

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. 48

January 1, 1959, through December 31, 1959

JOHN W. REYNOLDS
Attorney General



MADISON, WISCONSIN
1959

1917

1917

RECEIVED

1917

1917

1917

1917

1917

1917

1917

1917



1917

1917

1917

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. SMYTH, 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
LAFAYETTE M. STURDE- VANT, Neillsville	from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee	from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee	from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee	from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Rich- land Center	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madi- son	from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay	from Jan. 5, 1959, to

ATTORNEY GENERAL'S OFFICE

JOHN W. REYNOLDS	Attorney General
N. S. HEFFERNAN	Deputy Attorney General
MORTIMER LEVITAN	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General
JAMES R. WEDLAKE	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
ROY G. TULANE	Assistant Attorney General
RICHARD E. BARRETT	Assistant Attorney General
GEORGE F. SIEKER	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
A. J. FEIFAREK	Assistant Attorney General
ROBERT J. VERGERONT	Assistant Attorney General
JOHN E. ARMSTRONG	Assistant Attorney General
JAMES H. McDERMOTT	Assistant Attorney General
JOHN H. BOWERS	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
ALBERT ● HARRIMAN	Assistant Attorney General
ROY G. MITA*	Assistant Attorney General
WILLIAM WILKER	Law Examiner
GEORGE SCHWAHN	Law Examiner
MILO W. OTTOW	Chief Investigator

* Appointed April 1, 1959.

OPINIONS
OF THE
ATTORNEY GENERAL
OF
WISCONSIN

VOLUME 48

Secretary of State—Corporations—Nonstock nonprofit corporation organized under ch. 181 may by virtue of sec. 181.04 (14), 181.31 (2), and 181.54, file amendment to its articles providing that the corporation shall not be dissolved without the approval of the FHA as long as such agency holds an outstanding mortgage of the corporation.

January 8, 1959.

ROBERT C. ZIMMERMAN,
Secretary of State

You have inquired whether a nonstock nonprofit corporation organized under ch. 181 of the statutes may file an amendment to its Articles to the effect that the corporation shall not be dissolved without the approval of the Federal Housing Administration as long as the F.H.A. holds a mortgage from such corporation. Apparently this requirement is imposed upon the corporation by the F.H.A. as a condition precedent to the making of a \$2,000,000 F.H.A. loan.

Sec. 181.04 provides in part:

“General powers. Each corporation, when no inconsistent provision is made by law or by its articles of incorporation, shall have power:

“* * *

“(14) To cease its corporate activities and surrender its corporate franchise.”

Sec. 181.50 prescribes the steps to be taken for voluntary dissolution of a corporation organized under ch. 181.

The question is whether the corporation may limit its statutory right to dissolve voluntarily by adopting the amendment of its articles indicated above.

It seems to be recognized that a corporation can by contract agree never to exercise the power to dissolve. This was impliedly recognized in the case of *Taylor v. National Supply Co. of Cal.* (1936), 12 Cal. App. 2d 557, 56 P. 2d 263, although under the facts of that particular case it was held that a corporation purchasing the majority of another corporation's stock had made no implied agreement never to exercise the power to dissolve the latter corporation. In other words, there appears to be no sound reason why a corporation cannot contract to forego the exercise of a statutory right and be bound thereby.

The general statement is made in Vol. 16, Fletcher Cyclopedia Corporations, ch. 65, §8013, p. 725, that a purely private corporation, owing no special duties to the public, may dispose of all of its property, divide the proceeds among its stockholders, and cease to do the business for which it was organized, at least where the exigencies of the business require it, *if its creditors are not prejudiced thereby*.

By implication it would seem that a corporation, unless prohibited by statute, should be able at the request of a lending agency to guarantee by the very form of its articles that it will not dissolve without the approval of such creditor while the indebtedness is outstanding. Certainly it may make such a commitment by a contract not to dissolve as indicated above and Fletcher, *supra*, §8016, p. 728, states as follows :

“* * * And it seems that a voluntary dissolution should not be permitted where a corporation, with the approval of its stockholders, has guaranteed the payment for a long period of years yet to run, of the preferred stock of another corporation, for a valuable consideration, where the parties cannot be put in statu quo, at least without making adequate provision for the contingent liability on the contract of guaranty; and *this is undoubtedly true where the stockholders have expressly contracted that no voluntary dissolution should affect the guaranty.*” (Emphasis supplied.)

See *Allen v. Distilling Co. of America* (1917), 87 N.J. Eq. 531, 100 A. 620. It was indicated in this case that to hold otherwise would enable a corporation to defeat valid causes of action for heavy damages by the simple expedient of dissolution and organization of a new corporation taking over the assets of the old one.

Moreover, while we have found no cases directly in point on the limitation of the corporation's statutory powers of dissolution by restrictive language in the corporate articles, we do find the general statement in *Fletcher*, supra, §2482, p. 251:

"A corporation may limit or restrict the scope of its powers and authority conferred by the statutes or general law, by appropriate provisions in the articles of incorporation."

See also: *Seamless Pressed Steel & Mfg. Co. v. Monroe* (1914), 57 Ind. App. 136, 106 N.E. 538.

This is apparently exactly what the legislature had in mind in the opening language of sec. 181.04 listing the general powers of the corporation. To paraphrase this language by narrowing it down to the specific situation here under discussion it would read so far as sub. (14) is concerned:

"When no inconsistent provision is made by its articles of incorporation each corporation shall have the power to cease its corporate activities and surrender its corporate franchise."

If the corporation wants in its corporate articles to limit, without destroying this statutory power, by providing that such power shall not be exercised without the approval of some creditor holding an outstanding and unpaid mortgage we see no reason why under the authorities here discussed it should not be permitted to do so and file an amendment to its articles so providing.

As a matter of fact this conclusion is further fortified by the provisions of sec. 181.54 relating to articles of dissolution and which reads in part:

"Articles of dissolution. When all debts, liabilities and obligations of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of the remaining property and assets of the corporation shall have been transferred, conveyed or dis-

tributed in accordance with the provisions of this chapter, articles of dissolution shall be executed in duplicate by the corporation by the president or a vice president, and the secretary or an assistant secretary, and shall be sealed with the corporate seal, if there be any, * * *"

Again this wording seems to say that the corporation is not to be dissolved until its debts have been paid or adequate provision has been made therefor. Thus the expressed public policy of ch. 181 is strongly in favor of the object sought to be obtained by the proposed amendment.

Sec. 181.31 (2) relating to the contents of articles of incorporation also provides that such articles "may include any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation".

As already pointed out, the proposed amendment is not inconsistent with law but rather tends to implement the legislative intent as to dissolution expressed in sec. 181.54.

You are therefore advised that the proposed amendment may be properly accepted and filed.

WHR

Schools and School Districts—Taxes—County school committee has no jurisdiction or authority to make adjustments in the apportionment and certification of nonresident high school tuition and transportation taxes provided by secs. 40.56 and 40.91 to correct errors in such claims in a prior year.

January 16, 1959.

C. M. MEISNER,
District Attorney,
Dunn County.

You request an opinion whether a county school committee has jurisdiction or authority to make adjustment in the apportionment of nonresident high school tuition and transportation taxes to correct an error in the apportionment of such taxes in a prior year. The question arises because of an application by a town to the committee of your county requesting it to do so.

The town asserts that, in the apportionment of such taxes in the 1957 tax roll of taxes payable in 1958, property that had been attached to a school district which operates a high school was included by the county clerk in the territory that lies outside of districts that operate a high school in his spreading of the taxes pursuant to secs. 40.56 (2) and 40.91 (5) (a). The town has refunded the alleged excessive taxes on such property to taxpayers who applied therefor and asks that the county school committee allow it a claim for the total taxes so refunded and make the necessary adjustment in a future apportionment.

Your conclusion that the county school committee has no power or authority to pass upon or allow such an asserted claim of the town or to adjust a future apportionment to effect a correction in the spreading of such taxes of a prior year is correct. The only authority such committee has in respect to nonresident high school tuition or transportation claims, or the taxes therefor, is that set forth in 40.04, which reads as follows:

“40.04 School committee functions. The county school committee shall:

“(1) Determine the amount to be allowed in excess of the established maximum on claims for transportation of nonresident high school students as provided in s. 40.56 (2).

“(2) Approve all school bus routes established by the several school districts or municipalities of the county.”

These statutory provisions do no more than confer upon the committee the function and power of passing upon and determining the amount at which a claim for nonresident high school transportation is to be allowed by the county clerk pursuant to sec. 40.56 (2) if it exceeds the state aids by more than \$36 and certifying to the county clerk its approval thereof. There being no other statutory provision giving the committee any other power or function in respect to nonresident high school transportation claims, or the taxes therefor, this is its sole jurisdiction and authority in respect to such matters.

There is no statutory provision giving such committee any power or authority relative to nonresident high school tuition claims or the taxes therefor. Accordingly, it has no power whatsoever in respect thereto.

There are provisions in secs. 40.56 (2a) and 40.91 (4) (c) that "Any errors, omissions or other corrections in the" high school transportation or tuition claims respectively "or apportionment of the * * * tax for a given year * * * may be corrected in the certification of such tax for a subsequent year". However, the statutes do not specifically provide how or who is to make such corrections in the subsequent years. As it is the county clerk with whom the respective claims are filed and by whom the apportionment of the taxes is made, it follows that any such corrections for errors of past years are to be made through adjustments by the county clerk in a subsequent year. Therefore, any assertion of an error either in the amount of a claim as filed, or in the apportionment of the taxes, in a prior year should be presented to the county clerk for his determination as to whether an error did in fact occur and for correction by adjustment in his apportionment and certification of the respective taxes to the clerks of the municipalities involved in a subsequent year.

HHP

Real Estate Brokers' Board—Corporations—Foreign corporations or individuals soliciting sales of out-of-state lands by advertisement in Wisconsin newspapers and by literature mailed directly to Wisconsin residents are probably not required to comply with the provisions of ch. 136; nor do they appear to be amenable to service of process under the provisions of secs. 262.09 (4) and 180.825.

January 23, 1959.

WISCONSIN REAL ESTATE BROKERS' BOARD.

You state that during the last several years Florida real estate developers, which are for the most part corporations organized under Florida law with offices in Florida, have conducted land sale promotions and have disseminated information with reference thereto by placing large advertisements in local newspapers and by direct mail, and that agents do not generally appear in person in Wisconsin. You

state that the purchaser usually signs a contract similar to a land contract, pays \$10 down and agrees to pay \$25 per month, and mails the contract and payment to Florida where it is accepted, and a copy is thereafter returned to the purchaser indicating the location of the lot. Upon complying with the terms of the land contract a warranty deed will be given the purchaser.

You inquire as follows:

1. Whether foreign corporations or individuals engaged in the solicitation of sales of out-of-state real estate by means of Wisconsin newspaper advertisements and literature mailed directly to Wisconsin residents are required to be licensed as real estate brokers under ch. 136, Stats.

2. Whether such corporations or individuals so operating are subject to service of process under sec. 262.09 (4) and sec. 180.825, Stats.

The primary problem presented by your first question is not whether the foreign corporations or individuals can be brought under the definition of brokers and salesmen stated in sec. 136.01 (2) (a) and (b), but whether the state of Wisconsin has the power to regulate them when their only contact with the state is by mail and by advertisements in Wisconsin newspapers. Sec. 136.01 (2) (a) and (b) provide:

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

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

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

It would appear that the Florida realtors would be “offering” real estate for sale within the definition of the statute if they solicited sales of Florida real estate by placing advertisements in Wisconsin newspapers or by a direct mail campaign directed to Wisconsin residents.

However, even if their conduct is that described by the statute, is this activity sufficient to give the state of Wisconsin the power to require them to obtain licenses pursuant to sec. 136.02, which provides in part:

“No person shall engage in or follow the business or occupation of, or advertise or hold himself out as or act temporarily or otherwise as a real estate broker or salesman * * * without a license. * * *”

Or in the event that they fail to obtain a license, can the state punish them under the provisions of sec. 136.16 (1), which states:

“Any person who engages in or follows the business or occupation of, or advertises or holds himself out as or acts temporarily or otherwise as a real estate broker or salesman in this state without a license, or who otherwise violates any provision of this chapter, shall be fined not less than \$25 nor more than \$5,000 or imprisoned not less than 10 days nor more than 6 months or both.”

Interstate commerce as that term is used in the law is not involved in the matters with which we are here concerned. Real estate is not a subject of interstate commerce, 15 C. J. S. 277, 278; *Wisconsin Trust Co. v. Munday*, (1918) 168 Wis. 31, 168 N. W. 393, 169 N. W. 612; *Munday v. Wisconsin Trust Co. et al.*, (1920) 252 U. S. 499, 40 S. Ct. 365, 64 L. ed. 684; *Gross Income Tax Division v. Bartlett*, 228 Ind. 505, 93 N. E. 2d 174, appeal dismissed for lack of substantial federal question in 71 S. Ct. 499, 3 cases 340 U. S. 924; nor has the federal government preempted the field.

Even in matters involving interstate commerce, state regulation is permissible in certain instances.

The basis of the power of the state or of its agencies, such as the Wisconsin real estate brokers' board, to regulate foreign corporations or individuals must be derived from the contacts which the foreign corporation or individuals have with the state. Since the decision in *Metropolitan Finance Corp. v. Matthews*, (1953) 265 Wis. 275, 61 N. W. 2d 502, the rule in Wisconsin is that if the only contact with the state is by mail or newspaper advertisements, that contact, by itself, is not sufficient to give the state regulatory power. In that case Metropolitan sought to obtain a declaratory judgment that it was not required to comply with the provisions of sec. 218.04, or of regulations made by the defendant commissioner of banks pursuant thereto, and to obtain an injunction to prevent the defendant from enforce-

ing said provisions against it. Metropolitan Finance Corporation was a Missouri corporation with its principal office at Kansas City, Missouri. It was engaged in the business of collecting unpaid accounts and notes throughout the several states of the United States. It conducted its collection business by making use of residents of Wisconsin who were independent contractors who solicited various creditors within Wisconsin to assign their accounts to the corporation for collection. Under its mode of operation such independent contractors were contacted solely through newspaper advertisements and the use of the mails. The solicitors secured only offers to assign accounts from creditors, such offers being subject to acceptance or rejection by Metropolitan at its office in Kansas City. Thereafter the only activity of Metropolitan in Wisconsin was to solicit debtors by mail to pay their accounts, and then to remit to the creditors in Wisconsin their proportionate share of the sum so collected.

In affirming the lower court's judgment which declared that Metropolitan was engaged in interstate commerce exclusively, that the Wisconsin statutes had no application, that Metropolitan was not required to obtain a license nor to comply with any of the provisions of the regulations, and which further enjoined and restrained the commissioner of banks from enforcing or attempting to enforce said provisions against Metropolitan, the supreme court stated at page 279:

"Thus each case must be considered upon its own facts. So long as the solicitors are independent contractors and not subject to the direction of the plaintiff, its proposed activities within Wisconsin would be so minor that they would not be subject to regulation by the state. That may not be true so far as the solicitors are concerned. * * *"

The court also stated at p. 278 the following general test that is to be used in cases where the state's power to regulate is questioned:

"* * * So far as it is possible to state an applicable rule in general terms, it is as follows: If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regu-

lation under the police power, unless congress has, by appropriate legislation, preempted the field with reference thereto."

Although the court subsequently in *Meyers v. Matthews*, (1955) 270 Wis. 453, 71 N. W. 2d 368, held that the solicitors of Metropolitan and Metropolitan itself were subject to regulation by the state, it was very careful to point out that this was based solely on the fact that the solicitors were the agents of Metropolitan and that Metropolitan was doing business in Wisconsin because of the fact that they had agents operating in the state. The court specifically stated that it was not overruling *Metropolitan Finance Corp. v. Matthews*, supra.

The similarity between the operation of Metropolitan, while the solicitors were considered independent contractors, and the Florida realtors is obvious. The only contact of either with the state is by mail and by newspaper advertisements; the regulatory statutes are equally broad and would cover their activity by definition; both operate in a field that has historically been one that has required regulation to prevent fraud. If anything, a stronger argument could be given to support the proposition that Metropolitan had business which "has incidents and requires activities within the state intimately related to local welfare" than would the Florida realtors. Metropolitan was in the business of collecting debts owing Wisconsin creditors by Wisconsin debtors, and in doing this they arranged their initial contacts with the creditors through solicitors who were Wisconsin residents. The Florida realtors are selling land located in Florida to Wisconsin residents. They have contact only with those who respond to their advertisements.

It is our opinion that the decision in *Metropolitan Finance Corp. v. Matthews*, supra, controls the factual situation that you have presented, and that therefore the Wisconsin real estate brokers' board does not have the authority to require foreign corporations or individuals engaged in the solicitation of sales of out-of-state real estate by means of Wisconsin newspaper advertisements and literature mailed directly to Wisconsin residents to be licensed as real estate brokers under ch. 136.

The second question presented poses a similar problem—are the activities of the Florida realtors of such substantial and extensive nature as to constitute “doing business in Wisconsin” under sec. 262.09 (4)? That section provides:

“(4) If the defendant is a foreign corporation (including one created by or under any act of Congress) and (a) is doing business in Wisconsin at the time of service, or (b) the cause of action against it arose out of the doing of business in Wisconsin, service may be made in accordance with the provisions of s. 180.825 or by delivering within or without the state a copy of the summons to any officer, director or managing agent of the corporation.”

In recent years the supreme court of the United States and the federal courts have considerably broadened the constitutional limits within which a state is allowed to subject foreign corporations to the jurisdiction of its courts. *McGee v. International Life Insurance Co.*, (1957) 355 U. S. 220; *J. C. Schutt v. The Commercial Travelers Mutual Accident Associations of America*, (1956) 2nd Cir., 229 F. 2d 158, cert. denied 351 U. S. 940 (1957); *Parmalee v. Iowa State Traveling Men's Assn.*, (1953) 5th cir., 206 F. 2d 518; *Parmalee v. Commercial Travelers Mutual Acc. Assn. of America*, (1953) 5th cir., 206 F. 2d 523; *Travelers Health Ass'n. v. Virginia ex rel. State Corporation Comm'n.*, (1950) 339 U. S. 643.

But these cases can only be used as general guides to the maximum power of a state under a particular statute to subject a foreign corporation to the jurisdiction of its courts. Each individual state statute must be read with the decisions of that state supreme court which construe it.

In Wisconsin sec. 262.09 (4) requires that the corporation “* * * (a) is doing business in Wisconsin at the time of service, or (b) the cause of action against it arose out of the doing of business in Wisconsin, * * *” if it is to be amenable to service.

Sec. 180.825 is limited in its application by subsec. (3) which states:

“(3) Service under this section can be made upon a foreign corporation only in any action or proceeding arising out of or relating to any business transacted or property

acquired, held or disposed of by such foreign corporation within this state."

A revision committee note, 1953, to sec. 180.825 states: "The limitations on the type of action in which service can be made upon a foreign corporation under (3) parallel those in 180.847. (Bill 524-S)".

Sec. 180.847 provides in part:

"180.847 Transacting business without certificate of authority. (1) No foreign corporation transacting business or acquiring, holding or disposing of property in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be permitted to maintain or defend a civil action or special proceeding in any court of this state, until such corporation shall have obtained a certificate of authority. * * *"

The supreme court construed sec. 180.847 in *Bulova Watch Co. v. Anderson*, (1955) 270 Wis. 21, 70 N. W. 2d 243. In this case Bulova brought suit against the defendant, a Wisconsin resident, to enjoin and restrain him from selling its watches at prices less than those established by Bulova under sec. 133.25. The defendant's demurrer was sustained by the lower court on the grounds that the plaintiff foreign corporation lacked capacity to sue under sec. 180.847, since it had not acquired a certificate of authority. This order was reversed by the supreme court which held that Bulova was not transacting business in the state within the meaning of the statute. Bulova's contact with the state consisted of accepting orders from Wisconsin residents in its home office in New York and then shipping the merchandise requested to the Wisconsin residents. The court stated the following rule while discussing the transaction of business within a state:

"4. *In order for a foreign corporation to transact business in a state, it must be physically present within the state in the sense of having an officer or agent there who is performing some act on behalf of the corporation.*" (Emphasis added.)

The concept of "doing business in Wisconsin" under sec. 262.09 (4) was discussed by the supreme court in *Mitchell v. Airline Reservations, Inc.*, (1953) 265 Wis. 313, 61 N. W.

2d 496. The defendant corporation's contact with the state consisted of selling its tickets to the plaintiff, and later to another Wisconsin resident. The two dealers then sold the tickets to the public.

The supreme court affirmed a lower court order which quashed the plaintiff's service which was made pursuant to the statute. The order stated in part at pp. 314-315 :

“ * * * The mere fact that an officer, to wit: The treasurer of the Airline Reservations, Inc., was physically present in Milwaukee, Wisconsin, or that there are agents or subsidiaries within the state who deal with its products or merchandise, does not establish the defendant's corporate presence within the state in a manner so that it was doing or conducting business within this state within the meaning of the statute.’ ”

An analysis of the defendant's activities within the state was given by the supreme court in the following language at pp. 315-316 :

“Airline Reservations, Inc., is a foreign corporation. It owns no property in the state of Wisconsin, has no office or place of business in the state of Wisconsin, and has no authorized agent in Wisconsin. The plaintiff Mitchell and the codefendants Aldrich are independent ticket agencies, or operators in business for themselves, selling air-line tickets and located in Milwaukee. Although Mitchell sold defendant corporation's North Star tickets and was the sole seller of such tickets, codefendants Aldrich sold tickets of other air lines as well as tickets of the defendant corporation. The record shows that the plaintiff and later codefendants Aldrich merely sold tickets of the defendant corporation and in no other way represented said defendant corporation. * * * ”

Several subsequent decisions of the Wisconsin supreme court have held that particular foreign corporations were amenable to service under sec. 262.09 (4). However, in each of these cases the foreign corporation had its agents operating within the state. *Behling v. Wisconsin Hydro Electric Co.*, (1956) 275 Wis. 569, 83 N. W. 2d 162; *Prime Manufacturing Co. v. Kelly*, (1958) 3 Wis. 2d 156, 87 N. W. 2d 788; *Huck v. Chicago, St. P., M. & O. R. Co.*, (1958) 4 Wis. 2d 132, 90 N. W. 2d 154.

The *Huck* decision states the broadest definition of “doing

business in Wisconsin" contained in the three opinions. In that case the defendant corporation was served pursuant to sec. 262.09 (4). The defendant had no trackage in Wisconsin. However, it did have an office in Milwaukee for 30 years and was listed in the city telephone directory. Employees at the office consisted of a general agent, a secretary and three traffic representatives. The work of the agent and the representatives consisted of the solicitation of business for the defendant corporation. To effect this the representatives operated throughout the state. Advertisements were published in Wisconsin newspapers and advertisements were mailed to 300 Wisconsin shippers by the office. The office was also equipped to, and did, trace shipments for its Wisconsin customers. On these facts the lower court held that the defendant was not doing business within the meaning of the statute. The supreme court reversed the lower court, concluding with the following statement at p. 141 :

"It is our considered judgment that the solicitation activities of Rock Island in this state were of such substantial and extensive nature as to constitute the doing of business within the state under the provisions of sec. 262.09 (4), Stats., and we so hold."

It is evident, from the discussion of the foregoing cases, that sec. 262.09 (4) has never been construed to extend state jurisdiction over foreign corporations whose only contact with the state is by mail or by advertisements in Wisconsin newspapers. It would appear that, upon consideration of the decisions by the present Wisconsin supreme court, it is necessary for the foreign corporation to have an agent operating within the state if service under the statute is to be valid.

It is our opinion that a foreign corporation would not be amenable to service of process under the provisions of sec. 262.09 (4), if its only contact with the state is by mail or by advertisements in Wisconsin newspapers.

It is to be noted that there is no statute comparable to sec. 262.09 (4) by which personal service or its equivalent can be made on nonresident individuals who have never been residents of this state or who are not officers of domestic corporations. See secs. 262.08, 262.12 and 262.13.

RGT:RJV

Taxes—Schools and School Districts—Errors in the filing of claims or in the apportionment of nonresident high school tuition and transportation taxes under secs. 40.56 and 40.91, are correctible by the county clerk in the certifications of taxes thereunder in a subsequent year. Secs. 74.64 and 74.73 are not applicable thereto.

February 3, 1959.

FREDERIC EBERLEIN,
District Attorney,
Shawano County.

In requesting an opinion you submitted the following :

On April 19, 1955 the county school committee of your county issued an order, effective July 1, 1955, annexing school district #2 of the Town of Wescott (called the Oak Park district) to joint school district #8 of the City of Shawano, et al., (called the City of Shawano district). At the time said Oak Park district and school district #7 of the Town of Wescott (called the Murray Creek district) were the only two school districts in the Town of Wescott not operating high schools. Said City of Shawano district at that time, and ever since, has operated a high school. The equalized value of the Oak Park district was \$503,100 and the equalized value of the Murray Creek district was \$1,015,220, making the total equalized valuation of said two districts, \$1,518,320.

The statement of taxes and indebtedness, dated February 14, 1956, filed with the department of taxation pursuant to secs. 68.01, et seq., Stats., by the clerk of the town, which is a report relative to and based upon the 1955 town tax roll of the taxes payable in 1956, shows a separate assessed property valuation for each of said school districts and for the portion of the City of Shawano district in the town, as such districts were comprised on the assessment date of May 1, 1955. There was no indication therein that the Oak Park district had been attached to the City of Shawano district and it appears that the department of taxation was not informed thereof when later in 1956 it determined and certified the equalized valuations to the county clerk pursuant to sec. 40.91 (5) (a), Stats., for use in apportioning the non-

resident high school tuition and transportation taxes for inclusion in the 1956 tax rolls of taxes payable in 1957. The equalized value of territory in the Town of Wescott not in a school district operating a high school was thus certified as \$1,518,320, which is the total of the equalized valuations of the property in both the Oak Park and the Murray Creek districts.

Accordingly, the county clerk, in apportioning the total claims for nonresident high school tuition and transportation taxes in 1956 included said figure of \$1,518,320 in the total equalized value of all property in the county lying outside of a school district operating a high school, and also in the equalized valuation of that portion of the Town of Wescott not in a school district which operated a high school, and then certified the resulting proportionate amounts to the clerks of the several municipalities, including the Town of Wescott, upon that basis. As a result, the amount so certified to the clerk of the Town of Wescott was excessive by virtue of using such figure, which included the \$503,100 of equalized valuation of the property in the Oak Park district in the equalized value of territory in the Town of Wescott. However, in making up the 1956 tax roll of taxes payable in 1957, the clerk of the Town of Wescott spread the entire amount of the tax so certified over only the territory in the Murray Creek district, that being the only territory in the town then not a part of a district operating a high school. There was thus included in said tax roll and collected from the property in the Murray Creek district for nonresident high school tuition taxes in the neighborhood of \$3,000, which you compute to be \$3,286.05, in excess of what should have been paid.

In addition to such submitted facts, we assume that, in the 1955 town tax roll of taxes payable in 1956, the Oak Park district property was subjected to the City of Shawano district tax of that year and also was included in the property over which the taxes for nonresident high school tuition and transportation claims of the school year 1954-1955 were spread. Under all of these circumstances, both the computation of the taxes for nonresident high school tuition and transportation claims of the school year 1955-1956 and the

collection from only the property in the Murray Creek district, were in error. You have therefore asked several questions relative to a correction thereof.

At the time of such errors, only sec. 40.56, Stats., contained a provision for correction of errors in transportation claims and the apportionment thereof and there was no comparable provision in sec. 40.91, Stats., covering non-resident high school tuition claims. However, ch. 97, sec. 15, Laws 1957, effective on May 18, 1957 created the present provisions of sec. 40.91 (4) (c) which read:

“(c) Any errors, omissions or other corrections in the high school tuition claims or apportionment of the high school tuition tax for a given year after 1946 may be corrected in the certification of such tax for a subsequent year.”

The provisions of sec. 40.56 (2a), which were existent at the time, are in practically identical language except for use of the year 1949. Although the legislature has thus expressly authorized the correction of any errors in either tuition or transportation claims, and the taxes therefor, in a later year, no mechanics or procedure to be followed in doing so has been set out therein.

It is clear that by these provisions the legislature has declared the over-all policy that correction of errors in a past year may be made in a subsequent year. In view of the absence of any specific procedure or mechanics to be followed in doing so, the statement that such corrections shall be in the “certification” of the tax in a subsequent year is a recognition that the errors may occur in such variant and complex circumstances that corrections thereof can be made only through such adjustments in the apportionment and certification of such taxes in a subsequent year that are reasonable and will accomplish, so far as practicable, rectification thereof by following and utilizing such of the existing tax procedures as lend themselves thereto. The language, “*in the certification* of such tax for a subsequent year”, thus says that the necessary adjustments in a subsequent year are to be made by the one who makes the “certification” of the taxes under secs. 40.56 and 40.91, Stats., which is the county clerk.

Accordingly, if there is an assertion of an error in a claim filed with the county clerk under either of these statutes or in the apportionment thereof or the certification of the tax by him, it should be presented to the county clerk for his determination as to whether an error did occur. In his passing thereon, he has available assistance from the county superintendent of schools, the state superintendent of public instruction and the department of taxation. If an error has occurred, then the county clerk should make a correct recomputation of the apportionment, which will result in debits and credits to the several municipalities and the areas therein. He should then apply them in reduction and increase of the amounts which would otherwise be certified to the local municipalities for inclusion in the current year's tax roll in respect to the areas to which they are pertinent and then make the certification of taxes in the current year accordingly.

By so doing, the error will be corrected, to the extent it is practicable, except in respect to an area which was subjected to an excessive amount in the spreading of the tax in the prior year and is thus subject to a credit, but is no longer subject to the tax in the year of correction because it is then a part of a school district which is operating a high school. In this situation, the amount of such credit will be collected from the additions to the current year's tax certified for areas against which debits are applicable in correction of the prior year's apportionment or certification. When the certified taxes in the year of correction are collected, the county will have proceeds available to and should then remit the amount of any such credit to the clerk of the city, village or town in which such area, that is entitled to such credit and from which no such tax was collected, is located. The officials thereof will have the records showing the taxpayers who paid the excess taxes in the prior year giving rise to the credit and should then disburse the same to such taxpayers as a refund of the erroneously corrected taxes.

As respects any areas no longer subject to the tax for the current year's tuition and transportation claims because in a school district operating a high school but which should have paid a larger tax in the year being corrected, the

amount of the debit for the increased amount that such area should have paid in the prior year can be included in a current year's certification for imposition against such area the same as if it were subject to an apportionment of the current year's tuition and transportation claims. Thus, it would only be in an instance where an area is not subject to the current year's taxes but is entitled to a credit for an excess of taxes paid therein in a prior year, that the refund to such area could not be accomplished in the certification of an amount of tax to be collected therefrom in the year of correction and a payment would be made to the local municipality for it to effect the refund. In all other cases, the adjustments would be effected through the collection of the debits or additions to the current year's apportionment for the amount necessary to pick up the underpayment by the area in the prior year. This method is the only one which appears to be feasible and consistent with the accomplishment of the corrections by the county clerk under the existing tax imposition and collection mechanics and procedures.

Next there is presented the question of whether secs. 74.64 and 74.73 are available to a taxpayer who asserts that an excessive tax for nonresident high school tuition or transportation claims has been paid because of an error in the filing of a claim or in the apportionment and certification of the taxes, under secs. 40.56 and 49.91. Sec. 74.64 provides that a taxpayer, within 2 years after the payment of an improper state or county tax, may file a claim with the county board and obtain refund of the amount it finds was improper. However, as sec. 40.91 (5) (a) says specifically that the tax should be entered in the "local column" in the tax roll, it is our opinion that for the purposes of sec. 74.64, the taxes imposed under secs. 40.56 and 40.91 are not state or county taxes but are local taxes in a nature of school district taxes. Sec. 74.64 therefore is not available in respect to such taxes.

Sec. 74.73, however, is not limited to a state or county tax but provides that any person may file a claim for the refund of "any unlawful tax" with the local municipality within one year after the payment thereof. On their face, these provisions in sec. 74.73 would appear to be available to a taxpayer who has paid an excessive tax imposed by secs.

40.56 or 40.91. But, upon closer examination thereof, the result that would follow therefrom as respects reimbursement of the local municipality for refunds it might make thereunder, demonstrates the inapplicability thereof. The local municipality making the refund would have to present the matter to the county clerk for correction in the next certification and obviously, the allowance of the claim and the making of a refund would depend upon the county clerk's determination that an error had occurred so as to entitle the taxpayer to a refund. In order to insure reimbursement, it would seem necessary that the local municipality obtain an advance commitment from the county clerk that an error had occurred before it allows a claim. This would present some difficulty but it could work in respects to a situation where the property on which the excessive tax was laid is no longer outside of a district operating a high school in the year of correction so that the only means of effecting a refund would be remittance of the credit when collected to the local municipality for distribution as indicated previously. The total amount due the area for the credit arising out of the adjustments for the error in the prior year would be remitted to the local municipality which could then reimburse itself for any amounts refunded and make distribution of the remaining amounts to the other taxpayers in the area entitled to the refund even though they had not filed a claim therefor. This shows that it would be unnecessary for a taxpayer in such an area to file a claim under sec. 74.73 because he would be paid the refund through the above procedure in any event.

