

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

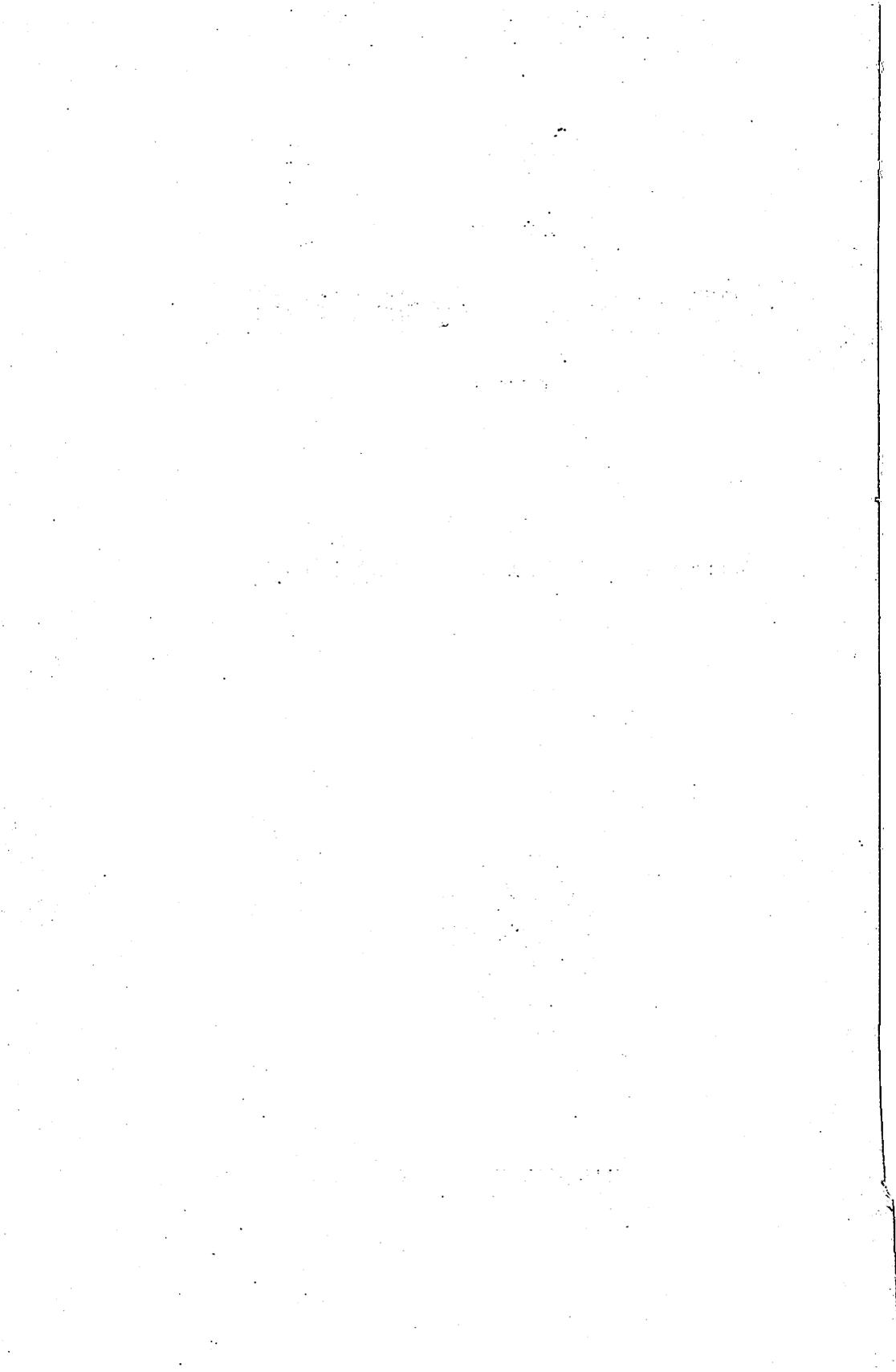
VOL. 46

January 1, 1957, through December 31, 1957

STEWART G. HONECK
Attorney General



MADISON, WISCONSIN
1957



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, Min- eral Point	from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899, to Jan. 5, 1903
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
STEWART G. HONECK, Madi- son	from Jan. 7, 1957, to

ATTORNEY GENERAL'S OFFICE

STEWART G. HONECK	Attorney General
JOHN D. WINNER	Deputy Attorney General
MORTIMER LEVITAN	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General
JAMES R. WEDLAKE	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
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ROY G. MITA	Law Examiner
JOHN H. BOWERS	Law Examiner
LEROY L. DALTON	Law Examiner
MILO W. OTTOW	Investigator

* Appointed January 31, 1957.

** Appointed November 17, 1957.

OPINIONS
OF THE
ATTORNEY GENERAL
OF
WISCONSIN

VOLUME 46

Real Estate Brokers' Board—Powers and Duties—Powers and duties of the Wisconsin real estate brokers' board under the following statutes discussed: Secs. 136.01 (2) (a) and (b), 136.05, 136.06, 136.07 (2), 136.12, and 180.801 (1).

January 4, 1957.

WISCONSIN REAL ESTATE BROKERS' BOARD.

You have raised several questions concerning the proper interpretation of ch. 136 of the statutes regulating real estate brokers and your duties in regard thereto. Your questions will be stated separately and answered *seriatim*.

I.

You inquire first whether a person licensed as a real estate broker who wishes to do business under more than one trade name need obtain a separate license under each trade name.

The answer to this question is, "No." The controlling statutes, secs. 136.05, 136.06 and 136.07, Stats. 1955, provide for the issuance of licenses only to individual persons, partnerships, and corporations.

As far as individuals are concerned, once the particular individual has received a license and paid the fee therefor,

we find no warrant in the statute for charging a second fee if he desires to do business under a second trade name. Absent statutory authority, you have no power to collect or receive an additional fee under such circumstances.

Under a variation on the foregoing question, you state that two persons, both licensed as brokers and each doing a separate business under his own trade name, desire to associate themselves in a joint venture or *quasi* partnership whereby they would engage in an exchange of listings, in joint advertising, and in sharing the fees received when property listed by one broker is sold by the other. Such persons would conduct their advertising under the name of X-brokers. You inquire whether the X-brokers should receive a separate license.

If the contract of association between the two individual brokers were sufficient to make the X-brokers a partnership, it would appear that their partnership should receive a separate license on your records. However, this would not result in any increase in license fees because the license issued to the X-brokers as a partnership would entitle one of the broker members to act as a broker without further fee. You are of course reminded that all members of any partnership, licensed and operating as a real estate broker, must themselves be licensed as brokers.

You have pointed out that the association in the name of the X-brokers is similar to the multiple listing sponsored by the real estate boards of various cities. However, we are not familiar with any practice of brokers engaged in such multiple listings to engage in joint advertising under a common trade name. If two or more licensed brokers desire to engage in operations under a single trade name and under a fee splitting arrangement, it would appear desirable that one license be issued in the advertised name since it constitutes in effect a partnership.

II.

You inquire next whether a person who engages as an auctioneer in selling real estate at a public auction would require a license either as a real estate broker or as a salesman under ch. 136. You state that under ordinary circum-

stances there is a real estate broker who lends his name to the sale but that soliciting the sale and striking off the property to the person making the highest bid are done by the auctioneer in the manner commonly employed at auctions. The auctioneer is paid for his services in conducting the sale.

In our opinion such an auctioneer of real estate would require a license under ch. 136. Part of the definition of a real estate broker found in sec. 136.01 (2) (b), Stats., states that it includes any person who "is engaged wholly or *in part in the business* of selling real estate, whether or not such real estate is owned by such person."

The term "real estate salesman" as defined in sec. 136.01 (3) "means one who is employed by a real estate broker to perform any act authorized by this chapter to be performed by a real estate broker."

It would seem clear from the description of the activities of the auctioneer which you have set out that he was engaged at least in part in the business of selling real estate and hence would require a license. He actively participates in soliciting a purchase, he determines whom the final purchaser is, and he receives a fee for his services. It would appear that he satisfies all tests of the definitions as set forth in sec. 136.01, and hence would require a license.

We point out to you that auctioneers of personal property are regulated and licensed under the provisions of ch. 130, Stats., but this chapter does not apply to auctioneers of real estate and there is no regulation of such persons unless they are subject to the provisions of the real estate licensing law.

III.

You next inquire whether the term "officer" as used in sec. 136.07 (2), Stats., includes the directors of the corporation. You ask this question apparently in order to determine whether a "director" of a corporation would be entitled to a salesman's license which, under the provisions of sec. 136.07 (2), cannot be issued to an "officer" of a corporation.

Under the provisions of the Wisconsin corporation law, ch. 180; Stats. 1955, it appears that a clear distinction is

made between the directors of a corporation and the officers of a corporation, and that the terms as far as the Wisconsin statutes are concerned are mutually exclusive. This is consistent with the ruling in the only case we have found dealing specifically with this subject, *Creighton v. Campbell*, 27 Colo. App. 120, 149 P. 448, wherein the court ruled that in the face of a bylaw requiring ownership of 1,000 shares of the stock of the corporation as a necessary qualification for becoming an "officer," a person could become a "director" without owning 1,000 shares since a director of a corporation is not an officer thereof.

Accordingly, it would appear that a director of a corporation who is not also an officer is entitled to receive a license as a salesman for that corporation under the controlling provisions of the present Wisconsin statute.

IV.

In an informal ruling, which is confirmed hereby, we have advised you that an interest in a cemetery lot is an interest in real estate; that persons selling cemetery lots must be licensed as brokers; and that you have no statutory authority for establishing more than one class of real estate broker and giving a separate and limited examination to persons who are engaged solely in the sale of cemetery lots.

In two previous opinions of this office, 11 O.A.G. 688 (1922), and 25 O.A.G. 741 (1936), it was ruled that the sale of cemetery lots could be conducted only by licensed real estate brokers. Sec. 136.01 (2) (b), Stats. 1935, appears to be identical in substance with the same statute as it exists today. Accordingly it would appear that in order to engage in the *business* of selling cemetery lots, a salesman must pass the regular real estate salesman examination.

In view of the foregoing ruling, you have raised the further question of the applicability of this rule to religious, fraternal, and nonprofit cemeteries, and to persons engaged in negotiating the sale for such cemeteries.

You state that for several years your office has held that salesmen for such organizations need not have a license under ch. 136.

It would appear that in many, if not all, instances involving religious, fraternal, and nonprofit cemeteries, your

ruling is correct and apparently has been acquiesced in for some period of time, at least, by the legislature.

We again direct your attention to the definition of a real estate broker found in sec. 136.01 (2), which reads in part:

“(2) ‘Real estate broker’ means any person * * * 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; * * *”

The clear import of the statute quoted is that the person who must obtain a license is one who is engaged for profit in the business of negotiating the sale of an interest in real estate.

The term “business” has been defined as denoting the “employment or occupation in which a person is engaged to procure a living.” *Allen v. Commonwealth*, 188 Mass. 59, 74 N.E. 287, quoting and adopting a definition in *Goddard v. Chaffee*, 84 Mass. (2 Allen) 395, 79 American Decisions 796. Webster’s New International Dictionary includes in the definition of business “3. b Any particular occupation or employment habitually engaged in, esp. for livelihood or gain.”

Our supreme court has held that a corporation organized for political purposes is not a business corporation and hence not subject to a statute regulating only business corporations. *State v. Joe Must Go Club*, (1955) 270 Wis. 108.

There is further authority that a “charitable” organization is not a “business” and this is consistent with the foregoing definition of business.

In the case of those religious, fraternal, and nonprofit cemeteries which dispose of their lots to their members as an incident of the service they perform to the community through the officers, directors, or trustees of the church or other organization who receive no commission whatsoever from negotiating the sale, it would appear that such persons are not subject to license as salesmen. On the other hand, if any such organizations should engage a person for a fee actively to solicit the sale of lots in a manner engaged

in by commercially operated cemeteries, it would appear that such person properly would be subject to license under the jurisdiction of your board.

Under the circumstances, any claim that a particular religious, fraternal, or nonprofit cemetery needs a licensed salesman should be carefully scrutinized on the facts and no license required in the absence of some clear direction from the legislature. There appears to be none such now.

V.

You inquire finally whether a foreign corporation desiring to engage in the real estate business in Wisconsin may do business in Wisconsin without complying with the provisions of sec. 180.801 (1), and whether you should require compliance before you issue a license to such corporation. Your question arises in view of a possible conflict between sec. 180.801 and sec. 136.12, Stats. The applicable provisions read as follows:

“180.801 (1) A foreign corporation shall procure a certificate of authority from the secretary of state before it shall transact business in this state or acquire, hold, or dispose of property in this state. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to regulate the organization or the internal affairs of such corporation.”

“136.12 (1) A nonresident of this state may become a real estate or business opportunity broker or salesman by conforming to all the provisions of this chapter, except that a nonresident real estate broker shall maintain an active place of business in the state in which he holds a license and a nonresident business opportunity broker shall maintain an active place of business in this state.

“* * *

“(3) Every nonresident applicant shall file an irrevocable consent that actions may be commenced against him in the proper court of any county of the state in which a cause of action arises or in which the plaintiff resides, by the service of any process or pleading authorized by the laws of this state on the board, any member thereof or any duly authorized employee. The consent shall stipulate and agree that

such service is valid and binding as due service upon said applicant in all courts in this state. The consent shall be duly acknowledged and, if made by a corporation, shall be authenticated by the corporate seal.

“(4) Duplicate copies of any process or pleading shall be served upon the board or its duly authorized employe. One copy shall be filed in the office of the board and the other immediately forwarded by registered mail to the main office of the applicant against whom the process or pleading is directed. No default in any such proceeding or action shall be taken unless it appears by affidavit of the secretary of the board or any duly authorized employe that a copy of the process or pleading was mailed to the defendant as herein required. No judgment by default shall be taken in any action or proceeding within 20 days after the date of mailing the process or pleading to the nonresident defendant.”

This express subject was covered by an opinion of the attorney general issued October 16, 1930, reported in 19 O.A.G. 520, in which it was held not only that the foreign corporation must comply with the appropriate provisions of the general corporation law then found in ch. 226, Stats., and now found in sec. 180.801, but that your board could refuse to issue a license until the appropriate statute was complied with. This opinion is now 26 years old and the legislature has never seen fit to reverse it by any specific statute. There is nothing in the exemption provisions now found in sec. 180.801 (3), which would authorize a change in the previous rule. If the legislature should believe that the appointment of an agent for the service of process and the other authorization for nonresident brokers, found in sec. 136.12, should be the exclusive requirement for foreign corporations engaged in real estate business, that is for the legislature to say and we cannot so declare on the basis of the existing statutes. Accordingly you are advised to require foreign corporations to comply with the provisions of both statutes in question.

RGT

Register of Deeds—Public Records—Destruction—Registers of deeds are not authorized to destroy original records of births, marriages, and deaths for the years 1852 to 1905.

January 10, 1957.

DR. CARL N. NEUPERT,
State Health Officer.

You state that the registers of deeds throughout the state have in their files original records of births, marriages, and deaths for the years 1852 to 1905, as well as bound volumes containing copies of such records. Also, exact duplicates of the bound volumes are stored in the vault of the bureau of vital statistics, state board of health, at Madison. You ask whether there is authority for the registers of deeds to destroy the original records.

The answer is, "No."

There is no question but that these records are public records and, as such, may not be destroyed without express legislative authority. See 38 O.A.G. 22, 37 O.A.G. 330, and 35 O.A.G. 279.

Several statutes provide for destruction of records filed with county officers, such as secs. 59.23 (8), 59.51 (14), and 59.715, but none of them applies to birth, marriage, and death records required to be filed under sec. 59.51 (7), Stats. It is therefore my conclusion that registers of deeds may not destroy such original records without express legislation upon the subject.

EWV

Counties—Charitable and Penal Institutions—Bids and Bidders—The county board is not required to submit for public bidding the purchase of furniture for a county institution. Where it elects to do so, it may authorize the board of trustees of the institution to take the bids and carry out the purchase.

January 10, 1957.

BRUCE R. RASMUSSEN,
District Attorney,
Dodge County.

You ask whether a county board may provide for purchase of furniture through public bidding, for a motel union to be used for county employes in connection with the operation of a county home and hospital, and delegate acceptance of a bid to the board of trustees of the institution.

The inquiry involves at least two facets, one relating to the matter of public bidding, and the other relating to the agencies by which authority may be exercised.

As to the first proposition, I agree with you that advertisement for bids is not a prerequisite to the purchase of furniture for a county institution.

As pointed out in 30 O.A.G. 320, competitive bidding on purchases by governmental agencies is not necessary unless required by statute.

While sec. 59.08, Stats. (formerly sec. 59.07 (4) (c)) requires certain contracts for public works, materials, and supplies to be let to the lowest responsible bidder, the opinions in 40 O.A.G. 22 and 35 O.A.G. 88 indicate that the section does not apply to purchase of such equipment as furniture.

See, also, *Standard X-Ray Co. v. Hubbell*, 280 N. Y. S. 458, 245 App. Div. 751, which held that the term "supplies" used in a statute does not include equipment. *Patten v. Concho County*, (Tex. Civ. App.) 196 S. W. 2d 833, 835, follows a similar rule.

As you have also pointed out, the county board may elect to make purchases through public competitive bidding even when not required to do so. In such cases the board is not bound by the procedures provided by statute for cases where bidding is mandatory.

See, *Cullen v. Rock County*, 244 Wis. 237, 240-243, where it was said:

"* * * It is elementary, as stated in 3 McQuillin, Mun. Corp. (2d ed.) sec. 1288, that—

"'In the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding...'

"* * *

"* * * But since the county had no duty to call for bids, it could impose any terms that it deemed prudent and the only recourse of a prospective bidder who objected to this manner of submission would be a refusal to bid.

"* * *

"* * * The acceptance of the bid did not constitute a contract. There was no duty on the part of the county to accept the lowest bid and there was on file no proposed contract complete except as to amounts to which the bidder could assent in advance. In such a case as the *Hudson Case, supra*, where the city was required to accept the lowest bid, it could at least be argued that a duty was imposed upon the city to execute a formal contract in accordance with the specifications. * * *

"Here we have not the same situation. Not only was there no proposed formal contract on file but plaintiffs' bid was accepted subject to the actual negotiation of a formal contract. * * *"

Accordingly, since the county was not obligated by statute to purchase furniture through competitive bidding, it "could impose any terms that it deemed prudent" when it elected to do so.

The foregoing general proposition was, however, doubtless intended to be limited to the area of the board's general powers; and would not warrant the board in delegating to others determinations on which the statutes require it to exercise its own discretion.

In the light of the ruling in the *Cullen case supra*, that the acceptance of a bid where bidding is not required may be merely preliminary to the completion of a contract, your question might be deemed answered by 13 O.A.G. 328, to the effect that a county board may delegate to trustees the "preliminary arrangements," including the letting of a contract to be later signed by the chairman of the county board and the county clerk.

I believe, however, that the applicable statutory provisions in this case permit the actual consummation of a purchase of furniture by the board of trustees.

It was pointed out in 37 O.A.G. 285 that the statutory authority of a board of trustees, since revision of sec. 46.18, Stats., by ch. 268, Laws 1947, has been limited to management, whereas such matters as acquisition of real estate and construction of buildings are addressed to the discretion of the county board.

What may be included in management is difficult of precise definition. As pointed out in 39 O.A.G. 330, the management is subject to regulation in any event. It was there recognized, however, that in absence of specific action by the county board, the normal procedure for repair of buildings "would be for the county board to make the appropriation and the trustees to make the expenditure." See, also, 21 O.A.G. 919, 20 O.A.G. 130 and 12 O.A.G. 26. Similarly, it was indicated in 3 O.A.G. 448 that after the county board fixed the amount of insurance to be purchased on institutional property, it might delegate to the trustees authority to make the purchase.

Where the operation of institutional facilities provided by the county board requires the purchase of equipment, I believe the authority to manage the institution was intended to be broad enough to permit the board of trustees to procure the equipment under appropriations made by the county board.

BL

Counties—Ordinance Prohibiting Drunkenness and Disorderly Conduct—Public Assistance—Old-Age Assistance— Sec. 59.07 (64), Stats., as created by ch. 651, Laws 1955, probably enables a county to enact ordinances prohibiting drunkenness and disorderly conduct.

The county officer charged with administration of old-age assistance may release liens under the circumstances described in sec. 49.26 (8), Stats., without specific authorization from the county board.

The residue of proceeds from sale of realty in administration proceedings under sec. 49.26 (5), Stats., is subject to assignment by the county court, after satisfaction of the county's lien.

January 10, 1957.

GERALD K. ANDERSON,
District Attorney,
Waupaca County.

The first question in your opinion request is:

"1. Has any decision been reached relative to the power of the Counties to enact valid ordinances covering disorderly conduct and drunk and disorderly charges similar to the provisions of the State's Statutes?"

I know of no judicial decision respecting the power of counties to enact ordinances covering disorderly conduct and drunkenness since the enactment of ch. 651, Laws 1955, revising the powers of the county board as enumerated in sec. 59.07, Stats.

It is probably still true, as it was prior to that revision, that the powers of the county board are limited to those expressly granted or necessarily implied, as held in such cases as *Spaulding v. Wood County*, 218 Wis. 224, *Dodge County v. Kaiser*, 243 Wis. 551, and *Frederick v. Douglas Co.*, 96 Wis. 411.

However, the revision of sec. 59.07 by ch. 651, Laws 1955, which created an opening paragraph and subsec. (64) to read as follows, was apparently intended to broaden the county board's powers:

"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:

"* * *

"(64) Enact ordinances to preserve the public peace and good order within the county."

It is impossible to foretell exactly how far the county board's powers under the above provisions extend, until specific ordinances are presented to the courts for adjudication. Generally speaking, it may be said that a statutory provision authorizing a governmental subdivision to preserve public peace and good order enables it to adopt regulations prohibiting disorderly conduct and drunkenness in public places. The following excerpt appears in 6 McQuillin, *Municipal Corporations*, 3d ed., pp. 634-635:

"Under charter or statutory power, ordinances may be enacted against disturbing the public order and peace by disorderly or boisterous conduct; unusual noises and other boisterous and improper conduct; abusive or indecent language, cursing, swearing, or any loud or boisterous talking; drunken, noisy and disorderly conduct; disorderly shouting, dancing and assembling; noisy, rude, insulting and disorderly words or conduct toward another; affrays and fighting; riots and disorderly or boisterous assemblages; molesting religious and other lawful meetings; undue or unnecessary blowing of whistles of factories, shops and the like; playing of musical instruments at certain hours except in specified appropriate places such as homes, churches and public buildings; parading in public thoroughfares with bands of music, and making various kinds of noises, without legal permits; holding unlawful public meetings in streets and public places; and ringing bells for auction sales, etc., playing on hand organs and other musical instruments, giving false alarms of fire, etc."

The following excerpt from page 756 of the same text indicates that drunkenness in public places may be prohibited under a general power to preserve the public peace:

"Accordingly, general power to preserve the peace and power to suppress nuisances, indecent and disorderly conduct, are ample to sustain an ordinance declaring it a public nuisance 'for any person to appear or be found on any street, alley or on the public square . . . in a state of intoxication or drunkenness,' although a state statute authorizes

the arrest by a peace officer of the state of a drunken person found in a public place. The court well observed: 'It is a matter of common knowledge that drunkenness in a public place is offensive to all who come in contact with the person in that condition. It is a nuisance and disorderly conduct, within the meaning of the statute.' But the view has been taken that under power to provide for keeping and preserving the peace and quietness of the municipality, and to prevent disorderly conduct, a municipality cannot make it an offense to be upon the streets of the city in a drunken and disorderly condition."

Your second question is :

"2. A question has been raised by a title examiner in our County as to whether or not the County Welfare Director has authority to release Old Age Pension Liens in the absence of a specific Resolution authorizing him to do so on behalf of the County Welfare Agencies."

Sec. 49.26 (8), Stats., authorizes the county agency charged with administration of old-age assistance to release liens in appropriate cases. Since the authority is conferred by statute, no authorization by the county board is necessary. See 29 O.A.G. 221.

It is pointed out in 42 O.A.G. 182 and 42 O.A.G. 193 that the authority of the agency charged with administration of old-age assistance to release a lien exists only under the circumstances described in sec. 49.26 (8). An attempted release by the welfare director under any other circumstances would probably be ineffectual, whether authorized by the county board or not.

A release of lien under other circumstances may be effected in the manner described in sec. 49.26 (3) under the authorization by the county board as described in 42 O.A.G. 182.

Your third question is :

"3. I have another problem relative to Old Age Assistance Lien. Our Old Age Assistance Lien was filed in 1951. The total aid granted to 1954 was approximately \$1200.00. On January 15, 1954, Judgment was filed against the pensioner in the sum of \$329.00. The widow is an incompetent and is now receiving Old Age Assistance in her own right. Her husband died early in 1955 and the Real Estate has been sold in the Estate proceedings to pay claims and ex-

penses. My question is whether or not we should pay this Judgment and secondly, as to what disposition should be made of the widow's equity, if any, in this property."

The opinion was given in 38 O.A.G. 380 that the filing of a certificate under sec. 49.26 (4), Stats., creates a lien for all assistance thereafter granted to the owner of the property. The lien to the extent of the \$1,200 in aid granted to the owner of the property would, accordingly, take priority over the judgment filed January 15, 1954. Since the property was sold in administration proceedings under sec. 49.26 (5), Stats., the proceeds of the sale would be subject first to deduction for costs of sale, and to costs of administration, funeral expense and the like up to \$300, as enumerated in that subsection. The lien for old-age assistance in the amount of \$1,200 should then be satisfied.

If any excess remains, the relative rights of other claimants will doubtless be adjudicated by the county court having jurisdiction of the administration. You have not informed us whether the property is a homestead, whether the judgment is for items which might have priority over homestead or dower rights, or of other circumstances which might be determinative of the proper distribution of the residue. In any event, those are questions subject to the determination of the county court.

You have not indicated that a certificate of lien has been filed under sec. 49.26 (4) with respect to assistance given the widow since the husband's death. In the absence of a lien, any part of the proceeds assigned to her would be subject to transfer under sec. 49.26 (1), Stats.

BL

Taxation—Counties—Forest Crop Lands—Withdrawal—

When a contract between a county and a state for entry of lands under the forest crop law is not renewed at the termination of the 50-year period, the county is liable to the state for 10 per cent of the appraised value of the stumpage.

If the county elects to withdraw its land at any time and does not sell it, there is no provision in the statutes in sec. 77.10 (2) (a) or otherwise for the payment of any sums to the state by the county.

If the county elects to withdraw its lands from entry under the forest crop law for purposes of sale, then the county is liable under sec. 28.12 (4), Stats., for all sums previously paid by the state under the provisions of sec. 20.280 (80) to (85), Stats.

January 11, 1957.

CHARLES B. AVERY,
District Attorney,
Langlade County.

You state that Langlade county has approximately 100,000 acres of land which have presently been approved as forest crop lands, and that at the end of 50 years Langlade county will have received approximately \$500,000 under the 10 cents per acre benefit payments it now receives from the state. You indicate further that the county board of Langlade county is presently contemplating the desirability of making further additions to its forest crop lands.

You ask my opinion as to the rights, obligations, and duties of the county under various provisions of the statutes governing the forest crop lands for the purpose of guiding the county in making decisions as to the management of its forest lands. The problems will be stated and answered separately.

I.

If the contract of the county with the state is allowed to run for its full 50-year period and is not renewed by mutual consent, the situation is controlled by the provisions of sec. 77.03, Stats. The controlling provision of this section reads:

“* * * If at the end of fifty years said contract is not renewed by mutual consent, the merchantable timber on said land shall be estimated by an estimator jointly agreed upon by the conservation commission and the owner, and in the event said conservation commission and said owner fail to agree, then and in that event, an estimator shall be appointed by the judge of the circuit court of the district in which said lands lie, whose estimate shall be final, and the cost thereof shall be borne jointly by the conservation commission and the owner; and the ten per cent severance tax paid on the stumpage thereon as agreed in the same manner as if said stumpage has been cut. * * *”

Under the quoted provision it would appear that the county would be liable only for 10 per cent of the appraised value of the stumpage. It is notable that this section does not contain the special provisions for counties, referring to timber actually cut, that is contained in sec. 77.06 (5), Stats., which provides for a severance tax of 50 per cent.

It would appear highly questionable whether the legislature intended that the county should pay a 50 per cent stumpage assessment when there is a failure to renew by mutual consent when other owners are charged only 10 per cent. It would appear that you may rely on the plain words of the statute. We do not overlook the phrase which refers to the agreement to pay “in the same manner as if said stumpage has been cut.” This phrase refers to the mechanics of payment rather than the amount. There is simply nothing in sec. 77.03 standing alone which provides for the 50 per cent assessment against counties.

II.

If the county elects to withdraw at any time without proposing to sell the lands withdrawn it would appear that the situation is covered by sec. 77.10 (2) (a), Stats., which provides that any owner may elect to withdraw “by payment by such owner, *other than a county*” of the sums provided for in such section.

Under a strict construction of this provision it would appear that a county may withdraw at any time other than for purposes of sale without making any payment whatsoever. Such a withdrawal, however, is conditioned by the

provisions of sec. 28.12 (4), Stats., which will be discussed in the next section.

III.

If the county elects to withdraw its lands from entry under the forest crop law for purposes of sale, the situation is controlled by sec. 28.12 (4), Stats., which reads:

“When forest crop lands are withdrawn and sold to any purchaser other than the state or a local unit of government, the county shall reimburse the state in the amount previously paid out on the withdrawn lands under s. 20.280 (80) to (85) and any such receipts shall be credited to the same section.”

Under the provisions of subsec. (5) of sec. 28.12 it is provided that the conservation commission may waive reimbursement where it finds that such withdrawal will result in county forest boundaries conforming with the best use of the land.

The quoted provision of the statutes speaks for itself. Only in the case where the county withdraws land and sells it and does not receive a waiver of reimbursement from the conservation commission, is it required to reimburse the state for the payments made under the authority of sec. 20.280 (80) to (85). If the lands are withdrawn and then sold, obviously the county will have a fund from which to make this reimbursement.

In closing I would like to emphasize the possibility of an interpretation of the statutes referred to in subdivision I hereof, under which a claim might be made that the county was liable for a 50 per cent severance tax on stumpage in the event the county and the state did not renew their contract after the 50-year period. However, that does not appear to be a proper interpretation of the statutes. Further, in the case of any withdrawal by a county it would clearly have to be established that the withdrawal was not for the purpose of sale or else the provisions of sec. 28.12 (4) would apply.

RGT

State—Taxation—Federal Documentary Stamp Tax—

The state of Wisconsin is not liable for the payment of the documentary stamp tax upon deeds or other conveyances running to or from the state.

January 14, 1957.

L. P. VOIGT, *Director,*

Wisconsin Conservation Department.

You have inquired whether the state is liable for the payment of the federal documentary stamp tax upon deeds or other conveyances running to or from the state.

In my opinion the answer to your question is "No."

Your question apparently arises out of the ruling of the commissioner of internal revenue dated May 1, 1950 (M.P. 39, I.R.B. 1950-9-13347) (1950-1 C.B. 141) which purported to revoke the historic rule that the state and its instrumentalities were not subject to the documentary stamp tax and specifically revoked the prior ruling S.P. 897 (C.D. 1940-1, 256) which had held that a conveyance of realty to a local housing authority which was an instrumentality of a state was not subject to the stamp tax.

Under the ruling of May 1, 1950, the state of Wisconsin, in order to consummate a sale of realty which it had contracted to sell, was compelled to place documentary stamps upon its deed of conveyance. Thereafter it made its proper claim for refund to the commissioner of internal revenue and this claim was turned down. Thereupon an action was started to recover the sums paid for the documentary stamps in the United States district court for the western district of Wisconsin, and on June 19, 1956 the state recovered judgment against the United States for the sums paid for the documentary stamps. The United States has not chosen to appeal this decision.

In my opinion there are two good reasons why the state is not liable for the documentary stamp tax on deeds running either to or from the state. First, the long continued acquiescence in the administrative interpretation of the internal revenue laws by the congress is the clearest evidence that the intention of the congress in adopting the statute providing for the documentary stamp tax was being cor-

rectly interpreted by the previous commissioners of internal revenue. The substantial authorities so hold. *Helvering v. Reynolds Tobacco Co.*, (1939) 306 U.S. 110; *United States v. Dakota-Montana Oil Co.*, (1933) 288 U.S. 459; *McCaughn v. Hershey Chocolate Co.*, (1930) 283 U.S. 488; *Publicker v. Commissioner of Internal Revenue*, (1953) 206 Fed. 2d 250; *E. R. Squibb & Sons v. Helvering*, (1938) 98 Fed. 2d 69.

Hence, when the historic freedom of the states from documentary stamp taxes had been recognized by the commissioners of internal revenue up until May 1, 1950, and the congress itself has never directed that the previous interpretations of the controlling federal statutes be changed, it is my opinion that that interpretation could not be changed by a ruling of the commissioner of internal revenue.

Second, the law appears to be established that a federal tax upon a state or a state agency which is a direct and determinable burden upon the state itself is unconstitutional and void. This principle is recognized in those cases which have upheld certain federal taxation which bears indirectly upon the state or its officers or employes, in which cases the taxation is justified only on the basis that the burden imposed is indirect. *Graves v. New York*, (1939) 306 U.S. 466, 83 L. ed 927.

After Mr. T. Coleman Andrews became commissioner of internal revenue in 1953, we addressed a plea to him to reverse the ruling of May 1, 1950. This plea was denied in a letter signed by T. Coleman Andrews dated September 3, 1953, addressed to this office. However, in view of the judgment of the United States district court of the western district of Wisconsin, it is my advice to you that you should not place documentary stamps upon any conveyance running from the state nor need you require that such stamps be placed upon any deeds or conveyances running to the state.

RGT

Constitutional Law—Internal Improvements—Harbors—
Port and harbor facilities are works of internal improvement which the state may not construct in view of the constitutional limitations in art. VIII, sec. 10, Wis. Const.

January 14, 1957.

EARL SACHSE, *Executive Secretary,*
Legislative Council.

You have asked my opinion on the following question: Is there any constitutional objection to the establishment by the legislature of a \$10,000,000 fund from which loans would be made to Great Lakes port cities for improvement of their harbors?

It is assumed that the fund you refer to would be established by the appropriation by the legislature of public moneys in the state treasury and not by grants from the federal government or by contributions from the municipalities. Under such circumstances the establishment of such a fund is prohibited by art. VIII, sec. 10, Wis. Const., which reads in part:

“The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. * * *”

It would appear that under the leading cases decided by the Wisconsin supreme court, port and harbor facilities are clearly works of internal improvement. *State ex rel. Martin v. Giessel*, (1948) 252 Wis. 363, 31 N.W. 2d 626; *State ex rel. Wisconsin Development Authority v. Dammann*, (1938) 228 Wis. 147, 277 N.W. 278; *State ex rel. Jones v. Froehlich*, (1902) 115 Wis. 32, 91 N.W. 115.

The leading Wisconsin case on this subject is the *Froehlich* case, in which the court held that the construction of levees along the Wisconsin river near Portage was a work of internal improvement which could not be carried on with

state public moneys. In this case the court discussed the history of art. VIII, sec. 10, Wis. Const., and pointed out that it was based upon the knowledge of the drafters of our constitution that for the quarter century preceding the constitutional convention various existing states had engaged in works of internal improvement which had proved disastrous, and specifically referred to tow roads, canals, and other facilities of commerce and navigation, such as improvements to harbors and navigable streams.

After discussing the case of *Rippe v. Becker*, (1894) 56 Minn. 100, 57 N.W. 331, which held that under a similar constitutional provision the state could not authorize the state railway and warehouse commission to erect and run grain elevators since such structures were works of internal improvement even though it was alleged they facilitated the legitimate police purpose of regulating the weighing and storing of grain, the court continued to discuss other cases defining works of internal improvement.

“In other cases the expression ‘works of internal improvement,’ contained in constitutional prohibitions similar to ours, have been declared to include enterprises as follows: Dredging sand flats from a river (*Ryerson v. Utley*, 16 Mich. 269); deepening and straightening river (*Anderson v. Hill*, 54 Mich. 477, 20 N.W. 549); constructing or operating street railways (*Attorney General v. Pingree*, 120 Mich. 550, 79 N.W. 814); telephone or telegraph lines (*Northwestern Tel. Exch. Co. v. C., M. & St. P. R. Co.* 76 Minn. 334, 345, 79 N.W. 315); irrigation reservoirs (*In re Senate Resolution*, 12 Colo. 287, 21 Pac. 484); roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gas works (*obiter*; *Leavenworth Co. v. Miller*, 7 Kan. 479, 493); levees (*Alcorn v. Hamer*, 38 Miss. 652); improvement of Fox river (*Sloan v. State*, 51 Wis. 623, 632, 8 N.W. 393); levees and drains (*State ex rel. Douglas v. Hastings*, 11 Wis. 448, 453). It also appears by the relation in this case that the original construction of the system of levees, to which those now contemplated are to be supplementary, was done both by this state and by the United States as a work of internal improvement, and by the municipalities for reclamation and improvement of property. See ch. 213, Laws of 1873; ch. 434, Laws of 1889; and *Barden v. Portage*, 79 Wis. 126, 132, 48 N.W. 210.

“In the light of the historical situation surrounding the framing of our constitution, and of the construction, both practical and judicial, since given, we cannot doubt that,

prima facie, levees or dikes to restrain the waters of a navigable river are works of internal improvement, within the meaning of the prohibitory section invoked by the attorney general; and that, too, whether the main purpose be promotion of navigability, creation of water power, or reclamation of adjoining lands. * * *” *State ex rel. Jones v. Froehlich*, (1902) 115 Wis. 32, 40.

In the case of *State ex rel. Wisconsin Development Authority v. Dammann, supra*, the court recognized that public utilities for the furnishing of electric power were works of internal improvement.

In the case of *State ex rel. Thomson v. Giessel, supra*, the court held that the construction of housing for veterans returning from World War II was a work of internal improvement which could not be justified under an alleged exercise of the war powers of the state.

In view of the foregoing it would appear that the development of port and harbor facilities for the purpose of aiding commerce and navigation is a work of internal improvement and hence is prohibited by art. VIII, sec. 10, Wis. Const.

RGT

Pensions—Social Security—Where failure of city to follow secs. 27.10 (1) (b) and 66.042 (1) and (3), Stats., results in wrongful exclusion of employe from Wisconsin retirement fund and federal old-age and survivors insurance system, director of public employes social security fund should accept and implement resolution of city which would extend social security coverage to such employe and possibly to others.

January 14, 1957.

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

Sec. 27.08, Stats., provides in part:

“(1) Every city may by ordinance create a board of park commissioners subject to this section, or otherwise as provided by ordinance. Such board shall be organized as the common council shall provide.

“(2) The board of park commissioners is empowered and directed:

“(a) To govern, manage, control, improve and care for all public parks * * * located within, or partly within and partly without, the corporate limits of the city * * *.”

One of the parks in the fourth class city of X contains a golf course owned by the municipality. The operation of the golf course has been delegated to the board of park commissioners in said city, which board submits an annual report of its activities to the common council. Sec. 27.10 (1) (b), Stats., provides:

“All moneys appropriated for park purposes, or received by subscription, gift, fees or otherwise for parks * * * shall be paid over to the city treasurer and be disbursed by orders of the city clerk drawn upon the city treasurer to pay accounts or bills that have been audited and allowed by said board and presented to the city clerk. Such orders shall be paid by the clerk and treasurer in the manner provided by section 66.042. The board shall not contract any liability on the part of the city in excess of the budget authorized by the common council.”

Sec. 66.042 provides in part:

“(1) Except as otherwise provided in subs. * * * (3) * * * in every * * * city * * * all disbursements from the treasury shall be made by the treasurer thereof upon the written order of the * * * city * * * clerk after proper vouchers have been filed in the office of the clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the clerk, it shall hereafter be the duty of the clerk to draw and deliver to the treasurer an order therefor before or at the time when such payment is required to be made by the treasurer. The provisions of this section shall apply to all special and general provisions of the statutes relative to the disbursement of money from the * * * city * * * treasury except s. 67.10 (2).
* * *

“(3) Except in cities of the first class and counties having a population of 500,000 or more, disbursements from the * * * city * * * shall be by order check. No such order check shall be released to the payee, nor shall such be valid, unless signed by the clerk and treasurer. * * *”

Notwithstanding the provisions of these statutes, it appears that the funds of the golf course have been segre-

gated and placed under the control of the park board so that such funds are not paid over to the city treasurer as required by sec. 27.10 (1) (b) or paid out as provided in sec. 66.042 (1) and (3). Mr. Y who is employed by the city of X has charge of the municipally owned golf course and has performed this work for some time.

Several years ago the city of X became a participating municipality under the Wisconsin retirement fund by electing to participate therein as authorized by sec. 66.902, Stats. Secs. 66.90 to 66.918, Stats., relate to the Wisconsin retirement fund. Sec. 66.901 (4) provides in part:

“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:

“* * *

“(4) EMPLOYE. Any person * * *:

“* * *

“(b) Whose name appears on a regular payroll of such municipality.”

You advise that if the city of X had complied with the provisions of secs. 27.10 (1) (b) and 66.042 (1) and (3), Stats., the name of Mr. Y would have appeared on a regular pay roll of the city of X, in which case he would have met all of the requirements for inclusion under the Wisconsin retirement fund and would have been so included.

Sec. 66.99 (3), Stats., provides that “all participating municipalities which have acted pursuant to s. 66.902 to be included under the Wisconsin retirement funds shall be included [under the agreement extending social security coverage] when the participating employes thereof are eligible.” If Mr. Y had been included under the Wisconsin retirement fund he would automatically have been included under the federal old-age and survivors insurance system.

Sec. 66.99 provides in part:

“(1) As used in this section:

“(a) ‘Public agency’ means * * * any * * * city * * * which is eligible for inclusion under the federal old-age and survivors insurance system.

“* * *

“(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.

“* * *”

You advise that the city of X now proposes to adopt a resolution pursuant to sec. 66.99 (2) to bring personnel of said city under the federal old-age and survivors insurance system. Since other eligible city employes are now covered under OASI by virtue of being included under the Wisconsin retirement fund, the action of the city of X might actually result in providing OASI coverage only for Mr. Y. Since Mr. Y presently is not covered by OASI solely because the city of X has failed to comply with the provisions of secs. 27.10 (1) (b) and 66.042 (1) and (3), you feel that if you as director of the public employes social security fund were to accept and honor the proposed resolution of the city of X and amend the agreement between the state of Wisconsin and the secretary of health, education and welfare for the purpose of extending OASI to eligible personnel of said city not already covered thereby, the state might be condoning and participating in an action which involves a violation of the statutes. Therefore you request an opinion as to whether you should accept and implement the proposed resolution of the city of X.

It appears to me to be doubly unfortunate that the city of X has not followed the provisions of secs. 27.10 (1) (b) and 66.042 (1) and (3) of the statutes, since this failure apparently has resulted in an intentional violation or disregard of a state law by a political subdivision of the state and at the same time has deprived an individual employe of the benefits of coverage under both the Wisconsin retirement fund and the old-age and survivors insurance system.

Mr. Y properly has been excluded from participation in the Wisconsin retirement fund since sec. 66.901 (4) refers only to a person whose name actually “appears” on the regular pay roll of the municipality and not to a person whose name “should appear” on such pay roll.

However, I do not believe that you have any discretion to decline to accept and implement the proposed resolution

if and when the same is properly adopted and submitted to you. Sec. 66.99 (4), Stats., provides:

"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 * * *."

"* * * That which a public officer is directed by law to do for others, and which is intended for their benefit, and is beneficial to them, the law holds must be done. *Mason v. Fearson*, 9 How. U.S. 249. Statutes imposing a duty, and giving the means of performing such duty, are to be regarded as mandatory. *Veazie v. China*, 50 Maine, 518; and *Milford v. Orono*, id. 529, and cases cited." *Wendel vs. Durbin*, 26 Wis. 390, 392.

Presumably the resolution would be in the proper form and theoretically broad enough to cover many employes. Although you now believe, probably with good reason, that the effect of the resolution and the subsequent modification of the state agreement would result in the inclusion of only Mr. Y, it is possible that the resolution might cover other employes. Even if it resulted in the inclusion of only Mr. Y, it would be a benefit to him. Your refusal to accept and implement the resolution would provide no guarantee or assurance that the city of X would revise its procedure to comply with secs. 27.10 (1) (b) and 66.042 (1) and (3) and might have the effect of preventing Mr. Y from acquiring the benefits of social security at least.

In any event, I am of the opinion that you should not refuse to accept and implement the proposed resolution if it is in proper form, because of the failure of the city to comply with the provisions of other statutes not a part of the Wisconsin retirement fund or public employes social security fund.

JRW

Schools and School Districts—Compulsory Attendance—Words and Phrases—Division of the School Year—Report card period is not a “division of the school year” within the meaning of the term as used in sec. 40.77 (1) (a), Stats. 1955, and a pupil is required to attend school until the end of the term, quarter, or semester in which such pupil reaches 16 years of age.

January 15, 1957.

JOSEPH W. BLOODGOOD,
District Attorney,
Dane County.

Your office has inquired as to the interpretation to be given to sec. 40.77 (1) (a), Stats. 1955 (formerly sec. 40.70 (1) (a)), which reads as follows:

“40.77 (1) GENERAL PROVISIONS. (a) Any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend some school regularly to the end of the school term, quarter, semester or other division of the school year in which he is 16 years of age, unless the child has a legal excuse, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session.”

The inquiry is how the words “to the end of the school term, quarter, semester or other division of the school year” are to be interpreted and applied in the case of a child who reaches her 16th birthday on, let us say, March 18, and attends a school which divides the school year into two semesters, but in each of which there are two report card periods of 9 weeks each. Specifically, the question is whether she must attend school to the end of the semester, which is in June, or can she terminate her schooling at the end of the 9-week report card period, in which she becomes 16?

The answer depends upon the meaning to be given to the words “other division of the school year.” The phrase “other division” must be construed with reference to the more specific words which precede it, i.e., “term, quarter, semester.” It is obvious that whenever a school district divides its school year into either terms, quarters, or semesters, a child

reaching the age of 16 during the school year must attend the school until the end of the term, quarter, or semester in which he or she becomes 16 years of age. Thus, in the instance your office has presented, the child would be required to attend school until June when the semester ends, unless the use of the 9-week report card period changes the situation.

The words "other division of the school year" are meant to cover corresponding words other than "term, quarter, semester," which would describe divisions of the school year of like character that different schools might use as divisions of the school year. So far as we are able to ascertain there are no schools which use any other designations for units into which the school year is divided. An illustration would be a "tri-semester." Nevertheless, there is always a possibility of a school year in some school district being divided unto some other similar unit. Therefore, the generic words "other division of the school year" must be included in the statute to cover some possibility. This is a common statutory practice.

The words "other division" do not refer to subdivisions of "term, quarter, semester" as, for example, the 9-week report card period in the instant case. Such subdivisions would be of a different class or genus from "term, quarter, semester." To construe the words "other division" otherwise, would be contrary to the rule of *ejusdem generis* that where an enumeration of specific things in a statute is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. In *Chicago and N.W.R. Co. v. Railroad Commission*, (1916) 162 Wis. 91, 93, 155 N.W. 941, the court said, and cited a number of cases for the following:

"* * * These rules require us, when we find in a statute words relating to a particular person or specific subject followed by general words, to restrain these general words to persons or subjects of the same genus or family to which the particular person or subject belongs. * * *"

It is therefore our opinion that under the facts stated, the 9-week report card period is not a "division of the school

year" within the meaning of sec. 40.77 (1) (a), and that the pupil in the assumed case would be required by such statute to attend school until the end of the semester in June.

HHP

Taxation—Motor Fuel Tax—Refunds—Under sec. 78.75 (1) (a), Stats., refund to a motor fuel wholesaler consuming its entire receipt for nonhighway use, is limited to the amount of tax it has paid thereon.

January 15, 1957.

J. JAY KELIHER,
State Auditor.

You direct attention to the fact that from an audit it appears that the refund of motor fuel taxes to each of certain airlines during the last three years has exceeded the total motor fuel taxes actually paid by them, and request an opinion as to the propriety thereof under the present statutes.

This situation arises out of the arbitrary loss allowance to wholesalers which, under the provisions of sec. 78.12 (4) (a) 2, Stats. 1955, is 1½ per cent for "evaporation and shrinkage." The comparable provision in sec. 78.04 (7) (b), Stats. 1951, was in substantially the same language and provided a 2½ per cent deduction "to cover evaporation, shrinkage and unaccounted for losses." It was the same in sec. 78.12 (4) (a) 2, Stats. 1953, except that the deduction was "to cover the cost of collection, evaporation, shrinkage and unaccounted for losses." Ch. 336, sec. 2, Laws 1955, changed it to allow only 1½ per cent and to specify that it is "to cover evaporation and shrinkage." As so amended, sec. 78.12 (4), Stats. 1955, now reads:

"(4) COMPUTATION OF TAX. Each wholesaler at the time of making his monthly report shall compute and pay to the department the full amount of the motor fuel tax for the next preceding month, which shall be computed as follows:

"(a) From the total number of gallons of motor fuel received (as defined in s. 78.07) by the wholesaler within this

state during the next preceding month shall be made the following deductions:

"1. That number of gallons of motor fuel received by the wholesaler within this state and sold, used or otherwise disposed of during the next preceding month as set forth in s. 78.01 (2) ;

"2. That number of gallons of motor fuel which is equal to one and one-half per cent of the total number of gallons received by the wholesaler within this state, less any deductions taken in s. 78.01 (2) during the next preceding month, to cover evaporation and shrinkage.

"(b) The number of gallons thus obtained shall be multiplied by six one-hundredths and the resulting figure expressed in dollars shall be the amount of the motor fuel tax for such preceding month."

Each month a wholesaler reports the total number of gallons of motor fuel received during the preceding month less the gallons exported out of the state and the gallons sold to exempt governmental agencies. Then 1½ per cent of the resultant gallonage is deducted for "evaporation and shrinkage" and a tax of 6 cents per gallon is paid on the balance. Sec. 78.75, Stats., provides that upon making and filing a claim therefor as provided therein, one who consumes motor fuel, "upon which has been paid the tax required to be paid under this chapter," for nonhighway use, "shall be reimbursed and repaid the amount of the tax so paid." Comparable provisions to sec. 78.75 (1) (a), Stats. 1955, were in secs. 78.14 (2) (a), Stats. 1951, and 78.75 (1) (a), Stats. 1953, in substantially the same language.

Sec. 78.75 (1) (a), Stats. 1955, reads, so far as here material, as follows:

"Any person who consumes motor fuel or special fuel, upon which has been paid the tax required to be paid under this chapter, for any purpose other than operating a motor vehicle upon the public highways, shall be reimbursed and repaid the amount of the tax so paid upon making and filing a duly certified claim, witnessed by 2 witnesses or acknowledged before a notary public, with the department, upon forms prescribed and furnished by it. * * *"

Where, as in the case of these airlines which consume in their airplanes the entire gallonage received, a wholesaler itself uses for nonhighway use all of the motor fuel which

it receives, claims for refund are made on the basis of the gallonage so used. However, because the stock loss from all causes is less than the arbitrary percentage deduction allowed under sec. 78.12 (4) (a) 2, the result is that the refunds total more than the actual tax the wholesaler has paid.

An example of the situation would be as follows: An airline licensed as a wholesaler, over a period of several months during the time prior to the 1955 change in the statute, received 6,000 gallons of motor fuel. In its tax reports it deducted a total of 150 gallons as the $2\frac{1}{2}$ per cent allowance, and the taxes it paid at the former rate of 4 cents per gallon on only the 5,850 gallons would total \$234. But, its actual stock loss was only 50 gallons, and therefore it consumed 5,950 gallons of the motor fuel in its airplanes. It made claims for refund on the basis of the gallonage used, which at the former rate of 4 cents on the entire 5,950 gallons would amount to \$238. However, it would have paid only \$234 taxes on that same motor fuel, and thus would receive in refund \$4 more than the taxes it actually paid thereon. If, however, the same situation occurred after the 1955 change in the statute, then in its tax reports the airline would have deducted only 90 gallons as the $1\frac{1}{2}$ per cent allowance, and paid taxes at the new rate of 6 cents per gallon on 5,910 gallons, totalling \$354.60. Its stock loss being only 50 gallons, it then consumed 5,950 gallons in its airplanes. Its refunds would be on the 5,950 gallons actually used which, at 6 cents a gallon, would total \$357. In that case, it would be refunded \$2.40 more than the taxes it actually paid on such motor fuel.

It is our opinion, considering the language of sec. 78.75 (1) (a), which says that the consumer "shall be reimbursed and repaid the amount of the tax so paid," where, as in the case of these wholesaler airlines, the amount of taxes that have been paid upon the motor fuel is ascertainable, the limit of the amount that is authorized to be refunded is the actual amount of taxes that have been paid on the motor fuel.

HHP

Civil Defense—War—Martial Law—Martial law if properly declared is a supreme law of the land and supersedes all other law.

Martial law can only be properly declared in a theater of operations.

It is doubtful if the entire United States could be considered a theater of operations, even under conditions of modern intercontinental warfare.

Under most conditions either under test exercises or under actual attack, all state and local agencies will continue to exercise their customary authority.

The powers and duties of the director of civil defense are specified in sec. 21.02 (3) (c) of the statutes.

January 18, 1957.

RALPH J. OLSON,

The Adjutant General.

You have requested my opinion as to the effect of a declaration of martial law by the president either during a national test exercise for civil defense or in the event of attack. You are particularly concerned with the effect of such a declaration upon the powers and authority of the governor and your office.

Martial law, properly speaking, can only be exercised in areas which may be considered a theater of operations and their immediate vicinity, and cannot be extended to remote areas not immediately connected with the operations of the opposing armies in actual conflict. *In re Kemp*, (1863) 16 Wis. *359; *Ex parte Milligan*, (1866) 4 Wall. 2.

In the case of *In re Kemp, supra*, our court held that during the civil war the state of Wisconsin was not a theater of operations or anywhere near such a theater, and held that a proclamation of martial law by the president confirmed by the congress was ineffective. In the case of *Ex parte Milligan, supra*, the court held that during the civil war martial law was ineffective in the state of Indiana and that military commissions established under the authority of that law could not supersede the civil tribunals.

The question arises today in view of the capabilities of the possible opponents striking anywhere on the surface of

the globe, whether the entire globe, and as far as we are concerned, the entire United States, may properly be considered a theater of operations.

In the case of *Ex parte Duncan*, (1944) 66 Fed. Supp. 976, the court held that after the initial declaration of martial law resulting from the attack on Pearl Harbor on December 7, 1941, at all times during the year 1943 and continuing down to the day of the trial, while the island was subject to possible attack by enemies at war, it was not then nor was it at the time of the hearing in imminent danger of invasion by hostile forces and was not in rebellion. The court held that the regularly constituted civil government was fully capable of operation in all its branches, and hence that martial law did not lawfully exist in the territory of Hawaii during the year 1943 and thereafter.

If this case be accepted as authority, it would appear that while the entire country may be subject to possible attack, until such attack has actually taken place the lawfully constituted civil governments are fully capable of operation, and hence a state of martial law would not exist. Accordingly, we will discuss briefly various principles that would apply during the call for a national test exercise which would be equally applicable throughout our state in the event of actual attack except in such areas as had suffered actual attack damage. The questions you have raised will be answered separately without restatement.

First, except in such areas as have suffered actual damage, local municipal officials would retain all their local authority and continue to function within their jurisdictions, subject only to the provisions of sec. 21.02 (3) (c) 3, Stats., which authorizes your office to prescribe traffic control, and in the case of a test exercise requested by you under the authority of sec. 21.02 (3) (e) 6, Stats., to take part in such test exercises under your direction.

Second, the governor would continue to exercise his full normal authority subject only to overriding federal authority in areas which have been subject to actual damage.

Third, in the case of a test exercise, the director of civil defense is limited to prescribing traffic control and requesting the participation of municipalities in test exercises. In case of an actual attack the director of civil defense in ad-

dition to his powers over traffic control would have the power provided in sec. 21.02 (3) (c) 6, Stats., which reads:

“Notwithstanding any other law, in case of attack, he may in the interests of the safety and health of the people take, use or destroy real or personal property required in the performance of his duties, and the taking of such private property pursuant to this section whether for temporary or permanent use or for destruction, shall be in the name of and payment for it shall be made in the name of the state. Whenever possible an appropriate record shall be made of such action, and a copy provided to the owner, and such record shall constitute a claim against the state.”

Fourth, when the president declares a status of martial law, if only for test purposes, it would be entirely proper for the governor to complement this proclamation with his own proclamation.

Fifth, the national guard will be operating under a letter of instructions directed through the commanding general of the Fifth Army through the governor, and it is to be assumed in all cases that the various national guard units will be mobilized at their armories to receive instructions and to carry out previously assigned missions.

Sixth, the president's powers and duties in regard to prescribing national test exercises of civil defense are described under federal law, and compliance and cooperation therewith is a responsibility of the governor.

Seventh, if the conditions should be deemed to exist under which a nationwide proclamation of martial law would be effective, the powers and duties of all state and local agencies and federal agencies would be based upon the terms of that proclamation as a supreme law of the land. It would be necessary for that declaration to be implemented by successive ordinances or regulations which would of necessity receive the approval of the commander in chief. During the existence of martial law in Hawaii under the initial proclamation by the commanding general, Lt. Gen. Walter G. Short, some 180 general orders were issued from the office of the military governor regulating the acts and affairs of the island and the management of their property in many particulars. That is, the powers and duties of all federal agencies and of state and local civil defense units will have

to be specified by federal ordinances issued under the authority of the president.

It would appear advisable for planning purposes, if it is possible, to obtain a copy of the proposed proclamation by the president, the intentions of the United States in regard to promulgating ordinances in support thereof, and to base your own plans accordingly.

RGT

Taxation—Income Tax—Apportionment of Administration Costs and Educational Aids—Base upon which the burden of the administrative costs and educational aids is to be borne in the apportionment of income taxes under sec. 71.14 (2a), Stats. 1953, does not include the taxes that resulted from the repeal of the 2 per cent discount provisions of sec. 71.10 (9) (c), Stats. 1951.

January 25, 1957.

E. C. GIESSEL, *Director,*

Department of Budget and Accounts.

By ch. 614, Laws 1953, the provisions in sec. 71.10 (9) (c), Stats. 1951, allowing a discount of 2 per cent if income taxes were paid in full by the date for filing the return, were repealed, and a new sec. 71.10 (9) (c), Stats. 1953, was re-created providing a 2 per cent penalty on the amount of the taxes not paid by the date for filing the return. This same ch. 614, Laws 1953, created two new subsections, (2a) and (10), to sec. 71.14, Stats. 1953, which so far as here material, reads as follows:

“(2a) Beginning July 1, 1954, and annually thereafter, out of the normal income tax collections of the preceding fiscal year, exclusive of the amount of such taxes as have resulted from the repeal of s. 71.10 (9) (c) of the 1951 statutes, there shall first be set aside for the state’s general fund, 14 per cent of such taxes collected from corporations and 8 per cent of such taxes collected from persons other than corporations. From the balance of such taxes there shall be set aside 80 per cent of the estimated costs to be incurred from the appropriation made by s. 20.09 (1) in-

cluding supplementary salary bonus appropriations made by the director of budget and accounts and supplementary appropriations made by the emergency board, for administering the income tax law as certified by the commissioner of taxation for the current fiscal year, and the amount of that portion of the appropriation made by s. 20.25 for the current fiscal year which is chargeable to the income tax. The estimated costs of administering the income tax law from s. 20.09 (1) shall be adjusted to actual costs on the cash basis per the records of the department of budget and accounts as of June 30 following, and such adjustments shall be reflected in the apportionment to be made August 15 pursuant to this section. The aggregate of the aforesaid amounts set aside to cover the cost of income tax administration and high school aid shall be borne by the state, the counties, and the towns, cities and villages in the proportion that the net normal income tax collections for the preceding year (after reduction by the 14 and 8 percentages) are allocated to the state and to each political subdivision pursuant to the provisions of this section. The remainder of the income tax collections shall be apportioned as follows, to wit: 40 per cent to the state, 10 per cent to the county, and the balance to the town, city or village from which the income was derived as provided in s. 71.14 (6) * * *.

“* * *

“(10) All normal income taxes collected by reason of the repeal of s. 71.10 (9) (c) of the 1951 statutes shall be retained entirely by the state.”

On July 1, 1954, the income collections (less refunds and adjustments) totaled \$118,780,612.78. Excluding therefrom the \$2,035,541.83 resulting from the repeal of the 2 per cent discount provisions in sec. 71.10 (9) (c), Stats. 1951, the result is a total of \$116,745,070.95. Subtracting from such total 14 per cent of the corporation taxes included therein and 8 per cent of the individual taxes included therein, amounting in all to \$12,154,866.16, as the teachers retirement surtax equivalent, leaves a balance of \$104,590,204.79. The 80 per cent of the costs of administration of the income tax from sec. 20.09 (1), Stats., amounted to \$972,353. The amount of the appropriation by sec. 20.25, Stats., for educational aids which is chargeable to the income tax, is \$3,500,000. These last two items total \$4,472,353.

In the August 15, 1954 certification of apportionment the department of taxation computed the proportion of the

\$4,472,353 chargeable to and deductible from the respective apportionments, by relating the same to the total of the income tax collections, the \$118,780,612.78, less only the \$12,154,866.16 of the 14 per cent and 8 per cent teachers retirement surtax equivalents. You have requested an opinion as to the correctness of this computation of the burden of such administration costs and educational aid and inquire whether the collections due to the repeal of the 2 per cent discount, which are excluded at the outset, should not have also been deducted from the base upon which the calculation was made.

