriate sufficient money to keep the fund solvent at all times.

The foregoing plan does not in my opinion amount to prepayment of medical care as that term is used in sec. 49.40, Stats. No payments would be made to the hospital and the dispensary until medical and hospital services were actually rendered to aid recipients. The total net result of the plan would be merely that funds for the purpose of making such payments would be segregated in the county treasury, and instead of being charged to the accounts of those recipients who actually received medical care, they would be spread evenly over all aid recipients' accounts. Presumably in the case of old-age assistance recipients they would be reflected in old-age assistance liens under sec. 49.26, Stats., against the property of the beneficiaries, whether or not they received any medical care during the period, and would likewise be reflected in any claim against their estates under sec. 49.25. This not only would work out unfairly in imposing a charge on the property and estates of some old-age assistance recipients for medical care which they did not receive, but also might result in the claim being successfully resisted to the extent that it did so.

The "medical care entitlement" card would not actually vest any rights in the recipient. Pursuant to sec. 49.40 (1), Stats., the county is obliged to furnish him with medical care. The card would not be evidence of a policy of insurance. On the other hand, if the aid recipient has previously acquired rights under a contract for hospital, medical, or

surgical care and the county welfare department elects to continue payment of premiums on such contract, as it is authorized to do, the aid recipient is not in a position to complain that his estate and his property are charged with the cost of that insurance, since he himself has voluntarily elected to obtain the coverage and holds one or more cards showing his contractual right to participate in the benefits thereof.

What has been said heretofore is intended to demonstrate that the proposed plan does not actually constitute prepayment but is merely a shift in the bookkeeping system employed by the county, and that it would result in some cases in unfairly burdening the property and estates of certain recipients for care not actually received by them. But even if this were not the case it would still be my opinion that the county is not authorized to operate the plan as proposed.

If the plan were looked upon as a genuine prepayment plan in which the recipients' accounts are charged for their per capita share, then I see no escape from the conclusion that the county would have put itself in the insurance business. The only statute authorizing a county to become an insurer of any sort of risk is sec. 59.07 (2) (a), which provides as follows:

"59.07 The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

"* * *

"(2) (a) Provide public liability and property damage insurance, either in commercial companies or by self-insurance created by setting up an annual fund for such purpose or by a combination thereof, covering without exclusion because of enumeration, motor vehicles, malfeasance of professional employes, maintenance and operation of county highways, parks, parkways and airports and any other county activities involving the possibility of damage to the general public."

It is well established that counties have no powers except those granted to them by the legislature. The foregoing statute obviously does not cover an insurance plan such as

is here under discussion, nor does any other statute authorize it.

It is apparent that if an aid recipient is to be charged a monthly premium, then his right to the benefits of the insurance must continue for the entire period for which the premium is charged, to wit, one month, even though during that month he might for some reason become ineligible for aid and be removed from the rolls. Any medical aid furnished him thereafter would not be justified by sec. 49.40, Stats. (see 43 O.A.G. 197), but would have to be based upon a contractual liability which the county is not authorized to assume.

WAP

Pensions — Wisconsin Retirement Fund — Teachers Retirement System—Where Mr. X, occupying a specific position, was included and retired under the Wisconsin retirement fund and both employer and state teachers retirement board determined that Mr. Y, his successor in same position, is covered by state teachers retirement system and neither determination has been reviewed and reversed:

(a) Mr. Y is excluded from the Wisconsin retirement fund under sec. 66.901 (5) (a), Stats.

(b) Attorney general cannot advise that Mr. X is improperly receiving retirement benefits from Wisconsin retirement fund.

(c) It is not the duty of the board of trustees of Wisconsin retirement fund automatically to exclude from such fund all persons occupying positions similar to that held by Mr. Y, since the duties of positions having the same name may vary greatly.

August 23, 1956.

FREDERICK N. MACMILLIN,

Executive Director,

Wisconsin Retirement Fund.

Pursuant to sec. 66.90 (4), Stats. 1943, the city of Green Bay elected to include its eligible employes under the provisions of the Wisconsin municipal retirement fund, effective

January 1, 1945. In accordance with a notice of employment which was received by the fund from the official representative of the city of Green Bay and which certified that Mr. X was eligible as an employe pursuant to sec. 66.90 (3) (d), Stats., Mr. X became a participating employe under the fund as of December 16, 1946. He occupied the position of superintendent of buildings and maintenance in the public school system in the city of Green Bay. He continued in that position as a participating employe without interruption until he retired under the Wisconsin retirement fund (formerly Wisconsin municipal retirement fund) at the end of the calendar year 1955.

By virtue of his inclusion under the Wisconsin retirement fund, certain federal and state legislation, which was implemented by an amendment of the agreement between the state of Wisconsin and the federal department of health, education and welfare, provided Mr. X with coverage under the federal old age and survivors insurance system as of January 1, 1951. At the time of his retirement Mr. X presumably was qualified for substantial retirement benefits under O.A.S.I.

On March 28, 1956 the board of trustees of the Wisconsin retirement fund approved a retirement annuity for Mr. X under the provisions of sec. 66.906 (2), Stats., such annuity to begin as of January 1, 1956.

Mr. X's successor in the position of superintendent of buildings and maintenance is Mr. Y. You state that "No evidence has been submitted that there has been any change in duties. Presumably the duties of Mr. *** [X] and Mr. *** [Y] have been identical."

At a meeting held on August 18, 1955, the state teachers retirement board ruled that Mr. Y was eligible for membership in the state teachers retirement system. At a meeting held on March 30, 1956 said board reaffirmed its previous ruling.

Sec. 66.901 (4), Stats., defines "employe" as used in secs. 66.90 to 66.918, Stats., relating to the Wisconsin retirement fund. Sec. 66.901 (5) states that the aforesaid "definition of employe shall not include persons: (a) Who are senior teachers or junior teachers within the meaning

of sections 42.20 to 42.54." These sections relate to the state teachers retirement system.

Sec. 42.20, Stats., provides in part:

"In ss. 42.20 to 42.54, inclusive, unless the context otherwise requires:

"* * *

"(11) 'Senior teacher' designates a teacher who shall have arrived at the twenty-fifth birthday anniversary on the first day of July preceding.

"* * *

"(13) 'Teacher' means any person legally or officially employed or engaged in teaching as a principal occupation.

"(14) 'Teaching' includes the exercise of any educational function for compensation, in any of the public schools, the state colleges, or the university, or in any school, college, department or institution, within or without this state, in instructing or controlling pupils or students, or in administering, directing, organizing or supervising any educational activity."

Mr. Y was born on December 2, 1912. The aforesaid ruling of the state teachers retirement board in effect constitutes a determination that Mr. Y is a senior teacher within the meaning of the statutes relating to the state teachers retirement system. If this determination is correct, Mr. Y as superintendent of buildings and maintenance is excluded from the Wisconsin retirement fund under the provisions of the aforesaid sec. 66.901 (5) (a). You state that presumably this means that Mr. X was included as a participating employe under the Wisconsin retirement fund in error and that consequently he was not entitled to an annuity from said fund.

It also seems to you that since Mr. X received coverage under O.A.S.I. only because of his presumed inclusion under the Wisconsin retirement fund, he would be ineligible to receive social security benefits and that the federal administrators of O.A.S.I. should be so advised.

If it is definitely decided that the work which is performed in the position of superintendent of buildings and maintenance in the public school system at Green Bay does not make the incumbent eligible for inclusion under the Wisconsin retirement fund, it appears to you that the occupants of other similar positions may have been included

under said fund in error. For example, you note that the incumbent of a position of the same name in another city is under the Wisconsin retirement fund at the present time. You wish to be advised whether:

“(1) Mr. *** [Y] is excluded from the Wisconsin Retirement Fund pursuant to section 66.901 (5) (a).

“(2) Mr. *** [X] was ineligible for inclusion under the Wisconsin Retirement Fund for the same reason (and consequently also ineligible under O.A.S.I.), and therefore he is now improperly receiving monthly payments from both the state and the federal system.

“(3) It is our duty to make certain that incumbents of similar positions in other school systems are excluded from the Wisconsin Retirement Fund.”

Sec. 42.20 (3) defines “employer” to mean “this state or any subdivision thereof authorized by law to employ teachers or to pay their salaries.”

Secs. 42.41 (1) and 42.43 provide in part:

“42.41 (1) Every employer shall deduct and withhold from the compensation as a teacher of each senior teacher on each and every pay roll for each and every pay roll period hereafter 6 per cent of the compensation of such senior teacher, which is paid by such employer. * * *”

“42.43 Every employer shall be responsible for the payment to the state teachers retirement board of the required deposits to be made by every senior teacher in the service of such employer. * * *”

Officials of the city of Green Bay as the employer apparently made the original determination that Mr. Y was a senior teacher within the meaning of secs. 42.20 to 42.54.

Sec. 42.31 (1) provides:

“42.31 (1) The state teachers retirement board from time to time shall adopt such by-laws and make such rules for the transaction of the business of the state teachers retirement system and for the control of the several funds hereby created and the payment of the benefits hereby provided as it shall deem necessary and proper and shall perform all duties necessary or convenient for putting into effect and carrying on the state teachers retirement system.”

Pursuant to the aforesaid statute, the state teachers retirement board adopted Rule TR 3.01 relating to membership, which provides as follows:

"The board will deem it prima facie evidence that teaching is a person's principal occupation if a person is engaged in teaching amounting to 50% or more of what is considered a normal load of a regular full-time teacher in the same school, college or university; and that teaching is not a person's principal occupation when engaged for less than this amount. In individual cases, the board will consider evidence which might make the above rule inapplicable but, in the absence of such evidence, the above rule will apply."

The state teachers retirement board has also determined that teaching is the principal occupation of Mr. Y and hence that he is a teacher within the meaning of secs. 42.20 to 42.54. By virtue of having been born on December 2, 1912, Mr. Y would be a senior teacher.

Sec. 42.38, Stats., provides that "Any order, rule or determination of the state teachers retirement board may be reviewed in the manner provided in ch. 227." In the absence of a review and reversal of the determination made by the state teachers retirement board to the effect that Mr. Y is a senior teacher within the meaning of secs. 42.20 to 42.54, it is my opinion that you should assume the correctness of that determination.

Since said board has determined that Mr. Y as superintendent of buildings and maintenance is a senior teacher, sec. 66.901 (5) (a) excludes him from coverage under the Wisconsin retirement fund on the basis of said employment. Hence your first question is answered in the affirmative.

Originally the city of Green Bay certified that Mr. X was eligible for inclusion under the Wisconsin municipal retirement fund. Presumably this certification was made after an analysis of the facts relative to the duties which he performed. The correctness of this certification was assumed by you and has not been challenged by any other persons including the administrators of the federal O.A.S.I. Although you state that no evidence has been submitted that there was a change in duties and that presumably the duties of Mr. X and Mr. Y were identical, it is still possible that there was a difference in the nature of the duties or a difference in the amount of time spent on various duties.

which would support the seemingly inconsistent determinations which were made in these two cases.

In the absence of a court review of the duties performed by Mr. X and a determination that he was improperly included under the Wisconsin municipal retirement fund and subsequently under the Wisconsin retirement fund, I cannot advise you that in my opinion Mr. X is now improperly receiving retirement benefits from either the Wisconsin retirement fund or the federal O.A.S.I.

As indicated above, the question of whether a particular individual is included under the state teachers retirement system or the Wisconsin retirement fund depends primarily upon the duties which he performs. Only after the duties of a particular individual are analyzed is it possible to determine under which system he belongs. Even then it often is difficult to make such determination. The title of a position might offer some clue, but not proof, as to the system under which the incumbent belongs. It would be very possible for Mr. A., who occupies the position of superintendent of buildings and maintenance in one city, to have duties which require his inclusion under the state teachers retirement system, and Mr. B., who occupies the position of superintendent of buildings and maintenance in another city, to have duties which clearly require his inclusion under the Wisconsin retirement fund. It is my opinion, therefore, that your third question should be answered in the negative.

JRW

Counties — Parking Facilities — Bonds — A county has power to establish and operate, through its county board, a parking lot or parking facility.

A county may pay the cost of such a facility only from its general funds or from revenue bonds. It may not use general obligation bonds or the proceeds of a bond issue raised for another purpose.

No referendum is necessary for the issuance of revenue bonds by a county for the purpose of erecting a parking facility.

August 24, 1956.

JOHN D. WINNER,
District Attorney,
Dane County.

You have raised several questions concerning the right of Dane county to construct and maintain a parking lot or parking facility on the site of the old court house and county jail. These may be lumped into two general questions which are:

1. Does Dane county have statutory power to establish, maintain, and operate a parking lot or parking facility?

2. If the answer to the first question is "Yes," how may such lot or facility be financed?

The answer to the first question is, "Yes." While it is well understood that a county, as a subordinate arm of the state, has such powers and only such powers as can be found within the four corners of the statutes or reasonably implied therefrom, *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 11 N.W. 2d 348, and *Spaulding v. Wood County*, (1935) 218 Wis. 224, 260 N.W. 473, I find there is specific statutory authority for a county to establish a parking facility.

The basic statute on this point is sec. 66.51, which provides in part that:

"66.51 (1) (a) Every county * * * may construct, purchase, acquire, develop, improve or operate * * * municipal parking lots or other parking facilities * * *."

This statute is reinforced by sec. 59.01, Stats. 1955, which establishes a county as a body corporate with power to acquire and hold real estate for public purposes and make all contracts necessary and proper therefor, and by sec. 59.07 (1) (a), Stats., which states that one of the powers of a county is to:

“* * * Take and hold land sold for taxes and acquire * * * property, real and personal, for public uses or purposes of any nature * * *.”

While we have found no case directly in point, it seems clear that establishment and maintenance of a municipal parking lot or parking facility is for a public purpose in view of the close relationship of parking facilities and the public highway system, and the further necessity of parking facilities to enable the public to make full use of such admittedly public institutions as parks, playgrounds, bathing beaches, specialized recreation areas, hospitals, etc. 51 Am. Jur., Taxation, §§ 321-386; 84 C.J.S., Taxation, §§ 14-16.

The parking facility, when established, would be under the direct supervision of the county board. While the facility might properly for some purposes, such as financing, be referred to as a utility, sec. 66.067, Stats., the county law contains no provision for a separate utility commission such as cities are required to have under sec. 66.068, Stats.

In summary, the county may acquire and hold real and personal property for any public purpose, a parking facility fulfills a public purpose, and the county has specific authority to acquire, construct, and maintain such facility.

In answer to your second question, the construction and maintenance of the parking facility may be paid for out of the general funds of the county or out of the proceeds of revenue bonds secured by the income of the facility, but they may not be paid for out of the proceeds of general obligation bonds or the proceeds of a bond issue raised for some other specific purpose.

Under sec. 59.07 (5), Stats., the county board is given the necessary authority to apportion and levy taxes and appropriate money to carry into effect any of its powers and duties. Since the county has the power to establish a

parking facility, it may levy taxes and make an appropriation therefor in the absence of some specific statutory restriction. I find no such specific restriction. As a result of this ruling, the county has authority to appropriate from its general funds moneys for advance planning and advance surveys, and to execute a contract with an architectural firm to draw plans and specifications for a parking lot or facility. If it has already requested and received architectural advice, it has power under sec. 59.07 (3) to examine and settle any accounts for such services. Payment for services already rendered would be based on the assumption that they are of value to the ultimate project, or furnished under a properly adopted contract. *Van Ryn v. Rock County*, (1933) 211 Wis. 678, 247 N.W. 848.

Revenue bonds are authorized under the express provision of sec. 66.51 (1) (b), Stats. Such bonds must be payable as to principal and interest from the income and revenues of the project but may not create a county debt. They may be secured by a trust indenture pledging the revenues, but a mortgage on property already owned by the county might appear questionable in view of the case of *State ex rel. Rogers v. Milligan*, (1955) 269 Wis. 565, 69 N.W. 2d 485, which held that if a borrowing agency pledged property already owned under circumstances where it could lose possession, a present indebtedness would be created.

In issuing such revenue bonds, no referendum is necessary even though the parking facility be regarded as a utility. While sec. 66.51 incorporates by reference the financing provisions of sec. 66.066, it does not incorporate the provisions of sec. 66.065, and in any event sec. 66.065 requires a referendum only in the case of utilities which furnish water, heat, light or power or street railway service. Only the financing provision of sec. 66.066 will apply. The applicable rule is set forth in *Meier v. Madison*, (1950) 257 Wis. 174, 42 N.W. 2d 914.

In my opinion, general obligation bonds may not be used to finance a county-owned parking facility. Counties may issue general obligation bonds only for the purposes set forth in sec. 67.04 (1), Stats.

While there might be a claim that a parking facility is a "building" under sec. 67.04 (1) (a), it would appear that

this paragraph should be construed *in pari materia* with the paragraph under city powers in sec. 67.04 (2) (a). In the case of cities, the legislature apparently felt that the term "building" as used in sec. 67.04 (2) (a) did not include a parking facility, including one of the ramp type, since it gave the city specific power to issue general obligation bonds to acquire municipal parking lots including buildings under sec. 67.04 (2) (y). Since no similar specific power was granted to counties, in my opinion they do not have such power.

Finally, the law appears established that if a bond issue is authorized by proper resolution for any specific purpose, the proceeds cannot be diverted to any other purpose except to pay off the outstanding bonds. In the case of bonds issued after a referendum, aside from the fact that no statute provides a procedure for a change of purpose, it would be a breach of trust, both with the voters who approved the issue and with the persons who purchased the bonds, to divert the fund to a different purpose. In bonds issued pursuant to a resolution of the governing body only, the same trust relation to the bondholders exists, and again there is no statutory procedure by which the governing body can change its mind once the bonds are issued. In the case of *Champion Iron Co. v. City of South Omaha*, (1913) 139 N.W. 848, 849, the court stated on this point:

"* * * It is clear that the city authorities have no power or authority to use the money derived from the sale of bonds under this statute for purposes foreign to that for which the money was voted * * *."

This means that funds raised for the joint city-county building cannot be used to construct a parking facility which is no part of that building and not even a part of a contiguous parcel of land.

RGT

Trust Funds—Investments—Denominational Church Securities—\$250,000 of first mortgage serial bonds dated November 1, 1955, issued by First Baptist Church of Columbia, Missouri, and registered with the Wisconsin department of securities in January of 1956, are eligible for the investment of trust funds under sec. 320.01 (16m), Wis. Stats.

September 10, 1956.

LEROY J. GONRING,
District Attorney,
Washington County.

In supervising and approving various accounts, the county judge of Washington county has occasion to pass upon the eligibility of certain securities as investments for trust funds. You wish to be advised whether the bonds referred to in a certain prospectus qualify for the investment of trust funds under sec. 320.01 (16m), Wis. Stats., which provides as follows:

“320.01 Executors, administrators, guardians and trustees may invest the funds of their trusts in accordance with the provisions pertaining to investments contained in the instrument under which they are acting, or in the absence of any such provision, then in the securities of the following classes:

“* * *

“(16m) In bonds, notes, trust certificates or other evidences of indebtedness of a denominational church body, which are exempt under s. 189.06 (7) or which are registered with the department of securities under s. 189.13.”

You have submitted a prospectus dated December 21, 1955, prepared by an investment institution relative to the sale of \$250,000 of first mortgage serial bonds of First Baptist Church of Columbia, Missouri (a Missouri religious corporation). These bonds were dated November 1, 1955 and are to mature serially through November 1, 1970. According to the prospectus:

“The \$250,000 of First Mortgage Serial Bonds are being issued under an Indenture dated as of November 1, 1955 and executed by FIRST BAPTIST CHURCH OF COLUM-

BIA, MISSOURI, Columbia, Missouri, a Missouri religious corporation (herein sometimes referred to as the 'Corporation') * * *.

"* * *

"The First Mortgage Serial Bonds, when issued, in the opinion of legal counsel for the Corporation, will be the direct legal and binding obligations of the Corporation, and will be secured by a first mortgage lien on the property described in the Indenture as subject to the lien thereof. Included in the lien of the Indenture are the existing educational building and the new church building now under construction, the sites thereof, together with the fixtures and equipment located therein."

Assuming the correctness of the prospectus, the securities described therein are bonds. They are being issued by First Baptist Church of Columbia, Missouri, which is described in the prospectus as "a Missouri religious corporation."

A "denomination" is a religious sect having a particular name. *Hale v. Everett*, 53 N.H. 9, 16 Am. Rep. 82.

A "denomination" is defined by Webster as "a class or collection of individuals called by the same name; a sect." *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

"Sect" strictly defined, means a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system, and "denominational" is given much the same definition. *Gordon v. Board of Education of City of Los Angeles*, 178 P. 2d 488, 78 Cal. App. 2d 464.

A "Baptist" is defined as "A member or adherent of a denomination, so called, of Christians who maintain that baptism should be administered to believers only, and almost all of whom hold that it should be by immersion, and who therefore deny the validity of infant baptism, and, generally, of the administration of baptism by sprinkling or pouring. * * *" Webster's New International Dictionary, Second Ed.

I have been advised by the Wisconsin department of securities that the bonds in question were registered with that department in January of this year under the provisions of sec. 189.13, Stats.

It is my opinion therefore that the securities described in the aforesaid prospectus are "bonds * * * of a denomina-

tional church body * * * which are registered with the department of securities under s. 189.13" and hence are eligible for the investment of trust funds under sec. 320.01 (16m), Stats.

JRW

*Appropriations and Expenditures—University—Wisconsin General Hospital—*Appropriation made to regents of the university by sec. 20.830 (61), Stats., may be used only for operating expenses in connection with the Wisconsin general hospital and the Wisconsin orthopedic hospital for children.

September 10, 1956.

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

You have inquired whether it is permissible to use funds appropriated by sec. 20. 830 (61), Stats., to pay for hospital and medical bills incurred by fourth year medical students who are away from the campus on preceptorships and other students who are temporarily away from the campus on officially assigned class work.

Sec. 20.830 (61) appropriates from the general fund to the board of regents of the university:

"As a revolving appropriation, all moneys collected or received by each and every person for or on account of the Wisconsin general hospital, the Wisconsin orthopedic hospital for children, and the university clinic as clinic, dispensary, infirmary or hospital fees, to be used for operating expenses in connection with the Wisconsin general hospital and the Wisconsin orthopedic hospital for children."

The purpose of the appropriation is stated in clear and express language. The money can be used only for operating expenses in connection with the two institutions named in the statute.

As an illustration of the type of situation you have in mind, you mention an incident which occurred about a year

ago when a student in animal husbandry was assigned to a livestock judging trip as a part of his course requirements and was stricken with poliomyelitis in Kansas City, Missouri, where he incurred hospital and medical bills in excess of \$1,000, which bills were presented to the university for payment.

Without in any way seeking to discredit the merits of these charges or the moral expectation of a student that the payment of his required infirmary fees entitles him to hospital and medical care wherever his class assignments may take him, it is obvious that the payment of hospital and medical bills in Kansas City is not an "operating expense of the Wisconsin general hospital or the Wisconsin orthopedic hospital for children."

In order to use the appropriation made by sec. 20.830 (61), Stats., for the purposes indicated, it will be necessary to amend the wording of the statute by appropriate language.

WHR

Motor Vehicle Department—Mobile Homes—Escort Service—State traffic patrol may charge reasonable fee for oversize mobile homes escort service furnished pursuant to sec. 85.445, Stats. Such funds received should be allocated to state highway fund pursuant to sec. 20.420 (91), Stats.

September 13, 1956.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You request my opinion as to whether your department may make a charge for providing an escort for the movement of certain mobile homes under authority of sec. 85.53 (5), Stats. If the answer to that question is, "Yes," you ask the question, to what fund should the monies collected be allocated.

Sec. 85.53, Stats., requires the procurement of a so-called special permit by any person who proposes to move loads which are in excess of statutory weight or dimension limits

over public highways. Where the proposed movement is wholly or in part over the state trunk system in more than one county, the permit is issued by the state highway commission. Where the movement is wholly within a single municipality or single county, certain municipal or county officers are empowered to issue such permits. See sec. 85.53 (2), Stats. Subsec. (5) of sec. 85.53 provides in part as follows:

“* * * Whenever the officer deems it necessary to have a traffic officer accompany such vehicle through his municipality or county, a reasonable charge for such officer’s services shall be paid by the person to whom the permit is issued.”

Sec. 85.445, Stats., requires special permits for the movement of oversize mobile homes. The requirements of sec. 85.53 are effectually imported into sec. 85.445. Sec. 85.445 makes it mandatory that the movement of an overwidth mobile home be made under “surveillance” by a traffic officer. This obviously means the officer would have to escort the vehicle to keep it under “surveillance.” It is part of a state traffic patrol officer’s duties to administer and enforce the provisions of ch. 85, Stats. If assigned to escort a movement of an overwidth mobile home, it would be the officer’s duty to do so. The “officer” having charge of issuance of special permits under sec. 85.53 (5) would be bound to recognize a state traffic patrol officer as a “traffic officer” qualified to escort such a movement. It is clear that the legislature intended that the “municipality” or county employing the traffic officer be authorized to charge a reasonable fee for his services. In the light of the purpose for which sec. 85.53 (5) was enacted, it is my opinion that the word “municipality” as used therein includes the state, and that your department is accordingly empowered to make the charge in question.

When collected, such charge would clearly constitute a fund “received in connection with highway operations.” That being true, the answer to your second question is that such proceeds would be required to be deposited in the state highway fund pursuant to sec. 20.420 (91), Stats.

REB
SGH

Motor Vehicle Department—Claims against Bankrupt— Registration fees and other fees and taxes imposed on motor vehicle operators under ch. 85 of the statutes are "taxes" for the purposes of the federal Bankruptcy Act, and such debts are not extinguished by the delinquent person's discharge in bankruptcy.

Purported payment of such fees and taxes by worthless check by a person who subsequently files in bankruptcy does not constitute payment, and a claim may be filed against the bankrupt estate as in the case of any other unpaid tax debt owed to a state.

September 13, 1956.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You request an opinion as to the procedure to be followed by the motor vehicle department in cases where registration fees for motor vehicles, as well as other fees imposed by ch. 85, Stats., have gone unpaid and the delinquent person has filed a petition in bankruptcy.

You also ask what procedure should be followed in a case where a check given as payment of the registration fee was dishonored because there were no funds in the bank and subsequently the drawer of the check was adjudicated a bankrupt.

Under sec. 85.94, Stats., the commissioner of the motor vehicle department is authorized to bring civil actions for the recovery of all license fees, ton mile taxes, interest and penalties to which the state may be entitled by reason of the operation by any person of a motor vehicle upon the public highways of the state.

Sec. 57 (n) of the Bankruptcy Act of 1938 removes for all practical purposes any doubts as to the provability of a tax claim of a state arising prior to bankruptcy by subjecting the latter to substantially the same formalities and time limitations as other provable debts. See Collier Bankruptcy Manual, 2nd ed., p. 774, §63.14.

Sec. 63 (a) (1) of the Bankruptcy Act, relating to provable debts, states:

"Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * *."

Sec. 64 (a) (4) of the Bankruptcy Act provides:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * * *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; * * *."

Sec. 17 (a) (1) of the Bankruptcy Act states:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; * * *"

Whether or not an exaction on the part of a state pursuant to a state statute constitutes a "tax" within the meaning of sec. 17 (a) (1) of the Bankruptcy Act and is not discharged in bankruptcy proceedings, is a federal question to be ultimately determined by the federal courts. *Ernst v. Hingeley*, (1941) 11 Wash. 2d 171, 118 P. 2d 795.

In my opinion, the motor vehicle registration fee, as well as other fees and taxes imposed by ch. 85 of the statutes, is a tax within the meaning of sec. 17 (a) (1) of the Bankruptcy Act and therefore is not discharged.

In 28 F. Supp. 412 (1939), the federal district court for the eastern district of Wisconsin ruled that unemployment compensation contributions due under ch. 108 of the Wisconsin statutes to the industrial commission of Wisconsin constituted a "tax" for the purposes of sec. 64 (a) (4) of the Bankruptcy Act. In reaching this decision the court, referring to sec. 64 (a) (4), stated:

"There is no justification in such language for a definition [of the word tax] in a narrow or restricted sense. Many

taxes under other names have been levied for special purposes, which nevertheless have been held by the courts to be for a public purpose, and have been designated as a tax." (p. 413)

The court further said :

"A careful examination of Chapter 108 leads inevitably to the conclusion that the framers of this legislation were very apprehensive that a tax levied for unemployment relief might be declared unconstitutional by the courts. They went to great lengths to avoid designating as a tax the payments to be made by employers. The word 'tax' does not appear anywhere in the chapter with reference to the compulsory payments which employers are required to make." (pp. 413-414)

In view of the fact that similar considerations may underlie the avoidance of the use of the word "tax" in our motor vehicle registration laws, I think that the registration fee can be considered as a tax for bankruptcy purposes without answering the question of whether it is a tax for other purposes.

In 31 F. Supp. 601 (1939), a case involving the same point as in the case cited above, the court said :

"* * * The word 'taxes' as used in Section 64, sub. a(4), quoted above, is not to be construed in a limited sense, but must be interpreted to include all types of involuntary exactions, regardless of name, levied by the Federal and State governments for governmental or public purposes, and it is immaterial which attribute of sovereignty, the police or taxing power, was employed in the imposition of such exactions. * * *" (p. 604)

I would assume that the line of argument pursued by the federal courts in construing the word "tax" for purposes of sec. 64 (a) (4) also applies to sec. 17 (a) (1) of the Bankruptcy Act. Therefore I recommend that your department continue to file claims for unpaid registration and other fees as you have been doing in the past. Civil action for their recovery is also possible after discharge in bankruptcy because these debts are not extinguished.

In my opinion, the principles outlined above also apply in the case where a check given for such purposes is returned

marked "not sufficient funds" and the drawer subsequently is adjudicated a bankrupt.

Delivery of such a check does not serve to discharge his indebtedness to the state.

Sec. 118.66, Stats., provides:

"The issuance for any purpose of a check, draft or order which is not honored or paid upon presentation because of no account at, insufficient or no funds in, or credit with the bank upon which such instrument was drawn, shall render the person or firm issuing the same liable for all costs and expenses in connection with the collection of the amount for which it was written."