On the other hand, if the property of the taxpayer receiving the refund under sec. 74.73 was in an area which at the time of the correction is still outside of a district operating a high school, the credit to which it would be entitled would be applied by the county clerk in reduction of the taxes certified for the current year against that area. Obviously, as all of the credits to which areas are entitled upon the adjustment of the error equal the total amount of the additions spread against other areas, there would be no funds collected that would be available for remittance to the municipality to reimburse it for the refund claims which it had allowed and paid. Furthermore, as such taxpayers in that

area would already have received the benefit of the credit by the application thereof to reduce their current year's taxes under said secs. 40.56 or 40.91, any remittance to the local municipality would have the effect of passing to the taxpayer a double benefit to correct the error in a prior year. Any attempt to merely reimburse the local municipality for such refunds as it might have made to taxpayers in such an area would result in further inequality if only a part of the taxpayers in the area had filed claims and had them paid by the local municipality.

The county clerk does not have any list of the individual properties against which the taxes under secs. 40.56 or 40.91 are to be spread in his apportionment and certification each year, but only has the areas. It would thus be impossible for him to make his adjustments in the certification of the current year in correction of an error in a prior year so as to give credit in reduction of the current year's taxes to only those properties subject to such tax in that year who had not applied for and received a refund from the local municipality in respect to the error of the prior year. Each of the credits and debits applied in the year of correction, of necessity applies to a whole area and cannot be broken down by him to individual properties. By the very nature thereof, the credit or debit adjustment must be applied in the current certification to all of the properties in the particular area to which it is applicable. It seems obvious therefrom that the provisions of sec. 74.73 would be inappropriate to effect correction of the prior error as to an area that is subject to the current year's taxes in the year of correction and is entitled to a credit for an excess amount paid in a prior year due to the error.

At the time the local municipality would allow payment of the claim under sec. 74.73 it would not be possible to determine whether the property would be subject to the current year's taxes under these sections in the year in which the adjustment will be made. It is thus not possible to differentiate between refunds on the basis of whether or not the property upon which the excessive tax was paid will be subject to the current year's taxes in the year in which the adjustment is made, so that sec. 74.73 would be available for refund where the property would not be subject to cur-

rent taxes when the adjustment for the error is made but would not be available where the property would be subject to such current taxes in the year of correction. Any attempt to make any such construction of sec. 74.73 would do violence to its language. If the section is applicable it extends to all matters coming within its language.

It must therefore be concluded that the language in secs. 40.56 (2a) and 40.91 (4) (c) that errors in such taxes "may be corrected in the certification of such tax for a subsequent year" is intended to prescribe the exclusive means or procedure for correction of such errors and the provisions in sec. 74.73 are not applicable thereto.

It is therefore our opinion that the correction of any errors in the filing of claims for nonresident high school tuition or transportation, or in the apportionment or certification of taxes by the county clerk, under secs. 40.56 and 40.91, is to be effected exclusively by adjustments by the county clerk in the apportionment and certification under those sections in a subsequent year; that neither sec. 74.64 nor sec. 74.73 are applicable or available to a taxpayer for a refund of any asserted excessive taxes arising out of such errors; and that where the adjustment in the subsequent year results in a credit to an area which is not subject to the current tax under secs. 40.56 or 40.91 for the year in which the correction is made, the county clerk shall effect a remittance therefor out of the proceeds of the collections of the current year's taxes to the local municipality for distribution to the taxpayers who paid the excessive amounts making up such credit. Such remittance for a credit is to be made to the local municipality only in that situation, because in all other instances the benefit of the correction will be obtained by the application of the credit in reduction of the tax otherwise payable by the property in the year in which the correction is made.

The foregoing pertains only to errors that occurred in the filing of claims, in apportionment by the county clerk or in his certifications of taxes to the local municipalities. If the only error was one in the spreading of the tax by the local municipal clerk, such error cannot be corrected by the county clerk. Sec. 74.73 would be applicable as the remedy of a taxpayer who paid an excessive amount due to the error of the

local clerk in spreading a correctly certified tax. The liability as respects any such errors would fall upon the local municipality and would not be correctible under secs. 40.56 (2a) or 40.91 (4) (c).

HHP

Retirement Systems—Public Officers and Employees—An elected county official having elected to be included under Wisconsin retirement fund cannot withdraw therefrom. Compulsory retirement under sec. 66.906 produces vacancy in office in purview of sec. 17.03. Officer holding over after term is de facto officer and entitled to compensation until successor is elected or appointed.

February 5, 1959.

S. RICHARD HEATH,
Corporation Counsel,
Fond du Lac County.

You have asked for my opinion as to whether a vacancy exists in the office of register of deeds for Fond du Lac county based upon the following facts: In 1946, J. G. Brunkhorst, who was then register of deeds, elected to be included within the provisions of the statutes relating to the Wisconsin (municipal) retirement fund. Ever since that time Brunkhorst has held that office and still maintains his right thereto. In July 1957, Brunkhorst's retirement annuity exceeded the 25% limit specified in former sec. 66.90 (9), Wis. Stats. Thereupon, the Wisconsin retirement fund was officially notified that the county board, in view of this and the fact that Brunkhorst was over 65 years of age, had authorized his continued employment until the end of his current term, pursuant to sec. 66.906 (1), Wis. Stats. (formerly sec. 66.90 (9) (b)). Late in 1958, the Fond du Lac county board passed another resolution which in effect expressed its intent not to grant any further continuance of Brunkhorst's employment. Brunkhorst has continued to perform the duties of the office of register of deeds, however, and insists he has a right to this office.

It is well settled in Wisconsin that an elected county official who at his own request is included within the Wisconsin retirement fund cannot later withdraw therefrom. See 35 O.A.G. 21 and Sec. 26, Ch. 206, Laws 1947. This principle seems well accepted in other jurisdictions. Such a choice by a public official was held not only to be binding upon him but upon the voting public.

In the case of *Williams v. Contributory Retirement Appeal Board* (1939), 304 Mass. 601, 24 N. E. 2d 525, which was a certiorari proceeding against the retirement board to review the retirement of petitioner Williams as register of deeds, the court held:

“* * * It is true that in the present case the voters, by casting their votes for petitioner cannot be presumed to have known that the term of office of the petitioner might be curtailed by acceptance by him of membership in a retirement system, operative not before but after his election; but nevertheless the system was one authorized by the Legislature and binding on the public * * * and the petitioner in accepting membership therein must be held to have done so under legislative sanction and to be bound thereby. * * * the petitioner, having made such an election, was not at liberty to withdraw from membership as he was about to reach the time fixed for retirement, and thereafter continue to serve for the remainder of the term for which he had been elected.”

Sec. 17.03, Wis. Stats., provides:

“Any public office * * * shall become vacant upon the happening of either of the following events:

“* * *

“(10) On the happening of any other event which is declared by special provision of law to create a vacancy.”

It has been urged that even though the incumbent is legally required to retire from county employment under sec. 66.906 (1), still no vacancy exists within the meaning of sec. 17.03 inasmuch as no reference is made to the word “vacancy” in the retirement law.

The word “vacancy” as applied to an office has no technical meaning. It is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has the lawful right to continue until the happening of some future

event. *State ex rel. Martin v. Ekern* (1938), 228 Wis. 645, 658, 280 N. W. 393. In fact, our supreme court has held, without referring to any special statute using the word "vacancy" that a vacancy may be created in a public office by the election of an ineligible candidate. *State ex rel. Bancroft v. Frear* (1910), 144 Wis. 79, 87, 128 N. W. 1068; *State ex rel. McKeever v. Cameron* (1923), 179 Wis. 405, 192 N. W. 374.

Sec. 66.906 (1) (a) provides:

"Any participating employe * * * who has attained age 65 or more on the effective date *shall be retired* * * * unless written notice is received by the board certifying that the governing body of the municipality by which such employe is employed has specifically authorized such employe to continue in employment * * *."

The language of the statute is obviously mandatory in its effect, i.e., the retirement of the employe must be effectuated upon the happening of the events specified and may be delayed only by the written notice referred to therein. To give the statute any other meaning would produce absurd results, lending confusion and uncertainty to the retirement laws. No statute should be construed so as to work an absurd result. *Laridaen v. Railway Express Co.* (1950), 259 Wis. 178, 182, 47 N. W. 2d 727. Such a construction is also in harmony with the stated purpose of the Wisconsin retirement fund. Sec. 66.90 (1), *State ex rel. Morse v. Christianson* (1952), 262 Wis. 262, 266, 55 N. W. 2d 20. If the retirement of an employe or public officer is mandatory upon the happening of certain circumstances, it must logically follow that upon the happening of those same circumstances there is a vacancy in the office occupied by him. When the circumstances come to pass which invoke mandatory retirement, there must be a vacancy in the office concerned within the purview of sec. 17.03. In this connection, it may be noted in passing that once this situation obtains, it is doubtful that it may be altered retroactively by action of the governing body of the municipality. A construction of a statute which gives it a retroactive effect is not favored unless that purpose on the part of the legislature plainly appears. *Northern Supply Co. v. Milwaukee* (1949), 255 Wis. 509, 516, 39 N. W. 2d 379.

Turning to the instant case, it is my opinion on the basis of the facts submitted that there has been a vacancy in the office of register of deeds of Fond du Lac County since the beginning of the current term, i.e., January 5, 1959. The vacancy has occurred by virtue of the special provisions of sec. 66.906 calling for the compulsory retirement of the incumbent, which retirement necessarily produces a vacancy in that office. The incumbent having continued to perform the duties of said office after his retirement is a de facto officer holding over after the expiration of his term and may continue to serve as such until the filling of such vacancy by appointment or election of his successor. 67 C.J.S. 444, Officers, Sec. 141. It is my further opinion that as long as the incumbent de facto officer continues to so perform the duties of such office, he is entitled to the compensation attached to the office so long as there is no de jure officer adversely contesting his right to the same. 67 C.J.S. 446, Officers, Sec. 145.

JEA

Words and Phrases—County—A “county nursing home” for the care and treatment of the aged infirm and chronic invalids would be a “county building” under sec. 67.04 (1) (a) which the county could provide by the issuance of its general obligation bonds.

February 11, 1959.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County.

It appears that the Manitowoc county board has authorized an application to the housing and home finance agency for the advancement of federal funds for the planning of a new county institution that is intended to house the aged and infirm people in need of nursing care. The county presently has an old folks' home that was designed for ambulatory patients but there are no regular nurses in attendance or medical services regularly available. It is your under-

standing that the proposed institution would be classified by the Wisconsin state board of health as a "nursing home". It would be distinguished from the existing home for the aged in the fact that it would be equipped to provide essentially for nonambulatory patients—for those who are aged and infirm and in need of regular nursing and medical services. In connection with this application to the housing and home finance agency the question has been raised as to whether Manitowoc county could issue general obligation bonds to finance the construction of this "County Nursing Home".

Secs. 49.171 and 51.25, Stats., provide in part:

"49.171 (1) Each county * * * may establish * * * a county infirmary for the treatment, care and maintenance of the aged infirm.

"* * *

"(3) As used in sections 49.171 to 49.173:

"* * *

"(b) A county infirmary is a county institution * * *."

"51.25 (1) Any county may establish a hospital *or facilities* for the detention and care of chronic mentally ill persons, mentally infirm persons * * * and chronic invalids * * *."

Regardless of the name by which the proposed institution may be known, it appears to me that it is essentially an infirmary, hospital or "facility" for the care and treatment of the aged infirm and chronic invalids which the county is authorized to establish under secs. 49.171 and 51.25.

Sec. 67.04 (1) provides:

"Municipalities are empowered to borrow money, subject to the general limitation of amounts prescribed by section 67.03, and subject in some specific cases to the further limitations prescribed by this section, and to issue bonds therefor, for the purposes enumerated in this section. Such bonds may be issued:

"(1) By any county:

"(a) To acquire sites, to equip and otherwise generally provide * * * county buildings, including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses * * *."

In 39 O.A.G. 367 it was held that under sec. 67.04 (1) (a) a county could issue general obligation bonds to finance the

construction of a grandstand on its fairgrounds. In that opinion it was stated:

“It appears that a grandstand containing an exposition hall and club rooms such as you have described would constitute a ‘county building’ within the meaning of the above statute. * * *

“* * *

“Does the fact that the words ‘county buildings’ in sec. 67.04 (1) (a) are followed by a clause reading, ‘including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses and houses of correction,’ limit the application of the words ‘county buildings’ to those structures specifically named in the clause above quoted under the rule of *noscitur a sociis* or *ejusdem generis*?

“I think not. The doctrine of *noscitur a sociis* may not be so applied as to render general words used in legislative enactments meaningless. *Neenah v. Krueger*, 206 Wis. 473. Also in *Boardman v. State*, 203 Wis. 173, in construing a statute enumerating certain buildings and containing the words ‘or other building’ it was held that the words ‘or other building’ included a building of a type other than those specifically described and that the rule of *noscitur a sociis* or of *ejusdem generis* did not apply. Consequently it is considered that the words ‘county buildings’ in sec. 67.04 (1) (a) refer to any buildings which by law the county is authorized to own and maintain.”

In 40 O.A.G. 9 it was held that a city and county were authorized to issue general obligation bonds to finance their respective shares of the cost of constructing a building which would be essentially a combination courthouse and city hall although it would be called a “Safety Building”.

Secs. 14.53 (5a) and 67.02 (3) provide:

“14.53 Duties of attorney general. The attorney general shall:

“* * *

“(5a) EXAMINATION OF BONDS, CERTIFICATE OF ATTORNEY GENERAL. Examine a certified copy of all proceedings preliminary to any issue of state bonds, and, if found regular and valid, indorse on each bond his certificate of such examination and validity, and that said bond is incontestable, except for constitutional reasons, unless an action making such contest shall be brought in a court having jurisdiction of the action within thirty days from the date of said certificate, and make similar examinations and certificates re-

specting municipal bonds in the cases specified in subsection (3) of section 67.02, except that the thirty days' limitation shall commence to run upon the recording of the attorney general's certificate in the office of the clerk of the municipality issuing the bonds, and the certificate shall so state."

"67.02 (3) The governing body of any municipality about to issue municipal bonds may, in its discretion, submit to the attorney-general a certified copy of all its proceedings preliminary to such issue, and also the unsigned bonds, for examination and certification as provided by subsection (5a) of section 14.53. * * *"

Notwithstanding the fact that sec. 67.03 (1) provides that "Every municipality may borrow money and issue municipal obligations therefor for the purposes specified and by the procedure provided in this chapter, and for no other purpose and in no other manner * * *" this office has approved the issuance of general obligation bonds by counties for the following purposes: "infirmary", "highway garage", "county home", "machine shop and garage" and "home addition", although these particular buildings are not specifically mentioned in sec. 67.04 (1) relating to the purposes for which general obligation bonds may be issued by a county.

This office has also approved the issuance of bonds by a county for the construction of a "courthouse", although this is not enumerated in sec. 67.04 as one of the purposes for which a county may issue bonds, except in (1) (q) thereof which authorizes the issuance of such bonds for "joint county and city buildings for a courthouse, city hall * * * or any combination thereof * * *". Even 67.04 (1) (q) was not created until ch. 395, Laws 1939.

I believe that it was not contended at any time, however, that a county could not issue general obligation bonds to finance the construction of a courthouse.

Hence it is my opinion that the proposed "County Nursing Home" which Manitowoc county desires to construct would be a "county building", and that under sec. 67.04 (1) (a) the county could issue its general obligation bonds for the purpose of providing such institution.

JRW

Taxation—State Bar—The state bar of Wisconsin is an arm or agency of the state and its property, real and personal, is exempt from taxation by virtue of sec. 70.11 (1).

February 17, 1959.

PHILIP S. HABERMANN, ESQ.

*Executive Director,
State Bar of Wisconsin.*

You state that the executive committee of the state bar of Wisconsin has adopted a resolution requesting the attorney general for an official opinion on the taxable status of the real and personal property belonging to the state bar of Wisconsin and necessarily used for its purposes.

The question presented calls for an analysis of the scope of the applicable tax statute as well as for an analysis of the nature, structure, and purposes of the state bar of Wisconsin.

Sec. 70.11 (1) exempts from general taxation property owned by the state. This, however, does not mean that the fee title to the property under consideration must be vested in the state, since our supreme court has held many times that in determining the ownership of property for tax purposes it will look to substance rather than to form. *Ross v. Board of Supervisors* (1860) 12 Wis. 29; *Comstock v. Boyle* (1910), 144 Wis. 180, 128 N. W. 870; *Ford Hydro-Electric Co. v. Aurora* (1932), 206 Wis. 489, 240 N. W. 418; and *State ex rel. Wis. Univ. Bldg. Corp. v. Bareis* (1950), 257 Wis. 497, 44 N. W. 2d 259.

In the latter case the legal title was held by a private non-profit corporation for the benefit of the regents of the university of Wisconsin, and the main difference of opinion between the parties centered on the question of whether the property was tax exempt before it was actually devoted to unquestionable university work. The court said at p. 500:

“* * * It has been ruled too often to permit doubting now that exemptions from taxation are acceptable when the property has been acquired and used by and for the benefit of the state. Taking property out from among the assessables and using it in a qualified and warranted service has the support of the doctrine that property owned by the state

is exempt from taxation. There is authority for the policy long recognized in this state: 'When public property is involved, exemption is the rule and taxation the exception'. 51 Am. Jur., Taxation, P. 550, sec. 557; Cooley, Taxation (4th ed.), p. 1414, sec. 673."

Under the doctrine of the *Bareis* case it is immaterial that the agency or entity holding the legal title for the benefit of the state is a private nonprofit corporation rather than a state agency or instrumentality. Thus, it is unnecessary to enter upon any voyage of exploration on the question of whether the state bar of Wisconsin is a private or a public agency. The question rather is whether it is organized for a public purpose of the state, and this calls for some study of the history, organization, purposes and functions of the state bar of Wisconsin.

Sec. 256.31 provides :

"State bar of Wisconsin. (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.

"(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

The matter of integration of the bar in Wisconsin has been before our supreme court four times.

In the first of these cases, *Integration of Bar Case* (1943), 244 Wis. 8, 11 N. W. 2d 604, it was held that the integration of the bar is a judicial and not a legislative function; that the court would treat the statute not as a memorial invoking the power of the court, nor as an attempt by the legislature to invade the province of the court, but rather as a legislative declaration that the integration of the bar would promote the general welfare. However, since so many members of the bar were then in military service the court decided not to proceed with integration at that time.

In the second case, *In re Integration of Bar* (1946), 249 Wis. 523, 25 N. W. 2d 500, the court held that the justifica-

tion for integrating the bar and compelling the payment of fees would be that the supreme court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members of the bar which serve in a measure the function of license fees, but which are not such in legal sense, in that they are not paid into the treasury of the state. The court referred to cases from other jurisdictions, all of which justify the fees as an occupational license. The court made it clear that the fees would have to be paid into the treasury of the bar for a public purpose connected with the administration of justice, and that the court could not permit the bar to use its dues for any purpose advantageous to its members that did not also further the good of the general public. One of the reasons why the court in this case refused to integrate the bar was the misunderstandings that might arise between the bench and the bar in the auditing of the funds.

In the third case the court granted a petition for an order integrating the bar. *In re Integration of Bar* (1955), 273 Wis. 281, 77 N. W. 2d 602. One of the reasons which apparently influenced the court in granting the petition was the necessity of having a correct registration of all lawyers practicing in the state. The court directed that proposed rules be drafted and submitted to the court on September 20, 1956.

Subsequent to this third decision proposed rules and by-laws for the integration of the bar were submitted to the court and were adopted on December 7, 1956. See 273 Wis. vii-xxxvii inclusive. Such rules were made effective for a two-year period commencing January 1, 1957, and it was ordered that during the month of September 1958, the board of governors of the state bar should file a report on the functioning of the state bar with the board's recommendations with respect to amendment of the rules and by-laws in the light of experience thereunder and with respect to continuation of the state bar under said rules and by-laws, with or without amendment, on a more permanent basis beyond December 30, 1958. This was done which brings us to the fourth opinion of the court on integration filed on December 22, 1958, 5 Wis. 2d 618, 93 N. W. 2d 601.

In this opinion the court reiterated the views expressed in the prior opinions to the effect that the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice, and that the members of the legal profession by their admission to the bar become an important part of that process which relationship is characterized by the statement that members of the bar are officers of the court.

While the rules adopted by the court make it clear that the court has made the state bar its agency for regulating the profession in the interests of the efficient administration of justice, this delegation is not an unrestricted one. For instance, in its last opinion the court points out that the integrated bar has no power to discipline or to disbar any member, since this power has been reserved to and not delegated by the court, the procedure under sec. 256.28 and 29 W.S.A. p. 353, for filing complaints for discipline being unaffected by the rules. However, the court did point out that by Rule 9 the rules of professional conduct set forth from time to time in the canons of professional ethics of the American Bar Association, as supplemented or modified by the supreme court shall be the standard governing the practice of law in this state.

The court in its last opinion also made reference to its opinion in *In re Integration of Bar* (1946), 249 Wis. 523, 25 N. W. 2d 500, where it was said that the justification for integrating the bar was that the court had inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members which serve in a measure the function of license fees, but which are not such in a legal sense. In other words, the court by reason of its inherent or implied powers may, if it thinks the exigencies call for it, require the bar to act as a unit so as to promote high standards of practice and the economical and speedy enforcement of legal rights, and to implement this may require the bar to make such contributions in money to the joint efforts as it deemed necessary and proper. Accordingly the court there stated at p. 528 of 249 Wis.:

“* * * No matter what these fees be called, they are moneys required to be paid into the treasury of the bar for

a public purpose connected with the administration of justice. * * *”

At p. 529 the court pointed out in considerable detail various activities of a non-public character which could not be financed by dues from the members. One of the reasons given by the court for denying integration at that time was that an integrated bar might impose upon the court embarrassing duties of censorship and audit which could lead to unfortunate misunderstandings between the bench and bar.

In its latest opinion, however, the court stated that two years of experience with the integrated bar had proven that such detailed supervision was not desirable or essential to the existence of the integrated bar, and it ordered the continuance of the state bar.

With reference to the fees paid by members which are paid into the treasury of the bar instead of into the state treasury the question may be raised as to why sec. 20.951 (1) is not applicable. This reads :

“Receipts and deposits of money; procedure; penalties. (1) Unless otherwise provided by law, all moneys collected or received by each and every officer, board, commission, society, or association for or in behalf of the state, or which is required by law to be turned into the state treasury, shall be deposited in or transmitted to the state treasury at least once a week and also whenever required by the governor, and shall be accompanied by a statement in such form as the treasurer may prescribe showing the amount of such collection, and from whom and for what purpose or on what account the same was received. All moneys paid into the treasury shall be credited to the general fund unless otherwise specifically provided by law.”

This language is not all-inclusive and does not apply where it is “otherwise provided by law”. Here, the law is to be found in supreme court rule 3 relating to the duties of the treasurer, and which reads :

“*Treasurer*: The treasurer shall receive, collect and safely keep, and under the direction of the board of governors disburse, all funds of the association; and render reports of receipts and disbursements as required. He shall assist the Executive Committee in preparing the annual budget. He shall furnish a surety bond at the expense of the association

in such amount as may be required by the board of governors.”

The court adopted this and the other rules relating to the bar pursuant to its inherent power to control and regulate the bar, a power which is entirely independent of and not dependent upon legislative pronouncement. It will be recalled that in the first integration case, 244 Wis. 8, the court held that integration of the bar is a judicial and not a legislative function and as stated before it treated the statute, ch. 315, Laws 1943, which created sec. 256.31, not merely as a memorial invoking the power of the court to integrate the bar, nor as an attempt by the legislature to invade the province of the court or to dictate to it, but as a legislative declaration that the integration of the bar will promote the general welfare.

Accordingly, it may properly be concluded that the non-payment of receipts into the state treasury under sec. 20.951 (1) is based upon the fact that provision therefor has “otherwise been provided by law” under the supreme court rules.

This brings us next to a consideration of the title to the real estate in question. This was conveyed to the state bar of Wisconsin on July 25, 1957, by warranty deed from the Wisconsin Bar Foundation, which deed was recorded February 28, 1958, in Vol. 675 of Deeds, p. 290, office of the register of deeds for Dane county. The conveyance was subject to an outstanding mortgage and it contained the following reversion clause:

“In the event the State Bar of Wisconsin should be dissolved or discontinued by order of the Supreme Court, or in any other manner, the premises hereinabove conveyed, together with all improvements thereon, shall thereupon forthwith revert to the grantor without the necessity of any act on the part of the grantor and without the necessity of any re-entry. Any encumbrances, however, which the grantee may have placed on the premises above described prior to such reversion of title shall survive such reverter and shall continue as an encumbrance upon the premises above described until the same shall have been paid or otherwise satisfied.”

So far as present tax exemption is concerned it is immaterial that the status of the property might change at some future time by reason of a reversion or dissolution clause whereby the property would pass from a taxable to a non-taxable status or vice versa. See *Legion Clubhouse, Inc. v. Madison* (1945), 248 Wis. 380, 21 N. W. 2d 668, and *Men's Halls Store v. Dane County* (1955), 269 Wis. 84, 69 N. W. 2d 213. In these cases there were provisions whereby the properties might ultimately pass to tax exempt organizations, and by a parity of reasoning were the converse true, it would be immaterial for present tax purposes that the property might ultimately pass to a taxable organization. One of the commonest illustrations of this is to be found in the titles to many rural school buildings in Wisconsin. In many, if not in the majority of these cases, the title to some corner of a farmer's land was conveyed to the district with a reversion clause that if the land should cease to be used for school purposes it would revert to the grantor or his heirs or assigns. To the best of our knowledge no land so held by a school district was ever taxed.

Reference should be made to one more statutory provision. That is sec. 20.953 (1) which reads in part:

"(1) Unless otherwise provided by law, all gifts, grants, bequests and devises to the state or to any department, board, commission, agency or officer thereof for the benefit or advantage of the state, whether made to trustees or otherwise, shall be legal and valid when approved by the emergency board * * *."

Since there is nothing in the supreme court rules relating to the acceptance of such a gift by the state bar on behalf of the state, it cannot be said that this situation is "otherwise provided for by law" so as to be excepted from the operation of sec. 20.953 (1). This being so the state bar sought and obtained the approval of the state emergency board for acceptance of the gift of the property from the Wisconsin Bar Foundation, a nonstock, nonprofit corporation which had previously acquired the property. The emergency board's approval was made upon the understanding that no present or future cost or obligation would be placed upon the state and that the state bar would assume the entire

cost of completing and paying for the building, and for all future maintenance and upkeep.

The property was acquired from funds turned over to the foundation by the former voluntary state bar association and the building was constructed from the proceeds of a mortgage on the property and from moneys contributed by lawyers to the foundation's special building fund. The mortgage has been partially retired.

There can be no question as to the authority of the state bar to hold real estate, since Rule 1, sec. 1, provides among other things that "The State Bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property".

This is significant in establishing the character of this organization as an arm or agency of the state, since without this rule of the court the power to hold property would be lacking. The state bar is not a corporation but has been vested with some, yet not full, corporate rights and powers by court rule rather than by corporate charter. The supreme court has never asserted the inherent power or right to set up a private corporation or entity for private purposes. Thus if the rules relating to the state bar have any validity, it must be because they are adopted by the court on the theory that this is a necessary and convenient way of furthering a public purpose, and here the purpose is surely as public as is the administration of justice itself. Upon any other theory the adoption of the rules creating the state bar would be an invalid usurpation of distinctly private powers by the court, or perhaps it would be more nearly correct to say that the court would be usurping legislative power in making provision for the creation of an entity in the nature of a corporation having the power to sue and be sued as such entity and to hold property in the name of such entity. In this connection attention is called to the case of *In re Gibson* (1931), 35 N. Mex. 550, 4 P. 2d 643, relating to the integrated bar of New Mexico. It was there held that the provisions of the state bar act creating the agency for control of the bar was not void as creating a corporation by special act, since the agency was a mere governmental agency. It was called the board of commissioners of the state bar and consisted of

nine members, one to be chosen from each judicial district by the members of the state bar. In general, its functions were more or less identical with those of the state bar of Wisconsin, and the court treated the annual fee to be paid by attorneys as a regulatory provision designed only to raise funds for carrying out the purposes of the act.

The opinion of the New Mexico supreme court is not an isolated one but is in accord with expressions of other courts. In 114 A.L.R. 161 there is an annotation in which it is said:

"* * * While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies." (Emphasis supplied.)

The Wisconsin supreme court in its last opinion on integration refers to the annotation in 114 A.L.R. 161 as well as to a later one in 151 A.L.R. 617.

You inform us that in several states the integrated bar is adequately housed in the state capitol in quarters furnished by the supreme court, and that in almost every instance where new state capitols or supreme court buildings are being erected in states with integrated bars, plans are made to provide space for the integrated bar offices, the latest example being the new supreme court building in Louisiana, which was occupied last year. Frequently, the supreme court designates the clerk of the court as the executive director of the state bar. This, of course, could not be very well justified on any ground other than the one that the integrated bar is an arm or agency of the state performing an essential public function in assisting with the administration of justice. Another item which you have furnished us consists of a ruling of the U. S. treasury department under date of October 16, 1956, to the state bar of Wisconsin. This ruling is to the effect that state bar was organized and exists as an agency of the supreme court of the state of Wisconsin and therefore is not subject to federal income tax and is not required to file income tax returns.

Also you have supplied us with a copy of an opinion of the attorney general of Texas, the Hon. Price Daniels, to the

president of the state bar of Texas, Opinion No. V-1299, dated October 4, 1951, to the effect that the state bar of Texas is a governmental agency of the state, and that property acquired by it as a site for permanent headquarters becomes public property devoted exclusively to public use so as to be exempt from taxation under Art. XI, Sec. 9, Tex. Const. In no state so far as we are aware has any attempt been made to tax the property of the integrated bar.

While the information you have furnished as to the housing of the state bar in state capitols or supreme court buildings, and the ruling of the U. S. treasury department and the opinion of the attorney general of Texas are not necessarily controlling in Wisconsin, the basic principles involved are the same.

In view of all of the foregoing it is concluded that the state bar of Wisconsin is an arm or agency of the state created for governmental purposes by the order of the supreme court of Wisconsin in the exercise of its inherent powers and that therefore the property of the state bar, real and personal, is exempt from taxation under sec. 70.11 (1).

WHR

Legislature—Statutes—Under sec. 35.93 (6) (g) a member of the legislature is entitled to but one copy of the Wisconsin administrative code plus current service. His reelection does not entitle him to an additional copy.

February 19, 1959.

JAMES BURKE,

Revisor of Statutes.

You have inquired whether a member of the legislature who has received a free set of the Wisconsin administrative code, plus upkeep, is entitled to another set free upon reelection and commencement of another term of office.

The five volume code sells for \$40, and there is a charge of \$15 per year for the current upkeep service.

Sec. 35.93 (6) (g) provides that the revisor of statutes shall distribute copies of the code (including the table of

contents, index, and necessary binders) and issues of the register free to members of the legislature, "*one copy to each member who makes a request therefor;*".

Two members of the assembly who have already received copies of the code during the 1957 session of the legislature were re-elected and they take the position that as of January 1959, they occupy the same status as any newly elected assemblyman and are to be treated no differently so that if a newly elected assemblyman is entitled to a copy of the code, the same is true of a re-elected assemblyman despite the fact that he has already received a copy.

The apparent purpose of the statute providing for this free distribution is to keep individual members of the legislature abreast of administrative directives so that legislative attention where needed and as suggested by matters appearing in the code, may be had. In other words, the legislature is entitled to all the information and guidance which this service may supply. It might be noted here that the administrative code is distinguishable from the statute book in that an entirely new statute book is published every two years, whereas the administrative code is in the form of a permanent service with loose-leaf supplements. It is thus always up-to-date, and no useful purpose would be served so far as information to a member of the legislature is concerned by receiving a duplicate copy of the code every time he is re-elected.

The statute says nothing about an additional copy to a legislator upon re-election. He has already received his "one" copy, as the records of the revisor will no doubt show, and the current loose-leaf service will make the copy he already has just as useable and informative as would the issuance to him of a "second" copy. There is nothing in the wording of the statute which would imply that the legislature intended that he should sell or give away one copy just because he has been re-elected, although once he is through serving in the legislature it is unimportant as to what he does with supplies given to him to assist in the performance of his legislative duties.

The very fact that only two members of the legislature are taking the position that a new copy of the code is to be distributed to a member of the legislature each time he is

re-elected is fairly indicative of the construction of the statute which the members of the legislature themselves are giving to the statute.

The general policy of the attorney general over the years has been to resolve any doubts on questions of this sort in favor of the state treasury, and if there are good and sufficient reasons for handling the distribution of the code on a basis different than that which has heretofore been followed, the legislature is now in session, and it would be very easy to clarify the situation.