The problem as to the correct method of computation arises out of the difference in language in sec. 71.14 (2a), Stats. 1953. In the beginning the language is "the normal income tax collections of the preceding fiscal year," and then further on in stating how the cost of income tax administration and high school aid shall be borne as between the state, county, and the local units, the language used is "the *net* normal income tax collections for the preceding year." In the opening language the phrase "the normal income tax collections" is followed by "exclusive of the amount of such taxes as have resulted from the repeal of s. 71.10 (9) (c) of the 1951 statutes." On the other hand, the phrase "the *net* normal income tax collections," where used later on in the section, is followed by "(after reduction by the 14 and 8 percentages)."

It is apparent that the basis of the computation by the department of taxation is that the words "net normal income tax collections" mean the same as the phrase "the normal income tax collections" as used in the beginning of the subsection. This interprets the parenthetical language to indicate how the figure to which the phrase "net normal income tax collections" refers is derived. The insertion of the parenthetical material is accordingly taken as stating that the figure to be used is the total income tax collections reduced only by the 14 and 8 percentages and by nothing more. However, the word "net" clearly implies a figure resulting after some deduction or subtraction has been made.

Obviously, the prior deduction thus implied in this use of the word "net" is not the refunds and adjustments made during the year out of the total moneys received from tax-

payers during that year. Such refunds and adjustments are basic and inherent in the figure for the "normal income tax collections." They are preliminary or accounting matters necessarily taken into account in the figure which is referred to as "the normal income tax collections" in the opening language of the subsection and is the \$118,780,612.78. Thus, the word "net" refers to some other deduction.

The parenthetical insertion immediately following is therefore equally susceptible of interpretation as specifying further deduction to be made in arriving at the figure to be used as the base for the calculation. If, instead, the provision had read "the net normal income tax collections for the preceding year (the normal income tax collections after reduction by only the 14 and 8 percentages)," then it would have been relatively clear what was intended. As the language stands, it is ambiguous and therefore must be interpreted. In doing so, effect, if possible, must be given to all parts thereof so as to harmonize them.

It is significant in endeavoring to determine the intended meaning of this provision that not only by the same chapter, but by the same section of the Laws of 1953 which created subsec. (2a), there was also created subsec. (10) of the same section, specifically stating that the normal income taxes collected by reason of the repeal of the 2 per cent discount "shall be retained *entirely* by the state." Taken together with the opening language of subsec. (2a) specifically excluding such taxes, this provision leads to an interpretation of the "net" as intended to provide that the base upon which the calculation was to be made is the total collections with the 2 per cent penalty derivative amounts excluded, and that by the parenthetical language such resultant figure is to be further reduced by the 14 and 8 percentages.

In this connection it is to be noted that the amount of taxes in the total collections which have resulted from the repeal of the 2 per cent discount provision is taken out of the total "normal income tax collections" before the 14 and 8 per cent teachers retirement surtax equivalents are computed. They are computed on the remainder after the exclusion of such taxes as result from that repeal. Furthermore, it is from the balance of the total normal income tax collections, after the exclusion of such taxes as result from the

repeal of the 2 per cent discount and the setting aside of the 14 and 8 per cent of the balance, that the administrative costs and school aids are set aside.

By virtue of the exclusion of the taxes resulting from the repeal of the 2 per cent discount provision, such taxes quite clearly would not be included in the phrase "net normal income tax collections" as used in subsec. (2a) if the parenthetical language were not in the statute. This illustrates that the word "net" was intended to refer to something other than the total normal income tax collections. It clearly means that something was taken out of the total normal income tax collections. It implies that what was taken out is something other than the 14 and 8 percentages, because they are taken out by the parenthetical insertion. Therefore, it can only mean that what was taken out are the taxes which resulted from the repeal of the 2 per cent discount provision, which are excluded at the outset by the language in the subsection. As thus viewed, the parenthetical insertion is not definitive of the phrase "net normal income tax collections," but takes what that phrase covers and then makes the further reductions of the 14 and 8 percentages therefrom. The amount of the taxes resulting from the repeal of the discount provision is thus excluded and is no part of the "net normal income tax collections" which are allocated by that section.

It is therefore our opinion that considering the use of the language "normal income tax collections" in the opening of the subsection as including all "the normal income tax collections," after all refunds and adjustments have been made, and the later use of the word "net" preceding the same phraseology, along with the fact that the taxes resulting from the 2 per cent discount repeal are taken out first and that the specific language in sec. 71.14 (10) is that the taxes resulting from the discount repeal "shall be retained entirely by the state," the taxes which resulted from the repeal of the discount provisions of sec. 71.10 (9) (c), Stats. 1951, were not included in the base upon which the burden of the administrative costs and educational aids was computable on August 15, 1954. While in no way determinative, it is to be noted that by chs. 204 and 610, Laws 1955, the

ambiguity here involved was removed by amending sec. 71.14 (2a) so as to include in the parenthesis "and the amount of taxes as have resulted from the repeal of s. 71.10 (9) (c) of the 1951 statutes."

HHP

State Radio Council—Powers and Duties—State radio council has no power to lease or make any other arrangements for the use of its facilities for private commercial purposes.

January 28, 1957.

H. B. McCARTY, *Executive Director,*
State Radio Council.

You have asked for a formal opinion on the question of whether or not the state radio council has the power to enter into a lease or other agreement with a private corporation for the installation of a community antenna system upon the receiving tower constructed and operated by the state radio council on the top of Rib mountain.

Confirming our previous informal opinion to you, the state radio council does not have any such power. The private corporation which desires an arrangement with you, which in effect would amount to a leasehold, desires to place receiving antenna upon your tower, to run coaxial cables from that tower to various receiving sets located in the city of Wausau and its environs, to make a charge for the installation to each receiving set, and at least as far as private receivers are concerned, to make a charge of some \$3.50 monthly thereafter. While the suggestion is made that this installation might be of benefit to educational institutions, the facts you submit do not indicate that such service would be offered free to educational institutions, and in any event the dominant purpose of the entire enterprise appears to be for the profit of the private corporation.

The state radio council is established by sec. 43.60, Stats. It consists of 9 members, 6 of whom are designated in the statute and 3 citizen members to be appointed by the gov-

error. While it is an official agency of the state, it is not designated as a body corporate and it does not have the power to sue or be sued in its own name. The powers of the state radio council are set forth in sec. 43.60 (4), Stats. The powers as set forth do not contain any specific reference to any power to deal in real estate, nor do those statutes contain any specific power to own and hold real estate. While it is clear that the council has the power to plan, construct, and develop radio broadcasting facilities, it would appear that it must acquire the land for such facilities by agreement with other state agencies. The land on which the tower on Rib mountain is located is owned by the conservation commission, and the state radio council occupies such land by an agreement in the nature of a lease. The plan of operation of the private corporation which desires to install its equipment upon your tower contemplates a permanent installation, the cost of which could only be amortized over a period of years and which would be of no value to the corporation unless it could be assured of a tenure sufficiently long to recover its costs.

There is no provision in sec. 43.60 (4) which by any stretch of the imagination could be construed to authorize your council to enter into such a permanent arrangement which for all purposes and effects would be a lease. Further there is no authority, express or implied, to make any agreement or arrangement for the use of any property under your control for private purposes, except in the provisions of sec. 43.60 (4) (h) when such agreement would further your research and experimentation in *educational* television.

The law is well established in this state that administrative agencies have such powers and only such powers as may be found within the four corners of the statutes creating the agencies or may be reasonably implied therefrom. *American Brass Company v. Board of Health*, (1944) 245 Wis. 440, 15 N.W. 2d 27; *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 11 N.W. 2d 348; *Spaulding v. Wood County*, (1935) 218 Wis. 224, 260 N.W. 473.

Accordingly it is my opinion that you have no statutory power to enter into the proposed arrangement.

RGT

Insane—Criminal—Transfer to Family Boarding Home
—Sec. 51.18, Stats., is not applicable to patients held at central state hospital pursuant to sec. 51.21 (3) (a), 957.11, and 957.13, Stats.

January 28, 1957.

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

You request my opinion as to whether or not patients committed to central state hospital pursuant to secs. 957.11 or 957.13 or transferred there pursuant to sec. 51.21 (3), Stats., or other patients at such hospital may be placed in boarding homes pursuant to sec. 51.18, Stats.

Sec. 51.18 provides:

“51.18 The department may place any state hospital or colony patient in a suitable family boarding home upon such terms and conditions as it determines, if it considers that such course would benefit the patient. The cost to the state of the supervision and maintenance of any patient so boarded out shall not exceed the average per capita cost of his maintenance in the state hospital or colony. Bills for his board shall be payable monthly out of the operating funds of such state hospital or colony and shall be audited as are other bills. The county of his legal settlement shall be charged with the rates and expenses provided under s. 51.08 and such charges shall be adjusted in the same manner as if the patient were at the hospital or colony. The department may visit and investigate such home and may return the patient to the hospital or colony or place him in another home when deemed advisable. Such placement shall not be considered a conditional release or temporary discharge.”

The words “any state hospital” are broad enough to cover central state hospital, and I find no reason for excluding that hospital from the provisions of the section. Consequently, patients at the hospital may be placed in boarding homes pursuant to sec. 51.18. However, persons held at central state hospital under provisions of the criminal law may, as you suggest, be subject to additional restrictions not applicable to other patients there.

Sec. 51.21 (3), Stats., provides for the transfer of any male prisoner at any of several penal institutions to cen-

tral state hospital under certain conditions. The subsection refers to prisoners, rather than patients, except that par. (f) provides:

“(f) Should the prisoner remain at the hospital after expiration of his term he shall be subject to the same laws as any other patient.”

This language clearly infers that until the expiration of his term he is not subject to the same laws as other patients, and for a very good reason. During the term of his sentence such a person is a prisoner as well as a mental patient; and if he recovers from his mental illness before his term expires, he must, under par. (e), be returned to prison.

While sec. 51.21 (4) provides that all statutes—with certain exceptions not including sec. 51.21 (3)—relating to state hospitals are applicable to central state hospital, this is a statute of general application and, as such, cannot be held to override the limitations expressed in subsec. (3).

Sec. 51.21 (3) (b) provides that the superintendent of central state hospital shall, before the prisoner's sentence expires, apply to the county court for an inquiry as to the prisoner's mental condition. If he is found not mentally ill, the court may dismiss the application and order him returned to the institution from which he was transferred. Par. (d) provides that if he is found mentally ill, the superintendent “shall retain him until he is legally discharged or removed.” Par. (e) provides for re-examination and requires that a prisoner found not mentally ill upon re-examination shall be returned to prison if his term has not expired. The paragraph further provides: “The time spent at the central state hospital * * * shall be included as part of the sentence already served.”

Thus subsec. (3) of sec. 51.21 sets forth particular requirements for the handling of inmates at central state hospital who have been transferred there from penal institutions. Those requirements clearly do not contemplate that such an inmate should be placed in a family boarding home. On the contrary, he is, by sec. 51.21 (3) (b), (d), and (e), to be returned to the institution from which transferred or retained at central state hospital until his sentence has expired. Not until the expiration of his term can he become a

patient subject to the same laws as any other patient, under par. (f).

The only exception would be the transfer of a prisoner pursuant to sec. 51.125, and then the transfer would have to be to *another institution*, rather than to a family boarding home. The effect of sec. 51.125 was discussed in an opinion addressed to you under date of November 23, 1956, 45 O.A.G. 273. Of course, the fact that a prisoner may be transferred from central state hospital to another institution does not mean that he then becomes eligible for family care under sec. 51.18.

Sec. 957.11, Stats., provides for the commitment to central state hospital of a defendant in a criminal trial who has been found not guilty because of insanity or feeble-mindedness. Subsec. (3) provides that such a defendant is "there to be detained until discharged in accordance with law." The quoted language is clear and unambiguous, and again, the only exception to the requirement that the prisoner be detained at central state hospital is the case of a transfer pursuant to sec. 51.125.

Sec. 957.13 (2), Stats., provides for confining in central state hospital or in an institution designated by your department defendants found to be insane or feeble-minded at or before trial or after conviction and before commitment. Upon the defendant's recovery he is remanded to the custody of the sheriff pending further proceedings in the criminal action. In 1947 this section was numbered 357.13 and subsec. (4) contained the following provision:

"* * * but no such person shall be removed or discharged from said hospital or home except upon the order of the court having jurisdiction over such person for trial, sentence or commitment."

The word "home" in the above quoted language referred to the home for feeble-minded or other institution to which the person had been committed. The statute formerly provided for commitment to central state hospital or the home for feeble-minded. Sec. 4700, Stats. 1919. When the statute was amended by inserting in subsec. (2) "institution to be designated by the board of control" in lieu of the word "home," the corresponding change was not made in subsec.

(4). See ch. 81, Laws 1927. Thus, until 1949, the statute expressly prohibited the removal of such a person from the institution to which he had been committed "except upon the order of the court having jurisdiction over such person for trial, sentence or commitment."

In 1949, sec. 357.13 was amended by a revision bill, ch. 631, sec. 130, and the words "removed or," were deleted from subsec. (4). That revision bill was the result of a prolonged study by the statutory advisory committee on rules of pleading, practice and procedure, and the committee's only comment upon subsec. (4) was that it was amended to conform the procedure on rehearing as to sanity to the procedure in cases arising under ch. 51. The committee kept voluminous notes of its meetings over the years, but a study of those notes and the earliest drafts of the revision bill has shed no light upon the reason for deleting the word "removed." Absent any such reason, it is at least open to question that the legislature intended to amend the statute so as to allow your department to place in a boarding home a defendant who is charged with a felony but whose trial is postponed while he is confined in central state hospital because of insanity at the time of trial.

Sec. 957.13 (4), as revised, retains in the committing court the power to determine the sanity of the prisoner and limits to that court the power to discharge him. Sec. 51.13 (2) makes necessary the approval of the committing court before a person committed under sec. 957.13 to a county hospital may receive a conditional release. Sec. 51.21 (6), providing for the parole of a prisoner committed to central state hospital under sec. 957.13, gives to the committing court a veto power over any such parole. Sec. 51.12 (3) makes it mandatory for the department to obtain approval of the committing court before transferring to a county hospital a prisoner committed to central state hospital under sec. 957.13. These provisions all are consistent with the long-standing policy of preserving to the committing court considerable control over the criminal insane. See 21 O.A.G. 902, 27 O.A.G. 229, 28 O.A.G. 193, 35 O.A.G. 322, and 37 O.A.G. 531. But these provisions are not consistent with a construction of secs. 957.13 (4) and 51.18 which would leave to the committing court no authority to prevent a per-

son awaiting trial for a major felony from being placed in a family boarding home.

The court has said that a statute "is to be construed with reference to the general system of laws of which it forms a part, and must therefore be interpreted in the light of the customary or unwritten law, of other statutes on the same subject, and of the decisions of the courts." *State ex rel. Time Ins. Co. v. Superior Court*, (1922) 176 Wis. 269, 274, 186 N.W. 748.

Another principle of statutory construction was stated in *Carchidi v. State*, (1925) 187 Wis. 438, 443, 204 N.W. 473, as follows:

"* * * A statute should not be construed so as to work an absurd result, and when it may be so construed ambiguity results, and justifies the invoking of principles of statutory construction to avert such a result."

In my opinion, these two principles are applicable to the proper construction of sec. 957.13 and the various provisions of ch. 51 discussed above. Although there is no express language in the statutes prohibiting placing in a family boarding home a prisoner who has been committed to central state hospital under sec. 957.13, to construe the statutes to permit such a placement would work an absurd result in light of numerous other statutory provisions specifically designed to insure that such a prisoner be confined in an institution unless and until the committing court assents to his parole, conditional release, or discharge. You are therefore advised that prisoners committed to central state hospital under sec. 957.13 may not be placed in a family boarding home.

EWV

Municipalities—Annexations and Consolidations—Elections—Polling Places—Voters residing in the areas sought to be annexed to the village of Brown Deer in March and April of 1956 should vote at the polling place established for the village of Brown Deer.

Voters residing in the area of the balance of the town of Granville sought to be consolidated with the city of Milwaukee by the vote of April 3, 1956, should vote at the proper polling places established in the town by the city of Milwaukee.

January 31, 1957.

ROBERT C. ZIMMERMAN,
Secretary of State.

You have informed me that the area of the former town of Granville in Milwaukee county has been broken up as a result of some four annexations to the village of Brown Deer which were initiated in March and April of 1956, and a consolidation of the town of Granville with the city of Milwaukee which was approved by vote of the two communities on April 3, 1956, and have requested my opinion as to which community should control the voting rights in the various areas.

The status of the former town of Granville which arises out of the annexations and consolidations is discussed in the case of *Village of Brown Deer v. Milwaukee*, (1956) 274 Wis. 50. The supreme court held on various demurrers to the pleadings that the annexations to the village of Brown Deer were presumptively valid, and further that the fact that such annexations had been made did not necessarily invalidate the consolidation proceedings of the remainder of the town of Granville and the city of Milwaukee. However, Milwaukee was given the right to plead over after demurring and to challenge the annexations on technical grounds.

Under the circumstances it would appear that elections in the town of Granville other than the annexed areas should be subject to supervision by the city of Milwaukee and the election in the annexed areas should be subject to the supervision of Brown Deer.

Since under the provisions of sec. 6.04 (1) and (2), Stats., the place of holding an election must be established at least 4 months prior to the election, it would appear that in the consolidated area in the town of Granville votes should be cast at the polling places previously established by the city of Milwaukee, and voters in the annexed areas should vote at the official polling place for the village of Brown Deer.

RGT

Harbors—Board of Harbor Commissioners—Powers and Duties—A board of harbor commissioners once duly established by a county or city pursuant to the provisions of sec. 30.085 (1), Stats., is the exclusive agent of the county or city for maintaining charge and control over the harbor.

The ultimate control of the harbor is vested in the common council of the city or county board of the county concerned.

February 5, 1957.

EARL SACHSE, *Executive Secretary,*
Legislative Council.

You have transmitted to me the request of the legislative council for my opinion as to the relation between, and respective powers of, the board of harbor commissioners which may be established in any city or in any county except Milwaukee county pursuant to the provisions of sec. 30.085, Stats., and the common council or the county board of the city or county which establishes such board of harbor commissioners.

The specific statute which gives rise to your question is sec. 30.085 (7), which reads in part:

“EXCLUSIVE CONTROL OF ALL HARBOR FACILITIES. Said board shall have exclusive charge and control over such docks, wharves, warehouses, piers, slips, basins or other structures and harbor facilities and waterways adjacent thereto and all railway tracks and belt railways connecting with them, belonging to such city or county, and also of the building, alteration, repair, operation and maintenance of the same and all the cleaning, grading, dredging and deepening in and about the same. * * *”

While it is a possible interpretation of this provision standing alone that certain jurisdiction is vested in the board of harbor commissioners free and clear of any other governing body, it is my opinion that the quoted provision properly construed only establishes the board of harbor commissioners as the agency of the city council or county board to carry out plans and projects which have been approved by such body, and also subject to the authority of the appropriate council or board to adopt ordinances for the government of the board or harbor in question.

This conclusion is supported by various other provisions of the statutes to which I will now refer.

First, under sec. 30.085 (4), Stats., the board of harbor commissioners is given power to call for assistance upon any other department of the city or county in which it operates. However, if any differences arise between the harbor board and other governmental departments as to whether the request of the harbor board is proper, the ruling of the common council or county board shall be final.

Second, while under sec. 30.085 (5), Stats., the board is given the general power to make plans for the improvement of the harbor, such plans cannot be carried out until they have been submitted to the common council or county board for approval or modification, and only after the common council or county board has approved such plans may the board proceed to carry them out.

Third, under sec. 30.085 (8), Stats., the harbor board is given general power to fix the tolls and charges for the use of harbor facilities "subject, however, to the prior approval of the same by the common council of such city or county board of such county." This section of the statutes is a clear declaration that the final power to approve tolls and charges is vested in the ultimate governing body and not in the harbor board.

Finally, under sec. 30.085 (11), Stats., the common council or county board is given extensive power to adopt ordinances on the following subjects: (1) To preserve peace and good order in the harbor and on all property under the control of the harbor board; (2) to prevent any use of said harbor detrimental to the public health; (3) to prohibit any

act which would pollute the waters of the harbor; (4) to prevent and remove all obstructions within the harbor; (5) to regulate water traffic, including speed of entering and leaving the harbor, passing bridges, of coming to and departing from the various wharves and docks; and (6) to regulate the location of vessels, changes of stations, and the use of the harbor to promote the safety and equal convenience of all vessels and watercraft.

It is true that under sec. 30.085 (11) (c), Stats., the council or county board cannot establish a dock line without the prior approval of the harbor board, but in the many respects enumerated above the council has statutory authority to regulate the harbor by ordinance.

In view of the foregoing it would appear that as a general proposition ultimate control is vested in the common council or county board, provided only that the board of harbor commissioners is the exclusive agent of the ultimate governing body for the purpose of carrying out and executing its plans in accordance with the provisions of sec. 30.085 (7).

RGT

*Automobiles and Motor Vehicles—Farm Trucks—*Question of whether a given truck is being used primarily for farm purposes under sec. 85.10 (5a), Stats., is one of fact. Indicia for determining fact discussed.

February 20, 1957.

MELVIN LARSON, *Commissioner,*
Motor Vehicle Department.

You have asked whether a dairy farmer who distributes his milk to his customers may also carry cottage cheese, orange drink, and chocolate milk drink not produced on his farm on a truck registered as a farm truck. You state a feeling that in the specific situation to which your request refers there are enough non-farm commodities carried to render the use improper on a farm truck registration. You do

not, however, state the amount of non-farm commodities carried.

The question of whether a truck is being used primarily for the purposes set down in the section defining farm trucks, sec. 85.10 (5a), Stats., is one of fact. Though we are not in a position to resolve questions of fact in individual cases, we feel it will be of aid if we set down here certain principles which we deem applicable in the resolution of fact situations of the kind you have here presented.

The former wording of sec. 85.10 (5a) required that a truck be used exclusively for the farm purposes enumerated therein. In 1953 the word "primarily" was substituted by the legislature for "exclusively." Webster, in defining "primarily," uses the words "pre-eminently" and "fundamentally" and defines the adjective "primary," from which the adverb is derived, as meaning "first in dignity or importance; chief; principal." Thus under the present statute a farm truck may be used for purposes other than the enumerated farm purposes so long as it is used chiefly or more importantly for farm purposes; and the criteria, then, are the extent and the importance of the non-farm uses.

A truck which is used as extensively for non-farm purposes as for farm purposes cannot be said to be used primarily for farm purposes. Extent of use is factual and is readily determinable. Extent of use, however, is not a sole guide. It is conceivable that a vehicle may be used less extensively though more importantly for non-farm than for farm purposes.

The question of primary importance is, again, one of fact. Useful indicia for determining the relative importance of the non-farm use are the volume of the load and the value of the various uses. Where the volume of the non-farm commodities carried causes the licensee to use a truck of greater size or different style than would be employed solely for farm purposes, an inference is raised that the use of the truck for farm purposes is not primary to the owner but rather that the use which dictates the size or style of the vehicle is primary or co-ordinate to the use for farm purposes. Likewise where the hauling of non-farm commodities is of equal value in terms of profits derived therefrom, the

inference is that such use is primary or co-ordinate to the use of the truck for farm purposes.

We trust that the application of the foregoing discussion to the facts in your possession will enable you to determine the factual question presented.

MJW

Child Protection—Adoption—Termination of Parental Rights—Discussion of grounds for termination of parental rights under sec. 48.40, Stats.

February 26, 1957.

R. R. ROGGENSACK,
District Attorney,
Grant County.

Your inquiry deals with the problem of how to clear the way for adoption of a child whose custody has been temporarily transferred from his parents on grounds of neglect or dependency, and who has been placed in a foster home. Your question presupposes that the situation which led to the finding of dependency or neglect continues, so that the child cannot be restored to the parents, and that the parents refuse to consent to adoption.

You describe the facts of the specific case which led to your inquiry as follows:

“Mother petitioned Grant County Juvenile Court on June 29, 1953 alleging that her illegitimate child was dependent in that at that time she was unable to support and care for him. The court committed him to the county welfare department on July 15, 1953 for placement in a suitable foster home until further order of the court. He was just one year of age at that time. Since then his mother has visited him exactly eight times, has seldom sent letters, cards, or presents which would evince a normal maternal interest, has provided only \$45.00 for his support, although no order for support was ever made. She moves frequently, is unable to hold steady employment, and is not presently ready or able to provide the child with an acceptable home in which to live. She has a two year old baby girl in her custody and is

receiving ADC. She is not employed at present. The welfare department strongly recommends that her son be adopted before he gets much older, but she refuses to consent."

You have indicated that neither par. (c) or (d) of sec. 48.40 (2), Stats., prescribing grounds for termination of parental rights, is applicable. Par. (c) is inapplicable in the case you report, presumably, because the mother is not "financially able" to provide support. You inquire:

"I would like a formal opinion on the following: Does the failure of a parent to provide an acceptable home for his child within three and one-half years after it has been temporarily placed in a foster home by the juvenile court constitute a substantial and continuous refusal to give the minor necessary parental care and protection as contemplated by sec. 48.40 (2) (b)?"

Sec. 48.40 (2) (b) prescribes as a ground for terminating parental rights the situation where the parents have "substantially and continuously or repeatedly refused to give the minor necessary parental care and protection."

What constitutes a situation such as is defined by statute to be ground for termination of parental rights involves a finding of fact, which is the function of the juvenile court having jurisdiction under sec. 48.13, Stats. Since there is room for variance in the inferences to be drawn from evidence presented in a given case, so that it is conceivable that different courts might arrive at different results, I cannot anticipate or usurp the functions of the proper court by giving you a categorical answer.

The most that can be done on the basis of analysis of statutes and judicial decisions is to give the opinion that a court *could* so exercise its jurisdiction and discretion, on the basis of a situation such as you describe, as to adjudicate a termination of parental rights.

The most nearly apposite case I have examined is *In re Aaronson*, (1955) 269 Wis. 460, 69 N.W. 2d 470. In that case, the supreme court announced that it had "no hesitancy in concluding that the trial court's termination of the parental rights" of the mother of an illegitimate child "was proper" (loc. cit. 269 Wis. 471) on the basis of a find-

ing that the child had been "neglected by" the mother (loc. cit. 269 Wis. 462).

In that case the mother had left the child in the home of the man who admitted being the natural father, to be cared for by the mother of the latter for a period of years. The situation differed from the one you describe in that the persons having custody of the child were also found to have neglected it, so that the child was removed from their home to a foster home. The mother of the child participated throughout the proceedings to oppose termination of her parental rights. The finding of neglect on which termination of parental rights was based included the period while the child was in a foster home.

The foregoing case was decided under sec. 48.07 (7), Stats. 1953, which specified the following as grounds for termination of parental rights:

"That the parents have abandoned such child or have substantially and continuously or repeatedly refused or being financially able have neglected to give such child parental care and protection;"

The law was amended by ch. 575, Laws 1955, recodifying the Children's Code, so as to divide the foregoing provision and to renumber it as sec. 48.40 (2) (b) and (c). Such change, however, was apparently not intended to narrow the grounds for termination of parental rights. The comments of the child welfare committee of the legislative council, appended to Bill 444, S., from which the present Children's Code was enacted, said of sec. 48.40 (2):

"Sub. (2) covers the grounds for terminating parental rights because of the unfitness of the parent. The first 4 paragraphs are substantial restatements of the present law.
* * *"

It was, therefore, apparently intended by the legislature to reenact the law as interpreted in *In re Aaronson, supra*.

If it were not for that circumstance, it might well be argued that neglect to provide financial support, in order to furnish grounds for termination of parental rights under sec. 48.40 (2) (c), must be coupled with financial ability; and that failure to give "parental care and protection,"

which constitutes grounds under sec. 48.40 (2) (b), must be something more than mere neglect, because of the use of the term "refused" in contrast to the term "neglected."

As will be observed from the number of cases dealing with the meaning of the term "refusal," cited in Words and Phrases, the term has some flexibility.

As used in sec. 48.40 (2) (b), I believe it was intended to be broad enough to cover the deliberate failure of a mother to meet the demands ordinarily required by society as an incident of parenthood. Such an interpretation would seem to be fortified by legislative reenactment of the provision so shortly after the decision in *In re Aaronson, supra*, in which the court pointed out that the best interests of the child are the paramount consideration.

BL

Public Welfare Department—Civil Defense—Charitable and Penal Institutions—Evacuation of Inmates upon Attack—The department of public welfare's responsibility for mass evacuation under sec. 46.03 (16), Stats., includes only such institutions as are mentioned in sec. 46.03 (1), Stats.

March 13, 1957.

RALPH J. OLSON,
The Adjutant General.

The evacuation responsibilities of the department of public welfare, in the event of enemy attack, are set forth in sec. 46.03 (16), Stats., as follows:

"EVACUATION UPON ATTACK. Plan and provide for the evacuation of inmates of charitable and penal institutions in the case of mass evacuation due to enemy attack and for the mass care of evacuees in public and private facilities and for payment for the use of facilities and supplies."

You have inquired as to the meaning of the phrase "charitable institutions" as used in this statute.

It is my opinion that the institutions referred to in this section of the statutes are the charitable and penal institu-

tions listed in sec. 46.03 (1). This portion of the statutes lists the establishments which are under the direct jurisdiction of the department of public welfare.

“INSTITUTIONS GOVERNED. Maintain and govern the Mendota and the Winnebago state hospitals, the central state hospital, the Wisconsin state prison, the Wisconsin state reformatory, the Wisconsin home for women, the Wisconsin school for boys, the Wisconsin school for girls, the Wisconsin workshop for the blind, the Wisconsin child center, the northern, central and southern colonies and training schools and the diagnostic center.”

The legislative history might justify a broader interpretation under which all publicly supported institutions would be included, or possibly all charitable institutions, whether publicly or privately supported. The first three drafts of the bill which was introduced into the 1955 session of the legislature specifically refer to “state, county and local” institutions. Had this terminology been retained in the bill as it was finally passed, it would appear clear that the department was intended to control all institutions which are governed by public employes and supported by tax monies. When the language “state, county and local” was stricken there is no evidence to indicate whether the legislative intent was to broaden or restrict the statute. As originally drafted, the bill was to be a part of ch. 21, Stats., and we cannot overlook the fact that the statute as finally adopted was consciously made a part of sec. 46.03, which already contained its own definition of the institutions controlled by the department of public welfare.

In view of the foregoing, while the responsibility of the department of public welfare for agencies other than those named in 46.03 (1) is not clear, no practical problem should arise, since one of the basic concepts of the civil defense plan for our state is the utilization of existing governmental agencies and facilities for emergency service in the event of enemy attack. Sec. 21.02 (3) (f), Stats., provides as follows:

“*Utilization of existing services and facilities.* In carrying out their functions under this section, the state and each political subdivision of the state shall utilize, so far as possible, the services, equipment, supplies and facilities of ex-

isting agencies of the state and of the political subdivisions thereof. All such agencies and the personnel thereof shall co-operate and extend such services, equipment, supplies and facilities as are required of them."

Further, we are informed that the director of the department of public welfare is also a co-director of civil defense and hence there should be no difficulty in having the department of public welfare assist in the preparation of plans, to be approved by the state director of civil defense, for the mass evacuation of inmates of all institutions and for carrying out such evacuation by the appropriate local agency.

SGH

JDW

Highways and Bridges—Expressways—Federal Funds—
The Milwaukee county expressway commission's expenditures for relocation of utilities under sec. 59.965 (5) (g) and (h), Stats., are expenditures for which participation in federal funds is permitted but not required. However, sec. 84.29, Stats., imposes a duty on the state highway commission to secure all advantages to the state and municipalities along the interstate system of highways, thereby imposing a duty to make the federal funds available to the Milwaukee county expressway commission for expressways on the interstate system.

March 13, 1957.

C. STANLEY PERRY,
Corporation Counsel,
Milwaukee County.

You have requested an opinion on the following question: Is the county of Milwaukee, acting by its county expressway commission, entitled to participation in such federal funds as may be allocated to the state of Wisconsin pursuant to federal Public Law 627, 84th congress, commonly referred to as the Federal-Aid Highway Act of 1956, to the extent that the county is required to pay to private

or municipal utilities for the costs of relocation of such facilities made necessary by the construction of expressways within Milwaukee county either forming a part of the so-called national system of interstate and defense highways, sometimes referred to as the "I" system, or where such expressways are eligible for and will receive federal secondary highway aid.

The law is well established that where a utility company (either privately or municipally owned) has a private easement, any disturbance of that easement is a taking of property in the constitutional sense and damages are compensable. Therefore, I am assuming that your question refers to utilities that are located within the present highway right-of-way by permission of the state or local government, thereby creating a tenancy at will or by sufferance.

The courts have uniformly reasoned that since the use of the highways is primarily designed for the traveling public, since the location of utility facilities therein is secondary and subordinate and entitles the utility to no specific position therein, and since rights in the highways are subject to the exercise of the police power of the state and its agencies, the utilities are required to bear the cost of any relocation necessary for the public welfare. The requisite relocation constitutes an uncompensable obedience to a reasonable police regulation even though the utility is there with the permission of the state or local unit of government.

It is clearly established that in absence of a statutory provision, relocations of utility facilities necessitated by an improvement are non-compensable items when no private easement exists. We must therefore look to the statutes. There is no Wisconsin statute that requires the state of Wisconsin to pay for the cost of relocation of utility facilities. However, sec. 59.965 (5) (g) requires expressway commissions in any county having a population of 500,000 or more to pay 100 per cent of the relocation costs of all municipal utility services by reason of the construction of an expressway project, and sec. 59.965 (5) (h) requires payment of $66\frac{2}{3}$ per cent of the cost of relocating private utility facilities.

It is necessary to look into the relationship between the federal and state governments to determine whether the

nature of the federal-aid highway program compels any legal conclusions different from that reached under the common law of the states. The matter was discussed in the cases of *Southern Bell Tel. & Tel. Co. v. Florida ex rel. Ervin*, (1954) (Florida), 75 So. 2d 796, and *Southern Bell Tel. & Tel. Co. v. Commonwealth*, (1954) (Kentucky), 266 S.W. 2d 308. The courts held that the states did not become the agents of the federal government. The legislation merely recognizes a national interest in improving highways and provides for a measure of aid for such improvement but does not take away or attempt to assume power and control over the highways. In the case of *Whitney v. Fife*, (1937) 270 Ky. 434, 109 S.W. 2d 832, 834, the court said:

“* * * The fact that the United States contributes to or assists states in the building of roads does not take from or limit the state in the exercise of its police power or other right to control and regulate the use of its roads when used for commercial purposes. * * *”

In the case of *State ex rel. Daniel v. John P. Nutt Co.*, (1935) 180 S.C. 19, 185 S.E. 25, the court said:

“The police power of the State concerning its highways has not been impaired by the federal aid statutes. The state may prescribe regulations adapted to conserve its highways as to cost of construction and maintenance * * *”

It appears from the above discussion that the federal aid legislation in no way affects the law of the state on this question but merely provides under what circumstances and conditions federal aid will be provided.

Section 111 of Public Law 627 relating to federal aid, 23 U.S.C.A. §162, provides:

“(a) Availability of Federal Funds for Reimbursement to State.—Subject to the conditions contained in this section, whenever a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project: *Provided*, That Federal funds shall not be apportioned to the States under this section

when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State."

It is my opinion that this section provides that federal funds will be available for all costs that the state is legally obligated to pay by common law, statute, or contract. However, if there is a contract that would provide that as part of the permission to occupy the right-of-way the utility will relocate its facilities at its own expense, federal aid would not be available; nor would it be available to pay the costs the state was not legally obligated to pay.

The public roads administration has published "General Administrative Memorandum No. 300," dated May 1, 1946, subject: Reimbursement of Costs of Changes to Utility Facilities. This is the latest administrative memorandum covering utility relocation. The memorandum you cite in your letter (21-4.1 dated December 31, 1956) applies only to right-of-way costs. The bureau of public roads has never considered utility relocation as part of right-of-way, and administratively has never considered that the right-of-way policies and procedures covered utility relocations. Memorandum No. 300 reads in part:

"PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS OCCUPANCY

"B. Where a utility occupies public rights-of-way and public lands pursuant to law, ordinance, franchise, easement, grant or otherwise, the State shall make a formal finding as to the extent that such utility company is obligated, or is relieved of the obligation, by law or otherwise to move or to change its facilities at its own expense. Where a utility company occupies public rights-of-way under a grant or otherwise from a municipality or other subdivision of a State which obligates the utility company, or pursuant to which the utility company may be required, to move or to change its facilities at its own expense, approval of the project will be contingent upon the municipality or other subdivision of the State exercising its right to require the removal or change of such facilities at the expense of the utility company. Where the law or the terms and conditions under which a utility occupies public rights-of-way do not specify who shall pay the costs of the change or removal, the State shall make a formal finding as to the extent the utility company is relieved or is required to move or to change its facilities at its own expense in accordance with

the applicable precedent established by courts. If the State should determine in conformity herewith that a utility company is not under obligation, and may not be required to move or to change its facilities at its own expense, reimbursement may be made in an amount not exceeding the regular Federal pro rata share applicable in such State of the cost of such work actually paid by the State or its subdivisions, and where no part of such cost is paid by the State or its subdivisions there will be no Federal reimbursement."

The bureau of public roads in Memorandum No. 300 has interpreted the word "State" to mean the state and any of its political subdivisions. In view of this memorandum, expenditures for utility relocations under sec. 59.965 (5) (g) and (h), are eligible for federal aid, providing the highway commission of the state of Wisconsin programs the expenditure, since it handles all federal highway aid that comes into the state.

Federal aid allotted the various states is different for the interstate system than it is for primary and secondary roads and urban extensions thereof. In the case of federal aid for the primary and secondary roads and urban extensions thereof, the state of Wisconsin is allowed an allotment of funds on a quota basis that has no relationship to the projects undertaken other than that the aid for a given project cannot exceed a certain percentage of the total cost of that project. The aid is a fixed amount to cover all highway expenditures in the entire state; and if the funds are used on one project, they are not available for another. On the interstate system, the allotments for the years 1957, 1958, and 1959 will be on a quota basis, but the appropriations from 1960 through 1969 will be apportioned on the basis of the estimated cost of completing the interstate system in each state. Therefore, from the point of view of the state of Wisconsin, any funds expended for utility relocation on other than the interstate system must come from the fixed quota of federal aid available to the state and will decrease the funds available for highway purposes. In the case of the interstate system, any expenditure for utility relocations will be included in the estimated cost of completing the system and will increase the amount of federal aid available to the state.

Sec. 84.29, Wis. Stats., was enacted to provide for the interstate system of highways and it reads in part as follows:

“(1) HIGHWAY COMMISSION TO CO-OPERATE WITH FEDERAL AGENCIES. The legislature of the state of Wisconsin hereby declares that the intent of this section is to assent to acts of the United States congress heretofore and hereafter enacted, authorizing development of the national system of interstate highways located wholly or partly within the state of Wisconsin to the full extent that it is necessary or desirable to secure any benefits under such acts and to authorize the appropriate state boards, commissions, departments, and the governing bodies of counties, cities, towns and villages, and especially the state highway commission, to cooperate in the planning, development and construction of the national system of interstate highways that may be proposed for development in Wisconsin, with any agency or department of the government of the United States in which is vested the necessary authority to construct or otherwise develop or aid in the development of such system. Whenever authority shall exist for the planning and development of a national system of interstate highways of which any portion shall be located in this state, it shall be the duty of the highway commission to make such investigations and studies in co-operation with the appropriate federal agency, and such state boards, commissions, departments and municipalities as shall have interest in such system development, to the extent that shall be desirable and necessary to provide that the state shall secure all advantages that may accrue through such interstate system development and that the interest of municipalities along such system shall be conserved.”

Under sec. 84.29, the state highway commission has the duty to see that the state secures all advantages that may accrue to the state and to conserve the interest of the municipalities along the system. Assuming that the advantages to the state include the financial advantages and the interest of the municipality includes the financial interests, the highway commission has the duty to see that the state receives all the federal aid available, and to see that the municipality is reimbursed for all the expenditures that the federal bureau of public roads will participate in.

Since the county of Milwaukee acting by its expressway commission is required under sec. 59.965, Stats., to pay the cost of the relocation of utilities, the highway commission

has the duty to program the expenditure for federal participation and to enter into a contract with the expressway commission under sec. 59.965 (5) (e) to disburse to the expressway commission the federal aid that is made available for the utility relocations. The highway commission, however, has no authority to contract state funds or to contract in such a manner that state funds would have to be expended in case the federal aid were not available.

This brings us to the second part of your question, and that is whether Milwaukee county acting by its expressway commission is entitled to reimbursement on those projects that are not on the interstate system but where federal aid is used to build the highway.

While the expenditures made according to sec. 59.965 (5) (g) and (h) are eligible for federal aid, I find nothing in the statutes that requires the highway commission of the state of Wisconsin to make federal funds available for any specific project or for any specific expenditure on the primary and secondary roads or urban extensions thereof. Sec. 84.01 (4) reads:

“(4) POWERS AND DUTIES; GENERAL PROVISION. The commission shall have charge of all matters pertaining to the expenditure of state and federal aid for the improvement of highways, and shall do all things necessary and expedient in the exercise of such supervision.”

It is my opinion that the highway commission has discretion to program projects under sec. 84.015, sec. 84.03, and sec. 84.06, Stats., that in their judgment will best serve the interests of the state of Wisconsin. The commission also has authority to decide to what extent federal aid will be used to construct a given project or what expenditures will be made participating. The federal act makes various items permissive for federal aid reimbursement, but does not require that they be included in the costs the commission programs. As an example, the commission may decide to acquire right-of-way with state and local funds, and program only the cost of the construction of the highway for federal aid.

Since the allotment of federal aid for other than the interstate system is a fixed sum for any and all highway pro-

jects within the state, the commission is in no way jeopardizing the amount of federal aid available to the state for highway purposes by not including the utility relocations for federal participation even though the costs are eligible for participation.

AJF

University—Appropriations and Expenditures—Constitutional Law—State—Public Debt—No violation of art. VIII, secs. 3 and 4, Wis. Const., relating to loaning the credit of the state or state indebtedness, or of other constitutional provisions, is involved in statutory provisions designed to permit the use of revolving funds such as student fees at the university and state colleges for rental of classroom facilities constructed by a nonprofit corporation on lands belonging to the state pursuant to a lease from the state to such corporation and a sublease back to the state at a rent sufficient to enable such corporation to retire the indebtedness it incurs in constructing the building.

March 13, 1957.

HONORABLE VERNON W. THOMSON,
Governor.

You have inquired whether it is constitutionally permissible to finance the construction of needed classroom buildings at the university and at the various state colleges out of revenues derived from student fees, assuming that the necessary enabling legislation is enacted.

The answer is, "Yes."

The principles applicable to the answer of this question were before the supreme court of Wisconsin in the case of *State ex rel. Thomson v. Giessel*, (1955) 271 Wis. 15, 72 N.W. 2d 577.

In this case the court passed upon the validity of ch. 144, Laws 1955, and one of the three factual situations presented to the court for declaratory judgment involved the Camp Randal Memorial, an indoor practice building for athletic

purposes at the university. The regents of the university leased the land in question to the Wisconsin University Building Corporation for a term of 50 years at a monthly rental of \$400. The building corporation on the same date subleased the identical land to the regents for a term of 50 years (unless earlier terminated), at a monthly rental of \$400 plus additional rentals calculated to enable the building corporation to retire the indebtedness to be created by the construction of the building. The estimated cost of construction of the project was \$1,500,000 of which \$900,000 was furnished by the regents from the revolving athletic fund under authority of what was then sec. 20.41 (5) (c) and 20.41 (11) (a), Stats. The balance of \$600,000 was borrowed from banks.

The sublease authorized the building corporation to assign the rentals. The assignment provided that the regents should pay the rentals to the banks and authorized the banks to collect them and apply them on the indebtedness, the banks being made attorneys in fact to collect the rents.

It was contended by the respondent among other things that since sec. 36.06 (6) (b) 8 and 9 authorized the regents to agree to pay rentals out of income derived from the operation of existing buildings, a debt was created, since the entire transaction, although in form a lease and re-lease, was actually a contract of purchase. About a dozen pages of the respondent's brief were directed to this proposition.

On the contrary, the attorney general contended that since future rent is held not to be a debt, it cannot be transformed into a debt by paying the same out of revolving appropriations and that whether the legislative appropriation is a straight appropriation of a stated number of dollars or a revolving appropriation of receipts cannot spell the difference between validity and invalidity, as long as the receipts are not pledged to the payment of debt service.

The court followed the argument of the attorney general and said at p. 44:

“* * * We perceive of no substantial distinction in the legislature's appropriation as made here in comparison with a straight appropriation of a specified sum, the latter which would clearly be valid. In circumstances as here there is no proscription of the payment of rentals from income-existing

facilities. The nature of the fund from which the rentals are paid does not alter the nonenforceable and contingent character of the obligation."

There would of course have to be a number of statutory changes to effectuate the proposed program. For instance, sec. 20.830 (1) now appropriates student fees, except adult education fees, to the regents of the university for general operation. It would be necessary to take such fees out of sec. 20.830 (1) and place them in another appropriation of a revolving character such as sec. 20.830 (44), with authorization to use them for rental of classroom buildings to be constructed by the building corporation. Also there would have to be changes made in the definitions of the types of buildings which may now be constructed for the university by the building corporation. See sec. 36.06 (6) (a) 1 and 2. Similar changes would have to be made in statutes relating to the state college regents.

Also, it should be kept in mind that to the extent student fees would no longer be available for general operation, the deficit for such operation would have to come from increased direct appropriation for general operation. Thus, so far as the fiscal picture is concerned, it makes little or no difference whether student fees are made available for paying rentals on classroom projects constructed by the building corporation or whether the legislature makes a direct appropriation to the regents for renting facilities at rentals calculated to enable the building corporation, the sublessor, to retire the indebtedness which it creates for building construction. The latter method in effect is being followed in the case of departmental appropriations to agencies housed in the state office building.

In any event there are no constitutional objections to legislation drafted in conformity with the statutory provisions approved in *State ex rel. Thomson v. Giessel, supra*, regardless of whether the source of the rental money is in a revolving appropriation in whole or in part, as was true of the indoor practice building, or whether the source of the rental money is by direct appropriation of a specified sum to the agency occupying the building, as is true in the case of the latest addition to the state office building. The supreme

court has approved both methods in the above case. It might also be noted in closing that the supreme court of appeals of West Virginia held on October 9, 1956, that a statute authorizing the issuance of revenue bonds by the state to provide new buildings for West Virginia university and providing for payment of the bonds solely out of a special fund derived from student fees does not create a debt against the state in contravention of the constitution. *State of W. Virginia v. O'Brien*, 94 S.E. 2d 446.
WHR

*Appropriations and Expenditures—Superintendent of Public Instruction—Surplus Government Property—Civil Defense—*State superintendent of public instruction is the agent designated by statutes, sec. 20.650 (42), to receive surplus war commodities from the federal government on behalf of the state.

March 14, 1957.

GEORGE E. WATSON,
Superintendent of Public Instruction.

You have inquired whether your agency or any state agency has present statutory authority to accept property from the federal government for civil defense purposes. Your specific inquiry at the present time relates to a proposal to acquire certain helicopters for civil defense for the city of Milwaukee.

You state that the entire program of handling the distribution of federal surplus property, including property for civil defense, is under the general direction of the federal department of health, education and welfare. The operating agency of the department of health, education and welfare is the office of surplus property utilization.

You have informed us that the federal agency prior to approving a plan for the distribution of property to this state requires assurances on several points to be supported by an official opinion of the attorney general.

You state that you have submitted plans of operation to the federal agency for the acquisition of properties for

health and education, and that as a result of a recent amendment to the federal law which made property available for civil defense, you are going to submit a supplemental plan of operation.

Before giving approval to these plans the federal agency would like an opinion of the state attorney general answering the following questions:

1. Has a state agency for the administration and receipt of surplus property been legally established?
2. In what part of the state government is the agency located?
3. Does the state agency have the power to make the certifications generally as to need for and use of the property required by various applicable regulations of the federal government?

Answers:

1. Among appropriations of public funds to the state superintendent of public instruction we find the following:

"20.650 * * *

"(42) SURPLUS WAR COMMODITIES. On July 1, 1947, \$100,000 to be used as a revolving appropriation for the acquisition, storage and handling of surplus government materials for transfer in accordance with Public Law 754, 81st Congress, amendments thereto or the provisions of other federal law pertaining to surplus government property, at cost plus handling charges to schools, school districts, nonprofit or tax supported nonprofit medical institutions, public health agencies and such other agencies, institutions and units of government as may hereafter be declared eligible to receive the same by act of Congress, desiring such commodities. The proceeds from such transfers shall be paid into the general fund and credited back to this appropriation. The procurement and allocation of such materials shall be in accordance with the recommendation of an advisory committee consisting of the state health officer or his representative and the state superintendent or his representative. In the event the advisory committee can not agree on any matter the dispute shall be arbitrated by a disinterested third party appointed by the governor."

In our opinion this section of the statutes clearly designates the state superintendent of public instruction as the agent of the state to act for the acquisition, storage and handling of surplus government materials which may be

transferred to the state under any provisions of the federal law relating to surplus government property. Such transfers are not restricted to transfers made under Public Law No. 754 of the 81st congress, which we are informed is only one amendment of Public Law No. 152 of the 81st congress, which is the basic law. Since these statutes have been passed, the federal law has been amended several times and in 1956 was amended to authorize the transfer of property for civil defense by Public Law No. 655 of the 84th congress. It is our opinion that the quoted section of the statute sufficiently designates the state superintendent of public instruction as the state agent for the receipt of all surplus properties and he has the authority under this statute and the general law of the state to acquire, warehouse, and distribute to agencies eligible under the federal act any available surplus property. *Sec. 20.650 (42) is a revolving appropriation act dating back to 1947 and is as permanent as any legislation can be.*

We are further informed that you have established a division in your office under the direction of Palmer Johnson who has been given the title of director of the state agency.

While this title may be a slight misnomer since legally the state agency is the department of public instruction and the powers as the state agent are vested finally in the superintendent of public instruction, we do not believe this designation should cause any difficulty in your operations as long as it is recognized that the statutes clearly empower the state superintendent of public instruction to act, and that he has the power to delegate his ministerial powers to his subordinates.

2. The state superintendent of public instruction is of course a constitutional officer elected by the people and exercising the powers set forth in the constitution and such other powers as are conferred upon him by statute. His powers in regard to surplus property are found, as we have indicated above, in sec. 20.650 (42) of the statutes.

Again we point out that he has established a division in his office for the handling of surplus property.

3. Under the express provision of sec. 20.650 (42) the state superintendent of public instruction may accept such properties and distribute them only to such institutions as

“may hereafter be declared eligible to receive the same by act of congress.” Here is a clear recognition that the state superintendent has no power to accept or receive commodities which may not properly be distributed under the controlling acts of congress. Accordingly, if a certification is required from the superintendent of public instruction that the articles are needed by the appropriate state agency, and that the articles will be useful to the state agency, and that the state agency or any other beneficiary named in sec. 20.650 (42) is eligible under the statutes of the state of Wisconsin to receive the property, he may properly so certify to the federal agency for such property but only such property as the state is eligible to receive.

The general controlling federal statute, we understand, is the Federal Property and Administrative Services Act of 1949, as amended, Title 40 U.S. Code, sections 484 and 485.
RGT

Cities—Prisoners in County Jail—Under sec. 62.24 (2) (b), Stats., county may charge salary expense of part-time jail matron to city provided that at the time there are in the jail no female prisoners other than city prisoners.

March 19, 1957.

FRANKLIN MOORE, JR.

District Attorney,
Winnebago County.

You state that the city of Oshkosh has refused to reimburse the county for care by a matron of city female prisoners who have violated city ordinances. The county has a matron who is not a regular employe of the county. She is the wife of the jailer and is designated to act as matron on a per diem basis when female prisoners are present.

It is the contention of the city that her salary is not a proper item of expense under sec. 62.24 (2) (b), Stats., which provides in part:

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

Reference is made to our opinion in 43 O.A.G. 41 to the effect that the above provision covers only out-of-pocket expenses for food, medical care, laundry, and like items, and does not justify a “lodging” charge based upon any cost accounting share of salaries, heat, light, gas, water, insurance, supplies, etc.

As pointed out in this opinion the limitations of the word “expense” as used in this statute are by no means clear or express, and the matter is one which should receive further legislative study.

We have some difficulty in the light of our former opinion in now determining that a share of the salary of the matron should be charged back to the city after concluding previously that salaries are not to be included in computing “expense” within the meaning of sec. 62.24 (2) (b).

Perhaps the difficulty can be resolved by making a charge for the matron’s services only in case the presence of such matron is made necessary by the fact that the female prisoners in the jail at the time of the charge are city prisoners. If there are other female prisoners in jail at the same time, the situation would clearly be covered by the prior opinion and no charge could be made, since no extra expense would be involved. The presence of the matron would have been necessary in any event, because under sec. 53.41, Stats., a matron must be on duty whenever there is any female prisoner in the jail whether she be a city prisoner or otherwise.

You are therefore advised that the expense of hiring a part-time matron may be properly charged to the city under sec. 62.24 (2) (b) only when the female prisoners in the jail are entirely city prisoners.

WHR

State Chief Engineer—State Planning Division—Appropriations and Expenditures—Federal Funds—Funds appropriated to the state chief engineer under sec. 20.350 (1), Stats., may be allocated by him for the functions of the state planning division and for the purpose of matching of grants from the federal government for urban planning.

March 19, 1957.

HENRY M. FORD,

Director of Regional Planning.

You have informed me that the state planning division is considering applying for a grant of federal funds under sec. 701 of the Housing Act of 1954 for the purpose of providing urban planning assistance to incorporated communities of less than 25,000 population. You have inquired whether the state chief engineer has statutory authority to engage in such a program and to pay for the state's share thereof out of his existing general appropriation.

Sec. 20.350 (1), Stats., provides in part:

“On July 1, 1955, \$346,740, and annually, beginning July 1, 1956, \$346,125 for the general administration expenses of the bureau of engineering and the operation of the several buildings and properties, except the state office buildings, for whose operation the bureau of engineering is responsible under the statutes. * * *”

Under the provisions of sec. 15.845, Stats., there is established in the office of the state chief engineer a state planning division of which you are the director.

Sec. 15.845 (3) (j) confers upon you as the director of regional planning specific power and authority to engage in urban planning for smaller communities with the assistance of the federal government. That provision reads as follows:

“To do work to facilitate urban planning for smaller communities lacking adequate planning resources (including surveys, land use studies, urban renewal plans, technical services and other planning work but excluding plans for specific public works) and to provide planning assistance to cities and other municipalities having a population less than 25,000 according to the latest decennial census; to do similar planning work in metropolitan and regional areas

in co-operation with official state, metropolitan or regional planning agencies empowered by law to perform such planning; and to accept and use therefor any planning grants made by the federal housing and home financing administrator; all as provided by s. 701, Title VII, Urban Planning and Reserve of Public Works, P. L. 560, 83rd congress, chapter 649, 2nd session, or any acts amendatory thereof or supplementary thereto. It is the intent that as to work authorized by this section the director may proceed under this paragraph or under any other provisions of this section authorizing such work."

In my opinion the appropriation made to the state chief engineer by the provisions of sec. 20.350 (1) is intended to be, and in fact has been, expended in part upon the allocation of the chief engineer for the purposes of the state planning division. It is the state chief engineer's responsibility to allocate the funds made available to him by the legislature among his various functions, and if he should allocate funds for planning purposes in accordance with the terms of the statute these may properly be considered the state's contribution to match any grants from the federal government.

RGT

Public Assistance—Dependent Children—Liability of Relatives—While a brother is not liable under sec. 52.01, Stats., for the support of a child for whose benefit aid to dependent children is granted under sec. 49.19, Stats., he may be held liable to contribute to the support of his mother to whom such aid is being paid.

March 19, 1957.

FRANCIS L. EVRARD,
Corporation Counsel,
Brown County.

You ask an opinion whether a son is liable for contributions for the support of his mother, who is receiving aid to dependent children.

Sec. 52.01, Stats., requires the "child of any dependent person" to "maintain such dependent person, so far as able."

It makes no such requirement of the brother of a dependent person.

One of the rules adopted by the department of public welfare to implement the statutory requirement is set out in Wisconsin Administrative Code, sec. PW-PA 20.05, which reads in part:

“When a relative enumerated in section 52.01 is not assisting an applicant for * * * aid to dependent children * * * and when there is reasonable doubt as to liability or ability of such relative to assist, no application for * * * aid to dependent children * * * shall be denied by the county agency until such agency shall have secured an order from a court of competent jurisdiction under section 52.01, Wis. Stats.; provided also that it is deemed to be the responsibility of the county agency in such case to petition under section 52.01, Wis. Stats.”

It appears, accordingly, that an authoritative determination of disputed liability in a given case could be made only by the proper court designated under sec. 52.01. Such a determination would, we believe, be governed by the following principle:

A brother could not be required to contribute to the support of the child for whose benefit aid to dependent children is being granted; but he could be required to contribute to the support of his mother, whose expenses might otherwise be included in the family budget for aid to dependent children under sec. 49.19 (5), Stats.

The principle is the same as that involved in 5 O.A.G. 100, where it was said:

“* * * sec. 1503 does not require the grandparents to contribute to the support of their grandchildren. While, if the mother of these children were herself destitute, her parents might be compelled to contribute to her support, I do not think they can be compelled to contribute to the support of her children. * * *”

Under sec. 49.19 (3) (a), aid may be granted “to the person having the care * * * of the child as the best interest of the child requires”; and under sec. 49.19 (5) the aid “shall be sufficient to enable the person having the care and custody of such children to care properly for them.” Such

provisions make it clear that the aid is to be granted primarily for the benefit of the child.

Sec. 49.19 (5), however, provides that the amount is to be based on a "budget for the family," including "the parents or other person who may be found eligible to receive aid under this section." Under sec. 49.19 (1) (c) aid to dependent children is defined to include payments or care "to meet the needs of the relative with whom any dependent child is living."

The "needs" of the mother are affected by other resources, including means of relatives liable for her support. The family budget under sec. 49.19 (5) is to reflect "all income." Income would include contributions from a relative liable for the support of the mother.

Under the ruling of the supreme court in *Milwaukee County v. Waukesha County*, (1940) 236 Wis. 233, 237, to the effect that aid to dependent children is a form of relief to the parent liable for the child's support, it would seem to follow that the determination of the mother's eligibility to receive the aid would establish her as a dependent person entitled to the benefits of sec. 52.01.

It is true that the son cannot be made responsible for the support of his brothers and sisters. The welfare department and the county court in proceedings under sec. 52.01 would have to discriminate between that part of the aid to dependent children grant which is for the support of the children and that part of the grant which is for the support of the mother, and not hold the son responsible for anything in excess of the part attributable to the support of the mother. However, that is not an insuperable difficulty, since the people who prepare the family budget for aid to dependent children purposes will have the figures available to break it down in that manner.

BL

State Crime Laboratory—Charges for Services—Under secs. 165.01 (8), 70.60, and 70.63 (1), Stats., the charge for each service rendered by the state crime laboratory at the request of the district attorney, sheriff, or coroner is to be borne by the county, and the charge for such service rendered at the request of a chief of police or village marshal is to be borne by the city or village and collected as a state special charge upon such city or village.

March 20, 1957

CHARLES M. WILSON, *Superintendent,*
Wisconsin State Crime Laboratory.

You have requested my opinion on the question whether the charges provided for by sec. 165.01 (8), Stats., are in all cases to be spread on the tax rolls of the counties at large or whether in some instances they are to be charged by the county clerk to the municipality whose officer requested the services.

Sec. 165.01 (8) provides as follows:

“The board shall annually, on or before July 1 of each year, establish a scale of charges for services performed by the laboratory. Such charges shall be at amounts sufficient to cover the estimated cost of laboratory operations in the ensuing fiscal year. Fifty per cent of said charges applicable to cases referred to the laboratory by *local units of government* shall be collected from *such local units which request and receive service*, along with other state taxes and charges, in the next apportionment of state special charges to *local units of government*. On October 1 of each year the director of the laboratory shall certify to the director of budget and accounts the amounts so determined to be due from each *local unit of government* for services provided by the laboratory in the preceding state fiscal year, and such amounts shall be included in the next following apportionment of state special charges *in the manner described by s. 70.60*, and when paid into the state treasury shall be credited to s. 20.290 (1).”

Sec. 70.60, Stats., provides as follows:

“The director of budget and accounts shall compute the state tax chargeable against each county basing each computation upon the valuation of the taxable property of the county as determined by the department of taxation pur-

suant to section 70.57. On or before the fourth Monday of October in each year the secretary of state, upon information which the director of budget and accounts shall timely furnish, shall certify to the county clerk of each county the amount of the taxes apportioned to and levied upon his county, *and all special charges which he is required by law to make in any year to any such county* to be collected with the state tax. He shall then charge to each county the whole amount of such taxes and charges, and the same shall be paid into the state treasury as provided by law."