This section makes it clear that the debt for which the check was given is still owing to the motor vehicle department, regardless of whether or not the issuance of such a check constitutes a crime under sec. 943.24 of the 1955 statutes or sec. 343.401 of the 1953 statutes.

The legal owner of the claim, namely, the state of Wisconsin, who would have been entitled to maintain suit thereon, is the person who should make the proof of claim. See Collier Bankruptcy Manual, 2nd ed., p. 516, §57.02. Since the state can act only by and through agents, you, as commissioner of the motor vehicle department, can execute the proof of claim.

SGH

Automobiles and Motor Vehicles—Transfer of Title—Junked or Stolen Vehicles—Where insurance companies take ownership of vehicles upon payment of total loss claims to owners whose vehicles are totally wrecked or stolen, such companies must comply with sec. 85.01 (8), Stats., respecting transfer of title.

September 14, 1956.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You state that a controversy has arisen as a result of the insistence by your department that automobile casualty insurance companies which settle total loss claims resulting from collision or theft and which take title to the vehicles involved, comply with the statutes respecting transfer of title and disposition of "junked" automobiles. (Sec. 85.01 (8), Stats.)

You state that some companies have been reluctant to effect transfer of title to such vehicles, particularly stolen vehicles, because of fear that they may incur some form of civil liability for damages while the vehicle is in the hands of the thief.

You request my opinion as to whether such companies are correct in their position respecting the possible incurring of certain liabilities for damage claims.

On the basis of the facts you stated, I can see no possible liability on the part of an insurance company for the acts or omissions of one who steals a car insured by the company. The company's sole liability is to the owner of the car for his loss under the contract of insurance. If the insurer desires to take title to the stolen vehicle in the hopes of effecting some salvage when and if the vehicle is recovered, it must assume all statutory responsibilities of ownership.

Even if an insurance company were to incur some form of liability (which I suggest is nonexistent) that would not be an excuse for noncompliance with the transfer of title laws. It would be a risk which such companies assume by being in the business in which they voluntarily choose to engage.

SGH

Counties—Superintendent of Schools—Schools and School Districts—Taxation—Property lying within a city which operates elementary schools under the city school plan provided by secs. 40.80 to 40.827, Stats., and has a city superintendent, is exempted by sec. 39.06 (4), Stats., from the tax imposed to support the office of county superintendent of schools, even though the entire city is within a union high school district.

September 15, 1956.

ALBERT J. CIRILLI,
District Attorney,
Oneida County.

You have asked whether or not property within the city of Rhinelander is exempt from the tax imposed to support the office of county superintendent of schools, under the following circumstances: Within the past year there has been created a union high school district which includes the city of Rhinelander and several adjacent towns. The city no longer operates a high school but, we are informed, continues to operate elementary schools under the city school plan provided by secs. 40.80 to 40.827, Stats., and has a city superintendent of schools. Prior to the creation of the union high school district, the city operated elementary and high school grades under the city school plan.

Sec. 39.06 (4), Stats., provides, so far as here material:

“(4) CITIES WITH SCHOOL SUPERINTENDENT. Cities which have a city superintendent of schools and the territory of any school districts that include a city or cities within their boundaries and operate both elementary and high school grades and employ a superintendent to supervise and manage its schools shall form no part of the county superintendent’s district, shall bear no part of the expense connected with the office of county superintendent of schools;
* * *”

The quoted language clearly exempts from the tax to support the county superintendent’s office any city having a city superintendent of schools, and the exemption is not limited to cities which operate both elementary and high school

grades. This same exemption of cities having a city superintendent of schools formerly was in sec. 39.01 (5), Stats. 1927 to 1951, and was discussed in detail in 41 O. A. G. 343. It was there pointed out that the exemption could apply only to cities operating under the city school plan, but this does not exclude the city of Rhinelander since it is operating elementary schools under that plan.

The city could not qualify for the exemption by reason of the city's inclusion in the new union high school district, since sec. 39.06 (4), Stats., expressly limits the exemption accorded to school districts (as distinguished from cities operating under the city school plan) to those districts which include a city and which "operate both elementary and high school grades" and employ a superintendent. The new union high school district does not operate elementary grades, so the territory within the district is not exempted by reason of the existence of that district.

In view of the opinion already expressed in answer to your first question, it is unnecessary to discuss your additional questions pertaining to the limitations upon the amount of the tax which may be imposed and the date when it may first be levied.

EWV

Legislature—Powers—Constitutional Law—Municipalities—Authority to Levy Taxes—No provision of the Wisconsin constitution appears to prohibit the legislature from granting to local municipalities power to levy an excise or stamp tax upon automobiles, a local sales tax, or a local income tax. Provisions of the constitution must be observed in the exercise of such power of the legislature.

September 15, 1956.

REVENUE RESOURCES COMMITTEE.

You have submitted for opinion two questions:—

1. Is there any Wisconsin constitutional prohibition which will prevent the state legislature from passing an enabling act granting to the municipalities of the state the power to levy an excise or stamp tax upon automobiles garaged within their jurisdiction?

2. Is there any Wisconsin constitutional prohibition which would prevent the state legislature from passing an enabling act granting to the municipalities of the state the power to levy a local sales tax or local income tax?

These questions go only to the general proposition of whether the legislature possesses the power generally to grant local municipalities the authority to levy and collect taxes of the types mentioned. There is no provision which we find in our constitution, which includes the uniformity provisions in art. VIII, sec. 1, that expressly negates the existence of any such general power in the legislature; nor do we find any case in which our supreme court has interpreted any provision thereof as denying the existence of any such general power in the legislature.

Necessarily, the answer to your submitted questions that there is an apparent existence of such general power in the legislature is only responsive upon the general proposition and cannot be taken as in any manner passing upon the validity of any particular attempted exercise thereof. Before there could be any expression of opinion as to any particular legislative enactment in this field, it would be necessary that it be at hand and be given careful scrutiny.

The apparent existence of such general power in the legislature does not mean that there are not provisions of our constitution which are applicable to, and must be observed in, the exercise thereof. While in *C. & N.W. Ry. Co. v. State*, (1906) 128 Wis. 553, 108 N.W. 557, it was held that the uniformity provisions of art. VIII, sec. 1, of our constitution relate and are applicable only to ad valorem taxes, if the particular form or detail of the authorization or of the tax involved is such as to be the equivalent of or in substance a personal property tax, then it would probably run afoul thereof. Similarly, the equality provisions of our constitution and the due process provisions in the fourteenth amendment to the United States constitution must be observed in the exercise of the power.

HHP

Banks and Banking—Use of Word “Bank”—Mortgage investment company not licensed to do business as a bank in the state of Wisconsin which advertises that it is a member of the “Mortgage Bankers Association of America” in effect asserts that it is a “mortgage banker,” and hence would be in violation of sec. 221.49, Stats. 1955.

September 20, 1956.

WILLIAM J. MCCAULEY,
District Attorney,
Milwaukee County.

You have inquired whether a mortgage investment company doing business in Milwaukee and which is not licensed by or subject to the supervision of the commissioner of banks may advertise and make reference on its stationery to the fact that it is a member of the “Mortgage Bankers Association of America.” You inquire specifically whether such action would constitute a violation of sec. 221.49, Stats. 1955.

The applicable statute, sec. 221.49, reads:

“No person, copartnership or corporation engaged in business in this state, not subject to supervision and examination by the commissioner of banks, and not required to make reports to him by the provisions of this chapter, shall make use of the words ‘bank,’ ‘savings bank,’ or ‘banker’ (or the plural thereof) upon any office sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is the place or office of a bank, nor shall such person or persons make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever having thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership or corporation shall be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than \$300 nor more than \$1,000, or by imprisonment in the county jail not less than 60 days nor more than one year; or by both such fine and imprisonment.”

This statute has existed substantially in its present form since the enactment of ch. 477, Laws 1921.

You have pointed out that under a previous statute, sec. 2024-50, Stats. 1919, this office has repeatedly held that engaging in an unlicensed banking business or using the words "bank," "savings bank," "banking," or "banker" or any plural thereof in connection with any business other than licensed banking was prohibited.

The previous statute read, sec. 2024-50, Stats. 1919:

"No person, copartnership or corporation engaged in *the banking business* in this state, not subject to supervision and examination by the commissioner of banking, and not required to make reports to him by the provisions of this chapter, shall make use of any office sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is the place or office of a bank, nor shall such person or persons make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever having thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank. It shall be unlawful for any person, copartnership or corporation to use the word 'bank,' 'savings bank,' 'banking' or 'banker' or the plural of any such words, in any other business or in connection with any other business than that of the business of banking as defined and authorized under the provisions of this chapter. * * *

In reference to this latter statute, it was stated in 8 O.A.G. 750, 751 (1919):

"It is hard to perceive how a foreign corporation using any of the prohibited words can be permitted to enter Wisconsin or do a banking business. The statute strikes in two directions. The first sentence of it provides that only those corporations which are under the supervision of the commissioner of banking and required to make reports to him can engage in the banking business in Wisconsin, and at the same time, use any name which indicates that its place of business is a bank or use any written or printed matter that may indicate that its business is banking. This part of the statute bars every foreign corporation which has the word 'bank' for a name or for part of its name from doing

banking business in Wisconsin. On the other hand, if a foreign corporation that has the word 'bank' in its name seeks to do other business than banking, it is arrested by the sentence of this section."

This opinion was quoted with approval and followed in 9 O.A.G. 579 (1920) wherein it was stated that a foreign corporation desiring to do business under the name of S-Bank S- Company would be in violation of said section 2024-50.

In 10 O.A.G. 169 (1921) it was stated that a company which advertised "The company is doing a private banking business" was in violation of sec. 2024-50.

In 10 O.A.G. 278 (1921) in reference to the same company, it was stated that it was not necessary to prove under the first sentence of sec. 2024-50 that the corporation was engaged in the banking business in the state, since the last sentence of the section prohibited the use of the word "bank" and variants thereof to corporations which were not licensed to do a banking business.

In 10 O.A.G. 344 (1921) it was stated that it was a violation of sec. 2024-50 for a person not engaged in the banking business under Wisconsin law to advertise himself as a Wisconsin representative of bankers located in another state.

In 10 O.A.G. 669, 670 (1921) it was held that it was a violation of the section then in force to advertise a business as "the business is a branch of banking."

In 12 O.A.G. 33 (1923) it was stated that a calendar issued jointly by a building and loan association and a firm of real estate dealers which contained a picture of a bank with the word "bank" indicated that the business of the loan association was that of a bank and hence the section was violated.

There appear to be no subsequent opinions or court decisions construing either the section 2024-50 as it appeared in the statutes of 1919 or as it was amended in 1921.

In my opinion the 1921 amendment, accomplished by ch. 477 of the laws of that year, only clarifies the statute and tends to make it stronger, and does not indicate an intent to relax the requirements of the previous statute or the

rulings of this office thereon. I base this conclusion upon the fact that the amendment of 1921 struck from the first sentence of the statute the reference to corporations engaged in "the banking" business in this state, and that the statute now refers to *any business* and states that it cannot indicate that its place or office is a place or office of a bank, nor can it use advertisements that would indicate that its business is the business of a bank.

When the investment company concerned asserts that it is a member of the "Mortgage Bankers Association of America" it is in effect asserting that it is a "mortgage banker." Hence it appears to be in clear violation of the express terms of the statute.

RGT

Counties—Rural Planning for Fire Protection, Emergency Services, and Civil Defense—It is doubtful that counties have authority to establish rural numbering systems whereby farms are numbered and indicated on maps, and signs are posted at the farms and at road intersections, under sec. 59.07 (36) or (63), Stats. Nothing in sec. 27.015, Stats., authorizes creation of such a numbering system.

September 24, 1956.

JOHN D. WINNER,
District Attorney,
Dane County.

You have requested an opinion whether the county has authority to establish a rural numbering system with uniform signs posted at all farms and other signs at road intersections, the whole system being shown on maps, for the purpose of aiding in fire protection, emergency services, and civil defense. This plan would be effective only outside of the limits of incorporated cities and villages.

You refer to the well established rule that counties have only such powers as are conferred upon them by statute

or such as are necessarily implied therefrom. *Spaulding v. Wood County*, (1935) 218 Wis. 224, 228, 260 N.W. 473. You then refer to sec. 59.07 (36) and (63), Stats., which provides as follows:

“59.07 The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

“* * *

“(36) FIRE PROTECTION. Establish a fire department or, upon petition of two-thirds of the residents of any contiguous locality, pursuant to s. 60.29 (20) insofar as applicable, provide fire department service and protection for such residents as are otherwise unable to obtain service from a municipality as provided by s. 60.29 (20). The board shall determine the fee schedule to reimburse the fire departments and make rules and regulations for maintenance of service and equipment. An inspector may be appointed to inspect each fire department at least twice each year for proper maintenance. The contract may be terminated by either party upon giving a 90-day written notice thereof. The board may levy a tax upon all the real and personal property in the contiguous locality to reimburse the county for the fees and costs expended.

“* * *

“(63) RADIO SERVICE FOR FIRE PROTECTION. Appropriate money for the purpose of providing radio service for fire protection in the county, in the manner prescribed by the county board.”

You express the opinion that it is doubtful that either of those two subsections authorizes the expenditure of the county's funds for the rural numbering project described above. In my opinion you are correct. Neither of the foregoing subsections expressly authorizes the numbering system, nor can it be said that the numbering system is necessarily implied. Subsec. (36) authorizes the county board to provide for the establishment of a fire department or provide fire department service and protection, but although a rural numbering system might serve as a great convenience in quickly locating fires, it cannot be said that it is a necessity without which fire department service could not be rendered. Likewise, subsec. (63) is limited to authorizing appropriations for radio service and says nothing about numbering of farms.

You refer also to sec. 27.015, Stats., relating to rural planning. That section, which is too long to quote here, has been carefully examined and found to contain no provision which could remotely be deemed to authorize such a project.

Rather than proceed on some tenuous and farfetched construction of existing statutes, it would be better to wait a few months until the convening of the 1957 legislature, at which time application may be made for legislation expressly authorizing this project, which appears, as you say, to have merit and to be in the public interest.

You also ask a second question as follows: "If the county does not have authority to establish a rural numbering system may the county through a duly authorized committee pay for the committee's per diem and mileage expenses in investigating the merits of the system, and in arranging for meetings with the towns in order to obtain the town's consent, and to generally promote and supervise the establishment of the system, although actual expenses are to be paid by the towns?"

What has been said in answer to the first question applies equally to the second. Since it is doubtful that the county can establish a numbering system at all, it does not seem to make any difference whether it undertakes all of the expense or only a small part of it. Moreover, examination of the statutes relating to the powers of towns fails to disclose any authority for them to bear the expense of posting the numbers and other signs.

WAP

Public Deposits—State Deposit Fund—Transfer to General Fund—Constitutional Law—Sec. 34.08 (6), Stats. 1955, appears to be constitutional.

The "balance" in the state deposit fund which is referred to in secs. 34.08 (6) and 20.550 (7), Stats., and which was transferred to the general fund as of July 1, 1955, includes the securities as well as the cash which constituted the state deposit fund on June 30, 1955.

State of Wisconsin investment board should take the action necessary to complete such transfer and may do so without incurring liability therefor.

September 27, 1956.

ALBERT TRATHEN, *Chairman,*
State Investment Commission.

Sec. 3 of ch. 332, Laws 1955, created sec. 34.08 (6), Stats., which reads as follows:

"On July 1, 1955 the segregated state deposit fund authorized by s. 34.08 (1) shall be discontinued and the balance therein shall be transferred to the general fund."

Sec. 2 of the same act created what is now sec. 20.550 (7), Stats., which reads as follows:

"There is appropriated from the general fund, or such other funds as may be indicated, annually, to be paid as herein provided:

"* * *

"(7) LOSSES ON PUBLIC DEPOSITS. Annually, such sums as may be necessary for the payment to public depositors of losses as defined by s. 34.01 (6). The aggregate of said payments shall not exceed the balance in the state deposit fund as of the close of business on June 30, 1955 plus interest at the rate of 2½ per cent per annum computed to the date of any such payment."

You have advised that the director of budget and accounts has requested the state of Wisconsin investment board to make the transfer contemplated by the aforesaid sec. 34.08 (6). You have been directed by said board to request an opinion on the following two questions:

1. Does the legislature have authority to liquidate the state deposit fund in this way?

2. Might the state of Wisconsin investment board incur any liability if it complies with the request for transfer which has been made by the director of budget and accounts?

“* * * Briefly stated, legislative power is the power of the law-making bodies to frame and enact laws. This power covers a very wide scope. Indeed, except where it is limited by the provisions of the State and Federal Constitutions, that power is practically and essentially unlimited. In the Legislature rests the power to apply the police power of the State, and every other power which confers governmental authority not directly, or by necessary constitutional implication, vested in the executive or judicial departments of the State. * * *” *State v. Huber*, 129 W. Va. 198, 40 S.E. 2d 11, 18.

“* * * the judiciary has no part in the policies of government, and is not concerned with the wisdom or the expediency of legislation. *Hallanan v. Hager*, 102 W.Va. 689, 136 S.E. 263; *Slack v. Jacob*, 8 W.Va. 612. A court may not question the wisdom or the governmental policy of a legislative enactment, as those matters belong exclusively within the legislative department of government. See *Woodall v. Darst*, 71 W.Va. 350, 77 S.E. 264, 80 S.E. 367, 44 L.R.A., N.S. 83, Ann.Cas. 1914B, 1278. Within its legislative sphere, and subject only to constitutional limitations, the power of the Legislature is almost plenary and it may pass whatever legislation it may see fit to enact. * * *” *State ex rel. Cashman v. Sims*, 130 W. Va. 430, 43 S.E. 2d 805, 812.

The legislature created the state deposit fund by ch. 1, Laws of the Special Session of 1931. It appears from the foregoing authorities that the legislature has the power to liquidate the state deposit fund as provided in sec. 34.08 (6) unless such statute contravenes some constitutional provision.

“More than a century ago it was held by the supreme court of the United States that the question whether a law should be held void for its repugnance to the constitution is at all times a question of much delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case. *Fletcher v. Peck*, 6 Cranch, 87. In a later case the rule was stated as follows:

... "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 270." *State ex rel. Dulaney v. Nygaard*, 174 Wis. 597, 608, 609, 183 N. W. 884.

"The validity of a statute must be sustained unless it palpably contravenes a provision of the state or federal constitutions. * * *

"* * *

"No act of the legislature can be held unconstitutional unless it is plainly and unquestionably in violation of the will of the people as declared in the fundamental law. * * *"
David Jeffrey Co. v. Milwaukee, 267 Wis. 559, 576, 579, 66 N.W. 2d 362.

"* * * It is well established in Wisconsin, as in most states, that any repugnance between a legislative act and the provisions of the constitution must be clear and irreconcilable, and that in matters involving only questions of public policy the determination of the legislature is final and conclusive on the courts. * * *"
Madison Metropolitan Sewerage Dist. v. Committee, 260 Wis. 229, 253, 254, 50 N.W. 2d 424.

Sec. 34.01 (6), Stats., provides:

"'Loss' shall mean any loss of public moneys, which have been deposited in a designated public depository in accordance with this chapter and upon which the required payment has been made into the state deposit fund, resulting from the failure of any public depository to repay to any public depositor the full amount of its deposit because the commissioner of banks or the comptroller of currency has taken possession of such public depository or because such public depository has, with the consent and approval of the commissioner of banks and the state of Wisconsin investment board, adopted a stabilization and readjustment plan or has sold a part or all of its assets to another bank which has agreed to pay a part or all of the deposit liability on a deferred payment basis or because such depository is prevented from paying out old deposits because of rules and regulations of the commissioner of banks or the comptroller of the currency."

Sec. 34.08 (1) and (2), Stats., provides:

"(1) (a) Payments made as required by the provisions of this chapter shall be set apart from other funds of the

state and shall constitute the state deposit fund. Such fund shall be used for the payment to public depositors of losses as defined by s. 34.01 (6), the repayment of any sums borrowed by the state of Wisconsin investment board for the purpose of paying losses required to be paid out of such fund, and for the payment of administrative expenses under s. 20.480 (72). Such fund shall be deposited by the state of Wisconsin investment board as are other funds of the state. On satisfactory proof of loss, the state of Wisconsin investment board shall direct the director of budget and accounts to draw his warrant payable from the state deposit fund in payment of such loss as provided in this chapter, and the state treasurer shall promptly pay such warrant out of moneys in his hands to the credit of the state deposit fund.

"(2) Every bank receiving or having any public funds on deposit, shall on the last day of March, June, September and December in each year pay into the state deposit fund at the per cent rate per year on the average daily balance of such deposits so deposited with it for the preceding 3 months' period as fixed by the state of Wisconsin investment board, such sum to be collected by the depository from the depositors. * * *"

Although by sec. 34.08 (6) the legislature abolished the fund from which it was anticipated prior hereto that claims under the state deposit law would be paid, in creating sec. 20.550 (7) it has provided that henceforth such claims shall be paid from the general fund.

Sec. 34.08 (6) specifies that the "balance" in the state deposit fund on July 1, 1955 "shall be discontinued and * * * transferred to the general fund." Sec. 20.550 (7) provides that such sums as may be necessary are appropriated from the general fund to pay losses to public depositors but that the aggregate of said payments shall not exceed the "balance" in the state deposit fund as of the close of business on June 30, 1955 plus interest at 2½ per cent per annum computed to the date of any such payment.

The term "balance" has no technical significance in the law. *Taylor vs. Taylor*, 10 Ky. 18.

The word "balance" is often used in the sense of residue or remainder and in a general sense may be defined as what remains or is left over. *Commercial Discount Co. v. Holland*, 107 Cal. App. 83, 289 P. 906; *Redman v. Evans*, 184 Tenn. 404, 199 S.W. 2d 115.

The word "balance" generally means total or net balance. *Aetna Life Insurance Co. v. Bartlett*, 53 F.Supp. 1005.

While the word "assets" might have been a more appropriate word than "balance" in secs. 34.08 (6) and 20.550 (7), it is my opinion that it was the legislative intent that the cash balance which was in the state deposit fund on June 30, 1955 and also the securities which belonged to said fund on said date, with interest as provided in sec. 20.550 (7), should be available for the payment of losses as defined in sec. 34.01 (6). In other words, it was the legislative intent that the assets which would have been available for the payment of losses from the state deposit fund should also be available, with interest as provided in sec. 20.550 (7), for the payment of such losses from the general fund.

While the question is not specifically raised in your request, it may be that you are wondering whether the segregated state deposit fund constitutes a trust fund in which there may be outstanding vested and contractual rights beyond the power of the legislature to alter. No state may pass any law impairing the obligation of contracts. Art. 1, sec. 10, U. S. Const.

The state deposit guaranty fund set up by sec. 34.08 (1) (a) of the statutes "shall be used for the payment to public depositors of losses as defined by s. 34.01 (6), the repayment of any sums borrowed by the state of Wisconsin investment board for the purpose of paying losses required to be paid out of such fund, and for the payment of administrative expenses under s. 20.480 (72)."

It is assumed for purposes of this opinion that the board has borrowed no money to pay losses and that payment of administrative expenses is current. The only remaining obligation is to pay losses of "public depositors."

Sec. 34.01 (3), Stats., defines a "public depositor" as follows:

"(3) 'Public depositor' shall mean the state or any county, city, village, town, drainage district, power district, school district, sewer district, or any commission, committee, board or officer of any governmental subdivision of the state or any court of this state which deposits any moneys in a public depository."

The state, of course, is free to make such provisions as may be deemed appropriate to take care of its own losses. This involves no constitutional rights of others.

All of the other entities mentioned in the statute are governmental subdivisions, municipalities, or offices created by the state. This transfer therefore is merely a rearrangement of the state's inter-family affairs. The principle is well settled that a municipal corporation has no privileges or immunities under the federal constitution which it may invoke against state legislation affecting it. *State ex rel. Martin v. Juneau*, 238 Wis. 564, 300 N.W. 187; *Williams v. Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. ed. 1015. In the *Juneau* case the court went on to point out that the authority of the legislature over a municipal corporation is supreme, subject, however, to such limitations as may be prescribed by the state constitution, and it is clear that the provisions of our state constitution only slightly restrict the power of the legislature over municipal corporations and these restrictions apply only to local affairs. "Municipalities obtain no vested right under an act of the legislature, the constitution reserving to the legislature the power to repeal or alter any such act" (p. 571).

Perhaps one further question is suggested and that is whether sec. 20.550 (7) appropriating from the general fund amounts necessary to pay losses creates a state indebtedness contrary to art. VIII, sec. 4, Wis. Const.

This appropriation is no different in principle than any other appropriation of "a sum sufficient" for a particular purpose. It cannot bind succeeding legislatures and could be repealed at any time. Moreover, the appropriation is carefully restricted to the balance in the state deposit fund on June 30, 1955, plus interest at the rate of 2½ per cent per annum, so that the impact upon the finances of the state is limited pretty much to a bookkeeping transaction whereby the balance is transferred from one fund to another. The state is neither richer nor poorer when the money is transferred from one pocket to another.

The fact that the appropriation is to be used to indemnify losses creates no constitutional problem, e.g., appropriations made from the general fund to the state department of agriculture to indemnify farmers for loss of animals afflicted

with tuberculosis and brucellosis. There is a well defined public purpose to be served whether the loss is sustained by a public depositor in the one case or as an incident in the public program of eradication of animal diseases threatening the agricultural economy of the state and the health of the public in the other case.

No other possible constitutional objections worthy of serious discussion suggest themselves at the moment.

The decision to have the claims paid from the general fund rather than the state deposit fund is a matter of legislative policy, the wisdom of which is not subject to review by the courts. Hence, I have no basis at this time for advising you that the legislature does not have authority to liquidate the state deposit fund in the manner provided in sec. 34.08 (6).

In connection with your second question, it is noted that sec. 34.08 (6) does not contain any direction to the state of Wisconsin investment board with respect to the transfer contemplated thereby.

Secs. 15.15 (5) and 15.16 (1), Stats., relate to the duties and powers of the director of budget and accounts and provide as follows:

“15.15 The director of budget and accounts in the discharge of pre-auditing and accounting functions shall have the following duties and powers:

“* * *

“(5) KEEP AND STATE ACCOUNTS. Keep and state all accounts in which the state is interested as provided in sections 15.16 and 15.17.”

“15.16 The director shall:

“(1) KEEP SEPARATE ACCOUNTS. Keep in his office separate accounts of the revenues and funds of the state, and of all moneys and funds received or held by the state, and also of all incumbrances, expenditures, disbursements and investments thereof, showing the particulars of every incumbrance, expenditure, disbursement and investment.”

It is my opinion that as of July 1, 1955 the cash and securities which constituted the state deposit fund as of June 30, 1955 became assets of the general fund, although it may be that some administrative work such as the assignment

and re-registration of securities should be done by your board to make such transfer complete, inasmuch as you have exclusive control of the investment of this fund under sec. 25.17 (1), Stats. It is my opinion that your board should take such action as may be necessary to complete the transfer contemplated by sec. 34.08 (6) and that you would not incur any liability by so doing.

JRW

WHR

HHP

Counties—Appropriations and Expenditures—Charitable and Penal Institutions—Private Social Welfare Agency— Under secs. 49.19 (4) (g), 46.22 (5) (g), and 48.57 (1) and (2), Stats., county may contract for services of private social welfare agency on individual case basis for care of unwed mother and child at time of confinement.

October 2, 1956.

JOSEPH B. FORRESTAL,
District Attorney,
Rock County.

You have referred to our opinions in 45 O.A.G. 44 and 45 O.A.G. 133 in which it was concluded that a county may not under sec. 46.22 (5) (g), Stats., or otherwise, make a voluntary contribution to a private welfare agency which cares for unwed mothers free of charge.

Rock county proposes to enter into an arrangement with the Children's Service Society of Wisconsin, a private licensed child welfare agency with headquarters in Milwaukee and having five branch offices in other parts of the state. The primary purpose of this agency is to provide care for unwed mothers during confinement and for a short time thereafter. As in the case of the agency discussed in the above opinions, this service is being offered free of charge and without regard to the county of residence or of any appropriation to the agency by the county of residence.

However, it is proposed that in the case of Rock county statements for services to Rock county residents will be submitted to the Rock county juvenile department monthly or quarterly on an individual case basis. Such statements will set forth in detail the services rendered, to whom rendered, and detailed costs. Upon approval by the department, the statement, minus names involved, would then be submitted to the county board for payment directly to the agency.

Money paid under this plan would not constitute a voluntary contribution or donation, as payment would be made only after the rendering of the service and the approval of the bill by the county.

The agency in question is not prepared to say whether it would refuse to render the service in the absence of an agreement to pay therefor on a case basis, but in any event it is not bound to accept any free cases, since, being a private agency, it is at liberty to determine for itself whether it will handle some cases free of charge and charge for others.

It would appear that there is sufficient statutory authority for a county to enter into an arrangement with a private welfare agency along the lines you have indicated.

Sec. 49.19 (4) (g), Stats., may be used in those instances where the mother's financial circumstances are such as to deprive her or the child of proper care. This provision reads:

"(g) Aid shall be granted to a mother during the period extending from 6 months before to 6 months after the birth of her child, if her financial circumstances are such as to deprive either the mother or child of proper care. The aid allowed under this paragraph may be given in the form of supplies, nursing, medical or other assistance in lieu of money."

As pointed out in the two opinions mentioned above, sec. 46.22 (5) (g), Stats., authorizes the county welfare agency to expend such amounts "as may be necessary" out of moneys appropriated therefor by the county board for the purpose of administering child welfare services, including services for illegitimate children. See also sec. 48.57 (1) and (2), Stats.