WHR

Words and Phrases—Poor Relief—Legal settlement of employe and inmate who resides in a county home discussed. Secs. 49.10 (4) and 49.15 (2) discussed.

February 20, 1959.

FREDERICK R. SCHWERTFEGER,
Corporation Counsel,
Dodge County.

You ask a number of questions to determine what government unit is chargeable for relief given to dependent persons.

1. What is the settlement of an employee of an institution owned and operated by D County, located in J city within such county, after the employee has resided a year or more in such institution without receipt of aid?

Sec. 49.10 (4) provides that every person "who continuously resides in any municipality one whole year without receipt of aid * * * gains a legal settlement" therein. Since J city is a municipality within the definition of sec. 49.01 (5), the employee gains a legal settlement in that city at the end of a year unless some other statutory provision supercedes the one quoted. (We assume that the facts establish the employee's legal residence in the institution. *Marathon County v. Milwaukee County*, (1956) 273 Wis. 541, 79 N. W. 2d 233, held that residence under settlement statutes is

equivalent to domicile. Mere physical presence does not of itself establish such residence.)

The opinion in 43 O.A.G. 223, involving residence in an institution maintained by a county operating on the county system of relief so as to come within the definition of a municipality under sec. 49.10 (11) is not applicable in the situation you submit because D county follows the municipal system.

There may be legal settlement in a county in which the municipal system of relief prevails, but only with respect to persons who have no settlement in a municipality within the county. See sec. 49.10 (4) and (12). The primary question here is whether the following provision of sec. 49.10 (4) would prevent a year's residence in J city from resulting in acquisition of settlement therein:

“* * * time spent by any person while residing on lands owned * * * by another municipality shall not be included as part of the year necessary to acquire a legal settlement in the * * * city * * * wherein such lands are located * * *.”

The lands in this case are owned by D county; but since the county is not operating under the county system of administering relief, it is not a municipality within the definitions of sec. 49.01 (5) and sec. 49.10 (11).

There are cases in which counties are treated as municipal corporations for certain purposes. The status of legal settlement, however, is strictly statutory so that specific legislative definitions must control.

There is pending before the 1959 session of the legislature Bill 14 A., which seeks to extend the provisions last above quoted so as to apply to land owned by “another municipality or county”. A note printed on the bill states that the change “logically extends the present law to include the county unit of government”. The terms of a proposed bill do not govern the meaning of an existing law; but the proposed change serves to illustrate that, if the legislature had meant a county operating under the municipal system to be included in the term “municipality” under the present settlement laws, it could have made that intent apparent.

In the situation you describe, it is my opinion that the employee would have legal settlement in city J.

2. What is the legal settlement of aged people who enter the above county home and are fully self-supporting therein for one year or longer and then find it necessary to accept public assistance while continuing to reside in said home?

Since this question deals with an inmate of the home rather than an employee, it brings into consideration a different statutory provision, sec. 49.10 (4), to the effect:

“* * * Time spent by a person in any municipality * * * as an inmate of any home * * * for the care of aged * * * maintained by any lodge, society or corporation * * * shall not be included as part of the year necessary to acquire or lose a settlement * * *.”

The home in this case is maintained by the county, which cannot be classed as a lodge or society, but which is classed as a “body corporate” under sec. 59.01.

In discussing your first question, we were faced with the specific definition of a municipality in the settlement statutes. Such statutes do not define the term corporation.

Throughout subsec. (4) of sec. 49.10, the terms “county” and “municipality” are used with respect to matters relating specifically to such units. It may be that the legislature intended to use the term “corporation” in a broader sense to cover counties and cities as well as private corporations.

See McQuillin, *Municipal Corporations*, 468-469, where it is said:

“There are some statutes and constitutional provisions in which the word ‘corporation’ is so broadly used that it includes both public and private corporations, including municipal corporations in the strict sense of the term * * *.”

See, also, Vol. 9, Words & Phrases, 696-697.

The exception to the acquisition of settlement which is involved in this question appears to be more concerned with the character of the occupancy (“as an inmate”) and the character of the institution (“home * * * for the care of aged” etc.) than with the definition of the types of organizations by which the institutions are maintained. The legislative policy is to prevent a local governmental unit from being charged with care of people moved into an institution within its boundaries solely for care of a charitable nature.

That policy would seem to be best served by a broad definition of corporations so as to include public as well as private ones.

I am of the opinion that the person described in your second question would not acquire a settlement in J city or in D county.

Whether he would lose his previous settlement under sec. 49.10 (7) depends upon whether his presence at the home in fact constitutes "residence", a matter to be determined in each instance by the agency authorized to determine issues of fact when the question is raised in appropriate proceedings.

3. When a person is maintained in a county home under sec. 49.15 (2), does payment of charges for the previous year by the municipality in which settlement is claimed constitute compliance with the condition relating to "written approval of its relief officer or agency".

Sec. 49.15 (2) reads:

"Any person upon application to the board of trustees may be admitted to the county home upon such terms as may be prescribed by the board. If such person or his relatives are unable to pay for his care and maintenance he may be admitted as a charge of the municipality of his legal settlement or the county if he has no settlement, but no municipality or county shall be bound without the written approval of its relief officer or agency, except as provided in subsection (3)."

The statute above quoted provides two methods of establishing liability of another municipality for care of a person voluntarily admitted to a county home; by written consent of specified officials, or by the usual non-resident procedure under sec. 49.11.

The matter of chargeability for relief as between municipalities is wholly statutory. Supreme court decisions indicate that unauthorized acts of individuals cannot create a liability where none exists by force of statute. The court said in *Milwaukee County v. Stratford*, (1944) 245 Wis. 505, 510, 15 N. W. 2d 812:

"* * * But estoppel is an equitable doctrine and as stated in *Holland v. Cedar Grove*, 230 Wis. 177, 188, 189, 282 N. W.

111, 282 N. W. 448: "There are no equities between municipalities in respect to caring for and supporting paupers. The whole matter being purely and strictly statutory, there is no liability where a statute imposes none."

If the previous year's charges were collected pursuant to sec. 49.11, the failure of the municipality to deny the settlement under sec. 49.11 (3) (h) makes it liable only "until said denial is made". Further, under sec. 49.11 (2), the municipality sought to be charged may, in proceedings to recover for relief granted, "set up the defenses that the settlement of the recipient is in the municipality which granted the aid or that he was not in need of the aid furnished or that the notices required to be served were defective".

Since the question of collection between governmental subdivisions is wholly statutory, I do not believe that other procedures practiced in particular cases could be substituted for the statutory condition of "written approval" by the specified officer or agency.

It should probably be noted that, since the legislature has created an agency under sec. 49.11 (7) to determine disputed claims, no opinion of this office can be conclusive as to the results in a given case. Determination of settlement and residence involves issues of fact. It was said in 45 O.A.G. 241, 242:

"It has been held a number of times by the supreme court of this state that questions of fact involved in such disputes are 'to be determined by the department.' *Town of Mazomanie v. Village of Mazomanie*, 254 Wis. 597, 599. The court also pointed out in *Waushara County v. Green Lake County*, 238 Wis. 608, 611, that 'the findings of the division of public assistance of the state department of public welfare are conclusive, in the absence of fraud.'"

It should also be noted that statutory amendments are pending which may, for the future, change principles here discussed.

BI.

*Appropriation and Expenditures—Statutes—*Sec. 15.09 et seq. contemplates that the executive budget bill sets forth a statement of the proposed expenditures for each of the fiscal years of the succeeding biennium. An executive budget bill which sets forth the same amounts for the several appropriations in both of the fiscal years complies therewith and when enacted into law will be controlling for the biennium unless later changed by appropriate legislative action.

March 4, 1959.

THE HONORABLE, THE SENATE

Resolution No. 7, S., requests an opinion "as to whether the budget submitted under the statutes must be a true and complete statement of the proposed expenditures for the biennium and whether the budgets for the biennium must be submitted at one time or may be submitted in yearly proposals". The occasion for this request appears to be that the governor has submitted an executive budget bill wherein the amounts of the several appropriations are set out in dollars and cents in a column for the fiscal year 1959-1960 and then either the same amount in dollars and cents or through incorporation by reference is included in a column for the fiscal year 1960-1961. Such bill was introduced in the assembly and then referred to the joint finance committee.

In transmitting such bill to the legislature, the governor stated, and in other public statements has reiterated, that the same amounts had been included for each of the years because, although the amounts set forth therein for the first of the two fiscal years are what he has determined to be what he recommends for that year, there are considerations yet undetermined, and which may not crystallize until later in the year, which would indicate that there may be occasions to revise the amount of the appropriations for the second fiscal year. Among such future contingencies are possible changes in the tax structure and the reorganization or rearrangements of functions of certain departments. However, until such changes do occur it is not possible to estimate what the results thereof will be and accordingly the estimates of the needed appropriations set forth for the first

year have been adopted and included in the same amounts for the second year of the biennium.

Art. IV, sec. 11 of the Wisconsin constitution provides that the legislature shall meet once in two years, and no oftener, unless convened by the governor in special session, and when so convened no business shall be transacted except as necessary to accomplish the purposes set forth in the call of the special session.

Art. VIII, sec. 2 specifies that no money should be paid out of the treasury except in pursuance of an appropriation by law. Other than these provisions, and the one in Art. VIII, sec. 8, which requires that the vote upon any appropriation measure shall be taken by yeas and nays, there is no provision in the Wisconsin constitution covering the making of appropriations by the legislature. However, the clear inference from these constitutional provisions is that when the legislature meets every two years, it shall make the appropriations to operate the state government for the two-year period until it meets again.

This concept is carried into, and is the basis for, the provisions in sec. 15.06, et seq., Stats., relating to budgets and budget bills. Throughout such provisions, recurring reference is to the collection of fiscal data relative to estimated disbursements and expenses and appropriations for the succeeding biennium. From statements submitted by the several departments, the director of budget and accounts is to compile and submit to the governor-elect not later than November 20 of each even-numbered year, a state budget report. By sec. 15.09, Stats., it is provided that the governor shall deliver his budget message to a joint session of the legislature and with it "transmit to the legislature the biennial state budget report and the executive budget bills together with suggestions for the best methods for raising the needed revenues".

Sec. 15.11, Stats., provides as follows:

"15.11 Budget Bill. (1) The executive budget bills shall incorporate the governor's recommendations for appropriations for the succeeding biennium. One bill shall cover each of the following operating funds: the general fund, the highway fund and the conservation fund. Each appropriation in each bill except those for highway construction and aids to

local units shall be divided into 3 allotments; personal services, other operating expenses, and capital outlay. Immediately after the delivery of the budget message, the bills shall be introduced without change into either house by the joint finance committee and when introduced shall be referred to that committee.

"(2) No bill affecting the general fund and containing an appropriation or increasing the cost of state government or decreasing state revenues shall be passed by either house until the general fund budget bill has passed both houses; except that the governor or the joint committee on finance may recommend and the legislature enact emergency appropriation bills. Such bills shall carry a statement to the effect that they are emergency appropriation bills recommended by the governor or the joint committee on finance, and such statement shall be sufficient to permit passage prior to the general fund budget bill."

In submitting the executive budget bill as above stated, the governor has complied with the statutory provisions above mentioned. The executive budget bill so submitted does contain appropriation amounts for both fiscal years of the biennium. Upon passage thereof by the legislature, it will constitute an express intention that the amounts of money set forth therein, either in figures or by reference, are available for and to be used for the specified purposes in each of the fiscal years included therein. The same will constitute a present determination that the amounts set forth therein are appropriated for such purposes in the respective fiscal years.

That the governor has stated he anticipates the probability of change in the amounts so set forth for appropriations in the second of the fiscal years, does not in any way destroy the amounts set forth therein for such second year as a statement of the amounts that are appropriated for use and expenditure during the second fiscal year. The amounts so set forth are those that will be available and used for the stated purposes unless there is some subsequent modification thereof by the legislature.

Every appropriation in a budget bill is, of course, subject to the contingency that, even at the session at which it has been passed, it may be later revised. In the present situation, there is an announced intention of reconsidering the amounts included in the executive budget bill for the second fiscal

year. In the light of changes that may be made later in the session, and because of future fiscal considerations, if the governor considers it necessary to revamp the appropriations set forth in the bill for the second fiscal year, he may make recommendations at a later date for that purpose. Until that is done, necessities require that there be appropriations made for such second fiscal year, as well as the first one, in order to carry out the clearly implied constitutional pattern that the legislature is to make appropriations to cover the succeeding biennium.

The statutes call for a statement of proposed expenditures for the biennium and the executive bill so submitted does set forth proposed expenditures for each of the fiscal years of the succeeding biennium. You are advised that in my opinion the executive budget bill as submitted, introduced in the legislature and referred to the joint finance committee, complies with the statutory provisions above mentioned and proposed appropriations for both of the fiscal years of the ensuing biennium.

HHP

County—Agriculture—Where county agricultural committee has entered into cooperative extension service contracts in agriculture and home economics under sec. 59.87 (3) (b), it cannot decrease its share if the university increases its share.

March 10, 1959.

DON W. JIRTLE,
District Attorney,
Kewaunee County.

You have referred us to a salary schedule for appointive county employees adopted on October 7, 1958, by the Kewaunee county board of supervisors. In this classification the salaries of the county agent, home agent, and 4 H club leader, paid partially by the state (with federal contributions being included in the state's share), appear as follows:

"Classifications	Annual Salary for 1959 Year
County Agent (State 3580.00) -----	\$6820.00
Home Agent (State 2980.00) -----	5220.00
4 H Club Leader (State 3400.00) -----	4180.00"

On November 6, 1958, at the regular county board meeting a budget was adopted including the above total salaries, except that the total salary for the county 4 H club agent was set at \$4880 instead of \$4180 as provided in the salary schedule adopted on October 7, 1958.

Accordingly on December 16, 1958, contracts were signed with these employes. Each of these contracts are entitled :

"AGREEMENT COMMITTING COUNTY FUNDS

for Wages and Expenses of an
Employee of the Cooperative Extension
Service of Kewaunee County, Wisconsin"

The next paragraph reads :

"It is hereby mutually agreed that within the funds made available by the County Board for the Cooperative Extension Service of Kewaunee County and pursuant to the authority vested in the County Committee on Agriculture by sections 59.87 and 59.15 (2) (d), Wisconsin Statutes:"

The remainder of the contract form, taking that of the agricultural agent as an example and omitting par. 3 on expenses which paragraph is not material here, reads as follows :

"1. ----- shall be employed by the said Cooperative Extension Service as Agricultural Agent from January 1, 1959 to December 31, 1959.

"2. Kewaunee County shall pay at the rate of \$3240 annually in equal monthly installments.

"* * *

"4. The employee herein named is being recommended to receive compensation from non-county sources. Should such compensation, for any reason, not be forthcoming the employee by notice in writing to the County Clerk may withdraw from the terms of this agreement."

The contract has lines for the signatures of the members of the committee on agriculture, the signature of a representative of the university of Wisconsin, and the employe.

At the same time this contract was signed another one was signed by the same individuals. This is entitled "Cooperative Agreement Between the College of Agriculture, University of Wisconsin and Kewaunee County for Employment of a County Extension Worker".

So far as material for purposes of the present discussion this agreement provides in part:

"1. PURPOSE OF AGREEMENT. It is hereby mutually agreed that the University of Wisconsin cooperating with the United States Department of Agriculture and Kewaunee County, will maintain in said county, a county agricultural agent from Jan. 1, 1959, to Dec. 31, 1959, in accordance with Sec. 59.87 of the Wisconsin Statutes, and amendments thereto, and the further provisions of this agreement.

"* * *

"3. FINANCIAL COOPERATION. (a) The University of Wisconsin, in cooperation with the United States Department of Agriculture, will pay at the rate of 3880 Dollars annually toward the salary of the aforesaid agent.

"(b) Kewaunee County will pay at the rate of 3240 Dollars annually toward the salary of the agent.

"* * *

"4. APPOINTMENT OF AGENT. It is hereby mutually agreed to employ ----- as county agricultural agent for Kewaunee County, in accordance with the other provisions of this agreement, with the further understanding that he (she) may resign on sixty days notice to the county agricultural committee and the Extension Director of the University of Wisconsin, and that they may likewise by joint action cause his (her) resignation with an advance notice of the same period.

"In case a vacancy occurs in this position from any cause, a successor will be appointed to serve for the remainder of the term covered by this agreement.

"5. EFFECTIVE. This agreement shall become effective upon the approval of the Board of Regents of the University of Wisconsin."

Below the signature of the representative of the university of Wisconsin and the signatures of the committee members the following statement is signed by the employe:

"I hereby agree to accept appointment as County Agricultural Agent under the terms of the above agreement."

The effect of this second agreement is a merit salary increase of \$300 in the case of each of the extension agents. This comes out of state and federal funds and not out of the county's contribution which remains exactly the same in both agreements. The county's share of the salaries does not exceed the amount approved and adopted by the county board on November 6, 1958, when it adopted the county budget for 1959.

The \$300 discrepancy between the total of the two amounts as determined by adding the \$3240 committed by the county under the first agreement and the \$3880 committed by the university under the second agreement or \$7120, for the county agricultural agent as compared to the total figure for the county agent's salary of \$6820 provided in the salary schedule adopted by the county board on October 7, 1958, was called to the attention of the personnel, supervision, and compensation committee of the county board on January 6, 1959.

Upon recommendation of this committee and action by the board the county clerk was instructed to withhold \$300 from the county's share of the salaries of the three extension agents pending receipt of an opinion clarifying this matter from the attorney general.

It seems reasonably clear that when the board set up the salary classification of October 7, 1958, it intended to commit the county to a \$3240 payment for the county agent, that being the difference between the stated annual salary of \$6820 and the designated state contribution of \$3580. This was made doubly clear when the county's contribution of \$3240 was specifically spelled out in the first of the two agreements mentioned above. When this agreement was signed on December 16, 1958, a valid contract committing the county to payment of this amount was made. The amount was within the salary schedule commitment of the county and it was within the budget adopted by the county board on November 6, 1958.

The fact that later on the same day a second agreement was made whereby the university increased its commitment

from \$3580 to \$3880 cannot destroy the validity of the first contract. The second agreement in no way alters the county's obligation. It was an increase which the university decided to make out of its own funds, and nowhere in the statutes referred to in the county's agreement to commit funds, secs. 59.87 or 59.15 (2) (d), is there any language which purports to give the county board authority to regulate the university's contribution or to authorize the county board to disavow a contract legally made on its behalf.

Sec. 59.15 (2) (d) provides authorization generally for contracts for services with county employes for periods of not to exceed two years and sec. 59.87 (3) (b) provides that the committee on agriculture of the county board shall have the power to enter into joint employment agreements provided that county funds committed in such agreements shall first have been duly appropriated by the board. It appears that the committee was complying fully with this provision when it made the agreement first mentioned.

While it is true that the members of this committee also signed the second agreement containing the university's commitment to pay \$3880, the county's share of \$3240 remains the same as in the first agreement under which the county was already bound, and the increase is in the part of the agreement relating to the university's promise rather than that of the county.

Obviously the merit increases granted by the university on its share of the total salaries were intended to operate for the benefit of the employes and not as a windfall for the county treasury which would be the practical effect if the county were now able to reduce its commitment below what it agreed to pay under the terms of both agreements. In other words, the county would be receiving the merit increase rather than the employes.

Accordingly it is our opinion that the contracts are enforceable against the county for the full amount of the county's commitment and that so far as the present contracts are concerned the county cannot deprive the employes in question of the benefit of the merit increases granted them out of state funds, through the device of withholding part of the funds which the county has agreed to

pay, nor can the county control the university in any way in the matter of its decision to grant additional salary beyond what it had originally contemplated for these employes. These contracts are for one year, and future contracts, of course, will be a matter for further negotiation between the parties.

WHR

Public Officers and Employes—Statutes—Register of deeds should accept for recording under sec. 59.51 (1) maps of subdivisions which do not comply with the requirements of ch. 236 provided the parcels of land in such subdivisions exceed 1½ acres in area, and the surveys comply with sec. 59.62. Descriptions by metes and bounds and numbered parcels in survey should also be accepted.

March 13, 1959.

DAVID H. BENNETT,
District Attorney,
Columbia County.

You have requested an official opinion as to the duty of the register of deeds to record subdivision maps which do not conform to ch. 236 of the statutes and to record deeds making reference to specifically numbered parcels on such maps along with metes and bounds descriptions.

The maps in question are used for reference purposes in warranty deeds where the descriptions are by metes and bounds. These parcels are allegedly of more than 1½ acres. After the description is given in the deed by metes and bounds there is further language such as “intending to convey Tract No. ----- as indicated on Surveyor’s plat recorded in Vol. -----, page ----, Miscellaneous, Columbia County Registry”. In some instances the reference is not to a surveyor’s plat, but to a photo “recorded in Vol. -----, page ----, Columbia County Registry”. All or practically all of the parcels border on a lake or on the Wisconsin river.

Assuming that each of the lots or parcels is in excess of 1½ acres in area it would appear that the requirements of ch. 236 do not apply.

Sec. 236.02 (4) provides that a plat is a map of a subdivision, and sec. 236.02 (7) in defining a subdivision of a tract of land mentions parcels or building sites of $1\frac{1}{2}$ acres each or less in area.

It would appear that the procedure you have described was designed to avoid the impact of ch. 236 with its numerous requirements. The purposes of ch. 236 are stated in sec. 236.01, and it may well be that these goals could have been sought in legislation affecting parcels slightly in excess of $1\frac{1}{2}$ acres in area as well as to parcels of less than $1\frac{1}{2}$ acres in area, but the legislature had to draw the dividing line somewhere. Each new exercise of the power of police regulation presents the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation, and the propriety of the distinction rests with the legislature as long as it does not attempt to make a distinction that no one in the exercise of human reason and discretion could honestly reach. See *State v. Evans* (1907), 130 Wis. 381, 385-6, 110 N. W. 241.

It may well be that the legislature was of the opinion and found it to be a fact that with parcels in excess of $1\frac{1}{2}$ acres in area the problems of overcrowding of land, lessening congestion in the streets and highways, providing for proper ingress and egress, all of which are mentioned as being of legislative concern in sec. 236.01, are not so urgent as is true in the case of smaller parcels and that hence the dividing line as to plat restrictions could well be drawn at that point.

While it is true that the register of deeds should not record plats governed by the provisions of ch. 236 unless such plats are in compliance therewith, he may not rely upon the requirements of that chapter in refusing to record plats which do not come within the purview thereof. See sec. 236.25 (2) which provides that the register of deeds shall not accept a plat for record unless it meets the requirements set forth in that subsection. See also, sec. 236.21 as to requirements which must be met to entitle a final plat to be recorded. However, the word "plat" as used in sec. 236.21 and in sec. 236.25 (2) means a map of a subdivision as set forth in sec. 236.02 (4) and (7) referred to above, that is, one where the parcels are $1\frac{1}{2}$ acres each or less in area.

Sec. 236.03 (1) reads:

“Survey and plat; when required. (1) Any division of land which shall result in a subdivision as defined in s. 236.02 (7) (a) shall be, and any other division may be, surveyed and a plat thereof approved and recorded as required by this chapter.”

This language appears to be permissive. In other words, even though the parcels we are discussing exceed $1\frac{1}{2}$ acres each, the procedure outlined in ch. 236 is nevertheless available to parties desiring to avail themselves of these provisions. The word “may” in statutes is usually employed as implying permissive or discretionary, as opposed to mandatory, action. See cases cited under word “may” in Vol. 26A, Words and Phrases.

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

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

This raises the question of whether or not a plat of a subdivision where the parcels are in excess of $1\frac{1}{2}$ acres must qualify under the permissive language in sec. 236.03 (1) to be entitled to recording. Certainly if it does comply with ch. 236 the plat is entitled to recording, since sec. 236.03 (1) says it may be recorded.

However, that is not to say that there may not be a recording of a map or plat which does not comply with ch. 236 if the parcels exceed $1\frac{1}{2}$ acres in area. To hold otherwise would ignore the $1\frac{1}{2}$ acre provision entirely, since we would then be saying that any plat regardless of the size of the parcels must comply with the provision of ch. 236 to be recorded. If this were true there would be no point in mentioning the size of the parcels at all. Obviously the legislature intended to draw a distinction between parcels of $1\frac{1}{2}$ acres or less on the one hand, and parcels in excess of that size on the other, or it would not have employed the language it did.

Reference to other provisions of ch. 59 makes it reasonably clear that maps or surveys other than those referred to in ch. 236 may be recorded.

For instance, sec. 59.62 provides:

“Whenever a surveyor is required to subdivide a section or smaller subdivision of land established by the United States survey he shall proceed according to the statutes of the United States and the rules and regulations made by the secretary of the interior in conformity thereto.”

See also sec. 59.61 as to how bearings are to be expressed in surveys.

Sec. 59.65 (4) relating to the fees of a surveyor provides that he shall receive \$1 for recording a survey and sec. 56.65 (3) provides for a \$1 fee for recording a plat or certificate, except town plats. No good reason suggests itself why this does not apply to a survey made pursuant to the requirements of sec. 59.62. At any rate sec. 59.65 long ante-dated sec. 236.03 (1) in its present form and surveyors have been recording surveys of one sort or another for many years.

Accordingly you are advised that the register of deeds should accept for recording maps of subdivisions which do not comply with the requirements of ch. 236, provided the parcels exceed $1\frac{1}{2}$ acres in area, and provided the surveys comply with sec. 59.62.

You are also advised that the register of deeds should accept for recording deeds to parcels in such a survey where the descriptions are both by metes and bounds and by reference to specifically numbered parcels in the survey. In this connection your attention is called to the fact that even if the plat were fatally defective so as to afford no warrant to the recording officer for putting it on record, a reference in a deed to such a recorded plat for purposes of fixing boundaries is sufficient. *Noonan v. Lee* (1862), 67 U. S. 499, 2 Black 499, 17 L. Ed. 278. Also it was held in *Fleischfresser v. Schmidt* (1876), 41 Wis. 223, that although a village plat was not acknowledged so as to be entitled to record and did not operate as a grant to the public of lands therein designated as streets, yet it might be resorted to for the purposes of identifying land conveyed by reference to it. See also *Simmons v. Johnson* (1861), 14 Wis. 568.

WHR

Military Service—Civil Service—Under sec. 16.275 (4) a state employe shall be allowed military leave of absence with pay during his two weeks reserve encampment; under sec. 16.276 he shall be allowed leave of absence without pay while serving the six months active duty required by his reserve program.

March 16, 1959.

C. K. WETTENGEL,
Director of Personnel.

You have requested an opinion of this office concerning the applicability of sec. 16.275 (4), Stats. to state employes who are participating in a military reserve program. You state that an employe has inquired, through his department head, whether sec. 16.275 (4) applies to the six months active duty of his military reserve program, and whether it applies to the two weeks reserve encampment which he must attend each year while in reserve status.

Sec. 16.275 (4), Stats., reads as follows:

“(4) Officials and employes of the state who are duly enrolled members of the national guard, the state guard, the officers’ reserve corps, the enlisted reserve corps, the naval reserve, the marine corps reserve, or any other reserve component of the military or naval forces of the United States or the state of Wisconsin now or hereafter organized or constituted under federal law, are entitled to leaves of absence without loss of time in the service of the state, to enable them to attend military and naval schools, field camps of instruction and naval exercises which have been duly ordered held but not to exceed 15 days, excluding Sundays and holidays enumerated in s. 14.59 (1) in the calendar year in which so ordered and held. There shall be no deduction from or interruption in the pay from the state for the time spent in such attendance, irrespective of whether or not they receive separate pay for and identified with the attendance. The leave granted by this section is in addition to all other leaves granted or authorized by any other provision of law and the time of the leave granted under this section shall not be deemed a part of any leave granted or authorized by any other provision of law. For the purpose of determining seniority, pay or salary advancement the status of the employe shall be considered as though not interrupted by such attendance.”

Prior to 1955 this statute provided a fifteen-day military leave of absence to state employes, who were members of the state guard of Wisconsin. By ch. 509, Laws 1955, the leave of absence was made applicable to all military reserve programs, whether state or federal.

Sec. 16.275 (4) was first enacted by ch. 365, Laws 1945, and published June 27, 1945. At that time another statute providing for military leave existed as sec. 16.276 which established a military leave of absence without pay for state employes while on active duty with the armed forces. This latter section was repealed by ch. 433, Laws 1945, and in its place was enacted sec. 16.276 which remains in the statutes today, and which provides for the restoration of employment of classified members of the state civil service program whose employment has been interrupted by active service in the armed forces.

Clearly, from this historical examination of the statutes concerning military leave, sec. 16.275 (4), as amended, was enacted to provide a leave of absence for state employes attending reserve encampments or military schools or meetings required by the military reserve program in which they held membership. Such military leave of absence with pay was not to exceed fifteen days. Although the language of sec. 16.275 (4) does not specifically express that the leave of absence is to apply to only those state employes attending a *reserve* encampment, school, or meeting, as required by their military reserve programs, the fact that another statute existed at the time sec. 16.275 (4) was enacted that already provided for a military leave of absence for state employees on *active* duty with the armed forces clearly establishes that only *reserve* programs are affected by the provisions of sec. 16.275 (4).

The following conclusions are reached :

1. That the military leave of absence provided in sec. 16.275 (4) is applicable to state employes, who, in fulfillment of their military reserve program, are attending a reserve encampment, school or meeting; and,

2. That the military leave of absence provided in sec. 16.276 is applicable to those state employes who enter active duty in the armed forces. This includes the six-months active duty of members of reserve programs.

Therefore, under the facts which you present, the state employe shall be allowed military leave of absence without pay pursuant to sec. 16.276 during the six months he is on active duty; and thereafter, pursuant to sec. 16.275 (4), he shall be allowed military leave of absence with pay during the two weeks he attends his reserve encampment.

JWR

Legislature—Statutes—Discussion on referendum to license bingo for charitable organizations. Legislative mechanics explained.

March 31, 1959.

THE HONORABLE, THE ASSEMBLY.

You have requested my opinion on the following question :

“If the referendum provided for by joint resolution No. 5, A., is approved by the voters, can legislation then be enacted to permit bingo without amendment of section 24 of article IV of the constitution?”

Joint Resolution No. 5, A., reads as follows :

“A JOINT RESOLUTION

“Relating to an advisory referendum on legalized bingo.

“Resolved by the assembly, the senate concurring, That there be submitted to the voters of the state at the election to be held on the first Tuesday in April, 1959, the following question :

“Shall the legislature authorize cities, towns and villages, by ordinance, to license playing bingo for consideration within their corporate limits when the game is conducted solely for the benefit of a bona fide religious, benevolent, charitable, veterans, firemen or police organization?” ”

The question thus submitted is conclusively answered by the decision of the Wisconsin supreme court in *State ex rel. Trampe v. Multerer*, (1940) 234 Wis. 50, 55-58, 289 N. W. 600. That was an action brought by a private citizen to enjoin the conducting of the game of bingo, the nature of

which is fully described in the opinion. In ruling that the game was a lottery and therefore subject to injunction as a public nuisance, the court stated in part:

“The defendants next contend that bingo was not gambling as it was played upon the defendants’ premises and was not prohibited by the statutes of this state. Secs. 348.07, 348.09, and 348.11, Stats. This contention is grounded upon the fact that the games were conducted for the purpose of raising funds for charitable and patriotic purposes, and, therefore, there was lacking in them any element of private gain. It is asserted that our statutes prohibiting gambling were never intended to interfere with or outlaw the custom of raising funds in that manner, by religious, charitable, social, or political organizations. It is conceded by the defendants that the term ‘gamble’ is sufficiently broad to embrace the game of bingo if played for money or prizes and for purposes other than those of raising money for charitable or patriotic purposes.

“We have no doubt that bingo, as played for about a year upon the defendants’ premises, was a gambling game and was a lottery. * * * Sec. 24, art. IV, of our constitution provides:

“‘The legislature shall never authorize any lottery. . . .’ That is a strong declaration of the public policy of this state. Similar games have been considered by other courts. Such courts have all held that such games when played for prizes are gambling. * * *

“The contention that bingo when conducted for the purpose of raising funds for charitable or patriotic purposes is not gambling and that such a game, when so played, was never intended to be within the prohibition of the constitution or the statutes, needs little discussion because so obviously without merit. No exception of that nature is found either in the constitution or the statutes.

“In *Seattle v. Chin Let*, 19 Wash. 38, 40, 52 Pac. 324, the defendant there was charged with violating a city ordinance which prohibited lotteries. The defendant contended that the ordinance was invalid because in conflict with a statute which exempted ‘lotteries for charitable purposes.’ The court held that the exception contained in the statute was unconstitutional because in conflict with the state constitution which provided that ‘the legislature shall never authorize any lottery.’ The court said:

“‘The language of the constitution is mandatory and the provision is self-executing. The question naturally suggests itself, if lotteries for charitable purposes may be lawfully conducted and permitted, why may not lotteries for any

other purpose? We think that the constitutional provision admits of no exception in favor of lotteries for charitable purposes or for any other purpose.'