The question arises because of the provision in sec. 165.01 (8) that half of the charges applicable to cases "referred to the laboratory by local units of government" are to be collected from "such local units which request and receive service." Sec. 165.01 (3) (b), relating to the superintendent and employes of the laboratory, provides in part as follows:

"* * * They shall not undertake investigation of criminal conduct except upon the request of a *sheriff, coroner, chief of police, village marshal, district attorney*, warden or superintendent of any state prison, attorney-general or governor. The head of any state department may request investigations but in such cases the services shall be limited to the field of health, welfare and law enforcement responsibility which has by statute been vested in the particular state department."

It will be observed that services may be requested, not by a local unit of government *as such* but by three county officers (sheriff, coroner and district attorney) and two municipal officers (chief of police and village marshal), as well as by various state officials.

In general parlance, the term "local units of government" is usually understood to refer to cities, towns and villages, but that interpretation cannot be applied to this particular statute, first because no *town* official is authorized to refer cases to the laboratory, and second because three *county* officials have that authority. In at least one other statute, sec. 15.22 (12) (e), the term is used to include counties as well as other local taxing bodies.

Sec. 70.63 (1) provides in part:

"The county clerk shall apportion * * * *the whole amount of state taxes and charges levied upon his county,*

as certified by the secretary of state, among the several towns, cities and villages of the county, *according and in proportion to the valuation thereof as determined by the county board*; and shall carry out in the record book aforesaid, opposite to the name of each in separate columns, the amount of state taxes and charges and the amount of county taxes so apportioned thereto, and the amount of *all other special taxes or charges* apportioned or ordered, or *which he is required by any law to make in any year to any such town, city or village*, to be collected with such annual taxes * * *."

The amount apportioned to each local unit of government pursuant to sec. 165.01 (8) is referred to therein as a "state special charge" and in my opinion the portion attributable to the county comes within the first clause above quoted from sec. 70.63 (1), and the portions attributable to cities and villages come within the words "the amount of all other special taxes or charges * * * which he is required by any law to make in any year to any such town, city or village."

It follows that the charge for each service rendered by the laboratory in any case at the request of the district attorney, sheriff, or coroner, shall be attributed to the county, and the charge for each service rendered at the request of a chief of police or village marshal shall be attributed to the city or village. In the latter cases the entire amount of the charges attributable to each city or village will be collected pursuant to sec. 70.63, the same as other special charges upon such cities and villages.

WAP

Register of Deeds—Deputies—Funeral Directors and Embalmers—Vital Statistics—Burial Permits—Register of deeds cannot appoint funeral director as special deputy to issue burial permits.

March 29, 1957.

LEROY J. GONRING,
District Attorney,
Washington County.

You have requested an opinion as to whether the register of deeds can appoint deputies in towns of Washington county for the purpose of issuing burial permits, and whether a funeral director could be appointed as such deputy.

Sec. 59.50, Stats., provides:

“Every register of deeds shall appoint one or more deputies, who shall hold their office during his pleasure. Such appointment shall be in writing and filed and recorded in his office. Such deputy or deputies shall aid the register in the performance of his duties under his direction, and in case of vacancy or the register’s absence or inability to perform the duties of his office such deputy or deputies shall perform the duties of register until such vacancy is filled or during the continuance of such absence or inability.”

In considering the question of appointing a deputy register of deeds whose sole function would be to issue burial permits in a certain portion of the county, it is helpful to observe the statutes relating to burial permits. Sec. 69.44 (1) provides:

“(1) The body of any person whose death occurs in this state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, until a permit for burial or removal is issued, and no burial or removal permit shall be issued until a complete and satisfactory certificate of the death has been filed as herein provided.”

Sec. 69.42 (1) and (2) provides:

“(1) The register of deeds, city health officer and the clerk of any incorporated village are authorized to issue a burial or removal permit.

“(2) If any certificate of death is incomplete or unsatisfactory, it shall be the duty of the officer authorized to issue burial or removal permits to call attention to the defects in the certificate and withhold the issuance of the burial or removal permit until a complete and satisfactory record is furnished.”

By statute the funeral director has a duty to obtain and file a death certificate and to secure a burial permit. Also, by statute the registrar or official issuing a burial permit has had conferred upon him the duty of ascertaining whether the certificate of death is “complete and satisfactory.” In other words, this is an official duty involving the exercise of discretion and judgment. The issuing of burial permits is not a mere perfunctory or ministerial act performed automatically upon every application for a permit. The purpose of this exercise of judgment is undoubtedly to safeguard the public in the maintenance of accurate vital statistics as well as to protect the health of the community and prevent the concealment or destruction of evidence in possible homicide cases. Unless specifically authorized by law, official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. 43 Am. Jur. 219.

There is also the question as to whether, as a general proposition, a deputy may be appointed for a specific or limited function. Deputies are usually invested with all the power and authority of the principal and this is one of the tests for determining whether persons employed in a public office to perform only clerical duties, which constitute only a part of the officer's official duties, are mere clerks and employes or deputies. 43 Am. Jur. 220. Therefore, with respect to the first part of your question, there is very great doubt that a register of deeds can lawfully appoint a deputy for the limited purpose of issuing burial permits.

There is, however, the yet more serious problem involved in the appointment of a funeral director as a deputy register of deeds for burial permit purposes. In practice, burial permits are almost invariably issued to funeral directors. Sec. 69.45 (1), Stats. Particularly in view of the fact that the registrar must exercise discretion in the issuing of such

permits, it would seem to be against public policy for a public officer to issue such a permit to himself. To say the least, it would be difficult for such a registrar to exercise objective discretion when he applied to himself for a burial permit.

It is my opinion, therefore, that a register of deeds cannot appoint a funeral director as a deputy register of deeds for the purpose of issuing burial permits.

JEA

University—Sale of Agricultural Lands—Nonprofit Corporation—Taxation—Problems arising under proposal to develop shopping center on lands of university to be sold under sec. 36.34, Stats., discussed.

April 1, 1957.

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

You have requested my opinion on a number of questions which have arisen in connection with the sale of agricultural lands of the university under sec. 36.34, Stats., which provides for the disposition of experimental agricultural lands known generally as the University Hill Farms on the west side of the city of Madison. These lands are located in an area which is rapidly becoming urban in character so that it is uneconomic to continue the use of such lands for present purposes. The statute provides for the acquisition of other lands in lieu thereof outside the Madison urban area. All sales, leases, and purchases are subject to the approval of the state building commission.

It is the policy of the regents in connection with this program to obtain the maximum return for the state, and it appears that the development of a commercial shopping center offers the possibilities of greatest return as to a portion of the property in question. In order that the state may be the beneficiary of such a program it is proposed that the following procedure be used.

1. The land in question would be sold to a nonprofit corporation organized under ch. 181, Stats., by friends of the university. None of the net income of the corporation would inure to the benefit of any individual, but would be distributed to the university for educational purposes.

2. Such corporation would obtain the purchase price on the land by a loan from the so-called Anonymous Trust Fund.

3. The corporation would lease the land on a long term lease (25–50 years) to a private developer who would construct buildings and other improvements thereon for a commercial shopping center. During the term of the lease the

rental paid by him to the corporation would be based on a fixed annual amount plus a percentage of gross rents from tenants. The net income of the corporation as indicated above would be paid to the regents and would be applied first to retire the loan from the Anonymous Trust Fund and then to such educational purposes of the university as might be proper.

4. In order for the private developer to finance the construction of the buildings and other improvements it would probably be necessary for him to mortgage his leasehold interest and it might be necessary for the corporation to join in the mortgage but not in the note given by the promoter. The financing would be retired within the period of the lease.

5. At the termination of the lease the corporation would own the land, buildings and improvements for the sole benefit of the university. In case of dissolution of the corporation its assets, subject to discharge of obligations, would be transferred to the regents.

I.

Your first question reads as follows: "Does the act of incorporating the proposed nonprofit corporation require any act on the part of 'The Regents of The University of Wisconsin'?"

The answer is "No." The corporation would be formed by friends of the university and not by any act on the part of the regents. The regents in their official capacity have no statutory authority to create a corporation. If individual members of the board wanted to be incorporators, it would have to be done in their individual capacities.

II.

The second question reads: "Do the regents have authority to sell the land to be used as a shopping center site to a nonprofit corporation organized in general accordance with the suggested articles of incorporation which are attached [to opinion request] as Exhibit B?"

Sec. 36.34, Stats., imposes no restrictions on the sale of the University Hill Farms so far as the identity of the purchaser is concerned.

III.

The third question is: "Would the real property of the nonprofit corporation be subject to real estate taxes? (it is the intent and desire of the regents that the real estate used for shopping center purposes be subject to real estate taxes.)"

The proposed corporate articles provide in part:

"SEVENTH: The corporation's net income, if any, after the payment of its obligations, *including real estate taxes*, less a reasonable reserve for contingencies in an amount to be determined by the directors, shall be computed at least annually and paid to The Regents * * * etc."

No exemption can be claimed by the corporation under the ruling in *State ex rel. Wisconsin University Building Corporation v. Bareis*, (1950) 257 Wis. 497, 44 N. W. 2d 259. In that case real estate for purposes of university expansion was purchased at the direction of the regents by a nonprofit corporation organized at the direction of the regents and which was authorized to acquire real estate for the exclusive uses, purposes, and benefit of the university. Among other things the articles provided that the members of the corporation should consist of the director of business and finance, the secretary of the regents, the superintendent of building and grounds, and the trust officers of the university and their successors in office. Also, that corporation acquired or disposed of property only as dictated by the regents. Under these circumstances it was considered that the corporation's property was to all intents and purposes held for the state so as to be entitled to exemption from real estate taxes under sec. 70.11 (1), Stats.

Here the situation is quite distinguishable. The property is being sold rather than purchased by the university, and except for the provision relating to transfer of the property to the university on dissolution of the corporation, the corporation would be free to dispose of the land as it sees fit.

Nor would the corporation here qualify for real estate tax exemption under sec. 70.11 (3) or (4) as an incorporated college or university or as an educational institution. It is not organized for such purpose. Article SECOND of the proposed articles provides:

“SECOND: The purpose or purposes for which the corporation is organized are: to acquire, own and hold real estate and other property; to buy, sell, lease, mortgage and otherwise acquire or convey real estate, easements, franchises and personalty and to construct, equip and furnish buildings, and in other ways improve and develop property, and maintain and operate such properties, for the purpose of producing income or proceeds to be used solely for educational purposes.”

It is the primary or actual use of the property that controls rather than the use to which the income is put. See *Frank Lloyd Wright Foundation v. Wyoming*, (1954) 267 Wis. 599, 66 N.W. 2d 642, and *Men's Halls Stores, Inc. v. Dane County*, (1954) 269 Wis. 84, 69 N.W. 2d 213.

Your attention is also called to Bill No. 274, S., which makes the lands referred to in sec. 36.34, Stats., subject to general property taxes of the city of Madison if said lands are sold or contracted to be sold to persons, including non-profit corporations, unless such persons or property are exempted from general property taxes by specific provisions of law, or in the event such lands are leased to persons, including nonprofit corporations, for commercial purposes, unless otherwise specifically exempted from general property taxes.

IV.

The fourth question reads: “Would the net income of the nonprofit corporation be subject to Wisconsin and federal income taxes, under the existing Wisconsin Statutes and Acts of Congress? Would the tax status of the nonprofit corporation be affected by the source of its capital funds, whether gift or loan as described in questions 5, 6, and 7 which follow?”

Sec. 71.01 (3) (a) of the Wisconsin statutes relating to income taxes provides:

“(3) EXEMPT INCOME. There shall be exempt from taxation under this chapter income as follows, to wit:

“(a) Income of mutual savings banks, mutual loan corporations, savings and loan associations, insurance companies, steam railroad corporations, sleeping car companies, freight line companies as defined in s. 76.39, and corporations organized under ch. 185, and of all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit.”

The italicized language above would appear to be applicable. However, I wish to make it very clear that I do not intend to usurp the administrative functions of state tax officials on any factual situation which may be presented to them, as it will be my duty to represent the state with respect to any tax rulings made by such officials.

With reference to federal income taxes, I wish to make it clear that the attorney general is not in a position to make any authoritative ruling, since the interpretation of federal tax statutes is primarily a matter for the federal tax authorities.

Subject to the foregoing qualification and the limitations hereinafter discussed, it would appear that the rental income of the proposed corporation would not be subject to the federal income tax if such income were periodically paid to the regents. The Internal Revenue Code of 1954, §501 (c) (2), exempts “Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.” The same section in subsec. (c) (3) exempts “Corporations * * * organized and operated exclusively for * * * educational purposes.” This would include the university of Wisconsin. However, §502 relating to so-called “feeder organizations” provides that:

“§502. Feeder organizations

“An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under section 501 on the ground that all of its profits are payable to one or more organizations exempt under section 501 from taxation. For purposes of this section, the term ‘trade or business’ shall not include the rental by an organi-

zation of its real property (including personal property leased with the real property).”

§511 imposes a tax on unrelated business income of an exempt organization. Unrelated business taxable income and unrelated business or trade are defined in §§512 and 513. In substance this is the net taxable income of an exempt organization arising from any trade or business, the conduct of which is not substantially related to its functions (aside from the need of such organization for income or funds or the use it makes of the profits derived).

§512 (b) excludes from taxable income all rents from real property which are not taxable as rents from a business lease.

§514 directs how unrelated business taxable income is to be computed. The general effect of §514 is to include in the annual taxable income of the exempt corporation that proportion of the net rental income from each business lease which the business lease indebtedness for the current year bears to the cost after adjustments for items such as depreciation, taxes, interest paid on the business lease indebtedness, etc.

This is a rather complicated statute and apparently was designed to prevent a particular form of tax avoidance whereby a tax exempt organization such as a university would acquire the title to real property owned and used by an ordinary commercial corporation. To pay for the property the exempt organization would borrow the money and lease the property back to the corporation at a rental adequate to amortize the loan. The rent would be a deductible expense of the business corporation and would be nontaxable when received by the exempt organization. At the end of the lease the property would be owned by the exempt organization debt free, and the federal government would be the only loser. There is no objection to the tax exempt organization's acquisition of the property with its own funds. The objection is to the use of borrowed funds as a medium of securing additional tax exempt income.

Hence, it would appear that the proposed corporation here would pay tax on that proportion of its net rent which can be properly allocated to the indebtedness. As the in-

debtedness is paid off, the proportion of the amount of the rent included in net taxable income would decrease and eventually cease upon retirement of the debt.

The foregoing, however, would not be true under the Wisconsin income tax law and as I understand it, the exemption would apply whether or not borrowed funds were involved. The Wisconsin Board of Tax Appeals ruled in *Louis E. Amberg and George H. Best* (1942), 1 W.B.T.A. 420, that a corporation engaged in ordinary commercial activities was nevertheless exempt under sec. 71.01 (3) (a), Stats., where its entire net income was distributed to associations exempt under the statute.

It should also be mentioned here that under the federal income tax law a corporation claiming exemption under §501 must apply for a determination of such exemption to the district director of internal revenue. Ordinarily, application should be made only after one year's operation, but the regulations do provide that in the case of an organization of a public character a tentative determination may be issued to be followed at the end of one year by a final determination. Even though the corporation is tax exempt it is required to file an annual return of its income.

V.

The fifth question reads: "Would it be legal for the regents to lend money from the principal of the Anonymous Trust Fund to the said nonprofit corporation? (A copy of the terms of gift of the Anonymous Trust Fund is attached [to opinion request] as Exhibit C.)"

The answer is "Yes." The board of regents is given the widest possible powers under the terms of this gift including the following:

- "(1) To invest any part of the fund in stocks, other securities, real estate, or any other form of property;
- (2) To retain or to sell any property held in the fund, or to exchange such property for any other property;
- (3) To vote any stock belonging to the fund, and to exercise all the other rights and powers of stockholders with reference thereto, and all the rights and powers of owners of any property belonging to the fund;

(4) To accumulate income and add it to principal; or to expend any or all of the principal at any time; and to commingle this fund with other University funds;

(5) In general to manage and dispose of the funds or any part of it as freely as an absolute owner, for the benefit always of the work of the University in whatever way the Regents may deem wise."

VI.

The sixth question reads: "Would it be legal for the regents to invest Anonymous Trust Fund moneys in the said nonprofit corporation?"

The meaning of this question is not clear since it involves a contradiction of terms to speak of investing in a nonprofit corporation. According to the dictionary the word "invest" means to put money to use, by purchase or expenditure, in something offering profitable returns such as interest or income. If by "invest" you mean to make an interest-bearing loan, the question is answered under V above. However, if by the question you mean the purchase of stock in the corporation, the answer is "No," because the corporation will have no stock.

VII.

The seventh question reads: "Would it be legal for the regents to make an outright gift of money from the principal or income of the Anonymous Trust Fund to the said nonprofit corporation?"

The answer is "Yes." Under items 4 and 5 of the gift, quoted in answer to the fifth question, the regents are authorized to expend any or all of the principal at any time and to dispose of the fund or any part of it as freely as an absolute owner for the benefit of the work of the university in whatever way the regents may deem wise.

WHR

Civil Defense—Natural Disasters—Workmen's Compensation—Civil Defense Employes—The use of civil defense forces for a natural disaster is not authorized under sec. 21.02, Stats. If used, such workers would not have the benefit of workmen's compensation coverage under sec. 21.02 (4) (c), Stats. A natural disaster probably cannot be designated as a test exercise for the use of civil defense forces.

April 1, 1957.

RALPH J. OLSON,
Adjutant General.

In your capacity as state director of civil defense you have asked for an opinion concerning the use of state civil defense forces in the event of natural disasters such as floods, tornadoes, serious fires, or explosions.

It is my opinion that the use of state civil defense forces for a natural disaster is not authorized by present legislation. The policy of our civil defense plan is set forth in sec. 21.02 (1), Stats., as follows:

"21.02 (1) POLICY. To insure that the state and its subdivisions and municipalities will be prepared and able to cope with disasters *during periods of armed conflict*, to protect the public peace, health and safety, and to preserve the lives and property of the people of the state, it is declared necessary to confer upon the governor the powers provided in this section."

It is manifest in the express terms of the purpose of the Wisconsin civil defense organizations that the authority granted to the governor extends only to situations involving disasters due to enemy attack or the preparation for such emergencies. Under the provisions of sec. 21.02 (2), Stats., the governor is given authority to proclaim an emergency in the case of enemy attack and to call a special session of the legislature, but such power is granted only when the governor finds that a disaster has occurred or is imminent "due to an act of war."

An examination of the appropriation sections of the statutes reveals that the funds for carrying out the provisions of the civil defense system are tied to use in emergencies

resulting from enemy attack. Sec. 20.270 relates to civil defense appropriations and the expenditure of state and federal funds for this purpose. Subsecs. (71) and (72) of this section provide that these funds are to be expended only for training purposes and in case of emergency resulting from enemy attack. The general state emergency disaster fund is expressly limited in sec. 25.39, Stats., to use in emergencies caused by enemy attack. It can be readily seen that no funds are provided for use by the civil defense organization in the event of a natural disaster.

The 1955 annual report of the federal civil defense administration sets forth the advantages of having natural and enemy-caused disaster functions combined in the same forces. This report points out that such an arrangement affords a means for the expeditious expenditure of federal funds in the event of a local natural disaster and provides an excellent means of training for the forces involved. The report emphasizes the fact that those states which have used their civil defense forces in the event of natural disaster have done so under express statutory authority. At the time of the report, thirty-nine states and the District of Columbia had specific statutory authorization for the use of civil defense personnel in the event of natural disaster. Independent research reveals that forty-two states, in addition to the District of Columbia, now have statutory authorization for civil defense forces to act in case of natural disaster. Wisconsin is among the six states which do not have express statutory authorization for use of their civil defense forces in case of natural disaster. Many states which originally adopted legislation similar to Wisconsin's have seen fit to amend their statutes in order to permit use of their civil defense forces in case of natural disaster, and in the 1953 and 1955 sessions of the Wisconsin legislature a "natural disaster" clause was proposed but was never adopted.

Your next two questions involve workmen's compensation and public liability coverage for the deputy civil defense director and local civil defense forces while working at the scene of a natural disaster. It is my opinion that civil defense workers working at the scene of a natural disaster would not be protected by workmen's compensation benefits as the statutes now exist. In private employment an em-

ployer can extend the scope of employment merely by directing an employe to perform certain duties. In governmental employment, however, the scope of the employment is covered by statutes or ordinances. Governmental subdivisions and employes have only such powers as are expressly conferred on them by law. Actions beyond the scope of the conferred power have no legal effect. No matter how beneficial to the state or to the local community an employe's activities may be, if his activities are not within the duties as set forth in the statutes or ordinances, the employe is acting outside the scope of his employment and is not covered by workmen's compensation. In the case of *State v. Industrial Commission*, (1948) 252 Wis. 204, 206, our supreme court held that a court reporter was not in the course of his employment when riding with a circuit judge from Green Bay to Madison, even though he was doing so at the direction of the circuit judge.

Indemnification of civil defense workers against tort liability is covered by sec. 21.02 (4) (f) and is limited to activities performed while in the scope of "civil defense" work. Since work at scenes of natural disasters is not within the scope of the present civil defense statutes, there would be no indemnification for employes so working.

Your last question relates to designating a natural disaster as a test exercise for the local civil defense units in order to secure workmen's compensation protection. Although sec. 21.02 (3) (c) 5 authorizes the director, subject to the approval of the governor, to "organize and train state mobile support units," it is doubtful that a person engaged in connection with a natural disaster would come under the protection of the compensation act. A test exercise should not be fraught with the real dangers to which personnel would be exposed while working at the scene of a natural disaster. Had there been no natural disaster, it would be doubtful whether a "test exercise" would have been planned for that particular time and place. In *Barragar v. Ind. Comm.*, (1931) 205 Wis. 550, the court set forth a test for determining whether an employe's trip was initially that of the employer or of the employe. The court said: "To establish liability, the inference must be permissible that the trip would have been made though the private errand had been

cancelled." To extend this test to the present problem, we could say the "test exercise" is analagous to the business trip; "natural disaster" is analagous to the private errand. The cancellation of the "natural disaster" would cancel the so-called "test exercise." By calling a natural disaster a test exercise, I feel that the authority granted in the purpose of the civil defense organization would be circumvented and you would be doing by indirection what you are prohibited from doing directly. The authority granted in the civil defense statutes extends only to situations involving emergency by reason of enemy attack and preparation for such an emergency. The power to train these forces is an important incident necessary to achieve an effective force capable of accomplishing the purpose of civil preparedness in case of enemy attack. The use of this force in the event of natural disasters serves an equally significant, though wholly different purpose. Even though it may be labeled "training," it is still in fact an end result. The end result purpose of this use is a different purpose than that permitted by the civil defense statutes. Since the authority granted is derived from the purpose to be served, once a use outside of the purpose of coping with disasters during periods of armed conflict is attempted, such use is without authority.

I would like to call your attention to former opinions wherein the attorney general discussed other problems which might arise because of the use of state funds at the scene of a natural disaster. I refer you to 32 O.A.G. 420, 36 O.A.G. 47, and 36 O.A.G. 116.

JDW

Mortgages—Open-End—Amendment to the existing statutes, which would provide that a mortgagee holding an open-end mortgage may make future advances to the mortgagor as long as a mortgage indebtedness is not increased above its original amount and retain his priority over any lien claimants subsequent to the date of the mortgage, would clarify the Wisconsin law on the subject and protect the mortgagee.

April 9, 1957.

THE HONORABLE, THE ASSEMBLY.

By assembly Resolution No. 15, A., you have asked my opinion on certain questions concerning the validity of open-end mortgages under Wisconsin law. This subject was extensively considered in an opinion of the attorney general dated June 22, 1948, and reported in 37 O.A.G. 333. I will summarize briefly that opinion and then proceed to answer your specific questions. First, the opinion pointed out that under the majority rule in cases outside the state of Wisconsin, so-called open-end mortgages, which are mortgages under which additional advances may be made which are entitled to the priority of lien of the original mortgage, are valid and enforceable so long as the mortgagee does not have actual notice or knowledge of an intervening lien. Under the minority rule it is held that the mortgagee cannot make advances without assuring himself that there are no intervening liens. Second, since there is no expressed authority on the subject in our Wisconsin cases, the safest rule to adopt is to assume that the minority rule might be followed by our supreme court.

Passing now to your specific questions, you asked the following:

1. May lending institutions in this state legally use open-end mortgages in making loans?
2. When such a mortgage is used, do advancements on such mortgage take precedence over liens which are created between the time the original mortgage is recorded and the time the advancement is made?

3. Would substitute amendment No. 1, A., to Bill No. 169, A., if enacted, make a change in existing law or merely authorize what may already be done under present statutes?

In answer to your first question, it appears clear that lending institutions in this state may legally contract for open-end mortgages which provide that they will secure future advances, subject only to the requirement that supervised lending agencies may be required by the appropriate state authority to adopt the safest practice which will assure the protection of the funds entrusted to them by their depositors or shareholders.

In answer to your second question, in accordance with our previous opinion the law is not clear, and hence it is possible that our supreme court would eventually rule that advancements on open-end mortgages are subject to any liens which intervene between the date of record of the original mortgage and the time the advancement is made.

In answer to your third question, it is my opinion that substitute amendment No. 1, A., to Bill No. 169, A., would clarify the law and protect the mortgagee in making advances on a partly paid mortgage up to the face amount of the original mortgage against any intervening lien, unless the intervening lien claimant delivers actual notice of his lien claim to the mortgagee by service of the notice provided for in the proposed statute.

I respectfully suggest that the statute does not cover the situation where advances are made in excess of the initial indebtedness, and hence the law on this point would remain uncertain.

RGT

Taxation—Personal Property—Conditional Vendor or Chattel Mortgage—Conditional vendor or chattel mortgagee of property in possession of vendee or mortgagor, is not liable under sec. 70.20 (1), Stats., for personal property tax on such property.

April 10, 1957.

JOHN P. SANTERRE,
District Attorney,
Barron County.

You request my opinion as to whether or not a conditional vendor or chattel mortgagee of property is liable for payment of property taxes thereon, under sec. 70.20 (1), Stats.

The answer is, "No."

Sec. 70.20 (1) provides that when personal property is "assessed to some person in charge or possession thereof, other than the owner, such owner" shall be liable for the taxes as well as the person in charge or possession of the property. However, that section does not specify when the assessment may be made against a person in charge or possession of the property, other than the owner.

Sec. 70.18 (1), Stats., provides, so far as here material:

"(1) Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto in the capacity of parent, guardian, husband, agent, lessee, occupant, mortgagee, pledgee, executor, administrator, trustee, assignee, receiver, or other representative capacity, it shall be assessed to the person so in charge or possession of the same. * * *"

In the case of the usual chattel mortgage or conditional sale, the mortgagor or vendee is in possession and is the beneficial owner, and the property is assessed to him as the owner. 22 O.A.G. 989. Consequently, sec. 70.20 (1), Stats., is not applicable. 22 O.A.G. 1034.

EWW

State Board of Health—Powers—Maternity Hospitals—
It is doubtful that secs. 140.35 to 140.39, Stats., relating to maternity hospitals, authorize the adoption of a rule by the state board of health requiring a consultation by physicians prior to any cesarean section or other major operative delivery.

April 10, 1957.

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

You inquire as to the authority of the state board of health to promulgate rules such as Wis. Adm. Code, sec. H 28.03. This section provides that: "Consultation prior to any cesarean section or other major operative delivery shall be required."

Sec. 140.05 (8), Stats., provides that:

"The board shall have power to license and exercise supervision over maternity hospitals as provided in ss. 140.35 to 140.39."

The provisions of these sections that are most pertinent to the inquiry here made are as follows:

"140.35 * * *

"(4) No license for a maternity hospital shall be renewed unless the person licensed to conduct the same shall have faithfully observed all of the provisions of ss. 140.35 to 140.38 and the rules and regulations of the state board of health issued thereunder. * * *"

"140.36 (1) * * * The investigation of any application for a license to conduct a maternity hospital shall include an inquiry as to the number of cubic feet of air space available for each patient, the facilities for ventilation and the admission of sunlight to the rooms used for the care of mothers and their infants. No license shall be issued unless the state board of health is satisfied that the physical equipment of the place to be used as a maternity hospital is adequate for the proper care of mothers and infants. The state board of health and the local health officer shall keep informed of the nature and reputation of every such maternity hospital and shall visit and inspect the same as often as they deem necessary and for such purposes shall at all reasonable hours be given free and unrestricted access to every part thereof. * * *

“(2) * * * The state board of health shall make such general rules and regulations for the various kinds of maternity hospitals as shall be necessary to effect the purposes of ss. 140.35 to 140.37.”

Sec. 140.38 (1), Stats., provides that the state board of health may revoke the license of any maternity hospital if the persons licensed to conduct the same violate any provisions of secs. 140.35 to 140.37 or any of the rules and regulations of the state board of health issued thereunder or the provisions of such license.

It must be remembered, as pointed out in the reply to your inquiry in 39 O.A.G. 388, that the state board of health has only such powers as are expressly granted to it or are necessarily implied, and any power sought to be exercised by it must be found within the four corners of the statute under which the board proceeds. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N.W. 2d 27.

The opinion in 39 O.A.G. 388 was to the effect that the board, as such, did not have the power under the statutes to regulate an individual physician's practice of medicine and surgery beyond those requirements that are imposed by law in this state.

The purpose of a regulation like Wis. Adm. Code, sec. H 28.03, as we understand it, is to be sure that all of the aspects of the case are gone over before resorting to the operation, to be sure that the best advantage is taken of all the latest information in the medical field, and generally to best protect the patient.

In promulgating such a regulation for the general welfare of the patient, the board is attempting to dictate to the physician the manner in which he shall engage in the practice of medicine and surgery. Such a regulation is open to the construction that either the practicing physician will not, or is not, capable of personally protecting the welfare of his patients.

This is not to infer that a physician who is confronted with a major decision is to be considered incompetent if he calls for a consultation. Quite to the contrary. Nevertheless, his should be the professional decision in the first instance, rather than that of some administrative agency, whether a

consultation is or is not needed. That is a problem which he must face constantly throughout his entire professional career, and if an administrative agency is to assume that responsibility for him in one class of case, then the door is open for similar invasions in all fields of medical and surgical practice.

The statutes give the board power to promulgate rules and regulations concerning maternity hospitals "as shall be necessary to effect the purposes of ss. 140.35 to 140.37." There is nothing expressly set forth in these sections relating to the intention of the legislature to control the particular manner in which medicine or surgery is practiced. It could be argued that since the board has the broad power to regulate equipment and facilities of maternity hospitals, and since it has been indicated in 39 O.A.G. 388 that his power must of necessity include a power to decide how that equipment is to be used, then to fully effectuate the purposes of this power, the board must be allowed to go one step further and determine the standards to be followed by physicians in the use of that equipment. The argument would be that this is necessary in order to have the general purpose of protecting patients in maternity hospitals fully carried out.

This line of reasoning could be carried to the extreme of having the board establish the medication to be used in each particular case. The line must be drawn at some point, and it is our opinion that when an administrative agency attempts to prescribe the particular manner in which an individual physician is to carry on his practice of medicine and surgery this point is reached.

Nothing stated above should be construed as determining that the legislature could not act in this field or that it is precluded from conferring such authority on the state board of health in a proper manner. However, it does not appear here to have taken either of these steps.

You are therefore advised that it is probably not within the authority of the state board of health to promulgate a rule such as Wis. Adm. Code, sec. H 28.03.

WHR

Public Welfare Department—Child Protection—County Liability for Care—Under sec. 48.55, Stats., county of legal settlement is chargeable for care of child in legal custody of department of public welfare, notwithstanding transfer or commitment to penal institution.

April 15, 1957.

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

You have inquired whether, under sec. 48.55, the county of legal settlement is chargeable for care of children in legal custody of the department of public welfare when such children have been (a) transferred by the department to or from a penal institution or (b) sentenced under the criminal law.

Historically, counties of legal settlement have been liable for the support of minors committed to state institutions, formerly known as "houses of refuge" or "industrial schools" and "orphan asylums." See ch. 189, R.S. 1858, and ch. 371, Laws 1891.

Until recently, this matter was governed by sec. 48.18, Stats. 1953, which permitted charging the county of legal settlement only for children in the Wisconsin school for boys or school for girls or in the Wisconsin child center or in a boarding home. This was changed by ch. 575, Laws 1955, called "The Children's Code," which completely revised ch. 48 of the statutes and, among other things, repealed sec. 48.18. In its place, secs. 48.55 and 48.52 were created. Sec. 48.55 provides:

"Liability of counties. The county of legal settlement, if any exists, shall be charged \$5 per week for the care of children in legal custody of the department, except for children in homes which do not receive board payments. These charges shall be adjusted in accordance with s. 46.106."

Sec. 48.52 provides in part:

"Facilities for care of children in legal custody of department. (1) FACILITIES MAINTAINED FOR CHILDREN. The

state department of public welfare may maintain the following facilities for the care of children in its legal custody:

“(a) Receiving homes to be used for the temporary care of children;

“(b) Foster homes;

“(c) Group homes;

“(d) Institutions, facilities and services, including without limitation forestry or conservation camps for the training and treatment of children 12 years of age or older who have been adjudged delinquent;

“(e) The Wisconsin child center.

“(2) USE OF OTHER FACILITIES. (a) In addition to the facilities and services described in sub. (1), the department may use other facilities and services under its jurisdiction, except that penal institutions may be used only for children adjudged delinquent and only until July 1, 1959, or such earlier date as medium security facilities for delinquents are in operation. * * *”

Under the statutes now in effect the department of public welfare may use “penal institutions” until July 1, 1959, for the care of children in its legal custody who have been adjudged delinquent. In practice, the term “penal institutions” has been administratively construed for a number of years to embrace the state prisons as defined in sec. 53.01, which include the penitentiaries at Taycheedah, Green Bay, and Waupun. Such practical construction is entitled to great weight. *State ex rel. Milwaukee C. Rep. Comm. v. Ames*, (1938) 227 Wis. 643, 655, 278 N.W. 273. There appears to be no reason for disturbing this interpretation. Also, it is clear that the department can and frequently does retain legal custody of such children until the age of 21. Sec. 48.34 (3) (a), Stats. It has been ruled that county liability may attach until the child reaches 21 years of age. 28 O.A.G. 7, 9 (1939).

Under secs. 48.51, 48.52 and 48.02 (10), the department of public welfare has authority to place these children over whom it has legal custody in various homes and in any facilities and services under its jurisdiction, including penal institutions. This authority necessarily carries with it the right to transfer any such children from one of its facilities to another. With respect to your first question, therefore, it is my opinion that the county of legal settlement is liable for the care of children in legal custody of the state depart-

ment of public welfare when the department has lawfully transferred such children to a penal institution. This would likewise apply to other inter-facility transfers made by the department.

In connection with your second question, it is understood that occasionally a child, adjudged a juvenile delinquent and under legal custody of the department, may, while in escape status or otherwise, commit a felony resulting in his prosecution, conviction, and sentencing under the criminal code. Assuming the offender is a male between the age of 16 and 21, the sentencing court, pursuant to secs. 959.044 and 959.045, must sentence him either to the Wisconsin state reformatory at Green Bay or the Wisconsin state prison at Waupun. The department has the right to maintain its legal custody status over this child, notwithstanding his concurrent status of serving a sentence in a penal institution under the criminal code. As a matter of practice, this is usual procedure and no doubt a wise one. As long as the legal custody of the child is retained in the department, the county of legal settlement is chargeable for the care, with immaterial exceptions, as provided in sec. 48.55, without regard to a concurrent criminal conviction. Your second question is answered in the affirmative.

JEA

Intoxicating Liquors—Malt Beverages—Closing Hours—Daylight Saving Time—Notwithstanding sec. 990.001 (12), Stats., the closing hours of taverns under secs. 66.054 (10) (a) and 176.06, Stats., are to be determined by daylight saving time pursuant to secs. 175.09 (2) and 175.095, Stats., from the last Sunday of April to the last Sunday of September in each year.

April 25, 1957.

BRUCE R. RASMUSSEN,
District Attorney,
 Dodge County.

You have requested an opinion whether daylight saving time is to be used in determining the closing hours of taverns under secs. 66.054 (10) (a) and 176.06, Stats., during the period when daylight saving time will be in force in this state.

Sec. 175.09, Stats., provides in part as follows:

“175.09 (1) The *standard of time* in this state shall be the solar time of the ninetieth meridian west of Greenwich, commonly known as central time, and no department of the state government, and no county, city, town or village shall employ any other time, or adopt any ordinance or order providing for the use of any other than *the standard of time*.

“(2) No person operating or maintaining a place of business of whatsoever kind or nature, shall employ, display or maintain or use any other than *the standard of time* in connection with such place of business.”

Sec. 175.095, Stats., created by ch. 6, Laws of 1957, provides as follows:

“175.095 DAYLIGHT SAVING TIME. (1) Notwithstanding s. 175.09 (1), *the standard of time* shall be as provided in sub. (2) during the period therein stated if approved by the people as provided in sub. (3).

“(2) From 1 a.m. on the last Sunday in April until 2 a.m. on the last Sunday of September of each year, *the standard of time* in this state shall be one hour in advance of that prescribed in s. 175.09 (1).

“(3) There shall be submitted to the vote of the people at the spring election in April 1957 the following question:

“ Shall section 175.095 (2) of the statutes, which proposes a state-wide daylight saving time of one hour per day from the last Sunday in April to the last Sunday in September in each year be law beginning with the last Sunday in April 1957? If the above question is approved by a majority of all votes cast on that subject at said election, sub. (2) shall be law, otherwise it shall be considered as of no effect.”

At the April 1957 election a majority of the voters answered “Yes” to the question submitted in the referendum required by the foregoing statute, and accordingly sec. 175.095 (2) thereby became law.

Sec. 175.09 (2) prohibits using any other than “the standard of time” in connection with any place of business of whatsoever kind or nature. Until the enactment, and ratification by the voters, of sec. 175.095, sec. 175.09 (2) required the use of central (standard) time throughout the year. But sec. 175.095 has changed “the standard of time” from the last Sunday in April until the last Sunday in September to be one hour in advance of that prescribed in sec. 175.09. Therefore, during that period “the standard of time” referred to in sec. 175.09 (2) means one hour in advance of central standard time, or what is commonly known as central daylight saving time. It follows that taverns and other places of business are prohibited by sec. 175.09 (2) from employing, displaying, maintaining, or using any time other than daylight saving time during the period when it is in force. This being true, it is apparent that the hours during which the taverns are required to be closed must be determined by daylight saving time.

It is true that sec. 990.001 (12) provides as follows:

“990.001 In construing Wisconsin laws the following rules shall be observed *unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature*:

“* * *

“(12) TIME. When time is referred to, central standard time is meant.”

If sec. 990.001 (12) were to be applied in construing the statutes relating to closing hours, it would have the effect of advancing the closing hour under sec. 66.054 (10) (a) from

1 o'clock a.m. to 2 o'clock a.m., and in the case of Milwaukee county it would advance the closing hour under sec. 176.06 from 2:00 a.m. to 3:00 a.m. on week nights and from 3:30 a.m. to 4:30 a.m. on Sundays, *according to the standard of time in effect from the last Sunday in April till the last Sunday in September each year.*

This is clearly "inconsistent with the manifest intent of the legislature" in adopting daylight saving time for that period and therefore by the very terms of sec. 990.001, the rule of construction is suspended during that period.

Sec. 990.001 (12) was enacted by ch. 261, Laws 1951, which was a revisor's bill. Its purpose was stated as follows in a revisor's note:

"* * * (12) is new and will eliminate repetition of 'standard time' 'central standard time' and 'central time' in many statutes."

At the time that statute was adopted in 1951, central standard time was the only legal time throughout the year in this state. Since the purpose of the statute was merely to make possible the elimination of references to the standard of time in many statutes, it would be improper to give it the effect of introducing confusion into the law now that daylight saving time has been adopted as the legal standard of time during part of the year.

It is perhaps unfortunate that the draftsman of ch. 6, Laws 1957, did not include an amendment of sec. 990.001 (12) to conform that section with the change in the standard of time created by that act. A bill to correct this oversight (Bill 480, S.) is now pending in the legislature and presumably will be enacted, whereby sec. 990.001 (12) will be amended as follows:

"990.001 (12) When time is referred to, ~~central~~ *the standard of time as provided by s. 175.09 or 175.095, whichever is applicable, is meant.*"

WAP

Insurance—State Insurance Fund—Municipalities—Co-tenant county having legal title and possession of 59.2 per cent of city-county building, having its property insured currently with state insurance fund, cannot insure full value of building in fund in its name for benefit of co-tenant where city having 40.8 per cent legal title and possession does not have its property insured with state fund; status as “fiscal agent” does not qualify county to extend existing policies, which cover whole building, in fund. Sec. 210.04 (1), (2), (3), Stats.

April 30, 1957.

JOSEPH W. BLOODGOOD,
District Attorney,
Dane County.

You advise that Dane county and the city of Madison are erecting a city-county building in the city of Madison and that title to the real estate is held as tenants in common, 40.8 per cent in the city and 59.2 per cent in the county. You advise that an agreement provides that construction costs and future costs of maintenance and upkeep of the building are to be divided in the same proportion as above and that each party has exclusive use of certain portions of the building and that certain other portions are jointly used.

The agreement provides that after completion of the building, it shall be managed by a building commission composed of two persons selected by the city council and two persons selected by the county board.

Under existing agreements, the county is the fiscal agent for the construction and future maintenance and administration of the building, and all disbursements will be made in the name of the county, after which the city will be billed for its proportionate share of the costs involved.

You advise that the state insurance fund is currently providing construction insurance on the theory that the county, as fiscal agent, was the proper insuring party. Dane county now has its property insurance with the state insurance fund but the city of Madison does not, and the city is not eligible for such insurance unless the city council elects to come under the provisions of ch. 210, Stats.

You query as to whether the county as a co-tenant of the building may insure the whole building under the state insurance fund, thereby protecting the interest of the city which is not otherwise eligible to insure with the state, and suggest that this basic question resolves itself into three subsidiary questions as follows:

1. May the county insure the whole building with the state, as a tenant in common who holds title and possession jointly with the city?

2. If the county can insure the whole value of the building, should the application for such insurance be made solely in the name of the county, where in fact the state insurance commission knows that the city is a tenant in common and co-occupant of the building?

3. Since the county is the fiscal agent for the construction and maintenance and operation of the building, may the county insure the whole value of the building under the provisions of sec. 210.04 (1), Stats., which permit existing policies to be extended to include property for which the applicant is "legally liable"?

As pointed out in 30 O.A.G. 405, and 37 O.A.G. 626, no part of county property may be insured in the state insurance fund unless all of the property of the county is so insured, and the same rule applies to city property.

It appears that at the time these opinions were written sec. 210.04 (3) contained the words "the insurance on all property of any such county, city * * * *shall* be provided for" under the fund, whereas the present statute reads "the insurance on all property of any such county, city * * * *should* be provided for" under the fund. This change appeared for the first time in the 1951 statutes, without act of the legislature, and apparently is a printer's error and the meaning of the statute, therefore, would not be changed.

As a general rule: "* * * a co-owner of real property has a right to enter upon the common estate and take possession of the whole thereof, subject only to the equal right of his companions in interest, with whose possession he may not interfere." 14 Am. Jur. 93-94.

In addition, a co-tenant has an insurable interest in the whole property. This rule is stated in 14 Am. Jur. 95 as follows:

“The right of possession of a cotenant carries with it, of course, the right to take such measures as may be proper to protect the property and his interest therein; for example, a cotenant may insure his own interest as a distinct thing, and is not accountable to his cotenants therefor; or, if he desires, he may insure the whole property for the benefit of all the cotenants. Where a loss occurs in such a case, each cotenant is entitled to his share of the money collected.”

The city-county agreement of February 8, 1955 provides in paragraph 4:

“That the land is to be held as tenants in common and the ownership of the land and buildings is to be held in the same proportion as the costs of construction are shared.”

The agreement further provides for a division and assignment of possession of certain parts of the building to the city and county respectively.

While it is true that the county may have an insurable interest in the whole building, it does not follow that such interest is insurable in the state insurance fund merely because the county's interest is insurable in that fund.

The city as a part owner of the building, not having its other property insured under the state insurance fund, is barred from so insuring its portion of the building until it elects by appropriate action to come under the provisions of sec. 210.04 of the statutes. To permit the county in its own name or on behalf of the city to insure under the fund would accomplish indirectly that which is not allowed directly.

The county does not have legal title to the whole building and does not have charge or full control over the same as it is managed by a four-member building commission, of which only two members are selected by the county board.

In answer to the first question, we conclude that the county may not insure the whole building with the state, but is bound under present circumstances to insure only its 59.2 per cent interest therein with the state fund.

Since the answer to the first question is in the negative, an answer to the second question is unnecessary.

We further conclude that the mere fact that the county is the fiscal agent for the construction, maintenance and operation of said building does not qualify the county to in-

sure the whole value of the building under the provisions of sec. 210.04 (1) which permit existing policies to be extended to include property for which the applicant is "legally liable".

RJV

*Automobiles and Motor Vehicles—Sleeping Operator—Criminal Law—Negligent Operation of Vehicle—*One who persists in driving a motor vehicle when he should know he is likely to fall asleep may be guilty of a high degree of negligence in the meaning of secs. 85.395, 940.08, and 941.01, Stats., and sec. 346.62 proposed to be created by Bill No. 99, S.

May 1, 1957.

THE HONORABLE, THE ASSEMBLY.

You have requested my opinion "whether a driver who falls asleep while operating a motor vehicle thereby violates section 85.395 of the statutes * * * or any other provision of the statutes which is now in existence or would be created by Bill No. 99, S., of the 1957 session."

Sec. 85.395, Stats., provides as follows:

"85.395 It is unlawful for any person to endanger the safety of his own person or property or the safety of another's person or property by a *high degree of negligence* in the operation of a vehicle."

Sec. 940.08, Stats., provides as follows:

"940.08 (1) Whoever causes the death of another human being by a *high degree of negligence* in the operation or handling of a vehicle, firearm, airgun, or bow and arrow may be fined not more than \$1,000 or imprisoned not more than one year in county jail or both.

"(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

Sec. 941.01, Stats., provides in part as follows:

"941.01 (1) Whoever endangers another's safety by a *high degree of negligence* in the operation of a vehicle, not upon a public highway as defined in ch. 85, may be fined not more than \$200 or imprisoned not more than 6 months or both.

"(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

Sec. 346.62, Stats., proposed to be created by Bill. No. 99, S., reads as follows:

"346.62 RECKLESS DRIVING. (1) It is unlawful for any person to endanger the safety of his own person or property or the safety of another's person or property by a *high degree of negligence* in the operation of a vehicle.

"(2) It is unlawful for any person to cause injury to another person by a *high degree of negligence* in the operation of a vehicle.

"(3) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

The Wisconsin supreme court has not yet had occasion to determine whether one who falls asleep while driving may be guilty of a "high degree" of negligence. That such conduct may constitute "negligence" was recognized in *Krantz v. Krantz*, (1933) 211 Wis. 249, 252, where the court stated as follows:

"Bearing on the question of John Krantz's negligence in permitting himself to fall asleep, there was evidence to the following effect: He was thirty-eight years of age. From 3 to 11 p.m. of the afternoon and evening preceding the accident he had been performing his usual work as a railroad car inspector. Then he went home to sleep from 11:30 p.m. to 3:30 a.m., when he got up and prepared his breakfast. At 4 a.m. he started in his car, with plaintiff as a passenger, on a fishing trip, and after he drove for about an hour the accident occurred. There was no evidence that he had any fainting spell, or that any unanticipatable mental or physical condition caused him to fall asleep. Under those circum-

stances, the evidence admitted of finding that he was negligent in permitting himself to fall asleep while he continued to operate his automobile on the highway. * * *” Citing *Bushnell v. Bushnell*, (1925) 103 Conn. 583, 131 Atl. 432, 44 A.L.R.785; *Devlin v. Morse*, (1931) 254 Mich. 113, 235 N.W. 812; *Kaplan v. Kaplan*, (1931) 213 Iowa 646, 239 N.W. 682.

And in *Wisconsin Nat. Gas Co. v. Employers Mut. L. Ins. Co.*, (1953) 263 Wis. 633, 637-8, the court went further and held a driver negligent as a matter of law, where consciousness of drowsiness was proved:

“FAIRCHILD, J. On June 6, 1949, defendant Ingbretson, traveling from Park Falls to Milwaukee, reached a point about seven miles south of West Bend on Highway 55 when he drove off the highway, struck a utility pole belonging to plaintiff, and caused the damage complained of. The evidence shows clearly that he was tired, and that in the 269 miles he had driven from Park Falls he had realized he was somewhat fatigued. He stopped his automobile three times to rest. On two of these occasions he slept for a period of time. While his weariness is conceded, it is suggested as a defense in his behalf that his conduct indicated that Ingbretson was acting in an extremely cautious manner. However, the responsibility was his. He failed in a duty to act with ordinary care, and the resulting damage to plaintiff's property was caused by his negligence. * * *”

“It is considered the trial court very properly found Ingbretson negligent as a matter of law. The fact of going to sleep while driving an automobile is a proper basis for an inference of negligence, and when the driver is conscious of drowsiness, he cannot go to sleep while driving and escape liability, for in such an event he has relaxed the vigilance which the law required of one so engaged. Because he is conscious of his fatigue and drowsiness, it lies within his own control to keep awake or cease from driving. We agree with the trial court that the doctrine of the case of *Eleason v. Western Casualty & Surety Co.* 254 Wis. 134, 35 N.W. (2d) 301, is applicable, because the driver possessed the knowledge that he was likely to lose consciousness, and that is the point here. And with the essential fact of knowledge of his condition on the part of the driver established, a question of law arises. *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155; *Tennes v. Tennes*, 320 Ill. App. 19, 50 N.E. (2d) 132; 5 Am. Jur., Automobiles, p. 605, sec. 180; Anno. 28 A.L.R. (2d) 20.”

An often-quoted discussion of the physiology of sleep is contained in the court's opinion in *Bushnell v. Bushnell*, *supra*, cited by the Wisconsin court in the *Krantz* case, *supra*. In the *Bushnell* case the court intimated (although the point was not involved) that permitting oneself to fall asleep while driving was great negligence:

"* * * There are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed of the direction of a conscious mind, and, because this is so, reasonable care to avoid such a danger requires very great care." 44 A.L.R. at 791.

The definitions of "high degree of negligence" in sec. 940.08 (2) and sec. 941.01 (2), Stats., and in proposed sec. 346.62 (3), quoted above, are based upon the case of *State ex rel. Zent v. Yanny*, (1943) 244 Wis. 342, 347. (See Comment to sec. 339.25 of the 1953 proposed Criminal Code, Bill No. 100, A., 1953 session, p. 24.) In the *Zent* case the court was concerned with the term as used in the old "negligent homicide" statute, sec. 340.271 (2), Stats. 1941. The court stated as follows:

"It is considered that the negligence requisite for a conviction under sec. 340.271 (2), Stats., is substantially and appreciably higher in magnitude than ordinary negligence. It is negligence of an aggravated character. It is great negligence. It represents indifference to legal duty. It is conduct that not only creates unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to such other person. In other words, the culpability which characterizes all negligence is magnified to a higher degree as compared with that present in ordinary negligence. On the other hand, it is something less than wilful and wanton conduct which, by the law of this state, is the virtual equivalent of intentional wrong."

It is apparent that the foregoing is an abridged version of the definition of "gross negligence" (as understood in the civil law, not in the law of Wisconsin) quoted in the respondent's brief, pp. 8-11, from the case of *Altman v. Aronson*, (1919) 231 Mass. 588, 121 N.E. 505, 4 A.L.R. 1185, 1187. This fact is important for it furnishes a bridge to a number of cases from Massachusetts and other states fol-

lowing the civil law definition of "gross negligence," which involved drivers who fell asleep.

These cases (relating to civil law "gross negligence") have recently been reviewed in an annotation in 28 A.L.R. 2d 12, and it is unnecessary, therefore, to review them here. The rules developed in the cases are summarized as follows in the annotation:

28 A.L.R. 2d at pp. 60-61:

"The numerous cases in which courts have considered the question whether falling asleep while operating a car is in itself gross negligence are almost unanimously to the effect that the fact of falling asleep while driving is sufficient to establish a prima facie case of ordinary negligence only, but that it is not sufficient to take the case to the jury on the question of the operator's gross negligence. Stated differentially, if plaintiff in an action based on gross negligence shows merely that the operator of the motor vehicle fell asleep while driving, a directed verdict for the defendant is proper. * * *"

28 A.L.R. 2d at p. 62:

"While the mere fact of falling asleep while driving does not give rise to an inference of gross negligence, the courts unanimously agree that the driver of an automobile who falls asleep while driving is grossly negligent if he had some prior warning of the likelihood of his going to sleep."

28 A.L.R. 2d at p. 63:

"Thus, it was stated in *Cooper v. Kellogg* (1935) 2 Cal2d 504, 42 P2d 59, that where more than ordinary negligence is required for recovery, the question whether falling asleep while operating an automobile constitutes gross negligence becomes whether, in the light of the surrounding circumstances, there was a likelihood, of which the defendant knew or should have known, that sleep would overtake him while operating the car.

"Similarly, it was stated in *Blood v. Adams* (1929) 269 Mass 480, 169 NE 412: 'Voluntarily to drive an automobile on the public street at any time of day or night with eyes closed, or to yield to sleep while operating such kind of dangerous machine as is an automobile on a public highway, is to be guilty of a degree of negligence exceeding lack of ordinary care, and is a manifestation of recklessness which may be found by judge or jury to be gross negligence within

any reasonable definition of that phrase.' For a very similar statement, see also *Tennes v. Tennes* (1943) 320 Ill App 19, 50 NE2d 132, supra, §32."

On the pages following the above quotation cases are cited in which the courts considered as indications of the foreseeability of the approach of sleep, evidence of tiredness or drowsiness, of drinking intoxicating liquor before or during driving, of earlier dozing off, of refusal of a guest's offer to relieve the driver at the wheel, of driving for an unreasonable length of time, and other factors.

The answer to the question submitted is, therefore, that one who falls asleep while driving does not necessarily violate the statutes quoted above, but that he may be found guilty if there is adequate additional evidence showing that he realized that if he persisted in driving he was likely to fall asleep. Mere proof that a person was driving while asleep is not, of itself, sufficient to support a finding of a high degree of negligence, under present or proposed laws. Since this is a criminal case, the trier of fact, whether it be court or jury, would have to be convinced "beyond reasonable doubt." While such additional evidence is often difficult to produce, such evidence of foreseeability as is available would be supported in some degree by the teachings of common experience and scientific writings to the effect that sleep does not usually approach without warning and that recognizable symptoms of its onset ordinarily precede actual loss of consciousness.

WAP

Appropriations and Expenditures—Legislature—Room and Board Allowance—State legislator who files affidavit pursuant to sec. 20.530 (1) (f) stating he has established a temporary residence in Madison for legislative session is entitled to room and board allowance even though he may have a second reason for maintaining a temporary residence in Madison.

May 3, 1957.

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

You request my opinion as to whether Senator Davis Donnelly who has been elected to the state legislature to represent the 28th senatorial district comprising Chippewa and Eau Claire counties and whose permanent residence is in the city of Eau Claire, is entitled to the benefits of sec. 20.530 (1) (f), Stats.

The statute in question provides as follows:

“Any member of the legislature who has signified, by affidavit filed with the director of budget and accounts, the necessity of establishing a temporary residence at the state capital for the period of any regular or special legislative session shall be entitled to an allowance of not to exceed \$100 per calendar month, or part thereof, for expenses incurred for food and lodging during each regular session and during each special session. Such allowances shall be paid within one week after each calendar month; and shall be paid, upon the filing with such director, the member’s affidavit stating the amount of such expenses and lodging.”

The undisputed facts on which you request my opinion are these:

Senator Donnelly established a temporary residence in Madison, Dane county, Wisconsin, during the two school years next preceding his candidacy for the state senate, for the purpose of attending the law school at the university of Wisconsin. He owns real estate in Eau Claire county consisting of a homestead which he has rented to a tenant during his temporary sojourn in Madison. When he finds it necessary to return to Eau Claire, he occupies rented quarters

there. He lists Eau Claire county and the city of Eau Claire as his permanent legal residence when required to state it in such forms as application for registration of his automobile, income tax returns, voting registration, etc. He pays real estate taxes in Eau Claire county.

The distance between the city of Eau Claire and the city of Madison is 186 miles.

The senator has executed and filed with you an affidavit, pursuant to sec. 20.530 (1) (f), reciting, among other things, that "it has been necessary for him to establish a temporary residence at Madison for the period of the regular session of the Legislature which began January 9, 1957; and that he makes this affidavit for the purpose of claiming food and lodging allowance of not to exceed \$100 per calendar month, or part thereof, which he will be entitled to under the provisions of sec. 20.530 (1) (f)."

It is my opinion Senator Donnelly is entitled to payment of room and board allowance by reason of the necessity of establishment of a temporary residence in order to perform his legislative duties.

If Senator Donnelly had no reason for maintaining a temporary residence in Dane county other than to attend to his legislative duties, you concede that he would be entitled to the room and board allowance. With this I agree. It is clear in such circumstance that a legislator could not, as a practical matter, commute daily between Eau Claire and Madison to attend to his legislative duties.

Your question arises, however, by reason of the fact that Senator Donnelly has a second reason for maintaining a temporary residence at Madison, to wit: so that he may attend law school.

The director of budget and accounts has not been given authority to determine the necessity for establishment of the legislator's temporary residence. The statute unequivocally confides that determination to the individual legislator whose affidavit is the controlling thing.

The argument opposing my conclusion requires reading into the statute an exception which the legislature did not write into the statute. The opposing argument says in effect that a legislator who complies with the statute by filing his affidavit is entitled to room and board payments "except in

such cases as the assemblyman or senator has a second reason for establishing a temporary residence." But that is not what the statute says. If that is what the legislature wanted to say it could easily have done so. The arguments opposing my conclusion are policy arguments which could have been addressed to the legislature when it was considering the bill, but in the light of the clear, unequivocal language of the statute they cannot now be used to change an unambiguous statute by legal interpretation.

JEA

Schools and School Districts—High Schools—A union high school district may be created under sec. 40.06 (1), Stats., without prior approval of map required by sec. 40.12 (1), Stats., and without certificate of establishment required by sec. 40.12 (4) (c), Stats., and no certificates of authority to operate a high school from the state superintendent is required.

May 13, 1957.

G. E. WATSON,

State Superintendent of Public Instruction.

You have asked for an opinion on the following questions:

1. Does sec. 40.06 (1), Stats., vest power in the town and village boards and city councils to create union high school districts without prior approval of maps as required by sec. 40.12 (1), Stats.?

Sec. 40.06 (1) provides in part:

"Upon the filing of a petition by an elector with the municipal clerk or upon its own order, any town or village board or council of a city of the second, third or fourth class may, by order, create, alter, consolidate or dissolve school districts. * * *"

Sec. 40.12 (1) provides in part:

"A union high school district may be established in any territory with an assessed valuation of \$2,500,000 or more. * * * At the time of filing the petition * * * the petitioners shall submit to the state superintendent, and to the clerk of each municipality affected by such proposed districts, a legal description and map of the territory proposed to be included in the district. * * * no election on the establishment of such district shall be held in such territory unless the state superintendent has approved such territory. A copy of such description and map, with the approval of the state superintendent indorsed thereon, shall be submitted to the clerk of each governmental subdivision affected by the establishment of such district."

Subsequent to the complete revision of ch. 40, Stats., by ch. 90, Laws 1953, the general subject relating to your inquiry was discussed at some length in 44 O.A.G. 229 (1955). It was indicated that the new legislation rendered the earlier conclusions reached in 40 O.A.G. 62 (1951) no longer supportable. 44 O.A.G. 229 stated at page 233:

"* * * It is therefore our opinion that under the present statutes a high school district can be established by a county school committee order without any approval by the state superintendent of the establishment of such district and that sec. 40.12 (4) (c), Stats., does not require the approval and issuance of a certificate of establishment by the state superintendent as a condition precedent to the existence of a district so created."

The situation is analogous and the same reasoning as set forth in 44 O.A.G. 229 applies to the instant inquiries. As stated therein at page 231:

"* * * The only general requirement in sec. 40.12 (1), Stats. 1953, which is therefore applicable to high school districts *regardless of what method is used in the creation thereof*, is that the territory thereof must have at least an assessed valuation of \$2,500,000. * * *" (Emphasis supplied.)

Your first question is therefore answered in the affirmative.

2. Does a union free high school district created by order of a town or village board or city council have authority to

operate a high school without issuance of a certificate of establishment by the state superintendent as required by sec. 40.12 (4) (c), Stats.?

The pertinent portion of sec. 40.12 (4) (c) provides:

“* * * If the proposal is approved by the state superintendent, he shall issue a certificate of establishment of a high school district in said territory.”

This provision in sec. 40.12 (4) (c), by its very language, relates only to the *creation* of a high school district as a separate legal entity, and the issuance of the certificate there provided is the final step or act which affects its existence as a district. In contrast is the entirely different language in the last sentence of sec. 40.10 (4), Stats., which requires the issuance of a “certificate of establishment of a *high school*” to a common school district before it may operate a high school.

This “certificate of establishment of a high school *district*” in sec. 40.12 (4) (c) relates to the coming into existence of such a district and has no application to a high school district already in existence. Conversely, the “certificate of establishment of a *high school*” in sec. 40.10 (4) relates only to the operating of a high school and is applicable only to a common school district. We find no comparable provision in sec. 40.12 (4) (c) or elsewhere in the statutes which is applicable to a high school district so as to require that, notwithstanding it has legal existence as a district, it must obtain a certificate of authorization to *operate* a high school before it does so. Therefore, your second question is also answered in the affirmative.