If the county makes a contract with the private agency along the lines indicated above, then payments for services rendered pursuant to the contract are "necessary" payments. The fact that the services might be furnished in some other way at little or no cost to the county is immaterial. If the county has the power to make the contract, and it appears that it does have such power, it is of no legal consequence to say that the contract is not a wise one. We hasten to add, however, that nothing said here is intended to reflect in any way on the wisdom of the proposed contract. It is important in any well planned social welfare program to know in advance that arrangements

have been made to meet a need which we have always had with us and which shows no signs of diminishing, rather than to leave the problem to chance and such charitable care as may be available when needed.

WHR

Justice Court and Justice of the Peace—Fees for Transcripts—It is not contemplated under sec. 307.01, Stats., relating to the fees of justices of the peace, or otherwise, that where the testimony on a preliminary hearing in a criminal case is transcribed by a reporter, the county is to pay twice for the original transcript, once to the justice and again to the reporter.

October 15, 1956.

FRANKLIN J. SCHMIEDER,
District Attorney,
Calumet County.

You state:

“On a preliminary hearing of a criminal charge the Justice of the Peace authorized the hiring of a reporter to take the testimony. There were 76 folios of testimony for which the reporter charged, and billed for. The Justice likewise charged the same 76 folios as part of his fee citing 39 Atty. General Opinions page 585.

“Reading the opinion I do not gather that impression. I read it as stating that the folio charge can be charged but once. That if it is done by a reporter and properly charged by her the Justice reports it as part of the costs but that amount is then payable to the reporter and not to both the reporter and Justice. Nowhere in the statute have I been able to find that the Justice is paid for listening to testimony.”

Our opinion is requested on the foregoing.

There is nothing in sec. 307.01, Stats, or elsewhere, so far as we are aware, which contemplates that the county is to pay twice for the same transcript, once to the reporter and a second time to the justice.

As stated in 39 O.A.G. 585, to which you refer, the justice is not authorized to make a folio charge for listening to testimony.

Sec. 307.01 provides:

“Justices are entitled to the following fees and may tax the same as costs in all actions when applicable.

“* * *

“All writing done in an action, including docket entries, minutes or evidence *and transcripts made of testimony taken by a phonographic reporter*, but excepting the drafting of papers, 15 cents per folio.”

The correct procedure would appear to be that the justice should take care of paying the reporter and then obtain his reimbursement as indicated above in sec. 307.01. The original of the transcript becomes a part of the record in the case, and the method of paying for it and including it in the taxable costs is provided by sec. 307.01.

If the district attorney should desire a carbon copy for the use of the county it would of course be necessary for him to make arrangements therefor with the reporter, and the reporter's fee for the copy would properly be chargeable to the county.

The only way whereby the justice could make an extra profit in the case of a preliminary hearing taken by a reporter as distinguished from one where the testimony is not so transcribed would be where the justice is successful in hiring a reporter for less than 15 cents per folio. The situation is distinguishable from the taking of testimony before a court commissioner under sec. 252.17 (8), Stats., where, in addition to the hourly fee of the commissioner, he receives 20 cents per folio for the original transcript of testimony, out of which he must pay the reporter 15 cents per folio.

The provisions of the statutes relating to circuit court reporters have no application in justice court, and it is up to the reporter to make his own contract with the justice of the peace, with all parties knowing in advance that the 15 cents per folio fee provided by sec. 307.01 is the only fee that can be taxed as costs so far as the transcript of testimony is concerned.

WHR

Prisons and Prisoners—Location of Jails—300-foot distance between jail and “school building” required by sec. 53.32, Stats., is to be measured from the school building, not the land boundary. Building containing jail and rooms used for other purposes is not in violation if jail entrance and jail part of building are 300 feet or more from the school, even though other parts of building are closer. Building used for Sunday school purposes is not a “school building” within sec. 53.32, Stats.

October 17, 1956.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County.

You request a construction of sec. 53.32, Stats., which provides as follows:

“No jail, lockup or temporary place of confinement shall be erected within 300 feet of any public, private or parochial school *building* or *building* used regularly or principally for school purposes.”

You state in your request that the county is contemplating construction of a new jail and that two sites are being considered, one of which is 300 feet from a parochial school building regularly used for school purposes and the other adjacent to a church which conducts Sunday school classes but not regular school.

You have asked three questions, in substance as follows:

1. Does sec. 53.32 require that the jail be 300 feet from the land boundaries of the school, or is the distance to be measured from the nearest portion of the actual school structure itself?

2. If the jail is located in a building housing other departments as well, e. g., county offices, county traffic center, etc., is the entire building subject to the 300-foot limitation requiring the nearest wall to be 300 feet from the school, or may the measurement be taken from the wing in which the actual jail is housed, permitting the nearest outer wall of the building to be less than 300 feet from the school?

3. Does the limitation apply to a church where regular daily school is not taught but where Sunday school classes only are held?

The answer to the first question is determined by the express language of the statute. The distance is to be measured from the "building," not the land boundaries. Sec. 53.32 is different in this respect from sec. 176.05 (9m), Stats., relating to intoxicating liquor licenses, which expressly requires the measurement to be from "the closest point of the *boundary* of such school," which has been construed to mean the land boundary, since buildings do not have "boundaries." 37 O.A.G. 192. If sec. 53.32 used the word "school" only, instead of "school *building*," it might be held to refer to the land boundaries. Cf. *Smith v. Ballas*, (1948) 335 Ill. App. 418, 82 N.E. 2d 181. But the "building" is specified by the statute and this cannot be stretched to include the playground or other school grounds.

The answer to the second question depends upon the construction of the building housing the jail. Doubtless the intent of the legislature was to insulate the school children from contact with prisoners being taken into and out of the jail premises, as well as from those in cells facing toward the school. Therefore, if the entrance used for that purpose were within 300 feet of the school it would be within the prohibition of the statute.

But if all parts of the building which are used for jail purposes, and the jail entrance, are 300 feet or more from the school building, it can hardly be maintained that the statute is violated merely because other parts of the building, not used for jail purposes, extend to within 300 feet. The whole building is not a "jail" within the meaning of sec. 53.32.

The answer to your third question rests upon the meaning of the term "school" as used in the statute. The statute prohibits construction of a jail within 300 feet of a "school building or building used regularly or principally for school purposes." Thus, to qualify as such, any building not a school building must be used *regularly or principally for school purposes*.

Your request states that the church at which the Sunday school classes are held does not have regular daily school

classes but conducts only Sunday school classes. Thus the church is not a building regularly or principally used for school purposes, and sec. 53.32 does not apply. It is to be noted that sec. 176.05 (9m) prohibits issuance of liquor licenses for premises within 300 feet from "any established public school, parochial school, hospital or church," thereby differentiating between schools and churches. In this connection it has been held that a kindergarten nursery is not a "school" within the meaning of a similar statute prohibiting licensing for the sale of intoxicating liquors near "schools." *Rinkind v. State ex rel. Gibson*, (1947) 159 Fla. 553, 32 So. 2d 330. It is therefore concluded that sec. 53.32 does not apply to a church at which Sunday school classes are held and when the building is not regularly or principally used for school purposes.

WAP

Public Assistance—Legal Settlement—A single instance of furnishing relief in the form of food and supplies, during a one-year period, may be sufficient in the light of attendant circumstances to prevent acquisition of a legal settlement under sec. 49.10 (4), Stats.

October 22, 1956.

KENNETH H. HAYES,
District Attorney,
St. Croix County.

You have asked this office to resolve a dispute between the county and a town as to whether aid given to a certain family by the town, on a single date within a 12-month period, tolls the running of the time required for acquisition of legal settlement under sec. 49.10 (4), Stats.

The determination of such disputes between municipalities and counties is a function the legislature has committed to the state department of public welfare under sec. 49.11 (7), Stats. See, also, sec. 49.04 (3), Stats., relating to disputes between counties and the state.

It has been held a number of times by the supreme court of this state that questions of fact involved in such disputes are "to be determined by the department." *Town of Mazomanie v. Village of Mazomanie*, 254 Wis. 597, 599. The court also pointed out in *Waushara County v. Green Lake County*, 238 Wis. 608, 611, that "the findings of the division of public assistance of the state department of public welfare are conclusive, in the absence of fraud."

For this office to attempt to give a categorical answer on a question of fact, subject to findings by an administrative agency, would not only be a usurpation of the functions of the fact-finding agency, but would be of little practical value. Not only does the fact-finding agency have some leeway for weighing evidence, but further, it cannot be known in advance exactly what evidence may be offered by adversary parties. This opinion can do little more than call attention to general principles of law which would govern deliberations of the department of public welfare.

Sec. 49.10 (4) provides in part that time spent "while supported as a dependent person" shall not be included in the year necessary to acquire a settlement.

The supreme court has held that one does not necessarily acquire the status of an indigent by the receipt of public assistance (*Town of Mazomanie v. Village of Mazomanie*, 254 Wis. 597), but that the status is to be determined "from all of the circumstances of the patient before and after."

Similarly, it was held that a single grant of aid "under temporary emergency circumstances, would not create a pauper status." *Waushara County v. Green Lake County*, 238 Wis. 608, 610; *Coffeen v. Preble*, 142 Wis. 183. See, also, *Ellington v. Industrial Commission*, 225 Wis. 169, and 35 O.A.G. 10.

The foregoing cases, as well as *Dane County v. Barron County*, 249 Wis. 618, and *Rolling v. Antigo*, 211 Wis. 220, held that the question whether one is a pauper or a dependent person, within the meaning of the poor relief statutes, is an issue of fact.

Rolling v. Antigo, 211 Wis. 220, 223, pointed out that the provisions of sec. 49.02 (4) (now included in sec. 49.10 (4)) could not be "applied as a mere rule of thumb, disregarding all considerations except the one of aid furnished."

The terms of sec. 49.10 (4) have been amended since decision of the foregoing cases, by ch. 702, Laws 1951. The statute now contains a provision to the effect that legal settlement is acquired by a year's residence "without receipt of aid under this chapter." Such terminology might indicate an intent to toll the running of the year even by receipt of "emergency" or "temporary" relief, such as was held in *Coffeen v. Preble*, 142 Wis. 183, not necessarily to give the recipient pauper status.

Ch. 702, Laws 1951, however, retained in sec. 49.10 (4) the provision that time spent "while supported * * * as a dependent person" should not be included in the time necessary to acquire a settlement. In view of that fact, and in view of the further fact that the title of ch. 702 indicates that it was concerned primarily with creating a county legal settlement rather than changing the underlying standards of dependency, it seems probable that the legislature intended the previously announced judicial rules to continue.

It does not seem necessary at this time to try to determine whether the legislature intended by ch. 702, Laws 1951, to modify the rules reviewed in *Dane County v. Barron County*, 249 Wis. 618. As you have pointed out, the facts reported do not indicate that the food and supplies furnished could be classified as relief in an emergency, in the sense that the need was brought about by unusual circumstances such as accident, illness, or incarceration.

Under the rule of *Town of Mazomanie v. Village of Mazomanie*, 254 Wis. 597, 599, the status of a person as a dependent is to be determined "from all the circumstances * * * before and after, as well as at the time." If that rule is to be applied, there is more than the single instance of aid to be considered. You do not indicate whether the family had ever received aid *prior* to commencement of its residence in the town of S; but you do indicate that after aid was given in September 1954, the family did receive substantial amounts of aid, continuing from January 1955. Since circumstances "after" are to be considered, the aid given in September 1953, need not be considered in isolation.

The issue as stated in *Sheboygan County v. Sheboygan Falls*, 130 Wis. 93, 95, quoted approvingly in *Holland v.*

Cedar Grove, 230 Wis. 177, 185, is "whether the town officers paid the money with the intention of aiding or supporting" the recipient "as a poor person" (now a dependent person).

The question whether one is a "dependent person" under sec. 49.01 (4) so as to be entitled to relief in the form of food, fuel, and light is in the first instance committed to the "municipal authorities." *Holland v. Cedar Grove*, 230 Wis. 177, 181.

Since the town authorities apparently made the initial determination that the family was dependent and entitled to relief in the form of the ordinary, every-day supplies, it would seem that such administrative determination should be regarded as presumptively correct, particularly if it were also accepted and approved at that time by the county by allowance of the claim under sec. 49.11 (2), Stats.
BL

Prisons and Prisoners—Location of Jails—300-foot distance between jail and school building required by sec. 53.32, Stats., must be measured in a straight line between the nearest points of the two buildings. Where a school has been constructed within 300 feet of an existing jail, jail building may be enlarged, but not in the direction of the school. Existing jail 300 feet or more from a school building may not be enlarged so as to bring it within the prohibited distance.

October 24, 1956.

MARK H. HOSKINS,
District Attorney,
Grant County.

You have requested an opinion with reference to the following state of facts. The Grant county jail has been standing at its present location for many years. About two years ago a parochial school was constructed one block west of the jail building considerably less than 300 feet from the jail, measured in a straight line. The county has now been

advised by the state department of public welfare that the present jail facilities are inadequate and that either the jail building must be remodeled or a new jail building must be constructed. The county owns a vacant lot adjacent to the jail, also within 300 feet of the parochial school building, which contains enough space for the construction of a new jail building. You refer to sec. 53.32, Stats., which provides as follows:

“No jail, lockup or temporary place of confinement shall be *erected* within 300 feet of any public, private or parochial school building or building used regularly or principally for school purposes.”

Your first question is whether the 300 feet should be measured in a straight line or via the shortest route along the highway, and from which points of the two buildings the measurement should be taken.

A similar statute, which relates to the distance between schools and places licensed for the sale of intoxicating liquors, is sec. 176.05 (9m). That statute expressly states that the distance “shall be measured via the shortest route along the highway from the closest point of the boundary of such school * * * to the closest entrance to such [licensed] premises.” In the absence of such express language, like statutes enacted in other states have been construed to require the measurement to be in a straight line from the nearest points of the respective properties. 30 Am. Jur., Int. Liq., § 347; Anno., 96 A.L.R. 778; *Leland Stanford Junior University v. State Bd. of Equalization*, (1934) 1 Cal. 2d 784, 37 P. 2d 84, 96 A.L.R. 775, 777.

It would appear that a like mode of measurement is contemplated by sec. 53.32. The measurement, therefore, should be taken in a straight line from the nearest point on the school building to the nearest point of the jail building, ignoring the usual mode of travel along the highway, and, except as discussed below, ignoring the entrances to the buildings.

Your second question is whether sec. 53.32 would prohibit the erection of an addition physically connected to the old jail building if such addition were used for the detention of the prisoners. You do not say whether the addition would

be on the side toward the school or on the side opposite the school.

This question raises the whole problem of whether a jail may be enlarged after a school has been constructed within 300 feet of it. It will be observed that the law does not prohibit the erection of a school, although the statutory purpose to insulate school children from close contact with jails might well have been served by making the prohibition reciprocal. Clearly, the statute does not require the removal of a jail after a school has been built within the prohibited distance. Does it prohibit enlarging the jail either by broadening the building or by adding on stories?

It would seem that the proprietors of the school, by constructing it less than 300 feet from an existing jail, have waived the protection of the statute *pro tanto*, and would probably be held estopped to object to its continued presence or to its enlargement, at least so long as the enlargement does not result in moving the jail closer to the school.

The thing prohibited by sec. 53.32 is the "erection" of a jail. Judicial definitions of the verb "erect" are not particularly helpful here. The question arises in the construction of statutes enacted for a different purpose from the one here under consideration. Some cases appear to hold that the word includes remodeling and improving an existing structure, while others hold that only the construction of a new structure is included. See 15 Words and Phrases (Perm. Ed.) 172-173.

Considering the purpose of sec. 53.32, it would appear that what the legislature intended to prohibit was the *establishment* or *initial location* of a jail within the prohibited distance.

One definition of the verb "erect" given in the American College Dictionary, p. 407, is "to set up or establish, as an institution; found." This definition seems most apt in expressing the legislative intent. The prohibition is directed not against the construction of a jail building but against establishing a jail, whether in a new building or in an old one. Under this construction of the word, it does not apply to the remodeling, rebuilding, or enlarging of an existing jail, subject to the limitations discussed below.

If a jail building which is more than 300 feet from a school building were to be enlarged by an extension in the direction of a school, it could not lawfully be so far extended as to bring it within the 300-foot distance, for this would be to "erect" a jail within the prohibited area, even though it were only an addition to an existing building. By like reasoning, a jail which at present lawfully stands within 300 feet of a school constructed since the jail was erected may not in my opinion be extended in the direction of the school, since that would be to "erect" a jail within the prohibited area. However, in my opinion this would not apply to an addition on the further side of the jail, even though it be within 300 feet from the school, nor would it apply to additional stories on top of the old jail building, since, as pointed out above, the school proprietors have waived the protection of the statute to the extent of whatever distance the jail building encroached upon the 300-foot area after the school was built.

The problem is somewhat similar to that involved in non-conforming uses under zoning ordinances. However, decisions under such ordinances are of little or no help in the solution of this problem because the question to what extent non-conforming buildings may be altered or enlarged is usually expressly dealt with in the ordinances. Moreover, somewhat different considerations apply to the construction of zoning ordinances.

Your next question is whether the statute prohibits the erection of an addition to be used for office space and living quarters for the sheriff, leaving the old jail building to be used in its entirety for the detention of prisoners. The principles applicable to such a construction are discussed in an opinion dated October 17, 1956, to district attorney Donald J. Bero of Manitowoc county, copy of which is enclosed.

It will be observed that in that situation the location of any entrances used for taking prisoners in and out of the jail are deemed to be a part of the jail. Therefore no such entrance should be located closer to the school than the old building is.

The construction of a wing between the jail and the school, not to be used for jail purposes, would be in accordance with the spirit of the statute, since it would block off the pupils from observation of the jail and possible contact with inmates.

WAP

Counties—Officers and Employes—Group Insurance— Sec. 59.07 (2) (c), Stats., which authorizes county to pay premiums for hospital, surgical and group insurance for county employes, does not extend to an assistant county agent employed jointly by the university of Wisconsin and the county, if such employe is not carried on the county pay roll but is paid entirely by the state and is compensated by the state for his traveling expenses.

October 29, 1956.

CHARLES B. AVERY,
District Attorney,
Langlade County.

You have inquired whether county funds may be used to pay premiums for group insurance in the case of the county agricultural agent's assistant.

Sec. 59.07 (2) (c), Stats., gives the county board the power to

“Provide for hospital, surgical and group insurance for county officers and employes and for payment of premiums therefor.”

The question to be determined is whether the assistant county agricultural agent is a county employe.

To aid in answering this question you have furnished us with a copy of the employing agreement between this individual, representatives of the county, and the college of agriculture of the university of Wisconsin.

The agreement recites that the university of Wisconsin, co-operating with the United States department of agriculture, and Langlade county will maintain a county

assistant agricultural agent in said county in accordance with sec. 59.87 of the statutes.

At the outset it is to be noted that sec. 59.87 says nothing about the employment of an assistant agricultural agent. The wording is "an agricultural representative." It may be that this language is susceptible of the construction that words importing the singular number as used in the Wisconsin statutes extend and may be applied to several persons or things. See sec. 990.001 (1).

Assuming for present purposes the propriety of the assumption of such an assistant, we pass next to the duties as set forth in the agreement. The agent is to promote the agricultural interests of the county by carrying out such program as is formulated and approved by the county agricultural committee with the proper representative of the university. Activities in furtherance of the program are to be conducted under the supervision of the committee and the extension supervisors for the university. Reports are made to both.

The university pays the entire salary of the agent, along with travel expenses, meals and lodging when away from headquarters and expenses of office maintenance. The only thing the county provides is office space and appropriate equipment.

The agent may resign on 60 days' notice to the county agricultural committee and the extension director of the university and they may likewise by joint action cause his resignation with like notice.

The agreement requires approval of the regents of the university of Wisconsin to be effective. It is signed by a university representative, the chairman of the county board, the county superintendent of schools, and three farmers. The county representatives above named constitute the special committee on agriculture under sec. 59.87 (9), Stats. The agreement is also signed by the assistant agricultural agent in question.

The agent is not carried on the county pay roll but on the university pay roll, with the university making pay roll deductions for federal income tax and for the state retirement system.

Under the foregoing state of facts we conclude that this person does not meet the test of being a county employe under sec. 59.07 (2) (c). Under liberal construction he would be at the most a joint employe of the county and state with the state being the principal employer since it makes the services of the agent available with state funds. "He who pays the fiddler calls the tune."

In any event the statute does not extend to joint employes under the facts stated. See 17 O.A.G. 326 to the effect that a county agricultural representative is considered to be within the unclassified service of the state civil service. Note also that sec. 59.87 (6), Stats., provides that he is to be selected by the board of regents of the university.

WHR

Insurance—Mortgage Loss—Insurance against nonpayment of mortgage indebtedness falls exclusively within sec. 201.04 (8), Stats. 1955.

November 1, 1956.

PAUL J. ROGAN,
Commissioner of Insurance.

You have requested our opinion as to whether a corporation may be organized under the laws of this state to transact the business of insuring mortgage lenders against loss by reason of nonpayment by the borrower of the mortgage indebtedness, and if so, which of the subdivisions of sec. 201.04, Stats. 1955, covers or authorizes the transaction of that type of insurance business.

Sec. 201.04, Stats. 1955, so far as here material provides:

"201.04 An insurance corporation may be formed for the following purposes:

"* * *

"(7) Fidelity Insurance.—Against the loss from the defaults of persons in positions of trust, public or private, and to guarantee the performance of contracts and obligations.

"(8) Title Insurance.—To examine titles to real and personal property, furnish information relative thereto and

insure against loss or damage by reason of encumbrance and defects in titles and against nonpayment of principal and interest of bonds and mortgages.

“(9) Credit Insurance.—Against loss from the failure of persons indebted to the assured to meet their liabilities, including the insurance or guarantee of depositors or deposits in banks or trust companies.

“* * *

“(17) Other Casualty Insurance.—Against loss or damage to property by any other casualty which may lawfully be the subject of insurance, and which shall be specified in the articles of organization, and for which no other provision is made by law.

“* * *”

The history of these provisions shows they came into the statutes by ch. 460, Laws 1909. As thus created, subsec. (7) read as it does now, except that it had at the end thereof the additional language “other than that of insurance.” Such additional language was removed by ch. 203, Laws 1935, which also removed similar language from (c) of sec. 204.08, Stats., which section specifies the scope of fidelity obligations in said subsec. (7). The initial language of subsec. (8) has remained unchanged since 1909. Subsec. (9) is the same except that the present language at the end thereof “including the insurance or guarantee of depositors or deposits in banks or trust companies” was later added thereto by ch. 275, Laws 1911.

So far as we are able to ascertain, no private insurance corporation has engaged in this state in the business of insuring against the nonpayment of principal and interest of mortgages, except possibly the company to which in 1926 the then commissioner of insurance addressed a ruling later referred to herein. We thus obtained no assistance from common practice in the insurance field in this state over the years.

It might appear arguable that the language “and against nonpayment of principal and interest of bonds and mortgages” in subsec. (8) was intended to cover only those instances where nonpayment thereof resulted from discovery of some defect in title. However, there is nothing in the wording used which so restricts it, and had it been so intended, it would have been very easy to have included

a limitation to that effect. It thus cannot be questioned but that the insuring against the nonpayment of mortgages clearly falls within the language in subsec. (8). Upon first consideration, it might seem that the default of a mortgagor in paying the debt secured by his mortgage comes within the language of subsec. (9), because it would constitute the failure of one indebted to meet his liability, but, while it may be a very narrow distinction, the insuring against loss on a mortgage is not the insuring against the failure of one indebted to meet his liability, because the mortgage itself is not the obligation and does not itself constitute a liability but is merely incident to and the security for the obligation or liability. Upon such analysis, mortgage loss insurance would not come within subsec. (9). Furthermore, credit insurance is commonly considered in the insurance field as relating to mercantile and similar open account indebtednesses and covering losses resulting from insolvency or inability of the debtor to pay the same. The noted addition to subsec. (9) of the language "including the insurance or guarantee of depositors or deposits in banks or trust companies" is a clear indication that such was the intended scope of the subsection. If the other language which was already in the subsection applied generally to any and all transactions involving a debtor-creditor relationship, then deposits in banks and trust companies would have been included and such additional language was unnecessary. It must be presumed that it was deemed that such additional language was necessary and the significance thereof is as indicated.

In 1926 the commissioner of insurance had presented to him this same question and after careful consideration he made a ruling to the effect that insurance against nonpayment of principal and interest of mortgages falls exclusively within subsec. (8) and is not included in subsec. (7). In his analysis of the intended coverage, he took cognizance of the fact that in the creation of subsecs. (7) and (8) in 1909, the legislature put the express language covering the considered type of insurance in subsec. (8), and that had it intended to include it in subsec. (7), it would have done so when by ch. 655, Laws 1919, it created what is now sec. 204.08, specifying what is fidelity insurance within

subsec. (7), but when covering the subject of banks and financial institutions in subdivisions (e) and (f), did not include in the language used the matter of nonpayment on principal of bonds and mortgages held by financial institutions. His conclusion was that the failure to include it meant that the legislature intended that such insurance did not come within subsec. (7) but within the language in subsec. (8) expressly covering that type of insurance. We find no significant change in the statutes since such ruling was made.

On the basis of the foregoing, it is our opinion that insurance of mortgage lenders against loss by reason of nonpayment of mortgage indebtedness falls exclusively within the provisions of subsec. (8) of sec. 201.04, Stats. 1955.

HHP

Counties—Salaries and Wages—Agricultural Agent—
 County agricultural agent or representative employed pursuant to the provisions of sec. 59.87, Stats., may serve as member of county park commission and be compensated under sec. 59.07 (43), Stats.

November 5, 1956.

FRANKLIN J. SCHMIEDER,
District Attorney,
 Calumet County.

You have inquired whether the county agent who receives compensation from the county in that capacity is entitled to additional compensation under sec. 59.07 (43), Stats., as director of the county park commission.

Sec. 59.07 (43) authorizes the county board to fix the compensation of members of the county park commission for attendance at meetings at a rate not to exceed the compensation permitted supervisors. While you refer to the individual as director of the county park commission, we assume that he must also be a member of that commission. Otherwise your reference to compensation under sec.

59.07 (43) for members of the commission would not be in point.

You state that there is no conflict in filling both jobs, since the park commission meetings are held in the evening after the regular working hours of the county agent.

We assume that the county agent is employed pursuant to the provisions of sec. 59.87, Stats. Subsec. (6) thereof provides:

“(6) Immediately after the board has established the position of county agricultural representative and has provided the necessary money for the share of the county therefor, the clerk shall send the application of such county to the dean of the college of agriculture for the appointment of a county agricultural representative. All applications shall be so made prior to December 10 of each year, or as soon thereafter as possible. The board of regents shall select as soon as possible a qualified person to serve in each county in the capacity of county agricultural representative.”

In some instances the university pays the entire salary of the county agent or county agricultural representative as he is called in the statute, and in other instances, as apparently is true in your county, he is paid in part at least by the county.

In 17 O.A.G. 326 the county agricultural representative was considered to be within the unclassified service of the state civil service.

We have had occasion to examine the form of employing agreement which is used by the university and counties relating to the services of county agents. It recites that the university will maintain a county agricultural agent in the county in co-operation with the United States department of agriculture in accordance with sec. 59.87 of the statutes. His duties are to promote the agricultural interests of the county by carrying out such program as is formulated and approved by the county agricultural committee with the proper representative of the university. His activities in furtherance of the program are to be conducted under the supervision of the committee and the extension supervisors for the university. Reports are made to both.

As above indicated, the university pays all or a substantial part of the agent's salary. Also it pays travel expense,

including meals and lodging when the agent is away from his headquarters and the expenses of office maintenance. The county agrees to provide office space and appropriate equipment. The agent may resign on giving a stated number of days' notice to the county agricultural committee and the extension director of the university. By like notice they may by joint action terminate his employment.

Under such circumstances the county agent cannot be considered as being exclusively a county officer or employe, and while the county may contribute to his compensation as county agent, it does not appear to be material that the county also makes use of his services in the capacity of member of the county park commission, assuming as you have stated that there is no incompatibility in the services to be performed or the hours of work. Even if the county agent is assumed to be a county officer, an officer lawfully holding two offices is entitled to receive the compensation attached to both, although he may not have the compensation attached to two offices if he is not entitled to hold or perform the functions of more than one office at one time. 67 C.J.S. 325.

There is nothing in sec. 27.02, Stats., relating to the appointment of a county park commission, which would make the county agent ineligible to serve on that commission.

As previously indicated, the county agent is in a sense a joint employe of the county and the university, although normally the university is the largest contributor to his salary. It is reasonable to presume that if any abuses or conflicts arise out of the discharge of the functions of two positions by the same individual, the university will take steps to correct the situation if the county does not.

It is therefore concluded that under sec. 59.07 (43), Stats., the county may compensate the county agent for his services as a member of the county park commission.

WHR

Counties—Officers and Employes—Salaries and Wages—Mileage—Under sec. 59.03 (2), Stats., mileage of county board member is in addition to salary and is not affected by the compensation limitations provided by sec. 59.03 (2) (f). Mileage of other county officers is considered to be a part of salary and can therefore be changed by virtue of authority granted by sec. 66.195, Stats.

November 8, 1956.

HOWARD W. LATTON,
District Attorney
Columbia County.

You state that your county board has in effect a standard mileage allowance for county officers and employes, the rate being 7 cents per mile. Question has been raised as to the authority of the board to increase this to 8 cents per mile for officers including the supervisors, although you have no question as to the propriety of the increase for county employes.

With reference to the compensation and mileage of supervisors, sec. 59.03 (2) (f) and (g), Stats., provides:

“(f) *Compensation.* Each supervisor shall be paid \$4 per day by the county for each day he attends a meeting of the board. However, any board may, at its annual meeting, by two-thirds vote of all the members, fix the compensation of the board members to be next elected at any sum not to exceed \$8 per day. Any board may, in like manner, provide additional compensation for the chairman.

“(g) *Mileage.* Each supervisor shall, for each day he attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board pursuant to s. 59.15 as the standard mileage allowance for all county employes and officers.”