“* * *

“If a state or its municipalities may not be authorized by its legislature to conduct gambling and lotteries for their benefit, it seems clear that religious or charitable organizations could not be so authorized, in the face of a constitutional provision like ours.”

See also, *State v. Laven*, (1955) 270 Wis. 524, 71 N. W. 2d 287, in which a conviction for violation of the lottery statute was affirmed. In this case a game similar to bingo was played by means of a television program and was sought to be justified under sec. 348.01 (2), Stats. 1953, which in substance purported to exempt from the lottery statute games of chance played for prizes where the consideration was watching a television program or listening to the radio. It was held that the statute purported to authorize a lottery and was unconstitutional under Art. IV, sec. 24, Wis. const.

A referendum such as is proposed by Jt. Res. 5, A., can have no effect upon the constitutional prohibition. It will be observed that the title of the joint resolution calls it “an advisory referendum.” The only manner in which the constitution can be altered is as provided in Art. XII, sec. 1, Wis. const., which requires action by two successive legislatures *followed* by a referendum. Jt. Res. 5, A., does not purport to be an amendment to the constitution, does not comply with the requirements of Art. XII, sec. 1, Wis. const., and is merely advisory to the legislature. The question submitted implies that the proposed referendum is not itself an attempt to amend the constitution. Since it seeks the advice of the electorate on a matter upon which the legislature is not competent to act, it appears that it would not be within the province of the legislature to provide for such a referendum and that if conducted it would be nugatory and of no effect. Compare the opinion of former attorney general (now chief justice) John E. Martin to your honorable body dated March 17, 1947, 36 O.A.G. 92.

There is grave doubt therefore that the legislature may lawfully submit the question in the form proposed by Jt.

Res. No. 5, A. Although the supreme court has taken a very liberal view of the authority of the legislature to submit questions for advisory referenda, it has indicated that there are limits upon its power in that regard. In *State ex rel. Fulton v. Zimmerman*, (1926) 191 Wis. 10, 15, 210 N. W. 381, the court sustained two resolutions submitting to the people the question whether congress ought to amend the Volstead act so as to permit the manufacture and sale of 2.75 per cent beer, against the argument that it was not within the scope of the functions of the state legislature. The court pointed out that all doubts must be resolved in favor of the validity of the action of the legislature in submitting such question; that the people have the right to express their will to their representatives in congress as well as to their representatives in the legislature; and that the matter was within the concurrent power of the states to pass appropriate legislation to enforce the Eighteenth Amendment. However, the court did use this language:

“* * * The courts cannot interfere with such legislative action *unless it is clear that the action taken is contrary to some mandate of the constitution.* * * *”

And the court also stated, after acknowledging that the particular legislation involved in the referendum must be enacted by congress:

“* * * But it by no means follows that an expression of the will of the voters upon this particular question *will not give the legislature of Wisconsin information which will aid it in the proper discharge of its duties* in the exercise of its concurrent power to pass appropriate legislation to enforce the Eighteenth amendment.”

The question proposed by Jt. Res. No. 5, A., amounts, for the reasons set out above, to asking the electorate whether the legislature shall pass legislation which would be clearly unconstitutional. In my opinion the legislature may not properly submit such a question to a referendum.

However, if the question submitted were whether the legislature should initiate proceedings pursuant to Art. XII, sec. 1, Wis. const., to amend the constitution so as to permit

the legislature to authorize municipalities to license bingo under the conditions outlined in Jt. Res. No. 5, A., this in my opinion would be a proper question to be submitted to the electorate and provision therefor could properly be made by joint resolution instead of by a bill. *State ex rel. Fulton v. Zimmerman*, (1926) 191 Wis. 10, 16-17, 210 N. W. 381, overruling on this point (1925) 14 O.A.G. 246.

WAP

County—Zoning Ordinance—Revision of an existing county zoning ordinance can be accomplished only by amendment pursuant to sec. 59.97 (3). Towns may adopt the amendatory ordinance only in the manner provided in sec. 59.97 (3) (g).

April 17, 1959.

LEE R. KRUEGER,
District Attorney,
Oneida County.

Your predecessor in office, Albert J. Cirilli, has requested an opinion regarding the passage of a county zoning ordinance. He stated that the Oneida county board has recently drafted a new county zoning ordinance to take the place of an existing ordinance deemed outmoded. He has asked the following questions:

1. What procedure must be used by a county in repealing an existing county zoning ordinance and enacting a new ordinance?
2. May the new ordinance be adopted in the towns in such a manner so that only when it is approved in a particular town is the existing ordinance repealed in that town; to borrow his phrase, can an existing ordinance be repealed "piecemeal" as the new zoning ordinance is approved in each particular town?

In answer to the first question, the procedure outlined in subsec. (3) of sec. 59.97 must be followed in order to totally revise an existing county zoning ordinance. Subsec. (2) should not be used except when a county adopts its first zoning ordinance.

In answer to the second question, the new zoning ordinance may not be adopted piecemeal by each town in the county. The method of town adoption outlined in sec. 59.97 (3) (g) must be strictly complied with.

It is fundamental that a county has no inherent police power and it follows that it has no inherent zoning powers. Accordingly, power to zone exists in a county solely by virtue of the delegation of that power from the state. Statutory requirements prescribing procedure in the enactment, amendment or repeal of zoning ordinances are provided in

order to safeguard zoned areas against capricious, sudden, or ill-considered changes, *McQuilling Municipal Corporations*, 3rd Ed., Vol. 8, sections 25.35 and 25.245.

In 38 O.A.G. 12 it was the opinion of this office that a city could not totally revise its existing zoning ordinance without adhering to the statutory procedure established for *amending* it. That opinion was reviewed and approved by this office in 42 O.A.G. 91 and was considered applicable to county zoning ordinances as provided in sec. 59.97.

Counties receive their grant of zoning power by sec. 59.97. Subsec. (1) of the statute establishes the extent of the power; subsec. (2) provides the procedure to be followed in forming a zoning ordinance; subsec. (3) establishes the procedure with reference to the *amending* or changing of existing county zoning ordinances. Thus, subsec. (3) of sec. 59.97 must be followed when totally revising an existing county zoning ordinance.

With regard to the method of adoption by the towns of the new county zoning ordinance, paragraph (g) of sec. 59.97 (3) provides:

“(g) Any such amendatory ordinance when so adopted shall within 7 days thereafter be submitted in duplicate by the county clerk by registered mail to the town clerk of each town in which lands affected by such ordinance are located. If after 40 days from the date of such adoption a majority of such towns have not filed certified copies of resolutions disapproving such amendment with the county clerk, or if, within a shorter time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk, the amendment shall thereupon be in full force and effect in all of the towns affected by the ordinance. Any such ordinance relating to the location of boundaries of districts shall within 7 days after adoption by the county board be transmitted by the county clerk by registered mail only to the town clerk of the town in which the lands affected by such change are located and shall become effective 40 days after the adoption of the ordinance by the county board unless such town board shall prior to such date file a certified copy of a resolution disapproving of such ordinance with the county clerk provided that if such town board shall approve of such ordinance, said ordinance shall become effective upon the filing of the resolution of the town board approving same with the county clerk. The county

clerk shall record in his office the date on which such ordinance becomes effective and he shall notify the town clerk of all towns affected by such ordinance of such effective date and also make such report to the county board, which report shall be printed in the proceedings of the county board."

It is important to note that the statute distinguishes the zoning ordinance dealing entirely with *substantive* provisions, such as set-back requirements, height of buildings, etc., from the zoning ordinance relating to the *location of boundaries of zoned districts*. The ordinance dealing with *substantive* provisions becomes effective in all towns in which lands affected by the ordinance are located, if it is approved by a majority of the towns, or not properly disapproved by such towns within 40 days from the adoption of the ordinance by the county board. The ordinance relating to the *location of boundaries of zoned districts* becomes effective in each town 40 days after the adoption of the ordinance by the county board unless prior to that time the town board files its disapproval with the county clerk. If a town board files its approval with the county clerk, the ordinance is effective in such town on the date of filing.

Under the facts which you present, i.e., a total revision of the existing county zoning ordinance, the result must be accomplished by two separate ordinances; one dealing entirely with *substantive* provisions, and the other dealing entirely with the *location of boundaries of zoned districts*. Under sec. 59.97 (3) (g) the amendatory ordinance dealing with substantive requirements will become effective in all the towns in the county if a majority of the towns approve the ordinance; and conversely, the amendatory ordinance dealing with substantive requirements will not become effective in any of the towns in the county, if a majority of the towns disapprove it. However, the amendatory ordinance relating to the location of boundaries of zoned districts may be adopted by each town individually, or rejected by each town individually, and the decision of a town in this regard will not affect the adoption by any other town of the amendatory ordinance relating to the location of boundaries of zoned districts.

The amended ordinance will become effective in the county and the adopting towns as the statutory requirements of sec. 59.97 (3) are fulfilled. The county board may not provide a "piecemeal" approval method for the towns since such a method would be contrary to the procedure set forth in the statute. The effect of town approval of the county ordinance is restricted to the effect given in sec. 59.97 (3) (g).

RJK

County—Municipal Court—Municipal Court Act of Racine County discussed relative to difference between maintenance of court and cost of litigation.

April 20, 1959.

EDWARD A. KRENZKE,
Corporation Counsel,
Racine County.

You have requested an opinion whether the city of Racine is required by the Municipal Court Act of Racine county to share certain expenses incurred by the county in connection with the said court. It appears that on April 22, 1958 the county clerk submitted an invoice to the city for payment and that the city has paid a part thereof but has refused to pay the items involved in your inquiry.

The Municipal Court Act of Racine county, 44 WSA §256-23, provides as follows:

"The salary of the judge and clerk, and *all other expenses necessarily incurred in the maintenance of said court*, are hereby adjusted and divided as follows: Two-thirds of said salaries and expenses of maintenance shall be paid by the county of Racine, and the remaining one-third shall be paid by the city of Racine. Said salaries and expenses shall, in the first instance be paid out of the county treasury of Racine county as hereinbefore provided. At the annual accounting between the city and county of Racine, the county treasurer shall furnish unto the proper officer of the city of Racine, a detailed statement of the amounts paid out of the county treasury as aforesaid. And it shall be the duty of the said treasurer of the city of Racine when said account

shall have been rendered and allowed, and he is hereby authorized and empowered, to pay unto the said county treasurer a sum equal to one-third of said expenses."

The dispute arises over the meaning of the words "all other expenses necessarily incurred in the maintenance of said court". The items in dispute are the following:

1. Witness fees and expenses;
2. Jury fees and expense;
3. Fees of physicians appointed under sec. 957.27, Stats.;
4. Fees of attorneys appointed for indigent defendants in criminal cases pursuant to sec. 957.26, Stats.;
5. Officers' fees.

It is my opinion that all of the foregoing items except "jury fees and expense" were properly rejected by the city and are not expenses to which the city is required to contribute.

There is little or no authority regarding the meaning of the term "other expenses necessarily incurred in the maintenance of said court". As you have pointed out, in a similar situation the supreme court has used the terms "expenses of maintenance" and "expense of operation" interchangeably in *City of Milwaukee v. Milwaukee County*, (1940) 236 Wis. 7, 14-15, 294 N. W. 51. It seems apparent that the term "maintenance" in the Racine County Municipal Court Act refers to operating expenses, and by the rule of *ejusdem generis* it means expenses similar to the salary of the judge and the clerk. I agree with your conclusion that costs of litigants are not intended to be included even though the county as a litigant has incurred and paid them. It is only the cost of operating and maintaining the court as such which is to be divided between the city and the county.

In this sense, the jury fees and expense are part of the cost of maintaining the court. In a sense, jurors are officers of the court and the jury is a constituent or arm of the court, although it may be dispensed with by waiver of the parties of the right to jury trial. 31 Am. Jur. 63—Jury, §64. The fees of the jurors are therefore as much an expense of maintaining the court as are the salaries of the judge and the clerk. This does not, however, apply to any jury fees in

civil cases under justice court practice which may be taxable as costs under sec. 307.02 (1) (a).

Witness fees and expenses, however, are expenses of the litigants and not of the court, and the same is true of officers' fees (except, of course, the salary or per diem of the bailiff). In proper cases, such fees are taxable against the defendant under sec. 959.055 (2) (a) and (b), but if the costs cannot be collected from the defendant or if he is acquitted, the county is required to pay the costs under sub. (1) of the same section. These items are clearly costs of litigation rather than expenses of maintaining the court.

The fees of physicians appointed under sec. 957.27 and of attorneys appointed for indigent defendants under sec. 957.26 are perhaps not so clearly a cost of litigation as are the witness fees and officers' fees. In each case the physician or the attorney is appointed by the court without instigation by the district attorney, and payment of the fees and expenses is made pursuant to order of the court. Nevertheless, in my opinion neither is an expense of maintaining the court; both are costs of litigation.

In the case of the counsel appointed to represent an indigent defendant, the responsibility of the attorney is to the indigent client, not to the court. He does not serve the court—he serves the defendant. Sec. 959.055 (2) (e) makes his fees paid by the county a taxable item of costs against the defendant. While such costs are seldom collectible from an indigent defendant, the statute establishes the character of the fees as costs of litigation rather than of maintaining the court.

A more difficult problem is presented by the case of a physician appointed by the court pursuant to sec. 957.27. The expert so appointed is responsible solely to the court and is in no sense under the control of either of the parties. An expert retained by either party may or may not be called as a witness and if he is called his qualifications and truthfulness are in a sense vouched for by the party who places him on the stand. The expert appointed by the court is presumably neutral and is subject to cross-examination by both parties. It might reasonably be argued that he is an arm or agency of the court and that his fees are chargeable to the maintenance and operation of the court.

However, sec. 957.27 expressly provides that "The compensation of such expert witnesses shall be * * * paid by the county * * * as a part of the costs of the action". And sec. 959.055 (2) (c) lists the fees and disbursements allowed such expert witnesses as an item of costs taxable against the defendant. I therefore conclude that such item is not an expense of maintaining the court.

WAP

Criminal Law—Flag—Sec. 946.06 prohibits the printing of the United States flag as part of an advertisement including an advertisement of the sale of the flag itself.

April 21, 1959.

WILLIAM J. MCCAULEY,
District Attorney,
 Milwaukee County.

You have requested an opinion as to whether or not it is permissible to display the lately revised United States flag in newspaper advertisements announcing their availability. Sec. 946.06, so far as is here material, reads:

"(1) Whoever intentionally does any of the following may be fined not more than \$100 or imprisoned not more than 3 months or both:

"* * *
 "* * *

"(c) Manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

"(d) Uses the flag for commercial advertising purposes.

"(2) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are no unauthorized words or designs on such flag and provided the flag is not connected with any advertisement.

"(3) In this section 'flag' has the meaning designated in s. 946.05."

An identical question was answered in the negative in an opinion of this office dated February 8, 1918, 7 O.A.G. 91, in interpreting sec. 4575h, Stats., 1917, which stated:

“* * * shall expose or cause to be exposed to public view any such flag * * * to which shall be attached, appended, affixed, or annexed * * * any advertisement of any nature or kind whatever. * * *”

On April 28, 1919, the legislature passed Ch. 113, Laws 1919, which repealed sec. 4575h and created new sec. 4575h, so far as is here material:

“No person shall, in any manner, for exhibition or display:

“* * *

“(c) Expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign, or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.”

The legislature, by passing this section, acquiesced in the opinion of the prior year, applying the prohibition to advertising the flag itself.

You suggest that a change in legislative intent was evidenced by the comment in proposed sec. 346.06, Volume 5, p. 169, Wisconsin Legislative Council’s Judiciary Committee Report on the Criminal Code of February, 1953. The comment on this subject reads as follows:

“The gravamen of the crime defined by this section is the disrespect shown for the flag in using it for commercial purposes. * * *

“* * *

“* * * if the flag is not connected with any advertisement, [is an exception].”

Here again, there is no suggestion that advertisement for the sale of the flag itself should be made an exception. Therefore, such an intention cannot be read into the language of the statute.

In 1955, sec. 348.479 was renumbered sec. 946.06. Exceptions have been made permitting its use on documents, ornaments, pictures or jewelry provided it is not for advertisement. The legislature also made an exception for periodicals (cf. sec. 946.06 (2), Stats.), but in so doing it jeal-

ously guarded the nonadvertising aspect. Had the legislature intended to permit the advertisement of the flag itself, it could have specifically made such exception. Advertising the sale of the flag certainly is a commercial purpose which the language of this section prohibits. The expressed policy is that it is not consistent with the dignity and honor of the flag to associate it with a commercial advertisement. I conclude that the language of the statute in this regard is clear and unambiguous, and, therefore, the answer to your question is in the negative.

RGM

Civilian Defense—Survey of structures for civil defense under contract requires services of registered professional engineer or architect.

April 28, 1959.

WILLIAM J. MCCAULEY,
District Attorney,
Milwaukee County.

You state that the federal government has contracted with the city of Milwaukee acting through the Milwaukee city civil defense administration to conduct a survey of existing structures in the city with a view toward compiling a list of structures which would be available and proper as "fallout shelter" areas. The city has contracted with local architectural and engineering firms to collect information of this type and is considering contracting with the "X" Appraisal Company which has an extensive library of information on numerous buildings in the area. The managerial and ownership staff of the "X" Appraisal Company are non-registered persons within the meaning of sec. 101.31. The president of the firm is a professional engineer and the person who would sign the contract for the firm is a professional engineer but a majority of the capital stock is not held by either professional engineers or architects.

You state that most of the buildings involved would be 50,000 cubic feet or over and the firm would be called upon

to estimate the probable cost of and suggest additional means of increasing the protection factor of the shelter areas in accordance with set standards. You state that any drawings, plans, designs, specifications, will be done by the architectural and engineering firms contracted with and will also be under the supervision of the Milwaukee civil defense bureau's professional engineer.

The subcontract prepared by the federal government which the firm would be required to sign provides in part:

"* * *

"WHEREAS, the United States of America, * * * has entered into a contract with the City * * * which contract calls for engineering research and development services necessary to inventory and thoroughly evaluate all existing and potential fallout shelter resources located within eight representative areas of the City of Milwaukee, Wisconsin; and

"WHEREAS, the work of making the inventory and the study and analysis necessary to thoroughly evaluate the fallout shelter resources and also to include an identification of any additional shelter facilities necessary, can be more feasibly performed by the Contractor than by the City because of the Contractor's specialized technical competence in the areas of surveys, studies and analysis and engineering ability; and

"* * *

"ARTICLE I. *Scope of the Contract*

"A. The Contractor, in consultation with the City shall furnish the necessary personnel, services of others, facilities and materials and shall use his best effort to thoroughly evaluate the fallout shelter resources located within the areas bounded by -----

of the City of Milwaukee, Wisconsin (hereinafter referred to as the 'Area') and shall prepare a comprehensive report on this evaluation as well as the methods and procedures utilized in the performance of the work and services under the contract.

"B. The specific research and studies to be undertaken will include, but will not necessarily be limited to, the following:

"1. Making a complete inventory, by individual major buildings, of the existing and potential (after estimated shelter improvements are made) fallout shelter located within the Area in accordance with the 'OCDM Guide for Fallout Shelter Survey,' (as revised to February 1959)

which is attached hereto and is herein by reference made a part hereof.

"2. Summarizing on maps of appropriate scale and in tabular form, the aforesaid inventory.

"3. Utilizing the MCDA data available, preparing separate maps of appropriate scales and tabulations, indicating the distribution of the daytime and nighttime populations of the Area.

"4. On the basis of the data developed in Paragraph 1 and 3, preparing a study and assessment of the fallout shelter resources of the Area for each of the following:

"a. Daytime population distribution and one hour warning time.

"b. Nighttime population distribution and one hour warning time."

Your first question is:

Is the work contemplated under the contract of such a nature that it can only be performed by a registered professional engineer or registered architect?

It is my opinion that the contemplated work required to be done by the sub-contractor involves structural analysis, before and after estimated shelter improvements are made, and that such work falls within the definitions set forth in sec. 101.31 (2) (a), (b), (c), (d), and may not be done by non-registered persons. Other work contemplated under the contract may also require the services of registered persons.

Your second question is:

May the "X" Appraisal Company do the work under the facts stated?

The answer to this question is in the negative.

Sec. 101.31 (7) (a) and (b) provides:

"(a) A firm, or a copartnership, or a corporation, or a joint stock association may engage in the practice of architecture or professional engineering in this state only provided such practice is carried on under the responsible direction of one or more registered architects or professional engineers. Any and all plans, sheets of design and specifications shall carry the signature of the registered architect or registered professional engineer who is in responsible charge.

"(b) No such firm, or copartnership, corporation, or joint stock association shall offer to practice the profession of architecture or the profession of professional engineer-

ing in this state, or to use in connection with its name or otherwise assume, use or advertise any title or description tending to convey the impression that it is engaged in the practice of the profession of architecture or the profession of professional engineering, nor shall it advertise to furnish architectural or professional engineering services, unless firm members or copartners owning a majority of the capital interest in such firm or copartnership, or unless the executive director and the holders of the majority of stock of such corporation or joint stock association are duly registered under the provisions of this section.”

It is clear that the company does not comply with the provisions of sec. 101.31 (7) (b) of the statutes. Before a corporation may practice professional engineering or architecture in this state there must first be compliance with the provisions of both subsection (a) and subsection (b) of sec. 101.31 (7). This has not been, and cannot be, done under the present set of facts. *Kempf v. Joint School District* (1959) 6 Wis. 2d 95, 94 N. W. 2d 172. Also see 36 O.A.G. 50.

Contention has been made that under sec. 101.31 (7) (a) a corporation may engage in the practice of architecture and professional engineering if the practice were carried on under the responsible direction of one or more registered architects or professional engineers even though they were not employes or officers of the firm. If we were to assume that this is a correct interpretation of the law, such corporation, in which the owners of the majority of the stock and director were not registered persons, still could not offer or advertise to practice architecture or professional engineering without violating sec. 101.31 (7) (b). Such construction of sec. 101.31 (7) (a) would lead to an absurd result.

It is therefore my opinion that the registered architects or professional engineers who are charged with the “responsible direction” of the work must be officers or employes of the corporation engaging in the practice of architecture or professional engineering.

It is probable that the information available in the files of the “X” Appraisal Company may be available and may be utilized in the project by the city or registered architect

tural or engineering subcontractors without the use of the contract submitted, providing such arrangements do not require the company to engage in services it cannot furnish without complying with sec. 101.31 (7).
RJV

Real Estate Statutes—Constitutionality of amendment of sec. 281.30 by Bill No. 37, S., and Amendment No. 1, S., discussed relative to retroactive enforcement.

April 29, 1959.

THE HONORABLE, THE SENATE.

By Resolution No. 10, S., of the 1959 legislature an opinion is requested from the attorney general on the constitutionality of Bill No. 37, S.

Bill No. 37, S., amends sec. 281.30 (1), Stats., relating to the removal of real estate restrictions.

It provides so far as material here:

“281.30 (1) When all or part of the area of any city block is affected by restrictive deed provisions, restrictive covenants or agreements, and when the first said restriction affecting said property has existed for ~~30~~ 20 years or more, * [and when 75 per cent or more of the area of said city block has not been developed with buildings of the type allowed by said restrictions,] the owner of any part of said block may commence an action in the circuit court of the county where said land lies to remove said ~~restrictive deed provisions, restrictive covenants or agreements.~~ All ~~adjo-~~ *acent adjoining* property owners shall be named as defendants and shall be served with a copy of the complaint.”

The effect of the bill with Amendment No. 1, S., is to provide in substance for circuit court actions to eliminate restrictive covenants and agreements after 20 years. Without Amendment No. 1, S., there would have to be a showing that 75% or more of the area had not been developed with buildings of the type allowed by the restrictions.

* The material in brackets is stricken by Amendment No. 1, S.

It is well settled that when restrictive covenants are entered into with the design of carrying out a general scheme for the improvement and development of property they are enforceable by any grantee against any other grantee having notice. In such a case there is a consideration and mutuality of covenant binding upon each. See *Stern v. Endres Home Builders, Inc.* (1938) 228 Wis. 620, 626, 280 N. W. 316, and cases cited. As to who may enforce restrictive covenants see 21 A.L.R. 1281, 33 A.L.R. 676, 60 A.L.R. 1223, 89 A.L.R. 812, and *Rosenberg v. Whitefish Bay* (1929) 199 Wis. 214, 225 N. W. 838.

Such restrictions are generally made for the benefit of other land in the locality and at the outset such restrictions usually increase marketability, although in the course of time they may come to have exactly the opposite effect. See Vol. VI, American Law of Property, sec. 26.63, p. 506. Restrictions of this type are upheld with practical unanimity of judicial opinion, although there may possibly result an impediment to alienation. The tendency of the courts has been towards strict construction. (Ibid, sec. 26.63.)

Some covenants are so drawn as to have a definite duration, e.g., 25 years is quite common. Others provide for termination by a majority vote of the lot owners. However, in the absence of such provisions there are a growing number of cases where the courts have entered affirmative decrees declaring that a change in character of the surrounding neighborhood, which would render the enforcement oppressive and inequitable, has resulted in the termination of the covenant, so that the burdened landowner is no longer under any duty to comply with the restriction. These cases proceed upon the theory that in all building restrictions there is an implied intention upon the part of the original parties that the restrictive covenants are only to last during the time that the basic purpose of the subdivision can be carried out; and that when the change in the surrounding neighborhood has rendered it impossible to continue to carry out this basic purpose of creating and maintaining a restricted residential area, the parties contemplated that the covenants would come to their natural end. (Ibid. 9.22.) See also 21 C.J.S. "Covenants" §75, p. 934-5.

Roscoe Pound puts the matter very well in an article on "The Progress of the Law", 33 Harv. L. R. 813, 821, where he said:

"* * * It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end; that the duration of the servitude is determined by its purpose. If imposed for a fixed time, it will last no longer, but it may not last so long if the purpose becomes unattainable in the meantime. When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. There is then nothing left to protect by injunction and nothing for which to award damages."

Courts of equity should not do inequity and if the granting of an injunction to enforce restrictive covenants will result in inequity it will be denied. *Bull v. Burton*, (1919) 227 N. Y. 101, 124 N. E. 111, 115. See also *Ward v. Manor Corp.*, (1926) 188 Wis. 534, 544, 206 N. W. 856.

It is true also that statutes sometimes provide limitations of restrictions as to the use of real property. A deed containing restrictions made after such a statute takes effect is to be construed as if the term fixed by the statutes had been expressly inserted therein. 14 Am. Jur. "Covenants, Conditions and Restrictions" §205, p. 616.

Hence, no constitutional problem is presented if Bill No. 37, S., is to be given a prospective application only, and is not applied so as to terminate existing contract and property rights under covenants and restrictions established prior to the enactment of the statute.

However, a much more serious question arises where a statute results in altering a substantive right of parties under contracts in existence at the time the statute is enacted, and it is held that a statute which alters a substantive right of parties to a contract will not be applied retroactively, since to do so would violate Art. I, sec. 10 of the United States Constitution which provides among other things that no state shall pass any law or laws impairing the obligations of contracts. *Cal. Fed. Savings & Loan Assoc. v. Allen* (Cal. App. 1941) 112 P. 2d 959, and subsequent opinion, 19 Cal. 2d 85, 119 P. 2d 137. See also 16A C.J.S. "Constitutional Law" §345, p. 14.

As applied retroactively there is another constitutional objection to Bill No. 37, S., and that is the provision providing that all adjoining property owners shall be named as defendants and shall be served with a copy of the complaint. The word "adjoining" ordinarily means joining to, contiguous, or adjacent, but it seems to be a more restricted or confining word than "adjacent." *Roach v. Soles* (D. C. Cal. 1954), 120 F. Supp. 400, 405. It implies at least that the owner of a lot desiring to commence an action under sec. 281.30 (1) would have to join as defendants only the owners of the lots on either side of him, the owners of the lots directly in back, and the owners of the lots whose corners touch the lot of the plaintiff. However, there may be numerous owners of many other lots in the block or plat who are entitled to rely on the covenants and restrictions and whose property and contract rights would be affected, e.g., *Ward v. Prospect Manor, supra*, p. 545, where it was deemed necessary to consider 92 lots in a portion of a plat.

It is true that sec. 281.30 (2) also requires notice of the commencement of the action and the area to be affected to be published once a week for 3 weeks and the filing of a lis pendens in the office of the register of deeds. Does this constitute due process of law under the 14th Amendment of the United States Constitution?

The answer would appear to be, No, as to known lot owners having a known place of residence. It is a fundamental requirement of due process of law in any proceeding which is to be accorded finality that there be notice reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. It was so held in the celebrated case of *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U. S. 306. The court there held in a proceeding on the judicial settlement of accounts by a trustee of a common trust fund, that as to known present beneficiaries of known places of residence, statutory notice by newspaper publication was insufficient, although such publication would be sufficient as to those whose interests or whereabouts could not with due diligence be ascertained.

While it is true that sec. 281.30 (4) allows any property owner affected by the removal of the restrictions to petition

for and be allowed actual damages in the action this cannot be regarded as a full protection of his constitutional rights, since private property rights can only be taken and paid for where the taking is for a public purpose. The mere fact that one property owner wants to get rid of the restrictions and is willing to pay his neighbors for their loss cannot force them to be unwilling sellers of their rights.

“Unless otherwise authorized by the constitution, private property can be taken only for a public use, and the legislature cannot authorize a taking for a strictly private use, *even on making compensation.*” 29 C.J.S. 816–817; *City of New Lisbon v. Harebo*, (1937) 224 Wis. 66, 271 N. W. 659; *Lamsco Realty Co. v. Milw.*, (1943) 242 Wis. 357, 8 N. W. 2d 372.

This, of course, is not to say that a property owner is not entitled to damages for breach of restrictive covenants. As a matter of fact the Missouri Supreme Court in the case of *Weiss v. Leanon*, (1949) 359 Mo. 1054, 225 S. W. 2d 127, allowed damages for breach even though the covenant would not have been enforceable in equity. There are also other courts which have allowed or suggested the recovery of damages after denial of injunction including the following: *Jackson v. Stevenson*, (1892) 156 Mass. 496, 31 N. E. 691; *McClure v. Leaycraft*, (1905) 183 N. Y. 36, 75 N. E. 961; *American v. Deane*, (1892) 132 N. Y. 355, 30 N. E. 741.

To summarize the foregoing it is concluded:

1. Sec. 281.30 (1) as amended by Bill No. 37, S., and Amendment No. 1, S., is not unconstitutional if applied prospectively only and not retroactively to covenants, restrictions and agreements antedating the statute.

2. Existing restrictions, covenants and agreements can be successfully attacked only in equitable proceedings upon a showing that it would be inequitable to enforce them because their purpose can no longer be carried out.

3. As applied retroactively the provisions of sec. 281.30 (2) as to service of notice by publication probably deny due process and are unconstitutional as providing insufficient notice to property owners having contractual rights under existing restrictions, covenants and agreements where such owners and their addresses are known.

WHR

Register of Deeds—Under sec. 157.07 cemetery plat must be divided into lots to qualify for recording by the register of deeds.

April 30, 1959.

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

You have inquired whether a plat of a cemetery may be recorded if the plat is not divided into lots.

The copy of the plat in question which you have supplied shows that the cemetery is divided into some 18 fairly large sections with drives between the sections, but the sections are not subdivided into lots. Presumably burial space purchased within any of the numbered sections would have to be described by metes and bounds.

Sec. 157.07 relating to platting of cemeteries provides among other things that the board of trustees "shall cause to be surveyed and platted such portions of the lands as may from time to time be required for burial into *lots*, drives and walks, and record map thereof in the office of the register of deeds".

This statutory provision is so clear and express that it calls for no construction or interpretation. It means exactly what it says, and it is couched in mandatory language.

Sec. 59.51 (1) provides in part that the register of deeds shall record instruments and writings authorized by law to be recorded in his office and left with him for that purpose.

The only authorization by law for recording cemetery plats is that found in sec. 157.07, and if the plat offered for recording does not meet its requirements it should not be accepted for recording by the register of deeds.

WHR

Register of Deeds—Mortgages—Mortgages and trust deeds referred to in sec. 182.025 (1) need only be recorded by the register of deeds as he would a real estate mortgage.

May 4, 1959.

EUGENE R. JACKSON,
District Attorney,
Chippewa County.

You have asked my opinion concerning the construction of the following language found in sec. 182.025 (1), Wis. Stats., relating to utility company mortgages and trust deeds:

“* * * Every such mortgage or deed of trust may be recorded in the office of the register of deeds of the county in which such corporation is located at the time of such recording, and such record shall have the same force and effect as if the instrument were filed in the proper office as a chattel mortgage, and so remain until satisfied or discharged without any further affidavit or proceeding whatever. * * *”

Specifically you ask what should be done by the register of deeds upon receipt of an instrument such as is described in this section.