JEA

Libraries—Municipalities—A town may appropriate funds for upkeep of a library in another municipality, under agreement entered into pursuant to sec. 43.30 (2), Stats.

May 16, 1957.

DAVID WEBER,
District Attorney,
Sheboygan County.

You request an opinion whether sec. 43.25 (1), Stats., when considered with sec. 66.30 (1), Stats., authorizes one municipality to contribute funds for the upkeep of a free or public library in another municipality.

It is probably unnecessary to consider the provisions to which you refer, because sec. 43.30 specifically covers such a situation. Subsec. (2) specifically provides:

“(2) The library board of any municipality may, by agreement with any other municipality, provide for the loaning of books from its library, singly or in traveling libraries, to the residents of such other municipality; *and any such other municipality may enter into any such agreement and levy a tax and appropriate money annually to meet its obligations thereunder.*”

The subject of municipal libraries is dealt with generally in secs. 43.25 to 43.34, Stats. When the term “municipality” is used in those sections, it relates back to the definitive provision of sec. 43.25 (1), which includes cities of the second, third or fourth class, villages, and towns. See, also, sec. 990.01 (22).

The opinion was given in 19 O.A.G. 111 that a county might, under sec. 43.30, appropriate money for library services received under agreement with another municipality even though no tax had been levied for the express purpose.
BL

*Municipalities—Appropriations and Expenditures—Highways and Bridges—Rivers—*Proper use of highway funds appropriated by secs. 83.03 and 83.065, Stats., discussed.

May 17, 1957.

C. L. GAYLORD,
District Attorney,
Pierce County.

You ask my opinion on several questions relative to the proper use of certain highway funds in the possession of your county. Your questions and the answers are as follows:

1. You state that the county has a surplus of funds which it has accumulated pursuant to secs. 83.065 and 83.03 of the statutes. You desire to know whether these funds may be used for dredging in the Mississippi river for the benefit of the village of Bay City in your county.

In answering this question, I wish to point out that there is a considerable difference between funds appropriated under secs. 83.065 and 83.03. The former are highway funds raised by a general county tax for the county at large, while the latter are funds appropriated by municipalities as their shares in the costs of particular projects. However, in either case, such funds may not be used for the purpose of dredging the river since in both instances the funds have been raised by statute specifically for some highway purpose and are not general or surplus funds of the county which can be diverted by the county board for any legal purpose. *Im-mega v. Elkhorn*, (1948) 253 Wis. 282.

While it may be argued that a river is a "highway" and that sec. 1, art. IX of the Wisconsin constitution declares the Mississippi and certain other waters to be "common highways," yet the funds collected by sec. 83.065 are for highways and bridges within the purview of ch. 83 of the statutes and, as stated above, funds acquired through sec. 83.03 are earmarked for particular improvements. Further, the provisions for improvements of navigable waters appear elsewhere in the statutes.

2. You ask whether money raised for road and bridge use by special levy against one municipality may be appropriated by the county board for use within another municipality. As I understand your question, you here refer to money raised by authority of sec. 83.03. As I pointed out above, this is a tax raised for a "specific improvement" and not for general purposes. Taxes must be spent on the level at which they are raised. My answer is, "No."

3. You desire to know whether taxes raised by the county at large may be used for road and bridge purposes "in another municipality." While I am not certain as to your meaning, I take it that you desire to know whether such money may be used for an improvement in a single municipality which is not directly for the benefit of the county trunk road net. In my opinion, such improvement may be made by authority of sec. 83.03 (1), which states:

"The county board may construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county."

REB

*Constitutional Law—Fair Employment—Labor Unions—Racial Discrimination—Bill No. 327, S., if enacted, would alter the law applied in *Ross v. Ebert*, 275 Wis. 523, and would be constitutional.*

May 20, 1957.

THE HONORABLE, THE SENATE.

Senate Resolution No. 19 requests my opinion as to whether Bill No. 327, S., concerning discriminatory employment practices, would, if adopted, change the result in a situation such as confronted the supreme court in *Ross v. Ebert*, 275 Wis. 523, and whether the proposed method of enforcement as set forth in said bill would be constitutional.

It is my opinion that the enactment of Bill 327, S., would change the result reached by the supreme court in *Ross v. Ebert, supra*.

The court recognized in its decision that sections 111.31 to 111.36 of the statutes provided that racial discrimination in employment was undesirable and that it was the public policy of this state to encourage and foster employment without such discrimination to the fullest extent practicable. The court stated, however, that the legislature had not declared that any such discrimination was illegal and it had not provided for enforcement of these declared policies. Bill No. 327, S., would give the industrial commission power to eliminate any discriminatory employment practices. The bill provides that the industrial commission shall endeavor to eliminate any discriminatory employment practice by conference, conciliation, or persuasion. In the event these methods prove unsuccessful in eliminating the discriminatory practice, the commission shall hold a hearing, and if it finds that a discriminatory practice exists, the commission is given the power to enter an enforcement order. The enactment of this bill would provide the necessary enforcement provisions which the supreme court stated the legislature had not previously included in the fair employment code provisions of the statutes.

It is my opinion that the proposed method of enforcement would be constitutional.

The United States supreme court has determined that a state law forbidding labor organizations from denying membership because of race, color, or creed, and prescribing penalties, does not violate the United States constitution. The court said in *Railway Mail Ass'n. v. Corsi*, (1945) 326 U. S. 88, 93-94, 65 S. Ct. 1483, 89 L. ed. 2072:

"Appellant first contends that Section 43 and related Sections 41 and 45 of the New York Civil Rights Law, as applied to appellant offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgment of its property rights and liberty of contract. We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment

which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.

"To deny a fellow-employee membership because of race, color or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not. * * *"

See, also: *Steele v. Louisville & N. R. Co.*, (1944) 323 U. S. 192, 65 S. Ct. 226; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, (1944) 323 U. S. 210, 65 S. Ct. 235; *Graham v. Brotherhood of Locomotive Firemen*, (1949) 338 U. S. 232, 70 S. Ct. 14; *Brotherhood of Railroad Trainmen v. Howard*, (1952) 343 U. S. 768, 72 S. Ct. 1022.

From a procedural point of view, the bill provides for notice, hearing, and judicial review, which, if properly followed in administration, would comply with due process requirements. The provisions of the proposed bill are similar to the enforcement provisions of ch. 101, Stats., which have been repeatedly upheld. The fact that a labor organization is involved would not alter the general rules as to the kind of procedure which would meet the rules of due process.

BL

Pensions—Wisconsin Retirement Fund—Constitutional Law—Public Officers—Extra Compensation—Ch. 572, Laws 1955, amending sec. 66.906 (3) (aa), Stats., cannot be validly applied to render effective an application for a retirement annuity under secs. 66.90 to 66.918, Stats., where the applicant was not alive subsequent to the date of receipt of such application by the board of trustees, as required in sec. 66.906 (3) (aa), Stats. 1953, at the time the application was received.

May 20, 1957.

FREDERICK N. MACMILLIN,
Executive Director,
Wisconsin Retirement Fund.

An opinion has been requested concerning the right of a beneficiary of a deceased employe of a city which is a participating municipality in the Wisconsin retirement fund. Several questions have been submitted, but they all resolve down to the single question of whether or not a particular application of such employe should be granted, and this opinion is directed solely to that question.

The employe, who was a participating employe in the fund, retired from his job on March 31, 1954. The following day he executed an application for retirement annuity pursuant to sec. 66.906 (3), Stats., and delivered to and left the application with the city clerk of such city to be forwarded to your office. Such application contained March 31, 1954, as the date of termination of employment. On April 5, 1954, such employe was given and received his final city salary check which included his regular compensation up to and including March 31, 1954, and also his regular compensation for an additional 3 weeks up to April 21, 1954, because such employe had 3 weeks' accrued vacation. Such application was not forwarded to and was not received by your office until on May 18, 1954. Said employe died on said May 18, 1954. The board of trustees of the fund concluded that the application should be denied because of failure to meet two requirements of sec. 66.906 (3) (aa), Stats. 1953, namely, the applicant was not alive after the date of receipt of

application by the board and the application was not received within 30 days of the date of termination of employment. Sec. 66.906 (3) (aa), Stats. 1953, provided as follows:

“(aa) Notwithstanding the death of an applicant for a retirement annuity under this subsection while such application is pending, the annuity applied for shall be payable if the applicant is alive at any time after the date of receipt of such application by the board, provided that the board had received the application within 30 days of the date of termination of employment.”

Thereafter, and apparently to endeavor to cover the above situation, Bill No. 342, S., was introduced in the legislature and was passed and published August 17, 1955, as ch. 572, Laws 1955, adding the following sentence at the end of sec. 66.906 (3) (aa):

“Delivery of an application by an employe to the municipal agent of an employer municipality at any time during 1954, constitutes receipt of the application by the board under this paragraph.”

It is clear that as the statutory provisions stood prior to the effective date of said ch. 572, Laws 1955, the application could not be validly granted because the applicant was not alive at any time after the *date* of receipt of such application by the board of trustees of the Wisconsin retirement fund. He died upon the same date that said board received the application. The question, thus, is as to whether or not the amendment to sec. 66.906 (3) (aa) by ch. 572, Laws 1955, is legally effective so as to authorize the granting of such application.

Sec. 66.901 (16), Stats., in defining the phrase “governing body” as used in secs. 66.90 to 66.918, Stats., does give recognition to the appointment of an agent by a participating municipality, which includes the city here involved, and the filing with the board of trustees of the Wisconsin retirement fund of a written notice of such designation of agent for such municipality. But, such agent is one authorized to act *for* the municipality in matters pertaining to the fund, and it is not there provided that such municipal agent is an agent of the board of trustees of the Wisconsin retirement

fund. Consequently, notwithstanding that the city clerk of the municipality involved had been designated as the authorized agent to act for the municipality in this instance, the delivery of the application to such city clerk was not delivery to an agent of the board of trustees of the Wisconsin retirement fund. Nor does the fact that the board had adopted and had in effect at the time involved herein, a rule that "each participating municipality shall designate one individual to whom all transactions with the fund shall channel," nor the fact that the widely followed practice has been for participating employes in dealing with the fund to do so through such duly appointed and designated agent of the municipality, such as the city clerk in this instance, make such agent of such municipality an agent of the board of trustees of the Wisconsin retirement fund so that delivery of the application to such city clerk was a delivery to said board.

To give to the amendment made by ch. 572, Laws 1955, the effect of validating retroactively said application for retirement benefits would be granting additional or extra compensation to such deceased municipal employe after the services have been rendered, said employe being deceased at the time of the enactment of said amendment. This would be contrary to the provisions of art. IV, sec. 26, of the constitution. It was held in *State ex rel. Thomson v. Giessel*, (1952) 262 Wis. 51, 53 N.W. 2d 726, that an enactment by ch. 551, Laws 1951, authorizing the payment of an additional annuity to teachers already retired under the teachers' retirement law, was unconstitutional and invalid as contrary to such provision.

It is therefore concluded that the amendment made by said ch. 572, Laws 1955, cannot be given effect as validating such application, and the retirement annuity applied for was properly denied and cannot legally now be granted.

HHP

Pensions—Wisconsin Retirement Fund—Guardian and Ward—Change of Beneficiary—Guardian of a participant or annuitant under Wisconsin retirement fund does not have authority to change the designation of the beneficiary named by a participant or annuitant and does not have authority to designate beneficiary where none has been named. Sec. 66.901 (13), Stats.

May 21, 1957.

FREDERICK N. MACMILLIN,
Executive Director,
Wisconsin Retirement Fund.

You have requested an opinion as to whether the guardian of a participant or annuitant under the Wisconsin retirement fund has the authority to change the designation of the beneficiary named by a participant or annuitant.

Sec. 66.901 (13), Stats., provides:

“(13) BENEFICIARY. The person so designated by a participant or annuitant in the last written designation of beneficiary on file with the board for that particular purpose; or if no person so designated survives, or if no designation is on file, the estate of such participant or annuitant.”

The Wis. Adm. Code, sec. Ret. 5.14, provides:

“Ret. 5.14 BENEFICIARY DESIGNATION. Each application for a retirement, beneficiary, or disability annuity must be accompanied by a designation of beneficiary (Form 2).”

You advise that it has been the consistent policy of your department to accept actions by guardians on behalf of annuitants or participants.

If a guardian has a right to act for a ward who is an annuitant or participant, his authority to so act must be derived from his powers specifically given under ch. 319, Stats., which governs guardians and wards, or from special provisions of the retirement act.

It is not the purpose of this opinion to set out all of the acts and elections by a guardian which may be proper inso-

far as a minor or incompetent annuitant, participant, or beneficiary is concerned, and this opinion will necessarily be limited to the specific question asked.

In 25 Am. Jur. 67, it is stated:

“* * * The right of the incompetent to change the beneficiary of a policy upon his own life is personal, and cannot be exercised by a guardian or committee * * *”

In *Kay v. Erickson*, 209 Wis. 147, the guardian of an incompetent attempted to change the beneficiary of a life insurance policy issued to his ward, who while competent had designated a beneficiary. The named beneficiary had predeceased the ward. The court at pages 152 and 153 stated:

“* * * while a guardian may undoubtedly surrender a policy of his ward upon payment to him of the cash surrender value thereof for the purpose of providing necessary funds for the support and maintenance of his ward or for what, at the time may seem to be in the interest of his ward (*Maclay v. Equitable Life Assurance Society*, 152 U.S. 499, 14 Sup. Ct. 678), no case is cited to our attention, and we have found none, which supports the contention that a guardian of an incompetent may designate a beneficiary in a policy issued to his ward while the latter was competent. No case has been found in which such a contention has ever been made. In our opinion a guardian has no more authority to designate a beneficiary in a policy of insurance upon the life of a ward than he would have to change the will of his ward by executing a codicil thereto or by executing a wholly new will. Since Mr. Egan designated his sister as beneficiary in the certificate herein, and thereafter accepted it pursuant to the rules and regulations of the order, it must be held, in the absence of a change of beneficiary effected by him according to the rules and bylaws of the order, that the proceeds, in case of the death of the named beneficiary prior to his death, go to those persons who are entitled to them under the articles of incorporation. * * *”

This case was followed in *Boehmer v. Boehmer*, (1953) 264 Wis. 15, in which case the court also stated at page 21:

“* * * where a ward has a personal privilege to elect between alternative or inconsistent rights or claims, the privilege of election does not pass to the guardian of the estate of the ward, and the guardian cannot make the election. * * *”

At page 22, the court said:

“* * * we, therefore, conclude that this was a personal right which could not be exercised by the guardian, and that it is up to the court to determine what, if anything, is necessary for the best interests of the incompetent; and if any funds are necessary for his support, then the court may order such withdrawal therefrom.”

We conclude that a guardian of an incompetent participant or annuitant under the Wisconsin retirement fund does not have authority to change the designation of the beneficiary named by a participant or annuitant at a time when such participant or annuitant was competent even where the named beneficiary predeceases the participant or annuitant, and does not have authority to name a beneficiary if none had been named.

We conclude that the same rule applies to guardians of minor participants or annuitants, who have in fact named a beneficiary or who have failed to name a beneficiary.

RJV

State Capitol—State Chief Engineer—Parking Meters on Capitol Square—Under the present statutes neither bureau of engineering nor state chief engineer can validly contract with city of Madison regarding control by the said city of motor vehicle parking at the curbs on the capitol side of streets surrounding capitol square. Legislative action would be necessary to empower the city of Madison, bureau of engineering or state chief engineer to erect parking meters on the inner square. Secs. 15.77 (5) (a), 15.90 (1), 85.845 (1), Stats.

May 28, 1957.

THE HONORABLE, THE ASSEMBLY.

You have requested an opinion as to whether the state bureau of engineering or the state engineer may enter into a valid contract with the city of Madison regarding control

by the said city of motor vehicle parking at the curbs on the capitol side of the streets surrounding the capitol square.

Sec. 15.76, Stats., provides as follows:

“15.76 There is created within the executive department a bureau of engineering. The directing head of said bureau shall be the state chief engineer who shall be appointed by the governor, subject to the provisions of chapter 16.”

In general, public officers, acting for the government or other public authority, cannot bind their principals, unless it manifestly appears that they are acting within the scope of their authority, or are held out as having authority to do an act, or are employed as such to make the declaration or representation for their principals. *State ex rel. Crawford v. Hastings*, (1860) 10 Wis. 525; *State ex rel. Proudfit v. Hastings, Id.*; *Orton v. State*, (1860) 12 Wis. 509; *Randall v. State*, (1863) 16 Wis. 340; *Kneeland v. City of Milwaukee*, (1864) 18 Wis. 411; *Veeder v. Town of Lima*, (1865) 19 Wis. 280; *Town of Rochester v. Alfred Bank*, (1861) 13 Wis. 432.

In addition to powers expressly conferred upon him by statute an officer has by implication such additional powers as are necessary for the due and efficient exercise of powers expressly granted, or such as may be fairly implied from the statute granting the express powers. *Kasik v. Janssen*, (1914) 158 Wis. 606.

Certain powers given to certain officers cannot be delegated to others unless expressly authorized by some law. *State ex rel. Crawford v. Hastings*, (1860) 10 Wis. 525; *Lauenstein v. City of Fond du Lac*, (1871) 28 Wis. 336; *Shipman v. State*, (1877) 43 Wis. 381; *School Dist. No. 3 of Town of Adams v. Callahan*, (1941) 237 Wis. 560.

The land on which the capitol stands was acquired by deed from Moses M. Strong as attorney in fact for Stevens T. Mason and Julia E. Mason, his wife, and Kintzing Pritchette, the original of which deed is in the custody of the secretary of state, being filed with him April 22, 1879. The deed runs to the territory of Wisconsin and was originally recorded January 17, 1839, at Mineral Point, and was filed with the territorial treasurer on February 22, 1840. It is by virtue of the provisions of this quitclaim deed running to

the territory of Wisconsin with the reversion to the state, when organized, together with art. XIV, sec. 4, Wis. Const., which provided:

“* * * and all the estate, or property, real, personal or mixed * * * of the territory of Wisconsin, shall enure to and vest in the state of Wisconsin, * * *”

that the state of Wisconsin claims title to the present capitol site.

The deed conveyed a parcel of land 792 feet square.

An accurate measurement of the four sides of the capitol park made in 1936 showed the distances between curbs to be as follows:

Carroll Street -----	764.35
Main Street -----	764.80
Pinckney Street -----	764.76
Mifflin Street -----	764.65
Average distance -----	764.65

It will be noted that the average distance differs from the distance of 792 feet, mentioned in the deed, by 27.35 feet, from which it may be concluded that slightly over 13.5 feet on all sides of the square are being used for vehicular traffic or parking.

Prior to 1939 there was no authority in the city of Madison to control parking in that area within approximately 13.5 feet on each side of the capitol park.

Ch. 371, Laws 1939, amended then sec. 15.72 of the statutes and gave it the language of present sec. 15.90 (1), which provides:

“15.90 (1) The parking of automobiles at the curb on the capitol park side of the 4 streets surrounding the state capitol park shall be subject to any police or city ordinance that may be enacted by the city of Madison limiting the length of time which automobiles can be so parked in such public streets in said city.”

By the force of this statute alone, the city of Madison, if it be conceded that the power of enforcing its ordinances is thereby granted, is granted no more than mere power to limit the length of time that cars may be parked on the inner square. There is no grant of an easement or license to

erect parking meters upon the property of the state on either side of the curb line, either expressed or implied, in this section.

Neither can it be said that sec. 85.845, Stats., which authorizes the use of parking meters by cities, gives the city of Madison the requisite authority to erect parking meters on the inner square. It is certainly open to question whether under this section a municipality would be authorized to erect parking meters upon private property in which the municipality has no highway easements inasmuch as the section authorizes the installation of meters "on streets or highways within the municipality." Without answering that question, it can be certainly stated that the section does not grant a municipality the power to erect parking meters on property of the state over which the municipality has no highway easement, because the rule is that the words of a general statute applying to private rights and not specifically mentioning the rights of the state, do not affect those of the state, *State v. City of Milwaukee*, 145 Wis. 131.

It should also be pointed out that sec. 85.845, Stats., enacted by ch. 313, Laws 1945, was enacted subsequent to the enactment of sec. 15.90 (1), Stats. Hence, there could have been no intent at the time of the enactment of sec. 15.90 (1) to authorize the use by the city of parking meters in enforcing limited parking on the inner square. Nor could it be said that the subsequent enactment of sec. 85.845 impliedly amended sec. 15.90 (1), for the reason cited in the last preceding paragraph and for the further reason that under rules on construction a general act such as sec. 85.845 will not be deemed to amend a special act, sec. 15.90 (1) being in the nature of a special act, *State ex rel. La Crosse Public Library v. Bentley*, 163 Wis. 632.

Over the years the state has repeatedly, by legislative acts too numerous to recite here, reaffirmed its intention to retain jurisdiction and control over the entire capitol park.

Some questions might arise as to whether or not the state has not lost title or control over that portion originally owned by the state which has for a long period of years been devoted to vehicular traffic. The rule, of course, is that the general statutes relating to acquisition of rights by user or adverse possession would not operate against the state un-

less such statutes specifically so provided, inasmuch as general statutes are not to be construed as including the sovereign to its injury or operating to restrict or diminish the rights or interests of the state.

Necedah Manufacturing Corporation v. Juneau County, 206 Wis. 316; *City of Milwaukee v. McGregor*, 140 Wis. 35; *State v. City of Milwaukee*, 145 Wis. 131; *Sullivan v. School Dist. No. 1, City of Tomah*, 179 Wis. 502.

Sec. 330.10, Stats., provides that adverse possession for certain purposes shall constitute a bar to any action for the recovery of real estate adversely held or of the possession thereof, and concludes: "But no person can obtain a title to real property belonging to the state by adverse possession, prescription or user unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years." The elements necessary under sec. 330.06 and 330.07, Stats., to show adverse holding are conspicuously absent, and no other statute could raise any question as to the acquisition of any rights against the state in or to any of the land to which the territory, and later the state, acquired title under the deed of 1839. Moreover, the use of any portion of this state property was originally, and has continued to be, permissive. The permissive nature of any use of the state property has been reinforced by a statute which is specifically permissive in nature, i. e., sec. 15.90 (1). It should further be pointed out that even were the elements of adverse possession present, it is extremely doubtful that a municipality can acquire any type of prescriptive rights against the state in dedicated state property where such rights would be inimical to the purpose of the dedication. In *State v. Seattle*, 57 Wash. 602, 107 P. 827, 27 L.R.A. (NS) 1188, it was held that an easement for alley purposes could not be created by prescription against the state of Washington in land dedicated for the purpose of a state university, for the reason that under the dedication the state could not grant the right to devote the property to the particular use.

Sec. 15.77 (5) (a), Stats., empowers the state chief engineer as follows:

"(5) (a) To have charge of, operate, maintain and keep in repair the state capitol building and the grounds con-

nected therewith, the executive residence, the light, heat and power plant and such other state properties as may be designated by law; to appoint such number of policemen as may be necessary to safeguard all public property placed by law in his charge, and, personally or by any such policeman, to arrest, with or without warrant, any person violating any law within or around any of said properties. Nothing in this paragraph limits or impairs the duty of the chief and each policeman of the police force of the city of Madison to arrest and take before the proper court or magistrate persons found in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state, except s. 15.90 (2), in or around any of said properties located in the city of Madison, as required by s. 62.09 (13)."

It is important to note that this section authorizes the state chief engineer "to appoint such number of policemen as may be necessary to safeguard all public property placed by law in his charge, and, personally or by any such policeman, to arrest, with or without warrant, any person violating any law within or around any of said properties." Madison police are also expressly authorized to arrest persons found in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state in or around said properties, but are not authorized to enforce sec. 15.90 (2).

We conclude that the legislature by sec. 15.77 (5) (a) and sec. 15.90 (1) has set out the extent of regulation permitted by the city of Madison and that the bureau of engineering and state chief engineer cannot enlarge upon that authority or delegate powers which are personal to the state chief engineer.

In view of the foregoing we conclude that under the present statutes neither the bureau of engineering nor the state chief engineer can validly contract with the city of Madison regarding control by the said city of motor vehicle parking at the curb on the capitol side of the streets surrounding the capitol square.

RJV

Counties—Public Welfare Department—Under sec. 46.22 (3), Stats., and regulations adopted by the state department of public welfare pursuant to sec. 49.50 (2), Stats., the power of appointing employes of the county department of public welfare is vested in the county board of public welfare, which must appoint persons selected by the county director of public welfare (or the county judge). The county board of supervisors has neither the power to appoint such employes nor the power to fix their compensation, under sec. 59.15 (2), Stats.

May 28, 1957.

MORGAN L. MIDTHUN,
District Attorney,
Wood County.

Your predecessor, Mr. John M. Potter, has asked the following questions: (1) Whether the county board of public welfare has the exclusive authority to appoint employes of the county department of public welfare and to fix their salaries; (2) Whether the county board of supervisors has such exclusive authority; (3) Whether the authority is concurrent and resides in both the county board of public welfare and the county board of supervisors.

It is Mr. Potter's opinion that question (1) should be answered "yes," question (2) answered "no," and question (3) answered "no," and he points out that in 44 O.A.G. 262, 266, it is ruled that the county board may not adopt an ordinance which would authorize the board to directly hire and fire county employes in positions within the county welfare department.

The matter of county welfare department employes is specifically provided for by secs. 46.22 (3), (6), (7) and 49.50 (2) to (5), Stats., which confer upon the state department of public welfare the duty and authority to establish rules and regulations for the employment of county welfare department employes.

Sec. 46.22 (3), Stats., provides in part as follows:

"The county director of public welfare shall serve as the executive and administrative officer of the county department of public welfare. In consultation and agreement with

the county board of public welfare he shall prepare and submit to the county board of supervisors an annual budget of all funds necessary for the county department, and shall prepare annually a full report of the operations and administration of the department. *He shall recommend to the county board of public welfare the appointment and fixing of salaries of employes necessary to administer the functions of the department*, subject to the provisions of sub. (6) and s. 49.50 (2) to (5) and the rules and regulations promulgated thereunder."

Sec. 49.50 (2) and (5), Stats., provides:

"(2) RULES AND REGULATIONS, MERIT SYSTEM. The department shall adopt rules and regulations, not in conflict with law, for the efficient administration of aid to the blind, old-age assistance, aid to dependent children and aid to totally and permanently disabled persons, in agreement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel; provided that the provisions of this subsection shall not be construed to invalidate the provisions of s. 46.22 (6).

"* * *

"(5) COUNTY PERSONNEL SYSTEMS. In counties having a civil service system, the department may delegate to the civil service agency in such county responsibility for determining qualifications of applicants by merit examination, provided the standards of qualifications and examinations have been approved by the department and the state bureau of personnel. The personnel in such counties shall be exempt from such reexamination provided such personnel has qualified for present positions by examinations conducted pursuant to standards acceptable to the department."

Pursuant to the authority thus conferred, the state department of public welfare has adopted rules for the employment of county welfare department employes which place hiring and tenure of such employes upon a civil service basis. Wis. Adm. Code, ch. PW-PA 10. Subsecs. (3) (b) and (3) (c) of sec. 10.02, Wis. Adm. Code, PW-PA 10, provide as follows:

"(b) All other employees of the agency shall be *selected* by the director or the judge, as the case may be, upon proper certification from an appropriate register of eligibles or

transfer in accordance with this rule, *with the advice and consent of the appointing authority.*

“(c) The provisions of this section shall not apply to counties having a county-wide civil service system provided the standards of qualifications and examinations have been approved and the Department has delegated to the civil service agency in such county responsibility for determining qualifications of applicants by merit examinations.” (Emphasis added.)

The appointing authority is the county board of public welfare. Sec. 46.22 (3), Stats., quoted above.

The general authority of the county board over employing county employes is provided by sec. 59.15 (2), Stats. Nothing in that section confers authority upon the county board to directly hire and fire employes within the county department of public welfare. 44 O.A.G. 262, 265-266.

Sec. 59.15 (2) (d), Stats., it is true, authorizes the county board to contract for services of employes upon a 2-year basis. Necessarily the authority thus conferred does not authorize the county board to directly hire and fire employes within departments of county government whose tenure and terms of employment are already provided for, e. g., upon a civil service basis or by appointment by elected officers, but was intended to enable the county board to contract for services not otherwise specifically provided for by statute. See 44 O.A.G. 262, 265.

Furthermore, sec. 59.15 (2) (c), Stats., which authorizes the county board to establish the number of employes in any department and to fix and change their compensation, specifically provides that no action of the county board shall be in derogation of the rules and regulations of the state department of public welfare adopted pursuant to sec. 49.50 (2) to (5), Stats.

The matter of hiring and firing county welfare department employes, therefore, “has been pretty effectively removed from the direct control of the county board of supervisors.” 44 O.A.G. 262, 266.

For like reasons, the matter of wages of county welfare department employes is beyond the direct control of the county board of supervisors.

The state department of public welfare has established rules and regulations for the fixing of salaries of employes

in the county welfare department. Wis. Adm. Code, PW-PA 10, secs. 10.04 and 10.25-10.30.

Subsecs. (1) (a) and (1) (b) of sec. 10.04, Wis. Adm. Code, PW-PA 10, provide in part as follows:

“(a) The division, in cooperation with the bureau, shall assemble data and develop a comprehensive compensation plan for all classes of positions. The plan shall include salary schedules for the various classes, with the salary of each class consistent with the functions outlined in the class specifications. Initial, intervening, and maximum rates of pay for each class shall be established to provide for steps in salary advancement without change of duty in recognition of meritorious service. In arriving at such salary schedules, prevailing rates in the counties of the state, conditions affecting the supply of competent persons, and other relevant factors shall be taken into consideration. The plan shall also include regulations covering salary increases and adjustments.

“(b) The compensation plan as adopted shall be binding upon all the agencies.”

The county board of supervisors is therefore without authority to fix the salaries of county welfare department employes, except in conformity with the rules of the state department of public welfare.

You are therefore advised that the county board of supervisors does not have either exclusive or concurrent authority directly to hire and fire employes within the county department of public welfare nor directly to fix the wages of such employes in derogation of the rules of the state department of public welfare. The county director of public welfare is responsible for the selection of such employes with the advice and consent of the county board of public welfare, and the power of appointment is in the board of public welfare.

WAP

Automobiles and Motor Vehicles—Nonresident Driver's License—Revocation—Under sec. 85.08 (24) (a), Stats., a nonresident convicted of an offense for which revocation of his driving privileges is mandatory should be required to surrender his foreign license in the same manner that a resident is required to surrender his Wisconsin driver's license.

May 31, 1957.

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

You have requested my opinion as to the proper interpretation of sec. 85.08 (24) (a), Stats., which reads in part as follows:

“Whenever any person is convicted of any offense for which this section makes mandatory the revocation by the department of a license or the privilege to secure a license, the court in which such conviction is had shall require the surrender to it of *all licenses then held by the person so convicted*, and the court shall thereupon forward the same together with a record of such conviction to the department and shall report whether such party was involved in an accident at the time of the offense. * * *”

Specifically, you desire to know whether this section requires the surrender by a convicted nonresident of an out-of-state driver's license. You state that requests for this opinion have come from several courts in Wisconsin.

While it is not the function or practice of this office to advise the courts of their powers and duties, prior to their acting or assuming to act, by interpreting statutes under which judicial powers and duties arise, it is considered that the function of a court in requiring the surrender of an operator's license is an administrative act required of the court by the legislature in aid of the revocation of operating privileges contemplated to be effected by your department. The act, then, is an administrative duty to be performed in your behalf, and the extent of such duty is accordingly deemed properly determinable by this office on your request. See *State v. Marcus*, (1951) 259 Wis. 543.

The conclusion, above stated, that the surrender of all licenses at the time of conviction is considered to be required as an aid to revocation follows from the fact that the commissioner, upon his receipt of the conviction report, must revoke the operator's privilege to drive, and to do so effectively must require surrender of all evidence of the possession of such privilege. The requirement of the surrender of the license, then, is nothing more than a step in the effective revocation of operating privileges, required at a time when the revocation order is certain to issue.

A nonresident's possession of a foreign operator's license, under sec. 85.08 (4) (c), Stats., is evidence of his privilege to operate a vehicle in this state. The effective revocation of that privilege would require that, where possible, the otherwise misleading evidence of the privilege be removed from his possession while he is in this state. By virtue of sec. 85.08 (22) (a), Stats., which provides that the operating privileges granted to nonresidents be subject to revocation *in like manner* and for like cause as licenses issued to residents, the surrender of license required by sec. 85.08 (24) (a), as a step in the revocation of operating privileges, must apply to a nonresident and his foreign license in the same manner as it does to a resident and his license.

Your question is therefore answered in the affirmative.

It should be noted, as showing the acceptance of the practice of requiring the surrender of a foreign license for transmittal to home state authorities, that in *State v. Marcus, supra*, it is stated without criticism by the court that the foreign license of the defendant, after he had been convicted of drunken driving, had been taken up and forwarded to the Missouri authorities for revocation under the laws of that state.

JDW

University—Gifts and Donations—As a result of the passage of sec. 39.024 (3) (h), Stats, the board of regents under sec. 36.065, Stats., has authority to use funds derived from general gifts to the university for the benefit of university of Wisconsin-Milwaukee or university extension centers.

May 31, 1957.

A. W. PETERSON, *Vice President,*
University of Wisconsin.

You have requested my opinion as to whether certain specific gifts and bequests made to "the board of regents of the university of Wisconsin", to "the university of Wisconsin" and to "the university of Wisconsin, a corporation located at Madison" may be used by the regents for the benefit of the university of Wisconsin-Milwaukee or any of the extension centers of the university. I am of the opinion that the regents of the university of Wisconsin are not limited to the university located at Madison in their use of the funds received from the bequests cited.

The university of Wisconsin-Milwaukee was merged with the university of Wisconsin located in Madison in 1955 by virtue of the passage of sec. 39.024, Stats. Sec. 39.024 (3) (h) provides in part as follows:

"* * * Such merged institution shall be operated as an integral part of the university and shall be under the government of its board of regents. * * * Upon the taking effect of the merger herein provided, the state college at Milwaukee and the university extension division in Milwaukee shall cease to exist as separate institutions, and the board of regents of the university shall succeed to all rights and duties, properties and obligations of these institutions. * * *"

It also provides that all additional programs now carried on by either of the two institutions consolidated shall be continued, enriched, and strengthened on an integrated basis subject to such changes as the board of regents of the university may deem advisable.

Sec. 36.065, Stats., relates to gifts and donations to the university. This statute provides in part as follows :

“36.065 (1) All gifts, grants, bequests and devises for the benefit or advantage of the university or any of its departments, colleges, schools, halls, observatories or institutions, or to provide any means of instruction, illustration or knowledge in connection therewith, whether made to trustees or otherwise, shall be legal and valid and shall be executed and enforced according to the provisions of the instrument making the same * * *.”

The rule with respect to construing wills is well-established in Wisconsin. This rule was stated in *Will of Klinkert*, 270 Wis. 362 366, as follows :

“ ‘In construing wills, all rules of construction yield to the cardinal rule that the language of a will should be so construed as to give effect to the intention of the testator, if that intention may be ascertained from the language of the will itself, considered in the light of the surrounding circumstances, ’ *Will of Stevens*, 232 Wis. 111, 286 N.W. 574; *Will of Asby*, 232 Wis. 481, 287 N.W. 734; *Will of Smith*, 235 Wis. 66, 292 N.W. 443; *Will of Pfeiffer*, 231 Wis. 117, 119, 285 N.W. 432.”

None of the documents creating the gift to the university of Wisconsin contains any evidence of intent on the part of the donor to limit the use of the gift with respect to its being applied to the benefit of the university of Wisconsin-Milwaukee or to any of the extension centers of the university. The use of the language “Madison, Wisconsin” is deemed to be merely a descriptive means of designating the main address of the university and not *per se* a limitation upon the use of the gift. Ordinarily conditions will not be implied in a will unless specific words manifest an intent on the part of the testator to impose a condition.

“* * * In absence of specific words manifesting intention to impose a condition, conditions will ordinarily not be implied. Even where the word ‘condition’ is used, the instrument creating a charitable trust will not be interpreted as imposing a condition in absence of a reverter clause. * * *” *Estate of Mead*, 227 Wis. 311, 329.

It is my opinion that the primary purpose of the various testators was to further the educational opportunities of those students who chose the university of Wisconsin as the place where they would receive their college education. Such testamentary purpose is expanded by reason of the merger of the various extension centers and the university of Wisconsin-Milwaukee with the university of Wisconsin. This view is also supported by cases cited in 63 A.L.R. 880—especially the merger case of *Starr v. Morningside College*, 186 Iowa 790, 173 N.W. 231, of which the annotation states:

“* * * the case turns on the proposition that the gift was not a conditional one because the college was located in a particular city, but rather that the intention of the testator was to further the cause of education and religion, and would be carried out under the new arrangement. * * *”

The university of Wisconsin has grown by reason of the passage of secs. 39.024 (3) and 36.17, Stats. A testator or donor is presumed to know that growth and extension of service by the university is natural and imminent, and the use of funds given to the university for educational purposes should not be restricted because such growth resulted from a change in the statutes.

In the absence of any specifically expressed condition, it is within the discretion of the regents to use such funds for the benefit of the university of Wisconsin-Milwaukee, university extension centers or the university in Madison.

JDW

Apportionment—Constitution—Amendment—Joint Resolution No. 82, A., regarding apportionment of the assembly, appears to be in proper form.

June 7, 1957.

THE HONORABLE, THE ASSEMBLY.

You have submitted to me a copy of Jt. Res. No. 82, A., of the session of 1957, which proposes to change the method of apportioning and districting the members of the assembly, and asked me three questions concerning the propriety of the form of the resolution. The resolution reads:

“1 To amend sections 3 and 4 of article IV of the constitution, relating
2 to apportioning and districting the members of the assembly.
3 Resolved by the assembly, the senate concurring, That sections 3
4 and 4 of article IV of the constitution be amended to read:
5 (Article IV) Section 3. At their first meeting after each enumera-
6 tion made by the authority of the United States, the legislature shall
7 apportion and district anew the members of the senate and assembly,
8 according to the number of inhabitants, excluding Indians not taxed,
9 soldiers, and officers, and officers of the United States army and navy.
10 Section 4. The members of the assembly shall be chosen biennially,
11 by single districts, on the Tuesday succeeding the first Monday of in
12 November after the adoption of this amendment, by the qualified
13 electors of the several districts. *Each county shall be designated an*
14 *assembly district except that there shall be two districts in Brown,*
15 *Dodge, Eau Claire, Fond du Lac, Kenosha, La Crosse, Manitowoc,*

[Page 2]

1 *Marathon, Outagamie, Rock, Sheboygan, Waukesha, Winnebago and*
2 *Wood counties; three districts in Dane and Racine counties; twenty*
3 *districts in Milwaukee county; Adams and Marquette counties shall*
4 *comprise a district; Buffalo and Pepin counties a district; Burnett*
5 *and Washburn counties a district; Florence, Forest and Oneida coun-*
6 *ties a district; Iron and Vilas counties a district; Green Lake and*
7 *Waushara counties a district, and Rusk and Sawyer counties a district.*
8 *In counties having two or more assembly districts the legislature*
9 *shall apportion them according to the number of inhabitants, such*
10 *districts to be bounded by county, precinct, town or ward lines, to*
11 *consist of contiguous territory and be in as compact form as prac-*
12 *ticable. Be it further*
13 *Resolved, That the foregoing proposed amendment be and it is*
14 *hereby referred to the legislature to be chosen at the next general*
15 *election and that the same be published for 3 months preceding the*
16 *time of holding such election.”*

You ask:

1. Is the resolution in proper form?
2. Does the resolution comply with constitutional requirements?
3. Will the amendment made by the resolution accomplish the apparent purpose of the amendment?

In my opinion the resolution is in proper form. It contains the proper introductory paragraphs stating the purpose of the amendment and the reference to the sections of the constitution to be amended, and concludes with the proper direction for the reference of the proposed amendment to the next legislature and the directions for publication.

The resolution appears to comply with the formal requirements of the constitution concerning the submission of amendments. The use of the joint resolution by successive legislatures has been traditional and has been recognized by our courts. While it is true that two sections of the constitution, that is, art. IV, secs. 3 and 4, are amended, it would appear that the amendments to these two sections are intended to accomplish the single purpose of providing a new method of apportioning and districting the members of the legislature. Hence, there would appear to be no violation of the provision of the constitution. Art. XII, sec. 1, provides that if more than one amendment is submitted, they shall be submitted in such a manner that the people may vote for or against such amendments separately.

In this connection, you might consider it advisable to omit the action shown in page 2, line 10, in striking out the word "county," since it would appear that if one county divided into two or more assembly districts, such districts of necessity would be bounded at least in part by *county*, precinct, town or ward lines.

It would appear that the purpose of the amendment is to restore the apportionment of the assembly as it existed prior to the effective date of the Rosenberry Law adopted by the 1951 legislature, with minor variations. It would appear on its face that the amendment as written is adequate to accomplish this purpose.

RGT

Counties—Zoning—Billboards—Powers of counties to regulate the erection and location of billboards under secs. 59.07 (49) and 59.97, Stats., discussed.

June 11, 1957.

THE HONORABLE, THE SENATE.

By Resolution No. 22, S., you have asked my opinion regarding the authority of counties to establish standards for the erection and location of billboards.

It is my opinion that counties may regulate the erection and location of billboards under and pursuant to the zoning powers conferred upon them by sec. 59.97, Stats. I refer particularly to subsec. (1) of the statute, which provides insofar as applicable:

“For the purpose of promoting the public health, safety and the general welfare the county board of any county may by ordinance effective within the areas within such county outside the limits of incorporated villages and cities establish districts of such number, shape and area, and adopt such regulations for each such district as the county board shall deem best suited to carry out the purposes of this section. The powers granted by this section shall be exercised through an ordinance which may determine, establish, regulate and restrict:

“* * *

“(f) The location of buildings and *structures* designed for specific uses and designation of uses for which buildings and *structures* may not be used or altered.

“(g) The location, height, bulk, number of stories and size of buildings and other *structures*.”

Without attempting to define the limits of control by an enumeration, I am of the opinion that the above language empowers counties to prescribe the areas where billboards may be prohibited altogether or where only billboards of a prescribed height or size may be located. The considerations permitted to guide the counties' exercise of control are the public health, safety, and general welfare. The relation between billboard control and public safety on the highway is, of course, clear; whereas the relation of billboard control to other possible considerations is a bit more speculative and

should probably abide the presentation of actual problems. However, the language adopted by the Wisconsin supreme court in *Jefferson County v. Timmel*, (1952) 261 Wis. 39, presses for attention as indicating a possible consideration which may be permitted to guide counties in a proper circumstance, given the existence of sufficient other elements. The court stated at page 60:

“The trial court, in addition to holding that the zoning ordinance was in the interest of promoting safety, also stated in his decision, ‘The present Highway 30 is beautiful. For esthetic reasons this beauty should be preserved.’ This court apparently has not heretofore upheld a zoning ordinance on the grounds of esthetic reasons. It is pointed out in 58 Am. Jur., Zoning, p. 959, sec. 30, that the general rule is that the zoning power may not be exercised for purely esthetic considerations, but that there are authorities which indicate that the rule on this subject is undergoing development and it has been declared by some authorities that ‘in relation to the validity of zoning laws, that esthetic considerations are not wholly without weight, and may be taken into account where other elements are present to justify the regulation under the police power.’ We find it unnecessary in upholding the validity of the ordinance to resort to esthetic considerations because the promotion of safety on Highway 30 is sufficient to support the exercise of police power.”

The authority granted to counties to regulate the location and erection of billboards under their zoning powers must be exercised within the limits inherent in the counties’ power to zone as established by sec. 59.97. The regulation must be by districts. The ordinance or amendment thereto must be formed according to the procedures set out in subsecs. (2) and (3) of sec. 59.97, including the designation of a proper zoning agency to prepare the ordinance or amendment and the provision for a hearing upon the proposal after notice. Sec. 59.97 (7), providing for nonconforming uses, forbids the counties to prohibit their continuance and allows their alteration, expansion, or repair up to 50 per cent of the assessed valuation of the nonconforming structure.

It should also be noted that the counties’ power to zone, limited by subsec. (1) of sec. 59.97 to the areas outside the

limits of incorporated villages and cities, is further limited by subsecs. (2) (d) and (3) (g) to those towns whose town boards approve of the zoning ordinance or amendments. Thus while the counties propose, the towns dispose; and any attempted regulation of billboards by the county board is dependent upon the ultimate approval of each town board in order to be effective in each town therein.

In addition to regulation by the zoning power, among the general powers conferred on the county boards by sec. 59.07, Stats., we find in subsec. (49) the specific power to:

“Regulate, by ordinance, the maintenance and construction of billboards and other similar structures on premises abutting on highways maintained by the county *so as to promote the safety of public travel thereon*. Such ordinances shall not apply within cities and villages which have adopted ordinances regulating the same subject matter.”

It will be noted that the power therein conferred is limited in its exercise to the promotion of “the safety of public travel” and to premises abutting on “highways maintained by the county”. Although counties do maintain state highways and in many instances town roads, this maintenance is done merely on a contractual basis and not pursuant to any duty independent of contract. It is my opinion therefore that the specific authority conferred by this particular section is limited to those lands abutting highways over which the county is the maintaining authority, i. e. the county trunk system, and is further limited, in that regulation under this statute would not appear to permit any considerations other than public safety to govern its exercise.

It is within the above powers that, in my opinion, the counties have authority to regulate billboards.

MJW

RB

Constitutional Law—Courts—Strong presumptions favoring constitutionality would probably result in determination of validity of Bill No. 35, S., relating to Green county circuit court, if enacted into law.

June 12, 1957.

THE HONORABLE, THE SENATE.

By Resolution No. 9, S., you request my opinion as to the constitutionality of Bill No. 35, S., if enacted into law. The bill would remove Green county from its present judicial circuit, create a new judicial circuit, the twenty-third circuit consisting of Green county, and among other things, provide that one individual shall serve as circuit judge, county judge, small claims court judge, and juvenile judge for Green county.

Our supreme court has frequently stated in substance that the legislature, subject to the constitution of the United States and that of the state of Wisconsin, is supreme in its particular field, and the court will not declare laws unconstitutional unless it clearly appears beyond reasonable doubt that they contravene constitutional provisions. *United Gas, Coke and Chemical Workers of America, etc. v. W.E.R.B.*, 255 Wis. 154. A statute will be presumed to be constitutional and will be held to be unconstitutional only if it appears so beyond a reasonable doubt; and the burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity. *ABC Auto Sales, Inc. v. Marcus*, 255 Wis. 325. An act of the legislature is presumed to be constitutional unless its repugnance to the constitution is clear and irreconcilable. *State ex. rel. Reuss v. Giessel*, 260 Wis. 524. Further, all doubts as to the constitutionality as to an act of the legislature must be resolved in favor of its validity. *State ex. rel. Thomson v. Giessel*, 265 Wis. 558. Justice Gehl, in his opinion in *State ex. rel. Thomson v. Giessel*, 265 Wis. 558, 565, said:

“Our search must be for a means of sustaining the act, not for reasons which might require its condemnation.”

For purposes of this opinion, the bill must be viewed as though it had been enacted into law, and my function is to express an opinion as to what the supreme court would do if the question of constitutionality were properly raised in an appropriate form of action.

I have had the benefit of the law memorandum submitted by interested attorneys of Green county. Among the questions I have considered are these:

1. The argument made against the bill that there is some uncertainty as to the meaning of the term "previously elected county judge" in sec. 8.025 (1) (a). It is claimed that if the term is intended to exclude an appointed judge, there is no provision for salary. In my opinion, this does not involve a constitutional issue, and if there is an ambiguity it can be clarified by the legislature.

2. The challenge that the provision for supervisory control by circuit courts over all inferior courts contained in art. VII, sec. 8, Wis. Const., would be violated if the same judge presides over the circuit court and the inferior court. The proposed bill makes provision for calling in an outside judge in such instance. It may be that this would prove somewhat cumbersome as a practical proposition, but the establishing of such procedures is a matter of policy to be determined by the legislature. In my opinion, this does not conflict with the constitutional provisions governing supervisory control of courts.

3. The claim that this bill may constitute a "merger" of the several courts involved. While it can be argued that that may be the practical effect of the bill, it does not so provide. The bill specifically provides that the circuit court and the county court "shall be separate and distinct courts for all purposes, except as herein provided, as though each had its own separate judge." Allied with this question is whether one person can serve as judge of more than one court. The Wisconsin constitution, art. VII, sec. 10, provides that a circuit judge shall hold no office of public trust *except a judicial office* during the term for which he is elected. The language of the constitution seems to anticipate that circuit judges may be likely to occupy other judicial positions. There appears to be no conflict with the constitution in this respect.

4. The contention that incompatibility may exist between the offices of circuit judge and county judge, small claims court judge, and juvenile court judge. The common law on this question is not clear, but even if such offices were deemed incompatible at common law, it seems quite certain that the legislature would have the constitutional power to provide for the holding of incompatible offices by the same person. This involves a matter of public policy, which is exclusively for the legislature to determine. *State v. Coubal*, 248 Wis. 247.

5. The invalidity of the original bill's provision relating to 70-year age limitation. As stated in 30 O.A.G. 148, this provision is probably invalid as an attempt to prescribe qualifications for a constitutional officer. It is also in conflict with Wis. Const., art VII, sec. 24. This objection has been removed, however, by Amendment No. 2, S., by dropping from the bill this language appearing in sec. 8.025 (1) (a): "No person over 70 years of age shall be eligible to hold such office."

It is my opinion, therefore, that the strong presumptions generally favoring a law's constitutionality would result in a determination upholding the validity of a law resulting from this bill.

JEA

Secretary of State—Corporations—Filing Fees—There is no statutory authority to cancel an amendment or other corporate filing, once filed, and no refund of filing fee paid can be made under the facts stated. Sec. 180.07 (1) (b), Stats.

June 13, 1957.

ROBERT C. ZIMMERMAN,
Secretary of State.

You advise that an amendment was filed in your office on January 15, 1957, on behalf of a corporation increasing the authorized capital stock from 10,000 shares at no par value

to 100,000 shares at no par value. Pursuant to the filing fee provision of sec. 180.87 (1) (b), Stats., a filing fee of \$1,810 was paid and was duly deposited in the state treasury and credited to the general fund.

You state that approximately three weeks thereafter, the individual who paid the \$1,810 to your office on behalf of the corporation contacted your office in an effort to "cancel" the amendment and obtain a refund of \$1800.

You query as to the possible procedures and circumstances which might allow your office to grant a refund of a filing fee paid to the state for an amendment or other corporate filing in cases where the parties desire to cancel the filing.

Pertinent provisions of sec. 180.87, Stats., involved in your inquiry are as follows:

"180.87 (1) The secretary of state shall charge and collect for:

"* * *

"(b) Filing articles of amendment, \$10; and an additional sum equal to \$1 for each \$1,000 or fraction thereof of par value shares and 2 cents for each share without par value as authorized after such amendment, less a credit computed at the foregoing rates upon all shares as authorized immediately prior to such amendment.

"* * *

"(2) The liability of any corporation for any fees, charges or penalties which may be due under this chapter may be enforced by suit brought by the attorney-general in the name of the state.

"(3) The secretary of state shall not file any document relating to any corporation, domestic or foreign, organized under or subject to the provisions of this chapter, until all fees and charges provided to be paid in connection therewith shall have been paid to him or while the corporation is in default in the payment of any fees, charges or penalties herein provided to be paid by or assessed against it."

Sec. 180.86, Stats., prescribes the procedure for the filing and recording of documents.

"* * * The term 'filing' and the verb 'to file,' as related to this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file." *Bergeron v. Hobbs*, 96 Wis. 641, 643.

In the instant case it is clear that there was an intent to file. The amendment was filed and remains of record with the secretary of state, the filing fee was tendered and accepted, and the provisions of sec. 180.86 were followed. There is no statutory procedure by which it can now be "canceled" or "unfiled."

If the corporation desires to reduce its authorized capital stock back to the original 10,000 shares of no par value, it will be necessary that a new amendment be duly passed and filed, in which case an additional \$10 filing fee would have to be paid.

RJV

Counties—Highways and Bridges—Snow Removal—The county board has the power under the provisions of sec. 83.03 (1), Stats., to appropriate funds for the removal of snow from any public road in the county.

June 14, 1957.

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

You have inquired whether or not a county board has authority to appropriate sums from county revenues for the removal of snow from town roads.

In my opinion the county has such powers. Under the provisions of sec. 83.03 (1), Stats., the county board is authorized to appropriate money for the "repair" of any road in the county.

In 39 O.A.G. 134, the attorney general stated that the word "repair" in effect meant the same thing as "maintain." That opinion is now some 7 years old, and the legislature has never seen fit to change the statute or the definition of the term "repair" as given in that opinion.

In the chapter of the statutes relating to state trunk highways, that is, ch. 84, maintenance is defined in sec. 84.07 (1) to include the removal and control of snow on highways.

Accordingly, since this office has previously ruled that the word "repair" is the same thing as "maintain" and the applicable statutes themselves recognize that the word "maintain" includes snow removal, the county board has the power if it so desires to appropriate funds for the removal of snow from any highway in the county.

RGT

*Constitutional Law—Taxation—Personal Property—*Bill No. 183, A., providing for assessment of inventories on basis of average monthly inventories, would be invalid under sec. 1, art. VIII, Wis. Const.

June 14, 1957.

THE HONORABLE, THE ASSEMBLY.

You have requested an opinion as to the constitutionality of assessing certain personal property by the average inventory method as proposed in Bill No. 183, A., or in substitute amendment No. 1, A.

Bill No. 183, A., would repeal sec. 70.30 (6), (7) and (8), Stats., which includes merchants' stocks, manufacturers' stocks, and logs, timber, lumber, ties, poles and posts that are not manufacturers' stock, within the list of property which the assessor must assess separately on the basis of the true cash value as of May 1. In lieu of the present method, Bill No. 183, A., would require that such property "be valued on the basis of the full market value of the average monthly inventories of such goods on hand for the year immediately preceding the assessment date, or for such number of months, less than a year, that the business has been in operation." The bill further provides that any item

which has been included in the inventory for 12 successive months shall thereafter be excluded from the assessment.

Substitute amendment No. 1, A., is substantially similar to the original bill except that the amendment provides that the owner of such property may elect to have the property assessed on the present basis or upon an average inventory basis, and if the latter basis is chosen the assessment is to be made on either the cost or the full market value, whichever is lower, of the average monthly inventories.

Doubt as to the constitutionality of using an average inventory basis stems from sec. 1, art. VIII, Wis. Const., which provides:

“The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe.
* * *”

In *Chicago & N.W.R. Co. v. The State*, (1906) 128 Wis. 553, 612-613, 108 N.W. 557, the court discussed sec. 1 of art. VIII at length, saying:

“* * * So in a sense the constitution prescribes the basic principle, the real rule of uniformity in the abstract; the legislature prescribes the rule in the concrete: in the sense of creating a union of constitutional principle and such laws as are necessary to give vitality thereto. Those laws are the essentials, as indicated: *those for the ascertainment of values and fixing rates and applying the latter to the former so as to effect the constitutional equality, must necessarily be uniform* throughout the state, having regard to the varying conditions as to taxing districts requiring varying amounts to be raised in them respectively for the needs of the special localities. Laws as regards mere details, designed to be aids in applying the rule, may or may not violate it according as they reasonably are in furtherance of it or are manifestly otherwise.” (Emphasis supplied.)

On the following page the court said:

“* * * It is sufficient to satisfy the constitution, in the case of the assessment of real and personal property, that the law provides for the valuation of real property at its full value, and, though a different method and time are pro-

vided for valuing personal property, the difference is immaterial since the law requires that to also be appraised at its full value."

The valuation on an average inventory basis is, of course, not a method for determining the full value of merchants' property. It is an entirely different basis for valuing inventories. The average inventory basis does not even attempt to determine the true value of a given inventory but merely the average of the month-end inventories throughout the year. As such, it is one of the essentials in the assessment process, mentioned in the *Chicago & N.W.R. Co.* case, which must be uniform. Use of the average inventory basis would result in some personal property being assessed on a different basis of valuation than other personal property.

Different bases of ascertaining values of various types of property for general property tax purposes are not, like exemptions from the property tax, a matter in which the legislature has wide discretion. In *Knowlton v. Supervisors of Rock County*, (1859) 9 Wis. *410, at *424, the court said of sec. 1, art. VIII:

"* * * The legislature can only 'prescribe,' and when they have done that, the first clause of the section governs the residue of the proceeding. There cannot be any medium ground between absolute exemption and uniform taxation."

In that case it was held that real property could not be divided into classes and valued on a different basis, because to do so would violate the rule of uniformity in sec. 1, art. VIII. The court at *420-1 said:

"* * * The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity in such a proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised. * * *"

In the more recent case of *State ex rel. Baker Mfg. Co. v. Evansville*, (1952) 261 Wis. 599, 53 N.W. 2d 795, the city

contended that the requirement of uniformity would be satisfied if all realty was assessed at a certain percentage of market value although personal property was assessed at a different percentage of true value.

In answer to this the court said, at 261 Wis. 609 :

“* * * We do not consider this to be the law. In our view the command of sec. 1, art. VIII of the Wisconsin constitution, requires uniformity of taxation, according to value, of real and personal property without distinction. The methods of determining true, current value necessarily differ in the absence of significant sales, but when once the true value is arrived at, each dollar's worth of one sort of property is liable for exactly the same tax as a dollar's worth of any other sort of property, and to assess real property at a different fraction of the value than personal property is error. * * *”

In the opinion last above quoted the court noted that different criteria for determining value are necessary in the absence of significant sales. However, in the case of inventories of goods held for sale there would seem to be no necessity for departing from the standard methods of determining values of personal property, namely, the true cash value as shown by the applicable market prices. Certainly if classes of real estate, or if real estate as contrasted with personal property, cannot be assessed at variant bases of valuation, because contrary to the rule of uniformity provided in sec. 1, art. VIII of the constitution, then the average inventory system would be violative thereof.

Bill No. 183, A., would also create subsec. (3) of sec. 70.31, providing for the exclusion from assessment of any item of inventory which had been included in 12 successive monthly inventories. While this, in effect, may be viewed as creating a new exemption from property taxation, it has all the aspects of classification. But even as an exemption it would be of dubious validity. As previously noted, the legislature has considerable discretion in the matter of classifying property for exemption from property taxes. Even that discretion is subject to the limitation of reasonableness.

In *Lawrence University v. Outagamie County*, (1912) 150 Wis. 244, at 247, 136 N.W. 619, the court quoted with approval the following language from an earlier case:

“ * * * a classification of persons or property liable to or exempt from taxation does not violate the required rule of uniformity and equality, provided such classification be founded on real differences, affording rational grounds of distinction, and the exemption be reasonable in amount. ”

Substitute amendment No. 1, A., to Bill No. 183, A., if adopted, would not in my opinion be a valid law. The substitute amendment would give the taxpayer a choice of having his inventories assessed under the present statutes or by the average monthly inventory basis. A merchant whose business requires him to maintain particularly large inventories on May 1 would, of course, elect to use the average inventory method, whereas one whose business allowed him to reduce his inventory for May 1 would do so and elect the present method of assessment. This choice is clearly in conflict with the rule of uniformity.

Secondly, the substitute amendment provides that if the average monthly inventory method is used the values shall be based on the cost or the full market value, whichever is lower. This likewise violates the rule of uniformity. In a period of rising prices an item purchased several months previously would be valued at its actual cost, rather than at the then current value. Another identical item purchased more recently would be given a different value. I can see no reasonable basis for such differences in assessing identical pieces of property, and in that respect certainly such provision would violate the principle of uniformity.

It is my conclusion that neither Bill No. 183, A., nor substitute amendment No. 1, A., thereto would, if enacted, be a valid law.

HHP

EWW

Legislature—Delegation of Power—Attorney General—Criminal Law—Solicitation of Funds by Law Enforcement Bodies—Substitute amendment No. 1, A., to Bill 537, A., authorizing the attorney general to grant or withhold permission to associations of law enforcement officers to solicit or receive donations, without prescribing any standards to guide him in the exercise of that authority, would probably be an unconstitutional delegation of legislative power.

June 18, 1957.

THE HONORABLE, THE SENATE.

You have requested my opinion "regarding the constitutionality of the delegation by the legislature of certain powers to the attorney general, by substitute amendment No. 1, A., to Bill No. 537, A., which relates to the solicitation of funds for law enforcement bodies."

Substitute amendment No. 1, A., to Bill No. 537, A., would create sec. 946.74, Stats., reading in part as follows, so far as material to the question submitted:

"946.74 SOLICITING FUNDS FOR FUNCTIONS OF LAW ENFORCEMENT BODIES. Whoever solicits or receives donations for or on behalf of any * * * state-wide association of law enforcement officers or for or on behalf of any of the functions, activities, benefits or charities thereof * * * may be fined not more than \$500 or imprisoned not more than 90 days, unless upon petition approval thereof in writing is first obtained:

"* * *

"(4) From the attorney general in case of soliciting or receiving donations for or on behalf of a state-wide association of law enforcement officers or for or on behalf of the functions, activities or charities thereof."

The rules relating to delegation of legislative power to administrative officers and bodies are well established in this state. Reference to a few recent cases will suffice for the purposes of this opinion.