The compensation and mileage of other elective county officers is governed by sec. 59.15 (1) (a) and (3), Stats., which reads:

“(1) ELECTIVE OFFICIALS. (a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county (other than super-

visors 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 him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

“* * *

“(3) REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, including without limitation because of enumeration, traveling expenses within or without the county or state, and the board may establish standard allowances for mileage, room and meals, the purposes for which such allowances may be made, and determine the reasonableness and necessity for such reimbursements, and also establish in advance a fair rate of compensation to be paid to the sheriff for the board and care of prisoners in the county jail at county expense.”

To the foregoing must be added sec. 66.195, Stats., which provides:

“66.195 Emergency salary adjustments. During the period commencing February 27, 1951, and ending December 31, 1957, the governing body of any county, city, village or town may, during the term of office of any elected official whose salary is paid in whole or in part by such county, city, village or town, increase the salary of such elected official in such amount as the governing body may determine. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary, except that the exercise of such power shall be governed by s. 65.90 (5).”

For a long time mileage has been considered to be part of the salary or compensation of a county officer. See 20 O.A.G. 1141; 30 O.A.G. 484; 36 O.A.G. 328.

However, there are rulings to the contrary so far as county board members are concerned. See 12 O.A.G. 579; 10 O.A.G. 645; 8 O.A.G. 327; 7 O.A.G. 240.

The conclusions reached in these opinions are fortified by the language of sec. 59.03 (2) (i), Stats., relating to alternative compensation for supervisors on an annual salary instead of a per diem basis, and which provides among other things:

“In *addition* to the salary, the supervisors shall receive mileage as provided in par. (g) for each day’s attendance at board or committee meetings.”

If the mileage is in *addition* to salary it cannot be a part of the salary. Nor is there any logic in designating mileage as per diem in those counties where the supervisors are paid per diems instead of salaries.

Hence, the limitations as to increase of compensation of county board members contained in sec. 59.15 (2) (f), Stats., quoted above have no application to increases in mileage allowances.

Turning next to the county officers other than supervisors and having in mind the opinions to the effect that in their case mileage is considered to be a part of salary or compensation, we reach the same result so far as authority to change the rate is concerned, by virtue of the provisions of sec. 66.195, relating to emergency adjustments of salaries, and which is quoted above. The language of the statute is very clear and express as to the authority of the county board to increase the salary of an elected county official during his term of office during the period commencing February 27, 1951, and ending December 31, 1957.

WHR

Water Pollution—State Committee—Federal Aid—Committee on water pollution acting under sec. 144.53, Stats., is the proper state agency for enforcing state laws relating to abatement of water pollution, and when so designated by the governor under sec. 14.205 (2), Stats., is the agency to administer federal funds made available for water pollution control under the Water Pollution Control Act, 33 U.S.C.A. §466.

November 9, 1956.

T. WISNIEWSKI, *Director,*
Water Pollution Committee,
State Board of Health.

You have directed our attention to an office memorandum dated October 22, 1956, from the office of the general counsel of the United States public health service to the regional director of Region V, relating to the identity of the state agency in Wisconsin for administering the state plan for prevention and control of water pollution in cooperation with the federal government under the provisions of the Water Pollution Control Act, 33 U.S.C.A. §466, as amended by Public Law 660, 84th congress.

The act provides:

“The term ‘State water pollution agency’ means the State health authority, except that, in the case of any State in which there is a single State agency, other than the State health authority, charged with responsibility for enforcing State laws relating to the abatement of water pollution, it means such other State agency;”

Heretofore and under earlier federal legislation the water pollution committee of Wisconsin has been accepted and designated as the state agency under the above language.

Despite this prior administrative construction of the law both by the federal authorities and state officials including the governor, doubts are now cast upon the correctness of this determination because of the existence of Wisconsin statutes other than those relating to the committee on water pollution which appear to involve other agencies of the state in matters that are incidentally related to water pollution control.

The question therefore is whether the water pollution committee can properly be described as a single state agency charged with responsibility for enforcing state laws relating to the abatement of water pollution.

In approaching this question it should be made clear that it is not the function of the state's attorney general to advise federal officials as to the proper construction of federal statutes. About all we can do in a case like this is to advise officials how we construe our own statutes. No doubt federal officers may find such construction helpful where the answer to a particular problem in administering the federal law depends upon the construction of the state law as it does here.

It therefore becomes necessary to survey in some detail the Wisconsin statutes relating to water pollution control.

The basic statute as to responsibility for water pollution control is sec. 144.53 which is very comprehensive in scope. In fact subsecs. (1) to (7) inclusive lay down a complete and all-embracing jurisdiction over water pollution as such.

It is true that sec. 144.54, Stats., contains a limitation to the effect that nothing in the statutes relating to the committee on water pollution shall be construed to limit or modify the powers and duties of the state board of health under secs. 144.01 to 144.12.

The powers and duties of the state board of health under secs. 144.01 to 144.12 are not directed to the control of water pollution as such.

Under sec. 144.02 the state board of health is given investigational powers to determine to what extent natural waters are contaminated by sewage or polluted by industrial wastes.

Under the regulatory powers of the board as set forth in sec. 144.03 no mention is made of water pollution as such, although the board has power to order the owner of a waterworks system or sewage system to correct a nuisance or menace to health and comfort.

It might be stated at this point that in its administration of secs. 144.01 to 144.12 the state board of health has never issued an order directed at water pollution as such. It issues orders where, for instance, a sewage plant is creating an odor nuisance or is discharging inadequately treated sewage

on the ground surface. It is important to note, however, that where the situation is one which involves water pollution, the order always comes from the committee on water pollution. The state board of health may join in such an order but it does so only where there is a hazard to public health. In other words, its jurisdiction is always exercised in the interests of preservation and protection of public health from whatever source the hazards may be, and we believe it to be a fair statement of the law that secs. 144.01 to 144.12 are not laws aimed at the abatement of water pollution as such. Basically they are water supply and sewage disposal regulatory statutes and have always been so construed by the state board of health.

The public service commission under ch. 31, Stats., has some rather extensive powers over navigation, water power, mills and milldams, with authority to abate nuisances such as obstructions, but again it is impossible to read into any of the statutes relating to the public service commission any legislative intent to confer upon that agency any responsibility for enforcing state laws relating to the abatement of water pollution, whether under ch. 31, ch. 196, Stats., or otherwise.

Sec. 29.29, Stats., prohibits the discharge of noxious substances harmful to game or fish life in any waters in this state, and refers to poison bait and toxic insecticides among other things. This is a part of the fish and game law administered by the conservation commission and again is not directed at water pollution control as such. On the contrary, the purpose of the chapter is the preservation of fish and game life. Nor was sec. 29.29 intended to supersede the authority of the water pollution committee. 38 O.A.G. 127.

In this connection it should be noted that in 38 O.A.G. 404 the test of the applicability of sec. 29.29 (3), Stats., was specifically stated to be whether the substances deposited "were in fact deleterious to fish life." The conclusion is clear that water pollution as such cannot be touched under this section unless the foregoing test is met. This is a penal statute designed to protect fish life and cannot properly be designated as a water pollution control regulation. Moreover, the overriding power of the water pollution committee is specifically preserved in sec. 29.29 (3) so that

even where there is what would otherwise be a violation of that act, it may nevertheless be done with impunity if the discharge of the noxious substance comes from a plant that has been installed pursuant to plans approved by the committee on water pollution.

It might also be noted at this point that the state board of health, the public service commission, and the state conservation commission, whose functions may incidentally involve situations in which water pollution plays a part despite the fact that the statutes relating to these agencies are not directed to water pollution as such, are represented, nevertheless, on the water pollution committee and as a matter of fact have four of the five votes on that committee. The state chief engineer is the only member of the committee who is not a member of one of these three agencies. See sec. 144.52 (1), Stats. This further supports the conclusion that the committee on water pollution is *the* agency charged with administration of the laws of the state relating to water pollution abatement.

Moreover, attention is called to the fact that in those instances where the legislature has deemed it necessary to have a single agency speak for the state on water pollution programs, it has specifically named the water pollution committee as that agency, as sec. 144.53 (7) provides that it shall be the duty of the committee on water pollution and it shall have power, jurisdiction, and authority:

“(7) To enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, *this committee shall be the agency for the enforcement of any such legislative agreement.*”

While, as previously indicated, it is not our function to construe a federal statute, we believe that if the statute in question is construed so as to preclude the designation of the committee on water pollution in Wisconsin as the single

agency charged with responsibility for enforcing state laws relating to the abatement of water pollution, the same reasoning would preclude naming of the agency in any other state set up for water pollution control as such agency, since it is impossible to conceive that any state in the United States has a body of statute law wherein one agency alone has complete control of every single statute relating directly or indirectly to water pollution control. No doubt many states have penal statutes relating to the discharge of noxious substances in public waters without incorporating such statutes in the powers delegated to some administrative agency such as a water pollution control board.

Otherwise, congress might just as well have said that the state board of health in every state shall be the agency to supervise administration of the plan. We do not believe that the statute should be so construed as to wind up with administration in every instance in the state board of health, and it would appear that the Wisconsin legislature has made it abundantly clear that so far as it is possible to have any one agency charged with the enforcement of the state's laws relating to water pollution, the committee on water pollution is intended to be that agency even though there are other agencies concerned with other responsibilities where water pollution problems are incidentally involved.

Lastly, it would appear that the legislature anticipated the very problem presented here when it enacted sec. 14.205, Stats., which provides:

"14.205 (1) Whenever the United States government shall make available funds for the education, the promotion of health, the relief of indigency, the promotion of agriculture or for any other purpose other than the administration of the tribal or any individual funds of Wisconsin Indians, the governor on behalf of the state is authorized to accept the funds so made available. In exercising the authority herein conferred, the governor may stipulate as a condition of the acceptance of the act of congress by this state such conditions as in his discretion may be necessary to safeguard the interests of the state of Wisconsin.

"(2) Whenever funds shall be made available to the state of Wisconsin through an act of congress and acceptance thereof as provided in subsection (1), the governor shall designate the state board, commission or department to administer any of such funds, and the board, commission

or department so designated by the governor is hereby authorized and directed to administer such fund for the purpose designated by the act of congress making an appropriation of such funds, or by the department of the United States government making such funds available to the state of Wisconsin.

"(4) Any board, commission or department of the state government designated to administer any such fund, shall, in the administration of such fund, comply with the requirements of the act of congress making such appropriation and with the rules and regulations which may be prescribed by the United States government or by the department of the federal government making such funds available."

Moreover, the legislature has further evidenced its intent that the water pollution committee shall be the agency to administer funds contributed from sources other than the legislature for water pollution control programs in sec. 144.53 (3) which makes it the duty of the committee and gives it power, jurisdiction and authority:

"To conduct scientific experiments, investigations and research to discover economical and practicable methods for the elimination, disposal or treatment of industrial wastes to control pollution of the surface waters of the state. To this end the committee may co-operate with any public or private agency, when requested by such agency, in the conduct of such experiments, investigations and research and may receive on behalf of the state any moneys which any such agency may contribute as its share of the cost under such co-operative arrangements. * *"*

While it would be possible to go into the subject in greater detail than has already been done, it would only prolong an already lengthy opinion to do so, and on the basis of the foregoing we conclude that the Wisconsin legislature has pretty clearly indicated that the water pollution committee is the only single state agency which the legislature intends to act for the state in matters relating to the control of water pollution, particularly where the activity involves co-operation with the federal government and other states.

Such has been the prior construction of our statutes by the state agencies involved, including the governor, and such has been the interpretation of the federal government as evidenced by a letter of June 17, 1949, from the surgeon

general to Hon. Oscar A. Rennebohm, governor of Wisconsin. In this letter the surgeon general of the United States public health service quoted the provisions of the federal Water Pollution Control Act and concluded:

“This is to advise you that the Committee on Water Pollution satisfies these requirements of the Water Pollution Control Act and is hereby designated the State water pollution agency for Wisconsin for the purposes of the aforementioned Federal Act.”

In order that federal authorities may be reassured on this point, we would suggest that the governor of Wisconsin be requested to again designate the water pollution committee as the agency authorized under sec. 14.205 (2), Stats., to administer any plans now under consideration for joint federal and state action under the federal Water Pollution Control Act and to receive and administer any federal funds which may be forthcoming under said Act.

WHR

State Board of Health—Hotels and Restaurants—Inspection Fees—Under sec. 160.03 (5), Stats., state board of health may issue checks only to cities and counties for inspections and investigational services of local health departments. No checks may be issued directly to the local health department whether it be a city, county, or joint city-county health department.

November 9, 1956.

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

In connection with the administration of the hotel and restaurant law, ch. 160, Stats., you direct our attention to the provisions of sec. 160.03 (5), which reads:

“(5) In the administration and enforcement of this chapter, the board may designate and use full-time city or county health departments as its agents in making inspections and investigations; provided, that when such designation is made and such services are furnished, the board shall reim-

burse the city or county furnishing such service at the rate of 50 per cent of the license fee per license per year issued in such municipality.”

Reference is also made to sec. 140.09 (1) (a), Stats., relating to county, city-county and multiple county health departments. This provides:

“(1) DEFINITIONS. As used in this section:

“(a) ‘County health department’ and ‘county board of health’ refer to a single county health department or board of health, a multiple county health department or board of health, or a city-county health department or board of health.”

Under the above provisions the state board of health has designated the city-county health department of Eau Claire as its agent. After the end of each license year on June 30 the board determines the number of licenses issued in each municipality. A separate check is sent to the city of Eau Claire covering establishments licensed in the city and another check is issued to Eau Claire county covering the issuance of licenses in the county outside the city, the check in each instance covering 50 per cent of the license fees for permits issued to establishments in each municipality.

The contention is made that because the city-county health department performs the service the checks should be issued to that department rather than being credited to the city’s general fund and to the county’s general fund.

You have accordingly inquired if the present procedure is correct. It is.

The mandate of the statute is very clear. It says the board “shall reimburse the *city* or *county*.” There is no statutory authority for paying the money either to a city’s health department or to a county’s health department or to a city-county health department or to a multiple county health department. The payment must be to the proper *city* or *county* as the case may be. If the legislature had intended the reimbursement to be made to the health department rather than to the municipality it could easily have said so, and if there are sound reasons why that should be done the legislature should be asked to make the change.

WHR

Sheriffs—Deputies—Deputy sheriff must be resident of county for which appointed, and duly appointed deputy sheriff may act anywhere in county within limitations of statutes and without county within limitations of statutes. Secs. 59.21 (1), (2), 59.24, 59.25, Stats.

November 21, 1956.

CLARENCE G. TRAEGER,
District Attorney,
Dodge County.

Your office advised that the sheriff of Dodge county appointed a police officer of the village of Randolph, who resides in the Columbia portion of said village, as deputy sheriff for Dodge county. Randolph is located both in Dodge and Columbia counties.

An opinion has been requested as to whether the sheriff may properly appoint such nonresident as deputy sheriff for Dodge county.

Sec. 59.21, Stats., provides in part:

“(1) * * * the sheriff shall appoint some proper person, resident of his county, undersheriff * * * and * * * the sheriff shall appoint deputy sheriffs for his county as follows:

“(a) One for each city and village therein having one thousand or more inhabitants.

“(b) One for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than one thousand inhabitants and does not contain a city or incorporated village having more than one thousand inhabitants.

“(c) Each deputy shall reside in the city or village for which he is appointed, or if appointed for an assembly district, shall reside in the village in such district.

“(2) He may appoint as many other deputies as he may deem proper.

“(3) He may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

“(4) A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

“(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts.

"(6) Every appointment of an undersheriff or deputy, except deputations to do a particular act, and every revocation of such appointment shall be in writing and be filed and recorded in the office of the clerk of the circuit court.
** * *

"(8) (a) In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by sub. (1) (a) and (b), and fix the salary of such deputies; and may further provide by ordinance, that deputy sheriff positions shall be filled by appointment by the sheriff from a list of 3 persons for each position, such list to consist of the 3 candidates who shall receive the highest rating in a competitive examination of persons residing in such county * * *."

Sec. 59.13, Stats., requires that every deputy take and file an official oath.

You will note that by sec. 59.22 (1) and (2), Stats., the sheriff is responsible for every default or misconduct in office of his deputy, and may require his deputies to give bond for faithful performance.

Sec. 66.11 (1), Stats., provides that a deputy sheriff must be a citizen of the United States and a resident of the state for at least one year.

Sec. 17.03 (1), (2), (3) and (4), Stats., provides in part:

"Any public office, including offices of cities, villages and school districts, however organized, shall become vacant upon the happening of either of the following events:

"(1) The death of the incumbent.

"(2) His resignation.

"(3) His removal.

"(4) His ceasing to be an inhabitant of this state; or if the office is local, his ceasing to be an inhabitant of the district, county, city, village, town, ward or school district for which he was elected or within which the duties of his office are required to be discharged; * * *."

Deputy sheriffs are appointed deputies for specific counties and such officers are local officers. Under sec. 17.03 (4) a deputy sheriff appointed for Dodge county who ceased to be a resident of Dodge county would lose his power to act as deputy and his office would be vacant.

You will note that the statutes specifically provide that the undersheriff shall be a resident of the county for which

he is appointed and that the deputies appointed in counties in which deputies are under civil service must be residents of the county at the time of appointment.

In 28 O.A.G. 591, in which it was stated a minor could not hold the office of deputy county clerk, it was stated:

"At a very early period in the history of this state it was held to be '* * * a fundamental principle of our government that a person not an elector of the state is ineligible to hold a public office therein * * *.' *State ex rel. Schuet v. Murray*, 28 Wis. 96; *State of Wisconsin etc. v. Trumpf*, 50 Wis. 103; *State ex rel. Off v. Smith*, 14 Wis. 497. The rule has been followed, and there has been, to our knowledge, no departure from the rule so laid down. See: *Sieb v. City of Racine, et al.*, 176 Wis. 617; *State ex rel. Wis. Dev. Authority et al. v. Dammann*, 228 Wis. 147, 163, (mandate vacated on other grounds on rehearing).

"The rule is apparently based upon the proposition that it is inherent in the constitutional framework of the state government that only those persons who participate in its management through exercising the privilege to vote are entitled to act as agents or officers of the electorate. It cannot be presumed that the sovereign electors would have delegated any portion of the sovereignty of the people to one who was otherwise unable, through constitutional limitation, to exercise any voice in the management of the government.

"There is not, to our way of thinking, any indication in the cases cited, either express or implied, that the rule is limited in application to constitutional officers or, for that matter, even to elective officers. The reasoning of the decisions extends as well to appointive officers. And the cases of *Sieb v. City of Racine*, and *State ex rel. Wis. Dev. Authority v. Dammann, supra*, both assume that the rule extends to appointive officers."

Sec. 59.21 (1) (c), Stats., specifically provides:

"Each deputy shall reside in the city or village for which he is appointed, or if appointed for an assembly district, shall reside in the village in such district."

We conclude that deputies appointed under the provisions of sec. 59.21 (1) and (2), Stats., must be residents of the county for which they are appointed.

Mr. Rasmussen also queried as to whether a deputy sheriff appointed for a specific village may act outside the corporate limits of the village.

The office of deputy sheriff is a county office, and a duly qualified deputy sheriff may act anywhere in the county pursuant to authority of sec. 59.24 and other applicable statutes, and in other counties pursuant to the authority of sec. 59.25 and other applicable statutes.

Mr. Rasmussen stated that "I note from a previous attorney general's opinion that a constable cannot act as a deputy sheriff."

The only opinion we are able to find on this subject is 20 O.A.G. 296, in which it was stated that the office of deputy sheriff or undersheriff and constable are compatible.

RJV

Plumbers—Licenses and Permits—Experience gained by employe in establishment wherein work is limited to maintenance and repair, who was neither indentured nor registered with the state board of health as an apprentice and who was not working under supervision of master plumber and who had no trade school attendance or participation in trade extension courses, does not meet intent of secs. 145.01 (3) and 145.02 (4), Stats., and Rule H 61.06 promulgated thereunder by the board relating to registration for journeyman plumber's license.

November 21, 1956.

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

You advise that the state board of health has received an application from an employe of the Winnebago state hospital to qualify for a journeyman plumber's examination under the provisions of Rule H 61.06 (2) (c). You further advise that this employe has worked as a craftsman's helper from August 1, 1951, to the present time; that the state employes in that institution are engaged primarily in maintenance and repair work as contrasted to original installation; and that new installations are let out to private contractors.

You inquire as to whether experience gained by the employe in an establishment as described meets the intent of the law and rules so as to permit registration.

Sec. 145.01 (1) (a), (b), (c), (d), and (e), Stats., defines plumbing. Sec. 145.01 (2), (3), and (4), Stats., defines master plumber, journeyman plumber, and apprentice.

It will be noted from a reading of those sections that the primary emphasis in each definition is placed on the *installation* of plumbing. As pointed out in 26 O.A.G. 187, the overall purpose of ch. 145 is to insure to the people of the state a safe water supply, and the work of the plumber consists of *installing* all piping fixtures, appliances, and appurtenances in connection with the water supply and drainage systems within a building, and to a point from three to five feet outside the building. It should be further noted that the definition of plumbing in sec. 145.01 (1) (b), Stats., excepts minor repairs to faucets, valves, pipes, appliances and the removing of stoppages.

Sec. 145.02 (4), Stats., provides in part:

"The board shall prescribe rules and regulations as to the qualifications, examination and licensing of master and journeyman plumbers and for the registration of plumbing apprentices. * * *

Sec. 145.03 (2), Stats., provides:

"APPRENTICESHIP. The board may determine and prescribe the conditions under which any person may serve a plumbing apprenticeship, as to preliminary and vocational school attendance requirements, and the credit for such school attendance in serving such an apprenticeship. Every person, regardless of age, commencing a plumbing apprenticeship after July 1, 1943, shall be indentured under chapter 106. The term of a plumbing apprentice shall be 5 years * * *. After the expiration of an apprenticeship term, no apprentice shall engage in the business of plumbing either as an apprentice or as a journeyman plumber unless after the expiration of the apprenticeship term he secures a journeyman plumber's license. * * * the board may prescribe the character of plumbing work that the apprentice may do during the fourth and fifth year under the direction or supervision of a master or journeyman plumber without either such master or journeyman being physically present, provided that the master plumber in charge shall be responsible for all such work."

Sec. 145.06 (1) and (2), Stats., provides in part:

“(1) No person shall engage in or work at plumbing in any city or village having a system of waterworks and sewerage or in any metropolitan sewerage district or in any area platted under chapter 236 adjacent to such city or village unless licensed to do so by the board. A master plumber may work as a journeyman. No person shall act as a plumber’s apprentice unless registered with the board.

“(2) In such city or village, metropolitan sewerage district or in any area platted under chapter 236 adjacent to such city or village, no person, firm or corporation shall install plumbing unless at all times a licensed master plumber is in charge, who shall be responsible for proper installation. Licenses shall be issued only to individuals
* * *.”

Rule H 61.06, journeyman plumber licenses, provides:

“(1) **PROOF OF FITNESS REQUIRED.** Proof of experience, skill, fitness, and related instruction shall be provided by all applicants for journeyman’s licenses and be found acceptable to the committee of examiners.

“(2) **QUALIFICATIONS OF APPLICANTS FOR JOURNEYMAN’S LICENSE.** Persons who have met one of the following qualifications may make application for a journeyman plumber’s examination and license:

“(a) *Apprentices.* Apprentices who have served a 5-year apprenticeship and who have complied with all the requirements as to shop training and related instruction.

“(b) *Trade school graduates.* Apprentices who are graduates of an accredited trade school and who in addition have completed two years of shop training and related instruction.

“(c) *Persons working at trade.* Persons who have worked for five or more years as journeyman plumbers in localities where a license is not required, who are sufficiently experienced and skilled, and who have completed a vocational school or correspondence course of related instruction acceptable to the board.”

Rules H 61.01, H 61.02, H 61.03 and H 61.04 deal with apprenticeship, term of apprenticeship, practical training, and related instruction.

This opinion is grounded on the facts represented in your opinion request, and we conclude that the employe in question does not possess the necessary qualifications for an applicant for journeyman’s license required by Rule H 61.06

(1) and (2). Much of his work has evidently been in the nature of minor repairs which are excepted from the definition of plumbing by the terms of sec. 145.01 (1) (b), Stats. The employe was not indentured under ch. 106 of the statutes as required by sec. 145.03 (2). He was not registered with the board as a plumber's apprentice as required by sec. 145.06 (1). He was not working under the supervision of a master plumber. There is no indication that his training was in any way supplemented by trade school attendance or participation in trade extension courses. This conclusion is in no way rested on the fact that the work was done in a state institution or as a state employe since, under the facts represented in your opinion request, the work done by the employe would not qualify him regardless of where the work was done.

RJV

Criminal Law—Prisons and Prisoners—Insane—Transfer of Inmates—Persons committed to central state hospital under secs. 957.11 and 957.13, Stats., may be transferred pursuant to sec. 51.125, Stats., since that section is not excepted from the provisions of sec. 51.21 (4), Stats.

November 23, 1956.

WILBUR J. SCHMIDT, *Director,*
State Department of Public Welfare.

You have requested an opinion whether persons held in central state hospital under secs. 957.11 and 957.13, Stats., may be transferred by your department to Mendota state hospital or Winnebago state hospital pursuant to sec. 51.125, when transfer is medically indicated.

Sec. 51.125 (1) and (2), Stats., provides as follows:

“(1) If it appears to the department at any time that a patient should have been committed to a different institution, it may transfer him thereto. The department shall notify the committing court of such transfer.

"(2) If a change in the patient's condition makes it advisable that he be transferred to a different institution, the department may transfer him."

Persons committed pursuant to sec. 957.11, Stats., are those found insane at the time of the alleged crime. They must be committed to central state hospital or other institution designated by your department "there to be detained until discharged in accordance with law." Sec. 957.11 (3). They may be discharged only by the committing court. Sec. 957.11 (4).

Persons committed pursuant to sec. 957.13 are those found insane (i.e. incapable of making a defense) at the time of the trial. They must be committed to central state hospital or other institution designated by your department. Upon defendant's recovery, the committing court must be notified by the superintendent of the hospital, and the court order the defendant remanded to the custody of the sheriff pending further proceedings in the case. Sec. 957.13 (3). If upon a re-examination it is determined that the defendant's insanity is chronic, he must be recommitted and cannot be discharged "except upon the order of the court which committed him." Sec. 957.13 (4).

It has always been the legislative policy to require approval of the committing court for the transfer of the two types of criminal insane covered by secs. 957.11 and 957.13, Stats. This is in harmony with the long established policy of this state to preserve the control of the committing court over such persons. See, 21 O.A.G. 902; 27 O.A.G. 229; 35 O.A.G. 322; 37 O.A.G. 531; and 45 O.A.G. 97. Sec. 51.12 (3), authorizing their transfer to county institutions when incurable specifically requires approval of the committing court. General provisions authorizing transfer between facilities without court approval, e. g. sec. 51.12 (1) and (2), have always been excepted from application to the criminal insane. Sec. 51.21 (4), Stats.

Sec. 51.125 was enacted in 1947 as part of the revision of chs. 51 and 52. Wis. Laws 1947, ch. 485, sec. 20. It authorizes not only transfer of patients who should have been committed to a different institution upon notice to the committing court, but transfer of a patient whose

condition makes such transfer advisable, without approval or notice to any court. As the revisor's note states, this is an omnibus transfer provision. However, sec. 357.13, Stats. 1947, present sec. 957.13, provided that no person committed pursuant to that section and adjudged incurable "shall be *removed* or discharged from said hospital or home" except upon order of the court. Sec. 357.13 (4), Stats. 1947. Transfer of such persons without court approval was clearly unauthorized, even after the enactment of sec. 51.125. See 21 O.A.G. 902; 24 O.A.G. 105; and 35 O.A.G. 322.

In the revision of 1949 of chs. 353 to 363, the word "removed" was deleted from subsec. (4) of sec. 357.13, now sec. 957.13, by ch. 631, Laws 1949, sec. 130. Consequently transfer of the criminal insane is governed entirely by the terms of sec. 51.21 (4), Stats., which provides as follows:

"All statutes relating to state hospitals, except section 51.12 (1), (2), (4) and (5), are applicable to the central state hospital. Sections 51.13 (1) and (3) and 51.22 (4) are applicable only to patients whose prison sentences have expired."

Sec. 51.21 (4) was reenacted in 1947 *by the same act which created sec. 51.125*, without excepting sec. 51.125 from application to central state hospital. Wis. Laws 1947, ch. 485, sec. 33. Curiously, sec. 51.12 (1) and (2), Stats., which are practical equivalents to sec. 51.125, continued to be excepted from sec. 51.21 (4). This tends to indicate that omission of new sec. 51.125 *may* have been an oversight. Nevertheless, sec. 51.125 is applicable to central state hospital by force of sec. 51.21 (4).

You are therefore advised that the criminal insane may be transferred pursuant to sec. 51.125, Stats. However, this opinion is not to be construed as authorizing transfer of such persons to out-of-state institutions. 35 O.A.G. 322.
WAP

Apportionment—Effect of Annexation—The 21st ward of the city of Madison annexed in 1954 continues to remain a part of the assembly and senate districts in which it was located prior to the annexation.

November 23, 1956.

MRS. GLENN M. WISE,
Secretary of State.

You state that the city of Madison as of December 23, 1954, by ordinance annexed a substantial area lying north-west of the city, formerly located in the towns of Madison and Middleton, and designated such annexed territory as the 21st ward of the city of Madison.

You state further that the area now known as the 21st ward of the city of Madison, under the terms of the so-called "Rosenberry Act," ch. 728, Laws 1951, was located in the 5th assembly district in Dane county and in the 16th senatorial district.

You point out that the 21st ward of the city of Madison is adjacent to the 3rd assembly district of Dane county, which is comprised of the 5th, 10th, 11th, 13th, 19th and 20th wards of the city of Madison, and you further point out that the entire city of Madison is designated in the statute, sec. 4.02, as the 26th senate district.

You inquire whether after the annexation the 21st ward of the city of Madison will remain in the assembly and senate districts in which it was located by the Rosenberry Act.

The law appears clearly established in Wisconsin that once the legislature has passed a valid apportionment act pursuant to the last national census, the legislature itself cannot alter the boundaries of the assembly and senate districts as laid out in that apportionment act until after the next decennial census. *State ex rel. Smith v. Zimmerman*, (1954) 266 Wis. 307, 63 N.W. 2d 52.