Sec. 182.025 (1) was enacted to facilitate the borrowing of money by certain utility companies, by enabling them to record their mortgages or deeds of trust in one county rather than in all the counties where any of the chattel property happened to be located. A chattel mortgage must ordinarily be filed in the county where the personal property is located. Sec. 241.10. Affidavits of renewal of chattel mortgages must also be filed. Sec. 241.11. Sec. 182.025 (1) relieves a utility from the necessity of filing chattel mortgages in more than one place, and relieves the mortgagor or trustee from the necessity of filing affidavits. The statute says simply that certain mortgages or deeds of trust may be recorded in the register of deeds office. It does not spell out how this is to be done.

The legislature has directed that the instrument be recorded rather than filed. As normally used, these words have distinctly different meanings as they relate to the

duties of the register of deeds. See 45 O.A.G. 47. When such instrument is received by a register of deeds he should record it and index it as he would a real estate mortgage under sec. 59.51 and return the instrument to the person who left it with him. Sec. 182.025 (1) provides that "such record shall have the same force and effect as if the instrument were filed in the proper office as a chattel mortgage". Recording as provided in sec. 182.025 (1) takes the place of filing as a chattel mortgage under sec. 241.10. Sec. 182.025 (1) requires only that such mortgage be recorded. There is no requirement that it also be filed or indexed as a chattel mortgage. It is possible, however, that a court might construe this section to require that such instrument also be indexed as a chattel mortgage. For this reason, it would be advisable for the register of deeds to index such instrument as a chattel mortgage as is provided in sec. 59.51 (11), with a cross reference to the recorded instrument. The instrument itself need not be filed. If the register of deeds wishes to file among the chattel mortgages a blank sheet of paper with the cross reference information thereon, as you have suggested, that could be done.

AH

Public Instruction—Appropriation—Under U. S. Public Law 85-864 state superintendent of public instruction is state education agency within meaning of federal statute. Under sec. 101.345 governor may accept federal funds, and under sec. 20.650 (41) funds are paid into state treasury and appropriated to state superintendent for authorized expenditures.

May 5, 1959.

G. E. WATSON,

State Superintendent of Public Instruction.

You have requested my opinion as to whether the state superintendent of public instruction, upon approval by the governor, would have authority to receive, administer and

disburse federal funds which may be allotted to the state pursuant to the National Defense Education Act of 1958, Public Law 85-864, 85th Congress, H. R. 13247, September 2, 1958, (72 Stats. 1582).

The federal law declares as its purpose "to provide substantial assistance in various forms to individuals and to States and their subdivisions, in order to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States". Title III of the federal act provides among other things that the payments to the state educational agencies are "for the acquisition of equipment (suitable for use in providing education in science, mathematics or modern foreign language) and for minor remodeling * * *". This section also provides that in order for a state to receive payments, it must submit a plan to the federal commissioner of education setting forth the program under which the funds paid to the state will be expended solely for projects approved by the state educational agency for "acquisition of laboratory and other special equipment, including audio-visual materials and equipment and printed materials (other than text books) suitable for use in providing education in science, mathematics or modern foreign language, in public elementary or secondary schools, or both, and * * * minor remodeling of laboratory or other space used for such materials or equipment". Also in Title V of said act, a state may receive payments upon submitting of a proper plan setting forth "the program for testing students in the public secondary schools * * * and a program of guidance and counseling in the public secondary schools * * *". The federal act provides that the funds are to be paid to the "State educational agencies" which administer the approved plans.

Sec. 103 (e) of said Public Law 85-864 defines "State educational agency" as "the State board of education or other agency or officer primarily responsible for the State supervision of elementary and secondary schools". The supervision of public instruction in Wisconsin is vested in the state superintendent of public instruction. Art. X, Sec. 1, Wis. Const. The state educational agency referred to in the federal law, therefore, is the state superintendent of public instruction.

Sec. 101.345, Wis. Stats., provides :

“101.345 Acceptance of federal benefits by governor. The governor is authorized to accept for the state at all times the provisions of any act of congress whereby funds are made available to the state for any purpose whatsoever, including the school health program under the social security act, and to perform all other acts necessary to comply with and otherwise obtain, facilitate, expedite and carry out the required provisions of such acts of congress.”

Sec. 20.650 (41), Wis. Stats., provides :

“(41) Federal aids. All moneys received by the state since January 1, 1943, from the United States pursuant to any act of Congress or pursuant to federal authority for educational purposes over which the state superintendent has jurisdiction, shall be paid within one week after receipt into the general fund and are appropriated therefrom to the state superintendent for the purposes for which the money was received.”

In answer to your question, it is not the state superintendent of public instruction but the governor who has authority pursuant to sec. 101.345 to receive these federal funds. However, the state superintendent does have authority to administer and disburse such federal funds, inasmuch as sec. 20.650 (41) requires such funds (received by the governor) to be paid to the state treasurer as a part of the general fund and therefrom appropriated to the state superintendent. The funds then would be paid out in accordance with the vouchers prepared by the state superintendent who has authority to spend such funds to carry out the purposes expressed in said Public Law 85-864. See 40 O.A.G. 6 and 40 O.A.G. 372. Although the authority to receive the federal funds is in the governor, once the funds have been received the responsibility for disbursement has been left exclusively with the state superintendent.

JEA

Annexation—School Districts—When there is annexation of territory to a city operating under the city school plan, such territory automatically becomes a part of the city school district and is detached from the school district or districts of which it was formerly a part.

May 5, 1959.

G. E. WATSON,

State Superintendent of Public Instruction.

You have asked for my opinion on the following question:

“Does the annexation of territory to a city which is operating under the City School Plan, Sections 40.80 to 40.827, Wis. Stats., operate automatically to constitute said territory a part of the so-called city school district and to detach such territory from the school district or districts (including common and high school districts) of which prior thereto it was a part?”

The present statutes comprising the system of school administration, called the “city school plan”, are secs. 40.80 to 40.827, and so far as here material provide:

“40.80 **City school plan.** (1) Sections 40.80 to 40.827 provide a system of school administration (called ‘city school plan’). All general school statutes govern city schools as far as applicable, and as they are in harmony with this plan.

“(2) (a) Any fourth class city whose territory constitutes all or part of one school district and which has at least 80 per cent of the entire population of such school district or a fourth-class city with not more than 10 per cent of its territory in another school district or any second or third class city may proceed under s. 40.803 or 66.01 to adopt or abandon the city school plan, or may operate or continue to operate as a common school district. * * *.

“(b) Territory of such fourth class city lying within another school district shall not pay school tax within such city. Such territory lying within the other school district shall continue to vote on school matters within said district and shall not vote on any matter relating to the city school plan within said city.

“(c) No second or third class city may, because of this amendment (1953), change from the city school district plan to the common school district plan unless it does so as part of a school reorganization plan under either s. 40.03, 40.06 or 40.07.”

“40.801 City is a school district. (1) Each city operating under the city school plan is a single and separate school district; any territory outside of the city which is joined with city territory in the formation of a school district is attached to the city for school purposes.

“(2) The electors residing in such attached territory may vote on all school matters, including borrowing of money for school purposes, which are submitted to or are voted on by city electors, and may exercise such right at the polling place where they vote at state, local and judicial elections or at any other convenient polling place agreed upon by the city clerk and municipal clerk of the municipality whose electors are concerned, and shall have the right to initiate and sign petitions pertaining to city bonds for school purposes as provided in s. 67.05 (7) (b). * * *”

Annexation of territory to a city, which is not operating its schools under the “city school plan”, has no effect upon school district boundaries. Any school district in which territory in such city is located is a separate entity that is entirely independent and distinct from the city, village or town in which its territory is situated. But, where the annexation is to a city that is operating its schools under the “city school plan”, the situation is different. Then the territory in the city, and any outside territory included therewith to comprise the so-called “city district”, does not constitute a separate and independent entity but the schools and their operation are merely a system which is the functioning of an arm or department of the city government. *State ex rel. Board of Education v. Racine*, (1931) 205 Wis. 389, 236 N. W. 553, *Huettner v. Eau Claire*, (1943) 243 Wis. 80, 9 N. W. 2d 583.

The “city school plan” law was first enacted by ch. 425, sec. 87, Laws 1927, which became effective July 1, 1928. This early statute started with this significant language :

“Sections 40.50 to 40.60 provide a plan or system of school administration for each city of the fourth class whose territory constitutes an entire school district, and each city of the second or third class, *to the end that city schools shall be as nearly uniform as practicable.* * * *”

This is in conformity with sec. 3, Art. X, Wis. Const., which provides :

“The legislature shall provide by law for the establishment of district schools, *which shall be as nearly uniform as practicable; * * **”

Ever since the enactment of such “city school plan”, the consistent construction and application of such statutory provisions by the department of public instruction has been that the annexation of territory to a city which is operating under the city school plan operates automatically to constitute such annexed territory a part of the so-called city school district and to detach such annexed territory from the school district or districts (including common and high school districts) of which prior thereto it was a part. Such practical construction and application of these statutes continuously for over 30 years has not been of a passive nature but has been of an active and affirmative character.

During said years there have been innumerable annexations to cities operating under the city school plan. In every instance thereof, where the department of public instruction was consulted by an interested party, including the cities and school districts involved, sometimes prior to and at other times after the annexation, it advised that such was the effect of the annexation. No instance is known of an annexation where such has not been the effect given thereto and the operations and affairs of the city and the school district or districts involved thereafter conducted on that basis.

But, in addition, over these years, there have been constantly recurring occasions in which, in order to perform its various activities, it has been necessary for the department to construe and apply said provisions. Among them are matters of calculation of state aids, approval of bus routes, allocation of the common school fund income for libraries, nonresident tuition and transportation, school census, school district reports, statistics as to school finances and operation, and the making of surveys, advising and deciding appeals respecting school district reorganizations. In all of them it has continuously so construed and applied such provisions.

While this was quite generally known and accepted throughout the state, the department deemed it desirable to have a specific provision to that effect in the statutes as evi-

dence of legislative acquiescence therein, and at its suggestion a bill was drawn and passed which became ch. 139, Laws 1941, and created the following statute:

“40.50 (3) Whenever any city shall operate under the city school plan as provided by sections 40.50 to 40.60, *all of the area within the corporate limits of such city shall automatically be included under such city school plan and be a part of such city school district.* The provisions of this subsection shall not affect or change the plan or territorial limits of any school system now operating in any city of the fourth class under a special charter heretofore granted to such city.”

Although this language in said sec. 40.50 (3) is not in present secs. 40.80 to 40.827, it is deemed that it is contained therein. The reason it is not is that Bill No. 1, S., the general school law revision which became ch. 90, Laws 1953, repealed sec. 40.50 (3). But, in so doing, there was no intent to change the effect of the “city school plan” statutes in this regard. There is nothing in the history of the bill, including the lengthy notes of the meetings of the committee that prepared it, which contains any indication of any intent to change this provision of the statutes. Rather, the intent in repealing it was the opposite, i.e., the intent was to leave the substance of the law unchanged.

As stated, ch. 90, Laws 1953, was a general revision and this is made clear by its title, which read:

“An act to revise chapters 39 and 40 * * *, relating to the school laws, for the purpose of *rearranging and clarifying* those laws.”

Bill No. 1, S., which became said ch. 90, contained the following introductory note which makes it clear that in repealing sec. 40.50 (3), there was no intent to change the law:

“The meaning of the 1951 statutes revised by this bill is not intended to be changed unless the new language shows clearly an intent to make a change. (See 370.001 (7), Wis. Stats.)”

Sec. 370.001 (7) has been renumbered sec. 990.001 (7), which provides:

“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.”

Sec. 135 of the bill contained a note which read: “Old 40.50 (3) is covered by new 40.80 and 40.801. * * *” This section 135 of the bill first repealed sec. 40.50 (3) and then revised and renumbered sec. 40.50 (1) and (2) to be sec. 40.80 (1) and (2). This statement in the note makes it clear that no substantive change was intended by such repeal and that the only reason therefor was that the committee read the revised language of new secs. 40.80 and 40.801 as including and embodying the substance of the provisions in sec. 40.50 (3). What the committee there stated was that the substance of old sec. 40.50 (3) was contained in new secs. 40.80 and 40.801 and therefore it was no longer necessary to retain sec. 40.50 (3) to effect its result. The effect of this is to carry the provisions of old sec. 40.50 (3) into the provisions of secs. 40.80 and 40.801 to the same effect as if the language of the repealed provisions was set out therein. It must be concluded, therefore, that the legislature intended no change of the substantive law of sec. 40.50 (3) and it was only because the language in secs. 40.80 and 40.801 was read as so providing that the express language was not retained.

Since the revision by ch. 90, Laws 1953, the department of public instruction has continued its interpretation and application of the city school plan as respects annexations to cities operating thereunder, exactly the same as it did during all the years prior thereto. Where the language of the statute is not clear and an ambiguity exists, and practical construction has obtained for many years, then it is entitled to controlling weight. *State ex rel. Bashford v. Frear*, (1909) 138 Wis. 536, 120 N. W. 216; *State ex rel. West Allis v. Dieringer*, (1956) 275 Wis. 208, 81 N. W. 2d 533.

The purpose of achieving uniformity in district schools as called for by the constitution can only be served by the

construction so long pursued by the administrative agency. To construe the statute otherwise would open a virtual Pandora's box of conflicting claims, if not litigation, in view of the innumerable annexations to cities operating on the city school plan that have taken place over the years and which have been given effect of immediate inclusion in the city school districts and detachment from the school district or districts of which the territories were a part prior thereto. It would cast doubt upon the validity of scores of financial transactions, including bond issues, where the rights of innocent third parties would be affected. The existence of these many prior annexations was known to the committee which drafted said Bill No. 1, S., and to the legislature when it enacted said ch. 90. In view thereof it cannot be taken that the legislature intended any such result. *Pfingsten v. Pfingsten*, (1916) 164 Wis. 308, 159 N. W. 921.

The occasion for your request for this opinion is that it has been urged that the somewhat recent decisions of the supreme court in *Village of Brown Deer v. City of Milwaukee*, (1956) 274 Wis. 50, 79 N. W. 2d 340, and *Foscato v. Byrne*, (1957) 2 Wis. 2d 520, 87 N. W. 2d 512, would indicate a different result from that mentioned above. Those cases, however, are not of such import as they clearly are distinguishable.

In the first place, those cases involved solely the effect upon the operation of schools by the City of Milwaukee, of addition of territory to the municipal corporate limits of that city. The City of Milwaukee does not operate its schools under the "city school plan" in secs. 40.80 to 40.827, but under the provisions in ch. 38. The provisions in said ch. 38 are special provisions that relate to and govern exclusively the administration and operation of schools by a city of the first class.

The provisions in ch. 40 are not applicable to schools in a city of the first class except as made so by some provision in said ch. 38. Sec. 38.23 sets out the specific provisions in ch. 40 that are applicable to cities of the first class and the schools thereof. None of secs. 40.80 to 40.827 are included in the provisions set out in sec. 38.23. It is also to be noted that the provisions of old sec. 40.50 (3) and the above history of its provisions were not mentioned by the court or

counsel in those cases. Possibly this may have been due to the fact that sec. 40.50 (3), Stats., 1951 was not included among the specified provisions in ch. 40 that were set out in sec. 38.23, Stats. 1951 as thereby made applicable to a city of the first class and its schools, and therefore not deemed pertinent to the cases. Therefore, the "city school plan", including the incorporated language of old sec. 40.50 (3), has no application to the City of Milwaukee and its schools. Accordingly, the effect of addition of territory to a city operating its schools under the "city school plan" which includes the substance of old sec. 40.50 (3), could not be determined by decisions relative to the effect given to additions to a city of the first class. Such a city does not come within the "city school plan" statutes but is governed by the special provisions in ch. 38, which do not include the provisions in old sec. 40.50 (3).

These cases are further distinguishable on another basis. *Village of Brown Deer, supra*, was an action for declaratory judgment arising from conflicting annexation and consolidation ordinances adopted by the Village of Brown Deer, Town of Granville, and the City of Milwaukee. Part of the territory affected constituted about 80% of a joint high school district engaged in constructing a large high school building situated in Brown Deer. After discussing the validity of the various attempted annexations and consolidation, the court considered the effect of the consolidation on the boundaries of the high school district. The court said (page 70) :

"On the merits, we hold that the *consolidation* which for this purpose we assume to be valid, does not operate to detach territory from the high-school district.

"The *consolidation* ordinances do not purport to change school-district boundaries, and indeed, contain no provision whatever relative to schools or school districts. * * *"
(Emphasis added).

In *Foscato, supra*, the court went in the same direction as in the *Brown Deer* case. In the *Foscato* case, the plaintiff was challenging the taxing power of a common school district (Maple Tree), the entire territory of which was absorbed in the City of Milwaukee's consolidation of the former Town of Granville. The court said :

“* * * Clearly the status of the Maple Tree district is not identical to that of the high-school district, the high-school district having been at all times partly outside of the town, but we think that the reasoning supporting the decision as to the high-school district leads to a similar result in the case of the Maple Tree district so that the *consolidation* did not destroy it. * * *” (Emphasis added).

Referring to the *Brown Deer* case, the court said at page 525 of the *Foscato* case:

“It was pointed out that general principles would make it doubtful whether one constituent municipality might destroy a joint union high-school district by unilateral action and further that the provisions of statutes dealing specifically with alteration of school districts suggests that *municipal consolidation* under sec. 66.02, Stats., was never meant ‘to withdraw territory automatically from a joint school district lying partly in a third municipality.’ * * *” (Emphasis added).

These cases are thus also distinguishable on the basis that the court was dealing with a consolidation as distinguished from annexation. Consolidations are authorized by sec. 66.02, which in no way suggests that school district boundaries are to be affected.

Annexation involves one municipality and only a portion of another, whereas consolidation involves total municipalities. The statutes governing annexation, as contrasted to those controlling consolidation, do have language indicating the legislature intended that annexation has an impact on school district boundaries. Sec. 66.021 (7) (c) provides:

“(c) The annexation shall be effective upon enactment of the annexation ordinance. The board of school directors in any city of the first class shall not be required to administer the schools in any territory annexed to any such city until July 1 following such annexation.”

It is my opinion, therefore, that the annexation of territory to a city operating under the city school plan operates automatically to constitute such annexed territory a part of the so-called city school district and to detach such territory from the school district or districts of which such territory was formerly a part, as of the time such annexation takes effect.

JEA:HHP

Associations—Stock—Resolution of cooperative association providing that shares of stock may be applied on cost of a funeral of deceased stockholder does not constitute violation of sec. 156.12 (3) or (7), where no provision of burial benefits or rebates is made to association operating funeral establishment.

May 11, 1959.

CARL N. NEUPERT,
State Health Officer.

You have requested an opinion on the question of whether or not a cooperative association is in violation of sec. 156.12 (3) and (7) if it limits the redemption of its stock or dividends to the purchase of a funeral at a funeral home operated by the cooperative.

From information which you have furnished us it appears that this particular cooperative is engaged in the furniture, feed, coal, petroleum, hardware, auto accessories and appliance businesses as well as in the funeral service business.

Individuals who have tendered to the association shares of common stock and shares of preferred stock for redemption in cash have been advised that the shares will be redeemed only upon the death of the shareholder by having the shares applied on the expense of the shareholder's funeral at the association's funeral home, and that such shares may be used only for one-half of the funeral expense with the balance to be paid in cash. The stock may not be applied on the purchase of merchandise sold by the association.

Sec. 156.12 (3) and (7), Stats., read:

“(3) No licensed funeral director, licensed embalmer or operator of a funeral establishment shall, directly or indirectly, solicit a funeral service or the right to prepare a dead human body for burial or transportation either before or after death has occurred, or pay or cause to be paid any sum of money or other valuable consideration for the securing of the right to do such work; but nothing herein shall interfere with the right of any person not a licensed funeral director or licensed embalmer to solicit memberships or sell

stock or memberships in any association organized under chapter 185.

“* * *

“(7) No licensed funeral director, licensed embalmer or operator of a funeral establishment shall sell or cause to be sold any shares of stocks, certificates of membership or any other form of certificate which provides for any burial benefit or any rebate at the time of death to the holders thereof.”

We are unable to see how any violation of sec. 156.12 (3) is involved on the basis of the facts submitted. There is no solicitation of funerals by the association or payment of money or other consideration for the securing of the right to render funeral service.

However, sec. 156.12 (7) might be applicable, depending upon the facts. In the material submitted to us is a letter from a firm of attorneys to the cooperative transmitting shares of both common and preferred stock for redemption in cash with the request that if this could not be done the shares of the deceased member be transferred to another person named in the letter. The reply to the letter from the manager of the cooperative states:

“We do not redeem these certificates at the present time because they are only earned shares on patronage. Therefore I transferred all of this stock to ----- . At present we only redeem these shares when the share holder dies and gets buried from our funeral home. Then the shares are applicable on the funeral bill.”

Thus so far as this transaction is concerned the association did not “sell or cause to be sold any shares of stocks” providing for burial benefits or rebates within the meaning of sec. 156.12 (7), as these were earned shares on patronage and not sold shares. A distribution of earnings and profits in the form of stock dividends is not ordinarily considered to be a sale. See cases cited in 38 Words and Phrases “Sale” under subheading “Distribution of Stock”.

However, among the items submitted is an excerpt from the minutes of one of the directors’ meetings from which it appears that a motion was made, seconded and adopted “That in case of death of member or his wife that are holding stock in this association may be applied on the funeral”.

Can it be said that the quoted language from the minutes constitutes a solicitation of a funeral service within the meaning of sec. 156.12 (3)?

The key word in this subsection is "solicit", and there are quite a number of cases in 39 Words and Phrases in which this word has been judicially construed. We will not take the space to cite or discuss them in detail here, but without exception they hold that one or more of the following elements are involved and they are to the effect that "solicit" means to ask for with earnestness, to entreat, importune, to plead for, beseech, to seek eagerly or actively, etc., and that the word implies personal petition and importunity addressed to a particular individual. In fact there are cases holding that the word "solicit" does not even include advertising in a newspaper.

Accordingly it cannot be said that the mere adoption of the resolution in question by the board of directors unaccompanied by any of the required steps to constitute a solicitation mentioned above could be considered as a violation of the provisions of sec. 156.12 (3).

It should also be noted that this subsection also provides,—“but nothing herein shall interfere with the right of any person not a licensed funeral director or licensed embalmer to solicit membership or sell stock or membership in any association organized under chapter 185”. This reflects the well established policy of the state that cooperative associations are favored by the laws of Wisconsin. See *Northern Wis. Co-op v. Bekkedal*, (1924) 182 Wis. 571, 197 N. W. 936.

In other words, while funeral services may not be solicited because of the prohibition in sec. 156.12 (3) this does not mean that memberships may not be solicited in a cooperative association which does operate a funeral establishment, provided that the stock or membership certificate itself does not contain provisions for burial benefits or rebates. This is prohibited by sec. 156.12 (7).

It might be stated at this point that there is nothing in the language contained in the photostatic copies of the common or preferred stock of the association or in any other certificate or document issued by the association to its members that has been called to our attention “which provides

for any burial benefit or any rebate at the time of death to the holders thereof". This quoted language from sec. 156.12 (7) may be and probably is an essential part of the proof in any prosecution for violation of that section. This is a penal statute, and statutes imposing penalties must be strictly construed. If there is a fair doubt as to whether the act charged is embraced within the prohibition of the statute, the doubt is to be resolved in favor of the accused. *State ex rel. Dinneen v. Larson*, (1939) 231 Wis. 207, 217, 284 N. W. 21.

Upon the basis of the facts submitted we cannot advise you that there has been a violation of sec. 156.12 (3) or (7). If there are other and additional facts which bring the activities of the association within the prohibitions of ch. 156, they should be called to the attention of the district attorney of the county where the business is conducted, as it is his prerogative to determine whether the facts are of such a character as to warrant prosecution under sec. 156.15, the penalty provision of the chapter.

WHR

County—Civil Service—County board may, under sec. 59.21 (8) enact ordinance placing deputy sheriffs under civil service and providing for various classes of deputy sheriffs.

May 19, 1959.

EDWARD A. KRENZKE,
Corporation Counsel,
Racine County.

You have requested an opinion as to whether the county board of a county having adopted an ordinance pursuant to sec. 59.21 (8) (a), placing deputy sheriffs under civil service, may provide in the ordinance for various job classifications for deputy sheriffs, such as detective, process server and jailer, and establish qualifications for each job.

The answer is yes.

It should be pointed out, however, that the jailer need not be a deputy sheriff. Sec. 59.23 (1), and 40 O.A.G. 140.

Section 59.21 (8) (a) empowers the county board of any county having a population of less than 500,000 to provide by ordinance that deputy sheriff positions be filled by appointment by the sheriff from a list of the three persons who receive the highest rating in a competitive examination to be given by either the state bureau of personnel or a county civil service commission. The paragraph then continues:

“* * * In the event that a civil service commission is decided upon for the selection of deputy sheriffs, then the provisions of ss. 16.31 to 16.44 shall apply so far as consistent with this subsection, except ss. 16.33, 16.34 and 16.43 and except the provision governing minimum compensation of the commissioners. The ordinance or an amending ordinance may provide for employe grievance procedures and disciplinary actions, for hours of work, for tours of duty according to seniority and for other administrative regulations. * * *”

In 29 O.A.G. 482, it was said that a county board could not, under sec. 59.21 (8) (a), prescribe qualifications for the office of deputy sheriff other than the requirement of residence in the county for one year. That opinion was concerned with the power of the county board to enact an ordinance limiting eligibility to the office of deputy sheriff to male citizens in a specified age group, and the opinion did not consider the specific question you have asked. The opinion concluded that the legislature had delegated to the state bureau of personnel or the county civil service commission, whichever was chosen by the county board, the function of grading applicants as to desirable qualifications and that no statute conferred upon the county board power to exercise this function.

When the above-cited opinion was written, sec. 59.21 (8) (a) did not contain the second of the two sentences quoted earlier in this opinion. That sentence expressly empowers the county board to include in the ordinance provisions “for other administrative regulations”.

McQuillin, Municipal Corporations, 3rd ed., vol. 3, sec. 12.77, states that the establishment of classifications based on departments, type of service and duties of the positions usually is a primary requirement of a municipal civil service law. The author refers to such classification as an administrative matter normally vested in the civil service commission.

It is my opinion that sec. 59.21 (8) (a) empowers the county board to adopt an ordinance placing deputy sheriffs under civil service, providing for examinations to be conducted by the county civil service commission, and providing for different classes of deputy sheriffs. The latter provision properly can be considered an administrative regulation, and the power to adopt such regulations is granted expressly by the statute.

Where the ordinance provides that a county civil service commission is to examine applicants for positions as deputy sheriffs, sec. 59.21 (8) (a) makes ss. 16.31 to 16.44 applicable, with certain exceptions. I find nothing in those sections which would prohibit the county board from providing in the ordinance for different classes of deputy sheriffs.
EWW

Regional Planning—Funds—Funds received under federal housing act of 1954 are received by bureau of engineering pursuant to sec. 20.350 (45) and paid into general fund and appropriated for purposes of regional planning under sec. 15.845 (3) (j). Contracts and reimbursements by cities discussed.

May 26, 1959.

HENRY M. FORD,

Director of Regional Planning.

You state that under the provisions of sec. 701, Title VII, Housing Act of 1954, P. L. 560, 83d Congress, certain federal funds are available to the state for the furnishing of planning assistance to Wisconsin municipalities. You have indicated that although your division is authorized to pro-

vide such planning assistance, nevertheless the size of your staff does not permit your division to undertake the detailed studies necessary in completing any comprehensive plan for a municipality such as contemplated under the federal program, and therefore it is necessary that this planning assistance to municipalities be provided through contractual arrangements with private planning consultants. You have furnished us with a copy of a proposed contract for the furnishing of such planning assistance to a Wisconsin city (hereinafter referred to as the city) by a private planning consultant (hereinafter referred to as the consultant) to be executed by the state, the city and the consultant.

You have asked for an opinion as to:

(1) The exact fiscal manner in which the federal funds should be received and handled.

(2) Whether there is authority for the receipt by the state planning division of funds from the city and if there is such authority, the manner in which such funds should be handled.

(3) Whether the state may enforce the contract so as to compel the city to deliver certain moneys to the state.

(4) Whether the contract is enforceable by the state to secure the performance by the city and the consultant.

While it appears that pursuant to the federal program for providing aid in this field there will be several other proposed contracts submitted to this office for examination and opinion, we do not feel that each one of them would properly be the subject of a formal opinion. Therefore, this opinion is limited to general policy and principles applicable to this program and the state's participation thereunder.

Sec. 701 of the Federal Housing Act of 1954, *supra*, provides:

"To facilitate urban planning for smaller communities lacking adequate planning resources, the Administrator is authorized to make planning grants to State planning agencies for the provision of planning assistance (including surveys, land use studies, urban renewal plans, technical services and other planning work, but excluding plans for specific public works) to cities and other municipalities having a population of less than 25,000 according to the latest decennial census. The Administrator is further authorized

to make planning grants for similar planning work in metropolitan and regional areas to official State, metropolitan or regional planning agencies empowered under State or local laws to perform such planning. Any grant made under this section shall not exceed 50 per centum of the estimated cost of the work for which the grant is made and shall be subject to terms and conditions prescribed by the Administrator to carry out this section. The Administrator is authorized * * * to make advance or progress payments * * *."

Sec. 15.845 (3) (j), Wis. Stats., dealing with urban planning and federal funds therefor, provides:

"(3) Powers. It shall be the duty of the director of regional planning, and he shall have power, jurisdiction and authority:

"* * *

"(j) 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 cooperation 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."

The director of regional planning, under sec. 15.845 (3) (b) is charged with the duty and power:

"(b) To co-operate with all county, city, town and village commissions, boards or committees, charged with the responsibility of planning or zoning certain areas or districts within their respective corporate limits, to the end that the purposes of this section be carried out. All such commissions, boards or committees shall co-operate with the director of regional planning to the same end."

While it does appear that the legislature intended that these federal funds should be used by the director of regional planning, the statutes above quoted do not make provision for the manner in which the funds may be paid into and from the state treasury. However, sec. 20.350 (45) provides:

“(45) PLANNING GRANTS; FEDERAL AID. The bureau of engineering is authorized to receive moneys from the federal government made available to the state as planning grants under P. L. 560, 83rd Congress, chapter 649, 2nd session, known as the Housing Act of 1954, and any acts amendatory thereof or supplementary thereto. Such moneys shall be paid within one week after receipt into the general fund and are appropriated therefrom to the bureau of engineering to be expended in carrying out the provisions of s. 15.845 (3) (j).”

The state planning division is within the bureau of engineering and the state chief engineer employs the director of regional planning. Sec. 15.845 (1) and (2). These circumstances, along with the fact that sec. 20.350 (45) refers to sec. 15.845 (3) (j), make it obvious that the two statutes must be interpreted together.

Thus, in answer to your first question, it appears that the procedure authorized by statute for the handling of these federal funds is through receipt by the bureau of engineering pursuant to sec. 20.350 (45), payment of the same into the general fund, and subsequent automatic appropriation of such moneys to the bureau of engineering for the purpose set out in sec. 15.845 (3) (j). The funds would then be paid out according to vouchers prepared by the director of regional planning.

That a city planning commission is authorized to engage in this type of planning work is evident from sec. 62.23 (1) (e). It is likewise lawful for the state, under sec. 15.845 (3) (j) to facilitate urban planning for smaller communities lacking adequate planning resources.

Under sec. 15.845 (1), the state chief engineer has all the powers necessary to perform the duties prescribed in that section, including the power to determine and allocate the functions prescribed therein. This, of course, includes the duties and functions of the director of regional planning

which, among other things, are to cooperate with and assist all local planning agencies in the state to the end that their activities may be properly coordinated in the interest of the state as a whole. Sec. 15.845 (2). His duties also include that of cooperating with all county, city, town and village commissions, boards or committees charged with the responsibility of planning or zoning certain areas or districts within their respective corporate limits, to the end that the purposes set forth in sec. 15.845 may be carried out. The legislature has indicated that these powers shall be liberally construed in favor of the director of regional planning. Sec. 15.845 (6). This is interpreted to mean that when there is a question as to whether or not the director has a certain power and the doubt as to his having such power can reasonably be resolved in favor of his having the same, then that is the conclusion that should prevail.

The statutes relating to the powers of the state chief engineer and the director of regional planning do not contain any express language authorizing either of them to enter into contracts of the type described with municipalities and private planning consultants. In order for the state to render itself eligible for an urban planning grant of federal funds under Section 701 of the Housing Act of 1954, it must undertake to provide in the particular municipality the required planning work consisting substantially of base maps, population and economic background studies, land use studies and plans, community facilities studies and plans (schools, parks, recreation, public and semi-public buildings) river front study, thoroughfare study and plan, traffic and parking studies, housing study, public improvements program, undeveloped area study and plan, coordinating all elements in a comprehensive master plan, public utilities study and plan, six-year capital improvements program and budget, zoning and land sub-division regulations, but excluding plans for specific public works. The only feasible means available to the state to accomplish this planning work and receive federal funds is through contract for the performance of these services by a private planning consultant.