In *United G., C. & C. Workers v. Wis. E. R. Board*, (1949) 255 Wis. 154, 158-159, 38 N.W. 2d 692, the supreme court stated in part as follows:

“* * * The extent to which the legislature may delegate legislative power has received the attention of this court many times. This question was reviewed in *State ex. rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 505, 220 N.W. 929. In that case the rule was stated as follows:

“It is considered that the constitutional aspects of administrative law have been so far developed by statute and decision as to indicate in a general way the line which separates that kind of legislative power which may not be delegated from that kind which may be delegated. The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by our constitution in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of Chief Justice MARSHALL “to fill up the details;” in the language of Chief Justice TAFT “to make public regulations interpreting the statute and directing the details of its execution.” It is legislative power of the latter kind which is oftentimes called the rule-making power of boards, bureaus, and commissions.’

“This rule has been quoted and followed since that time.
* * *”

In *Clintonville Transfer Line v. Public Service Comm.*, (1945) 248 Wis. 59, 68–69, 21 N.W. 2d 5, the court stated in part as follows:

“The record in this case presents some of the most baffling and complicated questions that arise under our system of constitutional law. These relate to the extent to which legislative power may be delegated to administrative agencies and how far the exercise of those powers by administrative agencies is subject to review by the courts. While these questions have been before the legislatures and courts of this country ever since the adoption of the Interstate Commerce Act in 1887, many of them still remain unsolved. It may be helpful to state a few fundamental propositions which are generally agreed upon.

“* * *

“5. It is not competent for the legislature, even in a circumscribed field, to grant to an administrative agency unlimited legislative power. The power granted must be exercised in accordance with standards and limitations fixed by the legislature.”

In *Olson v. State Conservation Comm.*, (1940) 235 Wis. 473, 481, 293 N.W. 262, after citing many cases dealing with the subject of delegation of legislative power, the court stated in part as follows:

“* * * The legislature, of course, may not delegate legislative power to an administrative board without standard or guide.”

This proposed legislation grants to the attorney general power to give or withhold permission to solicit and receive donations without prescribing any standards whatsoever to guide him in the exercise of that power. He could be as capricious and arbitrary as he liked. He could grant one organization permission to solicit donations for the entertainment of its members and deny another organization permission to solicit donations for the payment of expenses of speakers at its meetings or for the purchase of equipment for a hospital.

It is therefore my opinion that the delegation of authority to the attorney general would probably be held unconstitutional under the decisions above quoted.

WAP

Attorneys—Divorce Counsel—Fees—Sec. 256.49, Stats., created by ch. 118, Laws 1957, applies only to attorneys appointed by the court and therefore does not affect the fees of the divorce counsel, who is appointed by the circuit judge or judges under sec. 247.13, Stats.

June 18, 1957.

D. E. JENSEN,
District Attorney,
Polk County.

You have requested an opinion whether ch. 118, Laws 1957, affects the fees of the divorce counsel. Ch. 118 creates sec. 256.49 of the statutes, which provides as follows:

“256.49 COMPENSATION OF ATTORNEYS APPOINTED BY COURT. Notwithstanding any other provision of the statutes,

in all cases where the statutes fix a fee and provide for the payment of expenses of an attorney to be appointed by the *court* to perform certain designated duties, the *court* appointing the attorney shall, after the services of the attorney have been performed and the disbursements incurred, fix the amount of his compensation for the services and provide for the repayment of disbursements in such sum as the *court* shall deem proper, and which compensation shall be such as is customarily charged by attorneys in this state for comparable services."

Sec. 247.13 (1), Stats., provides as follows:

"In each county of the state, except in counties having a population of 500,000 or more, the *circuit judge or judges* in and for such county shall by order filed in the office of the clerk of the circuit court on or before the first Monday of July of each year, appoint some reputable attorney, of recognized ability and standing at the bar, divorce counsel for such county. Before entering upon the discharge of his duties such counsel shall take and file the official oath. The person so appointed shall continue to act until his successor is appointed and duly qualified."

Sec. 247.17, Stats., fixes the fees to be paid the divorce counsel "upon the order of the presiding *judge*."

There is a well established distinction in this state between the "judge" and the "court". *State ex rel. Department of Agriculture v. Aarons*, (1946) 248 Wis. 419, 421-3, 22 N.W. 2d 160; *Barrows v. Kenosha*, (1957) 275 Wis. 124, 125, 81 N.W. 2d 519; *In re Brand*, (1947) 251 Wis. 531, 536, 30 N.W. 2d 238; *State v. Marcus*, (1951) 259 Wis. 543, 551, 49 N.W. 2d 447; *State v. Friedl*, (1951) 259 Wis. 110, 47 N.W. 2d 306.

Inasmuch as the new statute applies only to attorneys appointed by the court and whose fees are fixed by the court, it does not apply to the divorce counsel who is appointed by the judge or judges of the circuit court and whose fees are fixed by the presiding judge.

WAP

Register of Deeds—Draftsman's Name on Instrument—Words and Phrases—Persons—The word “person” as it appears in sec. 59.513, Stats., as created by sec. 1 of ch. 70, Laws 1957, means the same thing as the word “draftsman” which appears in sec. 59.57 (1) (c), Stats., as created by sec. 3 of ch. 70, Laws 1957.

June 19, 1957.

JACK D. STEINHILBER,
District Attorney,
 Winnebago County.

You have inquired how instruments drafted on behalf of corporations, partnerships, or associations are to be handled so far as compliance with the provisions of ch. 70, Laws of 1957, is concerned.

The material portions of ch. 70 relating to your inquiry are secs. 1 and 3 which created sec. 59.513 (1) and sec. 59.57 (1) (c) of the statutes respectively to read:

“59.513 INCLUDING NAME OF PERSON DRAFTING INSTRUMENT. (1) No instrument by which the title to real estate or any interest therein or lien thereon, is conveyed, created, encumbered, assigned or otherwise disposed of, shall be recorded by the register of deeds unless the name of the person who, or governmental agency which, drafted such instrument is printed, typewritten, stamped or written thereon in a legible manner. An instrument complies with this section if it contains a statement in the following form: “This instrument was drafted by ----- (name) -----.”

“59.57 (1) (c) No additional recording fee shall be required as the result of inclusion on an instrument of information concerning the identity of the draftsman under s. 59.513.”

The specific question you have raised relates to the meaning to be attached to the word “person” as used in ch. 70. In other words, is it sufficient to attach to an instrument the wording, “This instrument was drafted by the X Corporation”?

In this connection you have made reference to sec. 990.01 (26), Stats., which reads:

“990.01 In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

“* * *

“(26) PERSON. ‘Person’ includes all partnerships, associations and bodies politic and corporate.”

It would appear here that to give the word “person” in ch. 70 the meaning used in sec. 990.01 (26), so as to permit the legend “This instrument was drafted by the X Corporation” would produce a result inconsistent with the manifest intent of the legislature and would thus be contrary to the directive in the opening sentence of sec. 990.01 relating to the construction of laws.

There are several reasons which support this view.

While a corporation may have many of the rights of a natural person such as the capacity to sue and be sued, to make contracts, to take, hold, and convey property, the capacity to commit certain kinds of torts and crimes, and other capacities even more extensive, such as the right of prolonging its existence beyond the term of natural life, it nevertheless is an artificial being and has no hands to write or type a document. As was said by Lord Coke in reporting the case of *Sutton’s Hospital*, (1612) 10 Coke Reports 285, 303:

“* * * the corporation itself is only *in abstracto*, * * * for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law; and therefore in 39 H. 6. 13. b. 14. a dean and chapter cannot have predecessor nor successor, 21 E. 4. 27. (72.) a & 30 E. 3. 15. They cannot commit treason, nor be (e) outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney 33 H. 8. Br. Fealty. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, Plow. Com. 213, and the Lord Berkley’s case 245, it is not subject to imbecilities, death of the natural body, and divers other cases. * * *”

Unlike natural persons, corporations can do nothing except through the agency of others. *Oliner v. Mid-Town Promoters, Inc.*, (N.Y. Court of Appeals Oct. 18, 1956) 2 N.Y.

2d 63, 156 N.Y.S. 2d 833. This is really the essence of what Lord Coke said over 300 years ago.

A statement, "Drafted by the X Corporation" is untrue and would be just as meaningless as though the name of the X Corporation were inserted as a witness.

Also you will note that sec. 59.57 (1) (c) uses the phrase "the identity of the draftsman." A "draftsman" is one who draws up documents, as the term is used here. It is a physical impossibility for a corporation to be a "draftsman."

Sec. 59.51 (1) of the statutes now requires that names of the grantors, grantees, witnesses, and notary shall be plainly printed or typewritten on a document offered for recording. Ch. 70 further fixes responsibility and identifies the transaction by requiring the name of the draftsman. No useful purpose would be served by the legend, "Drafted by the X Corporation," in view of the objective of the bill.

It is therefore concluded that the word "person" as it appears in ch. 70, Laws 1957, means the same thing as "draftsman," which term is also used in that chapter, and that the purpose of the law is to identify the individual who acted as the draftsman rather than the organization, company, partnership, or association with which he happens to be associated or at whose direction the instrument was prepared.

It might be added that there appears to be no objection, however, to the addition of other identifying information which may be helpful in locating the draftsman at a later date, e. g., "This instrument was drafted by John Doe, Secretary of the X Corporation" or "This instrument was drafted by Attorneys Doe and Roe per John Doe," etc.

Nothing said in this opinion should be construed as a ruling that a corporation or other business entity is entitled through its employes to engage in the practice of conveying for the general public.

WHR

Counties—Parks—County which has no county park commission has power under sec. 59.07 (1), Stats., acting through its rural planning committee pursuant to sec. 27.015 (10), Stats., to lease lands for park purposes and construct improvements thereon.

June 20, 1957.

FREDERIC C. EBERLEIN,
District Attorney,
Shawano County.

You inquire as to whether a county board which has not created a county park commission as provided by sec. 27.02, Stats., and which operates county parks under the provisions of sec. 27.015, Stats., has the power to lease land for park purposes and construct improvements thereon.

You advise that Shawano county recently leased a parcel of land for a period of 40 years and now intends to construct improvements thereon.

Sec. 27.015 (10), Stats., provides:

“(10) Any county in which there does not exist a county park commission acting through its rural planning committee may acquire by gift, grant, devise, donation, or purchase, condemnation or otherwise, with the consent of the county board, a sufficient tract or tracts of land for the reservation for public use of river fronts, lake shores, picnic groves, outlook points from hilltops, places of special historic interest, memorial grounds, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same, and to develop and maintain the same for public use.”

The term “lease” is not used in sec. 27.015 (10), although counties which have a county park commission specifically have the power to lease lands for airport purposes under sec. 27.05 (4), and under sec. 27.05 (3) such county may acquire “by purchase, land contract, lease, condemnation, or otherwise,” such tracts of land or public ways as it may deem suitable for park purposes.

Under the provisions of sec. 27.08 (2) (c), Stats., a city may lease land for park purposes. Towns and villages are

likewise permitted under the provisions of sec. 27.13, Stats., to operate parks and acquire them in the same manner as cities may do. Towns specifically under the provisions of sec. 60.184 (3), Stats., may acquire land by lease for park purposes where a commission has been appointed.

Prior to 1955 ch. 59 did not specifically include any power authorizing counties to acquire land for park purposes except sec. 59.07 (17m) (1953 Stats.) which provided power to acquire land for the purpose of transferring the same to state parks.

Sec. 59.07 (1) as enacted in 1955 provides in part:

“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:

“(1) PROPERTY. (a) *How acquired; purposes.* Take and hold land sold for taxes and acquire, *lease or rent* property, real and personal, for public uses or purposes of any nature, including without limitation acquisitions for county buildings, airports, *parks*, recreation, highways, dam sites in parks, parkways and playgrounds * * *.”

While sec. 27.015 (10) does not specifically include the word lease, it states that the county “may *acquire by gift, grant, devise, donation, or purchase, condemnation or otherwise*, with the consent of the county board, a sufficient tract or tracts of *land for* * * * *parks, playgrounds,*” etc., and “develop and maintain the same for public use.”

In ch. 990, Construction of Statutes, sec. 990.01 (18) defines “land” as:

“(18) LAND. ‘Land’ includes lands, tenements and hereditaments and all rights thereto and interests therein.”

It is clear from sec. 235.50, Stats., that a lease for a period exceeding 3 years conveys an “interest in real estate” and that the term “purchaser” embraces every person to whom any interest in real estate is conveyed for a valuable consideration.

We are of the opinion that a county which has no county park commission has the power, under the provisions of sec. 59.07 (1), acting through its rural planning committee pursuant to sec. 27.015 (10), to lease lands for park purposes and construct improvements thereon.

In constructing improvements on such leased property the county board and rural planning committee perhaps should consider the term of the lease and probable life of the improvements, and may want to include provisions in the lease as to what shall happen to the improvements at the end of the term. The county may want the right to remove certain buildings or provide for purchase of the improvements at their depreciated worth at the end of the term or on termination.
RJV

Deed—Reverter Clause—Tuberculosis Sanatorium—Wales—When the state in 1905 acquired option to purchase land for a tuberculosis sanatorium at Wales and the option contained the words “said property to be used exclusively for a state sanatorium if purchased”, and the land was subsequently conveyed to the state by deeds unconditional in form and containing no language as to the use of the property, the state may now abandon the use of the property for sanatorium purposes without giving rise to a reversion to the grantor or his heirs.

June 26, 1957.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 32, A., 1957 session, you have requested an official opinion as to whether or not the state may safely abandon the state sanatorium at Wales without possibility of reversion to the former owner or his heirs in view of the fact that when the state acquired an option to purchase the land on December 26, 1905, it was stated in the option, “said property to be used exclusively for a state sanatorium if purchased.”

The option contained no provision for a reverter and no language was used in which it could be construed as creating a condition subsequent. The language in the option relating to use of the property was not repeated in the deeds of conveyance, which are unconditional as to form.

A case very much in point is that of *State v. Milwaukee*, (1942) 241 Wis. 316, 6 N.W. 2d, 356. There the city of Milwaukee donated land to the state by an ordinary quitclaim deed which referred to an authorizing resolution of the common council containing a recital to the effect that the donation was for the purpose of ch. 89, Laws 1878, which appropriated money for the construction of an industrial school on land to be conveyed to the state.

It was held that the language of the common council resolution, even if construed to mean that the land was to be deeded for a specific purpose, was ineffectual to create a condition subsequent and that a subsequent quitclaim deed given to correct the description in the original deed did not give rise to a reversion under a provision in the deed that the land should be used solely as a site for an industrial school and would revert to the city if not used for such purpose.

In its decision the court referred to the earlier case of *Polebitzke v. John Week Lumber Co.*, (1914) 157 Wis. 377, 147 N.W. 703, where it was held that conditions subsequent must be created either in express terms, as by a statement of the condition coupled with a reverter clause, or by clear implication; and they are most strongly construed against the grantor. In this case the deed conveyed a strip of land one rod wide bordering on a river "for the purpose of rafting and boorage." The court considered that the words just quoted were entirely inadequate to create a condition subsequent.

If the statement of the purpose in the deed itself is inadequate to create a condition subsequent, it appears that such result would be even more unlikely where the purpose was stated in the option only and not at all in the deed.

You are therefore advised that the abandonment by the state of the use of the property in question for sanatorium purposes and its subsequent use by the state for other purposes does not in my opinion furnish a reasonable basis for a reversion of the property to the grantors or their heirs.

WHR

Appropriations and Expenditures—State—Republican Party Birthplace—Appropriation made by Bill No. 278, A., to give \$2,500 to the Foundation for American Principles and Traditions for the restoration and renovation of the Ripon school house which was the birthplace of the Republican party is valid.

June 26, 1957.

THE HONORABLE, THE SENATE.

You have requested my opinion of the validity of a proposed appropriation by Bill No. 278, A., of the sum of \$2,500 to the Foundation for American Principles and Traditions for the restoration and renovation of the Ripon school house which was the birthplace of the Republican party.

The issue which you pose may properly be divided into two questions: (1) Is the appropriation for a public purpose? (2) Is a private nonprofit foundation a proper agency of the state to carry out a public function?

First, the law appears clearly established that public funds may be expended only for public purposes. This rule was laid down by our supreme court in the early cases of *Curtis's Adm'r v. Whipple and Others*, (1869) 24 Wis. 350, and *Whiting v. The Sheboygan & Fond du Lac Railroad Company*, (1870) 25 Wis. 167, and has been followed without change since that time. See also the following cases: *State ex rel. McCurdy v. Tappan*, (1872) 29 Wis. 664; *Wisconsin Keely Institute Company v. Milwaukee County*, (1897) 95 Wis. 153; *State ex rel. New Richmond v. Davidson*, (1902) 114 Wis. 563; *State ex rel. Mueller v. Thompson*, (1912) 149 Wis. 488; *State ex rel. Wisconsin Dev. Authority v. Dammann*, (1938) 228 Wis. 147.

The determination of whether or not a particular purpose is public is for the legislature in the first instance, and the legislature is clothed with broad discretion in determining the character of a particular purpose as a public purpose.

The law appears to be established that the recognition of historical events and the provision of memorial buildings are properly recognized as public purposes. In 84 C.J.S. §16, p. 68, it is stated:

“The power of taxation is also exerted for a public purpose when the money raised is to be applied to the construction, maintenance, operation, support, aid, or encouragement, as the case may be, of * * * memorial buildings, monuments, and other public ornaments * * *.”

Recognition of historical events as a proper public purpose is also recognized in 51 Am. Jur. §346, p. 392, wherein it is stated:

“The observance of a historical event by celebration is a purpose of the same character as that of the erection of a monument to commemorate a great historical event, and accordingly is a public one.”

It would appear that the establishment of one of the great political parties of the country is a historical event of major significance which the legislature may commemorate in any proper manner. Our major political parties have made vital and indispensable contributions to our American system of government, and indeed it has been stated that without our adversary system of two major parties our government, as we know it today, could not function. The preservation of the site of the establishment of either of those parties together with any historical documents or other items, in my opinion, is clearly for a public purpose, and one for which public funds may be expended.

Second, under the proposed legislation the funds would be expended by the Foundation for American Principles and Traditions. Under the legislation as drawn, it would appear that the funds would not be turned over *carte blanche* to the Foundation, but it would have to submit proper vouchers for its expenditures and be subject to the standard state auditing procedures. The question then arises whether an activity which is public in nature and for a public purpose can be carried out by a private nonprofit foundation.

In Wisconsin the law appears to be established that if a function is public the legislature may direct that function to be carried out by a private corporation. The leading case on this point is *State ex rel. Wisconsin Dev. Authority v. Dammann*, (1938) 228 Wis. 147, in which the court held that the legislature could appropriate \$60,000 to the Wisconsin De-

velopment Authority, a private nonprofit corporation, for the purpose of promoting and developing municipal and cooperative electrical utilities throughout the state.

A similar rule was reached in the case of *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, and the use of privately controlled nonprofit corporations such as various veterans' organizations, agricultural associations, historical societies, to carry out various state functions, has been traditional. Wis. L. Rev. 304, note 80 (1957).

Accordingly, it is my opinion that once the purpose of the appropriation is established as public, the legislature has the authority to carry out the function by the use of a privately controlled nonprofit foundation.

RGT

Counties—County Boards—Committees—Under sec. 59.04 (1) (c), Stats., it is permissible for county board to elect county highway committee at April meeting next following November meeting at which they have failed to elect, subject to further provisions of sec. 83.015 (1), Stats.

July 3, 1957.

JAMES R. SEERING,
District Attorney,
Sauk County.

You advise that the county board of supervisors of Sauk county desire to elect their county highway committee at the April meeting of the board, if such practice is permissible. You state that one of the possible advantages would be to eliminate "lame duck" members.

You ask the following questions:

1. Is it permissible, as a regular practice, to elect members of the highway committee at the April meeting of the county board to take office immediately?
2. If it is permissible, can this be accomplished by failing to elect at the November meeting?

Sec. 83.015 (1) (a) provides in part:

"Except as otherwise provided in paragraph (b) each county board at the annual meeting shall by ballot elect a committee of not less than 3 nor more than 5 persons, to serve for one year, beginning either as soon as elected or on January 1 following their election, as designated by the county board, and until their successors are elected. Any vacancy in the committee may be filled until the next meeting of the county board by appointment made by the chairman of the board. * * *"

Sec. 59.04 (1) (a), Stats., establishes the November meeting as the annual meeting.

Sec. 59.04 (1) (c), Stats., provides in part:

"The board * * * shall meet on the third Tuesday of each April to organize and transact business. At this meeting the board may transact any business permitted at the annual meeting. * * *"

As pointed out in XIX O.A.G. 302, the county highway committee need not be composed of members of the county

board and, whether members or not, serve for one year and until their successors are elected. If members of the board are elected as such committee members, they serve for full time without reference to termination of their office as board members.

In VII O.A.G. 313 and IX O.A.G. 569 it was stated that county highway committeemen must be elected at the annual (November) meeting of the county board. These opinions were based on the 1917 and 1919 statutes respectively, and those statutes did not provide for a regular spring session of the board. It was stated in XX O.A.G. 81 that sec. 59.04, Stats., 1929 limited the county board to one regular meeting in each year, which was the November session. The regular spring session of the county board was first prescribed by sec. 59.04 (1) (b), Stats., 1935 which provided for a May meeting "for the purpose of organizing and for the purpose of transacting business as a board of supervisors. At such organization meeting such board may transact any and all business permitted by law to be transacted at the annual meeting."

In construing this section which corresponds with present secs. 59.04 (1) (c), and 82.05 (1), Stats., 1935 which corresponds with sec. 83.015 (1), Stats., 1955 it was stated in 25 O.A.G. 365, 366, that:

"* * * a county highway committee could be elected at the May meeting of the board to take office upon election or on the first day of the succeeding January. This power would be limited only by the requirement of sec. 82.05 (1), wherein it is provided that such committee shall serve for one year. The life of the present committee could not, therefore, be terminated before the expiration of the year for which that committee was elected."

This opinion was quoted with approval in 40 O.A.G. 158, 159.

We conclude that it is permissible under sec. 83.015 (1), Stats., to elect the county highway committee at the annual November meeting of the board or at the April meeting of the board, at which meeting the board may transact any and all business permitted to be transacted at the annual meeting. Such committee would take office upon election or on the first day of the succeeding January. This power

would also be limited by the requirement of sec. 83.015 (1), Stats., which provides that such committee shall serve for one year. The life of the present committee could not, therefore, be terminated before the expiration of the year for which that committee was elected. This practice is further restricted by the opinion set forth in 40 O.A.G. 158, 159, to the effect that a change-over in election practices is permissible only where the county highway committee is not elected at the annual meeting in November prior to the spring meeting following. If the November meeting did elect a committee, the April meeting would have no power to elect, having exhausted its authority at the November meeting of the board. If a change-over to April is effected, there could be no return to a November election until the board had failed to elect at an April meeting, and in that case a new committee could be elected at the November meeting following. A county board can elect only one county highway committee a year, subject of course to their power to fill vacancies as provided by sec. 83.015 (1) (b).

In answer to your second question, we conclude that a change-over to election of the county highway committee in April can be effected where there is a failure to elect at the November meeting.

RJV

Residence—Public Welfare Assistance—Discussion of residence requirements for public assistance under amendments to ch. 49, Stats., made by ch. 190, Laws 1957.

July 3, 1957.

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

You have asked a number of questions about the effect of ch. 190, Laws 1957, which was published June 15, 1957 and became effective June 16.

1. Your first question is:

“Section 49.01 (7) limits the period of giving assistance for persons who have not resided continuously in the state

for the past whole year before getting such assistance to a period of twenty days unless a medical emergency requires a further extension. If the municipality granting this assistance has already granted relief for twenty days or more on the date this change in the law became effective, and the cost of which is being charged back to the state under Section 49.04, is such dependent person entitled to additional relief not to exceed twenty days temporary assistance?"

The limitations upon granting public assistance which were created by ch. 190, Laws 1957, are to be applied prospectively, beginning June 16, 1957. (Sec. 990.05, Stats.) It is my opinion that relief granted prior to June 16, 1957 is not to be considered so as to cut down the twenty-day period for which "temporary assistance" may thereafter be given to a person lacking the residence requirements.

The law previously provided for relief without residence requirements, and had no provision for such a classification as "temporary assistance." Relief given under the old law could not be considered "temporary assistance", with respect to which limitations were first created by ch. 190, Laws 1957.

2. Your second question is :

"If the municipality granting assistance can not within the twenty-day period determine whether a person may be returned to another state, but subsequent to such twenty-day period they do confirm that the person had a residence in another state, can the State Department reimburse the municipality through the county for the cost of transporting such dependent person to the place of former residence as a charge against Section 49.04?"

Under sec. 49.04 (1), Stats., the state may reimburse municipalities only for such "temporary assistance" as may be needed under sec. 49.01 (7). Temporary assistance is by sec. 49.01 (7) limited to twenty days, except in cases of medical emergency.

The definition of relief under sec. 49.01 (1) includes money for transportation, so that if transportation is furnished within the twenty-day period, it could be reimbursed under sec. 49.04 (1) as temporary assistance. I find no provision in the law authorizing reimbursement from state funds for transportation provided *after* temporary assist-

ance has been given for twenty days, except where an extension of the period has been made necessary by a medical emergency.

3. Your third question is:

"A person who has resided in A county for three years, but has not gained legal settlement there goes to visit in Chicago for a period of four weeks. Shortly after returning to A county, he becomes ill and needs medical care as relief. Can the cost of this medical care be charged back to the state under Section 49.04?"

Sec. 49.01 (7) limits eligibility for relief to persons who have "continuously resided for one whole year in this state immediately prior to" the application.

Continuous residence does not necessarily require continuous physical presence in the state. The supreme court pointed out in *Marathon County v. State Department of Public Welfare*, (1955) 271 Wis. 219, 222-223 that:

"* * * The term 'residence' for legal-settlement purposes was considered in *Waushara County v. Calumet County* (1941), 238 Wis. 230, 298 N. W. 613, and it was there indicated that such term is affected by the meaning of residence for voting and divorce purposes. * * *"

See, also, *Marathon County v. Milwaukee County*, (1956) 273 Wis. 541, 544-550.

If a resident of Wisconsin leaves the state for a visit, without any intention of acquiring a new domicile, his residence in Wisconsin is not interrupted irrespective of the length of the visit.

4. Your fourth question is:

"A person who has resided in B county and has legal settlement there goes to Chicago to reside for four months. Upon his return, he goes to C county and within the next few months becomes a relief charge. Can C county recover for the costs of relief from B county and if so can they recover for the relief furnished after twenty days? Is the person entitled to receive relief from C county beyond the twenty-day period?"

If a resident of Wisconsin leaves the state with the intention of acquiring a new home, his residence is interrupted, even though he returns and resumes residence here

in a very short time. In such a case, the year of continuous residence required in order to warrant granting of relief would have to be computed from the date of the resumption of residence in Wisconsin.

It is pointed out in 17 Am. Jur. 603-604 that no extended period of presence in a place is necessary to effect a change in domicile (and accordingly a change of residence as the term is used in ch. 49, Stats.) ; so that if one were to move from Wisconsin to another state with the intention of making the latter place his home, his Wisconsin residence would be lost.

Perhaps it should be mentioned that, as the court stated in *Marathon County v. Milwaukee County*, (1956) 273 Wis. 541, 546, "abandonment of a residence once established and the acquisition of a new one is largely a matter of intention." This leaves a substantial question of fact for relief administrators in each case as to whether a physical move effects a change of residence; but your question is being dealt with on the assumption there was the necessary intent to establish a change.

The legal settlement in B county continues under the terms of sec. 49.10 (7), Stats., "until it is lost by acquiring a new one in this state or by residing for one whole year elsewhere than the municipality in which such settlement exists."

Legal settlement no longer entitles one to relief, in the absence of the requisite residence; but it is still the basis for determining liability between municipalities for such assistance as the statutes authorize. In specific response to the three subdivisions of your question:

a. C county can recover from B county for the costs of such relief as the statutes authorize.

b. Since sec. 49.02 (1) permits relief *only to eligible* dependent persons, B county could not recover for relief furnished after twenty days except in case of medical emergency.

c. The person is not entitled to relief beyond the twenty-day period.

5. Your fifth question is:

"Section 49.19 (4) (b) sets out eligibility for a grant of Aid to Dependent Children. Assuming that prior to the

birth of a child, the expectant mother applies for a grant of Aid to Dependent Children. Could the year's residence be based upon her residence at the time of her application or would she be precluded from receiving aid under such section until the child is born?"

I believe the foregoing question must have intended to refer to sec. 49.19 (4) (g) rather than 49.19 (4) (b). The terms of subsec. (4) (b) relate only to children born prior to the application for aid.

Under sec. 49.19 (4) (g), if an expectant mother has resided in Wisconsin for one year preceding the application for aid, she is eligible for aid even though that residence was prior to the effective date of ch. 190, Laws 1957. This is in accord with the rules discussed in 41 O.A.G. 30 and 142, to the effect that a statute is not to be regarded as retroactive merely because it draws upon antecedent facts for its operation.

6. Your sixth question is:

"A person having the care and custody of the dependent child is presently receiving Aid to Dependent Children in Wisconsin but has not yet resided in the state for a whole year. Could she continue to be granted Aid to Dependent Children because she met eligibility requirements at the time aid was first granted, or must her grant be discontinued?"

Since no one has an inherent right to public assistance (*Holland v. Cedar Grove*, 230 Wis. 177, 188-189), the legislature may at any time change its regulations so as to deny relief to persons who were receiving relief under the previous statutes. Whether such result is accomplished by a specific enactment depends on the legislative intent as shown in such enactment.

The legislature, in ch. 190, Laws 1957, has made apparent its intent to restrict expenditures for relief by withdrawing assistance from certain classes of persons to whom it was formerly made available. The fact that one was receiving assistance under a former law gives him no guaranty of the continuance of such assistance in the future.

If the legislature had intended that the new restrictions in ch. 190, Laws 1957, should not apply to persons formerly

receiving assistance, it could have said so by incorporating some sort of "grandfather" clause.

The situation here is different from one in which the legislature has made assistance dependent upon some status such as legal settlement, where a change in conditions for acquiring such status in the future need not be presumed to revoke a status previously acquired.

Here, the very purpose of the legislature was to cut down on the public assistance to be granted in the future; so that there is no reason for assuming that persons should be excepted from the regulation merely because they have received assistance in the past.

Your question is answered in the negative.

7. Your seventh question is:

"Under Section 49.19 (10), payments may be made to a foster home for a dependent child. Can reimbursement be made to this foster home prior to the time that the child is one year old inasmuch as Section 49.19 (4) (b) sets out as one of the eligibility requirements for a grant of Aid to Dependent Children that the child or parent with whom the child is living must have resided in the state one year prior to the birth of the child. The residence of the foster home parents not being a parent within the meaning of the statute would have no bearing on this one year residence and the child being less than one year old would not have one year's residence."

The question of who may receive public assistance is one for the legislature. No assistance may be given, however worthy the objective, unless it is affirmatively authorized by statute.

I find nothing in the statutes as amended by ch. 190, Laws 1957, which would warrant a grant of aid for dependent children unless either the child or one of the relatives designated in sec. 49.19 (1) (a) has resided in the state for one year.

Aid for dependent children may not be paid to foster homes for children less than one year of age, under the provisions of ch. 190, Laws 1957.

8. Your eighth question is:

"How is the term 'medical emergency' to be interpreted in Section 49.01 (6) wherein the statute provides 'Such

temporary assistance shall not extend beyond twenty days unless a medical emergency requires further extension'? Let us assume that a family who has been here for four months or five months requires relief and provisions for their return has been made under Section 49.09 (3). However the mother is confined at a hospital when the twenty-day period ends. Would this be considered as a 'medical emergency' or does this term mean that the medical condition must have arisen unexpectedly and needed immediate medical attention?"

Both the terms and the purpose of sec. 49.01 (7), as created by ch. 190, Laws 1957, differ from sec. 49.02 (5), which deals with circumstances under which the public will pay for medical bills without previous authorization by relief authorities. Sec. 49.01 (7) furnishes a legislative standard to guide public officials in the *authorization* of relief, and so is not to be governed by the same restrictions provided for payment of *unauthorized* relief.

Necessarily, a general legislative standard for guidance of relief administrators provides a leeway for fact-finding and exercise of discretion, which will not be disturbed by the judiciary unless arbitrarily exercised. It would be impossible for us to answer in advance exactly how the term "medical emergency" is to be interpreted, because that function lies in the first instance with the relief authorities.

The legislature doubtless used the term "emergency" according to its common meaning. It is defined in Webster's New International Dictionary, Second Ed., unabridged:

"An unforeseen combination of circumstances which calls for immediate action."

In the situation you have described, if competent medical opinion is to the effect that the mother requires hospitalization beyond twenty days, it is my opinion that the officials charged with administering relief would be warranted in finding the situation to be a medical emergency.

BL

Counties—Licenses and Permits—County board does not have authority to enact county-wide ordinance licensing peddlers. Ch. 129, sec. 59.07 (5) and (64).

July 10, 1957.

FRANCIS L. EVRARD,
Corporation Counsel,
Brown County.

You have requested an opinion as to whether the Brown county board of supervisors can enact a county-wide ordinance licensing peddlers.

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Spaulding v. Wood County*, 218 Wis. 224, 228; *Dodge County v. Kaiser*, 243 Wis. 551, 557; *John Maier v. Racine County*, (1957) 1, Wis. 2d 384.

Ch. 129 Stats. provides detailed and comprehensive measures of long standing, regulating on a state-wide basis many phases of the business of truckers, hawkers or peddlers. There are extensive provisions for the licensing of truckers, hawkers or peddlers and regulating their operations. The motor vehicle department is the state licensing agency. Sec. 129.07 provides:

"129.07 Local License. This chapter does not in any way limit or interfere with the rights of any *town, city or village to further* license truckers, hawkers, peddlers, or transient merchants to trade within the corporate limits thereof except in the case of ex-soldiers, as provided in section 129.02."

It was pointed out in 29 O.A.G. 253, 254:

"* * * Where the state has entered a field of regulation, municipalities may not make regulations inconsistent with the state law. *Hack v. Mineral Point*, (1931) 203 Wis. 215, 221, 233 N. W. 82. The state can limit the powers of municipalities in that regard only by 'express language'. *Fox v. Racine*, (1937) 225 Wis. 542, 275 N. W. 513; *La Crosse Rendering Works v. La Crosse*, (1939) 231 Wis. 438, 285 N. W. 393. It appears, moreover, that the issuing of licenses to carry on occupations, where the state has enacted general legislation establishing the public policy for the whole state, is not a matter of local concern within the meaning of the home-rule amendment to art. XI, sec. 3, Wis. consti-

tution. *State ex rel. Torres v. Krawczak*, (1935) 217 Wis. 593, 259 N. W. 607.

"It follows that the right of municipalities to regulate and license hawkers and peddlers depends upon the grace of the state in allowing them to do so, and they must accept that right with any limitations which the state has seen fit, by 'express language', to attach thereto. * * *"

The express delegation of power to cities, villages and towns to further license truckers, hawkers, peddlers or transient merchants as provided by sec. 129.07 is in our opinion inconsistent with a legislative purpose to confer like powers on county boards by the broad language of the introductory paragraph of secs. 59.07, 59.07 (5) and 59.07 (64). Where a general statute and a specific statute relate to the same subject matter, the specific statute controls. *John Maier v. Racine County*, (1957) 1, Wis. 2d 384; *Estate of Kirsch v. Old National Bank of Beaver Dam*, (1955) 269 Wis. 32.

We are of the opinion that the county board of supervisors does not have power to enact a county-wide ordinance licensing peddlers.

RJV

Teachers—Pensions—Member of state teachers retirement system must have been engaged in teaching after the effective date of ch. 435, Laws 1955, (sec. 42.49 (8), Wis. Stats.) in order to retire under the provisions thereof. Discussion of annuity rates.

July 16, 1957.

RAY L. LILLYWHITE, *Executive Secretary*,
State Teachers Retirement Board.

You have inquired whether or not a member of the state teachers retirement system must have been engaged in teaching within the meaning of the statutes relating to said system after the effective date of sec. 42.49 (8) in order to receive any benefit therefrom.

Sec. 42.49 (8), Stats., provides:

"(8) BENEFITS NOT REDUCED BY TEACHING AFTER QUALIFYING FOR ANNUITY. If any member who meets the requirements of subs. (4), (6) or (7) has attained the age of 60 years or more, and has 35 years or more of teaching experience in the public schools, the state colleges or the university in this state, and selects an annuity in a form other than a life annuity, the total amount of such annuity including the annuity purchased by the member's deposits shall be not less than the annuity of the same form to which the member would have been entitled had he retired immediately upon reaching 60 years of age and completing 35 years of such teaching experience. The amount of any annuity under subs. (4), (6) or (7) for a male member shall not be less than the annuity to which a female member would be entitled upon retiring with like qualifications."

The foregoing section was enacted by ch. 435, Laws 1955, and, under sec. 990.05, Stats., became effective on July 27, 1955.

The purpose of the first sentence of the above quoted section is to insure that any teacher aged 60 or more, who has completed at least 35 years' teaching experience and who elects to retire on a 15-year life annuity or a joint survivorship annuity, shall not suffer a reduction in the annuity payments by reason of having continued teaching after first reaching the age of 60 and completing 35 years of teaching experience in the public schools of this state. After meeting those two requirements, a teacher is, by the earlier subsec. of sec. 42.49, entitled to a minimum straight life annuity.

To determine the monthly payment under a 15-year annuity which would be the actuarial equivalent of a straight life annuity of, say, \$200 per month, the ratio between the 15-year annuity rates and the straight life annuity rates is applied to the \$200. At younger ages, when the life expectancy is greater, there is less difference between the monthly payments under a straight life annuity which may be purchased for a given amount and the monthly payments under a 15-year annuity which may be purchased for the same amount. \$1,000 will purchase a straight life annuity of \$6.24 monthly for a male teacher aged 60, while \$1,000 will purchase for him a 15-year annuity of only \$5.51 per month.

\$5.51 is 88.30 per cent of \$6.24, and applying this percentage to the \$200 produces a monthly payment of \$177.60 under a 15-year annuity which would be the actuarial equivalent of a \$200 per month straight life annuity.

If the same teacher continued teaching until the age of 65, and if sec. 42.49 (4), (6) and (7) still provided a minimum straight life annuity of only \$200 per month, the 15-year annuity then available to him would be less than \$177.60 per month. At age 65, the male straight life annuity rate is \$7.33 and the 15-year annuity rate is \$5.99, or 81.72% of the former. Multiplying \$200 by 81.72% produces \$163.44 as the monthly payment to which he would be entitled under a 15-year annuity granted at age 65.

The court repeatedly has held that under the state teachers retirement law a contract relation exists between the state and the teachers. *State ex rel. Stafford v. State Annuity and Investment Board*, (1935) 219 Wis. 31, at 32-33, 261 N. W. 718, and *State ex rel. Thomson v. Giessel*, (1952) 262 Wis. 51, at 55, 53 N. W. 2d 726. In the latter case, the court held unconstitutional an attempt to increase the retirement benefits to teachers who retired prior to the attempted amendment of the statutes, because such attempted increase violated the provisions of art. IV, sec. 26, Wis. Const.

In 1956 that section of the Constitution was amended so as to permit increased benefits to teachers already retired, but the constitutional amendment cannot affect the validity of sec. 42.49 (8), Stats., which was enacted prior to the constitutional amendment.

“An unconstitutional statute is not validated by a subsequent constitutional amendment which does not ratify and confirm the statute, but merely authorizes the enactment of such a statute.” 171 A.L.R. 1070.

It is clear that sec. 42.49 (8) is valid only as applied to teachers who retire subsequent to the effective date of that statute, and your first question is answered in the affirmative.

Since the foregoing question was submitted, you have advised that the state teachers retirement board has experienced a great deal of difficulty in interpreting and admin-

istering sec. 42.49 (8). Consequently you have submitted four additional questions which will be combined with the previous question and answered in this opinion, since it appears that considerable duplication can be avoided thereby.

You have also submitted several tentative determinations which have been made by the state teachers retirement board in administering sec. 42.49 (8) and you enclosed with your second request sample cases with figures illustrating some of the questions and the effect of certain interpretations.

Question 2. "In calculating the amount of the annuity which a member would have received at the time of reaching age 60 and completing 35 years of teaching experience under the first sentence of 42.49 (8), could such calculation be based upon the provisions of 42.49 (6) if such latter subsection were not in effect at such time?"

The first sentence of sec. 42.49 (8) provides that under the conditions there specified the total amount of the annuity "* * * shall be not less than the annuity of the same form to which the member would have been entitled had he retired immediately upon reaching 60 years of age and completing 35 years of such teaching experience." In calculating what the annuity would have been at any particular time in the past, it is necessary to make the calculation upon the basis of the statutes and the annuity rates which were in effect at that time. If 42.49 (6) was not in effect, it may not be used in making the calculation.

Your second question is answered in the negative.

Question 3. "May the annuity of a male member be increased by the application of both sentences of sec. 42.49 (8)?"

Sec. 42.49 (8), Stats., is quoted in full at the outset of this opinion. The two sentences of the subsection are independent and each could be applied to a given male member under certain circumstances.

As previously explained, the 15-year life annuity or joint survivorship annuity to which a member may be entitled may be less if he retires at age 65 than it would have been had he retired at age 60. The first sentence of sec. 42.49

(8) is intended to remedy this by granting an annuity of at least as much as the member would have received had he retired immediately upon reaching age 60 and completing 35 years of teaching experience, provided that he meets the requirements of subsecs. (4), (6) or (7) of sec. 42.49. If he meets the requirements of any one of those subsections, then clearly he is entitled to the increased annuity.

The second sentence of subsec. (8) provides that any annuity granted to a male member under subsecs. (4), (6) or (7) shall not be less than that for a female member retiring with like qualifications.

The entire subsection became effective on July 27, 1955 and can be applied only to a member retiring after that date. To such a member, however, the subsection applies differently, depending upon whether or not he first attained age 60 and completed 35 years of teaching experience prior to July 27, 1955. If he did, then the computation of the 15-year life annuity to which he would have been entitled immediately upon completing the age and experience requirements must be made under the statutes then in effect, excluding the second sentence of subsec. (8). The result would be to grant the male member, under the first sentence, a 15-year life annuity which would not be less than that to which he would have been entitled had he retired immediately upon completing the age and experience requirements. The second sentence would have no application in such a computation, since the second sentence was not in effect when he first completed the age and experience requirements.

If, however, application of the second sentence, and not the first, to the basic annuity under subsec. (4), (6) or (7) would provide for an annuity larger than that to which the member would be entitled under the first sentence only, then the larger annuity must be granted. An example may help to illustrate.

A male member, M, completed the age and experience requirements in 1952 and then would have been entitled to retire on a 15-year life annuity of \$155 per month. At the same time a female member, F, with like qualifications would have been entitled to a 15-year life annuity of \$160. M continued teaching until 1957 at which time his 15-year

life annuity, without applying sec. 42.49 (8), would be only \$150. In 1957, F would be entitled, again without benefit of subsec. (8), to a 15-year life annuity of \$156. M would then be entitled to a 15-year life annuity of \$156, under the clear language of the second sentence of subsec. (8), but both sentences could not be applied to increase his annuity to \$160, since the second sentence provides for increasing only an annuity provided by subsecs. (4), (6) or (7) and not for increasing one already increased by the first sentence of subsec. (8).

If, in the above example, the dates are changed to 1956 and 1961, a different result would be reached. In 1956 M would have been entitled to an annuity of \$155 without benefit of subsec. (8) and to \$160 under the second sentence of that subsection. In computing, in 1961, the annuity "to which * * * [M] would have been entitled had he retired immediately upon" meeting the age and experience requirements, it is thus necessary to take into account the second sentence of subsec. (8); and the result is to apply both sentences to M.

Question 4. "a. In calculating the amount of the annuity which a member, who had additional deposits to his credit, would be entitled to receive, shall the amount of the annuity from additional deposits be increased or decreased by either the first sentence or the second sentence of 42.49 (8) ?

"b. If the amount of the annuity from additional deposits is to be increased or decreased by the first sentence of 42.49 (8), using the rate for an adjusted age, shall the calculation be based upon the amount of additional deposits in the member's account at the time the annuity becomes effective or shall the calculation be based upon the amount of additional deposits which were in the member's account at the time of the adjusted age?"

Secs. 42.20 (2) and 42.40, Wis. Stats., provide:

"(2) Deposits. (a) 'Additional deposit' means any deposit made in the retirement deposit fund under s. 42.40 by or on behalf of a member, excluding required deposits.

"(b) 'Member's deposit' means any deposit made in the retirement deposit fund by or on behalf of a member, excluding the state deposit.

"(c) 'Required deposit' means the deduction in accordance with ss. 42.40 and 42.41 (1) from the compensation

received by a senior teacher deposited in the retirement deposit fund.

“(d) ‘State deposit’ means the deposit made by the state in the retirement deposit fund on behalf of any member.”

“42.40 Required deposits. Each senior teacher shall make a deposit in the retirement deposit fund equal to 6 per cent of all compensation received for teaching service performed by such teacher. Any member, or any person on behalf of any member, may make additional deposits whenever said member has any credits in the retirement deposit fund. All amounts deposited by or on behalf of any teacher shall be held for the benefit of the individual teacher in the retirement deposit fund for the purpose of providing an annuity or other benefit as provided by ss. 42.20 to 42.54.”

The total accumulations of \$20,624.41 possessed by Mr. Y on November 1, 1955 consisted of the following:

Required deposits -----	\$ 9,013.91
State deposits -----	11,200.57
Prior service credit -----	409.93
	<hr/>
	\$20,624.41

In analyzing and answering this question, let us assume that on November 1, 1955 he also had an accumulation from additional deposits which totaled \$1,000 so that his total credit at said time was \$21,624.41.

Sec. 42.49 (4), (6) and (7) provide in part:

“(4) Increased annuity based on total service; \$2 minimum. (a) When a member ceases to be employed as a teacher after August 3, 1957 and is not on a leave of absence from a teaching position, and has attained the age of 60 years or more, and has had not less than 30 years of teaching experience of which not less than 20 years were in the public schools, the state colleges, or the university in this state, and has applied the entire accumulations from required deposits as provided in sub. (2), and the accumulations from state deposits have been applied by the member to the purchase of an annuity as provided in sub. (3), and when the annuity purchased by such accumulations from state deposits, together with the annuity, if any, provided for the member under s. 42.51 (3), when computed as an annuity payable monthly to the member during life is less than an annuity of \$2 per month for each year of the member's teaching experience, not exceeding 35 years, in the public schools, state colleges or university in this state, the

annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such annuity, or the actuarial equivalent of such life annuity. The increase in the annuity shall be paid from the contingent fund.

“* * *

“(6) INCREASED ANNUITY BASED ON LAST 5 YEARS OF SALARY. (a) When a member who, after July 29, 1951, taught in a position which compelled such member to make required deposits, ceases to be employed as a teacher, and is not on a leave of absence from a teaching position, and has attained the age of 60 years or more, and has had not less than 30 years of teaching experience of which not less than 20 years were in the public schools, the state colleges, or the university in this state, and has applied the entire accumulation from required deposits as provided in sub. (2) and the accumulation from the state deposits has been applied by the member to the purchase of an annuity as provided in sub. (3) :

“(b) If the annual amount of the annuity provided under sub. (3), together with the annual amount of the annuity, if any, provided for the member under s. 42.51 when computed as an annuity payable to the member during life is less than one-one hundred fortieth of the average annual salary received by the member for the last 5 years of teaching experience in the public schools, the state colleges, or the university in this state, provided that any excess of such average over \$4,800 shall be disregarded, multiplied by the number of years of the member's teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state, the said annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such amount, or the actuarial equivalent of such life annuity, and

“(c) If the sum of the annual annuity provided in par. (b) and the annual annuity purchased by the accumulation of required deposits when computed as an annuity payable to the member during life is less than one-seventieth of the average annual salary as defined in par. (b), multiplied by the number of years of the member's teaching experience not exceeding 35 years in the public schools, the state colleges, or the university in this state, the annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such amount, or the actuarial equivalent of such life annuity. Any such increases in the annuity shall be paid from the contingent fund. * * *”

“* * *

“(7) INCREASED ANNUITY BASED ON TOTAL SERVICE IN STATE SYSTEM; \$2 MINIMUM. (a) When a member ceases to be employed as a teacher after July 29, 1951, and is not on

a leave of absence from a teaching position, and has attained the age of 60 years or more and has had not less than 25 years of teaching experience in the public schools, the state colleges, or the university in this state, or has attained the age of 55 years or more and has had not less than 30 years of teaching experience in the public schools, the state colleges, or the university in this state, and has applied the entire accumulation from the member's required deposits as provided in sub. (2), and the accumulations from the state deposits have been applied by the member to the purchase of an annuity as provided in sub. (3), and when the annuity purchased by such accumulations from the state deposits, together with the annuity, if any, provided for the member under s. 42.51 (3), when computed as an annuity payable monthly to the member during life is less than an annuity of \$2 per month for each year of the member's teaching experience, not exceeding 35 years, in the public schools, state colleges or university in this state, the annuity to the member shall be increased so that the member shall be paid an annuity for life equal to such annuity, or the actuarial equivalent of such life annuity. The increase in the annuity shall be paid from the contingent fund."

As indicated above, each of the two sentences in 42.49 (8) refers only to increases in annuities obtainable under 42.49 (4), (6) or (7). In turn, each of those subsections provides for the increase of an annuity produced by the accumulations from "required deposits," "state deposits" and sec. 42.51 (3). This latter subsection provides for an annuity from prior service credits. Hence, in the calculation of an annuity under 42.49 (4), (6) or (7) any annuity which could result from the "additional deposits" of the member is disregarded. Since each of the sentences in 42.49 (8) authorizes an increase only in the annuities referred to in 42.49 (4), (6) and (7), neither part of 42.49 (8) permits any increase or decrease in the annuity from "additional deposits."

Sec. 42.49 (2), Stats., provides:

"When a member has ceased to be employed as a teacher, and is not on a leave of absence from a teaching position, the accumulation from the member's deposits may be applied by the member as a net single premium at the rate certified by the state teachers retirement board, to the purchase of an annuity * * *."

Since "member's deposit" includes "additional deposit," this subsection authorizes the member to supplement an annuity under 42.49 (4), (6) or (7) with an annuity from additional deposits. This would be true even if the annuity under 42.49 (4), (6) or (7) were further increased under either sentence of 42.49 (8). Regardless of whether Mr. Y's retirement annuity was obtained under the money purchase plan under 42.49 (4), (6) or (7), or under one of the last three and 42.49 (8), he could use the \$1,000 of additional deposit accumulation to increase his 15-year life annuity by \$5.99 per month which is the rate per \$1,000 for a male at age 65 which Mr. Y was at the time of his retirement. Thus the first part of question 4 is answered in the negative.

The last part of question 4 requires no answer inasmuch as it was predicated upon an affirmative answer to the first part.

Question 5. "In calculating the survivorship annuity of a member who qualifies for the increased benefit provided in the first sentence of 42.49 (8), using the rate for the adjusted age of the member, shall the rate for the beneficiary be the rate for the actual age of the beneficiary at the time the annuity becomes effective or the rate for the age the beneficiary was at the time of the adjusted age of the member?"

Sec. 42.49 (2) (c) provides:

"(2) ANNUITY FROM MEMBER'S DEPOSITS. When a member has ceased to be employed as a teacher, and is not on a leave of absence from a teaching position, the accumulation from the member's deposits may be applied by the member as a net single premium at the rate certified by the state teachers retirement board, to the purchase of an annuity, the first payment to be made in such month and year after the application for the annuity is received by the board as the member shall direct, which annuity may be:

"* * *

"(c) An annuity payable monthly to the member during life, and after death of the member, monthly payments of one-half the monthly amounts paid to the member to be continued to such beneficiary during life as the member shall have designated in th original application for a retirement allowance; * * *"

Mr. Y's wife is 5 years younger than he. Consequently, as of November 1, 1955, when Mr. Y retired he was 65

years of age and she was 60. The life annuity rate for a male of 65 is \$7.33 and the rate for a joint survivorship annuity under 42.49 (2) (c) for a retiring male member of age 65 and a female of age 60 is \$6.04. Thus, as of November 1, 1955, Mr. Y could have obtained a joint survivorship annuity under 42.49 (2) (c) and (6) for himself and his wife in the sum of \$164.80 in accordance with the following formula:

$$\frac{\$6.04}{7.33} \times 200 \text{ equals } \$164.80$$

If Mr. Y had completed his 35th year of teaching experience at the end of the 1953-54 fiscal year, his average annual salary, within the meaning of 42.49 (6) would have been over \$4,800.

His rated age at that time would have been 63 $\frac{3}{4}$ and his wife's would have been 58 $\frac{3}{4}$. The straight life annuity rate for a male of that age is \$7.02 and the rate for a survivorship annuity under 42.49 (2) (c) for their age combination is \$5.82. Since Mr. Y still could have qualified under 42.49 (6) for a life annuity of \$200 per month, and said subsection allows the member to take the actuarial equivalent thereof in a different form of annuity, had he retired at that time he could have obtained the aforesaid type of joint survivorship annuity in the sum of \$165.81 in accordance with the following formula:

$$\frac{\$5.82}{7.02} \times 200 \text{ equals } \$165.81$$

However, if the actual age of Mr. Y's wife were not adjusted back to 58 $\frac{3}{4}$ but were considered to be 60 which was her actual age at the time of Mr. Y's retirement, the combined rate under 42.49 (2) (c) would have been \$5.89 and the calculation would have produced a joint survivorship annuity of \$167.81 in the following manner:

$$\frac{\$5.89}{7.02} \times 200 \text{ equals } \$167.81$$

However, the first sentence of 42.48 (8) provides that the annuity which Mr. Y could have obtained under 42.49 (6), whether it be taken as a 15-year life or a joint survivor-

ship, shall be not less than the annuity of the same form which he could have obtained had he retired when he first met both of the qualifications of being at least 60 years of age and having 35 years of teaching experience in the public schools, teachers colleges or the university in this state. If that had occurred as of the end of the 1953-54 fiscal year, Mr. Y's wife then would have been 58 $\frac{3}{4}$ years of age. There would have been no justification at that time for considering her age as anything but what it actually was at that time. There would be no justification now for treating it as age 60 at that time simply because it was age 60 when Mr. Y was retiring. In other words, the calculation should be based upon a backward and equal adjustment in the age of both the member and the joint beneficiary.

JRW:EWV

Counties—County Boards—Industrial development committee may be appointed under sec. 59.07 (30), Stats.

July 17, 1957.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County.

You have requested my opinion as to the extent that a county is able to promote and encourage industrial development within the county. We understand that the Manitowoc county board has created an industrial development committee which has been suggested as a general clearing house for similar local municipal committees as well as private groups or industrial firms. You state that the Manitowoc county industrial development committee has in mind to perform functions similar to those prescribed for the state division of industrial development in sec. 15.536. You ask whether this is authorized.

It is significant to note that sec. 15.536 (1) (c) stats. provides as follows:

“(c) To co-ordinate the activities of and give assistance to state and local organizations including local development

corporations, *county industrial committees*, chambers of commerce, labor organizations, and similar agencies interested in obtaining new industrial plants or commercial enterprises;"

This language would certainly permit the inference that the legislature had visualized that county boards would create committees to assist in the furtherance of county industrial development.

You are correct in your conclusion that Ch. 98, Laws 1957, which enables governing bodies of cities and villages to acquire real estate for industrial sites, does not apply to counties.

Generally, county boards have the power to take such action as may be necessary or convenient for the purpose of disposing of any subject of legislation entrusted to such county boards, unless limited by the legislature in conferring such power. 20 C.J.S. 125; *Stetzer v. Chippewa County*, (1937) 225 Wis. 125, 133.

Sec. 59.06 (1), provides:

"The board may, by resolution designating the purposes and describing the duties thereof and manner of reporting, authorize their chairman to appoint before June 1 in any year committees from the membership of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution."

The power of a county board to appoint such committees as may be necessary to effectuate the legitimate powers of the board is subject, of course, to the restriction that such committees may be delegated only ministerial and executive functions. 20 O.A.G. 416 (1931). The only statute bearing upon a county's authority to engage in promoting industrial development is sec. 59.07 (30) which provides:

"Appropriate not to exceed \$5,000 in any year to advertise the advantages, attractions and resources of the county and to conserve, develop and improve the same. The county may co-operate with any private agency in this work."

"59.07 General powers of board. The board of each county may exercise the following powers, *which shall be broadly and liberally construed and limited only by express language:*"

Even in a narrow sense, the above quoted statute clearly authorizes the county board to conserve, develop and improve the resources of the county. Sec. 990.01 (1) provides that all words and phrases must be construed according to common and approved usage. It is a matter of general knowledge that "development of resources" is of necessity an operation of considerable breadth and variety, and it would be unreasonable to say that this could not include "industrial development" of resources.

It is my opinion, therefore, that, within the statutory appropriation limitation, the county board is authorized to appoint an industrial development committee to assist the county board in encouraging and promoting the industrial development of the various resources of the county.

JEA

Words and Phrases—Automobiles and Motor Vehicles— Sec. 348.10 (3), Stats. 1957, requiring certain safety measures for vehicles carrying logs on highway, applies to vehicles carrying pulpwood.

July 18, 1957.

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

You request an opinion as to whether sec. 85.665, Stats. 1955, applies to a vehicle carrying pulpwood. The statute which you cite has been revised and renumbered by ch. 260, Laws 1957, and now appears as sec. 348.10 (3), Stats. 1957. It provides:

"(3) No person shall operate on a highway any motor vehicle, trailer or semitrailer carrying logs unless the logs are securely fastened to the vehicle by chains or unless the vehicle is equipped with stakes which are securely fastened by chains and the top of the load is lower than the top of the stakes."

The statute has never been construed by the supreme court or by this office, and your question resolves itself into a problem of construing the word "logs", as used in the

statute. The word has been variously construed by different courts, depending on the nature of the statute in which it is used.

In *Kolloch v. Parcher*, (1881) 52 Wis. 393, at 398, 9 N. W. 67, the court held that the word "logs", as used in a lien statute, meant "the stems or trunks of trees cut into convenient lengths for the purpose of being afterwards manufactured into lumber of various kinds".

The Maine court in *Dead River Co. v. Assessors of Houlton*, (1953) 149 Me. 349, 103 A. (2d) 123, at 128, in construing the word "logs", as used in a tax statute said:

"Such terms as 'timber', 'logs', 'pulpwood', and 'railroad ties' have no fixed definition in the law. * * * any one of such terms may have one meaning when used in a lien statute, another when used in a contract made by the parties, and still a third when a tax statute is involved. * * *"

Looking at the section as a whole it is obvious that sec. 348.10 (3), Stats. 1957, was enacted as a highway safety measure. In construing the statute this legislative purpose should be kept in mind.

As we understand it the custom in Wisconsin is to cut pulpwood into lengths of 100 inches, and the diameter of the pulp logs may vary from 3 inches to as much as 15 inches. Usually the pulpwood is loaded crosswise on the vehicle, in contrast to saw logs which are loaded lengthwise.

While the need for wrapper chains may be less in the case of a load of pulpwood laid crosswise on the vehicle than with a load of saw logs lengthwise on the vehicle, the statute makes no distinction on the basis of the method of loading the vehicle and in either case the hazard to users of the highways is reduced when the load is secured by chains or stakes.

It is my conclusion that in this statute, which is clearly a safety statute, the word "logs" should not be narrowly construed to mean only saw logs but should be applied to pulpwood as well.

SGH:EWW

Words and Phrases—Highways and Bridges—Driveways
—Under sec. 86.05, Stats., unity of ownership is not a deciding factor in the restoration of existing driveways, but the use and independence as economic units of the properties should control.

July 25, 1957.

DAVID WEBER,
District Attorney,
Sheboygan County.

You have requested my opinion as to the proper application of sec. 86.05, Stats., the pertinent part of which reads as follows:

“ENTRANCES TO HIGHWAYS RESTORED: Whenever it is necessary, in making any highway improvement to cut or fill or otherwise grade the highway in front of any entrance to abutting premises, a suitable entrance to the premises shall be constructed as a part of the improvements; and if the premises are divided by the highway, then one such entrance shall be constructed on each side of the highway. Thereafter each entrance shall be maintained by the owner of the premises. * * *”

You state that on a county road one person is the owner of considerable land on both sides of the highway. He has two “premises” on the east side of a road almost one-half mile from each other. You indicate that these two “premises” are both used by the owner. You further state that he has three “premises” on the west side of the road occupied by tenants. The center property of these three lies one-fourth mile and one-eighth mile respectively from the other two parcels. All of the five “premises” now have driveways. Your question is, how many of the existing driveways must be restored as a part of the reconstruction of the highway.