The only apparent exception to this blanket rule exists under the extremely limited circumstances discussed in *Slauson v. Racine*, (1861) 13 Wis. 398, and under the terms of sec. 4.04 (2), Stats., neither of which is operable under the facts in the instant case.

Since it is clear that the legislature itself cannot work any alteration of the boundaries of assembly and senate districts, *a fortiori*, a subdivision of the state cannot effect such change.

As far as the assembly districts are concerned, the statute's very definition of the 3rd assembly district of Dane county does not by its express terms include the 21st ward of the city of Madison.

As far as the description of the 26th senate district, that is, "the city of Madison," is concerned, the law appears clear that this refers to the wards of the city of Madison which were in existence at the time of the adoption of the apportionment act, that is, ch. 728, Laws 1951. *State ex rel. Attorney General v. Cunningham*, (1892) 81 Wis. 440, 51 N.W. 724.
RGT

County Judge—Fees—Sanity Hearings—Where county board has fixed salary of county judge in lieu of fees, etc., pursuant to sec. 59.15 (1) and sec. 253.15 (4), Stats., reasonable doubt exists as to the validity of judge's claim for additional compensation for mental hearings under sec. 51.07 (1), Stats., and payment should, as a matter of policy, be withheld until a court directs payment.

November 27, 1956.

JAMES R. SEERING,
District Attorney,
Sauk County.

You advise that on November 9, 1954, the Sauk county board of supervisors adopted the following resolution:

"BE IT HEREBY RESOLVED, that the salary of the Judge of County Court, in all capacities, be fixed at \$7,500.00 per annum to commence on January 1, 1956."

The resolution then goes on and sets out that so much of this amount shall be for performing his duties as county judge and as juvenile judge.

You further advise that in accordance with sec. 51.07 (1), Stats., the county judge of Sauk county has filed a claim with the county for a fee of \$5 in all mental hearings he has held to date.

You query as to whether a county judge is entitled to such fees in view of the resolution above and the limitations set forth in secs. 59.15 (1) and 253.15 (4), Stats.

Sec. 59.15 (1) provides in part as follows:

“(1) ELECTIVE OFFICIALS. (a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county (other than supervisors 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 him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer’s term and shall remain for ensuing terms unless changed by the board.

“(am) The board may provide additional compensation for any judge who in addition to his elective duties is acting as judge of a juvenile court, appointed or designated under s. 48.03, as compensation for the additional services rendered by him.”

Sec. 253.15 (3) and (4), Stats., provides as follows:

“(3) The judge of any county court where no other provision is made by law shall be entitled to receive five dollars per day, to be paid from the county treasury, for each day he shall be actually engaged in the examination of any person upon a criminal charge, or engaged upon any other matter, not appertaining to probate business, compensation for which is not otherwise provided.

“(4) The county board may by resolution provide that the salary fixed shall be in lieu of all fees, per diem or other compensation out of the county treasury for the performance of any official duty imposed upon the county judge by law by virtue of his office which are authorized under the provisions of subsection (3) of this section *or of any other statute.*”

The question presented is essentially a judicial question which cannot be resolved with finality by an opinion of the attorney general, because the respective rights of the parties can be adjudicated with finality only by a court. However, an evaluation of the arguments on both sides of the issue which could be presented to a court compels the conclusion that the county judge's claim cannot safely be paid without a judgment of a court of competent jurisdiction so directing. Where there is doubt as to the validity of payment of moneys out of the public treasury, such payment cannot safely be made without such adjudication. The function of an attorney general's opinion in a question of this kind, therefore, is solely to discover and point out the existence of factors creating the doubt, or to demonstrate that the validity of the proposed payment is free from doubt.

On the one hand, the claimant county judge asserts that since sec. 51.01 (1) (a) and (b), Stats., permits application to determine mental condition to be made to the county or district court of the county in which the patient is found, or in cases of nonavailability of the judges of those courts then to any court of record in the county, such mental hearings are not official duties of the county judge and that sec. 253.15 (4), Stats., is therefore not controlling.

The other side of the argument may be expressed in this manner. Sec. 59.15 (1) (am) permits the county board to provide additional compensation for any judge who, in addition to his elective duties, acts as judge of juvenile court. It will be observed that where the county judge acts as judge of the juvenile court under sec. 48.03, Stats., he does so as juvenile judge and the court is separate and distinct from the county court and is a court of record in its own right, whereas in mental cases before him under ch. 51 he is acting as county judge and signs papers in that capacity.

As pointed out in 39 O.A.G. 620, 621, sec. 51.01 (1) (b), Stats., at that time vested concurrent authority in various judges and the court commissioners and created a system of priorities among them. The present statute does not include court commissioners.

It is not unusual for several courts to have concurrent jurisdiction in various matters. In such situations, if a proper matter is brought before one of the courts, the respective judge has a duty to preside over the same, and in presiding, acts in his official capacity.

In 24 O.A.G. 46, it was stated that the county judge of Vilas county was not entitled to collect fees in addition to his salary for sanity hearings, committing to institutions and to Wisconsin general hospital, or for allowing mothers' pension claims or disallowing them. See also 23 O.A.G. 111.

In the case of *Axelberg v. Bayfield County*, 233 Wis. 533, 290 N.W. 276, the plaintiff contended that the county judge was entitled to charge for examination of persons seeking admission to the state general hospital or other public institutions. At that time sec. 253.15 (2), Stats. 1929, read as follows:

"The judge of any county court where no other provision is made by law shall be entitled to receive five dollars per day, to be paid from the county treasury, for each day he shall be actually engaged in the examination of any person upon a criminal charge, or engaged upon any other matter, not appertaining to probate business, compensation for which is not otherwise provided."

This same wording now appears as sec. 253.15 (3). In the *Axelberg* case, the court said at p. 540:

"* * * It was competent for the county board to substitute for the fees a salary already fixed for the office of county judge, * * *"

Sec. 51.07 (1), Stats. 1929, was substantially the same as sec. 51.07 (1), Stats. 1955, with respect to fees of judges in mental cases.

It is arguable from the holding in this case that the examination of mental patients is a part of the official duties of the county judge.

Thus it can be seen that a persuasive argument can be made for the conclusion that where the county board has by valid resolution established the salary of the county judge at a fixed figure in lieu of all fees, including per diem and other forms of compensation for services rendered, pursuant to sec. 59.15 (1), Stats., and sec. 253.15 (4),

Stats., the county judge is not entitled to fees for hearing mental cases, and that the hearing of mental cases is a part of the official duties of the county judge if application is made to the county court. It follows that reasonable doubt exists as to the validity of the claim, and accordingly payment should, as a matter of policy, be withheld unless and until a court directs payment in an appropriate proceeding.

RJV

Inebriates and Drug Addicts—Voluntary Commitment of Transients—A transient not residing in the county cannot be committed as an inebriate pursuant to sec. 51.09, Stats. Under subsec. (1), relating to involuntary commitments, the patient may be only temporarily residing in the county, but under subsec. (3), relating to voluntary commitments, he must be a permanent resident.

November 28, 1956.

JOHN D. WINNER,
District Attorney,
Dane County.

You have requested an opinion in general terms with reference to whether there is statutory authority for the commitment, either voluntary or involuntary, of transients to Mendota state hospital as inebriates.

Sec. 51.09 (1), Stats., provides in part as follows:

“If it appears to any court of record, by an application of 3 reputable adult residents of the county, that a *resident of the county* or person *temporarily residing therein* is an inebriate or addicted to the use of narcotic drugs or barbiturates and in need of confinement or treatment, the court shall fix a time and place for hearing the application, on reasonable personal notice to the person in question, requiring him to appear at the hearing, and shall summarily hear the evidence. * * * At the hearing the court shall determine the person’s legal settlement, and the county of such settlement shall be liable over for his maintenance and treatment. * * *”

Sec. 51.09 (3) provides as follows:

"Any adult *resident of this state* who believes himself to be an inebriate or a drug addict may make a signed application to a court of record of *the county where he resides* to be committed to a hospital. His application must be accompanied by the certificate of a resident physician of the county that confinement and treatment of the applicant are advisable for his health and for the public welfare. The court may act summarily upon the application and may take testimony. If it finds that the applicant satisfies the conditions of this section, it shall commit him as it would had there been an application under sub. (1), including a finding as to legal settlement."

Your question, in substance, is: What is meant by the terms "a resident of the county or person temporarily residing therein," "any adult resident of this state," and "the county where he resides," as used in the above statutes?

In the first place, it must be pointed out that sec. 51.01, Stats., relating to the commitment of mentally ill, mentally infirm, and mentally deficient persons, vests jurisdiction in the county or district court of the county in which the patient is "found." It was evidently the legislative intent that any person suffering from mental illness, etc., should be committable wherever he is found, regardless of his residence, but that inebriates and drug addicts must be in some sense residents of the county where the proceedings are held.

The terms "residence," "resident" and "reside" are ambiguous at best. Clearly, it requires a concurrence of physical presence and intention for one to establish a residence, and for purposes of determining legal settlement, the term "residence" has been held equivalent to "domicil." *Milwaukee County v. State Dept. of Public Welfare*, (1955) 271 Wis. 219, 222-223; *Carlton v. State Dept. of Public Welfare*, (1956) 271 Wis. 465, 467-469.

Evidently, however, the term "temporarily residing therein" as used in sec. 51.09 (1) means something less than domicil. It is a question of fact for the court to determine whether the person had an intent to make Dane county his temporary *place of abode*, as for example a university

student, or whether he was merely stopping over for a brief period, for example, in the course of a journey, or for a visit with friends or relatives, or on temporary business.

But the fact that subsec. (1) of sec. 51.09 distinguishes between residents of the county and persons *temporarily* residing therein clearly shows that the unqualified term "resident" as used in both subsecs. (1) and (3) refers to permanent residents, and shows that the voluntary application referred to in subsec. (3) must be made to a court of a county in which the applicant has a permanent residence. *Cf. The State ex rel. Wood County v. Dodge County*, (1882) 56 Wis. 79, 85-87.

Of course, the term "residence" does not imply legal settlement. 37 O.A.G. 274, 275.

You also inquire whether there is any way in which a transient who has no residence in Wisconsin can obtain treatment for alcoholism. Such persons cannot be committed to county or state hospitals, since there is no statutory authority for doing so outside of sec. 51.09. However, there may be in some areas, including Madison, municipal facilities created under former sec. 51.42, Stats. 1953, which are still in existence despite the repeal of that section by sec. 1, ch. 204, Laws 1955. It is possible that treatment may be obtainable in such municipal facilities, but I express no opinion on that point because each municipality is now free to make whatever requirements it sees fit regarding eligibility.

WAP

Architects and Engineers—Registration—The state registration board of architects and professional engineers has no authority under its own rules or under sec. 101.31, Stats., to make United States citizenship a prerequisite for registration as an architect.

December 3, 1956.

W. A. PIPER, *Secretary,*
Wisconsin Registration Board of Architects
and Professional Engineers.

You have requested an opinion as to whether the statutes or the rules of your board make United States citizenship a prerequisite to registration as an architect. The answer is, "No."

Secondly, you ask whether a rule of your board making such citizenship a requirement for registration of architects would be valid. Again, the answer is, "No."

As stated by the court in *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, at 448, 15 N. W. 2d 27:

"* * * No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds.
* * *"

There is nothing in the statutes creating your board which expressly or by necessary implication gives the board power to make United States citizenship a prerequisite to registration of architects. Sec. 101.31 (12) (h), Stats., provides in part: "The board shall issue a certificate of registration upon payment of registration fee to any applicant who, in the opinion of the board, has satisfactorily met all the requirements of this section." Since the section nowhere requires United States citizenship as a prerequisite for registration, it is beyond the power of the board to adopt a rule making any such requirement.

Sec. 101.31 (11), Stats., provides for the registration as an architect of a person who holds an unexpired certificate of similar registration issued to him by any country in

which the requirements for the registration of architects are of a standard not lower than specified in the section.

Paragraph (d) of the same subsection provides for the issuance of permits to practice to persons who are not residents of Wisconsin in certain cases. Nowhere in the statutes is residence or citizenship mentioned as a prerequisite to registration as an architect.

Somewhat similar citizenship requirements have been imposed in the case of licenses to practice medicine and pharmacy. Secs. 147.15 (1) and 151.02 (1), Stats. If any such requirement is to be applied to registration of architects, it must be done by the legislature.

EWV

Public Officers—Compatibility—County Board Member—Town Attorney—Position of attorney for town is not incompatible with membership on board of supervisors of county in which such town is located.

December 4, 1956.

CLAIR H. VOSS,
*Assistant District Attorney,
Waukesha County.*

You have asked whether the office of county board supervisor is compatible with the position of attorney for a town in the same county.

There is no provision of the statutes prohibiting a person from holding both positions at the same time, and there are statutory provisions from which it may be inferred that the two positions are compatible.

Sec. 59.48, Stats., prohibits a district attorney of a county having a population of 40,000 or more from holding the office of city attorney of a city in such county. The inference is thereby created that in smaller counties the offices are compatible, as noted in 42 O.A.G. 14 (1953). Also, if city attorney and district attorney are compatible, it would seem that town attorney and county board member would likewise be compatible.

Sec. 59.03 (3), Stats., expressly provides that a county supervisor may also be a member of a common council of a city or of a board of trustees of a village. The statute does not mention membership on a town board, but there was no need to include that because the town chairman is *ex officio* a member of the county board. By analogy, if there is no incompatibility between the offices of town chairman and county supervisor, there would be none between the latter and the position of town attorney.

A further reason for holding the two positions not incompatible is that questions of incompatibility arise only in cases where the two positions are offices rather than merely employment. The position of town attorney is not an office, as is that of city attorney.

Martin v. Smith, (1941) 239 Wis. 314, 332, 1 N.W. 2d 163, discusses the distinction between public office and public employment. It is sufficient here to note that the position of town attorney is not created by the constitution or by statute, is not a permanent office, and possesses no sovereign power. Since the town attorney is not a public officer, the position is not incompatible with membership on the county board.

EWV

Appropriations and Expenditures—Superintendent of Public Instruction—Schools and School Districts—Handicapped Children—Department of public instruction, under secs. 41.01 (8) and 41.03 (1), Stats., is authorized to reimburse school districts for expenditures in finding and supervising boarding homes for physically handicapped children attending special classes outside the school district of their residence, in certain instances.

December 4, 1956.

DEPARTMENT OF PUBLIC INSTRUCTION.

You ask whether, under the provisions of secs. 41.01 and 41.03, Stats., your department could reimburse a school district for the expense of finding and supervising homes

for handicapped children who reside outside of the district but are boarding at homes within the district while attending special classes or schools maintained by the district for handicapped children.

You state that there are now approximately 300 children whose sight or hearing is impaired and who are living in boarding homes while attending schools for handicapped children because the school districts of their residences do not offer the special classes needed by such children. From various appropriations in sec. 20.650, Stats., your department, through its bureau for handicapped children, is paying for the care of these children in the boarding homes. Heretofore the task of locating and supervising such homes has been performed without charge, principally by private and county welfare agencies. Some of these agencies are unwilling to continue this service, and it would not be feasible for your department to perform the service. You propose to authorize school districts to locate and supervise such homes, and your department would reimburse the school districts for their costs in rendering or obtaining this service.

Sec. 41.01 (8), Stats., makes the bureau for handicapped children responsible for the academic instruction of such children and then provides:

“* * * The bureau is also responsible for arrangements for maintenance or transportation for school days for physically handicapped children under the supervision of special classes whose parents or guardian resides outside the district in which the special classes are conducted. The bureau shall reimburse any school district which, on approval of the bureau, has advanced funds for such service.”

The quoted language clearly places upon the bureau the responsibility for arranging board and lodging for physically handicapped children attending special classes outside the district of their residence, and the last sentence of the subsection applies directly to the problem you have raised.

The bureau is to reimburse school districts for the amounts advanced by them, with approval of the bureau, for “such service.” “Such service” obviously would include the “arrangements for maintenance,” which in turn would

include the locating and supervising of suitable homes for the children.

Sec. 41.03 (1), Stats., provides that the state superintendent "shall certify to the director of budget and accounts in favor of each of the counties, and school districts maintaining such [special] schools or classes a sum equal to the amount expended by each board during the preceding year for salaries of qualified teachers * * *, maintenance and transportation of pupils residing within the state and attending such schools or classes, * * * and such other expenses as shall be approved by the state superintendent."

Subsec. (a) then provides:

"(a) Out of each of the several appropriations under s. 20.650 (20) to (25) for day schools for handicapped children he shall first set aside amounts equal to the approved claims for transportation or board and lodging of nonresident pupils enrolled in the classes or centers of each of the corresponding classifications of handicapped children, and certify said amount to the director of budget and accounts for payment in full to the school districts which have furnished said transportation or board and lodging."

Here, again, the legislature has expressly provided for state aid for board and lodging of physically handicapped children attending special schools.

Sec. 20.650 (20) to (22), Stats., appropriates money from the general fund to the state superintendent for "state aid for day schools or classes for the instruction of" children with defective sight, hearing or speech, "pursuant to s. 41.01, to be distributed as provided in s. 41.03." While the appropriation statutes do not themselves expressly refer to board and lodging and the arrangements for such services, the appropriation statutes do clearly provide that the appropriations are made as state aids for schools which offer the various types of special classes and that the appropriations are made to carry out the provisions of sec. 41.01.

Since sec. 41.01 (8) expressly provides that the bureau for handicapped children shall reimburse a school district which, with approval of the bureau, has advanced funds for arranging for maintenance for physically handicapped children, it seems clear that your department is authorized

to reimburse the school districts for expenditures made by them in finding and supervising proper homes for such children. The expenditure by the school district would, of course, have to be approved by the bureau.

EWW

Traffic Officers—Arrest without Warrant—State traffic patrol officers have power to arrest without warrant for all misdemeanor violations of ch. 85 committed in their presence and for violations not committed in their presence, upon probable cause and under conditions mentioned in sec. 954.03 (1), Stats.

December 5, 1956.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You have asked as to whether sec. 954.03 (1), Stats., permits state traffic patrol officers to make arrests without warrant in cases of violations of sec. 85.09 (32), Stats., in particular, and with regard to violations of ch. 85, Stats., in general.

Sec. 954.03 (1), Stats., provides in part:

“Arrest without warrant. (1) WHEN LAWFUL. An arrest by a *peace officer* without a warrant for a misdemeanor or for the violation of an ordinance is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprehended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested. * * *”

Sec. 85.09 (32), Stats., generally deals with the operation of a motor vehicle by one whose license or registration or nonresident's operating privileges have been revoked or suspended, or with operation before filing proof of financial responsibility. It also deals with wilful failure to return license or registration to the commissioner. One who violates the section is guilty of a misdemeanor.

Sheriffs are peace officers in the broadest sense of that term. Sec. 59.24, Stats.

At common law, a peace officer has the power to arrest for a misdemeanor amounting to a breach of the peace, when committed in his presence. Generally speaking, a disturbance of public order is a breach of the peace. It is now well established by judicial decision that an officer can arrest for a misdemeanor falling short of a breach of the peace, without a warrant, when committed in his presence. *Gray v. State*, (1943) 243 Wis. 57, 9 N.W. 2d 68, burglary, arrest for vagrancy, search of an automobile without a warrant pursuant to the arrest for vagrancy, sustained; *State ex rel. Tessler v. Kubiak*, (1950) 257 Wis. 159, 42 N.W. 2d 496, burglary, arrest for operation of a motor vehicle without a driver's license, search of automobile pursuant to said arrest, sustained; *Bursack v. Davis*, (1929) 199 Wis. 115, 225 N.W. 738, failure to register automobile.

Sec. 110.07, Stats., charges state traffic officers with the enforcement of chs. 85, 110 and 194, Stats., and states that said officers shall have the *powers of sheriff* in the enforcing of those chapters, and orders, rules or regulations issued pursuant thereto. They are empowered to enter any place where vehicles subject to chs. 85, 110, or 194 are stored and to examine such vehicles, and may stop such vehicles on the highway to examine them and make arrests for all violations of such chapters.

Whether state traffic officers are technically "peace officers" or not, they have the powers of peace officers (sheriffs) within their limited fields of enforcement, and therefore may arrest without warrant under sec. 954.03, Stats.

Under sec. 954.03 (1), a peace officer has the right to make an arrest without warrant for a misdemeanor when the officer has reasonable grounds to believe the person arrested has committed a misdemeanor *and* that (a) the person will not be apprehended unless immediately arrested, *or* (b) personal or property damage may likely be done unless he is immediately arrested.

In order to determine whether an arrest should be made without a warrant for a misdemeanor not committed in his presence in a specific case, these tests must be applied to the specific fact situation. The officer should also consider the gravity of the offense and the delay which might be caused if a warrant were sought first. The question of

availability of the violator (including county and state of residence) and the jurisdiction of the court should also be weighed.

Sec. 83.016 (1), Stats., establishes one basis for probable cause and provides in part:

“(1) * * * Any traffic patrolman, sheriff, constable or other police officer may make such arrest without warrant on the request of any other traffic patrolman, sheriff, constable or police officer in whose presence any such offense has been committed. * * *”

We conclude that officers of the state traffic patrol have power to arrest without a warrant for all misdemeanor violations of ch. 85 committed in their presence. We further conclude that they have power to arrest without a warrant for all misdemeanor violations of ch. 85 not committed in their presence, upon probable cause and under the conditions mentioned in sec. 954.03 (1).

In cases where an arrest is made without a warrant, a warrant should be secured at the earliest opportunity, and the practice of arrest without a warrant for misdemeanor should not be resorted to merely for reasons of convenience.
RJV

Automobiles and Motor Vehicles—Right of Way—Vehicles Emerging from Alleys or Private Driveways—Sec. 85.18 (8), Stats., requires vehicles emerging from driveway, garage, or alley onto an arterial to stop, without regard to presence or absence of a stop sign.

December 6, 1956.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You ask whether a vehicle emerging from a private driveway is required by sec. 85.18 (8), Stats., to stop before entering on an arterial highway if no stop sign has been erected at such point. Although sec. 85.18 (8), Stats., provides:

“The operator of a vehicle emerging from an alley, private driveway or garage shall stop such vehicle immediately prior to moving on to the sidewalk or sidewalk area extending across the path of such vehicle, or if there is no sidewalk or sidewalk area then before crossing the near limits of the roadway.”

you state that your question arises from the wording of sec. 85.71 (1), Stats., which seems to require that a stop sign be erected at any point where a vehicle entering an arterial would be required to stop. Sec. 85.71 (1) provides as follows:

“Every place where traffic crossing or entering an artery for through traffic is required to stop under the provisions of this chapter, shall be plainly marked by an official stop sign directing traffic to stop.”

A vehicle emerging from a private driveway, garage, or alley is required to stop by sec. 85.18 (8) by virtue of the very fact that the vehicle is emerging from a driveway, garage, or alley onto the highway and not by virtue of the fact that the highway happens to be an arterial. The stop is required whether or not the highway be an arterial and without regard to the presence or absence of a stop sign.

Both sec. 85.18 (8) and sec. 85.71 (1), Stats., were created by ch. 454, Laws 1929. Sec. 85.18 (8) was a new law but sec. 85.71 (1) had existed in the statutes of 1927 in somewhat different form as a part of sec. 85.16, then the arterial stop law. In the 1927 statutes, sec. 85.16 (2) permitted municipalities to designate streets as arterials; sec. 85.16 (4) authorized the state highway commission and county highway committees to establish arterials on state and county trunk systems and connecting streets; and sec. 85.16 (5) provided in part:

“Each place where the highway traffic crossing or entering an artery for through traffic is required to stop, *under the provisions of subsection (4) of section 85.16*, shall be plainly marked by a sign or traffic device notifying travelers of such artery for through traffic and directing the traffic to stop. * * *”

The italicized words in the 1927 statute were in 1929 changed to read: “under the provisions of this chapter.” So

that, whereas formerly only the rural arterials and connecting streets were required to be marked with a stop sign, under the law of 1929 and thereafter all arterial stops, including those established by municipalities, were required to be indicated by a stop sign. The intent of the amendment, then, was to require uniform marking of all intersections where the reason that a stop is required is the fact that the intersection is with an arterial. This conclusion is borne out by sec. 85.70, Stats., which provides that the declaring of any highway to be an arterial shall not be effective until the official stop sign or signal has been installed thereat.

It is not plausible that the legislature meant to require that an arterial stop sign be erected at those points where driveways and alleys emerge on arterials before the obligation to stop created by sec. 85.18 (8) would be enforceable. A motorist, knowing that he is emerging from a driveway or alley, already has notice of his obligation to stop. The additional requirement of a stop sign giving notice of an arterial would not only be redundant but would impose a greater burden in creating the obligation to stop where a stop is doubly prescribed than exists where the sole reason to stop is emergence from a driveway. Further, such requirement would be confusing, since a motorist, noticing that some driveways and alleys had stop signs while others did not, might be led to assume that no stop was required where there was no sign.

SGH

Savings and Loan Associations—Mortgages—Savings and loan associations may purchase conventional mortgage loans if the associations could have made such loans in the first instance.

Savings and loan associations may sell conventional mortgage loans only in accordance with the provisions of sec. 215.20 (5) and (17), Stats.

December 7, 1956.

C. P. DIGGLES, *Commissioner,*
Savings and Loan Department.

The following opinion will supplement our opinion of September 23, 1955 in 44 O.A.G. 249 which relates to the purchase and sale of mortgages and loans guaranteed by the federal housing administration under the National Housing Act approved June 27, 1934 and the acts amendatory thereof (commonly known as "FHA mortgage loans"), and loans guaranteed by the veterans administration under the provisions of the Servicemen's Readjustment Act of 1944, U. S. Public Law 346, 78th congress, and the acts amendatory thereof (commonly known as "G.I. mortgage loans").

You ask the following questions concerning conventional mortgage loans, that is, loans which are neither insured nor guaranteed.

1. Under what circumstances can a savings and loan association purchase conventional mortgage loans?

2. Under what circumstances can a savings and loan association sell conventional mortgage loans?

The answer to your first question is now found in the express provisions of sec. 215.20 (16) (b), Stats., created by ch. 143, Laws 1955, which reads:

"Acquire such notes, mortgages and other evidences of security from any person, provided such notes, mortgages or other evidences of security represent loans which the association could have made in the first instance."

This new section of the statutes is self explanatory and removes the restrictions which were previously found in sec. 215.20 (6), (16) and (18), Stats. 1953.

Conventional loans of course are restricted by the provisions of sec. 215.22 (1) to loans secured by a mortgage upon real estate in Wisconsin located not more than 50 miles distant from the office of the association, and unencumbered except by prior loans of the association.

The net effect of the amendment created by the laws of 1955 is that if an association could have made a loan in the first instance it may thereafter purchase such loan.

In answer to your second question, it does not appear that a savings and loan association has the same freedom in selling conventional mortgage loans which it has in selling the guaranteed loans referred to in our opinion in 44 O.A.G. 249.

The restrictions upon the sale of such loans are found in the specific provisions of the section of the statute establishing the powers of the corporation, which read:

"215.20 Savings and loan associations shall have power to:

"* * *

"(5) DISPOSITION OF ASSETS TO OTHER ASSOCIATIONS. With the approval of the commissioner, dispose of any or all of its assets to *other associations*.

"* * *

"(17) SALE OR TRANSFER OF MORTGAGES AND EVIDENCES OF SECURITY, WITH OR WITHOUT RECOURSE. Sell, assign or transfer its mortgages or other evidences of security, with or without recourse, to

"(a) The state of Wisconsin investment board;

"(b) Any of the funds whose investments are supervised by the state of Wisconsin investment board;

"(c) Federal home loan bank;

"(d) Any other instrumentality of the United States.

"(e) Any bank or insurance company doing business in this state or to a junior lien holder of the same securities, all, however, subject to the prior approval of the commissioner."

Again these sections of the statutes are self explanatory.

The only unrestricted sales of its conventional mortgages or evidences of security which an association may make are to those agencies designated in pars. (a), (b), (c), and (d) of sec. 215.20 (17). With the approval of the commissioner, the association may dispose of its assets to other associa-

tions (5), or to banks and insurance companies doing business in Wisconsin or junior lien holders with the approval of the commissioner, in accordance with sec. 215.20 (17) (e).

RGT

County Judge—Fees—Sanity Hearings—Where county board has fixed annual salary of county judge in lieu of all fees, including fees payable under ch. 51, Stats., pursuant to secs. 59.15 (1) and 253.15 (4), Stats., reasonable doubt exists as to whether county judge is entitled to fees for mental and inebriate hearings even where patient has legal settlement outside county in which proceedings take place, and payment should, as a matter of policy, be withheld until a court of competent jurisdiction directs payment.

December 10, 1956.

CLARENCE G. TRAEGER,
District Attorney,
Dodge County.

You state that:

“Under date of November 10, 1948, the County Board of Dodge County passed resolution number 4, which resolution sets an annual salary for the County Judge, Dodge County, Wisconsin, in lieu of all fees. It further states that:

“3. That all sums received by the county judge after January 1, 1950, for mental and inebriate examinations under Chapter 51 of the Statutes or acts amendatory thereof be repaid to the county.’”

You query as to whether the Dodge county judge is entitled to receive fees provided by sec. 51.07, Stats., where hearings on commitment of mental cases or rehearings are held before the Dodge county court for patients at central state hospital, in cases where the legal settlement of the patient is not Dodge county.

You state that it is contended that the county board has no authority to legislate under sec. 253.15, Stats., with respect to fees where the patient has a legal settlement outside

the county wherein the proceedings take place since such fees are ultimately paid for by another county and are therefore not "compensation out of the county treasury."