It must be assumed that the legislature knew the existing facts including, in this case, the limitations of the regional

planning division and the call of the federal statute. *State ex rel Consolidation Coal Co. v. Arnold*, (1925) 186 Wis. 609, 203 N. W. 373; *State ex rel City of Madison v. Industrial Commission*, (1932) 207 Wis. 652, 242 N. W. 321. Further, it must be assumed that the legislature did not intend to legislate in vain. *Haas v. Welch*, (1932) 207 Wis. 84, 240 N. W. 789. The only construction of the statute that would permit the execution of the evident legislative purpose is that the state, acting through its proper officers, is empowered to engage by contract the services needed to achieve eligibility for the federal urban planning funds. *Boynton Cab Co. v. Neubeck*, (1941) 237 Wis. 249, 296 N. W. 636.

All contracts for materials, supplies, equipment and contractual services shall run to the State of Wisconsin and shall be signed by the director of purchases. Sec. 15.61. All materials, supplies, equipment and contractual services (with immaterial exceptions) when the estimated cost exceeds \$3000, shall be purchased from the lowest responsible bidder. This is provided for in sec. 15.60 (1), which also contains provisions governing specifications, advertising, receiving, rejecting and accepting bids. Inasmuch as the statutes thus vest the state's contract making authority with the director of purchases, the awarding of a contract such as here contemplated would necessitate close coordination and cooperation between the director of purchases and the director of regional planning.

In connection with your second question, the contract you have submitted contains a provision to the effect that the city is to pay its share of the consultant's services to the state which in turn will pay it to the consultant along with funds received from the federal government. There is no statute which authorizes the state to receive into its treasury such funds from a city, nor is there any statute authorizing the paying out of such funds from the state treasury even if received. We perceive nothing in the federal law which would require any funds paid by the city through the state to the consultant. It is suggested that the contract could be altered to provide for payments to be made by the city directly to the consultant. The contract could further provide that these payments could be made subject to the written approval of the director of regional planning in the

event that it is deemed desirable that a further control be placed over these funds in addition to the control exercised over the portion furnished by the federal government.

The answer to your second question, therefore, is that there is no authority for the receipt by the state or the state planning division of funds from the city.

The answer to your third question is governed by the answer to the second. In other words, there being no authority for the state to receive such funds from the city, clearly the state could not compel the city to deliver such funds to the state.

With respect to your fourth question, no such contract would be enforceable unless the foregoing statutory requirements and procedures were complied with. With these exceptions, it would seem likely that the contract could be enforced by the state. However, inasmuch as the compliance with said requirements will necessitate certain changes in some of the provisions of the contract, it is recommended that you submit the contract, as amended, to this office for further examination.

JEA

Words and Phrases—Board of Health—Discussion of rule H12.03 of board of health relative to number of full-time instructors in school of cosmetology.

June 1, 1959.

CARL N. NEUPERT,
State Health Officer.

You have asked for my opinion as to the number of instructors required in a school of cosmetology in Wisconsin when more than sixteen students are being trained in such school.

In connection with your question, you refer to sec. 159.02 (2). The part thereof pertinent to this opinion reads:

“* * * No school for teaching cosmetology shall be granted a certificate of registration unless it shall employ and maintain a sufficient number of instructors regularly as such who shall hold an instructor’s license, * * *”.

You also direct my attention to state board of health rule H 12.03, relating to schools of cosmetology, which reads in part as follows :

“(1) There shall be at least one full-time instructor for each sixteen students or fraction thereof receiving instruction in cosmetology.”

With this statute and rule in mind you cite us an example of a school of cosmetology with one hundred thirty students enrolled and nine instructors employed. You state that of these nine instructors, three work six days a week, two work five days a week, one works five mornings a week, one works five afternoons a week, one works from 8:30 a. m. to 2:00 p. m. for five days a week, and one works from 8:30 a. m. to 3:30 p. m. for four days a week. You desire my opinion as to whether or not, under these circumstances, the school in question is complying with the requirement of the above-mentioned rule.

It is my opinion that in the above-described situation you have a failure to comply with such rule. The rule requires “at least one full-time instructor for each sixteen students or fraction thereof”, and it seems to me that even under an extremely liberal interpretation of the meaning of “full-time”, as used in such rule, it must be concluded that a minimum of two of the nine instructors in question are part-time instructors only. This being the case, the school you describe would have only seven full-time instructors for one hundred thirty students, and this falls two short of the nine full-time instructors required under the rule. The two instructors who, in my judgment, are clearly part-time teachers, although the rule fails to define what is meant by a “full-time instructor”, are the instructor who works five mornings a week, and the instructor who works five afternoons a week. It is common knowledge that there is no uniform “full-time” employment throughout the United States. While the forty-hour week is possibly the most widely recognized “full-time” employment, there are many positions, professional and industrial, which require either more or less time than forty hours to constitute “full-time” employment. However, I know of no instance, at least in the teach-

ing profession, where employment for half days for five days per week is recognized as "full-time" employment.

As noted above, there is no definition in state board of health rule H 12.03 of the term "full-time instructor" as used therein, and chapter H 12, Wis. Adm. Code, in its entirety contains no such definition. This makes for a troublesome ambiguity in the rule, for the word "full-time", unless defined, is, in the absence of any applicable and recognized standard of full time, of doubtful meaning. See *Johnson v. Stoughton Wagon Co.*, (1903) 118 Wis. 438, 446, 95 N. W. 394. See also 32 O.A.G. 65, 68; 42 OAG 212, 213. While it is neither my function nor wish to intrude on the rule-making process of the state board of health, it seems clear that state board of health rule H 12.03 should be changed so as to include a definition of the term "full-time instructor" as used therein. Such a change would relieve the board of the difficulties attendant upon deciding whether or not an instructor in a school of cosmetology is a full-time or part-time instructor, where there is no hard and fast definition of what constitutes a full-time instructor.

It should be pointed out, of course, that an administrative body has power to interpret its own rules, and such an interpretation becomes part of the rule. 42 Am. Jur., Public Administrative Law, Sec. 77. Under this principle, the state board of health could arrive at an interpretation of the rule here in question which would not necessarily be reduced to writing and incorporated in the rule itself, but would nevertheless become part of such rule. However, it would appear a sounder approach to the problem here involved to supply in the rule itself the definition above-mentioned.

In conclusion, then, it is my opinion that when more than sixteen students are being trained in a school of cosmetology, a full-time instructor must be employed for each sixteen students or fraction thereof, and an instructor teaching only half days for five days per week at such a school may not properly be deemed a "full-time instructor" within the meaning of that term as used in state board of health rule H 12.03.

JHM

Words and Phrases—Advertising—Discussion of sec. 66.054 (4) relative to the difference between signs as advertising matter and utilitarian material.

June 2, 1959.

H. W. HARDER, *Commissioner,*
Department of Taxation.

You have requested an opinion relating to the construction of sec. 66.054 (4) (a), Stats., which provides in part as follows:

“(4) RESTRICTIONS ON BREWERS, BOTTLERS AND WHOLESALEERS. (a) No brewer, bottler or wholesaler shall furnish, give, lend, lease or sell any furniture, fixtures, fittings, equipment, money or other thing of value, directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof, to any Class ‘B’ licensee, or to any person for the use, benefit or relief of any Class ‘B’ licensee, or guarantee the repayment of any loan, or the fulfillment of any financial obligation of any Class ‘B’ licensee; except that brewers, bottlers and wholesalers may:

“1. Furnish, give, lend or rent outside and inside *signs* to Class ‘B’ licensees provided the value of such *signs*, in the aggregate, furnished, given, lent or rented by any brewer, bottler or wholesaler to any Class ‘B’ licensee, shall not exceed \$125 exclusive of erection, installation and repair charges, but nothing herein shall be construed as affecting signs owned and located in the state of Wisconsin on May 24, 1941 by any brewer, bottler or wholesaler.

“2. Furnish *miscellaneous advertising matter and other items* not to exceed, in the aggregate, the value of \$25 in any calendar year to any one Class ‘B’ licensee;

“3. * * *”

Your question relates to the distinction between “outside and inside signs” and “miscellaneous advertising matter and other items” as used in the foregoing statute. The distinction is of importance because of the different value limitations which are prescribed.

The statute, sometimes referred to as the “tied-house law”, was enacted in 1941. Ch. 121, Laws 1941.

As a frame of reference for your question, you refer to two articles provided by breweries to class B licensees and inquire whether they constitute “signs” or “miscellaneous

advertising matter and other items". One is a large round watch (120 square inches) having a conventional watch face on one side in the center of which is the name of the producer's beer in fairly large type and a slogan in small type. On the back is a picture of a girl filling a Pilsener glass and the name of the beer is printed on the tap and above the girl's head. The watch is an electric timepiece—actually a good-sized clock—contrived to rotate slowly from a chain attached to its stem. The chain is designed to be hung in a lateral curve with the end opposite the watch terminating in a medallion or fob which also contains material advertising the producer's beer.

The other item consists of a translucent world globe having on it some advertising of the producer's beer. Inside is a light bulb which not only lights up the globe but also directs a beam of light from the bottom of the device, which is usually used to light up the beer taps.

In my opinion both of these items are miscellaneous advertising matter and neither is a sign. They are therefore subject to the \$25 annual limitation, and must be aggregated with all other miscellaneous advertising furnished by the brewer for the year. They are not subject to the \$125 limitation applicable to signs.

We have found no judicial definition of the word "sign" as a noun which would apply to this problem. Webster's New International Dictionary defines "sign" as follows :

"5. A lettered board, or other conspicuous notice, placed on or before a building, room, shop, or office to advertise the business there transacted, or the name of the person or firm conducting it; a publicly displayed token or notice."

The Wisconsin statute quoted above was enacted after the federal law dealing with the same subject. 27 U.S.C.A. §205, originally enacted in 1935, provides in part as follows :

"§205. Unfair competition and unlawful practices

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

"* * *

“(b) ‘Tied house’. To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if [etc.] * * *: (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, *subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe*, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; * * *.” (Italics supplied.)

The secretary of the treasury on March 9, 1936 by regulation prescribed exceptions in part as follows, which are now found in 27 Code of Federal Regulations, §6.3:

“§6.3 *Exceptions*. An industry member may furnish to a retailer, under the conditions and within the limitations prescribed, the equipment, signs, supplies, services, or other things of value specified herein: Provided, That such furnishing is not conditioned directly or indirectly on the purchase of distilled spirits, wine, or malt beverages.

“* * *

“(b) *Signs*. Signs, posters, placards, designs, devices, decorations or graphic displays, bearing advertising matter and for use inside a retail establishment, may be furnished, given, rented, loaned, or sold to a retailer *if they have no value to the retailer except as advertisements* and if the total value of all such materials furnished by any industry member and in use at any one time in any retail establishment does not exceed \$10: * * *

“* * *

“(e) *Other things of value*—(1) *Consumer advertising specialties*. Consumer advertising specialties, such as ash trays, bottle or can openers, corkscrews, paper shopping bags, matches, printed recipes, wine lists, leaflets, blotters, post cards, and pencils, which bear advertising matter, may be furnished, given, or sold to a retailer for unconditional distribution by him to the general public, if the retailer is not paid or credited in any manner directly or indirectly for such distribution service.

“(2) *Retailer advertising specialties*. Retailer advertising specialties, such as trays, coasters, beer mats, menu cards, meal checks, paper napkins, foam scrapers, back bar mats, *tap markers, thermometers, clocks, and calendars,*

which bear advertising matter, and which are primarily valuable to the retailer as point of sale advertising media, may be furnished, given, or sold to a retailer if the aggregate cost to any industry member of such retailer advertising specialties furnished, given, or sold in connection with any one retail establishment in any one calendar year does not exceed \$10."

It must be assumed that the legislature in enacting sec. 66.054 (4) (a) had in mind the foregoing federal statute and regulation. It is apparent that the word "sign" as used in regulation §6.3 (b) quoted above was intended to refer to something having no value to the retailer except as an advertisement. Doubtless the word was used in the same sense by the Wisconsin legislature. Items having value either to the consumer or to the retailer were separately treated by the secretary of the treasury in regulation §6.3 (e) (1) and (2), and it may fairly be assumed that it was such items which the Wisconsin legislature intended by the expression "miscellaneous advertising matter and other items".

Therefore, such things as tap markers, thermometers, clocks and calendars bearing advertising matter are not "signs", and to these may be added other like items having utility over and above their advertising value. Clearly, a lamp, a barometer, a board for the posting of baseball or football scores, and many other things could be added to the catalog of items in regulation §6.3 (4) (2), and come within the scope of the expression "miscellaneous advertising matter" as used in sec. 66.054 (4) (a) 2.

The so-called "watch" hereinabove described is in fact a clock which in addition to its function of advertising the brewer's product has additional utility as a timepiece. The translucent globe not only advertises the brewer's product but also functions as a lamp for the illumination of the beer taps. Therefore, neither is a "sign" and each is subject to the \$25 annual limitation. It should be pointed out, however, that if the fob or medallion be separated from the watch and chain ensemble it may, standing alone, be regarded as a sign within the provisions of sec. 66.054 (4) (a) 1.

WAP

Physicians and Surgeons—Hospitals—Under sec. 147.225 (3) agreement may properly be made between hospital, medical specialists, and physicians for billing of services provided the statements for respective services are segregated and professional autonomy is removed from lay control. Bill No. 129, A., would change law only with respect to separate billing requirement.

June 4, 1959.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 16, A., an opinion of the attorney general is requested on the legality of agreements between hospitals and certain specialists relating to the method by which patients are to be charged for such services.

The question is whether there is any violation of sec. 147.225 prohibiting fee splitting by physicians where the hospital includes in a single billing to the patient a charge for the services of specialists such as anesthesiologists, physiatrists, radiologists and pathologists.

The first two subsections of sec. 147.225 relate to fee splitting between physicians, e.g., where one physician pays another for sending a patient to him.

The material part of sec. 147.225 so far as the present inquiry is concerned is subsec. (3) which reads:

“(3) Any physician, surgeon, nurse, anesthetist, or medical assistant or any medical or surgical firm or corporation who shall render any medical or surgical service or assistance whatever or give any medical, surgical or any similar advice or assistance whatever to any patient for which a charge is made from such patient receiving any such service, advice or assistance, shall render an individual statement or account of his charges therefor directly to such patient, distinct and separate from any statement or account by any other person, firm or corporation having rendered or who may render any medical, surgical or any similar service whatever or who has given or may give any medical, surgical or any similar advice or assistance to such patient. Any violation of this provision shall be punishable by the penalty prescribed in sub. (1) of this section.”

This subsection was created by ch. 469, Laws 1915.

The difficulty in answering this inquiry is that no specific agreement has been submitted for consideration. However,

it is not beyond the realm of possibility that an agreement might be drawn between a physician and a hospital whereby the hospital could do the billing provided the charges are separately and distinctly indicated.

The problem which sec. 147.225 (3) was designed to solve has been a troublesome one and has led to some lengthy litigation in at least one state.

An action was brought in the District Court for Polk County, Iowa, in 1955 by the Iowa Hospital Association against the Iowa Board of Medical Examiners, the Iowa Association of Pathologists, and the Attorney General of Iowa. The Iowa State Medical Society intervened in the case. The question as the trial court saw it was whether hospitals have the legal right to sell the services of pathologists, radiologists and other physicians. The Iowa trial lasted 13 weeks and some 50 witnesses testified. District Judge C. Edwin Moore handed down his decision on November 28, 1955, and concluded that the work done by the pathologists, radiologists, and the technicians working in the pathology and X-ray laboratories, constituted the practice of medicine. He also concluded that the privilege of practicing medicine is a personal one requiring qualifications which cannot be met by a corporation, and that the plaintiff hospitals under the court's findings of fact and conclusions of law had been engaged in the unauthorized, unlicensed and illegal practice of medicine. It was further concluded that fee splitting was involved contrary to the Iowa statute. This item will be discussed later.

However, the court made it clear that the decision was not to be understood as holding that hospitals cannot own and maintain facilities for pathology and X-ray laboratories and receive just compensation for the use thereof, as these are essential and necessary parts of a modern hospital. It was the court's opinion that the furnishing of proper pathology and X-ray services to the patients could be worked out on the local level and within the law.

The court's decree was entered on December 7, 1955, and among other things it provided that the pathologist or radiologist, by permitting a hospital to bill for medical services in the name of the hospital without the consent of the patient violated the provisions of sec. 147.56 (4) of the Iowa

Code which defines unprofessional conduct so as to include division of fees or agreeing to split or divide the fees received for professional services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the consent of the patient.

In this respect the Iowa statute is broader than sec. 147.225 (1) and (2) of the Wisconsin statutes which forbid fee splitting only between physicians. However, subsec. (3) of sec. 147.225 gets at the fee splitting situation between physicians and non-physicians or corporations in a slightly different way by requiring submission of separate statements to the patient.

Subsequent to the entry of the decree in the Iowa case the parties did work out a joint declaration pursuant to the court's suggestion that the furnishing of proper pathology and X-ray services to the patient could be worked out on the local level and within the law. However, before discussing that declaration and its possible adaptation to use in Wisconsin in a way which would be consistent with the mandate of sec. 147.225 (3) some comment should be made on the broader question of whether or not a hospital is engaged in the illegal practice of medicine by furnishing the services of the various specialists mentioned in your opinion request.

It is the majority rule that neither a corporation nor any other licensed person or entity may engage, through licensed employes, in the practice of medicine or surgery. 41 Am. Jur. "Physicians and Surgeons" §20, p. 149. However, there does appear to be a growing trend in the decisions to deviate from the foregoing principle, particularly in the case of nonprofit corporations in the field of group medicine and health insurance. Ibid. See also 48 Yale Law Journal 346. Also it is pointed out in the Yale Law Journal note that even in states following the general rule as stated above numerous corporations engage unchallenged in activities which have all the indicia of corporate practice of medicine, and it was said at p. 349:

"* * * It is common knowledge that private hospitals, sanitariums, fraternal organizations, educational institutions, and industrial concerns all administer medical services to their constituents through staffs of physicians hired and paid on a full or part time basis. Similarly, salaried

physicians undertake part time contract practice on behalf of various companies, particularly railroads, to treat passengers and employees."

It might also be noted that in modern hospital practice the direct physician relationship may be almost completely absent particularly in the case of the pathologist and radiologist. Pathological specimens, blood studies, routine urinalysis, tissue work, etc., is frequently done by a pathologist who never sees the patient, and the same is likely to be true in the case of X-rays taken by technicians under the direction of a radiologist. The patient rarely selects a pathologist, radiologist or anesthesiologist, but assumes that the hospital will provide such services.

Perhaps the basic objection to corporate practice of medicine is that it sanctions the exploitation and control of professional people by a lay intermediary which intervenes between physician and patient and which is in a position to profit by high pressure solicitation of patients and sharp competitive advertising. The obvious purpose of laws relating to medical licensure is to protect the public from quacks and exploitation. These elements are not present in the service, care and treatment which a patient receives in a non-profit charitable hospital. See 167 A.L.R. 322, 327; *People ex rel. State Medical Examiners v. Pac. Health Corp.* (Cal. 1938) 82 P. 2d 429, 119 A.L.R. 1284, 1287; *Group Health Ass'n v. Moor* (Dist. Ct. of Dist. of Col. 1938) 24 F. Supp. 445.

While for the most part the cases which sanction the corporate practice of medicine are those which involve group health plans or medical insurance, there are cases in which these features are not present. *Iterman v. Baker* (1938) 214 Ind. 308, 15 N. E. 2d 365, and *Stuart Circle Hospital Corporation v. Curry*, (1939) 173 Va. 136, 3 S. E. 2d 153. Both of these were private hospital corporations operated for profit.

There appear to be no Wisconsin cases on the subject of corporate practice of medicine although in the case of *Gomber v. Ind. Comm.*, (1935) 219 Wis. 91, 261 N. W. 409, the court did discuss the question of whether the relationship of master and servant exists between a hospital and a physician employed by it. The court said at pp. 96-97:

“* * * It has been held generally that the relation between a hospital and a physician employed by it is not that of master and servant; that a hospital does not undertake to act through its physician, but only to procure him to act upon his own responsibility; that physicians and surgeons employed by hospitals to minister to the sick and infirm continue to be professional men who still practice their professions to the best of their abilities and according to their best judgment and discretion, and that while so practicing they are in no proper sense of the word subject to the orders or control of their hospital employers, or bound in treating the sick to follow their directions. *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 105 N. E. 92; *Glavin v. Rhode Island Hospital*, 12 R. I. 411; *Hillyer v. St. Bartholomew's Hosp.* L. R. [2 K. B. 1909] 820; *Hall v. Lees*, L. R. [2 K. B. 1904] 602; *Evans v. Liverpool Corporation*, L. R. [1 K. B. 1906] 160; *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 216, 112 N. Y. Supp. 566; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595; *Laubheim v. De K.N.S. Co.* 107 N. Y. 228, 13 N. E. 781.”

In 1914 the attorney general gave an opinion in III O.A.G. 218 relative to the interpretation of the fee splitting statute in effect at that time and concluded that a hospital might employ a physician or surgeon upon a salary basis and make a contract with the patient to furnish him medical treatment as well as hospital service. It was stated that if this were done the entire charge should be made in the name of the hospital. However, it was also stated that if the physician or surgeon were not paid a salary but charged separately for each treatment or operation, the safer practice would be to make the charge directly to the patient and let the hospital make its own charge to the patient. See also 24 O.A.G. 580 on fee splitting between physicians.

The foregoing discussion of the question of whether illegal practice of medicine by the hospital exists where specialists are employed by the hospital is relevant and important for the reason that if all of the services in question can be legally supplied by the hospital no problem is presented since all of the services mentioned in sec. 147.225 (3) would be furnished by the hospital and it could properly bill the patient for the same even though its charges might have to be broken down on some sort of itemized basis.

Since the basic question of the hospital's legal right to furnish the services in question by its own employes has not been judicially answered in Wisconsin, it will be *assumed* here to be on the safe side, *but without deciding the question*, that the answer is the same in Wisconsin as it was ruled to be in Iowa and that illegal practice of medicine is involved where the specialists are employed by and controlled by the hospital, excepting however the furnishing of such care by public institutions as is required by law for indigent, mental, and tubercular patients, which exception was recognized by the Iowa court.

The attorney general of Iowa has informed me that the decision of the Iowa district court was appealed to the Iowa supreme court but was dismissed when the parties worked out the joint declaration previously mentioned and that this declaration has now been substantially enacted into law by the Iowa legislature.

Space will not be taken here to quote the declaration or the Iowa statutes on the subject but reference will be made to the essential features thereof.

Sec. 135 B. 21 of the Iowa statute provides that the ownership, maintenance and operation of laboratory and X-ray facilities are proper functions of a hospital. Sec. 135 B. 22 states that these services performed in hospitals are the product of the joint contribution of hospitals, doctors and technicians but that these are medical services which must be performed under the direction and supervision of a doctor and no hospital shall direct, control or interfere with the professional acts of the doctor or technicians under his supervision.

Sec. 135 B. 26 provides that the contract between the hospital and the doctor may contain any provision for compensation upon which they mutually agree including a percentage arrangement but that no contract may create the relationship of employer and employe between the hospital and doctor.

Sec. 135 B. 28 provides that the hospital bill shall properly include the charges for the specialized services as long as the name of the doctor is stated and it fairly appears that the charge is for medical services. The hospital bill is also to contain a statement to the effect that the pathology

and radiology charges are for medical services by the doctor and are collected by the hospital on behalf of the doctor, from which charges an agreed sum will be retained by the hospital.

Sec. 135 B. 29 provides that all fees for such services shall be mutually agreed upon by the hospital and the doctor, and sec. 135 B. 30 provides that the fees for such services must be paid as medical and not hospital services. An exception is provided by sec. 135 B. 31 for certain public hospitals as well as the state hospital at Iowa City, and to the operation by the state of mental or other hospitals authorized by law.

CONCLUSION

It is concluded that an agreement can properly be drawn between a hospital and a specialist of the type mentioned in your request whereby the essential medical practice character of specialized services is recognized as well as the fact that such services are the product of the joint contributions of the hospital, doctor, and technicians, but that as indicated in the *Gomber* case, supra, the relationship between hospital and physician is not that of master and servant, and also that the hospital will not have the right to direct, control or interfere with the professional services of the doctor or the technicians working under his direction.

There is no legal obstacle to having the hospital act as the agent of the doctor for purposes of collecting his bill. Sec. 147.225 (3) does not forbid that. Rather it is directed at a breakdown of the respective charges of the hospital and the doctor. In the interests of literal compliance with the statute as to "an individual statement" by each it would seem advisable to list the charges of the doctor and those of the hospital on separate sheets. The actual collection of the bill for the services of the specialist is another matter and is not specifically covered by the statute. Presumably the doctor may assign his account to anyone he pleases, including the hospital. As a matter of fact under the Iowa joint declaration a hospital admission agreement is signed by the patient wherein it is stated that the specialized services are medical services but that the charges are collected by the hospital on behalf of the doctors pursuant to an agreement between

the physicians and the hospital from which charge the patient consents that an agreed sum be retained by the hospital in accordance with the agreement between the doctor and the hospital. This is also covered by sec. 135 B. 28 of the Iowa Code. Presumably the reason for requiring the consent of the patient is that under the Iowa statute the division of fees is unprofessional conduct on the part of the doctor unless the patient consents.

In closing some mention should be made of Bill No. 129, A., of the 1959 legislature. This adds to sec. 147.225 (3) language which emphasizes the propriety of contracts between specialists and hospitals with direct charges to the patient by the hospital for these specialized services pursuant to contract between the hospital and the patient. Also the added language makes it clear that the professional judgment of the specialist is not subject to supervision or interference by the hospital and that the hospital may charge the patient directly for the services of its employees such as nurses, anesthetists, and medical assistants.

The effect of such amendment is to clarify and to spell out specifically by statute some of the details in an area which was previously open to construction and implementation by agreement as has been pointed out above and which by the same token has also been open to some dispute since otherwise this opinion would probably not have been requested. It does, however, change the law so far as the separate billing provisions of sec. 147.225 (3) are concerned, and under Bill No. 129, A., the hospital is authorized to bill the patient without segregating the hospital services from the medical services. However, there is no language in the proposed amendment which in any way permits the hospital to take over or control the professional services of the physician. On the contrary the autonomy of the physician is expressly preserved by the wording that he "shall exercise his professional judgment without supervision or interference by the hospital". In other words, the law as expressed in the *Gomber* case, *supra*, on the hospital-physician relationship would in no way be changed. WHR.

Schools—Religion—Discussion of Bill 281, A., relative to released time for religious instruction and its constitutionality.

June 24, 1959.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 10, A., you have requested my opinion as to the constitutionality of Bill No. 281, A., relating to "released time" from public schools for religious instruction.

Bill No. 281, A., proposes to amend the compulsory school attendance law, sec. 40.77 (1) by adding thereto provisions permitting absence of public school children during school hours provided they attend religious instruction during the same school hours. As so proposed, sec. 40.77 (1) (a) and (c) would read as follows, with the added language italicized:

"40.77 Compulsory school attendance (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 *except as provided in par. (c).*

"* * *

"(c) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside. *The local board may permit pupils with written permission of parent or guardian to be absent from school not to exceed 60 minutes per week to obtain religious instruction outside the school during the required school period under a qualified instructor without approval of the state superintendent. The supervisor of such religious instruction shall report monthly to the principal of the school regularly attended, the names of the pupils who attended such weekly religious instruction. The release hour shall be fixed by the school board. The board may deny this privilege to pupils who absent themselves from such instruction after requesting the privilege.*"

In considering the constitutionality of the proposed amendments, let us first consider whether or not, (a) they violate any provision of the United States constitution, and secondly (b) whether or not they violate any provision of the Wisconsin constitution.

(a) United States constitution:

The applicable provisions of the United States constitution are in the first amendment, which by the 14th amendment is made applicable to a state, and reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

In *McCollum v. Board of Education*, (1948) 333 U. S. 203, 68 S. Ct. 461, 92 L. ed. 649, a system of “released time” in use in an Illinois public school was held invalid as violative of the provisions of said first amendment relative to “establishment of religion” and the “free exercise” of religion, because of the fact that the religious instruction was given in the school building.

In *Zorach v. Clauson*, (1952) 343 U. S. 306, 72 S. Ct. 678, 96 L. ed. 954, the U. S. supreme court dealt again with a “released time” system which was similar to that which appears to be contemplated by the amendment proposed by Bill No. 281, A. The court stated that a New York “released time” program which permitted its public schools to release students, upon written request of their parents, for a specified period during regular school hours to attend religious instruction elsewhere, and provided that those students not released must remain in the classrooms, did not violate the federal constitution.

The majority opinion by Justice Douglas held that the sole question before the court was “* * * whether New York by this system has either prohibited the ‘free exercise’ of religion or has made a law ‘respecting an establishment of religion’ within the meaning of the First Amendment”. The court held that as the program involved neither religious instruction given on public school premises nor the expenditure of public funds, as all the costs, including the

application cards, were paid by the religious organizations giving the off-school premises instructions, there was no violation of any provision of the first amendment. The court pointed out that in the type of "released time" program in the *McCollum* case the public school "classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we (The United States supreme court) have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction".

Therefore, it is my opinion, based on the *Zorach* case, that a "released time" program such as contemplated by Bill No. 281, A., does not violate any provision of the United States constitution as interpreted by the United States supreme court.

(b) Wisconsin constitution.

The applicable provisions of the Wisconsin constitution are as follows:

Art. I, sec. 18:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Art. X, sec. 3, Wis. Const., provides:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

A different question from the federal one is presented in interpreting and carrying out the mandate of the Wisconsin constitution. The founding fathers of this state were God-fearing men and they provided us with a constitution which created an environment in which all religions could

flourish and they have flourished in an environment in which there is room for both state and religion. But the writers of the state constitution went out of their way to provide in as clear, definitive and explicit language as men could devise that the police power of the state shall not be used to interfere with the right of every man to worship God "according to the dictates of his own conscience"; that the police power shall not be used to "compel" a man "to attend* * * any place of worship"; that the police power of the state shall not be used to "control" or "interfere" with "the rights of conscience"; that the state shall give no preference by law to any religious establishment; that no state money shall be used for the benefit of religious societies or seminaries; and that "no sectarian instruction shall be allowed in our public schools".

Before taking up the "released time" questions specifically, I would like to outline the historical construction given these sections by our supreme court and my predecessors in office.

The language in the Wisconsin constitution is more restrictive, definitive and explicit on the question of state-church relationship than the federal constitution.

Faced with this language our state supreme court and my predecessors in office have consistently held or given opinions to the effect that the state or the police power of the state may not be used to implement or discourage religion. Our court and my predecessors in office have frankly stated that the Wisconsin constitution has provided for the strictest so-called "separation" of state and church in the Union.

In *State ex rel. Weiss v. District Board*, (1890) 76 Wis. 177, 44 N. W. 967, our court unanimously and with two concurring opinions upheld the view of protesting parents that the reading of the King James version of the Bible in public schools violated the above-cited provision of the Wisconsin constitution. Justice Lyon speaking for the court outlined the constitutional history of Art. I, sec. 18 of our constitution: He pointed out how the convention was assembled at a time when immigration was large and increasing and that:

"* * * These immigrants were cordially welcomed, and it is manifest the convention framed the constitution with

reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way, *the free district schools in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter?*" (Italics added)

And on page 199 and 200 in dealing with the assertion that the children were not "compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of same", and, therefore the *reading* of the Bible did not violate the constitution, the court said :

"* * * We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, *for any cause*, from a stated school exercise, *particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere*, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that *the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect*, and puts a portion of them to serious disadvantage in many ways with respect to the others." (Italics added)

In dealing with the question as to where and by whom religion should be taught, under our state constitution, the court stated, on page 202 :

"* * * The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle. There, those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated, in accordance with the dictates of the parental conscience. The constitution does not interfere with such teaching and

culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would thereby be promoted, and they so declared in the preamble. Religion teaches obedience to law, and flourishes best where good government prevails. The constitutional prohibition was adopted in the interests of good government; and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a constitutional provision, enacted for such a purpose, is faithfully executed."

Justice Cassoday writing a concurring opinion at the request of the court pointed out at page 207 and 208:

"Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, as mentioned in the opinion of my associate, has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union."