The word “premises” as used in conveyancing in a technical sense means all of the terms of the conveyances including the property description which precedes the *habendum* clause. See Bouvier’s and Black’s law dictionaries. “Premises” has been accorded a wide variation of meanings in the law, but it is generally held that its meaning is to a great extent governed by the context. *Words and Phrases*, “premises,” vol. 33, p. 345. Among other definitions, Web-

ster defines the word as the property conveyed in a deed. In common usage it denotes a particular parcel of land without necessarily any reference to the last previous conveyance. On advice of this office, the state highway commission has long taken the position that in purchasing or condemning land it will pay damages to the owner, in partial takings, only as the taking affects a particular parcel which is in its economic unit. This rule is based on the supreme court case of *Lippert v. Chicago & N. W. R. Co.*, (1920) 170 Wis. 429. In that case a railroad took land for a spur track adjoining a tenement building. The owner also had land on which this homestead was built adjoining the tenement property. In holding that the two parcels should be treated separately, the court said at pp. 431-432:

“* * * In the light of the use to which plaintiffs devote the two properties they own fronting on Pearl street, can it be said that they are used as a unit so that each is dependent and related to the use of the other, or are they devoted to separate and distinct uses, so as to constitute independent properties as far as they are affected by this railroad in Pearl street? It is stipulated that the north part of the plaintiffs' property in the quarter of the block owned by them, and used as a tenement, is not so situated as to be united in use with the properties here in question as to entitle plaintiffs to damages in this condemnation proceeding. The uses of the homestead dwelling and the tenement abutting on Pearl street are wholly separated and independent and constitute in fact divided parcels of land, and each is put to the use for which it is best adapted. This separation of the properties is as complete as it would be if owned and occupied by different persons. Under these conditions, which are undisputably shown by the evidence, we are of the view that the trial court erred in holding that the homestead and the tenement properties fronting on Pearl street are a unit in use and occupation and constitute one property for the purposes of the condemnation proceeding. Their location, use, and separation make them separate and independent parcels of ground and entitle plaintiffs to recover damages by way of depreciation to only the forty-five foot parcel constituting the double tenement dwelling house property from which the triangular piece is taken for railroad purposes.

“Looking at the actual situation as presented by the evidence, and the different purposes and uses to which the plaintiffs devote these properties, from a practical and common-sense point of view it must be held as a matter of

law, in the light of the adjudications in this court, that plaintiffs can recover in this proceeding only for the depreciation resulting to the tenement property from which the triangular piece was taken. We consider that this result is sustained by the rule and the reasoning of the following cases: *Bigelow v. West Wis. R. Co.*, 27 Wis. 478; *Robbins v. M. & H. R. Co.*, 6 Wis. 636; *Welch v. M. & St. P. R. Co.*, 27 Wis. 108."

In advising the state highway commission informally from time to time as to the proper interpretation of sec. 86.05, this office has taken the position that the treatment of the lands of property owners must be consistent and that the condemnation rule appears to be the best comparable measure available.

Unity of ownership is then not a deciding factor, but rather the status of the properties, as to their use and independence as economic units, should control.

To specifically answer your questions, clearly the three properties under lease on the west side of the road should be treated independently and entrances restored. I do not have enough information as to the two properties on the east side of the road except that they are both apparently used by the single owner, but if they qualify as independent properties under the rules indicated above, they should be treated as separate "premises" and the driveways restored.
REB

Words and Phrases—Highways and Bridges—Definitions used in Standard Specifications for Road and Bridge Construction should be used to determine whether or not a span is a "bridge" and eligible for county aid in construction under sec. 81.38, Wis. Stats.

July 25, 1957.

EDWARD P. HERALD,
District Attorney,
Oconto County.

You have requested my opinion as to whether a large culvert can be considered a "bridge" within the terms of sec. 81.38, Stats., requiring counties to share with towns the costs of construction and repair of certain bridges.

You call my attention to the opinion in 15 O.A.G. 217 (1926) in which it is stated that a 60-inch culvert is not a bridge within the meaning of this law; yet, as you point out, modern highway construction sometimes employs large steel culvert pipes in lieu of the conventional deck type bridge formerly constructed. In view of the development in construction methods, you desire to know when the term "bridge" may be applied.

Sec. 86.14 (1), Stats., reads as follows:

"STRENGTH OF BRIDGES. (1) After July 1, 1943, no bridge or culvert shall be constructed in any highway unless it shall be designed to have sufficient strength to carry at least 15 ton truck loading in accordance with standard specifications covering design for structures as adopted by the state highway commission and in force at the time of design. Repairs to any bridge or culvert shall be of substantial character, strengthening same as much as practical."

The Standard Specifications for Road and Bridge Construction of the State Highway Commission of Wisconsin (1957) contains the following definitions in sec. 1101:

"Bridge: A structure having a span of more than 20 feet from face to face of abutments or end bents, measured along the centerline of the roadway, spanning a water course or other opening or obstruction on a public highway, including the substructure, superstructure and any trestle-work approaches thereto."

"Culvert. Any structure not classified as a bridge which provides an opening under any roadway."

In addition to the above definition, I have been informed that the 20-foot differential point is used by the bureau of public roads for the purpose of computing costs for statistical purposes and has become practically a national standard. I also find that the definition has been used in the state highway specifications manual as far back as 1935.

In view of the fact that the definitions have been so well established in technical highway operations for so long, it is my opinion that the definitions adopted by the state highway commission above quoted should be used.

REB

Courts—Automobile and Motor Vehicles—Violations by Children—Discussion of 48.18, Stats., regarding jurisdiction of criminal courts and juvenile courts for violations of state traffic laws. Juvenile courts and civil courts jurisdiction in cases of violation of ordinance other than traffic ordinances.

July 25, 1957.

WALTER T. NORLIN,
District Attorney,
Bayfield County.

You have requested an opinion on two questions which I will answer in the order in which they appear in your letter.

1. In cases of moving motor vehicle violations involving minors between the ages of 16 and 18 years of age, does the juvenile court have jurisdiction under the provisions of sec. 48.18, Stats., to waive its jurisdiction and refer the matter to the district attorney for appropriate proceedings in the criminal court?

Sec. 48.18, Stats., provides as follows:

“The criminal courts shall have jurisdiction over a child 16 or older who is alleged to have violated a state law only if the juvenile court deems it contrary to the best interest of such child or of the public to hear the case and enters an order waiving its jurisdiction and referring the matter to the district attorney for appropriate proceedings in the criminal court. In that event, the district attorney of the county shall proceed with the case in the same manner as though the jurisdiction of the juvenile court had never attached.”

Since a moving traffic violation is a “violation of a state law” the foregoing statute vests concurrent jurisdiction in the juvenile and criminal courts, subject to the proviso that the case must first be referred to the juvenile court, which may waive jurisdiction in favor of the criminal court. There is no express exception of traffic violation cases nor is there any reason to imply such exception.

It is true that sec. 48.36, entitled “Disposition of traffic violations”, deals with the disposition of such cases in the juvenile court and in the civil court but makes no mention of the criminal court, but this does not mean that criminal

courts are without jurisdiction in such cases by virtue of sec. 48.18. It means only that if the juvenile court waives jurisdiction of a traffic case in favor of the criminal court, the proceedings and penalty in the criminal court will be the same as in a case where the defendant is an adult, not as provided in sec. 48.36. In other words the court may impose sentence of a fine and costs, or of imprisonment, or both, notwithstanding the youth of the defendant. This, of course, is also true of other criminal charges against children brought after waiver of jurisdiction by the juvenile court.

2. Do civil courts have jurisdiction to try and, upon conviction, impose forfeitures on children between the ages of 16 and 18 for violations of county and municipal ordinances adopted pursuant to sec. 59.07 (64) and sec. 66.051, Stats., such as disorderly conduct, assault and battery, etc.? If so, may the child be imprisoned for the nonpayment of the forfeiture?

Sec. 48.12 (1), Stats., provides as follows:

"48.12 Jurisdiction over children alleged to be delinquent. The juvenile court has *exclusive* jurisdiction *except as provided in ss. 48.17 and 48.18* over any child who is alleged to be delinquent because:

"(1) He has violated any state law or any county, town, or municipal ordinance; * * *"

Sec. 48.17, Stats., as amended by ch. 260, sec. 7, Laws 1957, provides as follows:

"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 for violation of county or municipal ordinances enacted under s. 349.06. But disposition of such cases shall be made under s. 48.36 instead of under the ordinance."

Sec. 48.18, Stats., which has no bearing on the present question, has been quoted above in answer to your first question.

Under sec. 48.12 (1) quoted above the juvenile court has exclusive jurisdiction of ordinance violations committed by children under 18. The only exception is in the case of county and municipal ordinances enacted under sec. 349.06,

which grants authority to counties and municipalities to "enact and enforce any *traffic regulation* which is in strict conformity with chs. 341 to 348 * * *."

It follows that the civil courts are without jurisdiction to entertain prosecutions of children under 18 for the violation of any county or municipal ordinances other than traffic ordinances which are in strict conformity with the state traffic law.

WAP

Counties—Highways and Bridges—A county has no power to engage in constructing roads and driveways on private lands nor in draining such lands.

July 26, 1957.

CLIVE J. STRANG,
District Attorney,
Burnett County.

You have inquired whether the highway department of Burnett county can perform services on private lands, such as the grading and graveling of highways, blacktopping of driveways, and the clearing and draining of farm lands.

The answer to your question is "no."

In the case of *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151, 40 N. W. 2d 564, the court was called upon to construe the provisions of sec. 86.106 created by ch. 457, Laws 1947, which provided that towns, cities and villages could enter into contracts to build, grade, drain, surface and gravel private roads and driveways, and further provided that counties could contract with municipalities to perform such work. The court held the statute invalid on the ground that it involved an expenditure of public funds for a private purpose. The court rejected the argument that providing access to a public highway system on private lands was for a public purpose, and stated at page 156: "* * * We cannot agree that the building of private roads is allied with a public purpose."

During the 1951 session of the legislature, attempts were made to avoid the impact of the *Heimerl* decision by two

separate bills. In opinions reported at 40 O.A.G. 59 and 40 O.A.G. 151, the attorney general ruled that neither bill could safely be regarded as constitutional.

In my opinion the work proposed in your letter is indistinguishable from the work which the county was prohibited from doing in the *Heimerl* case, and the answer to your question is ruled by that case as indicated above.

RGT

Words and Phrases—Veteran Eligibility—Under sec. 45.37 (2) (f), Stats., when a member of the Grand Army Home obtains sole title to property in which he formerly had a joint interest, there is a change in his financial status which warrants reconsideration of his eligibility.

July 26, 1957.

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

You ask an opinion involving the following provision of sec. 45.37 (2) (f), Stats., as created by ch. 398, Laws 1949:

“(f) The members of the home on July 7, 1949 shall not be required to requalify for membership because of changes made in eligibility standards unless they are subsequently discharged and later apply for re-entry into the home, or unless the financial or physical status of any member has changed or improved so that he would no longer be eligible for admission under the standards applicable at the time of his admission. * * *”

You present the case of a veteran who, with his wife, was admitted to the Grand Army Home in January, 1931, and lived there continuously until the death of the wife in 1957, the veteran continuing his residence thereafter.

Before the death of the wife, the couple owned jointly property of a value slightly in excess of \$4,000. Proceedings are now under way to transfer title to the husband as survivor.

Acquisition of sole title to property in which one formerly had a joint tenancy works a change, and ordinarily

an improvement, in his financial status, which warrants a reconsideration of eligibility. In this instance the termination of the joint tenancy would result in a \$2,000 improvement in the financial status of the veteran.

The statutory provision above quoted refers to "the standards applicable at the time of his admission." In January of 1931, there was in effect sec. 45.07, Stats. 1929, which provided for maintenance in the home of "indigent" veterans.

It seems clear that property which might not be adequate for support of two people could be adequate to prevent an indigency status if it were available for the sole benefit of one.

Webster's *New International Dictionary*, Second Edition Unabridged, defines indigent as:

"Destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous."

The term has sufficient flexibility to permit of some variance in administration, depending upon the facilities available and similar circumstances. The following judicial decisions make it clear, however, that authorities charged with administration of the home could properly find that one owning liquid assets in excess of \$4,000 is not "indigent" and accordingly is not eligible to membership. *Carthaus v. Ozaukee County*, 236 Wis. 438, 295 N. W. 678; *Juneau County v. Wood County*, 109 Wis. 330, 85 N. W. 387; *The Town of Ettrick v. The Town of Bangor*, 84 Wis. 256, 54 N. W. 401; *The Town of Rhine v. The City of Sheboygan*, 82 Wis. 352, 52 N. W. 444.

BL

Navigable Waters—Diversion for Irrigation Purposes—Conservation Commission—Public Service Commission— State department agencies authorized by statute to engage in operations requiring the use of water need not secure a permit for diversion from the public service commission.

July 29, 1957.

PUBLIC SERVICE COMMISSION.

You state that the director of the conservation department has inquired of you whether it is necessary for that department to obtain a permit from your commission under the provisions of sec. 31.14, Stats., for the purpose of withdrawing water from lakes and streams for the purposes of irrigation and sprinkling state-owned lands open to the public.

In my opinion the answer to your question is "no."

Both your commission and the conservation commission are arms or agencies of the state itself. While it is true that your commission under your controlling statute, sec. 195.01 (9), has the power to sue and be sued in its own name, the conservation commission has no such power, and either sues or is sued as the "State of Wisconsin (Conservation Commission)."

The rule of law is well established that general statutes which do not mention the state in specific terms do not apply to the state itself or to its arms or agencies. *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 121 N. W. 642; *Sullivan v. School District*, (1923) 179 Wis. 502, 191 N. W. 1020; *Necedah Mfg. Corp. v. Juneau County*, (1932) 206 Wis. 316, 237 N. W. 277.

Under the provisions of your controlling statute, sec. 31.14, Stats., neither the state itself nor the conservation commission are named as agencies who must apply for a permit. The only reference to the conservation commission is found in sec. 31.14 (13), which states that the commission may apply for a permit to raise water elevations in any navigable stream or lake whenever it has funds to pay for such work and continues to provide that the public service commission "shall grant such permit."

The general powers of the conservation commission are set forth in sec. 23.09, Stats. Subsec. (1) provides:

"The purpose of this section is to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in the state of Wisconsin."

Subsec. (7) provides in part:

"The commission is hereby authorized to * * * establish such services as they may deem necessary to carry out the provisions and purposes of this act * * *."

Subsec. (7) (d) provides specifically that the commission may acquire lands and maintain the same for the purpose of state forests, for growing timber and for the purpose of providing public recreation.

I am aware of the fact that in your administrative practices and that of the conservation commission, when you are called upon to issue permits under the provisions of sec. 31.14, Stats., the agents of the conservation commission cooperate in obtaining and presenting the evidence of public rights which may be affected by the grant of a permit. Under the foregoing statutes and under the practices as they have developed, it would appear that the conservation commission has a responsibility, at least as great as your own, to insure that no withdrawals of water from a navigable water course are made which would in any manner adversely affect public rights.

Accordingly the activities of the conservation commission in this regard would appear to be a proper subject for coordination between that commission and your commission in accordance with the provisions of sec. 20.904, particularly in regard to any hydraulic aspects of any diversion works.

RGT

Barbers—Licenses and Permits—State Employees—
Practicing barbering at state institutions and restricting their practice to patients or inmates of such institutions are not subject to licensing requirements of sec. 158.04, Stats.

August 1, 1957.

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

You asked whether a barber employed by a state institution, who limits his practice to patients or inmates of the institution, must hold a master barber and shop manager's license and, if so, whether a master barber in such an institution would have to be licensed as a shop manager even though no room in the institution is maintained or equipped as a barber shop.

Ch. 158, Stats., contains various provisions regulating the practice of barbering and delegates to your department the duty of administering such provisions, including the license requirements. Sec. 158.04 provides that no person shall engage in the practice of barbering unless he holds a master barber's or journeyman barber's license or an apprentice permit card.

In 41 O.A.G. 378 (1952) it was stated that this statute did not prohibit inmates of the state prison from performing barber services for other inmates and guards at the prison. That opinion was based in part upon the fact that the barbering program at the prison was part of the general rehabilitation program for the inmates and also upon the principle that general statutory prohibitions do not apply to the state. As we understand it, the barbering services to which you refer are not part of any training or rehabilitation program, but are normal services which must be performed for the inmates or patients of a state hospital and other institutions.

It frequently has been held that the most general words in a statutory prohibition do not affect the sovereign. *Milwaukee v. McGregor*, (1909) 140 Wis. 35, at 37, 121 N. W. 642; *Sullivan v. School District*, (1923) 179 Wis. 502, at 507, 191 N. W. 1020; and *Necedah Mfg. Corp. v. Juneau County*, (1932) 206 Wis. 316, 237 N. W. 277, 240 N. W. 405. In the latter case, at page 322, the court said that "the

most general words that can be devised affect not the sovereign in the least, if they may tend to restrain or diminish any of his rights and interests." It has been held that a statute imposing license fees does not apply to state public agencies, unless the intention so to do is clearly expressed. 53 C.J.S. 558.

There is no language in ch. 158 expressly making the license requirements or other regulations of the chapter applicable to the state, and such application would "tend to restrain or diminish" the interests of the state in caring for patients at its institutions.

It is my conclusion that as long as the state employes concerned limit their practice to patients or inmates of the institutions where they are employed, they need not be licensed under ch. 158.

EWV

Salaries and Wages—Public Officers—Actions of administrative agencies granting pay increases pursuant to Bill 635, S., Laws 1957, which amends sec. 20.930, Stats., must be in strict compliance with statutes and may not be anticipatory or retroactive.

August 6, 1957.

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

You have requested my opinion as to the effect of certain provisions of Bill 635, S., in part amending sec. 20.930, Stats., relating to salary increases of certain state employes whose salaries are fixed by the appointing agency subject to a maximum limit set by the legislature. This particular bill has caused a considerable amount of confusion due to the fact that there was an error in enrolling, so that the bill as signed by the governor and published June 30, 1957 as ch. 263, Laws 1957, was not identical to that passed by the legislature, the salary of the secretary of the state athletic commission having been inadvertently omitted.

The validity of the enactment, as signed, which was published June 30, 1957, depends on whether the omission of

the salary of the secretary of the state athletic commission is a "material change" so that the bill, as approved by the governor, was not the one passed by the legislature. If it should be held that such is a "material change," the enactment is void. *The State vs. Wendler*, (1896) 94 Wis. 369.

It is my understanding that the governor has signed both a supplemental bill, which would correct only the error as to the secretary of the state athletic commission, and a corrected copy of the entire act as passed by the legislature. These were published July 31, 1957.

It is my position that the problem as to which published act is valid is one for judicial determination and not within the province of my office, since a question of fact is controlling. Therefore, in answering your questions, I am not attempting to give any opinion as to the validity of the law in either its original or corrected form. Further, the answers to your questions need no such determination.

Your specific questions and my answers are as follows:

"1. If a board with the power of determining its director's salary took such action by telephone and conveyed the results of said action to the director of budget and accounts in a letter signed by its chairman, would such action be valid?"

It is unnecessary to decide the general question of whether a board may take legal action by telephonic conversations between its members, because the methods in which governmental boards may act are usually indicated by the statute creating the board. By way of illustration, if the state aeronautics commission were involved, no meeting could be held by telephone, because sec. 114.30 (2), Stats., expressly requires "All regular and special commission meetings shall be open to the public." Meetings of a board must be held in strict compliance with the statutory regulations (*State ex rel. Mayer v. Schuffenhauer*, (1933) 213 Wis. 29; *State ex rel. Schroeder v. Board School Directors*, (1937) 225 Wis. 444), and action by telephone would not comply with the mandate that all meetings be open to the public.

"2. Can a board with the power of determining its director's salary take action in approving a salary increase prior

to the signing and publication of a legislative enactment making such increase possible under s. 20.931?"

The principle is well established in the state that administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440. This is not a case of the agency attempting, in a faulty manner, to do something it is empowered to do. The agency had no authority to act under the new law prior to its effective date. Numerous things could happen between the time an agency acts prospectively on a law that has not become effective. For example, the law could be amended which might change the entire thinking of the members of the board or commission. The members of the commission might change, or a governor's veto message on part of the bill might influence the agency. The action of the board was without authority and is invalid.

"3. Assuming that July 1, 1957 was the legally effective date of an increase in salary limit under s. 20.931 and that a board having the power of determining its director's salary took action at a meeting held July 10 and stipulated that the director's salary shall 'become effective July 1, 1957', would such retroactive action be valid?"

My answer is that the board could not act to make the salary increase retroactive to July 1. Art. IV, Sec. 26, of the Wis. Const. prohibits the granting of "extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into." Clearly, the legislature could not have increased the salaries of the officials in question retroactively. It necessarily follows that the administrative agency could have no greater power than the legislature:

"Where power to fix the compensation of public officers is delegated by the legislature to administrative boards and officers, it must be exercised by them in conformity to the requirements of the fundamental law. Any constitutional limitations * * * must be observed." 43 Am. Jur., Public Officers, § 349, p. 142.

The act, as passed, does not state that the salaries of the officials for the fiscal year commencing July 1, 1957 and ending June 30, 1958, may be increased to a certain amount. The terms of the officials are indefinite and at the pleasure of the appointing board or commission. What the legislature did say in effect is, "you may set the salary of your executive up to the sum of (X) dollars and you may do so any time you choose, but a salary change does not become effective until you take affirmative action."

"4. Assuming that August 1, 1957 is the legally effective date of an increase in salary limit under s. 20.931 and that board action was the same as under question 3, would said board action be valid and effective as of August 1, 1957, or should another board action be made to establish the effective date?"

I take it that your question is based on the hypothesis that the publication of the corrected law is the valid one. In such case, my answer to the question must be the same as is given above as to question "2". The action of an agency cannot anticipate the passage of a law under which it purports to act.

REB:JEA

*Counties—Public Welfare—Employes—*Under sec. 946.13 (1) Stats., a county board supervisor is not eligible for employment by a county department of public welfare established pursuant to sec. 46.22 (2), Stats.

August 8, 1957.

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

You ask whether a member of a county board of supervisors may be engaged as a worker in a county department of public welfare established pursuant to sec. 46.22, Stats.

Your question is answered in the negative. Under present statutes, and rules promulgated to implement them, the county board does not have direct control over employes of the welfare department. This office issued an opinion on May 28, 1957 stating that the county board of supervisors

has neither the power to appoint employes of the county department of public welfare nor to fix their compensation. The board of supervisors may, however, determine the classification (salary range) in which the employes are to be placed, determine whether certain employes will start at more than the minimum in the salary schedule, and make other determinations regarding compensation. It is, therefore, apparent that the county board retains some indirect control over the welfare employes by reason of its right of general supervision over the wage structure.

It is my opinion that a county board member who accepted employment as a civil service employe of the county welfare department would violate sec. 946.13 (1) (a), Stats. This statute makes punishable any public officer who "enters into any contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law * * * to perform in regard to that contract some official function requiring the exercise of discretion on his part."

Subsec. (2) (a) exempts contracts of less than \$1,000 in any year and subsec. (3) makes violative contracts void. The statute applies to contracts for personal services and no doubt the salary would exceed \$1,000 per annum. A claim for wages must be based upon a contract either express or implied. *Henry v. Dolen*, (1925) 186 Wis. 622, 625, 203 N. W. 369; 40 O.A.G. 488.

WAP:JDW

Counties—Platting Lands—County board has power to survey and plat county property as an aid to sale.

August 8, 1957.

R. H. NIENOW,
District Attorney,
Lincoln County.

You state that Lincoln county is presently the owner of some 100 acres of land within the city of Merrill which is a part of its discontinued county home farm and now de-

sires to sell that land. You inquire whether the county may plat the land prior to sale and sell it in separate parcels or lots on an appraisal and bid procedure. You have indicated some doubts as to the right of the county to proceed to sell in this manner.

In my opinion the county has such power.

For a proper understanding of the exact question involved, it is necessary to examine the exact nature of a plat. A plat is nothing but a formalized survey of the real estate involved marking its boundaries and the boundaries of the various parcels in accordance with the requirements of the statutes, ch. 236, and in accordance with the conditions therein, and thereafter preserving a formal record of the survey and the various approvals in the office of the register of deeds.

In any sale of any parcel by the county, even of unplatted land, the purchaser could properly insist that the property be surveyed and that the county indicate by monuments located on the ground the exact extent of the parcel which he was purchasing. If successive parcels were sold by metes and bounds, successive tasks of surveying and monumenting would be necessary.

I find nothing in the statutes to prevent the county from making a survey of an entire area at one time and dividing it into convenient parcels for sale. If the parcels are of less than $1\frac{1}{2}$ acres it is both necessary and desirable that a formal plat of the area be prepared and recorded. Sec. 236.02 (7) (a) and (b).

It is, of course, true that counties as agents of the state have only such powers as are found in the statutes or are necessarily implied therefrom. When we examine the statutes relating to the powers of the county board as set forth in ch. 59, we find that the county board has been given specific power to sell real estate. In sec. 59.01 (1) we find the following language:

*"Each county in this state is a body corporate * * * to acquire and hold * * * real and personal estate for public uses or purposes * * * to sell * * * and convey the same, * * * to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and*

privileges granted and the performance of the legal duties charged upon it."

In the preface to sec. 59.07 enumerating the general powers of the county board, it is stated that the grant of powers "shall be broadly and liberally construed."

Finally, in sec. 59.07 (1) (c) we find the specific power to "Direct the clerk to * * * sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on such terms as the board approves. * * *"

In my opinion the foregoing clearly establishes the power of a county board to subdivide county property as an aid in the sale of such property.

RGT

Counties—Words and Phrases—Funds—Funds accumulated by Clark county and earmarked for future use but not needed immediately may not be invested by such county in insured farm loans evidenced by notes fully and unconditionally guaranteed both as to principal and interest by the United States.

August 12, 1957.

WAYNE W. TRIMBERGER,
District Attorney,
Clark County.

You state that over a period of years Clark county has accumulated a considerable amount of money, most of which has been earmarked for a specific use at an uncertain future date. The finance committee of the county board desires to invest this money temporarily at the highest interest rate consistent with all legal requirements. Said committee wishes to know whether a substantial amount of this money could be invested in insured farm loans.

Sec. 66.04 (2), Stats., as amended by ch. 246, Laws 1957, provides in part:

"Any county * * * may invest any of its funds, not immediately needed, in * * * securities * * * guaranteed as to

principal and interest of the United States government, or of a commission, board or other instrumentality of the United States government * * * and may sell or hypothecate the same. * * *

You have submitted a brochure issued by the U. S. Department of Agriculture, Farmers Home Administration, Washington, D. C., describing the insured farm loans in which the finance committee is interested. Under this loan program private lenders can advance funds to eligible farmers to buy land, improve their farms and refinance their debts. As evidence of the loan the farmer issues a note to the lender which provides for repayment of the principal with interest at 3½ per cent per annum. The note is secured by a mortgage which runs to the government. The loan-making and servicing operations are handled by the Farmers Home Administration. Payments of principal and interest are fully guaranteed by the government. When an installment of principal and interest has been due for 30 days and has not been paid by the borrower the government will issue a U.S. Treasury check to the lender for the full amount of the unpaid balance of such installment.

Under a repurchase agreement which accompanies each loan the lender may, within a period of one year after the expiration of 5 years from the date of the note, have the note purchased by and assigned to the government. In such event the government issues a U. S. Treasury check to the lender for the balance of the principal and interest on the note. The notes can also be assigned to another investor. The notes are considered by the United States department of agriculture to be "Obligations guaranteed by the United States—Obligations fully and unconditionally guaranteed both as to principal and interest by the United States."

"Securities" are generally defined as written assurances for the return or repayment of money or evidences of indebtedness. *Jaffe v. Goldner*, 251 Ill. App. 188; *McCormick v. Shively*, 267 Ill. App. 99.

The word "securities" is a general term for evidences of debt. It is flexible in meaning and is ordinarily used as a synonym for investments. *Genessee Trustee Corporation v. Smith*, C.C.A. Mich., 102 F. 2d 125, 127.

The term "securities" embraces promissory notes, not only in a popular sense, but in a legal sense as well. *Wagner v. Scherer*, 85 N.Y.S. 894, 89 App. Div. 202.

Sec. 66.04 (2), Stats., authorizes a county to invest funds not immediately needed in "securities * * * of the United States government, or of a commission, board or other instrumentality of the United States government" which are guaranteed as to principal and interest. While the notes in question probably would be classified as "securities" they are signed by the farmer who borrowed the money. They constitute an evidence of the debt of the farmer. While they are guaranteed as to principal and interest *by* the United States government or an instrumentality thereof they are not securities *of* the United States government or of a commission, board or other instrumentality of the United States government.

Hence, it is my opinion that the funds of Clark county which are not immediately needed may not be invested in the insured farm loans referred to above.

JRW

Words and Phrases—Vocational and Adult Education—
Local board of vocational and adult education does not have the power to adopt policy or rule which arbitrarily defines "resident" for admission purposes in more restrictive manner than term is used in sec. 41.18 (1), Stats., and which would in effect deny free vocational school training to bona fide resident of the municipality who met other standards set forth in sec. 41.18 (1).

August 22, 1957.

C. L. GREIBER, *State Director,*
Vocational and Adult Education.

You have advised that the Wausau board of vocational and adult education has adopted the following policy regarding residence of students attending the Wausau school of vocational and adult education.

"A student is considered a resident of the city of Wausau if he has established Wausau as his permanent home and is

living in Wausau prior to July 1 of the year in which he initially enrolled in the Wausau Vocational School.”

You request an opinion as to whether the Wausau board of vocational and adult education can legally establish such a rule.

As pointed out in 41 O.A.G. 357, at page 358:

“The propositions are well settled that officers charged with the administration of schools have only such authority as is given by statute, and that an enumeration of their powers in a statute impliedly denies to them all powers not enumerated. See *Costigan v. Hall*, 249 Wis. 94, 23 N. W. 2d 495, and *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 166, 11 N. W. 472. These principles do not mean, however, that school districts or boards can do no acts except those expressly described; because each specific authorization necessarily carries with it the authority to do the incidental acts necessary to carry it out. * * *”

Sec. 41.18 (1), Stats., as amended by ch. 224, sec. 4, Laws 1957 provides:

“The schools of vocational and adult education shall be open to all residents of the municipalities or districts in which such schools are located, who are 14 years of age and who are not by law required to attend other schools, and to all persons over 14 years of age employed in said municipalities or districts, but who are residents of other municipalities or districts maintaining schools of vocational and adult education; provided, such nonresidents shall present the written approval of the local board of vocational and adult education of their home municipality. The schools of vocational and adult education shall be open to all persons 14 years of age or over who reside in other municipalities or districts having local boards of vocational and adult education but in which the specific courses desired by such persons are not given; provided, such courses are given in the municipality or district in which such persons elect to attend and the local board of such municipality or district agrees to admit them; provided further, that such nonresidents shall present the written approval of the local board of vocational and adult education of their home municipality. Any person over the age of 14 years who shall reside in any municipality not having a vocational and adult education school, and who is otherwise qualified to pursue the course of study, may with the approval of the board of vocational

and adult education, be allowed to attend any school under its supervision. Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

Insofar as this opinion is concerned, the words of primary importance in sec. 41.18 (1) are:

"41.18 (1) *The schools of vocational and adult education shall be open to all residents of the municipalities * * * in which such schools are located * * **"

The term resident is not defined in the section, and is not defined in other sections of ch. 41. However, in *Kidd v. Joint School District*, (1927) 194 Wis. 353, 357, the Wisconsin court interpreted the term "residence" for school tuition purposes under ch. 40 of the statutes as follows:

"* * * But the cases cited from *State ex rel. School District v. Thayer*, supra, [74 Wis. 48] and *McMillan v. Page*, supra, [71 Wis. 655] seem to settle the question in this state, that a child may gain a residence, for school purposes, apart from his parents when they in fact emancipate him. * * * The authorities are not uniform in different jurisdictions, and as to the special considerations as to what constitutes residence. Residence, however, is a very broad and liberal term, used most frequently to apply to a place where a person resides without a present purpose to remove therefrom. 'Resident' is synonymous with 'inhabitant.' * * *

I believe that the legislature intended that the same definitions be applied to the word "resident" as used in sec. 41.18 (1).

The words "shall be open" are mandatory and it is clear that the legislature intended that the schools of vocational and adult education shall be open to all residents of the municipalities in which such schools are located and who meet the other qualifications set forth in sec. 41.18. Nothing in the section requires that a person must have been a resident for any period of time or on any certain date. Nothing in the section requires that the resident must establish the municipality as his "permanent home." It requires that he be a resident at the time he is admitted, and that he continue to be a resident unless he comes under some of the other admission provisions.

Sec. 41.15 sets forth the powers of the local board of vocational and adult education, but there is nothing in that sec-

tion or in any other section of ch. 41 which authorizes a local board to establish an arbitrary definition of the word "resident" which is more restrictive than the statutory usage.

A local board of vocational and adult education does not have the power to adopt a policy or rule which arbitrarily defines resident for admission purposes in a more restrictive manner than the term is used in sec. 41.18 (1) and which would in effect deny free vocational school training to a bona fide resident of the municipality who meets the other standards set forth in the section.

RJV

Licenses and Permits — Child Protection — Sec. 48.65, Stats., relating to licensing of day-care centers, applies to a recreational camp maintaining a nursery unit for children of staff members, where care and supervision are furnished for 4 or more children under the age of 7, for compensation.

August 23, 1957.

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

You ask whether a license is required, under the following provisions of sec. 48.65, Stats., for a day camp operated primarily for children over 7 years of age, but providing care for younger children of staff members:

"48.65 Day care centers licensed. (1) No person shall for compensation provide care and supervision for 4 or more children under the age of 7 for less than 24 hours a day unless he obtains a license to operate a day care center from the department.

"(2) This section does not include:

"(a) A relative or guardian of a child who provides care and supervision for the child; or

"(b) A public or parochial school; or

"(c) A person employed to come to the home of the child's parent or guardian for less than 24 hours a day."

You describe the circumstances under which the care and supervision is furnished, in part, as follows:

* * * The parents and their children come to the camp about nine or nine-thirty in the morning and stay until mid-afternoon, at which time they leave. The nursery unit recruits its own trained staff in the same way as other staff is recruited for the day camp. The parent registers the child at the camp and pays a fee of about \$1.50 for an eight-day session. This amount is less than the regular camp fee paid by other older children attending the camp and is presumably applied to the cost of milk, transportation and the like.
* * *

"The parents of the young children at all times are on the camp grounds although not on the grounds set aside for the nursery unit. Sand boxes and toys and other recreational equipment are provided for the children. * * *

"This nursery service is provided for only persons who are on the camp staff. It is one of the inducements used to obtain such staff. The nursery service is not advertised, and no child who is not related to a camp staff member can attend the nursery unit."

Sec. 48.65 was adopted in its present form by ch. 575, Laws 1955, from Bill 444, S. The note to that bill as presented to the legislature, pointed out that sec. 48.65 incorporated the provisions of the former sec. 48.50, subsecs. (1) and (6), with certain modifications. Among the modifications was the omission of the exemptions formerly extended to recreational camps.

The intent of this change was discussed in the following commentary appended to the printed bill:

"In addition, the exception of recreational camps in the present law was dropped. Most recreational camps are not covered by the law because they do not provide day care; i.e., children come to camp to stay for one, 2, or more weeks and not for part of a day. Although there are a number of day camps, providing care for children for part of a day, they usually do not take children under the age of 7. *The committee was of the opinion that in cases of day camps taking children under the age of 7 they were properly classified as day care centers since the problems of care for pre-school children are quite different from the usual problems of a recreational group.*" (Emphasis supplied.)

The italicized sentence indicated it was intended that sec. 48.65 should apply to care of children under 7 in day camps, if the circumstances of the care otherwise fall within the terminology of sec. 48.65 (1), Stats.

We are assuming there are 4 or more children involved; else your question would not have been asked.

The excerpts quoted above from your statement of facts indicate that the camp provides "care and supervision" for "children under the age of 7 for less than 24 hours a day"; and that it is provided "for compensation."

The fact that the monetary consideration is less than that charged for older children is immaterial, since the statute makes no exception for cases in which the compensation does not provide a profit. Further, the very fact that the camp provides the nursery service as an "inducement" to obtain its staff indicates that the services of the parents constitute a consideration or compensation additional to the cash fee.

The fact that the service "is not advertised" and is not available to all members of the public does not remove it from the terms of the statute. Sec. 48.65 (1) does not refer to "public" service, but rather makes a definite classification for "4 or more" children. It is concerned with insuring proper care of children in all such cases, irrespective of whether the care is offered generally, or on a restricted basis.

The statute provides no exception on the ground that the parents are otherwise employed on the same premises, so long as the "care and supervision" is not furnished by the parents, but rather by a separate staff in a separate unit. The situation is the same as if a large factory were to set up a nursery for children of its workers. It is for the protection of parents and children in such cases, as well as for the public benefit, that the statute seeks to insure proper standards of care. See, also, 43 O.A.G. 124.

The fact that the camp is required, under other provisions of law, to observe certain requirements for health and sanitation does not obviate the need for further concern under sec. 48.65 because, as the committee commented in submitting the bill to the legislature, "the problems of care for pre-school children are quite different from the usual problems of a recreational group."

BL

Counties—Appropriation and Expenditures—Hospital—
County board may appropriate money to nonprofit corporation to maintain a memorial hospital where the conditions of sec. 45.055, Stats., are met.

August 27, 1957.

WARREN WINTON,
District Attorney,
Washburn County.

You have asked a number of questions about the power of a county to make an appropriation to pay off indebtedness of a hospital.

Your first question is:

“1. Does the County Board have authority to make an appropriation for the purpose of paying off the balance due for construction of the hospital?”

Consideration of questions involving the authority of a county board must be prefaced by the principle enunciated in *Dodge County v. Kaiser*, 243 Wis. 551, 557, that a county board has “only such powers as are expressly conferred upon it or necessarily implied from those expressly given.” *Maier v. Racine County*, 1 Wis. 2d 384, 84 N. W. 2d 76.

Whether the cause involved is a worthy one, or one of a public nature, does not become pertinent unless an underlying statutory authorization can be found.

You indicate that it has been suggested that the appropriation might be made “as a memorial” under secs. 45.05 and 45.055.

Sec. 45.05 authorizes a county board to “acquire property” for the purpose of “providing, furnishing, constructing, erecting, repairing, maintaining or conducting” a memorial, and to appropriate money and levy taxes for such purposes.

Sec. 45.055 authorizes a county board to “contract with or make an appropriation, or both,” to any nonprofit corporation “organized expressly for any of the purposes of sec. 45.05.”

Neither of the foregoing statutes authorizes an unconditioned gift to a private hospital corporation “as a memo-

rial." The gift may be made only to a corporation "organized expressly" for certain purposes.

Despite the fact that the corporation involved in your question is a nonprofit one without capital stock, and was organized for charitable purposes, it was not "organized expressly" for the purposes of providing "a suitable memorial" for the persons described in sec. 45.05.

The question you submit was answered in the negative in 37 O.A.G. 100; and there have been no later developments which would warrant a different answer now. I agree with your summation that what was contemplated by the legislature under sec. 45.05 would be a hospital erected and owned by the county for the purpose of a memorial to soldiers and sailors, etc., and that under the provisions of sec. 45.055 the county board is authorized to contract with or make an appropriation to a nonprofit corporation organized expressly for the purposes enumerated in sec. 45.05.

Your second question is:

"2. If the articles of incorporation of the S Community Hospital were amended to read substantially as follows:

"Article Second: The name of said corporation shall be The S-W County Memorial Hospital, and it shall be maintained and conducted as a suitable memorial to the memory of former residents of the County of W who lost their lives in the military or naval services of the State of Wisconsin or of the United States and to commemorate and honor the deeds of the soldiers, sailors, marines and nurses who served in the nation in any of its wars, it being the purpose to constitute said hospital a county and municipal memorial pursuant to Section 45.05 of the Wisconsin Statutes," "then would it be lawful for the County Board to make an appropriation to such memorial hospital corporation?"

The language above quoted adopts almost verbatim purposes included in sec. 45.05 (1), Stats.

The situation is the same as that involved in the opinion in 37 O.A.G. 591. An affirmative answer was there given, and there has been no legislative change which would warrant withdrawal of that opinion.

Your third question is:

"3. If the answer to question 2 is yes, then would it be lawful for the County Board to make an appropriation to such memorial hospital corporation with the membership

and board of directors as now constituted—that is, with each person or corporation making a donation, becoming a member with one vote?”

Secs. 45.05 and 45.055 provide two different methods by which a county may support a memorial. Sec. 45.05 provides a method by which the county may operate a memorial directly. Sec. 45.055 provides a method by which a county may support such an undertaking operated by others, including nonprofit corporations.

Sec. 45.055 does not condition the gift upon county operation of the memorial. If a county board does not elect to place a condition upon its appropriation, other than those included in the statute (assuming that it could do so, without giving an opinion to that effect), any plan of operation or determination of membership which is permissible for a nonprofit corporation might be followed so long as it is “without capital stock” and “provided that the facilities of such memorial are made available to the residents of the governmental unit making such appropriation to the extent that the governing body of the governmental unit may require.” (Sec. 45.055.)

Your fourth question is:

“4. If the answer to question 2 is yes, then would such memorial hospital be affected by the provisions of Sections 49.16 and 49.17, providing for the establishment of a county hospital for the treatment of dependent persons or by the provisions of Section 66.47 covering county-city hospitals?”

The answer to this question is implicit in the answer to the last one. The appropriation under sec. 45.055 contemplates that the memorial will be operated by some entity other than the county, including a nonprofit corporation. The operation of the memorial by such other entity is governed by the law appropriate to its own organization rather than by secs. 49.16, 49.17, or other statutes dealing with different types of entities.

The provision of sec. 45.055 that the facilities shall be made available to residents “to the extent that the governing body of the governmental unit may require” contemplates that they need not be limited to dependent persons.

Your fifth question is:

"5. If the answer to question 2 is yes, then would it be lawful for the County Board to make annual appropriations to such memorial hospital corporation to help operating deficits, or must such appropriations be confined to paying off the original construction costs, or for new additions or new equipment?"

Sec. 45.055 authorizes a county board to make an appropriation "to any non-profit corporation" and to levy taxes "for the purpose of raising funds for such memorial purposes or contributions." The statute does not limit the appropriations to contributions for construction costs.

Since the statute authorizes appropriation to any non-profit corporation organized for any of the purposes of sec. 45.05, which includes not only "constructing" and "erecting" memorials, but also "providing, furnishing, repairing, maintaining, or conducting" such memorials, the contribution may be utilized for any of such purposes unless otherwise conditioned by the county board.

In specific answer to your question, it is my opinion that a county board may appropriate money from year to year to a nonprofit corporation to maintain a memorial hospital, where the other conditions of sec. 45.055 are met.

BL

Counties—Taxation—Appropriation and Expenditures—
County board of supervisors does not have authority to build up so-called "Sales Pavilion Fund" for benefit of county fair association by letting yearly appropriation for such purpose accumulate in county treasury. Two-thirds vote of entire membership of board under sec. 65.90 (5), Stats., was effective in transferring amount and purpose of such fund to another project under facts stated. Board in county under 30,000 population limited to annual appropriation not to exceed \$5,000 to all fair societies in county for all purposes permitted by sec. 59.69 (2).

August 30, 1957.

FRANKLIN J. SCHMIEDER,
District Attorney,
Calumet County.

You advise that the board of supervisors of Calumet county has for a period of five successive years appropriated the sum of \$3,000 per year for the purpose of aiding the county fair association, a Wisconsin corporation, to build a sales pavilion for the sale of livestock on the fair grounds owned by the corporation. In addition, each year, the board appropriated sums not exceeding \$2,000 in any one year, to help defray expenses of the fair association in conducting their fair. The latter sum appropriated in 1956 was raised in the 1956 tax levy and has been paid to the fair association. The \$3,000 was never paid out by the county but was kept by the county and was always put in a separate account called the sales pavilion account which was allowed to accumulate. This sales pavilion account amounted to \$15,000 in March of 1957, and the treasurer of the fair association had never made demand for any of the sales pavilion money as of March, 1957, and you advise that the fair association had not retained an architect to build the sales pavilion or started construction as of March, 1957. Calumet county has a population of 18,801.

You advise that at the March, 1957, meeting of the county board, the board of supervisors without a dissenting vote, and with all members present except one, voted to transfer the \$15,000 from the sales pavilion account to a fund they

had set up for the installation of an elevator in the courthouse.

You query as to whether the board of supervisors can now reappropriate the total sum of \$15,000 to the fair association for the purpose of aiding in the building of said sales pavilion, or whether they are restricted to appropriating a sum not in excess of \$5,000 in any one year for such purpose by reason of sec. 59.69 (2), Stats.

In line with the reasoning in 34 O.A.G. 345, 37 O.A.G. 586, 39 O.A.G. 367, and in accordance with the holding of the supreme court in *Immega v. Elkhorn*, 253 Wis. 282, 34 N. W. 2d 101, it is clear that county boards do not have authority to tax for the purpose of accumulating surpluses, and that a surplus remaining in the treasury at the end of the year should be applied toward the following year's budget. I am not of the opinion that the money in the sales pavilion account constituted trust funds which could not be diverted as was the case in *Weik v. Wausau*, 143 Wis. 645 and *Miller v. Milwaukee*, 182 Wis. 549. This is especially true as to the \$12,000 which was in the fund in November, 1956, when the last \$3,000 was appropriated. Sec. 59.69 (2) contemplates that money appropriated to a fair society must be demanded by the treasurer of the fair society prior to the end of the year for which it is appropriated, and if it is not so demanded it lapses and becomes part of the *funds on hand* available to the county as that term is used in sec. 65.90 (1).

As to the \$3,000 appropriated in November, 1956, some further consideration is necessary. The treasurer of the fair society had not demanded this amount as of March, 1957, and the society had incurred no expense relative to the proposed sales pavilion. It had not retained an architect to draw the plans nor had construction or excavation begun.

It is my opinion that the county board of supervisors was acting within its authority pursuant to sec. 65.90 (5), Stats., when it voted by greater than a two-thirds vote of its membership, to transfer the \$15,000 from the sales pavilion account to the fund established for the installation of an elevator in the courthouse.

I am of the further opinion that the county board of supervisors cannot appropriate the sum of \$15,000 to the

fair society in one year for a sales pavilion, but that the board is restricted to voting a sum not in excess of \$5,000 in the aggregate for all fair societies in the county in any year pursuant to the terms of sec. 59.69 (2), Stats., and for the purposes therein stated.

RJV

Counties—Bids—County by a three-fourths vote of its board of supervisors may authorize direct construction or repair of a county-owned building and may purchase materials for said construction without taking bids where the estimated cost of such public work exceeds \$1,000, sec. 59.08, Stats.

September 9, 1957.

FRANZ W. BRAND,
District Attorney,
Green County.

You advise that the Green county highway committee wishes to install a concrete floor in one of the quonset buildings at the highway shop and that the county board has provided \$4,000 for that purpose. You state that the highway committee would like to have the labor for this project done by highway employes, but desires to purchase the ready mixed concrete, the cost of which would be about \$1,500, without submitting the same for bids.

You request an opinion as to whether a county by a three-fourths vote of its board of supervisors may purchase materials for said construction without taking bids where the estimated cost of such public work exceeds \$1,000.

Sec. 59.08 provides:

“Public work, how done. All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$1,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat

provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

It is apparent that ready mixed concrete is a material rather than equipment or apparatus. *Standard Oil Co. v. City of Clintonville*, 240 Wis. 411, 35 O.A.G. 88.

The history and meaning of sec. 59.07 (4) (c), Stats. 1951, was stated in 40 O.A.G. 489. That section is almost identical with sec. 59.08, Stats. 1955.

It was pointed out there at pages 490 and 491 that:

"Previous to 1945, the law did not require bids on county work. See *Cullen v. Rock County*, 224 Wis. 237. The law in this respect was not settled until the *Cullen* case (Dec. 1943). A review of these events in sequence makes the meaning and intention of this statute clear as it applies to your first question.

"First, after a period when the law on this point was not well settled, the supreme court held in the *Cullen* case in 1943 that a county was not bound to let public works out on bid.

"Next the 1945 legislature enacted ch. 456, Laws 1945, which created sec. 59.07 (4) (c) requiring the letting of contracts on public works of counties to the lowest responsible bidder.

* * *

"After that the 1949 legislature enacted ch. 98, Laws 1949, amending sec. 59.07 (4) (c) to allow public works to be done directly by the county upon a three-quarters vote of the county board.

"The result is that in order to protect the public from excessive charges, public works to be constructed by the county shall ordinarily be done by contract let to the lowest responsible bidder. However, in unusual situations the county board may at its discretion (exercised by a three-quarters vote of the members elect) order the work done directly by the county. This protects the interests of the county in instances where no satisfactory bid is received or in other special circumstances where a strict adherence to the requirements for letting contracts by bid would defeat the best interests of the county."

That opinion stated that under the provision in question the county, having authorized direct construction, could hire temporary employes to do the work on a daily wage or

other wage basis, even though the cost exceeded \$1,000. The county of course could do the work with personnel regularly employed by the county.

It is also apparent that the county having authorized direct construction could use its own materials on hand; sand, gravel, cement, steel, if it had them available. The only question remaining is whether the county can purchase the necessary materials without taking bids where the County board has voted by three-fourths of its membership to have the work done by the county.

As pointed out in 40 O.A.G. 489, 491, this section:

“Covers ‘all public work * * * where the estimated cost of the *work* will exceed \$1,000.00’, its application could not be avoided by breaking up the construction of a \$3,500 building into four or more segments and letting four or more contracts, each of which would be less than \$1,000. *It is the whole building which is the ‘public work.’*” (Emphasis added.)

In the present instance it is not the fact that the ready mixed concrete will cost \$1,500 which would require the contract be let on bids in absence of a three-fourths vote of the county board to have the work done directly by the county. *It is the estimated cost of \$4,000 for the entire improvement which would require that the contract be let on bids.*

When the history of sec. 59.08 is reviewed, it is clear that the county by a three-fourths vote of its board of supervisors may authorize direct construction or repair of a county owned building and may purchase materials for said construction without taking bids where the estimated cost of such public work exceeds \$1,000.

The provision for the county itself doing the work or any part thereof without bids, upon a three-fourths vote of the elected members of the county board, is an express exception to the requirement that contracts for over \$1,000 for the purposes stated must be let to the lowest responsible bidder. With certain limitations, if the provisions of the exception are complied with, it places the county in the same position it was in at the time of the *Cullen* case. It must have been contemplated that where the county elected

to do the work itself that materials would have to be purchased. The exception would be meaningless to a degree if, after having authority to do the work itself, the county would still have to seek one or any number of bids on various materials which must necessarily go into such public work. County officials have a duty to make purchases most favorable to the county as far as price, quality, quantity and availability are concerned. Even where the county board duly authorizes such work to be done by the county, the board can provide that the materials or certain of them be purchased by the bid method. *Cullen v. Rock County*, 244 Wis. 237.

RJV

Schools and School Districts—Reorganization—Proceedings instituted under sec. 40.075, Stats. 1955, and concluded while proceedings were pending before the county school committee pursuant to sec. 40.03 in respect to the same territory, are unauthorized and without legal effect.

September 13, 1957.

G. E. WATSON, *Superintendent,*
Public Instruction.

Because of the necessity of determining the territorial composition of the school districts involved, in order to be able to compute and certify the state aid payments to the districts involved, you have submitted for an opinion the following situation:

There are three school districts whose territory is entirely in Polk County, Wisconsin. District No. 3 is in the Town of Laketown, and will be referred to as the Laketown district. Joint School District No. 3 is composed of the Village of Luck and some adjoining territory, and hereafter will be referred to as the Village of Luck district. Joint School District No. 1 is located in the Village of St. Croix Falls, and adjoining territory, and hereafter will be referred to as the St. Croix Falls district.

On May 7, 1957, a petition was filed under sec. 40.03, Stats., with the secretary of the Polk county school committee requesting attachment of said Laketown district, which was a non-operating school district, to the Village of Luck district. The following day, May 8, 1957, the Polk county school committee met and adopted a resolution providing for the giving of notice of a hearing on said petition to be held on June 4, 1957, and such notice was thereafter given. Such hearing was held on June 4, 1957, pursuant to said notice, and the following day, June 5, 1957, the said Polk county school committee met and denied the petition. At that same time said committee thereupon adopted a resolution upon its own motion, providing for the giving of notice of a hearing to be held by it on June 24, 1957, on the proposal of dissolving the Laketown district and attaching a certain described part thereof to the Village of Luck district and attaching the remainder to the St. Croix Falls district. Said hearing was held on June 24, 1957, and after a conference in respect thereto with the school boards of the districts involved, the Polk county school committee, that same day, issued an order dissolving the Laketown district and attaching the parts thereof in accordance with the proposal set forth in the resolution and notice.

However, on May 8, 1957, a petition was filed with the clerk of the St. Croix Falls district, pursuant to the provisions of sec. 40.075, Stats., requesting the annexation of a certain described portion of the Laketown district to the St. Croix Falls district. Information is that such petition was so filed later in the day and subsequent to the time that the Polk county school committee had met and adopted the resolution on that same date as above recited. The district board of the St. Croix Falls district, in accordance with the provisions of sec. 40.075 and 40.14 (2), Stats., having approved said petition, held a meeting of the electors in the territory of the Laketown district so proposed to be annexed to the St. Croix Falls district on May 31, 1957, at which a majority of the electors present voted in favor of the proposal in said petition. The board of the St. Croix Falls district thereupon issued an order, dated June 4, 1957, annexing said portion of the Laketown district to the St. Croix Falls dis-

trict, specifying that such an annexation was effective as of May 31, 1957.

The said order made under date of June 24, 1957, by the Polk county school committee, included in the territory attached to the Village of Luck district, territory of the Laketown district that was purportedly annexed to the St. Croix Falls district by the proceedings and order of the St. Croix Falls district board, issued June 4, 1957, under sec. 40.075, Stats. Thus there is a conflict between the two orders or proceedings with the result that you are unable to compute the state aid payments to the several districts involved. Accordingly, you have requested an opinion as to whether the order dated June 24, 1957, by the Polk county school committee prevails and is effective to establish the composition of the districts, notwithstanding the order dated June 4, 1957, by the school board of the St. Croix Falls district, and if not, what is the status of said orders.

In *Oak Park School Dist. v. Callahan*, (1944) 246 Wis. 144, 16 N. W. 2d 395, the town board of the town in which Oak Park school district No. 2 was situated, gave notice of a meeting to be held by it on March 8, 1944, to annex a portion of territory in another school district to said Oak Park school district No. 2, which would thereby increase the valuation of the latter to more than \$1,000. However, on March 3, 1944, the state superintendent of public instruction, acting pursuant to an express statute authorizing him, on his own motion, to attach districts with valuations of less than \$100,000 to contiguous districts, issued an order annexing the said Oak Park school district No. 2, which then had a valuation of less than \$100,000, to the same school district a portion of whose territory the town board by its notice proposed to attach to the Oak Park school district. In proceedings upon appeal from the order of the state superintendent of public instruction the court held that an order made by the town board upon March 8, 1944, at a meeting held pursuant to its notice, which annexed a portion of the other school district to the Oak Park school district No. 2, took precedence and prevailed over the March 3, 1944 order of the state superintendent.

The basis of the court's decision, as noted in *Greenfield v. Joint County School Comm.*, (1955) 271 Wis. 442, 448,

73 N. W. 2d 580, was that the commencement by the town board of the exercise of legislative authority conferred upon it by the statutes, in respect to the composition of school districts, preempted the field and precluded the exercise of any other legislative authority granted by statute respecting the composition of the same school districts involved. In other words, the machinery of the law granting authorization and power to act in respect to the composition of the school districts involved, having been set in motion, any other authorization by statute to act in respect to the same school districts is withdrawn and suspended so long as the matter is pending under such procedure. Certainly the legislature, in the several authorizations as respects procedure for the alteration of the composition of school districts, could not have intended that the several procedures might all be followed at the same time, because to do so would obviously result in confusion and uncertainty.

In 38 O.A.G. 150, the conclusion was stated that where a petition was filed with the county school committee to alter the boundaries of a specified school district as provided in sec. 40.03, Stats. 1955 (then sec. 40.303 (4)) steps to alter the boundaries of the same school district by following the procedure provided in sec. 40.14 Stats., 1955, (then sec. 40.68) may not be initiated until the county school committee has disposed of the matter before it. While the situation in *Oak Park School District v. Callahan*, *supra* dealt with a conflict of so-called jurisdiction to alter school districts as between an official body or subdivision of the state and an officer thereof, this opinion in 38 O.A.G. 150 dealt with and reached the same conclusion in respect to a situation where the conflict of so-called "jurisdiction" or authorization was between an official body delegated legislative authorization to act in respect to the composition of school districts and proceedings under a statute providing an authorization of the same type as in sec. 40.075 Stats., 1955, and after which it appears to have been patterned as is indicated by the express reference to said sec. 40.14 in sec. 40.075. In 39 O.A.G. 620 and 44 O.A.G. 54, the general conclusion was drawn from *Oak Park School District v. Callahan*, *supra*, that where two bodies or officials have concurrent authority over a particular subject, the first one to

act acquires exclusive authority to continue and the other is precluded from exercising his authority until the official action of the former has been concluded.

Applying the above, it is concluded that in the instant situation the order of the Polk county school committee, made on June 24, 1957, prevails and is the only legally effective order. At the time that the petition pursuant to sec. 40.075, Stats. 1955, was filed with the clerk of the St. Croix Falls district, a petition had already been filed with the secretary of the Polk county school committee for the attachment of the entire Laketown district to the Village of Luck district, and the Polk county school committee had already met and adopted a resolution for the giving of notice of a hearing on such petition to be held on June 4, 1957. Thus the county school committee had acquired the authorization to act in respect to the Laketown district. It did not dispose of this matter until it dismissed the same when it met on June 5, 1957. All during this time it had the exclusive jurisdiction to deal with the subject. But, the presentation of the petition on May 8, 1957 to the school board of the St. Croix Falls district, the action of said board in approving the petition, the submission of the matter to the meeting of the electors in the territory involved therein which was held on May 31, 1957, and the issuance of the order of June 4, 1957 by the St. Croix Falls district board, were all done subsequent to the acquisition of authorization to act which then reposed in the Polk county school committee and before that committee had concluded its action in respect thereto by the dismissal or denial of the petition on June 5, 1957. All of said action under said sec. 40.075 having taken place during the time when the Polk county school committee had the matter before it and had exclusive jurisdiction or authorization to act in respect thereto, the order of June 4, 1957, made pursuant to sec. 40.075, Stats. 1955, is deemed wholly without authorization and therefore is without legal effect.

HHP

Tuberculosis Sanitoriums—Child Protection—Department of Public Welfare—Sec. 48.55 and other appropriate provisions of ch. 48, Stats., rather than ch. 526, Laws 1957, govern the chargeability of governmental divisions for care in a tuberculosis sanitorium of a child in the legal custody of the department of public welfare.

September 19, 1957.

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

You have asked a number of questions as to how the cost of maintenance in a private tuberculosis sanitorium is to be borne, for a child whose permanent care, custody and control was transferred by a juvenile court to the state department of public welfare on March 17, 1955, after termination of parental rights. The child was placed in the sanitorium by the department on April 5, 1957, without court action. There were no findings of delinquency.

You indicate that the cost of care has been borne in the past by charging to the county of legal settlement the portion specified under sec. 48.55, Stats. (amended by ch. 616, Laws 1957), with the other portion being paid from the funds appropriated to the department for the care of children under its custody.

This practice appears consistent with the opinion issued to you April 15, 1957, to the effect that sec. 48.55 governs the county's chargeability with respect to a "child in the legal custody of the department of public welfare notwithstanding transfer or commitment" to a penal institution.

The laws governing child welfare, since enactment of ch. 575, Laws 1955, are to be found primarily in ch. 48, Stats. The report submitted to the legislature at the time of the submission of Bill 444, S. upon which ch. 575, Laws 1955, was based, pointed out that one purpose of the revision was to place all provisions "intended primarily for the benefit and welfare of children" in "a single chapter."

See Vol. VI, Part I, of the *Report of the Wisconsin Legislative Council, Conclusions and Recommendations of the Child Welfare Committee, submitted to the Governor and the 1955 Legislature*, page 17.

The scope of the study undertaken by the above committee, pursuant to legislative mandate, included the "methods of financing the public programs of care and services for children and youth" *idem*, page 3. The committee pointed out that, in the time allotted to it, it could not complete all phases of the study (*idem*, page 3) and recommended that its work be continued to cover, among other things, a "review of the division of the responsibility between the state and county for the support of children in their care." (*Idem*, page 38.) The report stated:

"A. THE FINANCING OF THE PUBLIC PROGRAMS FOR FOSTER CARE

"This study would include the following:

"(1) A review of the division of responsibility between the state and county for the support of children in their care. For example, at present the state reimburses most counties for $\frac{1}{3}$ of the cost of the care of all children placed in foster homes by county agencies. On the other hand, the county is charged a certain sum [\$5 per week in the case of dependent, neglected or delinquent children]* for children in the care of the state.

"(2) An examination of the relationship between the cost of care and the use of local and private agencies. It was suggested to the committee that because the cost of care by the state is so inexpensive to the county, there are some undesirable results: The counties are discouraged from developing their own resources since state care is so much cheaper than a local program would be; the judge sometimes finds it difficult to use private facilities, which may have more to offer a particular child, because the cost to the county of the private facilities is much greater than the cost of care by the state, where the county only pays a small percent of the cost.

"(3) A reconsideration of the duty of the parent to provide part of the support of his child. It was pointed out to the committee that, although parents are sometimes required by the courts to pay for the support of their neglected, mentally ill or mentally deficient children, they apparently are never required to contribute if the children are committed to the state as a delinquent. Some committee members felt that the parent should be required to pay support for this type of care too."

* The county share has since been increased by ch. 616, Laws of 1957.

The foregoing indicates that sec. 48.55 was intended to continue as the general standard for counties' contribution to cost of care for children in the custody of the state department. Sec. 48.55 was amended by ch. 616, Laws 1957, as a result of the further study recommended.

Sec. 48.27 provides in part:

"(1) Whenever legal custody of a child is taken by the court from the child's parents, or whenever the child is given medical * * * treatment under order of the court, and no provision is otherwise made by law for payment for the care or treatment of the child, compensation for it when approved by order of the court, shall be a charge upon the county. * * *"

In sec. 48.55, however, "provision is otherwise made by law" with respect to "children in the legal custody of the department"; so that sec. 48.27 has no applicability unless further court action is permissible to alter the judgment of March 17, 1955, which will be discussed in connection with one of your specific questions.