I call your attention to the recent opinion of the attorney general to the district attorney of Sauk county, dated November 27, 1956, in which it was stated:

"Thus it can be seen that a persuasive argument can be made for the conclusion that where the county board has by valid resolution established the salary of the county judge at a fixed figure in lieu of all fees, including per diem and other forms of compensation for services rendered, pursuant to sec. 59.15 (1), Stats., and sec. 253.15 (4), Stats., the county judge is not entitled to fees for hearing mental cases, and that the hearing of mental cases is a part of the official duties of the county judge if application is made to the county court. It follows that reasonable doubt exists as to the validity of the claim, and accordingly payment should, as a matter of policy, be withheld unless and until a court directs payment in an appropriate proceeding."

It is our opinion that the primary liability for such fees is on the county in which the matter is held and it is immaterial that the county can make collection under the provisions of sec. 51.07 (5), Stats., from the county of legal settlement.

We conclude that such fees are "compensation out of the county treasury" and that a persuasive argument can be made that the county board has power to legislate as to such, and where the county board has provided that the county judge shall receive a set salary in lieu of all fees, including fees for mental and inebriate examinations under ch. 51, reasonable doubt exists as to whether the county judge is entitled to fees for mental and inebriate hearings even where the patient has a legal settlement outside of the county in which the proceedings take place, and payment should, as a matter of policy, be withheld until a court of competent jurisdiction directs payment.

RJV

Fish and Game—Nonresident Hunting Licenses—A nonresident may not obtain both a general hunting license, sec. 29.12 (2), Stats., and an archer hunting license, sec. 29.12 (3a), Stats., since they are both of the same kind or series.

December 18, 1956.

L. P. VOIGT, *Director,*
Wisconsin Conservation Department.

Sec. 29.09 (1), Stats., provides for the issuance of hunting, trapping, and fishing licenses. It further provides that "No more than one of the same series shall be issued to the same person in any year." You inquire whether the four types of nonresident hunting licenses provided for by sec. 29.12, Stats., are of the same series or not. More specifically you ask whether a nonresident could, in effect, receive two deer tags by obtaining both a general hunting license under sec. 29.12 (2) and an archer hunting license under sec. 29.12 (3a).

Our answer to the latter question is in the negative.

Sec. 29.12, Stats., reads as follows:

"29.12 (1) Nonresident hunting licenses shall be either general, limited, archer (bow and arrow) hunting, or shooting preserve hunting, and shall be issued by the commission or by the county clerk, subject to section 29.09, to persons duly applying therefor who are not residents of this state. The fee for each general license is \$50, for each limited license \$25, for each archer hunting license \$10, and for each shooting preserve hunting license \$5.

"(2) Each general license shall extend to the hunting of wild animals during the open season and shall be accompanied by a deer tag, and a back tag numbered to correspond with the license and supplied without additional fee.

"(3) Each limited license shall extend to the hunting of wild animals during the open season except deer. The holder of a limited license may at any time before its expiration surrender the same for cancellation, and in lieu thereof, upon payment of an additional fee of \$25, he shall receive a general license.

"(3a) Each archer hunting license shall extend to the hunting of deer only and shall be accompanied by a deer tag and a back tag numbered to correspond with the license and supplied without additional fee. Hunting with a cross-bow is prohibited.

"(4) Each shooting preserve hunting license shall extend to hunting, during the open season, for pheasants only, upon shooting preserves licensed under section 29.573, and then only for birds covered by the license and in accordance with said section except that the licensee may hunt pheasants only upon bird farms licensed under the section 29.574, said pheasants to be marked in a manner prescribed by the commission.

"(5) No general or limited license issued pursuant to subs. (2) or (3) shall permit the licensee to hunt, take or kill raccoon unless under the laws of the state of his residence, residents of this state may be issued hunting licenses permitting the hunting of raccoon."

In regard to sec. 29.12, it is not immediately clear what the legislature meant by licenses "of the same series." So, in answering your question, we must resort to the statutes as a whole which relate to the problem, particularly those related to deer hunting licenses. It is an elementary principle of statutory construction that statutes relating to the same subject matter should be construed together so as to carry out the general statutory scheme intended. *State ex rel. Morgan v. Dornbrook*, (1925) 188 Wis. 426, 206 N.W. 55; *State ex rel. The Sturgeon Bay and Lake Michigan Ship Canal and Harbor Company v. The Commissioners of School and University Lands*, (1874) 34 Wis. 162, 166-167.

Sec. 29.09 (5), Stats., sheds some light on the meaning of license "series." It provides that "The licenses shall be numbered consecutively, at the time of printing, in a separate series for each kind of license." Hence, licenses "of the same series" are licenses of the same "kind." Further light is shed on this problem by the resident deer hunting license statute, sec. 29.105, which permits only one deer tag per resident. In addition, sec. 29.45 (2), Stats., relating to the transportation of deer, provides that:

"Each holder of a resident hunting license, sportsmen's license, settlers' hunting license, nonresident general hunting license or nonresident archer's license, may, during the open season for deer and 3 days thereafter, transport or cause to be transported *one deer* legally taken * * *"

These statutes indicate quite clearly that the legislature intends each deer hunter to have only one deer tag per year. In addition, the above statutes and all the other statutes

pertaining to hunting and hunting licenses indicate that the legislature intends that each hunter, resident and non-resident, be restricted to one license for each kind of hunting, whether deer hunting or not. This is also the ordinary common sense interpretation of the restriction in sec. 29.09 (1) quoted above. Applying this construction to sec. 29.12, it is clear that a nonresident cannot obtain in the same year both a general hunting license under subsec. (2) and an archer hunting license under subsec. (3a), since both permit the same kind of hunting (deer in this case), and would therefore be the same "kind" or "series" of license. However, such a construction would not prevent a nonresident from obtaining both an archer hunting license under subsec. (3a) and a limited hunting license under subsec. (3) for example, or an archer hunting license and a shooting preserve hunting license under subsec. (4). Thus, all of the four types of nonresident hunting licenses provided for by sec. 29.12 are not of the same "kind" or "series."

Another important consideration requiring the construction given above is the constitutional provision for equal protection under the laws. If the nonresident were allowed two deer tags under sec. 29.12, he would be receiving unjustifiably favored treatment over the resident deer hunter. Under the 14th amendment to the United States constitution, "a state cannot * * * discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse." *Northwestern Mutual Life Insurance Company v. State*, (1916) 163 Wis. 484, 490, 155 N. W. 609, 158 N.W. 328, affirmed (1918) 274 U. S. 132, 38 S. Ct. 444, 62 L. ed 1025. If more than one construction is possible, the court should choose the one which sustains the constitutional validity of a statute. *Swanke v. Oneida County*, (1953) 265 Wis. 92, 99, 60 N. W. 2d 756; *Madison Metropolitan Sewerage District v. Committee on Water Pollution*, (1951) 260 Wis. 229, 254, 50 N. W. 2d 424; *The Attorney General v. The city of Eau Claire*, (1875) 37 Wis. 400, 438.

RGT

Marketing and Trade Practices—Motor Fuel—Posting Prices—State Purchases—It is not a violation of sec. 100.18 (8), Stats., for gasoline dealers to sell to motor vehicle department patrol cars at a discount from the regular price without posting such discount price.

Also a gasoline dealer can sell to other fleet car or truck accounts at a price which is less than the regular price. Such dealer should post both the regular price and the fleet or truck price. This latter price may be posted in terms of so many cents per gallon, in terms of so many cents discount from the regular price, or in terms of a percentage discount from the regular price.

December 20, 1956.

HERBERT J. SCHMIEGE,
Director of Purchases

You indicate the bureau of purchases has sought competitive bids from gasoline suppliers for gasoline to be used in motor vehicle department patrol cars. Your specifications require that the bids be stated in the form of a discount from the posted pump price. With reference to sec. 100.18 (8), Stats., you ask whether your attempt to purchase gasoline at a discount violates the law or invites the gasoline dealers to violate the law.

Sec. 100.18 (8) provides:

“Every wholesaler and every other person selling or distributing motor fuel in this state shall keep posted in a conspicuous place, most accessible to the public at his place of business, and on every pump from which delivery is made directly into the fuel tank attached to a motor vehicle, a placard showing the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. On pumps or other dispensing equipment from which motor fuel is sold and delivered directly into fuel supply tanks attached to motor vehicles, such posting shall be in figures not less than one inch high, except that no such placard shall be required on a computer pump whereon the total net selling price per gallon including all taxes is legibly shown on its face. All sales shall be made at the posted price and delivery slips shall also show the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. If the wholesaler or person has more than one place of

business in this state, the wholesaler or person shall post said placard at all of his places of business. All prices posted shall remain in effect for at least 24 hours after they are posted."

This statute requires that a seller of gasolines post conspicuously at his place of business and on every pump a placard showing net selling price per gallon and the amount of the tax. Such placard need not be posted on computer pumps where the net selling price, including all taxes, is shown on the face of the pump. All sales must be at the posted price.

The purpose for which a statute is enacted is of primary importance in the interpretation thereof. 50 Am. Jur., Statutes, §303. The object sought to be accomplished by a statute should be given great consideration in construing it. *Wis. Truck Owners Asso. v. Public Service Comm.*, (1932) 207 Wis. 664, 678, 242 N.W. 668. See also *Standard Oil Co. v. Industrial Comm.*, (1940) 234 Wis. 498, 291 N.W. 826; *Chilovi v. Industrial Comm.*, (1945) 246 Wis. 482, 486, 17 N.W. 2d 575.

The purpose of gasoline pump price-posting laws is "to protect the general public from the effects of fraudulent misrepresentations, concealment, and deception in display advertising." *State v. Guyette*, (R. I. 1954) 102 A. 2d 446. A gasoline price-posting law is neither a price-fixing law nor a fair trade law, but is designed to prevent fraud upon purchasers in the retail sale of gasoline. The fraud involved is the use of misleading signs. *S. & H. Company v. McBride*, (1940) 307 Mass. 408, 30 N.E. 2d 269. The purpose of such laws is to see that the sale of motor fuel is conducted in such a fashion as not to inflict injury upon the public. *State v. Woitha*, (1939) 227 Ia. 1, 287 N.W. 99, 123 A.L.R. 884; *State v. Hardy*, (1939) 227 Ia. 12, 287 N.W. 104; *Slome v. Godley*, (1939) 304 Mass. 187, 23 N.E. 2d 133.

The state, through its bureau of purchases, has sought to buy gasoline for state patrol cars at a price commensurate with the quantity of gasoline purchased. The state has solicited sealed bids to be stated in terms of a discount from the regular price. Any contract which the state may let for the purchase of gasoline can have no effect upon other consumers of gasoline. Such a contract has no ten-

dency to mislead or defraud members of the public. There is no need for members of the public or even the drivers of the state patrol cars to know what price the state is paying. The reason for posting the price of gasoline on the pump is to give the consumer accurate information. But the price to the state is to be fixed by written contract entered into pursuant to sealed bids, and there is no reason to inform the state of the price by posting on the pump.

In connection with a sale of gasoline to the state the reason for the price posting on the pump is wholly lacking. There is also a legal principle that a law of general application should not be construed to affect the sovereign. *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 121 N.W. 642. It is therefore my opinion that sec. 100.18 (8) is not applicable to the sale of gasoline to the state and that a gasoline company or dealer can sell gasoline to the state at a price which is not posted on the pump. Thus the state may solicit and accept bids and a gasoline supplier may sell gasoline to the state at a price which represents an agreed discount from the regular posted price. The price to the state need not be posted on the pump.

The foregoing analysis is based upon the proposition that the gasoline price-posting law does not apply to a sale to the state because of the doctrine of sovereign immunity. This leaves the question as to how the gasoline dealer should handle sales to other volume buyers. The question is whether more than one price may be posted on a pump.

It has already been demonstrated that the gasoline price-posting law is intended to prevent fraud by disclosing to the customer the price he will be asked to pay. It is not a price-fixing or a fair trade law. A statute which attempted to fix the price of gasoline would be unconstitutional because the gasoline business is not affected with a public interest. *Standard Oil Co. v. Hall*, (1929) 278 U. S. 235.

Sec. 100.18 (8) uses the word "price" in the singular. Sec. 990.001 (1), Stats., provides that singular words in a statute may be construed to have a plural meaning. There is nothing in the price-posting law which would prohibit a dealer from making reasonable classifications of customers and giving to each class a price commensurate with

the volume of gasoline purchased. The dealer should comply with sec. 133.17, Stats., however. Under these circumstances it is my opinion that the word "price" should be construed to have a plural meaning and that a gasoline dealer can lawfully sell at different prices from the same pump provided he properly posts such prices.

Assuming that the regular retail price were 34 cents and that a gasoline dealer determined that he could afford to sell two cents a gallon cheaper to trucks and fleet cars, his computer pump should show a 34-cent price and he should post on the pump another sign saying "Trucks and fleet cars 32 cents a gallon."

A further question arises whether, instead of posting the 32-cent price, the dealer could merely place a sign on the pump saying "Trucks and fleet cars 2 cents a gallon discount." Sec. 100.18 (8) uses the words "net price." It is true that the word "net" ordinarily implies that no further calculation is necessary to reach the final price. However, the supreme court has held that giving trading stamps constitutes a discount reducing the selling price. *Schuster v. Steffes*, (1941) 237 Wis. 41, 295 N.W. 737. This office has expressed the opinion that the gasoline dealer in addition to his regular price posting may post on the pump a statement that a discount of 1-2/3% will be given in the form of trading stamps. 31 O.A.G. 53. It is therefore my opinion that it is entirely proper for a gasoline dealer to post his regular price in the usual way and also post a sign saying that a discount in terms of cents or in terms of a percentage will be given under stated circumstances. This conclusion is further reinforced by the decision of the supreme court in *State ex rel. Downey-Farrell Co. v. Weigle*, (1918) 168 Wis. 19, 29, 168 N.W. 385. There the court said that the cash value required by the trading stamp law to be stated on the stamp may be stated in terms of a percentage. The court felt that this was substantial compliance with the statutory requirements.

It is entirely up to the gasoline station operators whether as a matter of policy they wish to furnish gasoline for these state patrol cars with the attendant necessity of making out the slips required. However, it is clearly possible for them to sell to these state patrol cars at a discount price without

violation of the law. It is therefore my opinion that your attempt to purchase gasoline at a discount does not violate sec. 100.18 (8). It is also my opinion that your action in this respect does not invite or encourage the dealers to violate the law, since it is entirely possible for them to sell to the state at a discount without posting the discount price.

AH

Insane—Maintenance—Statutes—Effective Date—Those parts of sec. 3, ch. 508, Laws 1947, and ch. 465, Laws 1949, which increased the rates charged to counties for the care of patients in state mental hospitals, became effective on August 9, 1947 and July 17, 1949, respectively, the days following the days of publication of said acts.

Overcharges against counties, resulting from an erroneous construction of the effective dates of said increased rates, shall be corrected as provided by sec. 46.106 (6), Stats., upon which no statutes of limitations run.

December 31, 1956.

J. JAY KELIHER,
State Auditor.

You have requested my opinion on several questions arising out of the following circumstances:

In sec. 3, ch. 508, Laws 1947, the legislature increased the rate charged to counties for the care of patients in state mental hospitals from \$2.70 per week per patient to \$3.25 per week. This same section also increased the rate charged for patients in county mental hospitals. The last sentence of the section provided that "This amendment (1947) shall be effective so as to apply to the *cost of county operation of asylums* beginning July 1, 1946." Most other sections of ch. 508 were specifically made effective without qualification as of July 1, 1946. The act was published on August 8, 1947. In 1949 the legislature, by ch. 465, Laws 1949, again raised the rates chargeable to counties for patients in state mental hospitals and county mental hospitals. The last sentence of

the act provided that "This amendment (1949) shall be effective so as to apply to the *cost of county operation of hospitals* beginning July 1, 1948." Ch. 465 was published on July 16, 1949. Subsequent to both the 1947 and 1949 acts, in settlements of accounts between the state and counties, the increased rates charged to counties for patients in the *state mental hospitals* as well as those in *county mental hospitals* were made effective as of July 1, 1946 and July 1, 1948, respectively, and not as of the days following publication of said acts.

Your questions are as follows:

1. Was it erroneous to make the increased rates charged to counties for the care of patients in *state mental hospitals* in sec. 3, ch. 508, Laws 1947 and ch. 465, Laws 1949 effective as of July 1, 1946 and July 1, 1948, respectively, instead of the days following publication, which were August 9, 1947 and July 17, 1949, respectively?

2. If so, is there any limitation of time on correcting such erroneous overcharges against the counties?

3. If there is not such time limitation, under which statutory provision can the errors be corrected?

The first question must be answered affirmatively. The increased rates for patients in *state mental hospitals* should have been made effective as of August 9, 1947 and July 17, 1949, respectively, the days after publication, rather than making them retroactive to July 1, 1946 and July 1, 1948, respectively. Sec. 990.05 Stats. (sec. 370.05 Stats. 1953, and prior years), provides that: "Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication." As noted above, both of the acts here in question provided that they were to be effective as of July 1, 1946 and July 1, 1948, respectively, *as to the cost of county operation of hospitals* (asylums). Nothing was said concerning the effective dates as to *state hospitals*. Moreover, other sections of ch. 508, Laws 1947, were made effective as of July 1, 1946 without qualification or restriction. Hence, it must be concluded that the legislature intended the increased rates for state mental hospital patients to be effective on the days following publication. See 40 O.A.G. 327.

Questions (2) and (3), as to whether such erroneous overcharges can be refunded to the counties, are covered by sec. 46.106 (6) Stats., which provides as follows:

“Any error in the accounts between the state and a county for the support of any inmate in any such institution, or in the amount certified to a county as due and to be assessed upon it on account of such support, when certified by the department, shall be corrected by the director of budget and accounts by a proper charge or credit or both on the next state tax.”

The words “any such institution” refer back to the following language in subsec. (1) of sec. 46.106: “Charitable, curative, reformatory or penal institution of the state or of a county.” State mental hospitals are clearly included within such language. The plain and ordinary meaning of sec. 46.106 (6) covers the situation in question here.

Furthermore, our office has held that no statute of limitations applies to the proceedings in sec. 46.106 (6). 44 O.A.G. 87; 40 O.A.G. 351, 354; 24 O.A.G. 360. See also 23 O.A.G. 9. In 24 O.A.G. 360, in construing the predecessor of present sec. 46.106 (6), which was worded essentially the same, it was held that said section imposed a duty which was a continuing mandate until complied with. Similarly, in the case of *State ex rel. Grant County v. State Board of Supervision*, (1888) 72 Wis. 108, 39 N.W. 350, the court, in construing a still older statutory predecessor of present sec. 46.106 (6), held that said section imposed an “imperative” duty in the nature of “a mere ministerial act, and not a judicial one.” Other authorities which have held that no statutes of limitations apply to ministerial acts in the nature of continuing duties are as follows: *Kendrik v. State ex rel. Shoemaker*, (1951) 356 Ala. 206, 54 So. 2d 442, 450; *Stoddard v. Keefe*, (1917) 278 Ill. 512, 116 N.E. 193, 196; *State ex rel. Cashman v. Carmean*, (1941) 138 Neb. 819, 295 N.W. 801, 804; *Application of Galls*, (1956) 154 N.Y.S. 2d 171, 176; *Shevlin v. La Guardia*, (1938) 2 N.Y.S. 2d 597, 600, 166 Misc. 473.

Therefore, any overcharges made against counties as a result of misinterpreting the effective dates of increased rates for patients in state mental hospitals under sec. 3, ch.

508, Laws 1947, and ch. 465, Laws 1949, should be certified by the state department of public welfare to the director of budget and accounts to be corrected on the next state tax, as provided by sec. 46.106 (6), Stats.

HHP

State Investment Board—State Building Commission—State Building Trust Fund—State investment board has no responsibilities for the application of funds of the state building trust fund by the state building commission for the purpose of financing the construction of regional state office building facilities. Duties of state investment board under sec. 25.17, Stats., and of state building commission under sec. 14.89, Stats., are mutually exclusive.

December 31, 1956.

ALBERT TRATHEN, *Chairman,*
State Investment Board.

By resolution you request my opinion as to whether or not the investment board "would in any way be responsible for the application of funds of the state building trust fund by the state building commission for the purpose of financing the construction of regional state office building facilities."

Your duties with respect to the funds of the state building trust fund consist solely of the investment of unused funds in accordance with sec. 25.17, Stats.

The duties of the state building commission are fixed by sec. 14.89, Stats. Your board has no authority with respect to the use or application of funds by the state building commission. The duties of your respective boards are mutually exclusive. When building commission funds are needed by the building commission for carrying out its duties, your board has merely a ministerial duty to release unused funds when requisitioned in accordance with statutory procedures provided.

SGH

Automobiles and Motor Vehicles—Speed Restrictions—Proof of Violation—In prosecution under sec. 85.40 (2) (a), Stats., involving collision with another vehicle it is incumbent on prosecutor to prove conditions and actual and potential hazards then existing and that other vehicle was on or entering highway in compliance with legal requirements and using due care; use of sec. 85.40 (2) (b), Stats., suggested.

December 31, 1956.

FRANZ W. BRAND,
District Attorney,
Green County.

You have requested an opinion as to the requirements of sec. 85.40 (2) (a), Stats. 1955, as to the extent of proof of violation required in order to convict when a collision with another vehicle is involved.

You state that the defendant often attempts to show by way of defense that the operator of the car with which he collided was at fault in some degree. This defense is based on the contention that in order to convict the defendant under sec. 85.40 (2) (a) it is necessary to prove that the driver of the other car was without fault whatsoever, that the other car was "on or entering the highway in compliance with legal requirements and using due care."

Sec. 85.40 (2) (a) provides:

"No person shall operate a vehicle at a speed greater than is reasonable and prudent under conditions and having regard for the actual and potential hazards then existing and the speed of the vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care."

Sec. 85.40 (2) (b) provides:

"The operator of every vehicle shall, consistent with the requirements of paragraph (a), operate at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, when

passing school children or other pedestrians, and when special hazard exists with regard to other traffic or by reasons of weather or highway conditions.”

These are criminal statutes and if open to construction must be strictly construed; however, such construction should be in a manner which carries out the legislative intent.

In a civil case, *Roeske v. Schmitt*, (1954) 266 Wis. 557, 565-566, the court in construing sec. 85.40 (2) (b), said:

“It is suggested that we must read pars. (a) and (b) of sec. 85.40 (2), Stats., together, that the expression in par. (b) ‘consistent with the requirements of paragraph (a)’ means that one approaching an intersection must reduce his speed to avoid a collision *only* with a vehicle ‘entering the highway in compliance with legal requirements and using due care,’ language contained in par. (a). Par. (b) is complete in itself, and without the necessity of going to any other statutory regulation lays down a rule of action. The expression ‘consistent with’ does not limit the application of either (a) or (b) nor does it bring into the provisions of (b) those of (a). It means no more than that the two paragraphs should be construed to make them compatible or standing in agreement, not contradictory. If the statute were to be construed as suggested it would mean that an operator when approaching and crossing an obscured intersection may be held guilty of negligence with respect to speed and to have violated the provisions of (b) only when his competitor for the crossing is in all respects without fault. Such construction could not have been intended by the legislature.”

The inference seems to be drawn that under sec. 85.40 (2) (a) it is necessary to prove that the other car was without fault, that it was “on or entering the highway in compliance with legal requirements and using due care.” The case holds that under sec. 85.40 (2) (b) it clearly is not necessary to prove that the other car was in all respects without fault.

The provisions of sec. 85.40 (2) (b) are extensive and can properly be applied to many cases where a collision is involved.

We conclude that in a prosecution for violation of sec. 85.40 (2) (a), involving a collision with another vehicle, it

is incumbent on the prosecutor to prove the conditions and actual and potential hazards then existing and that the other vehicle was on or entering the highway in compliance with legal requirements and using due care. The other vehicle must be without any fault whatsoever which might be causal to the collision. Since it is not necessary to prove that the other car was in all respects without fault in a prosecution under sec. 85.40 (2) (b), it is suggested that this section be used in preference to sec. 85.40 (2) (a) whenever the physical facts permit.

RJV

Juvenile Court—Child Protection—Neglected or Dependent Child—Transfer of Custody—Reports—Requirement of annual reports, contained in sec. 48.35 (2), Stats., is not applicable to children, legal custody over whom was transferred prior to July 1, 1956.

December 31, 1956.

WILBUR J. SCHMIDT, *Director,*
State Department of Public Welfare.

You request my opinion as to whether sec. 48.35 (2), Stats., requires annual reports on the status of children, legal custody over whom was transferred prior to July 1, 1956. If such reports are required, you ask when the annual reports would be due.

All of ch. 48, Stats., was repealed and recreated by ch. 575, sec. 7, Laws 1955, which chapter took effect on July 1, 1956. Sec. 48.35 (2) (a), Stats., now provides, so far as here material:

“* * * Any person to whom legal custody of a child is transferred shall report to the court in writing once a year on the status of the child.”

The verb “transfer” is used in the present tense and the passive voice. Sec. 990.001 (3), Stats., provides that in construing the statutes the present tense includes the future when applicable and the future perfect includes the past

and future tenses, unless such a construction would produce a result inconsistent with the manifest intent of the legislature.

The 1953 statutes did not require annual reports, and I see no inconsistency from applying the cited construction statute and limiting the requirement of annual reports to those children, legal custody over whom has been transferred subsequent to June 30, 1956.

In view of my conclusion on your first question, it is unnecessary to consider the second.

EWW

**STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION
LAWS, LEGISLATIVE BILLS AND RESOLUTIONS,
REFERRED TO AND CONSTRUED**

U. S. CONST.	Page	SESSION LAWS	Page
Art. I, sec. 10 -----	231	1931, Ch. 1, Sp. Sess.-----	228
Amendment XIV -----	220	1935, Ch. 203-----	251
	300	1939, Ch. 79-----	113
		1943, Ch. 377-----	158
U. S. LAWS		392-----	56
Bankruptcy Act		1945, Ch. 559-----	56
Sec. 17(a) (1) -----	214, 215	1947, Ch. 121-----	8
57(n) -----	213	152-----	18
63(a) (1) -----	213-214	183-----	158
64(a) (4) -----	214, 215	268-----	105
G. I. Bill of Rights-----	81, 83	485-----	99
Mutual Security Act of 1951	83		274, 275
National Housing Act-----	294	508-----	305-308
Servicemen's Indemnity Act.	83	519-----	32
Servicemen's Readjustment		1949, Ch. 392-----	183
Act of 1944 -----	294	465-----	305-308
Social Security Act-----	60-74	631-----	275
Soldiers' and Sailors' State		1951, Ch. 6-----	117
Homes Aid Act -----	10-12		167
Veterans' Pension Acts-----	82	60-----	67, 68
Water Pollution Control Act	259	702-----	243
Public Law 280, 83rd Con-		703-----	125
gress -----	159, 161	725-----	195
Public Law 661, 83rd Con-		728-----	276, 277
gress -----	159, 161	1953, Ch. 337-----	7
		356-----	183, 184
U. S. STATS.		428-----	125
18 U.S.C.A. §1162-----	159-160	667-----	7
		675-----	167
WIS. CONST.		1955, Ch. 10-----	167
Art. IV, sec. 26-----	146	19-----	7
Art. VI, sec. 4-----	76	66-----	116, 117
	152, 156		119
Art. VIII, sec. 1-----	220	114-----	60-72
4-----	232	143-----	294
Art. IX, sec. 1-----	24, 26	204-----	283
		223-----	76
SESSION LAWS		330-----	32
1853, Ch. 17-----	174	332-----	227
1867, Ch. 40-----	36	346-----	131, 132
1909, Ch. 460-----	251	377-----	100, 101
1911, Ch. 275-----	251	414-----	90, 91
	38	475-----	162
1919, Ch. 655-----	252	477-----	65, 66
1921, Ch. 477-----	222, 223	484-----	66
1929, Ch. 439-----	3, 5	509-----	144
454-----	292	552-----	90-96

SESSION LAWS		Page	STATS. (1898 and since)		Page
1955, Ch. 570	-----	47-49	Sec. 27.015	-----	224, 226
575	-----	4	27 02	-----	255
		77	29.01 (7)	-----	19-20
		133	29.09 (1)	-----	298, 300
		311	(5)	-----	299
643	-----	142	29.105	-----	299
651	-----	45	29.12	-----	298-300
		51	(1)	-----	298
		106, 107	(2)	-----	298, 300
660	-----	119	(3)	-----	298, 300
682	-----	180-184	(3a)	-----	298, 300
			(4)	-----	299, 300
			(5)	-----	299
BILLS			29.174	-----	23
1935, No. 312, S.	-----	186	29.29	-----	261
1955, No. 114, S.	-----	127	(3)	-----	261
232, S.	-----	67	29.45 (2)	-----	299
317, S.	-----	124	29.54	-----	30
366, S.	-----	66	29.55 (1)	-----	29
444, S.	-----	80	29.573	-----	113
			29.574	-----	113
RESOLUTIONS			30.06	-----	25-27
1955, Joint No. 75, S.	-----	124	(6)	-----	25
			(7)	-----	25
STATS. 1858			31.01 <i>et seq.</i>	-----	37-39
Sec. 3, Ch. 81	-----	175		-----	261
STATS. (1898 and since)			31.04	-----	37
Sec. 4.02	-----	276	31.04 through 31.11	-----	39
4.04 (2)	-----	276	31.05	-----	37-38
14.205	-----	263	(1)	-----	38
(1)	-----	263	34.01 (3)	-----	231
(2)	-----	259-265	(6)	-----	229, 231
(4)	-----	264	34.08 (1)	-----	229-231
14.89	-----	308	(2)	-----	229-230
15.15 (5)	-----	233	(6)	-----	227-234
15.16 (1)	-----	233	39.01 (3)	-----	56
16.18 (1)	-----	81, 84	(5)	-----	219
16.275 (1)	-----	145	39.04	-----	56
(4)	-----	143, 144	39.06 (4)	-----	218, 219
17.03 (1)	-----	268	39.10 (4)	-----	56
(2)	-----	268	40 80 to 40.827	-----	218
(3)	-----	268	40.91	-----	90
(4)	-----	268	(4)	-----	90-95
19.01	-----	58	(5)	-----	90-96
20.410 (1)	-----	84-89	41.01	-----	286, 288
(42)	-----	84-89	(8)	-----	286-288
20.420 (91)	-----	211, 212	41.03	-----	286
20.430	-----	177	(1)	-----	286, 288
20.550 (7)	-----	227-232	42.20	-----	200
20.650	-----	287	(3)	-----	201
(20) to (22)	-----	288	(11)	-----	200
20.830 (61)	-----	210, 211	(13)	-----	200
21.02	-----	100, 101	(14)	-----	200
(3)	-----	103	42.20 to 42.54	-----	201, 202
21.024 (4)	-----	100	42.31 (1)	-----	201
23.09	-----	23	42.38	-----	202
25.17	-----	308	42.41 (1)	-----	201
(1)	-----	234	42.43	-----	201
26.14 (7)	-----	18	44.01	-----	174, 175
(8)	-----	17-18	44.01 <i>et seq.</i>	-----	175