Speaking of the constitutional provisions considered herein, Justice Cassoday said at page 210 and 211:

"* * * it will readily be perceived that these clauses operate as a perpetual bar to the state, and each of the three departments of the state government, and every agency thereof, from the infringement, control, or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guaranty protection in the freedom of such exercise. We neither have nor can have in this state, under our present constitution, any statutes of toleration, nor of union, directly or indirectly, between church and state—for the simple reason that the constitution forbids all such preferences and guaranties all such rights.* * *"

In a second concurring opinion in the *Weiss* case, Justice Orton, after reciting all of the provisions of the Wisconsin constitution dealing with religion or schools or both points out on pages 217, 218, 219, 220, and 221:

"These provisions of the constitution are cited together to show *how completely this state, as a civil government,*

*and all its civil institutions, are divorced from all possible connections or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or appertaining to religion; and to show how completely all are protected in their religion and rights of conscience, and that no one shall ever be taxed or compelled to support any religion or place of worship, or to attend upon the same, and more especially to show that our common schools, as one of the institutions of the state created by the constitution, stand, in all these respects, like any other institution of the state, completely excluded from all possible connection or alliance with religion or religious worship, or with anything of a religious character, and guarded by the constitutional prohibition that 'no sectarian instruction shall be allowed therein.' * * **

The common schools, like all the other institutions of the state, are protected by the constitution from all 'control or interference with the rights of conscience,' and from all preferences given by law to any religious establishments or modes of worship. As the state can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can *have nothing to do with religion in any respect whatever. They are as completely secular as any of the other institutions of the state, in which all the people alike have equal rights and privileges.* * * *

"The clause that 'no sectarian instruction shall be allowed therein' was inserted *ex industria* to exclude everything pertaining to religion. They are called by those who wish to have not only religion, but their own religion, taught therein. 'Godless schools.' They are Godless, and the educational department of the government is Godless, in the same sense that the executive, legislative, and administrative departments are Godless. * * * The only object, purpose, or use for taxation by law in this state must be exclusively *secular*. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter our common schools, they would be destroyed. Those who made our constitution saw this, and used the most apt and comprehensive language in it to prevent such a catastrophe.

* * *

"No state constitution ever existed that so completely excludes and precludes the possibility of religious strife in the civil affairs of the state, and yet so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines in all proper places. Our constitution protects all, and favors

none. But they must keep out of the common schools and civil affairs. * * *

"The common school is one of the most indispensable, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform and may enjoy the benefits of an equal and common education. An enemy to our common schools is an enemy to our state government. It is the same hostility that would cause any religious denomination that had acquired the ascendancy over all others, to remodel our constitution and change our government and all of its institutions so as to make them favorable only to itself, and exclude all others from their benefits and protection. In such an event, religious and sectarian instruction will be given in all schools. Religion needs no support from the state. It is stronger and much purer without it.

"This case is important and timely. It brings before the courts a case of the plausible, insidious, and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the constitution. Those provisions should be pondered and heeded by all of our people, of all nationalities, and of all denominations of religion, who desire the perpetuity, and value the blessings, of our free government. That such is their meaning and interpretation no one can doubt, and it requires no citation of authorities to show. It is religion and sectarian instruction that are excluded by them. Morality and good conduct may be inculcated in the common schools, and should be. The connection of church and state corrupts religion, and makes the state despotic."

In *State ex rel. Conway v. District Board*, (1916) 162 Wis. 482, 156 N. W. 477, where the court held that it was not unconstitutional to hold school graduation exercises in a church hall, the court said at p. 491:

"* * * When the constitution protects the individual from being compelled to attend a place of worship, it undoubtedly means that he shall not be required to attend a place where religious instruction is being given at the time he is required to be present. It protects a man from being obliged to attend the services of the Salvation Army in our public streets, or from being compelled to enter a hall or opera house while such services are being carried on, just as much as it does against being forced to enter a church. It is what is done, not the name of the place where it is done, that is significant."

And in speaking of the background and philosophy of our state constitution the court said at pp. 487-488:

“* * * Our population is made up of many people divided into many religious sects, as well as many people who belong to no sect, all of whom contribute to the maintenance of our state school system in proportion to their ability to pay. The number of our people who do not believe in the existence of a Supreme Being and in Life Hereafter is almost negligible. Of the vast majority who do, some think Eternal Bliss can be most safely insured by pursuing one route and others by pursuing other routes, and hence the number of sects into which we are divided. There is no subject on which people are more touchy than on that of religion. We may think that there is small reason for such a state of mind, but it is a ‘condition and not a theory’ which confronts us. * * * Our constitution makers wisely sought to prevent as far as they could the injection into the affairs of state of anything that would tend to germinate or foster religious rancor or bitterness. It is wise and just that its provisions be adhered to in spirit as well as in letter. * * *”

The Wisconsin supreme court in the case of *Milwaukee County v. Carter*, (1950) 258 Wis. 139, 45 N. W. 2d 90, referred to *Weiss* with approval and stated as follows at page 143:

“* * * in view of said provision in sec. 18, art. I, Wis. Const., and the decision in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967, and consistently thereafter in many cases, no person can be compelled to support any place of worship, nor can any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies or religious or theological seminaries. Thus, it is well-established law in this state that neither tax-supported public-school property nor funds so raised for public-school purposes can be used for sectarian organized religious purposes. In these respects the decisions of this court are in accord with the decision in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649, holding unconstitutional the use of public-school time and the course of instruction given the children through the compulsory-education law to teach religious doctrines, creeds, and principles. * * *”

It is to be noted that the *McCollum* case has been modified by the *Zorach* case but both of those cases dealt with the construction of the federal constitution and not the Wis-

consin constitution. As of this date the only rule laid down by the Wisconsin supreme court is that the Wisconsin constitution is in accord with the *McCullum* case.

Attorney General Herman L. Ekern in an opinion in 1926, XV O.A.G. 483, stated that a "released time" program comparable to that in Bill No. 281, A., would violate Art. I, sec. 18 of the Wisconsin constitution. General Ekern in the caption of this opinion stated as follows:

"Plan under which cards to be signed by parents asking that their children be excused from school one hour each week to receive religious instruction are handed to pupils by teachers and returned to and sorted by teachers and passed on to ministers of churches designated by such parents, violates sec. 18, art. I, and sec. 3, art. X, Wis. Const., prohibiting any interference with freedom of conscience or use of public moneys for religious purposes or dissemination of sectarian instruction in public schools."

In 38 O.A.G. 281, 287 Attorney General Thomas E. Fairchild, now Justice Thomas E. Fairchild, in discussing the question of "released time" stated in his opinion:

"The only conclusion that can be expressed with any degree of certainty on the basis of the present state of authorities is that any released time plan that utilizes the tax-established and tax-supported public school system to aid religious groups to spread their faith is in violation of the first amendment of the United States constitution made applicable to the states by the fourteenth amendment. * * * There is grave question as to the validity of any plan that makes use of a pupil's school time, whether off or on the school property, and makes use of school regulations to facilitate attendance for religious instruction. * * * There is also doubt as to the validity of any plan where school authorities cooperate to the extent of releasing the children for religious instruction, the children remaining under the technical jurisdiction of the public school. * * *"

General Fairchild's conclusion was based primarily on the federal constitution as interpreted by the *McCullum* case, which has since been modified, but he also relied on the opinion of General Ekern which was based on the Wisconsin constitution.

In 34 O.A.G. 127, 128, Attorney General John E. Martin, now Chief Justice John E. Martin, held in regard to

the school bus law that the proposed Bill No. 439, A., which would have authorized school districts to provide transportation of students to sectarian schools at public expense was unconstitutional, and so finding Attorney General Martin reviewed contrary theories and decisions and other jurisdictions and concluded:

“All of the cases previously cited are decided under constitutional provisions somewhat different from those in the Wisconsin constitution. It is obvious the constitutionality of Bill No. 439, A. must depend upon a consideration of the applicable provisions in *our* constitution. * * *” (Italics added.)

From the above authorities it is clear that Wisconsin has stricter constitutional provisions in regard to the separation of state and church than does the federal government or our sister states. The Wisconsin supreme court has admitted quite frankly in the *Weiss* case when it stated at page 220:

“No state constitution ever existed that so completely excludes and precludes the possibility of religious strife in the civil affairs of the state, and yet so fully protects all alike in the enjoyment of their own religion. * * *”

Now let us turn to this question of released time specifically as proposed in Bill No. 281, A., and see whether or not it violates our state constitution.

1. Art. I, sec. 18 provides:

“The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; * * *”

This means that the police power of the state shall not be used to infringe or to interfere with a man's religious conscience or mode of worship. In the case of Bill No. 281, A., the police power of the state, that is, the school truant officer, would be or could be used to apprehend the child who absented himself from religious instruction and was running the streets. The bill itself contemplates such activity by providing for reports on the religious activities of children by the religious authorities to the state (school) authorities. To quote from Bill No. 281, A.:

“* * * The supervisor of such weekly religious instruction shall report monthly to the principal of the school regularly attended, the names of the pupils who attended such religious instruction. * * *”

I think this part of the bill is unconstitutional because the reports by the religious authorities are made for the purpose of invoking the police power of the state (that is, the truant officer or the public school authorities) over the religious activities or lack of religious activities of the child.

Also, what happens if a pupil has written permission from his parent to receive the religious instruction but fails or refuses to present it to school authorities because he does not want to go to church but prefers to stay in school? Must the teacher on learning the facts act as a policeman and force the child to leave the school and go to church? I do not believe that the constitution would permit the teacher to do this.

2. Our constitution further provides in Art. 1, sec. 18:

“* * * nor shall any man be compelled to attend * * * any place of worship, * * *.”

This phrase means that the police power of the state shall not be used to compel a citizen to attend a place of worship. Our supreme court held in *Conway* at page 491 that a place of religious instruction was a place of worship. The element of compulsion in the “released-time” program proposed by Bill 281, A., exists not only in respect to the reporting mentioned above but in addition it is an inherent part of the plan that those students who do not go to the religious instruction are held in the school building even though it is impossible to have the normal class instruction. This would have the desired effect of tending and encouraging them to leave their class rooms and join their fellow students in attending religious instruction. It may well be that they should have more religious instruction, but the constitution of Wisconsin does not permit the *state* to compel them to get it.

The question that then arises is whether or not the parents can consent to the invoking of the power of the state “to compel” the child’s attendance at religious instruction. I think not, because the constitution deprives the state of this power in the first instance and that power which the

state does not have cannot be invoked by consent or by any other means. No one would assert that if the parents consented the *state* could compel children to go to church on Sunday. The constitution leaves the element of compulsion in religion up to the religious authorities and the parents.

3. The Wisconsin constitution further provides in Art. I, sec. 18:

“* * * nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; * * *”

This means that the police power of the state shall not be used to “control” or “interfere” with one’s religion or right of conscience; and it further means that the police power of the state shall not be used to show preference for *any* organized or unorganized religion over the other or for any mode of worship.

The “released time” program proposed by Bill 281, A., for reasons stated above does tend to “control” or “interfere” with one’s religious activities and it would unquestionably favor those children whose parents belong to organized religions over those children who come from homes whose parents do not belong to an organized religion. The bill tends to give preference to those whose “mode of worship” is on an organized basis.

Bill 281, A., provides that the matter of whether permission is to be granted pupils to receive religious instruction rests in the discretion of the local school board which “*may* permit pupils with written permission of parent or guardian to be absent” for religious instruction “under a *qualified* instructor”. This gives the board the power to rule that pupils may be released to go to church A but not to church B because the board may entertain the notion that the instructor of church A is “qualified” but not the instructor of church B. Obviously the constitution denies to the state such control over religion.

The Wisconsin constitution further provides in Art. I, sec. 18:

“* * * nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

Our supreme court has held at p. 215 in *Weiss*, that this means the state treasury:

“* * * But we are to remember that the school in question receives annually from the state treasury its proportionate share, not only of the school fund income (sec. 554, R. S.; sec. 3, ch. 124, Laws of 1885; and ch. 277, Laws of 1887), but also of the one mill tax (sec. 1070a, S. & B. Ann. Stats.; ch. 287, Laws of 1885). The question thus recurs whether the money thus drawn from the state treasury for the maintenance and support of the school in question is for the benefit of a religious seminary, within the meaning of this clause of the constitution. A seminary is defined by Webster as a ‘place of training; institution of education; a school, academy, college, or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments.’ It manifestly includes institutions of learning or education of different grades. * * *”

In the same case at p. 215 the court found that the reading of the Bible violated this provision of the constitution because it was an expense to the state.

“* * * The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text-book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution.”

In order for a system of “released time” of the type proposed by Bill No. 281, A., to be put into operation and carried on, the time of teachers and school officials, the properties and equipment of the schools, and the very school system itself would be used and necessary. The teachers and supervisory personnel would have to process the written authorizations, keep records thereof, arrange and effect the departures of the “released” pupils from the school premises, keep records and make reports in respect to attendance at the religious instructions, and have additional problems and work in the matter of truancy due to the program. Also, the school operation would have to be accommodated thereto by arranging or revamping the ordinary classwork

so that the unreleased pupils would not be given any instruction during the "released time" but would engage in some other activity otherwise special arrangements would have to be made for "released time" pupils whereby they might receive the instruction or classwork missed during their absence. Whatever the arrangement it would be something other than the program which followed except for the "released time" program.

The cost or additional expense attendant upon a "released time" program of this type might not be large in comparison to the total school costs, but to the extent that time of school personnel and the property and equipment of the school were devoted thereto, there would be a use of time and property for which public school funds were expended. The public school system would thereby be subjected to operational functions that would have no purpose or object except to aid attendance at the religious instructions. In view of the fact that our supreme court objected to the cost of reading the Bible I would expect that it would find the cost of a "released time" program more objectionable.

In other states the "released time" question has been treated differently than in Wisconsin. In forty of the states some form of "released time" is in use, and has been for a number of years. Some of them, such as New York, Minnesota and California, have express statutory provisions providing for or authorizing programs comparable to the one proposed by Bill No. 281, A., as an amendment to our compulsory attendance law. The constitutions of the various states differ, although in some the provisions thereof are comparable to the quoted provisions of the Wisconsin constitution. The only state courts of last resort that have passed on the constitutionality of "released time" are New York, California and Illinois and they have all found it constitutional. *People ex rel. Lewis v. Graves*, (1927) 245 N. Y. 195, 156 N. E. 663; *Lewis v. Spaulding*, (1948) 85 N.Y.S. 2d 682, 193 Misc. 66, appeal dismissed 299 N. Y. 564, 85 N. E. 2d 791; *Zorach v. Clauson*, (1951) 303 N. Y. 161, 100 N. E. 2d 463, affirmed (1952) 343 U. S. 306, 72 S. Ct. 678, 96 L. ed. 954; *Gordon v. Bd. of Ed. City of Los Angeles*, (1947) 78 Calif. App. 2d 464, 178 P. 2d 488; *People ex rel. Latimer v. Bd. Ed. Citu*

of *Chicago*, (1946) 394 Ill. 228, 68 N. E. 2d 305. As noted above the supreme court of the state of Wisconsin on the last occasion that it discussed this general problem indicated that the Wisconsin constitution was in accord with the position of the United States supreme court in the *McCullum* case. The court stated in *Milwaukee County v. Carter*, (1950) 258 Wis. 139, 143, 45 N. W. 90, as follows :

“* * * In these respects the decisions of this court are in accord with the decision in *Illinois ex rel. McCullum v. Board of Education*, 333 U. S. 203, 68 Sup. Ct., 461, 92 L. ed. 649, holding unconstitutional the use of public-school time and the course of instruction given the children through the compulsory-education law to teach religious doctrines, creeds, and principles. * * *”

It is readily apparent that Wisconsin is in a minority position on the “released time” question. Most of the states approve it, even those that have similar constitutional provisions to ours. The constitution means, for legal purposes, what the Wisconsin supreme court says it means. Based upon the constitutional provisions of the Wisconsin constitution and upon the construction given these provisions by the supreme court and my predecessors in office and for the reasons stated herein, I do not see how I could come to any conclusion except that Bill 281, A., violates the Wisconsin constitution.

JWR:HHP:NSH

School District—Appropriations—School district may bring proceedings to enforce payment by a town, city or village of unpaid utility taxes to which it is entitled under sec. 76.28 (3) in prior years. Six year statute of limitation applies thereto.

June 25, 1959.

THE HONORABLE, THE SENATE.

By Resolution No. 8, S., an opinion has been requested in answer to three questions relating to the apportionment of utility taxes to school districts under sec. 76.28 (3).

1. Can the school district which has not received a distribution of utility tax to which it is entitled from the municipality collect after the municipal clerk has made his tax settlement and closed his accounts for the fiscal period?

The tax settlements pursuant to secs. 74.03 (5) and 74.031 (8) and the distributions made to school districts as a part thereof by the town, city or village treasurer have no effect upon any distribution of utility taxes which the school districts would be entitled to receive under sec. 76.28 (3). The provisions in sec. 74.03 (5) for a distribution on or before March 15 of each year, and in sec. 74.031 (8) for monthly settlements in the case of installment payment of taxes, cover only the collections which the city, town or village treasurer has made of taxes in the local tax roll of that year. The distributions therein provided to each school district include only a payment of the proportion of the school district tax levy that the balance of general property taxes collected bears to the total general property taxes included in that tax roll.

The local tax roll does not include the utility taxes. Sec. 76.13 specifically provides that they are levied by the department of taxation in a special tax roll and are collected by the state treasurer. The utility taxes collected each year are distributed by the state treasurer as provided in sec. 76.28 upon the certifications made in July and November of each year pursuant to sec. 76.27.

Therefore, the fact that a town, city or village treasurer has fully complied with and followed the requirements of sec. 74.03 (5), or 74.031 (8) where the latter is applicable, could not have any effect upon the right of school districts to a distribution from that town, city or village of utility taxes which sec. 76.28 (3) provides said town, city or village shall distribute and pay over to such school districts. Nor would the fact that the town, city or village, has closed its fiscal books for a year without making a distribution as provided in sec. 76.28 (3) constitute any bar to a school district asserting thereafter that it had not received its proper distribution of the utility taxes received by the town, city or village treasurer in that year. Certainly, the mere closing of the books of the town, city or village for its fiscal year could not operate as a discharge of a liability which it

had incurred or been subjected to during the fiscal year but did not pay during the year. The obligation of the town, city or village to make the proper distribution to school districts set forth in sec. 76.28 is a liability created by such statute which the school district as a separate entity could enforce by appropriate proceedings, unless barred therefrom by some statute of limitation.

2. If a municipality required under sec. 76.28 (3) of the statutes to share the utility tax with the school district has failed to do so, can the school district collect their share for prior years?

As stated above, the obligation of a town, city or village to make distribution of utility taxes to a school district is a statutory liability that continues until it is discharged or any claim therefor is barred by a statute of limitations. This being true, a school district entitled to a distribution under sec. 76.28 (3) would be entitled to collect any unpaid distributions in prior years and the only bar thereto would be some statute of limitations.

The provision in sec. 40.22 (13) granting the annual school district meeting the power to direct and provide for the prosecution or defense of any action or proceeding in which the district is interested, indicates that a school district has the power and authority to bring legal proceedings. It is provided in sec. 40.29 (1) that a school board, subject to the authority vested in the district and the authority specifically given to other officers, has the possession, care, control and management of the affairs of the district. Sec. 40.34 (2) provides that the treasurer of a school district shall "Apply for, receive, and if necessary sue for all money appropriated to or collected for the district * * *". These several provisions clearly support a power in a school district to bring the necessary court proceedings to enforce payment to it of moneys due it, which would include utility tax distributions provided in sec. 76.28 (3) that remain unpaid.

3. If the school district can recover for prior years, for how many years back can they compel the municipality to pay?

In *Gilman v. Northern States Power Co.*, (1943) 242 Wis. 130, 7 N. W. 2d 606, it was held that the six year statute, sec. 330.19, was applicable to a suit by the Village of Gilman to recover from a utility company a sum of money paid to it under an allegedly void contract relating to an electrical distribution system and it barred such action where it was not commenced within six years after the cause of action accrued. This decision said that the action would have been barred if brought by the state and therefore, it was barred by a subdivision of the state because a subdivision of the state would be subject to the statutes of limitation applicable to the state unless expressly provided otherwise and there was no such provision. The state was not a party to that proceeding and while it has been the position of this office that the court there misinterpreted the intent of ch. 79, Laws of 1931, and the import of the notes to the Bill which became that chapter, in determining that the six year statute, sec. 330.19, would have there been applicable instead of the ten year statute, sec. 330.18, if the state had been the plaintiff in that case, no case has arisen since then in which there has been an opportunity for this office to present to the court the arguments in that regard. It will be done when an opportunity arises. However, the argument in support of applicability of the ten year statute, sec. 330.18, is too lengthy and complex to be set forth herein and no purpose would be served, because as long as the *Gilman* case stands it is controlling that the six year statute, sec. 330.19, would be applicable to such a suit by a subdivision of the state. Although a school district is not a municipality but has merely the status of a quasi-municipal corporation with limited powers, it would be a subdivision of the state for purposes of the statutes of limitation. Therefore, until some further decision by the supreme court, the six year statute would be applicable to a claim of the school district against a town, city or village for distribution of utility taxes pursuant to sec. 76.28 (3).

HHP

Workmen's Compensation—Statutes—Where an award was made on claim for compensation under the 1951 statutes, additional injury due to subsequent exposure constitutes a new and separate claim under sec. 102.555.

June 26, 1959.

RALPH E. GINTZ,
Industrial Commission.

In your letter of April 2, 1959, you ask the following question:

“Where claim has been made for loss of hearing due to noise exposure under the provisions of 102.52 (17) or (18) of the Wis. Stats. of 1951, and an award is issued, can the employe make a subsequent claim for additional loss of hearing due to subsequent noise exposure? (Under the present statutes this would be under the provisions of 102.555). In other words, must the initial award be interlocutory or does the later claim constitute a new and separate injury?”

Where a claim for loss of hearing due to noise exposure was made under the 1951 statutes, and an award issued, additional loss of hearing due to subsequent noise exposure constitutes a new and separate injury and may be the basis of a claim under the provisions of sec. 102.555.

Under the 1951 statutes, sec. 102.52, which contained the permanent partial disability schedule, the allowance for total deafness was 333 $\frac{1}{3}$ weeks (subsec. (17)), and for total deafness in one ear was 50 weeks (subsec. (18)), and there was no differentiation between hearing loss caused by accident or by occupational disease. Ch. 328, Laws 1953, amended subsecs. (17) and (18) of sec. 102.52, Stats. 1951, so that they applied only to deafness “from accident or sudden trauma”. Ch. 281, Laws 1955, created sec. 102.555, which contains comprehensive provisions relating to occupational deafness and provides in part as follows:

“* * *

“(4) * * * In cases covered by this subsection ‘time of injury,’ ‘occurrence of injury,’ ‘date of injury’ shall be exclusively the date of occurrence of any of the following events to an employe:

“(a) Transfer because of occupational deafness to non-noisy employment by an employer whose employment has caused occupational deafness;

“(b) Retirement;

“(c) Termination of the employer-employee relationship;

“(d) Layoff, provided the layoff is complete and continuous for one year;

“(e) No claim under this subsection shall be filed, however, until 6 consecutive months of removal from noisy employment after the time of injury except that under par. (d) such 6 consecutive months' period may commence within the last 6 months of layoff.

“(5) The limitation provisions in this act shall control claims arising under this section. Such provisions shall run from the first date upon which claim may be filed, or from the date of subsequent death, provided that no claim shall accrue to any dependent unless an award has been issued or liability admitted.

“(6) No payment shall be made to an employe under this section unless he shall have worked in noisy employment for a total period of at least 90 days for the employer from whom he claims compensation.

“(7) An employer shall become liable for the entire occupational deafness to which his employment has contributed; but if previous deafness is established by a hearing test or other competent evidence, whether or not the employe was exposed to noise within the 6 months preceding such test, he shall not be liable for previous loss so established nor shall he be liable for any loss for which compensation has previously been paid or awarded.

“(8) Any amount paid to an employe under this section by any employer shall be credited against compensation payable by any employer to such employe for occupational deafness under subs. (3) and (4). No employe shall in the aggregate receive greater compensation from any or all employers for occupational deafness than that provided in this section for total occupational deafness.”

When an employe filed a claim for occupational loss of hearing under the 1951 statutes, he necessarily filed a claim only for the injury sustained. The injury was in the nature of occupational disease, *Green Bay Drop Forge Co. v. Industrial Comm.*, (1953) 265 Wis. 38, 60 N. W. 2d 409, 61 N. W. 2d 847 a disease acquired as a result of work in the employment over an appreciable time, *Andrzeczak v. Industrial Comm.*, (1945) 248 Wis. 12, 14, 20 N. W. 2d 551; *Zabkowicz v. Industrial Comm.*, (1953) 264 Wis. 317, 322, 58 N. W. 2d 677. In some occupational disease cases, such as silicosis, for example, increased disability may result without additional exposure to silica dust. See *Maynard*

Electric Steel C. Co. v. Industrial Comm., (1956) 273 Wis. 38, 48-49, 76 N. W. 2d 604. In the case of occupational loss of hearing, however, no increase in disability can occur without additional exposure to noise. The Report of Medical Subcommittee to Advisory Committee on Workmen's Compensation Legislation (attached to Ind 80.25) indicated that a certain amount of recovery may be expected after removal from the noisy environment, and that a final estimate of hearing loss should not be made until there has been at least six months removal from the noisy working area (p. 91, Workmen's Compensation Act pamphlet, 1957). The six-month provision was embodied in sec. 102.555 (4) (e), which precludes the filing of claim until six consecutive months of removal from noisy employment.

If additional loss of hearing occurred due to exposure after the filing of a claim under the 1951 statutes, it would be the result of subsequent exposure and would constitute a separate injury. The position of an employe who sustained additional hearing loss as a result of exposure to additional noise while working for the same employer would be analogous to that of an employe who sustained successive injuries while working for the same employer. In *Kiesow v. Industrial Comm.*, (1934) 214 Wis. 285, 287, 252 N. W. 604, the claimant sustained injuries to his foot while working for the same employer in 1926 and 1929. For the first injury, compensation was paid on the basis of a 35 per cent disability to the foot; for the second injury, the commission awarded 15 per cent disability to the foot. The argument was made that compensation paid for the first injury covered all permanent injury up to 35 per cent. The court said, however, that:

“* * * the first settlement is not effective in excluding the compensation benefits following the subsequent injury if as a matter of fact the subsequent injury has lessened Greening's efficiency. * * *”

In like manner, the payment for hearing loss under the 1951 statutes would not exclude a claim for compensation for the subsequent hearing loss caused by additional exposure to noise. However, under the provisions of sec. 102.555 (7), the employer would not be liable “for any loss for

which compensation has previously been paid or awarded", that is, the employer would not become liable under the present statutes for the loss of hearing paid for under the 1951 statutes.

ML

Taxation—Statutes—The taxation and regulation of oleomargarine and other butter substitutes as provided by sec. 97.39 (3) et al. would probably be held to be constitutional.

June 29, 1959.

TO THE HONORABLE, THE ASSEMBLY.

By Joint Resolution No. 22, A., you have requested my opinion on the constitutionality of sec. 97.39 (3), 97.42, 97.44, 97.47 and 97.72 (2), which pertain to the taxation and licensing of the sale of oleomargarine, penalties for violation thereof and other matters.

While there have been numerous amendments to the oleomargarine laws, the basic provisions were enacted in 1931 and their principles and purposes have not changed since that date.

Ch. 279, Laws 1925, which became sec. 352.365 of the statutes represented an earlier enactment in this field. That statute in effect prohibited the manufacture and sale of oleomargarine and was enacted for the purpose of protecting the dairy industry from what was considered by the predominant political thought of that time to be unfair competition. This was based upon the price differential between dairy and vegetable fats and the fear that the lower price of oleomargarine would disrupt and destroy the market for butter. This statute was held unconstitutional by the supreme court of Wisconsin in *Jelke v. Emery*, (1927) 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

The court stated that this statute was an invalid exercise of the police power because it prohibited the sale of a healthful and nutritious food when such prohibition was not necessary to protect the public health, morals or safety, or to prevent fraud. The court specifically ruled that it could not

be justified by a desire to protect the dairy industry from unfair competition.

The instant statutes appear to have been stimulated by the same school of thought which had unsuccessfully sought to prohibit the use of oleomargarine, but they are clearly distinguishable. Essentially, they provide for:

1. A tax of 15¢ per pound on oleomargarine and certain other butter substitutes.
2. License requirements including fees for manufacturers, wholesalers and various classes of retailers, which range from \$5.00 per annum to \$1,000.00.
3. Requirements for labeling and identifying oleomargarine and other butter substitutes so that the consumer cannot be deceived as to the nature of the product he is buying or using.
4. Direction to the heads of public welfare institutions and programs to serve butter and not substitutes.
5. Penalties for violations.

Sec. 97.42 (1) (a) provides in part as follows:

“An occupational tax is hereby assessed, imposed and levied, as hereinafter provided, upon the sale, offering or exposing for sale, or giving or delivery or use of oleomargarine, butterine and similar substances, in this state. *The purpose of this section is declared to be the raising of revenues* and the regulations herein imposed are for the purpose of securing the full collection of such revenue, and punishing evasion or attempted evasion of the payment thereof.
* * *”

The question of the constitutionality of these sections is so clearly analogous to the issues involved in the case of *A. Magnano Co. v. Hamilton, Attorney General*, (1934) 292 U. S. 40, 54 S. Ct. 599, 78 L. ed. 1109, in which the supreme court of the United States upheld the 15¢ per pound oleomargarine tax imposed by the state of Washington, that it can best be answered by fairly extensive quotations from that opinion. The court therein stated:

“(1) In respect of the equal protection clause it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation. (2) That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the

tax, and not to any ulterior motive or purpose which may have influenced the Legislature in passing the act. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

and again on pp. 44-45:

"Second. Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 24, 36 S. Ct. 236, 60 L. ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 329, 21 S. Ct. 625, 45 L. ed. 879; *Heiner v. Donnan*, 285 U. S. 312, 326, 52 S. Ct. 358, 76 L. ed. 772. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.

"Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray v. United States*, *supra*, 195 U. S. 56-59, 24 S. Ct. 769, 49 L. ed. 78, 1 Ann. Cas. 561. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 per cent tax imposed upon the notes of state banks involved in *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. "The power to tax may be exercised oppressively upon persons,

but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' ”

On page 46-47 the court stated (quoting from *Alaska Fish Co. v. Smith*, (1921) 255 U. S. 48, 49, 41 S. Ct. 219, 220, 65 L. ed. 489) :

“ ‘Even if the tax, should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. * * * The Acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation.’ ”

and,

“(12) *The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the Legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used. Child Labor Tax Case, supra, 259 U. S. 36, 42 S. Ct. 449, 66 L. ed. 817, 21 A.L.R. 1432. If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act.*” (Italics added)

The *Magnano* case has stood as a landmark in this field. It has been often cited and never overruled. It is my opinion that it must be considered controlling in the instant case and that if the tax features of these sections are valid, the companion provisions are clearly sustainable.

The provisions which have the effect of preventing the deception of the consumer as to the nature of the product are analogous to both state and federal false advertising and anti-deceptive practices statutes, the constitutionality

of which I would consider to be beyond question. The other provisions are largely complementary to the tax and aids to its enforcement.

On the basis of this authority, it is my opinion that the oleomargarine laws of Wisconsin cited above would probably be held constitutional if tested in the supreme court. This same conclusion was reached by Circuit Judge Otto H. Breidenbach of Milwaukee County in the case of *State ex rel. Department of Agriculture v. Waller's Food Distributor, Inc.*, decided April 15, 1943, which cited primarily the same authorities.

This opinion relates only to the power of the legislature to enact such laws. The question of whether or not it is advisable to continue these statutes and what effects they may have on the free access to markets for Wisconsin produced dairy products in other states, is not covered by this opinion.

GFS

Nurses—Statutes—Any person not a registered nurse who displays caduceus with D. N. superimposed or who represents self as “D. N.” or “Doctor’s Nurse” violates sec. 149.06 (4) and is subject to penalty of sec. 149.12.

June 30, 1959.

ADELE G. STAHL, *Secretary,*
State of Wisconsin Department of Nurses.

You have written asking for my opinion in connection with the following facts:

A private association or corporation operating under the name “American Registry of Doctor’s Nurses”, of Washington, D. C. (formerly Marianna, Florida) has been soliciting certain persons employed in the offices of practicing physicians of Wisconsin to become members of said organization. According to this organization’s literature, which accompanied your letter, a person may become a member by meeting the following requirements:

“QUALIFICATIONS :

“Membership is open to all persons who have had experience as a doctor’s nurse in a doctor’s office or clinic and can successfully check at least ten blocks on the qualification chart. Original application must be co-signed by a recognized Doctor of Medicine.”

The so-called “qualification chart” is preceded by the statement “Place an X in the box alongside the following procedures in which you have had experience:”. These “procedures” are then listed as follows:

“Autoclave Procedure	Basal Metabolism
Catheterization	Electrocardiography
Injections	Ultrasound Treatment
Bandaging	Diathermy
First Aid	Taking X-Rays
Taking Respirations	X-Ray Developing
Oxygen Therapy	Bookkeeping
Taking Blood Pressures	Collections
Minor Surgery Assisting	Case History Record
Taking Pulses	Medical Terminology
Instrument Care	Purchasing
Taking Temperatures	Medical Records
Minor Surgery Prep	Insurance Forms
Instrument Sterilization	Hemoglobin
Gyn. Prep.	Urinalysis
Massage	Blood Counts
Infra-Red Treatments	Sedimentation Rate
Ultra-Violet Treatments	Differential Smears.”
Whirlpool Treatments	

Next follows five blank spaces over which appears the caption “OTHERS (Write In):”.