Legal custody of a child includes, under sec. 48.02 (10), "the duty to provide food, clothing, shelter, ordinary medical care, education and discipline for a child." The department's obligation as to children under its legal custody is to be based on an examination to determine the type of placement needed (secs. 48.50 and 48.51); and may be carried out, under sec. 48.52, by "contract for the use of private facilities."

Under secs. 48.52 and 48.55, the cost of the child's care in a private tuberculosis sanatorium is to be borne by the state department of public welfare except for the portion which sec. 48.55 (as amended by ch. 616, Laws 1957), allocates against the county of legal settlement, unless some other allocation is permissible under a superseding statute or under court action. It is with respect to the latter possibilities that you inquire. The foregoing background has been given to enable me to deal more concisely with your specific questions.

1. You ask:

"Would the transfer provisions of new sec. 50.03 (2) cover children in the custody of the department being cared

for in foster homes as well as those being cared for in the specific institutions mentioned therein? And, under new sec. 50.04 (6), to what appropriation would the 'state expense' be charged?"

Sec. 50.03 (2), created by ch. 526, Laws 1957, provides:

"(2) There may also be admitted for care and treatment upon proper certificate of examining physician and recommendation of the superintendent of the institution, any inmate committed to the Wisconsin school for boys, Wisconsin school for girls or the Wisconsin child center, who is suffering from tuberculosis, and the state department of public welfare is authorized to cause such transfers thereto."

Sec. 58.06 (2) provides in part that a private tuberculosis sanatorium "may admit patients committed to it by any county in the manner and on the terms provided by s. 50.03. * * *"

It is my understanding that a bill is under preparation by the legislative council to correct certain discrepancies in ch. 526. It may be that such a bill will amend sec. 58.06 (2) to change the term "committed" or the reference to "sec. 50.03," or both, since sec. 50.03 deals with admission of patients "upon payment" of a certain rate. However, it is unnecessary in response to your request to consider what effect the provision would have upon allocation of costs for children whose custody has been transferred to the department; because I do not believe it is applicable.

Sec. 50.03 (2) relates specifically to inmates "committed to" three specific institutions. Prior to enactment of ch. 575, Laws 1945, juvenile courts had authority to "commit" a child directly to "a suitable public institution." The term "commitment" is ordinarily used to refer to a *judicial* order of some kind. See 7A Words & Phrases, 577, et seq. It was so interpreted by the attorney general in 1948, when the opinion was given that a child committed to the department of public welfare and placed by the latter in an institution could not be considered as "committed" to the institution. In the light of such opinion, it is probable that the legislature used the term "committed" in sec. 50.03 (2) (as created by ch. 526, Laws 1957), in its technical sense, to insure that the department should have authority to trans-

fer from the designated institutions children committed there directly by the court. I do not believe sec. 50.03 (2) is applicable except where there has been a commitment by a court to one of the institutions named.

2. You also ask:

“The question has now arisen as to whether application should be made by the department to the County Court of the county of legal settlement for a commitment under sec. 58.06 (2), Stats. Would it be proper for the Court to so commit in view of the proceedings taken in 1955? Or are the charges under sec. 48.55, Stats., the sole measurement of the liability of the county of legal settlement pursuant to the proceedings taken in 1955? In any event, could a subsequent commitment under sec. 58.06 (2), Stats., be retroactive or *nunc pro tunc* to April 5, 1957?”

The use of the word “committed” may be an inadvertent retention of an outmoded term, both in sec. 58.06 (2), Stats., 1955, and in the same section as amended by ch. 526, Laws 1957. In both cases, it is used in the phrase “committed to it by any county in the manner and upon the terms provided by” another designated statutory section. In neither case does the other statutory section referred to use the term “commit.” In any event, sec. 58.06 (2) does not purport to confer jurisdiction upon any court, which the court does not have by reason of some other statutory provision.

While juvenile courts had jurisdiction under sec. 48.07, Stats. 1953, to “commit” a child “to a suitable public institution,” no such authority is contained in secs. 48.34 and 48.35, Stats. 1955. Indeed, the term “commit” has been intentionally dropped from ch. 48, Stats. See the note to proposed sec. 48.02 contained in Bill 444, S., as presented to the 1955 legislature.

The last sentence of your question will be disposed of first because the answer is simplest and most unequivocal. Whatever authority a court may have to act now, it cannot, under the *nunc pro tunc* doctrine, make its action retroactive so as to modify the effect of the judgment of March 17, 1955, in a matter of substance. The rule is summarized in 30 Am. Jur. 876 that:

“* * * the amendment or *nunc pro tunc* entry may not be made to supply a judicial omission or an error of the

court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide. The authority of the court in this connection does not extend beyond the power to make the journal entry speak the truth, and may be exercised only to supply omissions in the exercise of functions which are clerical merely. * * *"

I find no provision under ch. 48, Stats. 1955, under which a juvenile court would have authority to "commit" a child in the legal custody of the department to a tuberculosis sanitorium. It is the legislative policy, as shown by secs. 48.50 and 48.51, Stats., that the determination of the appropriate placement in such cases should be made by the department.

There remains the question whether the department might obtain a different allocation of the cost of maintaining the child in a tuberculosis sanitorium, by applying for admission on the child's behalf under sec. 50.04 and 58.06 (2), Stats. The cost for patients maintained in sanitoriums at public charge under ch. 50, Stats., is allocated under ch. 526, Laws 1957, to counties in the amount of \$21 per week and the balance to a different state fund than that by which children in the legal custody of the welfare department are maintained.

Applications for care as a public charge in a county tuberculosis sanitorium may be made on behalf of a minor under sec. 50.04 (2) by a parent or guardian. Such an application must be made to the county judge rather than to a juvenile court. While the county court apparently acted as the juvenile court in the case you report, that would not necessarily be true in all cases; and, in any event, applications under ch. 50 must be made to the county judge in his capacity as such, rather than to the juvenile court.

As previously suggested, there is some question whether the provisions of sec. 50.04, providing a means for obtaining care at public cost, are applicable to private sanitoriums, because sec. 58.06 (2), as amended by ch. 526, Laws 1957, provides for admission on being committed "in the manner and upon the terms provided by s. 50.03." There is, however, no need here to determine what differences there may be with respect to maintenance of patients at public

charge in public or private sanitoriums, because it is my opinion that the provisions of sec. 50.04 as amended by ch. 526, Laws 1957, do not apply to children in the legal custody of the department of public welfare.

I base that conclusion in part upon the indications in the committee reports accompanying Bill 444, S., enacted as ch. 575, Laws 1955, which indicate that division of governmental responsibility for children who become wards of the state was intended to be covered in ch. 48, Stats., and in part upon other indications of legislative intent.

One of these indications is contained in the last sentence of subsec. (2) (a) of sec. 48.52. After authorizing the department of public welfare to make use of public and private facilities, it is provided that:

“Removals to institutions for the mentally ill or mentally deficient shall be made in accordance with ch. 51.”

If the legislature had intended that removals to tuberculosis sanitoriums should be governed by ch. 50, it would have made some provision in sec. 48.52 similar to the above.

Further, the terms of those provisions of ch. 50, Stats., relating to applications of patients to be relieved of charges, do not seem to be appropriate to the situation of children in the custody of the department. Under sec. 50.04 (2), Stats., the application may be made by any patient “unable or who believes that his circumstances do not warrant his being required to pay for any part of his care or who meets the requirements of sub. (3).” In passing upon the application, the judge is to consider not only the patient’s circumstances but the “chargeability” of the person liable for the care of the patient “by the same rules applicable to the patient.” The legislature has charged the department, as legal custodian, with the duty to provide care for the child; and the fact that the department’s chargeability cannot be determined “by the same rules applicable to the patient” is an indication that the legislature did not intend that the department should file an application under sec. 50.04 (2). Similarly, sec. 50.04 (3), as amended by ch. 526, Laws 1957, provides that a patient who meets certain conditions shall be cared for “without charge to him.” Since a dependent child in the legal custody of the department is

otherwise cared for "without charge to him," there is no need for an application under that section.

I am of the opinion that sec. 48.55 provides the sole measurement, under present statutes, for liability of a county for care of a child in a tuberculosis sanatorium, when that child is in the legal custody of the department of public welfare.

BL

Public Assistance—Residence—If a man married in Wisconsin leaves his family here, it is possible for him to be a resident of Wisconsin although he does not remain physically present in the state. A county cannot be reimbursed under sec. 49.04, Stats., for aid granted to the family more than a year after the marriage, if it found that the man established and continued residence in Wisconsin.

September 19, 1957.

CHARLES B. AVERY,
District Attorney,
Langlade County.

You ask a question as to X county's right to reimbursement under sec. 49.04, Stats., for relief given for the wife and child of one B under the following circumstances:

A, a widow, resided and had her legal settlement in X county prior to November 9, 1951. On that date she married in Wisconsin B whom you state "was never a resident nor did he ever have legal settlement in Wisconsin." A child was born of this marriage. Relief was given for the child from October 3, 1954 to March 28, 1955.

B was in military service at the time of the marriage and was absent from the state on military duty thereafter. He obtained a discharge from the army on grounds that he was needed by his family, but did not return to Wisconsin after the discharge. In 1955 or 1956, B got a default divorce as a resident of Missouri.

We have been informed by the department of public welfare that if your proposition were accepted, to the effect

that B was never a resident of Wisconsin, your claim under sec. 49.04 would not have been disallowed. There is nothing to be gained by giving an opinion on a proposition with respect to which there is no dispute. The department of public welfare informs us that the question in dispute is whether B became a resident of Wisconsin upon his marriage. If so, he had resided in Wisconsin for more than a year by October 3, 1954 when relief was first granted. Sec. 49.04 of the statutes provides that reimbursement is to be made to counties only if the person receiving relief "has resided in the state less than one year."

Before discussing the question of residence which is in issue, it is advisable to call your attention to the proposition recognized in 45 O.A.G. 241, 244, to the effect that determination of residence involves a fact-finding function as to which "the findings of the Division of Public Assistance of the State Department of Public Welfare are conclusive in the absence of fraud." See *Town of Mazomanie v. Village of Mazomanie*, 254 Wis. 597, 599 and *Waushara County v. Green Lake County*, 238 Wis. 608, 611.

This opinion cannot assume the functions of the agency named by the legislature to make findings of fact, by determining categorically whether B was, or was not, a resident of the state of Wisconsin after his marriage on November 9, 1951. It can only call attention to the general principles of law which govern the determination of such factual question.

While subsecs. (7) and (8) of sec. 6.51, Stats., relate specifically to residence for voting purposes, they are definitive of rules generally applied in determining residence for other purposes. They are to the effect that the place where a man's family resides is ordinarily considered his residence, even though he does business in another place.

If residence is established, even for a day, by coincidence of intent and physical presence a continuance of physical presence is not necessary to maintain such residence. See *Marathon County v. State Dept. of Public Welfare*, 271 Wis. 219, 223, where the court said:

"* * * While both personal presence and intention are required to establish residence, the continued personal presence thereafter is not essential to continuous residence. The

intention to retain the residence once established by a person is an important element in determining whether he in fact retains such residence."

See, also, *Waushara County v. Calumet County*, 238 Wis. 230.

Upon the basis of the facts above stated, I am of the opinion that it is a question of fact for the department of public welfare to determine whether B became a resident of Wisconsin upon his marriage. If he did, no reimbursement can be made under sec. 49.04, Stats., for relief granted more than a year thereafter, while B was still a Wisconsin resident.

BL

University Regents—Appropriations and Expenditures—

The regents of the university of Wisconsin under secs. 36.062 and 36.065, Stats., have authority to participate in an association with other universities for astronomical and related scientific research and become a member of a non-profit Arizona corporation organized for that purpose. Gift money properly available for that purpose may be utilized to finance the university's share of the costs of such undertaking.

September 25, 1957.

A. W. PETERSON, *Vice President,*
University of Wisconsin.

You have referred us to the following resolution of the regents of the university of Wisconsin:

"That subject to the approval of the Attorney General, the Vice President of Business and Finance be authorized to sign an agreement with other institutions of higher education including, but not by way of limitation, Indiana University, University of California, the Ohio State University, Harvard University, Princeton University, the University of Chicago, and the University of Michigan, providing for participation by the University of Wisconsin in a non-profit corporation for the purpose of establishing, equipping, and operating an observatory for astronomical and related scientific research to be known as 'Association of Universities for Research in Astronomy, Inc.', with the understanding

that the cost to the University of Wisconsin will not exceed \$12,500, chargeable to gift funds, payable over a five-year period."

It is proposed that a non-profit corporation will be organized in the state of Arizona which has been selected as the site of the proposed observatory, no doubt because of favorable atmospheric conditions in that state.

We have been furnished with excerpts of the Arizona statutes relating to non-profit corporations, a draft of the proposed articles of incorporation, a draft of the proposed by-laws, and a copy of an agreement for cooperative research in astronomy between the governing boards of the educational institutions mentioned in the above quoted resolution.

By way of further explanation it might be stated that the National Science Foundation has granted to one of the participating institutions, the university of Michigan, \$805,700 for studies leading to the establishment of an observatory which studies have been in progress for the past two years, and the foundation has indicated a willingness to make additional grants to an association of universities for the purpose of building, equipping, and operating an observatory.

You inquire whether the regents of the university of Wisconsin may become a member of the proposed Association of Universities for Research in Astronomy, Inc., provided that the regents are not obligated financially beyond \$12,500, chargeable to gift funds and payable over a five-year period.

It is to be noted that under the Arizona statutes the incorporators may not be corporations, but must be natural persons according to the opinion of the Arizona attorney employed by the university of Michigan to draft the articles. However, after the incorporation, corporations may become members. This would appear to be applicable to the board of regents of the university of Wisconsin, which is a body corporate. Sec. 36.03, Wis. Stats.

In 26 O.A.G. 555, at pages 556-7, it was said:

"It is true that the regents have no powers except those conferred by statute, either by express language or fair

intendment. *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159. However, the court said at p. 166:

“* * * The board is a creature of law, and hence cannot rise above the law, nor be a law unto themselves, in matters outside of the scope of the powers granted to them. *But this does not mean that it can do no act except such as is specifically mentioned in the statute. It would be altogether impracticable to prescribe by statute the numerous and varying duties of such a board. Much must necessarily be implied from the character and objects of the corporation, the nature of the trust imposed, and the general powers granted.* * * *” (Italics ours.)

Sec. 36.062, Stats., provides:

“36.062 Scientific investigation encouraged. The board of regents shall have power and authority to encourage scientific investigation and productive scholarship, and to create conditions tending to that end.”

Also sec. 38.065 (1), Stats., provides in part:

“36.065 Gifts and donations. (1) All gifts, grants, bequests and devises for the benefit or advantage of the university or any of its departments, colleges, schools, halls, observatories or institutions, or to provide any means of instruction, illustration or knowledge in connection therewith, whether made to trustees or otherwise, shall be legal and valid and shall be executed and enforced according to the provisions of the instrument making the same * * *.”

Sec. 36.065 (2), Stats., further provides:

“(2) All such gifts, grants, devises or bequests may be made to the regents of the university or to the president or any officer thereof, or to any person or persons as trustees, or may be charged upon any executor, trustee, heir, devisee or legatee, or made in any other manner indicating an intention to create a trust, and may be made as well for the benefit of the university or any of its chairs, faculty, departments, colleges, schools, halls, observatories, or institutions or to provide any means of instruction, illustration or knowledge in connection therewith, or for the benefit of any class of students at the university or in any of its departments, whether by way of scholarship, fellowship, or otherwise, or whether for the benefit of students in any course, subcourse, special course, postgraduate course, summer school or teachers' course, oratorical or debating course,

laboratory, shop, lectureship, drill, gymnasium, or any other like division or department of study, experiment, research, observation, travel or mental or physical improvement in any manner connected with the university, or to provide for the voluntary retirement of any of its faculty."

It is to be noted that among other things specific mention is made of such items as "observatories," "research," "observation," and "travel".

If thorough and effective research is to be conducted in astronomy it should be possible to carry on the work where the atmospheric conditions are favorable, and if the resources of other universities and foundations can be enlisted in a cooperative program to do a better job for the benefit of all concerned, the over-all program would appear to be in conformity with the basic legislative intent in establishing and providing for a truly great state university which ranks among the nation's recognized leaders in higher education.

Perhaps some mention might be made here of the fact that sec. 36.06 (9) was added to the statutes in connection with a cooperative arrangement for a central library depository with other institutions. It was concluded that this specific legislation was necessary because of the fact that books belonging to the university were to be sent out of the state and were to be placed under the control of an agency other than the regents. I do not understand that specific astronomical property or equipment presently belonging to the university will be transferred to Arizona so as to bring the situation here under discussion within the same line of reasoning.

One more consideration might be stressed in closing. The regents have no power to create any indebtedness on the part of the state. *State ex rel. Thomson v. Giessel*, (1953) 267 Wis. 331, 65 N. W. 2d 529. However, here the commitment of the regents, as I understand it, will be within the limits of gift funds on hand and available for the proposed undertaking. The proposed by-laws provide that a member may resign on 60 days' written notice to the corporation, and the proposed articles provide that the private property of the members, directors and officers shall be forever exempt from its debts and obligations.

You are accordingly advised that the regents of the university of Wisconsin may properly become a member of the proposed Association of Universities for Research in Astronomy, Inc.

WHR

Teachers—Vocational and Adult Education—Neither teachers nor employes, full time or part time, employed by local boards of vocational and adult education under secs. 41.15 (6) and 41.17 (1), Stats., are required to take periodic health examination under the provisions of ch. 393, Laws 1957, which repealed and recreated sec. 40.30 (10m) (a) and created sec. 143.16.

September 26, 1957.

C. L. GREIBER, *Director,*
Vocational and Adult Education.

You have requested my opinion as to whether the provisions of ch. 393, Laws 1957, which repealed and recreated sec. 40.30 (10m) (a) and created sec. 143.16 of the statutes relating to periodic health examinations of teachers applies to part-time and full-time teachers employed by local boards of vocational and adult education under secs. 41.15 (6) and 41.17 (1) of the statutes.

Sec. 143.16 created by ch. 393, Laws 1957 provides that the governing body of each *private or parochial school* enrolling pupils in grades 1 to 12 shall, as a condition of entering or continuing such employment, require a physical examination of every school employe.

It is clear that this section does not apply in any manner to teachers or employes of local boards of vocational and adult education since the school under their jurisdiction is neither private nor parochial but is a special type of public school.

The pertinent portion of sec. 40.30 (10m) (a) and (b), 1955 statutes provided:

“(10m) (a) The *district board*, in counties containing less than 500,000 population, *may*, as a condition of employment, *require* periodic health examinations of all school

employes * * *. The cost of such examinations * * * shall be paid out of district funds. * * *"

"(b) For the purpose of par. (a) a 'school employe' is defined as anyone *employed by the board of education of the school district* who comes in contact with children or who handles or prepares food for children while they are under the supervision of school authorities."

Ch. 393, Laws 1957, repealed and recreated sec. 40.30 (10m) (a) in material part as follows:

"(10m) (a) The *district board shall*, as a condition of entering or continuing employment * * * *require* a physical examination * * * of every school *employe of the district*. * * * The cost of such examinations * * * shall be paid out of district funds."

Sec. 40.30 (10m) (b) was not altered in any way.

Sec. 41.15 (6), 1955 Stats. provides:

"(6) The local board of vocational and adult education shall employ and fix the compensation of a local director of vocational education for the development and supervision of the local work of vocational and adult education and shall also employ and fix the compensation of other supervisors, co-ordinators, teachers, and technical advisors and experts as may be necessary for the proper execution of its duties. The qualifications and fitness of these employes shall be subject to the approval of the state board of vocational education and shall meet the requirements designated by the said state board. The local board may also employ and fix the compensation of such clerical assistants, janitors and other employes as may be necessary."

Sec. 41.17 (1) Stats., 1955 provides:

"(1) The qualifications of teachers and the courses of study in these schools shall be approved by the state board of vocational and adult education, and shall include English, citizenship, physical education, sanitation and hygiene, and the use of safety devices, and such other courses as the state board of vocational and adult education shall approve."

Neither of these sections has been altered by the 1957 legislature. While the state board of vocational and adult education has the power under the above sections to establish requirements as to qualifications and fitness of such employes, it has not issued requirements which necessitate physical examination of teachers and other employes.

A school of vocational and adult education is under the supervision and control of the local board of vocational and adult education, and not under the supervision and control of the district board although the members of the local board of vocational and adult education may have been appointed by the local school board or district school board. Sec. 41.15 (2) (a), (3) (a), (10) (a). Also see 10 O.A.G. 1066 where the attorney general stated that once a vocational school system had been established neither the school board nor common council had power to abolish either the system or the board so appointed.

The teachers and employes in schools of vocational and adult education are employed by the local board of vocational and adult education and are not "employed by the board of education of the school district" as provided in sec. 40.30 (10m) (b), which is the definition section which applies to sec. 40.30 (10m) (a) as recreated by ch. 393, Laws 1957.

It is also important to note that sec. 40.30 (10m) (a) as recreated by ch. 393, Laws 1957 provides that the cost of such examinations shall be paid out of district funds, rather than out of the vocational and adult education fund which is the fund from which expenses for vocational and adult education schools are paid. Sec. 41.16 (6).

There is no express reference to teachers or employes of local boards of vocational and adult education in sec. 40.30 (10m) (a) as recreated by ch. 393, Laws 1957, and I conclude that such teachers and employes, whether full time or part time are not subject to its terms.

RJV

Weights and Measures—Highways and Bridges—Weight limitations—Sec. 348.15 (5) Stats., explained.

September 26, 1957.

TO THE HONORABLE, THE SENATE.

You have requested my opinion "explaining the application of section 348.15 (5) of the statutes, as created by chapter 603, Laws of 1957."

Sec. 348.15 (5), Stats., provides:

“For enforcement of weight limitations specified by this chapter the gross weight, measured in pounds, imposed on the highway by any wheel or any one axle or by any group of 2 or more axles shall be determined by weighing the vehicles and load, either by single draft or multiple draft weighing on scales in good working order which are tested periodically by the department of agriculture or other authorized testing agencies for accuracy to within standard accepted tolerances. The weighing operation shall be performed in accordance with and under conditions accepted as good weighing technique and practice. In multiple draft weighing the sum of the weight of respective components shall be used to establish the weight of a combination of the components. It is recognized that the weight, determined in accordance with methods herein prescribed, includes all statutory tolerances and represents the momentary load force or reaction imposed on the scale at the time of weighing. Such tolerances include any variation due to (a) positioning or tilt of the vehicle on the scale platform and adjacent bearing surface; (b) momentary position of axle centers with respect to wheel bearings and vehicle body; (c) temporary distribution of loading on the wheel or axle; and (d) miscellaneous variable factors of spring flexure, shackle friction, clutch engagement, brake pressure, tire compression and other variable factors.”

This means that a vehicle may be weighed all at one time or, as is often necessary when the vehicle is too long for the scale, by weighing each axle or group of axles separately and adding the separate weights thus obtained to determine the total weight of the vehicle or of any combination of axles or groups of axles.

It is recognized that multiple draft weighing does not always give an absolutely accurate result as to total weight, for the reasons set out in the last sentence of the act. Therefore the statute points out that the statutory tolerances are provided in part to allow for and include slight variations from true total weight when multiple draft weighing is used.

WAP

Conservation Commission—Park Lands—Lease—Conservation commission has statutory power to lease park land owned by the state in fee for the purpose of constructing a radio and television transmission tower. The attorney general cannot determine the adequacy or inadequacy of the consideration; that is a question that can be decided only by a court of competent jurisdiction.

October 2, 1957.

L. P. VOIGT, *Director*

Wisconsin Conservation Department.

You have inquired whether the conservation commission has authority to lease a parcel of land of approximately 1½ acres on the summit of Rib Mountain state park to a commercial television operator for the purpose of erecting a television tower.

You have submitted a proposed lease and a brief in opposition to the powers of the commission to make that lease or any other lease of the proposed site.

The following matters, while not necessarily controlling in any respect, appear material to a consideration of the problem:

Rib Mountain is in a substantial degree the highest point in the Wisconsin valley and the most desirable site for a frequency modulated radio or television tower.

Your commission and the state radio council now maintain and operate a tower at this location for the use of your own forest protection network, state radio station WHRM, and the communications facilities of the motor vehicle department.

The civil aeronautics board will not permit more than a single tower on Rib Mountain because of the hazard to aircraft operating out of the Wausau airport.

The state transmitting equipment for the three named agencies will be transferred to the new tower without cost to the state; the tower will be adequate to support any additional state licensed equipment which may be placed on the tower without cost to the state except for the actual equipment and installation required.

The regulations of the federal communications commission provide the following in CFR Title 47, ch. I, § 3.635:

“§ 3.635 *Use of common antenna site.* No television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations.”

The Washington air space committee operating for the civil aeronautics board has approved the proposal to erect the new tower.

The federal communications commission has indicated approval of the proposal.

The proposed lessee owns a 100-acre tract of land on Rib Mountain adjacent to the park on which the civil aeronautics board has refused permission to erect a tower. One of the reasons advanced is the desire of the board to have a single tower on Rib Mountain. It is possible that permission would not be granted for this site in any event.

The proposed lease indicates that provision must be made on the tower on an equitable basis for any additional licensees in the Wausau area subject to your permission.

Present television reception for a substantial area around Wausau is now poor and would be greatly improved by a television tower at this location.

Further facts which appear to be undisputed will be discussed in the course of this opinion.

The principal objection to the proposed lease appears to be that it is *ultra vires*—that is, beyond the existing statutory powers of your commission. Supporting objections are raised that there may be still in existence deed restrictions on this use of the property, and that the consideration of \$100 a year rental, in addition to paying for the tower, was insufficient. A suggestion was made that statutory authority, if it existed, might be unconstitutional, but was not strongly pressed.

I

In the event the legislature cannot constitutionally authorize a state agency or a municipality to lease lands initially acquired for a public purpose to a private person in whole

or in part for a private commercial enterprise, all other questions will become immaterial. Hence, I deem it appropriate to dispose of the constitutional issue first.

The custom of leasing public lands or buildings to private promoters for commercial enterprises which will add to the recreation, entertainment or cultural education of the public is traditional. Perhaps the primary example at the present time is the rental of the publicly owned Milwaukee county stadium to the National League Baseball Club of Milwaukee, Inc. Other examples of such uses are the Milwaukee auditorium, the Milwaukee arena, Breese Stevens field in Madison, and many other buildings or structures of a similar nature throughout the state. This custom has the support not only of tradition, but of law. *Lang v. Mobile*, (1940) 239 Ala. 331, 195 So. 248; *Burrow v. Pocahontas School District*, (1935) 190 Ark. 563, 79 S. W. 2d 1010; *People v. Monstad*, (1930) 209 Cal. 658, 289 Pac. 847; *Baltimore v. Baltimore Steam Packet Co.*, (1933) 164 Md. 284, 164 Atl. 878; *Albritton v. Winona*, (1938) 181 Miss. 75, 178 So. 799; *Young v. Broadwater County High School*, (1931) 90 Mont. 576, 4 P. 2d 725; *Shea v. Ellenstein*, (1937) 118 N.J.L. 438, 193 Atl. 551; *Simmons v. Board of Education*, (1931) 61 N. D. 212, 237 N. W. 700; *Benedict v. Lincoln County*, (1932) 161 Okla. 50, 17 P. 2d 454.

There is nothing to the contrary in *Cutts v. Department of Public Welfare*, (1957) 1 Wis. 2d 408, 84 N. W. 2d 102. In this case the court upheld a statute by which the legislature directed a transfer of forest lands under the jurisdiction of the conservation commission to the department of public welfare for the establishment of a boys' correctional school. While, in its opinion, the court supported the decision with the observation that this was not a sale at all but simply a transfer of property from one state agency to another, there is nothing in the opinion to indicate that the court intended in any way to recede from the decision in the case of *State ex rel. Thomson v. Giessel*, (1955) 271 Wis. 15, 72 N. W. 2d 577, in which the court held that art. XI, sec. 3a in no way restricted the power of the state to sell or lease any of its real estate. In this case the court pointed out that art. XI, sec. 3a, which was created by an amendment to the constitution in 1912, was related to the problem

of excess condemnation and the adoption was an attempt to broaden the public purpose for which the power of eminent domain might be exercised. The court stated at page 53 :

“Prior to the adoption of this constitutional provision the state possessed the power to acquire lands for public purposes and to dispose of the same. There is in the provision no express restriction on the power of the state to convey land. It cannot be held by implication that the legislature is precluded from authorizing such sale. A restriction to such effect would necessarily have to be expressed in words. There is no such expression here.”

Accordingly, it is my opinion that when the state, through any of its agencies, or its municipalities, has acquired title in fee simple to any lands for public purposes, whether by purchase or by condemnation, it may thereafter sell or lease those lands for private enterprises, particularly when those enterprises are of great interest and benefit to the public at large.

II

Does the conservation commission have power to execute the proposed lease for a radio and television tower for a combination of public and private purposes? This is the major question proposed by your inquiry and will be dealt with *in extenso*.

The statutes material to an answer to this question are as follows:

Sec. 26.08 (1), Stats. 1955, provides:

“Said commission may, from time to time, lease for terms not exceeding 15 years, parts or parcels of *state park lands* or *state forest lands*; * * * The rents arising therefrom shall be paid into the state treasury to the credit of the proper fund. * * *”

Sec. 25.29, Stats. 1955, provides:

“Except for fines, moneys payable to the forest reserve fund, and gifts or bequests for specific purposes, all moneys accruing to the state under ch. 29, or otherwise received or collected for or in behalf of the state conservation commission, shall constitute the ‘Conservation Fund’ and shall be paid, within one week after receipt into the state treasury and credited to said fund. * * * No money shall be expended

or paid from the conservation fund except in pursuance of an appropriation by law; but any unappropriated surplus in said fund may be expended subject to the approval of the governor, secretary of state and state treasurer, for the purchase of lands for forestry purposes as provided in s. 28.02, for additional equipment, new buildings, new hatcheries, or hatchery ponds, property, improvements, increasing the warden force at any particular period, or any other similar special purpose except road work or improvement work on the state parks. * * *

Sec. 27.01, Stats. 1955, provides in part:

“(2) POWERS OF THE CONSERVATION COMMISSION. * * *
The commission shall also have authority to:

“* * *

“(f) Grant concessions or franchises for the furnishing of supplies or facilities and services on the state parks considered necessary for the proper comfort of the public.

“(g) Lease parts or parcels of state park land or grant easements thereto.

“* * *

“(i) Establish and operate in state parks such services and conveniences and install such facilities as will render such parks more attractive for public use and make reasonable charges for the use thereof.”

Sec. 27.01 (1m) (1), Stats. 1921, provides in part:

“* * *, or lease parts or parcels of state park lands or properties; * * *”

The provision last quoted is also found verbatim in the Statutes of 1931 and 1933.

It is my opinion that the provisions of sec. 26.08, taken in connection with the provisions of sec. 27.01 (2) (g), constitute a clear grant of statutory authority to your commission to enter into a lease of a portion of Rib Mountain state park for the purposes expressed above. These two sections contain an unrestricted power to lease and are over and above the provisions of sec. 27.01 (2) (f), Stats. 1955, in regard to the grant of concessions or franchises. The grant of concessions or franchises for the convenience of the using public is common in many parks or forests throughout the state. Examples are the pavilion, commissary and bathhouse at Devils Lake state park, and the ski tow and other facili-

ties for the benefit of skiers at the same Rib Mountain state park; similar facilities are leased in state forest lands.

It would appear clear that the unrestricted power of leasing is over and above the special restricted power to grant concessions and franchises for the named purposes. If this were not true, the legislature would have performed a useless act in adopting sec. 27.01 (2) (g) in addition to sec. 27.01 (2) (f).

It is a familiar rule of statutory construction that effect must be given to every word or phrase in a statute and it is not to be presumed that the legislature has performed a useless act. *State v. Columbia National Life Insurance Co.*, (1910) 141 Wis. 557, 124 N. W. 502; *State ex rel. Milwaukee v. Milwaukee Electric Railway and Light Company*, (1919) 169 Wis. 183, 172 N. W. 230; *Walter W. Oeflein, Inc. v. State*, (1922) 177 Wis. 394, 188 N. W. 633; *State ex rel. Mattek v. Langlade County*, (1933) 204 Wis. 311, 236 N. W. 125; *State v. Berres*, (1955) 270 Wis. 103, 70 N. W. 2d 197; *Worachek v. Stevenson Town School District*, (1955) 270 Wis. 116, 70 N. W. 2d 657.

The only rational construction that can be placed upon sec. 27.01 (2) (g) is that the legislature intended, insofar as it was in its power, to grant to your commission an unrestricted power to lease parts or parcels of state park land.

The special provisions of sec. 27.01 (2) (f) are only intended to make it indisputably clear that the general power of leasing included the power to grant concessions and franchises.

The foregoing statutes can be considered in the light of the public policy indicated in sec. 24.40 (1), which provides:

“Every board, commission, department and agency of the state having real estate belonging to the state under its control is authorized and empowered to grant easements in said property for public utility service through, over, along or to said property, including without limitation by enumeration the necessary poles, wires, structures, lines, conduits, pipes or pipe lines for heat, light, water, gas, sewer, power, telephone, telegraph and transmission of messages.”

While it is true that television has not yet been recognized as a public utility, it is subject to licensing by the federal power commission and control by that commission, and it is

obviously engaged in the transmission of messages. It is within the spirit if not the letter of this particular section.

The foregoing situation is clearly distinguishable from that in many cases which have held that a state agency or municipality has no power to devote lands which it holds for park purposes to any other purpose. A large number of such cases are collected in extensive notes in 18 A. L. R. 1246, 63 A. L. R. 484, and 144 A. L. R. 486. In every one of the cases in which the power to devote park lands to other purposes was denied, there was either a lack of statutory power in the particular agency concerned or, in some cases, a special dedication to the public which had to be fulfilled.

That is, the large majority of these cases turn upon the special point that the legislature had never conferred upon the state agency, or upon the municipality, the power to sell or lease park lands whether they were acquired by gift, purchase, or condemnation.

For example, in the case of *Gilman v. City of Milwaukee*, (1882) 55 Wis. 328, the court specifically limited its decision by pointing out that there was no legislative authority for the city in the instant case. At page 334 of its opinion, the court stated:

“* * * The officers of the city could no more divert the park to other uses than strangers or other intruders, and could confer no right by lease or other contract upon others to do so, *without legislative authority at least*, and such authority is not asserted in this case. * * *” (Emphasis supplied.)

In the case of *New York and B. B. R. Co.*, (1880) 20 Hun. (N. Y.) 201, the court held that lands acquired by a municipality by condemnation for park purposes could not be used for railroad purposes without *express legislative authority*.

In the case of *Melin v. Community Consolidated School District*, (1924) 312 Ill. 376, 144 N. E. 13, the court stated that a municipality could not, *without statutory authority*, appropriate any part of a public park for the erection of buildings.

In the case of *Massey v. Bowling Green*, (1925) 206 Ky. 692, 268 S. W. 348, the court held that where a statute authorizes a city to purchase or condemn lands for a park,

but makes no provision for their disposal or abandonment, it could not dispose of such lands or devote them to other purposes inconsistent therewith.

In the case of *Hanlon v. Levin*, (1935) 163 Md. 674, 179 Atl. 286, the court held that the board of park commissioners of Baltimore had no power to lease a parcel of park lands for the purpose of erecting a radio tower.

In this case the court pointed out specifically first, that the park board had apparent statutory authority to lease only such property as it (meaning thereby the park board) had acquired on behalf of the city, and in the instant case the particular park property had been acquired by the city and not by the park board. Furthermore, by way of *dictum*, the court commented that even if the park board itself had acquired the property, a literal construction of the statutes would result in the park board having more power than the city itself. The court concluded that that was an improper construction of the statute and accordingly denied the right to lease the property. In spite of the *dictum* this case clearly turned upon the point that the park board had no statutory authority to lease the property in question.

In the case of *Norton v. City of Gainesville*, (1955) 211 Ga. 387, 86 S. E. 2d 234, the court held that the city had no power to lease a portion of park property for the construction of a miniature railroad for recreational purposes. In its opinion the court stated “* * * The title and power of disposition of property acquired for strictly corporate purposes, and held in its proprietary capacity, are different from its title to property acquired for and dedicated to the public use of its inhabitants. As to the former, the power to dispose is unquestioned, but as to the latter, *in the absence of express legislative authority*, it is only where the public use has been abandoned or the property has become unsuitable or inadequate for the purpose to which it was dedicated that the city has power to dispose of such property.”

Simul: *Astley v. Newark*, (1922) 98 N. J. L. 251, 119 Atl. 187; *Bedford-Nugent Co. v. Argue*, (1939) 281 Ky. 827, 137 S. W. 2d 392; *West v. Monmouth Beach*, (1931) 107 N. J. L. 445, 153 Atl. 495.

On the other hand, where the agency or city concerned has acquired fee title to a park property, either by purchase

or condemnation, the power of the legislature to authorize a sale or lease of said property appears to be established.

In the cases of *Brooklyn Park v. Armstrong*, (1871) 45 N. Y. 234, and *Brooklyn v. Copeland*, (1887) 106 N. Y. 496, 13 N. E. 451, the court held that where a city had acquired park lands by condemnation, the legislature could authorize the discontinuance of the parks and the sale of the land. Early cases have stated the same rule in regard to lands conveyed in fee to a city for use as a park. *Clark v. Providence*, (1888) 16 R. I. 337, 15 Atl. 763; *Mowry v. Providence*, (1889) 16 R. I. 422, 16 Atl. 511. Many other cases support the foregoing. *Wright v. Walcott*, (1921) 238 Mass. 432, 131 N. E. 291.

In *Davis v. Rockport*, (1913) 213 Mass. 279, 100 N. E. 612, the court held that a town could lease "common land" within its limits for the erection of private summer cottages. In *Bryant v. Logan*, (1904) 56 W. Va. 141, 49 S. E. 21, the court held that a city had statutory power to lease lands acquired for park purposes for the purpose of training and running race horses. In the case of *Cascambas v. Newport*, (1923) 45 R. I. 343, 121 Atl. 534, the court held that the city could lease a portion of a beach to a private firm which would maintain and equip it in furtherance of the public use as long as the public was not excluded therefrom. (I may here point out that this lease appears to be similar to the Devil's Lake state park lease and similar leases in Wisconsin already referred to.)

In the case of *Briggs v. Grand Rapids*, (1932) 261 Mich. 11, 245 N. W. 555, the court held that where the city had purchased land in fee "for park purposes" there had been no donation or dedication for park purposes but an outright purchase and hence, the city could act under legislative authority to sell a portion of the park with the approval of three-fifths of the electors.

In the case of *State ex rel. Excelsior Springs v. Smith*, (1935) 336 Mo. 1104, 82 S. W. 2d 37, the court held that when a city had acquired land by condemnation at a time when the existing statute expressly authorized it to sell city-owned park lands, the city could validly sell such parks to private individuals.

The foregoing clearly established that when an agency or city acquires lands in fee either by purchase or condemnation, such lands may either be sold or leased if the legislature has granted statutory authority to do so.

III

Has the area of the proposed lease either by statute or by the terms of the conveyance to the state been so dedicated to park purposes that the legislature could not and cannot validly authorize its use for another purpose?

It is not necessary in the present case to determine whether the legislature at the time of authorizing the purchase or condemnation of lands could so estop itself by its conduct from changing the purpose of their use for park purposes to other purposes, that it could not thereafter validly authorize the agency or municipality concerned to sell such lands.

The specific lands which are concerned in the proposed lease were purchased for full consideration by the state in 1922. At that time the existing statute covering the operations of the conservation commission specifically provided, as it does today, that the commission should have the power to lease park lands as previously indicated. Sec. 27.01 (1m) (1), Stats. 1921, in describing the powers of the commission provides in part "or lease parts or parcels of state park lands or properties."

This is a clear grant of power to the commission in existence at the time it purchased the lands here in question to lease such lands when in its sound judgment it became either necessary or desirable in the interests of the public to do so. This provision is sufficient to give notice generally that the state, acting through its conservation commission, had reserved the right to lease park lands in an appropriate case.

For reasons which will hereafter become apparent we now point out that the same provisions of the statute continued through 1931-1933 and are in substance the present statute as now found in sec. 27.01 (2) (g).

Title to the premises which are the subject of the lease was conveyed to the state of Wisconsin as the result of three successive conveyances, recorded successively February 19,

1923, March 14, 1934 and September 13, 1934. It appears clear from the first of the deeds that this property was conveyed by the owner to the state for a full and fair consideration and was in no wise a gift or a donation. There was no dedication to the public, but on the other hand in the first deed there was a clause or condition subsequent that the premises should be used for park purposes and if they were not, they should in the first instance "revert" to Marathon county, and if Marathon county did not accept the lands, to the heirs of the grantor. While in view of the fact that Marathon county later by appropriate action quitclaimed any interest it might have to the state, it would appear immaterial, we here point out, that "reverter" to a stranger to the title is a legal impossibility.

The second deed recorded from the same named grantors as in the first deed was a deed without restriction and as indicated, the final deed was a quitclaim from Marathon county. While we must consider that the nature of these deeds may constitute a technical flaw in the title to the property, one of my predecessors as attorney general in 1934 concluded that the state owned the land unencumbered and I have been furnished with no facts or legal argument to change that conclusion. In reliance thereon the state acting through its own radio council has erected and maintained its own radio tower on the lands in question and has maintained such tower for a period of more than 8 years. No challenge has ever been made to its right to do so. If, therefore, there is a technical flaw in the title, that is the concern of the lessee.

IV

Our final question is whether or not the state is getting fair consideration for its premises. It would appear that the answer to this question is a matter of policy, and rests within the sound discretion of the conservation commission. As long as that discretion is not abused no legal question arises. While it has been asserted that the consideration is inadequate, I have been furnished with no undisputed facts and figures which would either support or refute that charge. If there is a dispute as to such facts, the attorney general has no power to adjudicate disputed facts. That is solely within the province of a court or a jury.

If the question of adequacy of consideration became an issue in a lawsuit, the court would have the benefit of the testimony of expert witnesses on land values or rentals of television tower sites, and could, within its competency, adjudicate the factual issue as to value, and the legal issue of adequacy. No evidence has been submitted to me respecting values. Assertions in the brief of the objector alleging inadequacy of consideration merely raise an issue, but do not constitute evidence or proof of the assertions made.

The lease provides that the state receive the benefit of the use of a substantial portion of a tower which will cost in the neighborhood of \$100,000 and the possibility which it never had before of putting its own transmitting equipment at an elevation of at least 400 feet. This, obviously, is not a negligible consideration. In this connection it is interesting to note the policy of the forest service of the United States department of agriculture in leasing sites for commercial radio towers. As of June 30, 1955, there were 169 sites in the forests leased for commercial radio and television transmitter facilities. The charges for such sites were based on the following schedule:

<i>Investment</i>	<i>Fee</i>
\$ 10,000 and under -----	\$ 50
50,000 -----	100
100,000 -----	200
250,000 -----	500
250,000 plus -----	Add \$100 for each full \$50,000 increase in investment.

V

The foregoing has all been based upon the assumption that the erection of a radio and transmitting television tower would be a use of the area concerned inconsistent with its use for park purposes. This is not necessarily established by law. The area concerned, 1-1/2 acres, is less than 1 per cent of the 160 acres contained in the particular grant and a much smaller percentage of the state-owned park area. Different considerations arise than would arise if an attempt were made to erect a similar structure upon a park of much more limited area.

In *Central Land Co. v. Grand Rapids*, (1942) 302 Mich. 105, 4 N. W. 2d 485, the court held that the drilling of two oil wells on an area of 25 acres was not a breach of a condition or proviso in a deed that the land be used for park purposes. In its opinion the court placed some reliance on the statement that the pumping structures were housed in buildings which the court described as being only of the size of normal tool houses.

In conclusion, then, the conservation commission has the power to enter into the proposed lease of state park property, provided the consideration is not inadequate. The attorney general cannot determine the adequacy or inadequacy of the consideration; that is a question that can be decided only by a court of competent jurisdiction.

RGT

Prisons—Prisoners—Sentence to State Prison for Misdemeanor—Sentence for a misdemeanor to a state prison contrary to sec. 959.044, Stats. (except in the case of a repeater under sec. 939.62 (1) (a)) is not merely erroneous but is wholly void and the prisoner is entitled on a writ of habeas corpus under ch. 292, Stats., to have the sentence vacated and be returned to the trial court for resentencing.

October 3, 1957.

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

You have requested an opinion whether women convicted of misdemeanors such as drunkenness in violation of sec. 947.03 (2), or vagrancy in violation of sec. 947.02 of the criminal code may be sentenced to the Wisconsin home for women for 6-months terms, and if not, then whether the sentences are void or merely erroneous.

Both those sections of the criminal code provide a maximum penalty of 6 months' imprisonment, and sec. 959.044, Stats., provides as follows:

“When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, (a)

a sentence of less than one year shall be to the county jail, (b) a sentence of more than one year shall be to the state prison and the minimum under the indeterminate sentence law shall be one year, and (c) a sentence of one year may be to either the state prison or the county jail. But in any proper case sentence and commitment may nevertheless be to the state reformatory, the Wisconsin home for women, the Wisconsin school for boys, the Wisconsin school for girls or any house of correction or other institution, as provided by law."

Under sec. 53.01, Stats., the Wisconsin home for women is declared to be a state prison. Sec. 959.045 (2) provides that "All commitments to the Wisconsin home for women shall be for one year or more." Sec. 959.051 (3) formerly provided as follows, but this has been repealed by ch. 205, Laws 1957:

"(3) In lieu of the penalty provided by statute, under which a female offender is tried, the court may commit such person except one convicted of murder in the first or second degree to the home for women for an indeterminate term, which term shall not exceed 5 years in any case, subject to the power of release from actual confinement, by parole or absolute discharge by the state department of public welfare or by pardon, as provided by law."

Even while sec. 959.051 (3) was in effect, it applied only to offenses carrying a maximum penalty of at least one year. *State ex rel. Maloney v. Proctor*, (1946) 249 Wis. 377, 380f, 24 N.W. 2d 698, 25 N.W. 2d 742. It would therefore not have applied to the offenses mentioned in your letter.

You do not state whether the convictions to which you refer were obtained in a court of record or in justice court, or whether the defendants were repeaters subject to sentence to a state prison under sec. 939.62 (1) (a), Stats. I conclude that it makes no difference whether the conviction was in a court of record or a justice court if the defendant was not a repeater, and if she was a repeater the conviction would have to have been in a court of record with jurisdiction to sentence to the state prison for a term up to at least 3 years. See: *Belter v. State*, (1922) 178 Wis. 57, 61, 189 N.W. 270.

I shall therefore assume that the defendants were not repeaters and that the convictions were either in justice court

or in some statutory court such as the district court for Milwaukee county which has original trial jurisdiction of such offenses.

It is clear that the sentences are erroneous under the above statutes. A woman defendant who is not a repeater cannot be sentenced to the Wisconsin home for women upon conviction of a misdemeanor but must be sentenced to a county jail or, if there is one, a county house of correction.

This leaves the question whether the sentence is void or merely erroneous. There are no Wisconsin cases dealing specifically with this subject but a majority of the courts in other states and the United States supreme court which have passed upon this question hold that a sentence to an unauthorized place of detention is completely void and therefore subject to collateral attack by a writ of habeas corpus, and is not merely erroneous and therefore good unless reversed on appeal, writ of error, or other direct review. Anno. 76 A.L.R. 510; 25 Am. Jur. 189, 190—Hab. Corp. § 63.

The reason for this rule is given in *In re Bonner*, (1894) 151 U.S. 242, 256-259, where the court stated in part:

“* * * According to his [counsel for the government] argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a penitentiary, to which place it is expressly forbidden to order it. It would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guardhouse of a fort, or the hulks of a prison-ship, or in any other place not specified in the law.

“We are unable to agree with the learned counsel, but are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. * * *

“* * * If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form pre-

scribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

“* * *

“The laws of our country take care, or should take care, that not the weight of a judge’s finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief. In the case before us, had an appeal been taken from the judgment of the United States court of the Indian Territory, it would hardly have reached a determination before the period of the sentence would have expired, and the wrong caused by the imprisonment in the penitentiary have been inflicted.”

Other cases to the same effect are discussed in 76 A.L.R. 510. Cases to the contrary are cited in 76 A.L.R. 512 and I have examined them, and in my opinion they would probably not be followed by the supreme court of Wisconsin so far as they may be said to hold that a sentence to a wrong place of imprisonment is merely erroneous. Some of the cases are of doubtful authority on that point:

In *State ex rel. Kelly v. Wolfer*, (1912) 119 Minn. 368, 138 N.W. 315, 42 L.R.A. (N.S.) 978, Ann. Cas. 1914A, 1248, a relator who had been sentenced to the reformatory complained that the judgment did not recite that he was within the statutory age limits and alleged that he was in fact over the age of 30. The trial record, however, showed that he had told the court that he was 29. On habeas corpus the supreme court held that the presumption of regularity would prevail and that a judgment is not required to show that the

defendant is within the age limits for a reformatory sentence. In my opinion this case is no authority for the proposition that a sentence of imprisonment in a state prison for an offense punishable only in a county jail is a valid sentence unless reversed on appeal and the Minnesota court would still be free to hold such a sentence void without having to overrule the *Wolfer* case, *supra*.

Two New York cases are cited in the annotation. They are not only distinguishable but are lower court decisions which, so far as they might be held to support a rule that a sentence to a wrong place of imprisonment is not jurisdictionally void, are in conflict with the decision of the court of appeals in *People ex rel. Devoe v. Kelly*, (1884) 97 N.Y. 212. In that case the relator had been sentenced to prison at hard labor instead of a county penitentiary or jail, as required by law, and it was held that the sentence was void and relator should be returned to court for resentencing.

Ex parte Max, (1872) 44 Cal. 579 seems to hold that one who has been sentenced to the state prison for a misdemeanor cannot raise the point on habeas corpus, but the opinion is not very clear on that since there was a problem involving the verdict which probably was the error involved, rather than the sentence to a wrong place of imprisonment. (Cf. *In re Elliott*, (1930) 200 Wis. 326, 228 N. W. 592.) At any rate, in *Ex parte Moon Fook*, (1887) 72 Cal. 10, 12 Pac. 803 the same court held, without citing *Ex parte Max*, *supra*, that a person sentenced to a house of correction who was not of the class of convicts eligible to be sent there was entitled to be discharged on habeas corpus, the sentence being wholly void.

Herrington v. State, (1888) 87 Ala. 1, 5 So. 831, was not a habeas corpus case but was an appeal from the judgment of conviction. The court held that one sentenced erroneously to the state prison would not be discharged but the judgment would be reversed and remanded to the trial court for resentencing. Whether the erroneous sentence was void was not discussed.

In *Matter of Coffeen*, (1878) 38 Mich. 311, a woman sentenced to the state prison for arson applied for a writ of habeas corpus on the ground that the statute required women to be sentenced to the Detroit house of correction.

The court denied the writ, holding that in such a case it was not a writ of right. As a reason for not issuing it the court pointed out that on habeas corpus it could not order the case remanded for sentencing, as it could do on a writ of error, and therefore justice required that the sentence be reviewed on a writ of error rather than on habeas corpus.

This argument would not apply in Wisconsin since our court has recognized that on a writ of habeas corpus it is not limited to discharging the prisoner from custody, but may make further provisions necessary to dispose of the case as justice requires. Thus in *State ex rel. Drankovich v. Murphy*, (1946) 248 Wis. 433, 440, 22 N.W. 2d 540, where the court held on habeas corpus that the trial court had lost jurisdiction by accepting a plea of guilty from a defendant who neither had counsel nor had waived his right thereto, the court did not merely discharge the prisoner, but vacated the judgment and sentence and ordered that the warden of the state prison deliver the petitioner to the sheriff of Marinette county to be held by him for further proceedings according to law. Obviously the court would have no difficulty in ordering, on a writ of habeas corpus, that a prisoner sentenced to the wrong institution be remanded to the sheriff's custody in order that the trial court might resentence him.

Three state courts have refused to allow writs of habeas corpus in cases of sentences to the wrong institution on the apparent ground that the writ does not lie where the relator is held on process issued on final judgment of a court of competent jurisdiction, and that the sentence is voidable only and not wholly void, which begs the question. *Baker v. Krietenstein*, (1916) 185 Ind. 693, 114 N.E. 445; *In re Schenk*, (1876) 74 N.C. 607, 610-611; *Ex parte Bond*, (1877) 9 S.C. 80, 30 Am. Rep. 20. The North Carolina court thought that otherwise judges would be setting aside each other's judgments which it considered an "unseemly" result "disgraceful and destructive to the orderly and harmonious administration of justice." This conception would result in denial of the writ in any case where a court has entered judgment in excess of its jurisdiction or after loss of jurisdiction, which is not the law in this state. *State ex rel.*

Drankovich v. Murphy, supra; *State ex rel. Welch v. Sloan*, (1886) 65 Wis. 647, 651, 27 N.W. 616.

Moreover, although no decision of our court passes expressly upon this question (as pointed out above), a number of cases infer that a judgment not authorized by law in the particular case would be void:

"The defendant having been duly charged with the crime of murder in the first degree, and having been brought into the custody of the court, the court had full jurisdiction both of the subject matter of the action and of the person of the defendant, and, *having rendered a judgment against the defendant which the law authorizes* after trial and conviction, any errors of the court intervening before the sentence and judgment must be taken advantage of either by motion in the court where the trial is had, or upon writ of error or exceptions in the manner prescribed by the statutes. * * *

"It is only when the court pronounces a judgment in a criminal case *which is not authorized by law under any circumstances, in the particular case made by the pleadings*, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by such judgment.* * *" (Emphasis supplied.) *State ex rel. Welch v. Sloan*, (1886) 65 Wis. 647, 650-651, 27 N.W. 616.

See also: *In re Shinski*, (1905) 125 Wis. 280, 282-283, 104 N.W. 86; *In re French*, (1892) 81 Wis. 597, 599, 51 N.W. 960; *In re Carlson*, (1922) 176 Wis. 538, 552-553, 186 N.W. 722.

It is true that the supreme court has held that a sentence in excess of the maximum prescribed for the offense by statute is erroneous but not void (*In re Graham*, (1889) 74 Wis. 450, 43 N.W. 148) and that the constitutionality of an indeterminate sentence will not be reviewed on habeas corpus (*In re Pikulik*, (1892) 81 Wis. 158, 51 N.W. 261). But these decisions are in accord with the prevailing rule, which however also recognizes that a sentence to the wrong place of detention is *void*. 25 Am. Jur. 188-189—Hab. Corp. §59.

I am therefore of the opinion that the Wisconsin supreme court would not follow the minority decisions discussed above but would follow the majority rule holding such sen-

tences to be void and not merely erroneous. Moreover, even where there is no preponderance of authority elsewhere, the Wisconsin supreme court has announced that it will generally follow the decisions of the United States Supreme Court, all other things being equal. *Topolewski v. Plankinton Packing Co.*, (1910) 143 Wis. 52, 63, 126 N.W. 554; see *Wait v. Pierce*, (1926) 191 Wis. 202, 213, 209 N.W. 475, 210 N.W. 822.

I am therefore of the opinion that the sentences concerning which you have inquired are not merely erroneous but are wholly void and that the prisoners should be returned to the sentencing courts for resentence to a proper institution.
WAP

Vital Statistics—Copy of Death Certificate—Certified copies of death certificates are procurable only from officers named in sec. 69.23(1) upon payment of fees specified in sec. 69.24 or without payment of fee if request meets provisions of sec. 69.23 (3). After death certificate is filed with proper officer, any person may make photo or other copy of certificate at office where filed if proper care is taken. Sec. 18.01 (1), (2), sec. 59.14 (1). Not illegal to make copy of unfiled death certificate.

October 10, 1957.

CARL N. NEUPERT,
State Health Officer.

You advise that certain funeral directors and other persons, by means of photocopy machines, have been engaging in making copies of original certificates of death for the use of next of kin and that in some cases the copies are made before the certificate is filed with the proper local registrar as provided in sec. 69.45 (2), Stats.

You further advise that it is your understanding that authority to make copies of vital records is limited to the agencies provided in sec. 69.23, namely, "the state registrar, register of deeds, or the local registrar of any city" and only upon the payment of the fees provided in sec. 69.24.

You request an opinion as to whether persons, such as funeral directors, other than those specified in sec. 69.23 of the statutes are authorized to make copies of vital records such as death certificates.

This opinion will necessarily be limited to death certificates.

Sec. 69.23 is concerned with *certified copies* to be furnished and provides in part:

“69.23 (1) The state registrar, register of deeds or the local registrar of any city shall, upon request, furnish any applicant a *certified copy* of a record in their possession of any birth, fetal death, death, marriage or divorce.”

Sec. 69.24 provides in part:

“69.24 (1) The state registrar, register of deeds, and city health officer who are authorized to issue *certified copies*, as stated in this chapter, shall collect the following fees for the search, filing and issuing of *certified copies* of birth, fetal death, death, marriage and divorce records and for making authorized corrections, alterations or addition:”

Sec. 69.45 (1) as amended by ch. 62, Laws 1957, provides:

“69.45 (1) The funeral director, or person acting * * * under authority of ss. 69.34 (2), 155.02 or 156.16, shall be responsible for obtaining and filing the certificate of death with the registrar and securing from him a burial or removal permit prior to any disposition of the body, except that any person who personally prepares for burial and conducts the funeral of any deceased member of his immediate family may obtain and file such certificate.”

Sec. 69.45 (2), Stats. 1955, provides:

“(2) He shall obtain the personal and statistical particulars required from the person best qualified to supply them over the signature and address of his informant. He shall then present the certificate to the attending physician or other person authorized by law to fill out the medical certificate of the cause of death and other particulars necessary to complete the record, as specified in sections 69.35 to 69.41. He shall then state the facts required relative to the date and place of burial over his signature and his address, and present the completed certificate to the registrar who shall then issue a burial or removal permit.”

Sec. 69.26 provides certain fees for informants but does not specifically mention funeral directors and I am informed that the state registrar does not certify any fees for payment to funeral directors as informants.

Sec. 69.09 provides:

"69.09 Districts and local health officers. For the purposes of this chapter each county shall be a primary registration district for villages and towns and the registers of deeds' office shall be the place for filing. The primary registration district for any city shall be the city and the office of the local health officer the place for filing. The local registrar shall be the health officer or commissioner of health in cities."

Sec. 69.10 provides:

"69.10 Local statistics; copies; filing. Each register of deeds and city health officer shall collect and file certificates of births, fetal deaths, deaths and marriages that occur in his county or city as provided in s. 69.09 and after making a copy thereof transmit the original to the state registrar."

It is clear that once a death certificate has been filed with the proper register of deeds or local registrar, it becomes a "public record" and "Its contents are published to the world and are no longer treated as privileged." *State v. Pabst*, (1909) 139 Wis. 561, 592; *McGinty v. Brotherhood of Railway Trainmen*, (1917) 166 Wis. 83.

Sec. 18.01 (1) and (2) provide:

"18.01 Custody and delivery of official property and records. (1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

"(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection 1 (1)."

In addition, sec. 59.14 (1) provides in part:

"59.14 Offices, where kept; when open. (1) Every sheriff, clerk of the circuit court, *register of deeds*, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices provided * * *. All such officers shall keep such offices open during the usual business hours each day, Sundays and legal holidays excepted, * * * and *with proper care shall open to the examination of any person all books and papers required to be kept in his office and permit any person so examining to take notes and copies of such books, records or papers or minutes therefrom.*"

It is my opinion that it is proper for any person to make a photo or other copy of a death certificate which has been filed if the same is made at the office where the certificate is on file and if proper care is taken so that the original is in no way damaged in the process. Such copy would not be a certified copy. *Certified copies* are procurable only from the officers named in sec. 69.23 (1) upon payment of the fees specified in sec. 69.24, or without payment of the fee if the request meets the provisions of sec. 69.23 (3).

I find nothing in the statutes which would prohibit a funeral director from making a photocopy of an unfiled death certificate. It goes without saying, however, that such copy is not a certified copy and its use would be limited to instances where recipient is willing to take the risks of error which may be found in uncertified copies.

RJV

Public Welfare—Police Powers—Institutional Premises— State department of public welfare has power to enact reasonable police regulations for the government of state institutions operated by the department. Secs. 46.03 (1), (2), (6), (7), Stats. Violation of such a regulation is a crime. Sec. 946.73, Stats. Primary responsibility rests with institutional officers and employes. Sec. 46.05 (2), Stats. Local law enforcement officers have duty to render aid for law enforcement purposes when called upon by institutional officers and employes.

October 23, 1957.

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

You request an opinion as to the extent of the department's regulatory powers over institutions operated by the department and you also inquire as to the extent of police powers of law enforcement officers and of institutional officers and employes of the department within such institutions and upon adjacent roads and grounds. You point out that the problems are most apparent in connection with the extensive roads and grounds of open institutions, such as the northern and southern colonies and training schools.

Insofar as the state prisons and reformatories are concerned, regulatory and police powers are specifically granted, and present no particular problem. Secs. 53.02, 53.04, and 53.07, Stats. Consequently, this opinion excludes any specific consideration of the state prisons or reformatories. The conclusions drawn in this opinion are applicable to prison farms.

The department has the power to enact reasonable police regulations for the government of institutions and open areas operated by it.