STATS. (1898 and since)	Page
Sec. 45.352	22
(2)	22
(4)	22
45.37 (2)	10-12
46.10	105
(1)	104, 105
(2)	104, 105
(8)	107
46.106	107
(1)	105
	307
(6)	305-308
46.17	75
(1)	75
(2)	75
(3)	75
46.18	75
46.19 (1)	76
(2)	77
46.22 (5)	44-46
	133
	235, 236
48.01 <i>et seq.</i>	135
	311
48.01 (5)	80
48.03	279
48.35 (2)	311
48.36 (2)	77-80
48.37	78, 79
48.57	133
(1)	133, 135
	235, 236
(2)	133-135
	235, 236
48.80	133, 134
(1)	134
(2)	134
(3)	134
49.01 (4)	244
49.02 (4)	242
49.04 (3)	241
49.10 (4)	241-243
49.11 (2)	244
(7)	241
49.16	75
(1)	75
49.19 (4)	136
	235, 236
49.22 (2)	6-9
(4)	7
49.25	6-9
	196
49.26	196
(1)	7
(7a)	7-9
49.40	196, 198
(1)	136
	194-196
50.06 (8)	76

STATS. (1898 and since)	Page
Sec. 50.065	76
51.001 <i>et seq.</i>	97
	274
	279
	296, 297
51.01	282
(1)	279
51.07	296
(1)	277-280
(5)	297
51.08	105
51.09	281, 283
(1)	281-283
(3)	281-283
51.12 (1)	274, 275
(2)	274, 275
(3)	274
51.125	273-275
(1)	273
(2)	273, 274
51.13 (1)	98
(2)	98
51.21 (3)	97, 98
(4)	98
	273-275
(6)	97-100
51.22 (4)	98
51.234	99
51.42	283
52.01 <i>et seq.</i>	274
52.21 through 52.45	5
52.22	5
52.28	128-130
52.36	2, 6
52.37 (2)	5
(3)	5
53.01 <i>et seq.</i>	34
53.32	239-241
	244-246
53.36	36
53.41	31-36
53.42	31-34
55.05	33
55.06	33
55.07	33
57.01 <i>et seq.</i>	99
57.13	99
59.01	205
59.03	116
(2)	116, 117
	256, 258
(3)	286
59.07	107
(1)	205
(2)	194, 197
	248, 250
(3)	206
(5)	205
(17)	106

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
Sec. 59.07 (36)	224, 225	Sec. 60.04	122, 124
(43)	253-255	60.29	25
(63)	224, 225	(18)	30
59.08	138	(35)	26, 27
(1)	137, 138	61.01 <i>et seq.</i>	27
(5)	137, 138	61.28	152, 155
(9a)	45	61.31	152, 155
59.09 (1)	138	61.34 (1)	26, 27
59.13	268	62.01 <i>et seq.</i>	27
59.15	56	62.09 (13)	152-156
(1)	56	62.11 (5)	26, 27
	118, 119	65.90 (5)	117
	166-171	66.065	206
	256-257	66.066	206
	277-280	66.067	205
	296	66.068	205
(2)	146, 147	66.11 (1)	268
	258	(2)	31
(3)	51-59	66.195	116, 117
	257		119
59.21	267		166-171
(1)	267, 269		256-258
(2)	267, 269	66.30	100
(3)	267	66.40	182-184
(4)	267	(4)	183
(5)	267	(9)	183
(6)	268	(25)	182
(8)	268	66.40 to 66.404	182
59.22 (1)	268	66.40 <i>et seq.</i>	180
(1) to (4)	33, 36	66.51	204, 206
(2)	268	(1)	204, 206
(3)	36	66.90 to 66.918	199
	157	66.90 (3)	199
(4)	36	(4)	198
	157	66.901	171
59.23 (1)	32, 33	(1)	171
(7)	33		181
(9)	33	(2)	171-177
59.24	152-155		181-183
	267, 270	(3)	172
	289		181, 182
59.25	267, 270	(4)	171-180
59.42 (1)	129		199
(2)	128-130	(5)	198-202
59.48	285	(6)	172
59.51 (1)	124, 125	(9)	172
(6)	48	(16)	172, 173
(11)	48	(17)	172
(12)	48	66.901 to 66.918	182, 183
59.57	50	66.902	171
(1)	47, 50	(1)	172-173
(10)	50		182
(11)	50	(2)	183
(11a)	50	66.903	171
59.87	249	(1)	173
	253, 254	66.906(2)	199
(6)	250	66.99	60-72
	254	(1)	64-72
(9)	249	(2)	64-74

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
Sec. 66.99 (3)	67, 68	Sec. 118.66	216
(3a)	64-74	133.17	304
(4)	64-67	136.01 <i>et seq.</i>	20
67.04 (1)	206	136.01 (2)	21
(2)	207	136.02	21
70.11	142	140.09 (1)	266
(1)	142	142.01 <i>et seq.</i>	104-107
70.114	142	142.04	104
(1)	143	142.08 (1)	105
75.14 (1)	122, 124	144.01 to 144.12	260, 261
77.01 <i>et seq.</i>	16, 17	144.02	260
83.016	154	144.03	260
(1)	291	144.52 (1)	262
85.01	160	144.53	259, 260
(1)	159	(1) to (7)	260
(8)	217	(3)	264
85.01 <i>et seq.</i>	118	(7)	262
	160, 161	144.54	260
	212	145.01 <i>et seq.</i>	87
	213, 214		271
	289-291	145.01 (1)	271, 273
85.08	159	(2)	271
(14)	154	(3)	270, 271
85.09 (32)	289	(4)	271
85.095	158	145.02 (4)	270, 271
(6)	157	145.03 (2)	271, 273
85.10 (19)	154	145.06 (1)	272, 273
(21)	162	(2)	272
85.10 to 85.86	154	147.15 (1)	285
85.12	154	151.01 <i>et seq.</i>	111
(2)	154	151.02 (1)	108
85.16	292		285
(2)	292	(2)	108-112
(4)	292	151.04 (2)	110, 111
(5)	292	151.07 (1)	111
85.18 (8)	291-293	156.01 <i>et seq.</i>	87
85.40 (2)	309-311	156.095	109
85.445	211, 212	156.10	109
85.53	211, 212	158.01 <i>et seq.</i>	87
(2)	212	158.09	109
(5)	211, 212	159.01 <i>et seq.</i>	87
85.70	293	159.12	109
85.71 (1)	292	160.01 <i>et seq.</i>	87-89
85.91	154		265
85.94	213	160.03 (5)	265-266
94.26	37, 38	160.05	87
94.26 to 94.32	36, 39	160.06	87
100.18 (8)	301-305	160.21	87
101.31	284	165.01 <i>et seq.</i>	41-44
(4)	164	165.01 (3)	41-44
(7)	163-165	165.02 (2)	42
(11)	284	166.01 <i>et seq.</i>	3
(12)	284	166.07	3
106.01 <i>et seq.</i>	273		130
108.01 <i>et seq.</i>	214	166.08	3
108.02 (5)	173	166.10	3
110.01 <i>et seq.</i>	290	166.11	4
110.07	290	169.02	1, 2
(1)	154	174.01	115

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
Sec. 174.05	115	Sec. 235.37	126
174.06	116	235.45	123, 124
174.11	39, 40	235.46	123
	113-115	235.50	21
(1)	40	236.01 <i>et seq.</i>	48
	113-115	236.05 (3)	123, 124
(4)	113, 114	236.11 (1)	47, 48
176.05 (9m)	240, 241	236.25	49
	245	(4)	48
189.13	209, 210	236.34	47-50
190.11	122, 124	(1)	49
192.44	18	(2)	47-49
194.01	161	252.17 (8)	238
194.01 <i>et seq.</i>	159-161	253.15	296
	185	(2)	280
	290	(3)	278, 280
194.18 (8)	185	(4)	277-280
194.36 (3)	185		296
194.38	185	253.29	131
196.01 <i>et seq.</i>	261	(2)	131-132
201.01 (3)	192	(2m)	131, 132
201.04	190	253 30	55
	250	256.16	140
(8)	190, 191	(1)	140
(3a)	190	(2)	140
(3b)	190	270.58	152-158
(4)	190, 191	276.36	123, 124
(7)	250-253	288.09	79
(8)	250-253	(1)	77-80
(9)	251, 252	307.01	77-79
(17)	251		237, 238
201.44	191, 192	307.02	77, 79
(1)	186-194	320.01 (16m)	208, 210
(5)	192	340 58	32, 33
(7)	192	343.401	216
204.08	251, 252	343.421	39
206.03	191	346.38	155, 156
206.41	188, 191	353.01 <i>et seq. to 363.01</i>	
(2)	186-191	<i>et seq.</i>	275
(13)	188	353.25	2, 5
215.20 (5)	294-296		128-130
(6)	294	(2)	5-6
(16)	294		129
(17)	294-296	357.11	97-100
(18)	294	(3)	98
215.22 (1)	295	(4)	98
218.01	150, 151	357.13	97-100
(2)	150, 151		275
221.49	221	(2)	98
235.01 (1)	125, 126	(3)	98
235.16	120	(4)	98
(1)	119-128		275
235.19	121	365.01 <i>et seq.</i>	100
(7)	121	370.001(7)	4
(8) to (11)	121	370.01 (28)	111
(13)	121-126	370.05	91, 93
235.34	126		306
235.35	126	943.24	216
235.36	126	946.40	155, 156

STATUTES CITED

319

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
Sec. 954.08 -----	290	Sec. 990.001 (1) -----	249
(1) -----	154		303
	289-291	(3) -----	311
957.11 -----	273, 274	990.01 (12) -----	161
(3) -----	274	(28) -----	111
(4) -----	274	990.05 -----	306
957.13 -----	273-275	2024-50 -----	222, 223
(3) -----	274		
(4) -----	274		

INDEX

	Page
AGRICULTURE	
✓ Cranberry culture—Dams across navigable waters for purpose of aiding in cranberry culture may not be constructed without permission of the public service commission -----	36
APPORTIONMENT	
✓ Effect of annexation—21st ward of city of Madison annexed in 1954 continues to remain a part of the assembly and senate districts in which it was located prior to the annexation -----	276
APPROPRIATIONS AND EXPENDITURES	
✓ Counties—County may contract for services of private social welfare agency on individual case basis for care of unwed mother and child at time of confinement -----	235
✓ Counties—County may not make voluntary contribution to privately organized social welfare agency which cares for unwed mothers and which makes such service available to anyone free of charge regardless of county of residence and regardless of any appropriation to the agency by the county of residence -----	44
✓ Counties—45 O.A.G. 44, relating to donations by county to private welfare agency, reviewed and reaffirmed -----	133
✓ Counties—Sec. 59.15 (2) (c) does not specifically authorize retroactive salary increases for county employes and they may not be granted except under special circumstances, e.g., where there is a prior agreement with employes that when a future pay raise is granted, it will be effective as of some prior agreed date -----	146
✓ In-service training of employes—Appropriations to state board of health under 20.410 (1) and (42) are broad enough to cover expenditure for instruction of hotel and restaurant division personnel, their supervisor, and sanitarians in division of environmental sanitation, at 5-day university instruction course in matters relating to discharge of their duties -----	84
✓ In-service training of employes—Under 59.15 (3) county board may in its discretion reimburse county officials for membership dues in such organizations as Wisconsin district attorneys association, Wisconsin county clerks association, etc. -----	51
✓ Superintendent of public instruction—Under 41.01 (8) and 41.03 (1) is authorized to reimburse school districts for expenditures in finding and supervising boarding homes for handicapped children attending special classes outside the school district of their residence, in certain instances -----	286
✓ University—Appropriation made to regents by 20.830 (61) may be used only for operating expenses in connection with Wisconsin general hospital and Wisconsin orthopedic hospital for children -----	210

ARCHITECTS AND ENGINEERS	Page
<ul style="list-style-type: none"> ✓ Registration—Registration board of architects and professional engineers has no authority to make U. S. citizenship a prerequisite for registration as an architect ----- 	284
<ul style="list-style-type: none"> ✓ Signature and seal requirements—Under 101.31 (7) (a), plans, sheets of design and specifications furnished by corporation must bear signature of the registered architect in responsible charge, and under rule of board of architects and professional engineers there must also be affixed the seal or rubber stamp of such architect ----- 	163
ARREST	
<ul style="list-style-type: none"> ✓ Traffic officer without warrant—State traffic patrol officers have power to arrest without warrant for misdemeanor violations of ch. 85 committed in their presence and for violations not committed in their presence, upon probable cause and under conditions mentioned in 954.03 (1) ----- 	289
ATHLETIC COMMISSION	
<ul style="list-style-type: none"> ✓ Vice chairman—State athletic commission may validly create office of vice chairman and designate one of its members as such officer under 169.02 ----- 	1
AUTOMOBILES AND MOTOR VEHICLES	
<i>See also Motor Carriers</i>	
<ul style="list-style-type: none"> — Arrest by traffic officer without warrant—State traffic patrol officers have power to arrest without warrant for misdemeanor violations of ch. 85 committed in their presence and for violations not committed in their presence, upon probable cause and under conditions mentioned in 954.03 (1) ----- 	289
<ul style="list-style-type: none"> ✓ Indians—By virtue of enactment of Public Laws 280 and 661, 83rd congress, vehicles belonging to Menominee Indian tribe or individual Indians must be licensed under 85.01 (1) if operated on state highways. Drivers must be licensed under 85.08. Menominee Indians operating on state highways are subject to prosecution for offenses such as reckless driving and driving while intoxicated. Ch. 194 governs for-hire transportation of logs by other than tribal members upon state highways. Certain logging roads built by tribe and not generally open to the public are not public highways ----- 	159
<ul style="list-style-type: none"> — Minors—Civil court imposing forfeiture on child for traffic violation pursuant to 48.36 (2) (b) and (c) of children's code, Stats. 1955, is required by 288.09 (1) to add costs to amount of forfeiture. In cases of moving vehicle violations covered by 48.36 (2) (a) where no forfeiture may be imposed, court should tax costs pursuant to 307.01 and 307.02. Provision of 288.09 (1) for sentence to county jail for nonpayment of forfeiture does not apply to juveniles prosecuted under 48.36 (2) (b) and (c) ----- 	77
<ul style="list-style-type: none"> Mobile homes, escort service—State traffic patrol may charge reasonable fee for escort service furnished pursuant to 85.445. Such funds received should be allocated to state highway fund pursuant to 20.420 (91) ----- 	211
<ul style="list-style-type: none"> — Right of way, vehicles emerging from alleys or private driveways—Sec. 85.18 (8) requires vehicles emerging from driveway, garage, or alley onto an arterial to stop, without regard to presence or absence of stop sign ----- 	291

AUTOMOBILES AND MOTOR VEHICLES—(Continued) Page

✓ Salesman—If commissioner of motor vehicle department has reasonable cause to doubt financial responsibility of applicant for salesman's license or that applicant will comply with provisions of 218.01, he may require applicant to furnish bond as provided in 218.01 (2) (h) ----- 150

✓ Speed restrictions—In prosecution under 85.40 (2) (a) involving collision with another vehicle, prosecutor must prove conditions and actual and potential hazards then existing and that other vehicle was on or entering highway in compliance with legal requirements and using due care; use of 85.40 (2) (b) suggested ----- 309

✓ Transfer of title, junked or stolen vehicle—Insurance company taking ownership of vehicle upon payment of total loss claim to owner whose vehicle is totally wrecked or stolen, must comply with 85.01 (8) respecting transfer of title ----- 217

BANKRUPTCY

✓ Motor vehicle fees—Fees and taxes imposed under ch. 85, Stats., are "taxes" under federal Bankruptcy Act, and such debts are not extinguished by discharge in bankruptcy. Payment by worthless check prior to bankruptcy does not constitute payment, and claim may be filed against the bankrupt estate as in the case of any other unpaid tax debt owed to a state ----- 213

BANKS AND BANKING

✓ Use of word "bank"—Mortgage investment company not licensed to do business as a bank in Wisconsin, which advertises that it is member of "Mortgage Bankers Association of America" is in violation of 221.49 ----- 221

BOATS

✓ Municipal regulation—Legislature has not delegated to towns, cities, and villages power to charge fee for use of navigable waters within their boundaries. It has, validly and constitutionally, delegated to them power to pass reasonable safety and traffic regulations for vessels operating upon navigable waters within their boundaries ----- 23

BONDS

County, parking facility—County may pay cost of parking facility only from its general funds or revenue bonds. It may not use general obligation bonds or proceeds of bond issue raised for another purpose. No referendum is necessary for issuance of revenue bonds by county for purpose of erecting parking facility ----- 204

BUILDING COMMISSION, STATE

✓ Building trust fund—State investment board has no responsibilities for application of funds of state building trust fund by state building commission for the purpose of financing construction of regional state office building facilities. Duties of investment board and building commission are mutually exclusive ----- 308

CHARITABLE AND PENAL INSTITUTIONS

Page

Private social welfare agency—County may contract for services of private social welfare agency on individual case basis for care of unwed mother and child at time of confinement -----	235
Private social welfare agency—County may not make voluntary contribution to privately organized social welfare agency which cares for unwed mothers and which makes such service available to anyone free of charge regardless of county of residence and regardless of any appropriation to the agency by the county of residence -----	44
Private social welfare agency—45 O.A.G. 44, relating to donations by county to private welfare agency, reviewed and reaffirmed -----	133

CHILD PROTECTION

✓ Neglected or dependent child—Requirement of annual reports in 48.35 (2) is not applicable to children, legal custody over whom was transferred prior to July 1, 1956 -----	311
--	-----

CHURCHES

✓ Securities eligible for trust funds—\$250,000 first mortgage serial bonds dated November 1, 1955, issued by First Baptist Church of Columbia, Missouri, and registered with Wisconsin department of securities in January 1956, are eligible for investment of trust funds under 320.01 (16m) -----	208
---	-----

CIRCUIT COURT

✓ Clerk's fees—While costs in illegitimacy proceedings are to be taxed under 353.25 as in criminal cases, clerk's fee for filing illegitimacy settlement agreement made under 52.28 is that provided by 59.42 (2) (a) relating to civil actions -----	128
---	-----

CIVIL DEFENSE

✓ Mutual aid contract between counties and municipalities—Sec. 21.02, state civil defense law, considered as it relates to mutual aid contracts between counties and municipalities and compatibility of offices of county coordinator and municipal civil defense director. Sec. 66.30 discussed -----	100
---	-----

CIVIL SERVICE

✓ Military leave with pay—Members of national guard and reserve components of armed forces of the United States or the state are entitled to up to 15 days leave to attend annual encampment with pay, whether or not they are full-time state employes. Military leave pay is not prorated in the manner that annual leave pay is prorated. -----	143
✓ Veterans—In order to qualify for veteran's preference under 16.18 (1), veteran's service must have occurred during periods December 7, 1941, to December 31, 1946, or June 27, 1950, to July 27, 1953 -----	81

CONSERVATION COMMISSION	Page
<ul style="list-style-type: none"> ✓ Dams—Commission has no power to take over operation of Rush lake dam solely for preserving and controlling levels of the lake ----- 	28
<ul style="list-style-type: none"> ✓ Wild animals for park purposes—Commission has authority to grant permits to park boards to take wild animals for park purposes and thereafter sell them or their offspring for park purposes, and to take wild animals in the possession of the commission for park purposes ----- 	29
CONSTITUTIONAL LAW	
<ul style="list-style-type: none"> ✓ Internal improvements—Conservation commission has no power to take over operation of Rush lake dam solely for preserving and controlling levels of the lake ----- 	28
<ul style="list-style-type: none"> △ Public deposits, transfer of state deposit fund to general fund—Sec. 34.08 (6), Stats. 1955, appears to be constitutional. "Balance" to be transferred includes securities as well as cash. State investment board should take action to complete transfer, and may do so without incurring liability ----- 	227
<ul style="list-style-type: none"> ✓ Taxation—Constitution does not appear to prohibit legislature from granting local municipalities power to levy excise or stamp tax on automobiles, local sales tax, or local income tax. Provisions of constitution must be observed in exercise of such power of legislature ----- 	219
CONVEYANCES	
<ul style="list-style-type: none"> ✓ Forms—Matter of approval by Wisconsin state register of deeds association under 235.16 (1) of forms without provision for signature of witnesses discussed. Forms approved under 235.16 (1) are limited to 60 in number. The fact that a form is made recordable under 235.16 (1) has nothing to do with validity or legal effect of instrument although the association ought not to adopt forms containing clauses of questionable validity ----- 	119
CORPORATIONS	
<ul style="list-style-type: none"> ✓ Architecture—Under 101.31 (7) (a), plans, sheets of design and specifications furnished by corporation must bear signature of the registered architect in responsible charge, and under rule of board of architects and professional engineers, there must also be affixed the seal or rubber stamp of such architect ----- 	163
COUNTIES	
<ul style="list-style-type: none"> ✓ Agricultural agent—County agricultural agent or representative employed pursuant to provisions of 59.87 may serve as member of county park commission and be compensated under 59.07 (43) ----- 	253
<ul style="list-style-type: none"> ✓ Board member—Position of attorney for town is not incompatible with membership on board of supervisors of county in which town is located ----- 	285
<ul style="list-style-type: none"> ✓ Board member—Sec. 66.195 as created by ch. 66, Laws 1955, constitutes an exception to salary limitations otherwise applicable to county board members under 59.03 (2) (f) ----- 	116
<ul style="list-style-type: none"> ✓ Hospital, use of tuberculosis sanatorium for—Under 49.16 county may establish county hospital in portion of county tuberculosis hospital with same individual acting as superintendent of each institution, provided proper separate accounts and records are kept and each unit is operated in compliance with applicable statutory provisions ----- 	75

COUNTIES—(Continued)	Page
✓ Officers and employes, association membership dues—Under 59.15 (3) county board may in its discretion reimburse county officials for membership dues in such organizations as Wisconsin district attorneys association, Wisconsin county clerks association, etc. -----	51
✓ Officers and employes, group insurance—Sec. 59.07 (2) (c) authorizing payment of group insurance premiums for county employes does not extend to assistant county agent employed jointly by university and the county if such employe is not carried on the county pay roll but is paid entirely by the state and is compensated by the state for his traveling expenses -----	248
✓ Officers and employes, mileage—Under 59.03 (2) mileage of county board member is in addition to salary and is not affected by limitation in 59.03 (2) (f). Mileage of other county officers is a part of salary and can be changed by virtue of authority granted by 66.195 -----	256
✓ Officers and employes, salaries—Sec. 59.15 (1) (a) prohibits decrease in sheriff's compensation during his term of office, and where ordinance establishing his compensation permits him to retain fees in civil cases, county board may not arbitrarily and incorrectly classify county traffic ordinance violations as criminal so as to deprive sheriff of fees which he was entitled to retain under salary ordinance in effect when he took office -----	118
✓ Officers and employes, salaries—Sec. 59.15 (2) (c) does not specifically authorize retroactive salary increases and they may not be granted except under special circumstances, e.g., where there is a prior agreement with employes that when a future pay raise is granted it will be effective as of some prior agreed date -----	146
✓ Officers and employes, salaries—Under 66.195 salaries of elected county officers may be increased during term of office within limitations therein prescribed, but may not thereafter be decreased during such term (sec. 59.15 (1) (a)). Cost of living bonuses and county board action changing same must be taken into account in determining whether there has been an increase or decrease in compensation -----	166
✓ Parking facilities—County has power to establish and operate, through county board, a parking lot or facility. County may pay cost of such facility only from its general funds or revenue bonds. It may not use general obligation bonds or proceeds of bond issue raised for another purpose. No referendum is necessary for issuance of revenue bonds by county for purpose of erecting parking facility -----	204
✓ Public welfare department—County may contract for services of private social welfare agency on individual case basis for care of unwed mother and child at time of confinement -----	235
✓ Public welfare department—County may not make voluntary contribution to privately organized social welfare agency which cares for unwed mothers and which makes such service available to anyone free of charge regardless of county of residence and regardless of any appropriation to the agency by the county of residence -----	44

COUNTIES—(Continued) Page

- ✓ Public welfare department—45 O.A.G. 44, relating to donations by county to private welfare agency, reviewed and reaffirmed ----- 133
- ✓ Rural planning for fire protection, emergency services, and civil defense—Doubtful that counties have authority to establish rural numbering systems whereby farms are numbered and indicated on maps, and signs are posted at the farms and at road intersections ----- 224
- ✓ Superintendent of schools—Property which lies in city operating elementary schools under city plan and having city superintendent, is exempted from tax imposed to support office of county superintendent, even though entire city is within a union high school district ----- 218
- ✓ Town boundaries, power of county board to change—County board may change boundaries of towns within the county under 59.08 (1) only by ordinance and not by resolution. Attempt to do so by resolution is void and ineffectual-- 137
- ✓ Wisconsin general hospital, public patients—County, except Milwaukee county, may not recover from patient sent to Wisconsin general hospital under ch. 142 or from his responsible relatives, cost to county of hospital care. Under 46.10 (1) and (2) state public welfare department is sole collecting agency. Contract by patient with county for reimbursement is unenforceable for lack of consideration. Towns, cities, and villages may not legally contract with county to accept charge-backs by county for hospitalization under ch. 142 ----- 104

COUNTY COURT

- ✓ Register in probate, fees—Sec. 253.29 as amended by ch. 346, Laws 1955, provides for no fees for filing petitions for discharge of bonds for maintenance, discharge of mortgages and the like ----- 131

COUNTY JUDGE

- ✓ Fees—Where county board has fixed salary of judge in lieu of all fees, including fees payable under ch. 51, pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists whether judge is entitled to fees for mental and inebriate hearings even where patient has legal settlement outside county in which proceedings take place--- 296
- ✓ Fees—Where county board has fixed salary of judge in lieu of fees pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists as to validity of judge's claim for additional compensation for mental hearings under 51.07 (1) ----- 277

Cranberries. See Agriculture.

CRIME LABORATORY

- ✓ Powers and duties—Ch. 165, Stats., does not authorize state crime laboratory board to establish investigative unit as part of laboratory's functions ----- 41

CRIMINAL LAW

- ✓ Insane—Persons committed to central state hospital under 957.11 and 957.13 may be transferred pursuant to 51.125, since that section is not excepted from the provisions of 51.21 (4) ----- 273

CRIMINAL LAW—(Continued)

Page

Insane—Sec. 51.21 (6) does not authorize parole of persons committed pursuant to ch. 51 or those removed to central or Winnebago state hospital pursuant to 51.21 (3) (a). Sec. 51.21 (6) authorizes parole of persons committed to central or Winnebago state hospital pursuant to 357.11 or 357.13, within the state, but persons so committed cannot be paroled for supervision without the state ----- 97

DAMS

Cranberry culture—Dams across navigable waters for purpose of aiding in cranberry culture may not be constructed without permission of public service commission 36

State operation and maintenance—Conservation commission has no power to take over operation of Rush lake dam solely for preserving and controlling levels of the lake 28

DOGS

Damage claims—Dogs “worry” domestic animals when they run after, chase, or bark at them, and they need not attack or tear them with their teeth ----- 39

Damage claims—Owner of dog attacked by other dogs may not properly file a claim for damages under 174.11 ----- 113

Damage claims—Owners of mink raised in captivity are entitled to all rights of owners of domestic animals ----- 39

FEDERAL AID

Water pollution—State committee on water pollution is state agency for enforcing state laws relating to abatement of water pollution, and when so designated by governor under 14.205 (2) is agency to administer federal funds made available under Water Pollution Control Act ----- 259

FIRE

Forest—Railroad corporations are responsible for costs of fire suppression for all fires either willfully or negligently set on their right of ways ----- 17

FISH AND GAME

Bear—Invading bears’ dens for purpose of taking bear cubs therefrom by hand is unlawful under Wisconsin laws and game orders of 1955 ----- 19

Nonresident hunting licenses—Nonresident may not obtain both general hunting license, sec. 29.12 (2), and archer hunting license, sec. 29.12 (3a), since they are both of the same kind or series ----- 298

Wild animals for park purposes—Conservation commission has authority to grant permits to park boards to take wild animals for park purposes and thereafter sell them or their offspring for park purposes, and to take wild animals in the possession of the commission for park purposes ----- 29

FOREST CROP LANDS

Easement—Easement for purposes not inconsistent with the forest crop law is not a conveyance of property and does not necessitate a withdrawal of lands covered by the easement from the provisions of the forest crop law under ch. 77, Stats. ----- 16

FORESTS	Page
✓ Fires—Railroad corporations are responsible for costs of fire suppression for all fires either willfully or negligently set on their right of ways -----	17
FORFEITURES	
✓ Minors, traffic violations—Civil court imposing forfeiture on child for traffic violation pursuant to 48.36 (2) (b) and (c) of children's code, Stats. 1955, is required by 288.09 (1) to add costs to amount of forfeiture. In cases of moving vehicle violations covered by 48.36 (2) (a) where no forfeiture may be imposed, court should tax costs pursuant to 307.01 and 307.02. Provision of 288.09 (1) for sentence to county jail for nonpayment of forfeiture does not apply to juveniles prosecuted under 48.36 (2) (b) and (c) -----	77
GRAND ARMY HOME	
✓ Maintenance charges—In computing sums due state for maintenance of veterans at Grand Army Home, funds which veterans are allowed to retain should be charged in full against veterans' federal pension and not against other income such as social security, other pensions, or other outside income -----	10
HEALTH, STATE BOARD OF	
✓ Employes, in-service training—Appropriations to board under 20.410 (1) and (42) are broad enough to cover expenditure for instruction of hotel and restaurant division personnel, their supervisor, and sanitarians in division of environmental sanitation, at 5-day university instruction course in matters relating to discharge of their duties -----	84
✓ Hotel and restaurant inspection fees—Under 160.03 (5) board may issue checks only to cities and counties for inspections and investigational services of local health departments. No checks may be issued directly to local health departments, whether city, county, or joint city-county -----	265
HISTORICAL SOCIETY, STATE	
✓ Wisconsin retirement fund—Employes of state historical society are "employes" within meaning of 66.901 (4) and properly have been included under the Wisconsin retirement fund -----	171
HOLIDAYS	
✓ Memorial day—Sec. 256.16 requires granting of full day's leave with pay to veterans regardless of whether other employes are required to work that day or not -----	140
HOSPITALS	
✓ County—Under 49.16 county may establish county hospital in portion of county tuberculosis hospital with same individual acting as superintendent of each institution, provided proper separate accounts and records are kept and each unit is operated in compliance with applicable statutory provisions -----	75

HOTELS AND RESTAURANTS

Page

✓ Inspection fees—Under 160.03 (5), state board of health may issue checks only to cities and counties for inspections and investigational services of local health departments. No checks may be issued directly to local health departments, whether city, county, or joint city-county ----- 265

HOUSING AUTHORITIES

✓ Wisconsin retirement fund—Municipal housing authority created under 66.40, and employes thereof, are not eligible for inclusion under Wisconsin retirement fund by virtue of enactment of ch. 682, Laws 1955 ----- 180

ILLEGITIMACY PROCEEDINGS

✓ Court clerk's fee—While costs in illegitimacy proceedings are to be taxed under 353.25, as in criminal cases, clerk's fee for filing illegitimacy settlement agreement made under 52.28 is that provided by 59.42 (2) (a) relating to civil actions ----- 128

✓ Taxation of costs—Costs in illegitimacy proceedings are to be taxed under 353.25 as in criminal cases. Under this section there is not authority for taxing as costs the expense of blood tests (sec. 52.36) or the cost of transcript of preliminary hearing ----- 2

INDIANS

✓ Automobiles and motor vehicles—By virtue of enactment of Public Laws 280 and 661, 83rd congress, vehicles belonging to Menominee Indian tribe or individual Indians must be licensed under 85.01(1) if operated on state highways. Drivers must be licensed under 85.08. Menominee Indians operating on state highways are subject to prosecution for offenses such as reckless driving and driving while intoxicated. Ch. 194 governs for-hire transportation of logs by other than tribal members upon state highways. Certain logging roads built by tribe and not generally open to the public are not public highways ----- 159

INEBRIATES AND DRUG ADDICTS

✓ Voluntary commitment of transients—Transient not residing in county cannot be committed as an inebriate pursuant to 51.09. Under subsec. (1) relating to involuntary commitments, patient may be only temporarily residing in county, but under subsec. (3), relating to voluntary commitments, he must be a permanent resident ----- 281

INSANE

✓ Criminal—Persons committed to central state hospital under 957.11 and 957.13 may be transferred pursuant to 51.125, since that section is not excepted from the provisions of 51.21 (4) ----- 273

✓ Criminal—Sec. 51.21 (6) does not authorize parole of persons committed pursuant to ch. 51 or those removed to central or Winnebago state hospital pursuant to 51.21 (3) (a). Sec. 51.21 (6) authorizes parole of persons committed to central or Winnebago state hospital pursuant to 357.11 or 357.13, within the state, but persons so committed cannot be paroled for supervision without the state ----- 97

INSANE—(Continued)

Page

✓ Hearings, judge's fees—Where county board has fixed salary of county judge in lieu of all fees, including fees payable under ch. 51, pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists whether judge is entitled to fees for mental and inebriate hearings even where patient has legal settlement outside county in which proceedings take place ----- 296

✓ Hearings, judge's fees—Where county board has fixed salary of county judge in lieu of fees pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists as to validity of judge's claim for additional compensation for mental hearings under 51.07 (1) ----- 277

✓ Maintenance—Parts of ch. 508, Laws 1947, and ch. 465, Laws 1949, increasing rates charged to counties for care of patients in state mental hospitals, became effective on days following dates of publication. Overcharges against counties resulting from erroneous construction of such effective dates shall be corrected as provided by 46.106 (6), upon which no statutes of limitation run ----- 305

INSURANCE

✓ Group, county officers and employes—Sec. 59.07 (2) (c) authorizing payment of group insurance premiums for county employes does not extend to assistant county agent employed jointly by university and the county if such employe is not carried on the county pay roll but is paid entirely by the state and is compensated by the state for his traveling expenses ----- 248

✓ Group life, accident and health—Payments by employers pursuant to collective bargaining agreement to be used to provide group life insurance for local union employes with insurer not authorized to do business in the state constitutes violation of 206.41 (2). Group accident and health insurance is not within 206.41 (2). It is not certain that delivery of group insurance beneficiary certificates is not within 201.44 (1) ----- 186

✓ Mortgage loss—Insurance against nonpayment of mortgage indebtedness falls exclusively within 201.04 (8), Stats. 1955 ----- 250

INVESTMENT BOARD, STATE

✓ Building trust fund—Board has no responsibilities for application of funds of state building trust fund by state building commission for the purpose of financing construction of regional state office building facilities. Duties of investment board and building commission are mutually exclusive ----- 308

✓ Jails. See Prisons and Prisoners.

JUSTICE COURT AND JUSTICE OF THE PEACE

✓ Fees for transcripts—It is not contemplated under 307.01, relating to fees of justices of the peace, or otherwise that where the testimony on preliminary hearing in criminal case is transcribed by a reporter, the county is to pay twice for the original transcript, once to the justice and again to the reporter ----- 237

JUVENILE COURT	Page
✓ Neglected or dependent child—Requirement of annual reports in 48.35 (2) is not applicable to children, legal custody over whom was transferred prior to July 1, 1956	311
LABOR	
✓ Hours of labor, motor carrier drivers—Motor vehicle department has no authority to prescribe hours of labor for drivers of private motor carriers. Its powers under 194.38 relate solely to drivers of vehicles operated under common and contract motor carrier permits -----	185
LEGAL SETTLEMENT	
✓ Poor relief—Single instance of furnishing relief in form of food and supplies, during 1-year period, may be sufficient in light of attendant circumstances to prevent acquisition of legal settlement under 49.10 (4) -----	241
LEGISLATURE	
✓ Powers—Constitution does not appear to prohibit legislature from granting local municipalities power to levy excise or stamp tax on automobiles, local sales tax, or local income tax. Provisions of constitution must be observed in exercise of such power of legislature -----	219
LICENSES AND PERMITS	
✓ Hunting—Nonresident may not obtain both general hunting license, sec. 29.12 (2), and archer hunting license, sec. 29.12 (3a), since they are both of the same kind or series	298
✓ Motor vehicle salesman—If commissioner of motor vehicle department has reasonable cause to doubt financial responsibility of applicant for salesman's license or that applicant will comply with provisions of 218.01, he may require applicant to furnish bond as provided in 218.01 (2) (h) -----	150
✓ Plumber—Experience in establishment where work is limited to maintenance and repair, by employe who was neither indentured nor registered as an apprentice, who was not working under supervision of master plumber, and who had no trade school attendance or participation in trade extension courses, does not meet intent of statutes and rule of state board of health relating to registration for journeyman plumber's license -----	270
✓ Real estate broker—Person proposing to engage in sale of uranium mining leases must be licensed as real estate broker under ch. 136 -----	20
MARKETING AND TRADE PRACTICES	
✓ Motor fuel—It is not violation of 100.18 (8) for dealers to sell gasoline for motor vehicle department patrol cars at a discount from the regular price without posting such discount price. They may also sell gasoline to other fleet car or truck accounts at a discount from the regular price, but must post both regular and fleet or truck price	301
MILEAGE	
✓ County officers and employes—Under 59.03 (2) mileage of county board member is in addition to salary and is not affected by limitation in 59.03 (2) (f). Mileage of other county officers is a part of salary and can be changed by virtue of authority granted by 66.195 -----	256

MINORS

Page

✓ Forfeitures, traffic violations—Civil court imposing forfeiture on child for traffic violation pursuant to 48.36 (2) (b) and (c) of children's code, Stats. 1955, is required by 288.09 (1) to add costs to amount of forfeiture. In cases of moving vehicle violations covered by 48.36 (2) (a) where no forfeiture may be imposed, court should tax costs pursuant to 307.01 and 307.02. Provision of 288.09 (1) for sentence to county jail for nonpayment of forfeiture does not apply to juveniles prosecuted under 48.36 (2) (b) and (c) ----- 77

MOTOR CARRIERS

✓ Drivers' hours of labor—Motor vehicle department has no authority to prescribe hours of labor for drivers of private motor carriers. Its powers under 194.38 relate solely to drivers of vehicles operated under common and contract motor carrier permits ----- 185

MOTOR VEHICLE DEPARTMENT

✓ Bankrupt, claims against—Fees and taxes imposed under ch. 85, Stats., are "taxes" under federal Bankruptcy Act, and such debts are not extinguished by discharge in bankruptcy. Payment by worthless check prior to bankruptcy does not constitute payment, and claim may be filed against the bankrupt estate as in the case of any other unpaid tax debt owed to a state ----- 213

✓ Drivers' hours of labor—Department has no authority to prescribe hours of labor for drivers of private motor carriers. Its powers under 194.38 relate solely to drivers of vehicles operated under common and contract motor carrier permits ----- 185

✓ Mobile homes, escort service—State traffic patrol may charge reasonable fee for escort service furnished pursuant to 85.445. Such funds received should be allocated to state highway fund pursuant to 20.420 (91) ----- 211

✓ Motor vehicle salesman—If commissioner has reasonable cause to doubt financial responsibility of applicant for salesman's license or that applicant will comply with provisions of 218.01, he may require applicant to furnish bond as provided in 218.01 (2) (h) ----- 150

✓ Motor Vehicles. See Automobiles and Motor Vehicles.

MUNICIPALITIES

✓ Boat traffic, power to regulate—Legislature has not delegated to towns, cities, and villages power to charge fee for use of navigable waters within their boundaries. It has, validly and constitutionally, delegated to them power to pass reasonable safety and traffic regulations for vessels operating upon navigable waters within their boundaries ----- 23

✓ Roadblocks—Police officers, sheriffs and their deputies, traffic officers, and other peace officers may set up roadblocks to effect arrest of law violators. They may call on private persons for aid and commandeered vehicles or other property. Officer must use due care for protection of users of highway and commandeered property by giving adequate warning of roadblock, and will be liable for any negligence in this regard. County is not liable for

MUNICIPALITIES—(Continued)	Page
acts of sheriff or undersheriff or his deputies, but state, county, or other municipality is liable for damages caused by other officers in negligently setting up road-block, if done in good faith. Officer cannot bind his governmental unit by promising that it will take care of damages to commandeered property -----	152
Salary increases—Sec. 66.195 as created by ch. 66, Laws 1955, constitutes an exception to salary limitations otherwise applicable to county board members under 59.03 (2) (f) -----	116
Taxation—Constitution does not appear to prohibit legislature from granting local municipalities power to levy excise or stamp tax on automobiles, local sales tax, or local income tax. Provisions of constitution must be observed in exercise of such power of legislature -----	219

NAVIGABLE WATERS

Boat traffic—Legislature has not delegated to towns, cities, and villages power to charge fee for use of navigable waters within their boundaries. It has, validly and constitutionally, delegated to them power to pass reasonable safety and traffic regulations for vessels operating upon navigable waters within their boundaries -----	23
Dams—Dams across navigable waters for purpose of aiding in cranberry culture may not be constructed without permission of public service commission -----	36

PARKS

Wild animals—Conservation commission has authority to grant permits to park boards to take wild animals for park purposes and thereafter sell them or their offspring for park purposes, and to take wild animals in the possession of the commission for park purposes ----	29
--	----

PENSIONS

Social security—Sec. 218 of federal social security act and sec. 66.99, Wis. Stats. 1955, permit school district to initiate proceedings whereby its employes rendering service in positions under state teachers retirement system may be included under social security. Discussion of procedure to be followed -----	60
Wisconsin retirement fund—Employes of state historical society are "employes" within meaning of 66.901 (4) and properly have been included under the Wisconsin retirement fund -----	171
Wisconsin retirement fund—Municipal housing authority created under 66.40, and employes thereof, are not eligible for inclusion under Wisconsin retirement fund by virtue of enactment of ch. 682, Laws 1955 -----	180
Wisconsin retirement fund, teachers retirement system—Where X, occupying specific position, was included and retired under Wisconsin retirement fund, and both employer and state teachers retirement board determined that Y, his successor in same position, is covered by state teachers retirement system, and neither determination has been reviewed and reversed: (a) Y is excluded	

PENSIONS—(Continued) Page

✓ from Wisconsin retirement fund under 66.901 (5) (a);
 (b) Attorney general cannot advise that X is improp-
 erly receiving retirement benefits from Wisconsin retire-
 ment fund; (c) It is not the duty of board of trustees of
 Wisconsin retirement fund automatically to exclude
 from such fund all persons occupying positions similar
 to that held by Y, since the duties of positions having
 the same name may vary greatly ----- 198

PHARMACY

Apprenticeship—Person desiring to engage in training for
 registration as a pharmacist as required by 151.02 (2)
 (a) must first register as an apprentice with state board
 of pharmacy. Apprentice training must be supervised by
 pharmacist registered by Wisconsin board ----- 108

PLUMBERS

✓ License requirements—Experience in establishment where
 work is limited to maintenance and repair, by employe
 who was neither indentured nor registered as an ap-
 prentice, who was not working under supervision of
 master plumber, and who had no trade school attendance
 or participation in trade extension courses, does not meet
 intent of statutes and rule of state board of health re-
 lating to registration for journeyman plumber's license 270

POLICE

✓ Roadblocks—Police officers, sheriffs and their deputies, traffic
 officers, and other peace officers may set up roadblocks
 to effect arrest of law violators. They may call on pri-
 vate persons for aid and commandeered vehicles or other
 property. Officer must use due care for protection of
 users of highway and commandeered property by giving
 adequate warning of roadblock, and will be liable for
 any negligence in this regard. County is not liable for
 acts of sheriff or undersheriff or his deputies, but state,
 county, or other municipality is liable for damages caused
 by other officers in negligently setting up roadblock, if
 done in good faith. Officer cannot bind his governmental
 unit by promising that it will take care of damages to
 commandeered property ----- 152

PRISONS AND PRISONERS

✓ Insane—Persons committed to central state hospital under
 957.11 and 957.13 may be transferred pursuant to 51.125,
 since that section is not excepted from the provisions of
 51.21 (4) ----- 273

✓ Insane—Sec. 51.21 (6) does not authorize parole of persons
 committed pursuant to ch. 51 or those removed to central
 or Winnebago state hospital pursuant to 51.21 (3) (a).
 Sec. 51.21 (6) authorizes parole of persons committed to
 central or Winnebago state hospital pursuant to 357.11
 or 357.13, within the state, but persons so committed
 cannot be paroled for supervision without the state ---- 97

✓ Jailer—Provisions of 53.42 requiring that there "shall be a
 keeper or custodian or attendant present at every jail
 where there is a prisoner therein" means that there must
 be a jailer present and awake at all times while a pris-
 oner is lodged therein ----- 31

PRISONS AND PRISONERS—(Continued)	Page
Jails, location—300 feet between jail and “school building” required by 53.32 is to be measured from school building, not land boundary. Building containing jail and rooms used for other purposes is not in violation if jail entrance and jail part of building are 300 feet or more from school, even though other parts of building are closer. Building used for Sunday school purposes is not “school building” within 53.32 -----	239
Jails, location—300 feet between jail and school building required by 53.32 must be measured in straight line between nearest points of the two buildings. Where school has been constructed within 300 feet of existing jail, jail building may be enlarged, but not in direction of the school. Existing jail 300 feet or more from school building may not be enlarged so as to bring it within the prohibited distance -----	244
Matron—Sec. 53.41 requiring that there shall be a matron “on duty” in every jail whenever a female prisoner is confined therein, means that there must be a matron present and awake at all times while there is a female prisoner therein -----	31
PUBLIC ASSISTANCE	
Legal settlement—Single instance of furnishing relief in form of food and supplies, during 1-year period, may be sufficient in light of attendant circumstances to prevent acquisition of legal settlement under 49.10 (4) -----	241
Medical care—Proposed plan for setting aside in county treasury a fund for payments of medical care for categorical aid recipients pursuant to 49.40 (1), and charging to each such recipient’s account a per capita share of said fund, is not “prepayment of medical care” in the contemplation of that statute. If it were prepayment of medical care it would constitute doing an insurance business, in which county is not authorized to engage -----	194
Proration of insurance policy proceeds—Funds received from insurance policy assigned to county by applicant for old-age assistance are part of final estate of decedent and must be prorated between claims of a county for relief and claims for old-age assistance -----	6
PUBLIC DEPOSITS	
State deposit fund, transfer to general fund—Sec. 34.08 (6), Stats. 1955, appears to be constitutional. “Balance” to be transferred includes securities as well as cash. State investment board should take action to complete transfer, and may do so without incurring liability -----	227
PUBLIC OFFICERS	
Compatibility—Member of town board may not be employed by town as fireman -----	30
Compatibility—Position of attorney for town is not incompatible with membership on board of supervisors of county in which town is located -----	285
Compatibility—Sec. 21.02, state civil defense law, considered as it relates to mutual aid contracts between counties and municipalities and compatibility of offices of county co-ordinator and municipal civil defense director. Sec. 66.30 discussed -----	100

	Page
PUBLIC SERVICE COMMISSION	
✓ Dams—Dams across navigable waters for purpose of aiding in cranberry culture may not be constructed without permission of commission -----	36
PUBLIC WELFARE DEPARTMENT	
✓ Collection of charges—County, except Milwaukee county, may not recover from patient sent to Wisconsin general hospital under ch. 142 or from his responsible relatives, cost to county of hospital care. Under 46.10 (1) and (2) state public welfare department is sole collecting agency	104
RAILROADS	
✓ Fires—Railroad corporations are responsible for costs of fire suppression for all fires either willfully or negligently set on their right of ways -----	17
REAL ESTATE BROKERS	
✓ Mining leases, sale of—Person proposing to engage in sale of uranium mining leases must be licensed as real estate broker under ch. 136 -----	20
✓ Register in Probate. See County Court.	
REGISTER OF DEEDS	
✓ Certified survey maps—Certified survey maps recorded or filed with register of deeds under 236.34 (2) are to be kept in a bound volume and are not to be copied and returned to owner. Fee is \$1.50 under 59.57 (1) (b) -----	47
✓ Conveyances, forms—Fact that form is made recordable under 235.16 (1) has nothing to do with validity or legal effect of instrument, although state register of deeds association ought not to adopt forms containing clauses of questionable validity -----	119
✓ Conveyances, forms—Forms approved under 235.16 (1) are limited to 60 in number -----	119
✓ Conveyances, forms—Matter of approval by Wisconsin state register of deeds association under 235.16 (1) of forms without provision for signatures of witnesses discussed	119
✓ Roadblocks. See Police.	
SALARIES AND WAGES	
✓ County agricultural agent—County agricultural agent or representative employed pursuant to provisions of 59.87 may serve as member of county park commission and be compensated under 59.07 (43) -----	253
✓ County board member—Sec. 66.195 as created by ch. 66, Laws 1955, constitutes an exception to salary limitations otherwise applicable to county board members under 59.03 (2) (f) -----	116
✓ County judge—Where county board has fixed salary of judge in lieu of all fees, including fees payable under ch. 51, pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists whether judge is entitled to fees for mental and inebriate hearings even where patient has legal settlement outside county in which proceedings take place -----	296
✓ County judge—Where county board has fixed salary of judge in lieu of fees pursuant to 59.15 (1) and 253.15 (4), reasonable doubt exists as to validity of judge's claim for additional compensation for mental hearings under 51.07 (1) -----	277

SALARIES AND WAGES—(Continued)	Page
✓ County officers and employes—Sec. 59.15 (2) (c) does not specifically authorize retroactive salary increases and they may not be granted except under special circumstances, e.g., where there is a prior agreement with employes that when a future pay raise is granted, it will be effective as of some prior agreed date -----	146
✓ County officers and employes—Under 59.03 (2) mileage of county board member is in addition to salary and is not affected by limitation in 59.03 (2) (f). Mileage of other county officers is a part of salary and can be changed by virtue of authority granted by 66.195 -----	256
✓ County officers and employes—Under 66.195 salaries of elected county officers may be increased during term of office within limitations therein prescribed, but may not thereafter be decreased during such term (sec. 59.15 (1) (a)). Cost of living bonuses and county board action changing same must be taken into account in determining whether there has been an increase or decrease in compensation -----	166
✓ Sheriff—Sec. 59.15 (1) (a) prohibits decrease in sheriff's compensation during his term of office, and where ordinance establishing his compensation permits him to retain fees in civil cases, county board may not arbitrarily and incorrectly classify county traffic ordinance violations as criminal so as to deprive sheriff of fees which he was entitled to retain under salary ordinance in effect when he took office -----	118

SAVINGS AND LOAN ASSOCIATIONS

✓ Mortgages—Savings and loan associations may purchase conventional mortgage loans if they could have made such loans in the first instance. They may sell conventional mortgage loans only in accordance with the provisions of 215.20 (5) and (17) -----	294
--	-----

SCHOOLS AND SCHOOL DISTRICTS

✓ County superintendent—Property which lies in city operating elementary schools under city plan and having city superintendent, is exempted from tax imposed to support office of county superintendent, even though entire city is within a union high school district -----	218
✓ Handicapped children—Under 41.01 (8) and 41.03 (1) state department of public instruction is authorized to reimburse school districts for expenditures in finding and supervising boarding homes for handicapped children attending special classes outside the school district of their residence, in certain instances -----	286
✓ High school tuition claims—Ch. 552, Laws 1955, providing that audit statements accompany claims for nonresident tuition and transportation under 40.91 (4) is inapplicable to claims filed prior to effective date of August 12, 1955. As to claims filed thereafter, it does not require such accompanying audit statement unless county clerk's request is made or petition of taxpayers is filed prior to filing of the school district claim -----	90

SHERIFFS

Page

✓ Compensation—Sec. 59.15 (1) (a) prohibits decrease in sheriff's compensation during his term of office, and where ordinance establishing his compensation permits him to retain fees in civil cases, county board may not arbitrarily and incorrectly classify county traffic ordinance violations as criminal so as to deprive sheriff of fees which he was entitled to retain under salary ordinance in effect when he took office ----- 118

✓ Deputy—Must be resident of county for which appointed. Duly appointed deputy may act anywhere in county within limitations of statutes, and without county within limitations of statutes ----- 267

✓ Roadblocks—Police officers, sheriffs and their deputies, traffic officers, and other peace officers may set up roadblocks to effect arrest of law violators. They may call on private persons for aid and commandeered vehicles or other property. Officer must use due care for protection of users of highway and commandeered property by giving adequate warning of roadblock, and will be liable for any negligence in this regard. County is not liable for acts of sheriff or undersheriff or his deputies, but state, county, or other municipality is liable for damages caused by other officers in negligently setting up roadblock, if done in good faith. Officer cannot bind his governmental unit by promising that it will take care of damages to commandeered property ----- 152

✓ Social Security. See Pensions.

SOLDIERS, SAILORS, AND MARINES

✓ Civil service preference—In order to qualify for veteran's preference under 16.18 (1), veteran's service must have occurred during periods December 7, 1941, to December 31, 1946, or June 27, 1950, to July 27, 1953 ----- 81

✓ Grand Army Home—In computing sums due state for maintenance of veterans at Grand Army Home, funds which veterans are allowed to retain should be charged in full against veterans' federal pensions and not against other income such as social security, other pensions, or other outside income ----- 10

✓ Loans for housing—State department of veterans affairs has no present statutory authority to make loans for construction of single car garages ----- 22

✓ Memorial day privileges—Sec. 256.16 requires granting of full day's leave with pay to veterans regardless of whether other employes are required to work that day or not ----- 140

STATE

✓ Employes, military leave with pay—Members of national guard and reserve components of armed forces of the United States or the state are entitled to up to 15 days leave to attend annual encampment with pay, whether or not they are full-time state employes. Military leave pay is not prorated in the manner that annual leave pay is prorated ----- 143

STATE—(Continued)

Page

- ✓ Purchase of gasoline—It is not violation of 100.18 (8) for dealers to sell gasoline for motor vehicle department patrol cars at a discount from the regular price without posting such discount price. They may also sell gasoline to other fleet car or truck accounts at a discount from the regular price, but must post both regular and fleet or truck price ----- 301

STATUTES

- ✓ Construction—Requirement of annual reports in 48.35 (2) is not applicable to children, legal custody over whom was transferred prior to July 1, 1956 ----- 311
- ✓ Effective date—Parts of ch. 508, Laws 1947, and ch. 465, Laws 1949, increasing rates charged to counties for care of patients in state mental hospitals, became effective on days following dates of publication. Overcharges against counties resulting from erroneous construction of such effective dates shall be corrected as provided by 46.106 (6), upon which no statutes of limitation run ---- 305
- ✓ Prospective or retrospective operation—Ch. 552, Laws 1955, providing that audit statements accompany claims for nonresident high school tuition and transportation under 40.91 (4) is inapplicable to claims filed prior to effective date of August 12, 1955. As to claims filed thereafter, it does not require such accompanying audit statement unless county clerk's request is made or taxpayers' petition is filed prior to filing of the school district claim ----- 90

SUPERINTENDENT OF PUBLIC INSTRUCTION

- ✓ Handicapped children—Under 41.01 (8) and 41.03 (1) is authorized to reimburse school districts for expenditures in finding and supervising boarding homes for handicapped children attending special classes outside the school district of their residence, in certain instances--- 286

TAXATION

- ✓ Exemption—Real estate acquired by state department of veterans affairs in realizing upon any security and not contracted to be sold is exempt from local real estate taxes ----- 141
- ✓ Municipalities—Constitution does not appear to prohibit legislature from granting local municipalities power to levy excise or stamp tax on automobiles, local sales tax, or local income tax. Provisions of constitution must be observed in exercise of such power of legislature ----- 219
- ✓ School districts—Property which lies in city operating elementary schools under city plan and having city superintendent, is exempted from tax imposed to support office of county superintendent, even though entire city is within a union high school district ----- 218

TEACHERS

- ✓ Social security—Sec. 218 of federal social security act and sec. 66.99, Wis. Stats. 1955, permit school district to initiate proceedings whereby its employes rendering service in positions under state teachers retirement system may be included under social security. Discussion of procedure to be followed ----- 60

TOWNS

Page

- ✓ Attorney—Position of attorney for town is not incompatible with membership on board of supervisors of county in which town is located ----- 285
- ✓ Board member—Member of town board may not be employed by town as fireman ----- 30
- ✓ Boundaries—County board may change boundaries of towns within the county under 59.08 (1) only by ordinance and not by resolution. Attempt to do so by resolution is void and ineffectual ----- 137

✓ Trade Regulations. See Marketing and Trade Practices.

TRAFFIC OFFICERS

- ✓ Arrest without warrant—State traffic patrol officers have power to arrest without warrant for misdemeanor violations of ch. 85 committed in their presence and for violations not committed in their presence, upon probable cause and under conditions mentioned in 954.03 (1) ---- 289

TRUST FUNDS

- ✓ Investments, denominational church securities—\$250,000 first mortgage serial bonds dated November 1, 1955, issued by First Baptist Church of Columbia, Missouri, and registered with Wisconsin department of securities in January 1956, are eligible for investment of trust funds under 320.01 (16m) ----- 208

TUBERCULOSIS SANATORIUMS

- ✓ County—Under 49.16 county may establish county hospital in portion of county tuberculosis hospital with same individual acting as superintendent of each institution, provided proper separate accounts and records are kept and each unit is operated in compliance with applicable statutory provisions ----- 75

UNIVERSITY

- ✓ Appropriations and expenditures—Appropriation made to regents by 20.830 (61) may be used only for operating expenses in connection with Wisconsin general hospital and Wisconsin orthopedic hospital for children ----- 210

✓ Veterans. See Soldiers, Sailors, and Marines.

VETERANS AFFAIRS, STATE DEPARTMENT OF

- ✓ Housing loans—Department has no present statutory authority to make loans for construction of single car garages 22
- ✓ Housing properties, taxation—Real estate acquired by department in realizing upon any security and not contracted to be sold is exempt from local real estate taxes 141

WATER POLLUTION

- ✓ Committee—Committee on water pollution is state agency for enforcing state laws relating to abatement of water pollution, and when so designated by governor under 14.205 (2) is agency to administer federal funds made available under Water Pollution Control Act ----- 259

WISCONSIN GENERAL HOSPITAL

Page

✓ Appropriations and expenditures—Appropriation made to university regents by 20.830 (61) may be used only for operating expenses in connection with Wisconsin general hospital and Wisconsin orthopedic hospital for children 210

✓ Public patients—County, except Milwaukee county, may not recover from patient sent to Wisconsin general hospital under ch. 142 or from his responsible relatives, cost to county of hospital care. Under 46.10 (1) and (2) state public welfare department is sole collecting agency. Contract by patient with county for reimbursement is unenforceable for lack of consideration. Towns, cities, and villages may not legally contract with county to accept charge-backs by county for hospitalization under ch. 142 104

✓ Wisconsin Retirement Fund. See Pensions.

WORDS AND PHRASES

✓ Taxes—Motor vehicle registration fees and taxes imposed under ch. 85, Stats., are "taxes" under federal Bankruptcy Act, and such debts are not extinguished by discharge in bankruptcy ----- 213

✓ Worry—Dogs worry domestic animals when they run after, chase, or bark at them, and they need not attack or tear them with their teeth ----- 39