The department has been given both the power and responsibility to govern state institutions, and to manage, preserve and care for institutional property. Sec. 46.03 (1) and (2), Stats., provide as follows:

“The department shall:

“(1) Institutions governed. Maintain and govern the Mendota and the Winnebago state hospitals, the central state

hospital, the Wisconsin state prison, the Wisconsin state reformatory, the Wisconsin home for women, the Wisconsin school for boys, the Wisconsin school for girls, the Wisconsin workshop for the blind, the Wisconsin child center, the northern, central and the southern colonies and training schools and the diagnostic center.

“(2) Supervision over property. Supervise, manage, preserve and care for the buildings, grounds and other property pertaining to said institutions, and promote the objects for which they are established.”

The power to govern, it has been held, carries with it the implied power to establish suitable police regulations. *Richmond F.P.R. Co. v. Richmond*, (1877) 96 U.S. 521, 528. To “govern” means to regulate and control. See 18a *Words and Phrases* (Perm. ed.) 236, “Govern”. The term “manage” means to govern, control and direct. See 26 *Words and Phrases* (Perm. ed.) 351, “Manage”; *Webster's New International Dictionary* (2d ed. Unabridged 1935) 1492 “Manage”.

Furthermore, by the well established rule an administrative agency possesses not only those powers expressly granted to it, but in addition possesses those powers necessarily implied and which are essential to the accomplishment of its duties. See *Kasik v. Jansen*, (1914) 158 Wis. 606, 609-610, 149 N.W. 398; *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 448, 451, 15 N.W. 2d 27; 43 Am. Jur. 69 “Public Officers” sec. 250. In addition to its general duty to govern state institutions, and to manage, preserve and care for institutional property, the department and its institutional officers and employes are charged with the responsibility for the custody, control and discipline of the inmates. Sec. 46.03 (1), (2), (5), (6) (b), (7), Stats. See, also, secs. 53.04, and 53.07, Stats.

An officer or employe of an institution who is charged with the custody of a prisoner, and who, through negligence allows such prisoner to escape may be criminally liable for misfeasance. Sec. 946.45, Stats.

Manifestly, the department must enact suitable police regulations to govern the conduct of both inmates and non-inmates upon institutional premises, in order to discharge its responsibility for the custody and discipline of the in-

mates, and for the care of institutional property. It is inconceivable for example, that the department is without power to control and determine the hours and conditions upon which non-inmates may be present upon the institutional premises, including open areas, or to control the speed of vehicles or parking and the like. Control over such matters is essential to the discharge of the department's responsibility in connection with both the inmates and the institutional property.

In this connection it is to be observed that a violation of any such regulation adopted by the department is a violation of a state law and constitutes a crime. Sec. 946.73, Stats., provides as follows:

“Penalty for violating laws governing state or county institutions. Whoever violates any state law or any lawful rule made pursuant to state law governing the state fairgrounds or any state or county charitable, curative, reformatory, or penal institution while within the same or the grounds thereof may be fined not more than \$50 or imprisoned not more than 60 days.”

The regulations adopted by the department are enforceable by both designated institutional officers and employes, sec. 46.05 (2), Stats., and local law enforcement officers. It is of course impossible to assess the relative responsibility of institutional officers and employes *vis a vis* local law enforcement officers, in the abstract. In general, however, primary responsibility for the maintenance of peace and order within the institutions and adjacent open areas rests with the department and its institutional officers and employes. Local law enforcement officers, however, have the same duty to prevent crime and make arrests for violations of state law within such areas as they have anywhere else within their respective jurisdictions, provided the offense is one falling within their enforcement power. It is also their duty to render aid within their jurisdiction, for the purpose of law enforcement when called upon by officers and employes of the department.

As previously pointed out responsibility for the custody and discipline of inmates and the care of institutional property rests with the department and its institutional officers

and employes. From this duty flows a duty to maintain order with respect to persons not inmates who are upon the premises of the institution. For this purpose the warden or superintendent of the institution, and such employes to whom they delegate such power, have the powers of a constable to enforce the laws and regulations governing the institution, and to arrest idle or vagrant persons who are upon the premises and refuse to leave. Sec. 46.05 (2), Stats.

This means that the department and its institutional officers and employes have the duty of active surveillance in preserving order within state institutions and adjacent open areas.

This does not mean that local law enforcement officers are without any responsibility for the maintenance of law and order within the institutional areas. As a general proposition a law enforcement officer is clothed with the powers and correlative responsibilities of his office anywhere within the territorial limits of the governing body for which he acts. Thus, the sheriff, town constable, village marshal, and city police officer, have the duty and responsibility to maintain law and order throughout the county, town, village, and city respectively, regardless of who owns the land or buildings therein. Secs. 59.24, 60.54, 61.28, 61.31 (2) and 62.09 (13), Stats. Unless otherwise provided by statute, this general principle applies with equal force to both privately and state-owned lands and buildings. In other words, law enforcement officers have the same law enforcement powers, and duties upon state-owned lands as they have everywhere else within their county, town, village or city, as the case may be, provided the offense is one falling within the cognizance of their enforcement power. This is limited, however, to enforcement of the state law and does not include local ordinances. 62 C.J.S. 319, sec. 157; 46 OAG 131.

You are therefore advised that the department has the power to enact reasonable police regulations for the government of institutions and adjacent open areas operated by it. Institutional officers and employes, and local law enforcement officers have jurisdiction to enforce the law and make arrests for its violation within such areas. The primary duty of active, preventive surveillance and maintenance of peace

and order rests with the department and its institutional officers and employes. Local law enforcement officers have a duty to render aid for law enforcement purposes within their jurisdiction, when called upon by the institutional officers and employes.

WAP

Juveniles—Order Necessary for Detention—Under sec. 48.29, Stats., written order of juvenile judge or other authorized person is necessary to detain child taken into custody under sec. 48.28, unless detention is during unreasonable hours or on Sunday or holiday.

November 6, 1957.

J. ROBERT PETITJEAN,
District Attorney,
Brown County.

You have asked my opinion with respect to whether, under sec. 48.29 (2), Stats., an order for detention must be obtained prior to placing a child in detention during "reasonable hours". You state that in practice a child may be detained up to 24 hours without a juvenile court order "to serve the purpose of investigation and as an assist to the various law enforcement agencies".

Before the question of detention can arise, the child must be taken into custody. Sec. 48.29 provides as follows:

"(1) When a child is taken into custody as provided in s. 48.28, the parent, guardian or legal custodian of the child shall be notified as soon as possible. The person taking the child into custody shall, unless it is impracticable, undesirable, or has been otherwise ordered by the court, return the child to his parent, guardian or legal custodian on the promise of such person to bring the child to the court, if necessary, at a stated time or at such time as the court may direct. If the person taking the child into custody believes it desirable, he may request such parent, guardian or legal custodian to sign a written promise to bring the child to court as provided above.

"(2) If the child is not released as provided in sub. (1), he may be detained in a place of detention specified in s. 48.30 but only on written order of the court specifying the

reason for detention. The parent, guardian or legal custodian of the child shall be notified of the place of detention as soon as possible. If because of the unreasonableness of the hour or the fact that it is a Sunday or holiday it is impractical to obtain a written order from the court, the child may be detained without a written order of the court for a period of not to exceed 24 hours but a written record of such detention shall be kept and a report in writing filed with the court. The judge of the juvenile court may authorize any person, designated by s. 48.06 or 48.07 to provide services for the court, to order detention of the child."

It is significant that a child may be taken into custody only under certain circumstances and these are set forth in sec. 48.28, which provides:

"(1) No child may be taken into immediate custody except:

"(a) With a *capias* issued by the judges of the juvenile court in accordance with s. 48.23 or with a warrant; or

"(b) When in the presence of the officer who takes the child into custody a child has violated a county, town or municipal ordinance or a state or federal law and the officer believes that such action is necessary for the protection of the public interest; or

"(c) When the officer finds a child in such surroundings or condition that he considers it necessary that he take the child into immediate custody for the child's welfare; or

"(d) When it is reasonably believed that a child has committed an act which if committed by an adult would be a felony; or

"(e) When it is reasonably believed that the child has run away from his parents, guardian or legal custodian or is a fugitive from justice; or

"(em) On order of the court when made upon a showing satisfactory to the court that the welfare of a child demands that it be immediately removed from its present custody, the order to specify that the child be placed in the custody of a licensed welfare agency pending a hearing on the matter; or

"(f) When it is reasonably believed that the child has violated the terms of his probation, parole or other field supervision.

"(2) Taking into custody under this section shall not be considered an arrest."

The above cited statutes were part of the Children's Code which was passed by the legislature in 1955, as amended in

1957. This was done after considerable research and study by the legislative council through the assistance of the child welfare committee, advisory committee of juvenile court judges and advisory committee of social agency representatives. The legislative council recommended Bill No. 444, S., which later became ch. 575, Laws 1955, and which contained in original form the statutory language quoted above.

Prior to the enactment of the Children's Code, a child could be detained in "such place of detention as shall be designated by the court" but not in any place where the child could "come into communication with any adult convicted of crime or under arrest and charged with crime." Also, the law formerly provided that only a child 14 years of age or older could be detained in a jail and then only in a room apart from adults confined therein and approved by the state department of public welfare and only upon written order of the juvenile court. (See ss. 48.06 (5), (6), (7) and 48.12 (1), Stats. 1953.) Prior to the 1955 legislation, the statutes made no provision for any one but the judge of the juvenile court to order detention. Now, the judge may delegate this authority to one of his juvenile court workers (frequently called "probation officers").

In construing the Children's Code, we are assisted by this language appearing in sec. 48.01 (2), Stats.:

"(2) INTENT. It is declared to be the intent of this chapter to promote the best interests of the children of this state through:

"(a) Juvenile courts adequately equipped to review each case on its individual merits under procedures designed to safeguard the legal rights of the child and his parents;

"(b) An integrated and co-ordinated program for all delinquent, neglected and dependent children both in their own community and while in the custody of the state;

"(c) *Protection of children from unnecessary separation, either temporary or permanent, from their parents;*

"(d) Adequate care and rehabilitation for all children who must be separated from their parents temporarily for the child's protection or that of the public;

"(e) Co-ordinated planning to assist local communities in promoting effective programs in health, education, recreation and welfare for the maximum development of all children and for the control of influences detrimental to youth;

“(f) Assurance for children needing adoptive homes that they will be placed in the best home available; protection of children from adoption by persons unfit to have responsibility for raising a child; protection for children who are legally established in adoptive homes from interference by their natural parents.”

We are also assisted by the guide to construction in sec. 48.01 (3):

“(3) CONSTRUCTION. This chapter shall be liberally construed to effect the objectives in sub. (2). The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child and the interest of the public.”

In addition, all words and phrases shall be construed according to common and approved usage. Sec. 990.01 (1).

By the very language of the statute, sec. 48.28 details the only circumstances under which a child may be taken into custody. This does not include taking into custody for the purpose of investigation, interrogation or otherwise assisting law enforcement agencies unless there also is present a reasonable suspicion of the child's having committed a felony or other circumstances bringing the case under sec. 48.28. It must follow, of course, that unless a child is lawfully taken into custody, he cannot be lawfully detained.

Once a child has been taken into custody pursuant to sec. 48.28, it is mandatory that the procedures outlined in sec. 48.29 be followed. These procedures include a requirement that, unless impracticable, undesirable, or otherwise ordered by the court, the child must be returned to his parent, guardian, or legal custodian upon a proper promise by such person. In a situation where a child, taken into custody as provided in sec. 48.28, and, for proper reason, is not returned to his parent, guardian, or legal custodian, it then becomes mandatory that a written order of the court be obtained in order that the child may be lawfully detained. The only exception to this requirement is that it may be waived for not to exceed 24 hours “if because of the unreasonableness of the hour or the fact that it is a Sunday or holiday it is impractical to obtain a written order from the court.” The statute does not simply say “if it is impractical

to obtain a written order" but specifies that such impracticality must be either because (1) of the unreasonableness of the hour, or (2) the fact it is a Sunday or holiday. Therefore, the statute can only mean that if the child is taken into custody during the "reasonable hours" and not on a Sunday or holiday, it is mandatory that a written order of the court or court representative be obtained.

As previously noted, such an order need not necessarily be signed by the judge personally since sec. 48.29 (2) permits the judge of the juvenile court to authorize other proper persons to order such detention.

Interpreting what is meant by "unreasonableness of the hour" poses a more difficult problem. It has been said that "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number, and measure what is not space". *Bonnett v. Vallier*, (1908) 136 Wis. 193, 203. The word has various shades of meaning and the particular shade is to be determined according to the context and circumstances of each particular case. 75 C.J.S. 634. "Reasonable hours" was held to mean "business hours" in a case which involved construction of a statute requiring that the books of every corporation should be subject to inspection at all reasonable hours. *Clawson v. Clayton*, (1908) 33 Utah 266, 93 P. 729, 731. Bearing in mind the expressed legislative intent and the context in which the words are used, there is sound basis for construing "unreasonableness of the hour" to mean any time outside of the usual business hours of the office of the judge of the juvenile court.

Your question is answered, therefore, that in order lawfully to place a child in detention under sec. 48.29 a written order of the judge of juvenile court or person authorized by the judge must be obtained unless the detention is during unreasonable hours or on a Sunday or holiday when the obtaining of such order from the court may be delayed not to exceed 24 hours.

JEA

Toxic Insecticides—Words and Phrases—Application Governed—Sec. 29.29 (4), Stats., relating to toxic insecticides is applicable to forest and noncrop areas only, regardless of location and ownership (except in the case of the state itself) and urban areas as such are not exempt. Secs. 29.29 (4), 144.53, and ch. H-89, Wis. Admin. Code, discussed.

November 7, 1957.

L. P. VOIGT, *Director,*
Conservation Department.

You have raised several questions relating to the proper interpretation of sec. 29.29 (4), Stats., and Wis. Admin. Code H-89.01 adopted jointly by the conservation commission, the state board of health, and the state department of agriculture.

Sec. 29.29 (4), provides:

“(4) Toxic insecticides. No person shall cast, deposit, throw overboard, dust, spray, diffuse or otherwise disperse any toxic insecticide in any form either by hand or from any apparatus, airplane, boat, vessel, craft, automobile or other equipment in forest and noncrop areas in amounts sufficient to be of possible danger to the health of persons or wild animals. The amounts of the various types of insecticides which may be dangerous shall be established by rules and regulations issued jointly by the conservation commission, the state board of health, and the Wisconsin department of agriculture. The conservation commission, upon recommendation of the department of agriculture and the state board of health, is authorized to issue permits for use of larger amounts where it is established that no serious hazards are involved or for experimental purposes.”

Rule H 89.01, Wis. Adm. Code, provides:

“(1) Any person desiring to treat a forest or non-crop area with DDT for the control of obnoxious and injurious insect pests shall send notification of intention to treat, in triplicate, to the Conservation Director, State Office Building, Madison 2, Wisconsin. In this notification shall be included: (a) description of area to be treated, (b) the date when such treatment shall be made, (c) intent of nature of treatment, and (d) material used, method, and rate of application. This notification shall be submitted at least one week in advance of the proposed treatment date.

"a. If the treatment is made at a rate in excess of one pound of DDT per acre, a permit issued by the state conservation commission upon approval of the state board of health and the state department of agriculture and markets is essential.

"b. If the treatment rate is one pound or less of DDT per acre, no permit is necessary; however, notification must be submitted as provided above and the state reserves the right to inspect and supervise any or all such treatments.

"(2) If any insecticide other than DDT is to be used on forest and non-crop areas, a permit for such use shall be obtained from the state conservation commission.

"(3) Wherever feasible, strips shall be left untreated at the first application to serve as undisturbed sanctuary for wildlife; such strips to be treated at a later date.

"(4) In treating marshy areas or fish-bearing waters where there is danger of damage to fish, no such area shall be treated without a proper permit from the state committee on water pollution."

Pursuant to sec. 29.29 (4) a three-man committee has been set up including representatives from the three agencies mentioned in the section. However, it has been the policy of the committee not to exercise jurisdiction in urban areas because it has not been felt that urban areas were intended to be included within the purview of the statute and secondly because the controlling of spraying activities in cities would be a very large undertaking for which the law makes no provision so far as budget and staff are concerned. Also it has been pointed out in a communication from the office of the corporation counsel for Milwaukee county that the county owns approximately 9,000 acres of park land and that to obtain permits to spray from week to week would tremendously hinder the county's spraying program because it is often impossible to plan the work in advance on the basis of predicted weather conditions.

Apparently large numbers of birds have been killed in some cities by the use of DDT in spraying activities, directed to the control of Dutch elm disease. The effective control of Dutch elm disease calls for a saturation spray applied under dormant or wintertime conditions when leaves are absent but when temperatures are above 40 degrees.

As a solution to the problem it is proposed that the committee shall change its policy and assume jurisdiction in

urban areas but that public hearings be held looking to the revision of H 89.01 so as to provide for the issuance of blanket permits within certain dates for spraying under dormant wintertime conditions. Also provision would be made for prohibiting spraying activities in cities at other times. It is believed that such limitations will greatly mitigate the hazards to bird life.

Accordingly you have asked for our opinion on the following points:

“(1) Does the Committee established under 29.29 (4) have jurisdiction in urban areas?”

“(2) If they do have such jurisdiction, will there be any conflict with local city governmental authorities in spray control?”

“(3) Does the Committee have authority to issue a blanket order in revising Wisconsin Administrative Code H-89.01 to grant general permission for spraying within certain dates in the wintertime and prohibiting such activities at all other times?”

“(4) Is there any overlapping of jurisdiction by the Committee set up under 29.29 (4) and the State Water Pollution Committee acting under provisions of Chapter 144 insofar as control of toxic sprays is concerned?”

I.

It is to be noted that sec. 29.29 (4), Stats., which sets up the jurisdiction of the joint agencies is applicable only “in *forest* and *noncrop* areas.” The answer to this question must therefore hinge upon the meaning which is to be attached to the underscored words which are admittedly very general if not ambiguous in scope.

In the construction of statutes all words and phrases are to be construed according to their common and approved usage although technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. Sec. 990.01 (1), Stats.

The word “forest” gives us the least difficulty. According to the American college dictionary it means “a large tract of land covered with trees; and extensive wood.” If any lands of such a character are owned by a municipality they would be subject to the law, since it is the character of the lands rather than ownership which brings them within the

purview of the statute. The only exception to this would be in the case of state-owned forest lands under the rule of law that statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 121 N. W. 642. Nor is location a determining factor within the scope of sec. 29.29 (4). While normally forests are not found in cities this is not universally true. For instance, we are informed that the city of Superior owns about 5,000 acres of forest lands located within the city limits. This rather unusual circumstance in no way changes the scope of the term "forest area" as used in the statute, and such lands must be deemed as coming within the statute.

It is the word "noncrop" which creates the greatest difficulty. It is not defined in the standard dictionaries but is a compound word created by adding the prefix "non" to the word "crop." The prefix "non" meaning "not" is freely used as an English formative, usually with a simple negative force as implying mere negation or absence of something. American college dictionary. The word "crop" means the cultivated produce of the ground, as grain or fruit, while growing or when gathered.

Presumably a crop, albeit a small one, could be grown in urban areas. Many city dwellers have gardens of various sizes in their back yards and raise small crops of various fruits, vegetables, and flowers. These are just as much "crop" areas to them as is the larger field to a farmer. Hence these specific areas would not be subject to the provisions of sec. 29.29 (4). However, that situation probably raises no particular problem as it is the spraying of trees rather than the spraying of crops that is resulting in the loss of birds.

Hence, by way of summary in answering your first question, it would appear that trees other than those in "forests" are subject to the provisions of sec. 29.29 (4) regardless of where located and regardless of ownership, with the one exception above noted in the case of the state. Also it would appear that the same is true of "noncrop" areas. In other words, the statute makes no distinction between urban and nonurban areas, and the agencies named in the statute are not at liberty to read any such distinction into the law.

II.

The second question is more or less hypothetical. We are not advised as to whether there are any actual conflicts between the provisions of ch. H 89 of the Wis. Admin. Code adopted under sec. 29.29 (4), and the provisions of any local municipal ordinances covering the same subject matter.

If any such conflicts exist they must be resolved by giving effect to the state regulations rather than to those of the local municipality. 37 Am. Jur. "Municipal Corporations" § 106. So far as conflicts with state law and regulations are involved, the powers of cities in Wisconsin under the home rule amendment of our state constitution, art. XI, sec. 3, do not extend to matters of state-wide concern, which would include measures relating to "possible danger to the health of persons or wild animals" as does sec. 29.29 (4). See *Van Gilder v. Madison*, (1936) 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, and *State ex rel. Martin v. Juneau*, (1941) 238 Wis. 564, 300 N. W. 187.

III.

This question is answered in the affirmative. The agencies in question have the power under sec. 29.29 (4) to determine the amounts of the various types of insecticides which may be dangerous. As you have pointed out, this may vary with the seasons, the conditions of the trees so far as leaves are concerned, and the temperature.

IV.

Properly construed there is no overlapping of jurisdiction between the provisions of sec. 29.29 (4) and sec. 144.53 (3). Sec. 144.53 (3) provides among other things that it shall be the duty of the committee on water pollution and it shall have power, jurisdiction and authority:

"* * * To supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmer's itch and other nuisance-producing plants and organisms. To this end the committee may conduct experiments for the purpose of ascertaining the best methods for such control. It may purchase equipment and may make a charge for the use of the

same and for materials furnished, together with a per diem charge for any services performed in such work. The charge shall be sufficient to reimburse the committee for the use of the equipment, the actual cost of the materials furnished, and the actual cost of the services rendered plus 10 per cent for overhead and development work."

If over-all limits as to types of insecticides, amounts, and seasons for spraying are adopted under sec. 29.29 (4) and are made applicable to water areas, then the committee on water pollution should operate pursuant to such regulations in supervising the chemical treatment of waters and in determining the best methods of control. In other words, the water pollution committee is charged with supervision and the ascertaining of the best methods of control, whereas the agencies mentioned in sec. 29.29 (4) are charged with determination of the amounts of toxic insecticides which may be used under varying circumstances. Both legislative directives are specific as to the subjects they cover. It is a cardinal rule of statutory construction that conflicts between statutes by implication or otherwise will not be determined to exist, if the statutes may be otherwise reasonably construed. *State v. Thomas*, (1912) 150 Wis. 190, 136 N. W. 623. Or putting it another way, if a supposed incongruity between statutes can be avoided by reasonable construction, such construction should be adopted. *Hite v. Keene*, (1909) 137 Wis. 625, 119 N. W. 303.

WHR

Fees—Register of Deeds—Since there is conflict between sec. 59.57 (1) (b) and sec. 59.57 (13), the enactment of sec. 59.57 (1) (c) by ch. 226, Laws 1957, requires that sec. 59.57 (1) (b) prevail for recording photostatic copy of right-of-way easement by cooperative association organized under ch. 185.

November 11, 1957.

WILLIAM T. BRADY,
District Attorney,
 Juneau County.

You have requested an opinion as to whether sec. 59.57 (1) (c) as created by ch. 226, Laws 1957, authorizes the register of deeds to charge a minimum fee of \$1.50 pursuant to sec. 59.57 (1) (b) for the recording of a photostatic copy of a right-of-way easement by a cooperative association organized under ch. 185 rather than the ten cent fee heretofore charged pursuant to sec. 59.57 (13).

Sec. 59.57 provides in part:

“59.57 Register of deeds; fees. Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

“(1) (a) For entering and recording the following forms of standard instruments as approved by the register of deeds association and filed in the approved form in the office of the secretary of state:

FEES FOR RECORDING WISCONSIN LEGAL FORMS

Forms	Nature of Instrument	Fees
1 to 14	Warranty or quitclaim deed -----	\$1.50
15 to 32	Mortgage -----	2.00
33 to 36	Land contract -----	2.50
37 to 39	Assignment of land contract -----	1.00
40 to 48	Assignment of real estate mortgage ----	1.00
49 to 51	Partial release of mortgage -----	1.00
52 to 54	Partial payment mortgage receipt -----	1.00
55 to 60	Satisfaction of real estate mortgage ----	1.00

“* * *

“(b) *For entering and recording standard instruments not drawn on an approved form and other instruments for*

which there is no approved form 20 cents per folio, and 5 cents for every necessary entry in a tract index in excess of 3 entries in counties where a tract index is kept; with a minimum fee for recording standard instruments not drawn on an approved form as specifically set forth in s. 59.57 (1) (a) of \$2 for any deed, \$3 for any mortgage, and \$1.50 for any other instrument."

Sec. 59.57 (1) (c) as created by ch. 226, Laws 1957, provides:

"In the event of conflict between par. (b) and any other statute, the provisions of par. (b) shall, to the extent of such conflict, prevail."

After a review of entire sec. 59.57, I conclude that there is a conflict between sec. 59.57 (1) (b) and sec. 59.57 (13) and that the register of deeds may charge 20 cents per folio plus 5 cents for every necessary entry in the tract index in excess of three with a minimum of \$1.50 for the recording of a photostatic copy of a right-of-way easement or other instrument which comes within the terms of sec. 59.57 (13) by a cooperative association instead of the ten cent fee which previously applied.

Sec. 59.57 (10) provides for specific fees for the recording of plats, and sec. 59.57 (11) and (11a) provide for specific fees for recording of exhibits, drawing or plats, attached to or incorporated in any deed or other instrument. It does not appear that there is a conflict between the specific fees set forth in these subsections and sec. 59.57 (1) (b) for the reason that such plats, exhibits, or drawings even though they may be properly termed "instruments," are not of the type of instrument to which a folio charge can be properly applied as a measure of the fee to be charged.

I have checked the eighty or so sections of statutes which are listed under the heading "Recording Instruments" in the general index to the statutes for apparent conflicts with sec. 59.57 (1) (b) but find that in most of the sections referred to there is no specific reference to any certain fee to be charged, and hence no basis for conflict. Certain of the statutes referred to in the index do provide for set fees for filing, but are not in conflict with sec. 59.57 (1) (b)

as that section refers to fees for *entering and recording instruments*.

There is an apparent conflict between sec. 74.76 (4) which refers to a 75 cent fee to be charged for filing and recording a notice of lien for internal revenue taxes payable to the United States of America and sec. 59.57 (1) (b), and thus sec. 59.57 (1) (c) requires that the fees set forth in sec. 59.57 (1) (b) prevail.

There is also an apparent conflict between sec. 45.21 which provides for the recording of veterans' certificates of discharge or release from the armed services for no fee, except in fee system counties where a 25 cent fee may be charged, and sec. 59.57 (1) (b), and the fee set forth in the latter section must prevail.

Bill No. 210, A., which became ch. 226, Laws 1957, bears the recital that it was introduced at the request of the Wisconsin register of deeds association. A review of the legislative history of the bill indicates an intention to establish recording fees for all instruments, with specified minimums, as follows:

(1) For all instruments drawn on approved forms, the specified fees set forth in sec. 59.57 (1) (a), (ab), (am);

(2) For *all* instruments not drawn on an approved form, regardless of whether there is an approved form, or not for such instrument, except deeds and mortgages for which there is an approved form, 20¢ per folio plus 5¢ for every necessary entry in the tract index in excess of 3, plus any charge necessary by reason of sec. 59.57 (1) (ab), with a minimum fee of \$1.50.

(3) For deeds for which there is an approved form, but which are not drawn on such approved form, 20¢ per folio plus 5¢ for every necessary entry in the tract index in excess of 3, with a minimum fee of \$2.00.

(4) For mortgages for which there is an approved form, but which are not drawn on such approved form, 20¢ per folio plus 5¢ for every necessary entry in the tract index in excess of 3, with a minimum fee of \$3.00.

RJV

Civil Defense—Volunteers Covered by Workmen's Compensation—Civil defense volunteers are covered by workmen's compensation statutes when engaged in activities duly authorized by appropriate officials, within the scope of their statutory powers.

November 18, 1957.

RALPH J. OLSON,
Adjutant General.

You ask a number of questions as to whether civil defense workers are covered by workmen's compensation in given situations.

The proposition was stated in 40 O.A.G. 332, 335, that, by force of secs. 21.02 (4) (c) and (e), Stats., generally "members of state or local civil defense units are entitled to workmen's compensation benefits from the state or local municipalities, provided they are not at the time acting as employes of a private employer. *This coverage extends to all activities authorized by the controlling statutes.*" (Emphasis supplied.)

Your question then is largely dependent upon whether the activity in which the volunteer worker is engaged is within the scope of an enabling statute, and has been duly authorized by the officials designated to implement the statute.

I.

Your first question is:

"1. Are civil defense volunteers protected by workmen's compensation in training activities other than test runs?

"As an example, training in traffic control is deemed highly important in civil defense. A civil defense director might prescribe as part of traffic training that some of his volunteers direct traffic at football games and other public gatherings. In the event that a volunteer civil defense worker is injured while engaged in such training, is he covered by workmen's insurance under civil defense workmen's compensation provisions?"

Sec. 21.02 (3) (c) authorizes the state director of civil defense to organize units, "including the power to engage in practice operations." Sec. 21.02 (3) (e) authorizes municipalities to establish a civil defense organization under a

director who "shall be responsible for the organization, administration and operation of the local civil defense organization, subject to the direction and control of the chief executive and the governing body".

Since the policy of the legislature in making provision for civil defense organization is to insure that the state and its subdivisions and municipalities "will be prepared and able" to cope with the emergencies as they arise, it seems clear that the training activities are a basic element of the plan.

It is my opinion that civil defense workers receiving no pay are eligible for workmen's compensation from the "sponsoring state, municipality or county" in case of injury during training activities authorized by the proper officials of the unit involved.

It should be noted, not only in connection with this question but also with the following ones, that the answers are given on a generalized basis. There is wide room for variance of circumstances in individual cases which might affect the answers in such cases. Workmen's compensation is enforceable in disputed cases by procedure before the industrial commission. That commission has a considerable leeway for fact-finding. For example, the commission's findings whether an injury occurred in the course of employment, so as to be compensable, are generally held to be conclusive where there is room for a difference of opinion. See *Guenther v. Industrial Comm.*, (1939) 231 Wis. 603, 286 N. W. 1 and *Eckhardt v. Industrial Comm.*, (1943) 242 Wis. 325, 7 N. W. 2d 841.

II.

Your questions 2a and 2b are taken together because their answers are related. They are:

"2a. Are civil defense volunteers protected in test runs other than those authorized by the Governor?"

"2b. May test runs be held without specific authority of the Governor?"

If test runs may be held without specific authority of the governor, volunteers appointed for duty in connection with such runs are eligible for compensation.

Under sec. 21.02 (3) (c), authority is conferred upon the director of civil defense to do certain things "subject to the approval of the governor".

As pointed out in *Powers v. Isley*, (1947) 66 Ariz. 94. 183 P. 2d 880, 884, 885, 886:

"The term 'approved' is susceptible of different meanings dependent upon the subject matter and context concerning which the term is employed and the object and purpose to be subserved or accomplished."

The court went on to point out that approval ordinarily means ratification of some act previously done by another.

In *Cranmer v. Fidelity & Casualty Co.*, (1944) 18 So. 2d 220, 222 (La.), the court held that a statute relating to deduction of certain overpayments of workmen's compensation "subject to the approval of the court" did not mean that the court's approval must be procured as a condition *precedent* to a valid adjustment. The court said:

"* * * 'Subject to the approval of the court' simply means that the matter, even when disposed of by agreement of the parties or otherwise, was not removed from the inquisitorial power of the court in a proper proceeding."

To similar effect are *Atlantic Pacific Oil Co. v. Gas Development Co.*, (1937) 105 Mont. 1, 69 P. 2d 750, 762 and *Johnston v. Landucci*, (1942) 21 Cal. 2d 63.

I believe the legislature intended a similar result in enacting sec. 21.02 (3) (c). It seems unlikely that the legislature intended to preclude the director from taking any single effective step on operational matters without preliminary affirmative action on the part of a busy chief executive. A more practical interpretation in carrying out an effective state-wide program is to construe the provision relating to the governor's approval as giving him general supervisory power to set policies, or to set aside decisions of which he disapproves—but not to require him to act affirmatively on each detail. The governor's failure to take specific action may be regarded as tacit approval.

It is accordingly my opinion that a test run may be held without specific authority of the governor for the particular run, so long as it does not violate any policy established by him.

III.

Your third question is:

"3. A 'public emergency' has been determined to exist pursuant to section 59.08 (2) or 62.15 (1b) of the statutes. A member of a civil defense unit, on duty by direction of the State civil defense authority, is injured. Is he covered by the workmen's compensation provisions of Section 21.02 stats.?"

I assume your question refers to members of state units such as were dealt with in the opinion published April 1, 1957 in 46 O.A.G. 91. The opinion was there given that the use of civil defense forces for a natural disaster was not authorized under sec. 21.02, and that workers so used would not have the benefit of workmen's compensation coverage.

I also assume you use the term "public emergency" in your question in the sense in which it has been used in ch. 539, Laws 1957, which became effective after issuance of the opinion above referred to. A "public emergency" may be declared by specified local authorities under ch. 539, Laws 1957, on the basis of enumerated circumstances which include natural disasters.

Sec. 21.02 (1a), as created by ch. 539, Laws 1957, now authorizes the state office of civil defense to "utilize its existing facilities and manpower" to cooperate with counties and municipalities in declared public emergencies resulting from "disasters caused by man or nature." Similar authorization is contained in secs. 59.08 (2) and 62.15 (1b) as amended.

The opinion in 46 O.A.G. 91 was expressly based on the absence of statutory authority to use state facilities in case of natural disaster, and recognized that the answer would be different if an enabling statute existed.

Under sec. 21.02 (4) (c), and the opinion in 40 O.A.G. 332, 335, a member of the state unit on duty by direction of the state authority would be covered by workmen's compensation while working in connection with a "public emergency" duly declared by appropriate local authorities pursuant to ch. 539, Laws 1957.

IV.

Your fourth question is:

"4. Does the local unit of government have the power to order its local CD units to duty in a duly declared 'public emergency' without State civil defense authority, and if so are the members of the unit covered by the workmen's compensation provisions of Section 21.02 Stats."

Whether local defense units are authorized to work on local disasters depends largely on the action taken by the governing bodies and local officials.

Sec. 21.02 (3) (e) 2. provides in part that each municipal director shall be responsible for the operation of the local civil defense organization "subject to the direction and control of the chief executive and the governing body of such political subdivisions".

Since the enabling statutory provisions with respect to municipalities generally authorize governing bodies to act for the health, safety and welfare of their inhabitants (see for example, sec. 62.11 (5)) I believe that such provisions read in conjunction with sec. 21.02 (3) indicate a legislative intent that local governing bodies may provide for alleviation of disasters within their own borders through use of their civil defense facilities and manpower. Use of such facilities and manpower for disasters outside their borders would raise a different question not here considered.

V.

Your fifth question is:

"5. Is a civil defense worker called out on a local situation not duly declared to be a 'public emergency' covered by workmen's insurance under civil defense workmen's compensation provisions."

The legislature has, by sec. 21.02 (3) (e) left the organization, administration and operation of local units to the municipal direction, subject to direction and control of the chief executive and governing body. That would indicate a legislative intent to leave it largely to the designated officials to determine the area of operation of the local units,

subject of course to statutory limitations respecting the authority of the municipality involved.

It would be impossible to answer your question categorically without information as to the specific activity involved, and the ordinances or resolutions adopted by the governing body. Generally speaking, it is my opinion that a member of a local civil defense unit would be eligible for workmen's compensation while engaged in activities affecting local health or safety within the municipality's power, which have been duly authorized by local officials.

BL

Driver's License—Revocation—Surrender—Upon being notified by the commissioner of the motor vehicle department that the driving privilege of an inmate has been revoked, cancelled or suspended, the superintendent of a mental institution must deliver to the commissioner the driver's license of such inmate if it comes into his possession.

November 22, 1957.

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

You request my opinion as to whether the holding in 37 O.A.G. 467 (1948) has been affected by any subsequent legislation or decision.

That opinion pointed out the absence of statutory authority for the commissioner of the motor vehicle department to require surrender of a validly issued driver's license after the licensee had fallen into one of the classes which were not to be licensed unless the provisions of sec. 85.08 (33) Stats., were complied with.

This absence of authority was remedied by the creation of sec. 85.08 (6m) by the 1949 legislature, which gave the motor vehicle department authority to require surrender of licenses under such circumstances.

The Vehicle Code, enacted as ch. 260, Laws 1957, *directs* the commissioner to cancel a license when the person hold-

ing it falls into one of the classes to whom the law prohibits the issuance of a license. (See sec. 343.25 (4), Stats. 1957.)

A duty is placed upon not only the licensee, but upon any person in whose possession a cancelled, revoked, or suspended license may be, under sec. 343.35, to "forthwith surrender such license to the department upon being notified of such action on the part of the commissioner". A penalty of \$100 and/or six months' imprisonment is provided for any person who fails to comply.

It should be pointed out that once the "operating privilege" has been cancelled, revoked, or suspended by the commissioner the licensee may no longer use the physical evidence of the privilege under penalty as provided in sec. 343.35 (2), and sec. 343.43 (1) (a) and (2). In other words, it is the action of the commissioner which determines when the privilege is cancelled, revoked or suspended, and confiscation of the license itself merely prevents illegal use of the physical evidence of the privilege.

It is a well recognized legal principle that driving an automobile on the highway is a privilege, not a right, and is subject to reasonable regulations under the police power in the interest of public safety and welfare. That regulation may include the summary cancellation, revocation, or suspension of the privilege. Nor is it a violation of any constitutional right to cancel, revoke, or suspend the privilege without prior hearing, provided a subsequent judicial review is afforded. *State v. Stehlek*, (1953) 262 Wis. 642.

The case which apparently brought about your inquiry concerns a patient at Mendota state hospital. The commissioner has informed you that the subject's driving privilege was revoked on July 15, 1957, under the "point system", and that the person will not be licensed again by the department until the requirements of sec. 343.38 have been satisfied. This is deemed to be sufficient notice to the superintendent that the motor vehicle commissioner has performed his duties and that the person has been lawfully notified that his operating privilege has been revoked.

Therefore, because the patient's privilege to operate a motor vehicle has been revoked and he has been so notified, he may no longer legally retain possession of the physical

evidence of the privilege. Accordingly, if such license which has been revoked comes into the possession of the superintendent, under the provisions of sec. 46.07, he must comply with the commissioner's request to return such license to the motor vehicle department.

WAP

Interstate Compact—Parolee Supervision—Words and Phrases—Under ch. 663, sec. 13, Laws 1957, amending sec. 990.01 (40) and (44), Stats., the commonwealth of Puerto Rico is a state of the United States in the meaning of sec. 57.13, Stats., and the governor has authority to enter into the interstate parole compact, authorized by that section, with the said commonwealth.

November 25, 1957.

VERNON W. THOMSON

Governor of Wisconsin.

You request my opinion whether you have authority to enter into the interstate compact for out-of-state parolee supervision under sec. 57.13, Stats., with the commonwealth of Puerto Rico.

Preliminary research on this question indicated that clarifying legislation was probably required to authorize this and accordingly a bill to accomplish that (and other minor clarifications and corrections in the statutes) was prepared by the revisor for introduction at the adjourned session of the legislature. Since the action of the legislature would materially affect my opinion, I advised you of the situation and suggested that it would be prudent to await such action before issuing the opinion. The bill has now been passed, signed, and published as ch. 663, Laws 1957, so that all doubt on the question is now removed.

Sec. 57.13, Stats., provides in part as follows:

“Out-of-state parolee supervision; state compacts. The governor of this state is authorized and directed to enter into a compact on behalf of this state with any state of the United States legally joining therein in the form substantially as follows:”

There then follows the text of the compact.

Sec. 990.01 (40) and (44), Stats., as amended by ch. 663, sec. 13, Laws 1957, provide as follows:

"990.01 Construction of statutes; words and phrases. In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

"* * *

"(40) STATE. 'State,' when applied to states of the United States, includes the District of Columbia, *the commonwealth of Puerto Rico* and the several territories organized by Congress.

"(44) UNITED STATES. 'United States' includes the District of Columbia, the states, *the commonwealth of Puerto Rico* and the territories organized by congress."

It therefore appears that the word "state" as used in sec. 57.13 expressly includes the commonwealth of Puerto Rico and you have authority to join in the compact with the commonwealth.

WAP

Juveniles—Revocation of Operator's License—Criminal Court—Juvenile Court—Sec. 343.30 (2), Stats., created by ch. 260, Laws 1957, applies to cases of children under 18 convicted of moving traffic violations in criminal court after waiver of jurisdiction by the juvenile court, and requires revocation or suspension of the child's operator's license by the criminal court the same as though the case had been handled in juvenile court under sec. 48.36, Stats., in addition to any criminal penalty imposed.

November 26, 1957.

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

You have requested a clarification of my opinion to district attorney Walter T. Norlin of Bayfield county dated July 25, 1957, 46 O.A.G. 204. You state that the opinion is being interpreted to the effect that when the juvenile court waives jurisdiction in favor of the criminal court under sec.

48.18, Stats., and a child under 18 is criminally prosecuted for a moving violation of the state traffic law, the court is without authority to suspend the operator's license of the child as would be done if the case had been handled in the juvenile court under sec. 48.36.

There was no intention that the opinion should be so interpreted since the only question there was whether the criminal court could obtain jurisdiction in such cases.

It is clear that the criminal court is required to suspend or revoke the license of a child under 18 upon conviction of a moving violation, the same as would be done by the juvenile court, or by a civil court upon conviction of a violation of a traffic ordinance, under sec. 48.36 as amended by ch. 260, Laws 1957, sec. 9.

Sec. 343.30 (2) created by ch. 260, Laws 1957 (the Vehicle Code) provides as follows:

"A court shall revoke or suspend the operating privilege of a person under 18 years of age under the circumstances stated in s. 48.36."

It might be argued that this provision should be construed to apply only to cases processed under sec. 48.36 either in the juvenile court or as a traffic ordinance violation in a civil court. However, that construction is manifestly incorrect for two reasons:

In the first place, if sec. 343.30 (2) meant no more than what is already stated in sec. 48.36, it would be a useless enactment. Every statute, if possible, must be construed in a way that gives it meaning, and the only meaning which can be given to the foregoing statute in addition to what has been already expressed in sec. 48.36 is that it applies to convictions in the criminal courts upon waiver of jurisdiction by the juvenile court.

In the second place, the note following sec. 343.30 in Bill No. 99, S. (which became ch. 260, Laws 1957), page 146, states in part as follows:

"Subsections (1), (2) and (3) of the new section are based respectively upon subs. (27) (a) (24c), and (25c) (d) of s. 85.08. *There is no change in the law except for the change in procedure and change in terminology mentioned above.*" (Emphasis supplied.)

Sec. 990.001 (7) provides as follows:

“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. *If the revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent.*”

Therefore, sec. 343.30 (2) is derived from sec. 85.08 (24c), Stats. 1955, and must be construed as making no change in the law except the change in procedure and change in terminology referred to elsewhere in the note, and which do not affect the present problem.

Sec. 85.08 (24c), Stats. 1955, provided as follows:

“Whenever any child under 18 is found *by a criminal court*, by a juvenile court or, in the case of an ordinance violation, by a civil court to have violated a provision of this chapter regulating moving vehicles or any county or municipal ordinance enacted in conformity therewith under s. 85.84, the court shall suspend the child’s motor vehicle operator’s license, for not less than 30 days nor more than one year by taking immediate possession of the license and mailing it with a report of the violation to the department. But the provisions of sub. (29) shall not be applicable to the first such suspension unless the court so orders.”

Since the former statute specifically referred to convictions in criminal court, the new statute, sec. 343.30 (2), must be given the same construction for the reasons above stated.

It follows that when a child under 18 is convicted of a moving traffic violation after waiver of jurisdiction by the juvenile court, the court is required to suspend or revoke the child’s operator’s license the same as though the case had been handled in juvenile court, *in addition to* imposing such sentence of fine or imprisonment as the court may deem proper, or placing the child on probation under sec. 57.04. (See sec. 959.01 (2), relating to the duty of the court to impose sentence after a criminal conviction.)

WAP

Courts—Fire Marshal—Statutory Privileges—United States Supreme Court decision in Jencks v. United States, (1957) 353 U. S. 57, modified by the Act of Congress creating 18 U.S.C. § 3500, is a rule of federal procedure, is not binding on state courts, and does not affect the statutory privilege of the fire marshal pursuant to sec. 200.21 (2), Stats.

December 2, 1957.

PAUL J. ROGAN,
State Fire Marshal.

You have requested my opinion upon the following questions:

“(1) Does the recent U. S. Supreme Court decision in the case of *Jencks v. United States, (1957) 353 U. S. 657, 77 S. Ct.1007, 1 L ed. 2d 1103, in any way rescind, change, modify or otherwise affect the Wisconsin law and rulings on the privileged and confidential nature of investigations of fires made by the State Fire Marshal and his subordinates, and of reports, statements, notes, etc., incidental thereto?*

“(2) Does this ruling (*Jencks v. U. S. supra*) otherwise apply in any way to prosecutions in state courts?”

Sec. 200.21 (2), Stats., provides as follows:

“All investigations held by or under the direction of the state fire marshal, or his subordinates, may, in his discretion, be private, and persons other than those required to be present may be excluded from the place where such investigation is held, and witnesses may be kept apart from each other, and not allowed to communicate with each other until they have been examined.”

This has been construed by the Wisconsin supreme court to confer a privilege upon notes, reports, etc., compiled by deputy fire marshals in the course of investigating fires of suspicious origin and to prevent their disclosure in court. See *State ex rel. Spencer v. Freedy, (1929) 198 Wis. 388; Gilbertson v. State, (1931) 205 Wis. 168; 40 O.A.G. 34.*

This privilege is generally considered to apply to the notes and files of the deputy fire marshal even at the criminal trial, although it has been pointed out that at the trial the marshal is required to answer all questions put to him

by the district attorney and produce all evidence which the district attorney requires of him. 40 O.A.G. 34, 39. The reason why the defense is not entitled to inspect the notes of the deputy fire marshal even after he and other witnesses have testified in a criminal trial for arson is probably based upon general rules of law which will be discussed below, rather than upon the statute.

Jencks v. United States, (1957) 353 U. S. 657, 77 S. Ct. 1007, 1 L. ed. 2d 1103 was a federal prosecution for violating 18 U.S.C. § 1001 by falsely swearing, in an affidavit filed with the national labor relations board pursuant to the Taft-Hartley Act, that defendant was not on April 28, 1950 a member of the communist party or affiliated with such party. Two witnesses called by the government were communist party members who had been for a long time in the pay of the federal bureau of investigation and had made oral and written reports of communist activities in which they participated. The witnesses testified regarding activities of the defendant and other circumstantial facts tending to establish the falsity of the affidavit. They also testified on cross-examination that they had made oral and written reports to the federal bureau of investigation relating to the matters regarding which they had testified.

The defense, *without making any showing that the reports of the witnesses would impeach their testimony given at the trial*, moved that the government be required to produce the statements for inspection. The motion was denied by the trial court and the defendant was convicted. The conviction was affirmed by the court of appeals and that court's decision was reversed by the supreme court, holding that *no preliminary showing that the statements would impeach the witnesses was required* and that the defense was entitled to inspect them in order to determine whether there was any inconsistency which would impeach the testimony of the witnesses given at the trial. The court stated in conclusion as follows:

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses

touching the subject matter of their testimony at the trial. Accord, *Roviaro v United States*, 353 US 53, 60, 61, 1 L ed 2d 639, 644, 645, 77 S Ct 623. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

The opinion of the court deals with the question as one of federal procedural law and there is no suggestion that the rule is one of due process of law guaranteed by the constitution. That it was not intended to be binding upon the states is shown by the introductory paragraph of the concurring opinion of Justice Burton:

"Because of the importance of this case to the administration of criminal justice *in the federal courts*, I believe it appropriate to set forth briefly the different route by which I reach the same result as does the Court." (Emphasis supplied.)

Moreover, it should be remembered that congress, in the exercise of its undoubted power to establish rules of procedure and evidence for the federal courts, modified the rule of the *Jencks* case within a matter of a few months after that decision by creating 18 U.S.C. § 3500 (71 Stat. 595, approved September 2, 1957). The statute makes clear, as did the decision, that the right of inspection does not arise until the witness has testified on direct examination. It limits the right of inspection to written statements made by the witness and signed or otherwise adopted or approved by him, or stenographic, mechanical, electrical or other recordings or transcriptions thereof which are substantially verbatim recitals of oral statements made by the witness to an agent of the government and contemporaneously recorded. This would have excluded the oral statements made by the witnesses in the *Jencks* case unless they were recorded in the manner described, and certainly would exclude notes taken by officers such as deputy fire marshals but not signed or otherwise approved by the witness.

Moreover, although the supreme court in the *Jencks* case disapproved "the practice of producing government documents to the trial judge for his determination of relevancy

and materiality without hearing the accused", the statute requires the production of the statement for inspection of the court *in camera* if the government claims that it contains matter which does not relate to the subject matter of the testimony of the witness. In such case the court is required to excise the irrelevant matter before directing delivery of the statement to the defendant. Provision is made for review of such action by the trial court in case of an appeal from a conviction, but presumably the court of appeals would also examine the statement *in camera*.

Since the statute supersedes the decision of the *Jencks* case, any attempt to apply the rule in the state courts would result in the absurdity of giving to an act of congress, designed to regulate practice in the federal courts, the effect of establishing a rule of procedure in the state courts.

It is very clear in my opinion that neither the decision nor the act of congress has any binding effect outside the federal courts, and therefore could not possibly be considered to affect any privilege created by a state statute.

The rule is well established in this state that "one accused of crime enjoys no right to the inspection of the evidence relied upon by the public authorities for his conviction." *State v. Herman*, (1935) 219 Wis. 267, 274, 262 N. W. 718, and cases cited.

In one of the cases cited in the *Herman* case, *supra*, *Santry v. The State*, (1886) 67 Wis. 65, 66, 30 N. W. 226, the facts are not very completely reported for the reason that there were neither briefs of counsel nor any abridgment of the record furnished to the supreme court. However, it appears that Louis Christensen, after being convicted of a murder, made a voluntary confession implicating Santry and others. Santry was charged with and tried for the murder, and although the report of the case does not say so, it is apparent that Christensen must have been a witness for the state. Apparently, also, at the trial the defense demanded a copy of Christensen's confession. The supreme court said:

"The district attorney was under no obligation to furnish the defense with a copy of Christensen's confession, and his refusal so to do was not error."

It follows that the rule that the defense is not entitled to an inspection of the state's evidence applies to statements of witnesses who have been examined by the state at the trial.

The general rule is that documents used by a witness to refresh his recollection outside of court, or at any rate while the witness is not on the witness stand, need not be given to the defendant's attorney for inspection. The rule on this point is stated as follows in 14 Am. Jur. 893—Crim. Law § 182:

“To permit a prosecuting attorney to furnish a paper to a witness and to allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand practically deny him the right of being confronted with the witnesses against him and tends to deprive him of full opportunities to defend himself. It is the universal rule of evidence in the courts of this country that where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified. *This rule is limited in that the opposing counsel or party has a right to inspect only such memoranda or papers as are used by a witness while he is on the witness stand and during his examination.* Therefore, where a witness has refreshed his present recollection prior to the time of giving his testimony, by the use of papers or memoranda, and they are not in court, he will not be obliged to produce them for the purpose of allowing the opposing party to make an inspection. *A defendant is not entitled to inspect a paper that the prosecuting attorney is using for the purpose of aiding him in the examination of a witness, where such paper is not a public document or used to refresh the memory of the witness.*” (Emphasis supplied.)

A few jurisdictions, including Wisconsin, have recognized a right on the part of the defendant to the production of statements given by state witnesses to peace officers or the district attorney *upon a showing that such a statement would contradict and impeach the witness' testimony.* 156 A.L.R. 345.

However, it is clear that a foundation must first be laid for the use of the document to impeach the witness. In the absence of such a showing the accused has no right to demand an inspection of the document for the purpose of

seeing whether or not it might tend to impeach the witness.

Even then, the refusal to produce the document may not be prejudicial error. It was held as follows in *Alto v. State*, (1934) 215 Wis. 141, 146-147, 253 N. W. 777, a prosecution for being accessory before the fact to an armed robbery:

“The next contention is that the district attorney was guilty of suppressing evidence. Harry Erdmann testified upon the trial to defendant’s guilty part in the robbery. On cross-examination he admitted that he had theretofore made a statement to the district attorney and that this statement completely exonerated defendant. He stated that the district attorney took this paper away with him. Counsel for defendant then demanded of the district attorney production of this paper. The district attorney declined to produce the writing, although he concededly had it. The refusal to produce was sustained by the court. The refusal of the district attorney to produce the paper was not warranted, and evidently resulted from a misunderstanding as to his duty in the premises. However, this error was not prejudicial. The paper was important only in so far as it tended to corroborate Erdmann’s self-impeachment. Since he admitted having made the statements, it is clear that the paper in the district attorney’s possession would add nothing to the evidence, and that its suppression did not prejudice the defendant in any way.”

The reason why a proper foundation must first be laid before asking the district attorney to produce the document is set out in the following quotation from *State v. Simon*, (1912) 131 La. 520, 523, 59 So. 975:

“The accused was tried for murder, and convicted of manslaughter, and sentenced to 10 years at hard labor.

“A state witness having said on cross-examination that he had testified on two previous occasions, a first time in the district attorney’s private office, and a second time on the preliminary examination of the case, and that his testimony had been the same as now, and had been taken down in writing, counsel for accused orally in court called upon the district attorney to produce the testimony given in his private office. The district attorney would not do so, and the court refused to compel him, although counsel stated that the object was to impeach the witness by showing that the said testimony was different from that on the trial.

“If counsel, instead of saying in general terms that the said testimony was different, had recited it in an affidavit, or, at any rate, given the particulars of it under oath, there-

by making proper showing, the question would have arisen whether the court can compel the prosecution to produce on the trial a material private document of which it has possession. But no such showing was made, and for the very good reason, as is manifest from the brief, that counsel did not know that said testimony had been different, and therefore were not in a position to make any such showing. *So that in making said request counsel were merely on a fishing expedition.*

“The courts *uniformly* decline to grant an application for production and inspection *where it is merely for the purpose of a fishing examination.*’ 23 A. & E. E. of Law, 179.

“Counsel say that said testimony was a public document, and that, therefore, they were entitled to access to it.

“The document was not a public document; but even if it had been, and even if the ruling denying access to it had been erroneous, there would be no ground for reversal, because the document, even if produced and found to be conflicting with the testimony on the trial, would have been inadmissible in evidence; since the sole purpose for which it was wanted was for impeaching the witness, and it would have been inadmissible for that purpose, the proper foundation for its introduction in evidence for that purpose not having been laid by calling the attention of the witness to the particulars wherein the two statements were contradictory.

“‘Before the statements could be introduced for such purpose, it is essential, under the rule, that the substance of the contradictory matter should have been stated to the witness, and he should have been asked whether the statements had been made.’ State v. Jones, 44 La. Ann. 961, 11 South. 596.” (Emphasis supplied.)

In *State v. Zimnaruk*, (1941) 128 Conn. 124, 127, 20 A. 2nd 613 the complaining witness, who testified for the state, had been questioned by a county detective in the presence of a stenographer who had taken notes and later transcribed them. The defendant asked the court that the state’s attorney be required to produce them for any effect that they might have upon the credibility of the witness by reason of statements contradictory to her testimony. There was no evidence that any statements therein did contradict this testimony and the trial court refused to order their production. The supreme court held: “* * * Information disclosed to a state’s attorney for the purpose of enabling him to per-

form the duties of the office is privileged upon grounds of public policy, and an adverse party has no right to demand its production."

For the foregoing reasons it is my opinion that the rule of the *Jencks* case is contrary to former decisions of the Wisconsin supreme court and would not be followed here, and that the defense has no right to inspect prior statements of state witnesses in the absence of a showing that they would tend to impeach the witness.

WAP

Public Assistance—Aid to Dependent Children—Welfare Department—Sec. 49.53 (1), Stats., does not prohibit the applicant for public assistance from disclosing the facts relating to the same, nor does it prevent a representative of the welfare department from testifying regarding aid to dependent children in a prosecution for nonsupport under sec. 52.05, Stats., against a parent responsible for their support.

December 20, 1957.

DAVID WEBER,
District Attorney,
Sheboygan County.

You ask whether sec. 49.53 (1), Stats., prevents disclosure, in court proceedings to impose penalties for nonsupport under sec. 52.05, Stats., of amounts paid to a particular person as aid to dependent children. You state that the question arose because of the following circumstances:

"In the past it has been the procedure of the office of the district attorney in prosecuting non-support cases under section 52.05 to ascertain from the Department of Public Welfare all amounts which had been paid by that department to parties affected or possibly to be affected by a prosecution under section 52.05.

"The figures obtained (the amount paid by the State Department of Public Welfare for the support and maintenance of destitute wives and children) were then used in

the prosecution of a case and the exact figures presented to the court. To cite a specific case: several days ago we prosecuted a defendant for non-support and advised the court that in this particular case the defendant's former wife and two minor children had received aid from the Department of Public Welfare since May of 1955 in the amount of \$4,896.41 and that of that amount only \$367.00 was paid back by the defendant. These facts were, of course, used by the court in sentencing the defendant. Subsequently a radio station used the afore-quoted figures in its news cast."

Sec. 49.53 (1) provides as follows:

"The use or disclosure of information concerning applicants and recipients for any purpose not connected with the administration of aid to dependent children, aid to the blind, old-age assistance and aid to totally and permanently disabled persons, except as provided under sub. (2), is prohibited. Any person violating this section shall be punished by a fine of not less than \$25 nor more than \$500 or by imprisonment not less than 10 days nor more than one year or both."

The foregoing statute has been construed and applied in *Plainse v. Engle*, (1952) 262 Wis. 506, 56 N. W. 2d 89, 57 N. W. 2d 586, an action to declare two deeds null and void, to require defendants to satisfy certain mortgages placed by them upon the real estate, and for an accounting. The action was brought by the general guardian of the plaintiff against his daughter and her husband. As bearing upon the financial situation of the daughter, which in turn reflected upon the credibility of the contentions made by her, the plaintiff produced evidence that she had applied for aid to dependent children. The action was obviously not "connected with the administration of aid to dependent children" and the court held as follows at page 520:

"The court erred in permitting a representative of the department of public welfare to testify concerning the application of Florence for mother's aid, sec. 49.53, Stats. There was, however, other competent evidence to sustain the findings and we must hold that the court disregarded it. *Estate of Getchell*, 211 Wis. 644, 247 N. W. 859."

The "other competent evidence" is evidently that referred to at page 515 of the opinion:

"It appears from her own testimony that in 1939 after her first husband's death, Florence Engle applied for a mother's pension and now she claims that upon the death of her first husband in 1930 she received \$2,000, the proceeds of a life insurance policy; that she retained that sum and applied it to the purchase price of the home. It follows that if she did so retain that amount she misrepresented her financial status when she applied for a mother's pension."

From the foregoing it appears that in an action not connected with the administration of aid to dependent children a representative of the welfare department may not testify regarding the application for such aid, *but the applicant may so testify*. This is apparently on the ground that the secrecy provision is intended for the benefit of recipients of the aid and may be waived by them.

It is, therefore, clear that the law in no way prohibits the recipient of aid to dependent children from testifying voluntarily in relation thereto, whether in a prosecution for nonsupport or any other kind of action.

The question remains whether a representative of the welfare department may disclose such facts in connection with a prosecution for nonsupport. The answer depends on whether the prosecution is a "purpose * * * connected with the administration of aid to dependent children" within the meaning of sec. 49.53 (1).

One definition of the verb "connect" given in Webster's (Unabridged) New International Dictionary (2nd ed. 1940) is:

"3. To regard as associated;—followed by *with*; as, to *connect* prosperity with industry."

As a practical matter, when a woman and her children are receiving public assistance in the form of aid to dependent children and their need for such aid arises out of the failure of the father to support them, a prosecution for nonsupport is brought for the purpose not of sending the father to prison but of compelling him to support the family and thus eliminate or reduce the need for public assistance. This purpose is perfectly legitimate and is recognized by the statute creating the offense of nonsupport,

sec. 52.05, Stats., subsec. (3) of which provides for an order for support *pendente lite*, and subsec. (4) of which provides for an order for support in lieu of penalty and release of the defendant on probation for a period of up to 2 years.

To say that the prosecution is not connected with the administration of the aid to dependent children in the dictionary sense quoted above would be most unrealistic. As a practical matter, the administration of the aid and the prosecution are about as closely related as two things can possibly be.

Moreover, the law itself recognizes a connection. Sec. 49.19 (4) (d), relating to aid to dependent children, provides in part:

“* * * Aid may not be granted to the mother or stepmother of a dependent child unless such mother or stepmother is * * * the wife of a husband who has continuously abandoned her for at least 3 months, *if the husband has been legally charged with abandonment* under s. 52.05 or in proceedings commenced under s. 52.10, or if the mother or stepmother has been divorced from her husband for a period of at least 3 months, dating from the interlocutory order, and unable *through use of the provisions of law* to compel her former husband to support the child for whom aid is sought.”

The foregoing statute clearly demonstrates that the use of criminal or civil proceedings to compel the father to support the children and (except in the case of a divorce) the wife, is very definitely a part of the system prescribed for the administration of aid to dependent children.

The fact that the mother and children are receiving such aid is relevant to the prosecution, since it establishes their destitute and necessitous condition, which is an element of the crime.

For the foregoing reasons I am of the opinion that sec. 49.53 (1) does not prevent either the aid recipient or a representative of the welfare department from disclosing information regarding aid to dependent children in a criminal prosecution for nonsupport.

WAP

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