This literature also lists among “5 Outstanding Benefits” the following:

“Membership will afford Recognition.
Use of the letters D.N. after name.
Affix the official automobile emblem.
To wear the official D.N. Cap.
To wear the official Pin.
Professional Standing.”

The “official pin” referred to is in the form of a caduceus used by the medical profession on which is superimposed the letters “DN”, being an abbreviation of the title “Doctor’s Nurse”.

Examination of the literature submitted further shows that there is no prescribed period of training required in order for one to be eligible for membership in the so-called "American Registry of Doctor's Nurses". All that is required is "experience" in any of ten of an apparently unlimited number of procedures, of which 37 have been listed above. In fact, there is no provision on the application form for a showing of how much experience the applicant has had in any such procedures.

You ask if a person who is employed in a Wisconsin physician's office or clinic, and who is not a Wisconsin registered nurse, may wear or display a caduceus with the letters "D.N." superimposed thereon or use such letters after her name.

Ch. 149 prescribes the requirements for the licensing of registered nurses and trained practical nurses. Sec. 149.06 deals with the certification of registered nurses and provides:

"149.06 Certificate. (1) One complying with this chapter relating to applicants for registration as nurses and passing a satisfactory examination shall receive a certificate of registration. The holder of such a certificate of another state or territory or province of Canada, shall be granted a certificate without examination if her credentials of general and professional educational qualifications and other qualifications are comparable to those required in Wisconsin during the same period. The board shall evaluate the credentials and determine the equivalency in each such case.

"(2) The certificate shall be issued by the president of the board and countersigned by the secretary of the committee of examiners. The holder of such certificate is a 'registered nurse' and may append 'R.N.' to her name, and is authorized to practice professional nursing.

"(3) A registered nurse practicing for compensation shall annually during January file with the department on furnished blanks a statement giving her name, residence and such other facts as the board requires, with a re-registration fee of \$3.

"(4) No person shall practice or attempt to practice professional nursing, nor use the title, letters, or anything else to indicate that she is a registered or professional nurse unless she is registered under this section. No person not

so registered shall use in connection with her nursing employment or vocation any title or anything else to indicate that she is a trained, certified or graduate nurse."

An earlier opinion from this office concluded that the use of the letters "R.N." as a title by a person not authorized to practice professional nursing in Wisconsin, is unauthorized and constitutes an offense punishable under sec. 149.12. 24 O.A.G. 563.

In interpreting a statute, the general design and purpose of the law must be kept in view. A statute must be given a fair and reasonable construction with a view toward effecting the object and purpose of the statute. *Julius v. Druckrey*, (1934) 214 Wis. 643, 649, 254 N. W. 358.

The basic purpose of Ch. 149 is the preservation and protection of the public health through the regulation of the practice of nursing. Protection of the health of the public necessarily includes protection against the inherent dangers arising from unauthorized persons representing themselves to be lawfully entitled to practice professional nursing. The same purpose of protecting the public health is served by the statute prohibiting unauthorized persons from holding themselves out as trained practical nurses or licensed attendants. Sec. 149.09 (4) (c).

The nursing profession and its members enjoy a high degree of prestige and public confidence which reflects the profession's high standards of education, competence and conduct, and its exacting responsibilities. The only end that could be sought by a person, not a registered nurse, holding herself out as a "D.N." or "Doctor's Nurse" would be to deceive the public as to her true status in order to share in the prestige and other benefits of professional nursing, without assuming the responsibilities and without being subject to the regulations of the licensed profession. In order to ascertain the legislative intent, it is proper to look to the mischiefs intended to be remedied. *Carchidi v. State*, (1925) 187 Wis. 438, 444, 204 N. W. 473. To protect the public from being deceived and defrauded by the type of pretense described above is clearly a purpose of the legislation. This type of conduct is obviously within the scope of the statutory language prohibiting any person from

attempting to practice professional nursing or using the title, letters or *anything else* to indicate that she is a registered nurse unless she is registered as required by law. Sec. 149.06 (4).

My answer is, therefore, that any person who is not a Wisconsin registered nurse, who wears or displays the caduceus with the letters "D.N." superimposed thereon, or who uses such letters after her name, or who otherwise represents herself to be a "doctor's nurse" as contemplated in the literature as described herein would violate sec. 149.06 (4), and be subject to the penalty imposed by sec. 149.12 (1).

JEA

Highways and Bridges—Weights and Measures—In a prosecution under sec. 348.15 to 348.17 state need not show actual knowledge on part of owner where it is evident vehicle was operated on behalf of and in connection with owner's business. Wherein seasonal weight limits are imposed by counties it is immaterial whether highway is class "A" or "B".

July 2, 1959.

EDWIN C. STEPHAN,
District Attorney,
 Door County.

You ask for my interpretation of secs. 348.17 (1), 348.20 (1) and 349.16 (2) Stats., which read as follows:

"348.17 Special or seasonal weight limitations

"(1) No person, whether operating under a permit or otherwise, shall operate a vehicle in violation of special weight limitations imposed by state or local authorities on particular highways, highway structures or portions of highways when signs have been erected as required by s. 349.16 (2) giving notice of such weight limitations, except when the vehicle is being operated under a permit expressly authorizing such weight limitations to be exceeded.

"* * *

"348.20 Policy in prosecuting weight violations.

"(1) It is declared to be the public policy of the state that prosecutions for overweight violations shall in every instance where practicable be instituted against the person holding the authority, certificates, licenses or permits evidencing operating privileges from the public service commission or motor vehicle department which may be the proper object of cancellation or revocation proceedings. In instances where a combination of tractor and trailer or semitrailer is used, the person standing in the relationship of principal or employer to the driver of the tractor portion of the vehicle combination is liable for violation of s. 348.15 to 348.17 along with the owner holding authority, certificates, licenses or permits from the state. It is a violation of ss. 348.15 to 348.17 for the owner or any other person employing or otherwise directing the operator of the vehicle to require or knowingly to permit the operation of such vehicle upon a highway contrary to ss. 348.15 to 348.17.

"349.16 Authority to impose special or seasonal weight limitations.

"* * *

“(2) Imposition of the special weight limitations authorized by sub. (1) (a) shall be done by erecting signs on or along the highway on which it is desired to impose the limitation sufficient to give reasonable notice that a special weight limitation is in effect and the nature of that limitation. Imposition of the special weight limitations authorized by sub. (1) (b) shall be done by erecting similar signs within 100 feet before each end of the bridge or culvert to which the weight limitation applies. All weight limitation signs shall comply with the rules of the state highway commission and shall be standard throughout the state.”

You have asked two specific questions. First, you question whether it is necessary for the state to prove that the county highway committee has designated the particular highway involved as a Class “B” highway in accordance with sec. 349.15 before a successful prosecution for violation of sec. 348.17 may be had.

The answer to this question is no.

Chap. 348 regulates the size, weight and load of vehicles on the highways of this state. As such it is a specific *exercise* of the police power by the legislature. Chap. 349 defines the powers of state and local authorities in the field of traffic law. This chapter constitutes an express *grant* of authority in this general field to state agencies and local municipal authorities.

All highways in the state are Class “A” highways with the exception of those county trunk and town highways and city and village streets which have been designated Class “B” highways by the county highway committee or local authorities in accordance with s. 349.15.

Weight limitations applying to Class “A” highways are found in s. 348.15 and to Class “B” highways in s. 348.16. Additional limitations as to both Class “A” and Class “B” highways in the form of special or seasonal weight limitations are authorized by s. 349.16.

The limitations found in ss. 348.15 and 348.16 are legislative impositions which apply statewide. The limitations authorized by s. 349.16 are permitted to be adopted by the officer charged with the maintenance of town, city or village highways, the county highway commissioner *or* county highway committee in case of county highways and the state

highway commission in the case of state maintained highways.

Imposition of such special or seasonal limitations may be accomplished as provided in the statute, s. 349.16 (2), i.e. “* * * by erecting signs on or along the highway on which it is desired to impose the limitation sufficient to give reasonable notice that a special weight limitation is in effect and the nature of that limitation. * * *”

Sec. 348.17 prohibits the operation of any vehicle in violation of special weight limitations on any highway or highway structure or portion of such highway where signs have been posted as required by s. 349.16 (2). The penalty section for violation of such restrictions is s. 348.21. The authority delegated to local officials and the state highway commission under s. 349.16 applies to any highway, whether Class “A” or Class “B”. Accordingly, the limits set for Class “A” highways under s. 348.15 and the limits set for Class “B” highways under s. 348.16 may be further curtailed by special or seasonal restrictions imposed in accordance with s. 349.16, by the county highway commissioner or the county highway committee as relates to county highways.

Sec. 349.15 permits only the county highway committee to change a Class “A” highway to a Class “B” highway with respect to the county trunk highway system. This is immaterial as to restrictions which are authorized under s. 349.16.

Your second question inquires as to whether the state must prove *actual* knowledge by the owner or employer or the actual direction of the operator of the vehicle to use a highway in violation of s. 348.17 where the prosecution is against the owner or employer. The answer to this question is also no.

You point out that s. 348.20 declares it to be the public policy of the state that prosecution for overweight violations, where practicable, shall be against such owner or employer. You further point out that the statute provides that it is a violation for the owner or other persons directing the driver to “* * * *require or knowingly to permit* the operation of such vehicle upon a highway contrary to ss. 348.15 to 348.17. * * *” The italicized disjunctive terminology should be noted.

It should be emphasized that the prosecution against the owner should be instituted only where "practicable". The driver may be charged where it is not practicable to charge the owner.

The nub of the question is whether the legislature intended that s. 348.20 (1) should attach vicarious liability to the owner who "requires" his trucks to operate on the highways in violation of weight limitations. It is to be noted that s. 348.02 (3) provides that the "owner" who "causes or permits" a vehicle to be operated on a highway in violation of *any provision* in ch. 348 is guilty of the violation the same as if he had actually operated the vehicle himself. "Owner" is defined by s. 340.01 (42) as the person who holds legal title to the vehicle or is a lessee or conditional sale vendee with right of possession.

First, it appears necessary to reconcile sections 348.02 (3) and 348.20 (1). The first comprehensive motor vehicle code in this state was embodied in ch. 454, Laws 1929, which became chapter 85 of the statutes. The provisions now found in s. 348.02 (3) were found in s. 85.45 (1) from its enactment in 1929 until the new vehicle code was adopted by ch. 260, Laws 1957.

The substance of s. 348.20 (1) became law by ch. 436, Laws 1951, and was sec. 85.90 (3) (a) until the motor vehicle code of 1957. The legislative intent may be determined by a review of the legislative history of the particular provision. Ch. 570, Laws 1949, created a highway advisory committee to study problems posed by motor carrier transportation in Wisconsin. One of the conclusions the committee reached was that there was a dangerous amount of overloading by truckers using Wisconsin highways and that many truckers were repeated violators. The committee's 1950 report was submitted to the governor and the legislature recommended heavier penalties to be assessed for repeated violators; mandatory unloading or shifting of load to comply with the law; penalties should rest against the owner of the vehicle; and a system of recording convictions and providing for revocation of authority of license should be provided among other things.

At page V of the letter of transmittal found in sec. 1, part 1, of the committee's report, it had the following to say in regard to penalties against the owner:

"Investigation indicated that the imposition of repeat violation penalties was hampered by the fact that some cases were brought against the owner of the vehicle, others against the driver. Some courts prefer the charge against the driver because of the ease of disposing of the case. There are two objections to this practice: (1) It hampers conviction under the 'repeater' statute, and (2) in many cases the driver is not at fault because he has no control over the loading of the vehicle. Proposed legislation would rest the penalties against the owner of the vehicle. Because of the various leasing practices, the proposed law seeks to charge the owner of the truck or the tractor unit of a tractor-semitrailer combination. The driver should be authorized to accept summons for the owner."

It should be noted that all of the recommendations of this committee became law with the passage of ch. 436, Laws 1951.

Sec. 348.20 (1) being a specific statute relating to prosecutions in overweight violations it must rule as to those violations since sec. 348.02 (3) is a general statute relating to ch. 348 as a whole. *In re Miller's Estate*, (1952) 261 Wis. 534, 53 N.W. (2d) 172.

Accordingly, as to weight violations, we must determine whether the legislature intended that the state must prove "intent" or "actual knowledge" on the part of the owner who is charged with "requiring" the operation of his vehicle upon a highway in violation of ss. 348.15 to 348.17. It must be conceded that knowledge must be proved where the charge is "permitting" the illegal operation. This would obviously be the situation where the vehicle was loaned or leased by the owner to another and was not being operated on behalf of the owner at the time. The driver or person employing the driver could then be charged.

In spite of the general rule that an essential ingredient of a criminal offense is some blameworthy condition of mind such as negligence, malice, or guilty knowledge, the legislature may if it pleases punish offenders although there is no blameworthy condition of mind about them. These offenses are commonly described as *mala prohibita* as distinguished

from *mala in se*. These are welfare statutes, and include such offenses as the illegal sale of intoxicating liquor, adulterated food and drugs and violation of the motor vehicle laws among others. For discussion of this subject, see 33 Col. L.R. 55.

These statutes, “* * * impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.” *People v. Roby*, (1884) 52 Mich. 577-79, 18 N.W. 365; also *Reismier v. State*, (1912) 148 Wis. 593; *Scott v. State*, (1920) 171 Wis. 487; 16 Corp. Jur. pp. 76-77 §42; *Knecht v. Kenyon*, (1923) 179 Wis. 523 at 530; *Commonwealth v. Ober*, (1934) 286 Mass. 25, 189 N.E. 601. In *Scott v. State, supra*, the court upheld a conviction of the operator of a cheese factory for allowing cheese made at his factory to be put into the channels of trade with an excessive amount of moisture contrary to a criminal statute. The defendant testified that the cheese was sent from his factory by his employees in violation of his orders. The court said at p. 488:

“So far as the manufacturer who puts into the channels of trade cheese with excess moisture is concerned, no question of intent, except that of manufacturing for sale or exchange is involved. * * *”

and at page 489:

“Here cheese was sent from the factory into the channels of trade. * * * when the cheese is offered for sale or exchange, the manufacturing process must be *conclusively presumed* to be completed, and the statute in such case provides for proof of no other intent than that of manufacturing for sale or exchange, which is here both admitted and proven.” (Emphasis supplied)

In *Knecht v. Kenyon, supra*, the court held that the operator of a store had violated a criminal statute prohibiting gasoline to be stored in a container not painted and labeled as prescribed by the statute despite his testimony that he had directed his clerk to fill the container with kerosene instead of gasoline. The court said at p. 530:

“Manifestly, if the owner of a large retail store, employing numerous clerks, engaged in selling gasoline and other

similar products, was exempted by a construction of the statute involved because of his lack of knowledge or lack of intention, and where such clerks failed to comply with the provisions of the statutes, the statute itself would be emasculated and the beneficial results designed to be attained would be frustrated. The statute itself must be construed in connection with the general object and purpose which it is apparent that the legislature desired to effect. * * * a compliance with such statute requires the exercise of the necessary amount of diligence on the part of the owner to prevent a violation of its provisions."

Remembering that the purpose of the statute in question is to prevent illegal overloading, which causes early deterioration of the highways, and that the use of the highways is a privilege subject to reasonable regulation under the police power, the only reasonable conclusion is that this is one of the unusual instances where a person, at his peril, must see to it that the regulations are not violated by his acts or by the acts of another, acting in his behalf. See *State v. Hartfiel*, (1869) 24 Wis. 60; *Conlin v. Wausau*, (1908) 137 Wis. 311; *State v. Grams*, (1942) 241 Wis. 493.

According to Blacks Law Dictionary, one who "requires" something to be done directs it, orders it, instructs it, demands it or compels it. Where the owner's vehicle is being used to carry on the business of the owner at the time a violation occurs, a presumption arises that the owner "required" such operation within the meaning of s. 348.20 (1), just as in the *Scott* case, *supra*, a presumption of completion of the manufacturing process arose when the cheese was offered for sale.

Evidence that the vehicle is being used to carry on the business of the owner may be obtained in the case of contract carriers from information required to be kept on the vehicle by Wis. Adm. Code, sec. PSC 16.32 (1) and as to common carriers from information required to be kept in their home office by Wis. Adm. Code, sec. PSC 16.32 (2). In addition, a manifest on the rig will usually disclose such information.

LLD

Traffic Patrol—Municipalities—State traffic patrol may permit local law enforcement personnel to ride in state patrol squad cars for training purposes, providing municipality requests that the officers participate in such training.

July 2, 1959.

JAMES L. KARNS, *Commissioner*
Motor Vehicle Department.

You request my opinion as to whether it would be legal and proper for the state patrol to permit local law enforcement personnel to ride in state patrol squad cars for the purpose of observation of your enforcement methods and better understanding of motor vehicle laws. You feel that such an arrangement would be desirable but are uncertain as to responsibility in case of injury or death to such local personnel. You ask my advice on four specific questions.

Since all law enforcement agencies have a duty to enforce the state traffic laws, a joint effort at improving such enforcement by the municipality and the state patrol is within the meaning and intent of sec. 66.30 (1). Such an arrangement would also appear to be within the intent of the legislature as set out in sec. 110.07 (2) relating to assisting local enforcement officers “* * * wherever possible in the regulation of traffic and the prevention of accidents upon the public highways. * * *”, and could be considered an operational phase of training authorized by sec. 110.065 in connection with the traffic academy.

Your specific questions and my answers are as follows:

1. Should we permit such riding only with the consent or at the request of the head of the rider's department?

This would appear to be an administrative policy problem which does not require legal advice. However, from the standpoint of good administration, the patrol should require the local officer to present a request from an authorized representative of the municipality before allowing the local officer to accompany him on patrol.

2. Would a signed statement from the rider and/or his superior exonerating the motor vehicle department from liability have any legal value?

Since such a release would have no effect in regard to liability under the workmen's compensation law, if liability

should exist, I assume you mean liability for negligence of the state patrolman. A release *could* provide for barring of contingent and future claims as to negligence of the state patrolman if the intent of the parties is clear. *Rotberg v. Dodswell*, (1945) 152 F. 2d 100. However, the release could be declared void if contrary to public policy. 45 Am. Jur., Releases, p. 683. Lack of consideration would not necessarily void the release if it was under seal, *Singer v. Gen Accident Co.*, (1935) 219 Wis. 508, 262 N.W. 702, but equity may inquire into it. *Radio Corp. of America vs. Raytheon Mfg. Co.*, (1935) 296 U. S. 459 at 462.

It appears to me that it would be inadvisable for the officer to grant such a release to the state and unnecessary for the state to demand it. Under sec. 345.05 the state has consented to suit against it for injuries resulting from negligent operation of motor vehicles owned and operated by it. The local officer might have a cause of action against the state in case he suffers personal injuries resulting from the negligence of the state patrolman with whom he is riding. It would be contrary to the spirit of sec. 345.05 for the state to deprive the local officer of any rights he might have in this regard.

The state is insured by a contract of liability insurance with a company licensed to do business in this state. This policy covers all state owned vehicles and has special endorsements applying to motor vehicle department vehicles which provide liability limits for *bodily injury* of \$50,000 per person and \$300,000 per accident, and for *property damage* of \$25,000.

In addition the policy provides for "drive other car" coverage for 244 state patrol officers in the same amounts as above. It would appear that the state is adequately insured so that a release from the officer and/or municipality would not be a necessity.

3. Assuming that the rider had the approval of his superior, would he be officially on duty, thereby subject to that department's workmen's compensation insurance, etc?

As has been pointed out previously, the municipality employing the officer should request the department by an authorized representative of the governing body, to have their traffic officers ride with the state patrol for purposes

of training. As long as they remain in the course of such employment the local officers will be officially on duty for the employing unit and covered by that department's workmen's compensation insurance or entitled to benefits under sec. 66.191, if applicable.

4. Where would responsibility be if the rider was injured or killed while he was temporarily outside the squad car such as might happen if he accompanied the state patrol officer away from the car to interrogate or arrest a motorist?

In the process of training it would be necessary to observe methods of approaching motorists who have been stopped for violations. It may be reasonably assumed that it will be necessary for the rider to leave the patrol car for purposes of observation at different times. Accordingly, it is my opinion that any injuries suffered by the local officer in the course of such observation would be incurred while performing service arising out of his employment by the municipality. In such a situation the state would bear no responsibility. Assuming statutory requirements are met, the responsibility for workmen's compensation would be with the municipality.

At this point it should be emphasized that because both the state patrol and local officers are engaged in law enforcement, there is always a chance that one of the officers might impress the other into service for the purpose of maintaining the peace or apprehending a law violator. Should the state patrol officer impress the local officer into his service because of an emergency the state would bear the ultimate responsibility for any injuries suffered by the impressed officer in accordance with sec. 66.315 (2).

Although not likely, it is conceivable that the local officer might impress that state patrolman, *if within the jurisdiction of the local officer*, to render assistance in the enforcement of a law not within the purview of sec. 110.07 (1) and (2). In such case the state officer would become the employee *pro tem* of the county or municipality of the officer impressing him. See *Village of West Salem v. Ind. Comm.*, (1916) 162 Wis. 57, 155 N.W. 929; *Vilas County v. Ind. Comm.*, (1930) 200 Wis. 451, 228 N.W. 591; and *Shawano County v. Ind. Comm.*, (1935) 219 Wis. 513, 263 N.W. 590;

47 O.A.G. 209. However, there is no statutory provision for reimbursement of the state for damages to a state vehicle which might result under such circumstances.

For an extended discussion in regard to the responsibilities of the state or municipalities whose officers impress citizens or other officers, please refer to the opinion given to your department in 47 O.A.G. 209.

LLD

Credit Unions—Banking—Credit union under ch. 186 may issue only one class of stock. Sums deposited by mortgagors for purpose of paying real estate taxes and insurance are not share capital on which dividends may be paid.

July 2, 1959.

G. M. MATTHEWS,
Commissioner of Banks.

You have requested an opinion relating to the interpretation of the laws under which credit unions operate. Your first question is as follows :

“Can sums deposited with a credit union by mortgagors, pursuant to Section 54.02 of the Wisconsin Administrative Code, for the purpose of paying annual taxes and insurance premiums, be considered share capital on which dividends may be paid?”

Sec. 186.16, Stats., provides for the payment of dividends on “shares” as follows :

“Dividends. Quarterly, semiannually or annually the gross earnings shall be ascertained and from this amount shall be set aside the amount required for the guaranty fund provided in section 186.17. From the balance shall be deducted the expenses of the credit union. Out of the remainder a dividend may be declared by the board of directors. Such dividends shall be paid on all paid up shares outstanding at the end of the dividend period. Shares which become fully paid up during the dividend period shall be entitled to a proportionate part of said dividend providing said shares shall be on deposit at the close of the period for which dividend is declared. No dividend shall be paid on shares withdrawn during the dividend period. Dividends

due to a member shall be paid in cash or credited to the account of the member, the same as payments on shares."

Although ch. 186, entitled "Domestic Corporations, Co-operative Credit Associations", does not contain an express definition of "shares", the chapter does make it clear that such shares represent capital. Sec. 186.05 provides as follows:

"186.05 Bylaws. The bylaws shall prescribe:

"* * *

"(2) The par value of the shares of capital stock which shall in no event be more than \$5;"

Capital stock represents an *owner's* equity in a corporation. In a credit union, it is the amount of money which is paid in by the members and which is devoted to the purpose of the organization.

Sec. Bkg. 54.02 of the Wisconsin Administrative Code, which governs borrowing by members of the credit union, provides as follows:

"Each member shall, in addition to the required monthly payment, deposit each month a sum equal to one-twelfth of the estimated annual tax plus one-twelfth of the annual insurance premiums."

When such sums are paid to the credit union they become liabilities of the credit union. Such sums do not represent capital and in my opinion dividends cannot be paid on them.

Your second question is:

"If the answer to question No. 1 is 'no,' can a credit union under existing law establish two classes of shares, 'A' and 'B' and provide that the 'B' shares be held in a so-called Pledge Share Account for the payment of taxes and insurance?"

Sec. 186.05 (2), *infra*, declares that the bylaws may prescribe the par value of the shares of capital stock. It does not contemplate that two classes of capital stock be issued. It appears clear that there is no legislative authorization for two classes of "shares", one of which represents capital and the other liability.

Furthermore, sec. 186.27 provides as follows:

"186.27 Bookkeeping; commissioner of banks may prescribe. Whenever it shall appear to the commissioner of

banks that any credit union operating in this state does not keep books and accounts in such manner as to enable him to readily ascertain the true condition of such credit union, he shall have the power to require the officers of such credit union or any of them to open and keep such books or accounts as he may in his discretion determine and prescribe for the purpose of keeping accurate and convenient records of the transactions and accounts of such credit union."

This section is indicative of the legislative concern for accounting propriety. Sound principles of accounting dictate that liabilities, such as those for tax and insurance, be recognized and expressly denominated as such in any financial statements. A debt is not a share in any sense of the word and should not be labeled as anything but a debt. It is therefore my opinion that this second question be likewise answered in the negative.

RGT

Savings and Loan—Statutes—A state chartered savings and loan association can be converted into a federal chartered association only by compliance with sec. 215.67 (1). Commissioner must act on request within 90 days. Failure to do so, approval is deemed granted by sec. 215.52 (7). If statutory requirements for conversion have been complied with, commissioner has no authority to disapprove request.

July 2, 1959.

C. P. DIGGLES, *Commissioner,*
Savings and Loan Department.

You have requested an opinion relating to the construction of sec. 215.67 (1) which provides as follows:

"215.67 Conversion of associations. (1) PROCEDURE TO EFFECT CONVERSION. Any local association may convert itself into a federal association, and any federal association may convert itself into a local association, by the following procedure:

"(a) A meeting of the members shall be held upon not less than 10 days' written notice to each member, served either personally or by mail, directed to him at his last

known post-office address, stating the time, place and purpose of such meeting.

“(b) At such meeting, the members may by the affirmative vote in person or by proxy of $66\frac{2}{3}$ per cent of the dollar value of outstanding shares of the association declare, by resolution, to convert such association into a federal association or into a local association. A copy of the minutes of such meeting, verified by the affidavit of the chairman and the secretary of the meeting, shall be filed in the office of the commissioner within 10 days after the meeting. Such copy, when so filed, shall be evidence of the holding of and of the action taken at such meeting.

“(c) If the members voted to convert the association, the secretary shall serve notice either personally or by mail, directed to them at their last known post-office addresses, on all members of such action within 30 days after such meeting. Any member may, within 30 days after service of the notice, give written notice that he desires to have his share accounts repurchased. He shall be entitled to the participation value of his share accounts, less any amount due the association.

“(d) Within 6 months after the adjournment of a meeting to convert into a federal association, the association shall do what is necessary to make it a federal savings and loan association, and within 10 days after the receipt of the federal charter, a copy of it shall be filed with the commissioner, certified by the federal home loan bank board. Thereupon, the association shall cease to be a local association and shall thereafter be a federal savings and loan association. Within 6 months after the adjournment of a meeting of the members of a federal association, called for the purpose of converting the association into a local association, the commissioner shall examine such association and shall determine the action necessary to qualify the association for a state charter. Upon complying with the necessary requirements, a state charter shall be issued to such association.”

Your first question concerns itself with the necessity for compliance with these procedures. This statute was created by ch. 140, Laws 1939. Its language is clear with respect to procedural requirements precedent to conversion. Provisions relating to the protection of stockholders via rights of notice, voting and repurchase of stock are unambiguously set forth.

Approval of the action for conversion by the commissioner is required by sec. 215.67 (4) as follows:

“(4) COMMISSIONER’S APPROVAL REQUIRED BEFORE CONVERSION BECOMES EFFECTIVE. Before any such conversion of any association shall be final and in effect, the written approval of the commissioner must be secured by such association.”

In my opinion, the procedural requirements of sec. 215.67 (1) must be followed, and the final approval by the commissioner is merely an additional requisite for conversion. The commissioner is, without authority to grant written approval to a local association when the procedural requirements of sec. 215.67 (1) have not been complied with.

Your second question is whether or not the commissioner can expressly grant or deny approval of conversion within the 90-day period permitted under sec. 215.52 (7), which provides as follows:

“(7) GRANTING OR DENYING ASSOCIATIONS’ REQUESTS FOR APPROVAL OF ACTS. Whenever any association requests approval of the commissioner for any act, which by statute requires such approval, he shall have 90 days in which to grant or deny such approval. If he fails to act, approval shall be deemed to have been granted.”

This statute does not change the conversion procedure set forth in sec. 215.67, which makes no mention whatever of a requirement that any period of time lapse before the commissioner approves or disapproves conversion. Sec. 215.52 (7) merely declares that the failure of the commissioner to grant an express request within 90 days is to be construed as a grant of such request. Such approvals or disapprovals may relate to matters other than conversion. Accordingly, it is my opinion that the commissioner may grant or deny approval of a request for conversion within 90 days of the receipt of such request.

Your third question is whether or not a failure to grant a request for conversion within 90 days would be deemed an approval of such request. Following the ideas expressed in the preceding paragraph, it is my opinion under sec. 215.52 (7), that such a failure would be deemed approval.

Your fourth question is:

“Does the Commissioner have the statutory right to disapprove a local association’s request to convert itself into

a federal association in view of *State ex rel. Cleary v. Hopkins Street Building and Loan Association*, (1935) 217 Wis. 179, 257 N. W. 684, 296 U. S. 315?"

The *Cleary* case was decided at a time prior to the enactment of state legislation prescribing a method of conversion. In that case a state building and loan association converted itself to a federal association on the authority of the federal government alone. The United States supreme court held unconstitutional the provision of the federal home owner's act that any member of federal home loan bank may convert itself into a federal association on a vote of 51 per cent of the votes cast at a meeting to consider such action. The theory of the decision was that a local association had only the power emanating from the state, and that an association was required to exercise those powers with due consideration for the contractual rights of non-consenting stockholders.

In *Opdyke v. Security Savings & Loan Co.*, (1952) 157 Ohio St. 121, 105 N. E. 2d 9, a state enactment of conversion procedures similar to those of Wisconsin was sustained.

"Where, as here, all stockholders are given sufficient notice of a meeting duly called to consider the question of approving such a conversion, and a majority of the votes cast are for approval of the conversion, it is reasonable to determine that the self-interest, in protecting their stockholder rights, of those stockholders who are sufficiently interested to attend the meeting and vote for approval will ordinarily be a sufficient protection to similar stockholder rights of those stockholders who either voted against approving the conversion or were not even sufficiently interested to attend such a meeting."

Sec. 215.67 (1) (b) was created to require an affirmative vote of $66\frac{2}{3}$ of the outstanding shares, not just a majority. Ch. 516, Laws 1943, amended the statute to require an affirmative vote of $66\frac{2}{3}$ per cent of the *dollar value* of outstanding shares. Also, votes may be cast in person or by proxy.

It is my opinion, therefore, in view of the *Cleary* case, that the commissioner may not disapprove a request to convert if the statutory requisites to conversion have been complied with. The charter granted a local association is a

contract between the state and the stockholders. The commissioner as an agent of the state may not modify the contractual relations between the state and the stockholders.

This brings us to the last question :

“What recourse, if any, does a local association have if the commissioner disapproves its request for conversion?”

Sec. 215.60 (8) provides as follows :

“(8) REVIEW OF GRIEVANCES CAUSED BY ANY ACTS, ORDERS OR DETERMINATIONS OF COMMISSIONER. Any interested person or any association aggrieved by any act, order or determination of the commissioner, which relates to savings and loan associations may, within 20 days from the date thereof, apply to the advisory committee to review the action of the commissioner. Such applications shall be considered and disposed of as speedily as possible.”

Thus, a disapproval of a request for conversion may be reviewed by the savings and loan advisory committee.

RGT

Insurance—Contracts—Contract entered into by company actually engaged in television repair, for service, for service and parts for stated price which bears reasonable proportion to services rendered is not insurance. Company not in service business but contracts with others to provide service, offers indemnification, or covers only replacement of parts, a prohibited insurance contract would be in effect.

July 6, 1959.

CHARLES MANSON,

Commissioner, Insurance Department.

Your predecessor presented for my consideration two contracts which are being used or are proposed to be used by businesses in this state. The contracts are for furnishing service and/or parts for television sets for a period of time for a specified charge. It has been suggested that such contracts might be ones of insurance and should be regulated by the insurance department.

The first contract provides for an inspection by a TV serviceman and in consideration of a specified fee he issues a warranty that the picture tube will provide satisfactory service for a period of one year from the date of the contract. The warrantor agrees that if the picture tube fails to provide satisfactory service for the year he will either repair or replace the tube so that satisfactory service will be provided.

Whether a person, corporation or association is engaged in the insurance business must be determined by particular objects the business has in view. The business being carried on rather than the form of organization, name of the company or its stated business purposes, is the test to determine whether the business actually constitutes insurance.

Our supreme court has defined an insurance contract as a "contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril". *Shakman v. U.S. Credit System Co.*, (1896) 92 Wis. 366, 66 NW 528, 32 LRA 383, 53 Am St Rep 920. This is a widely quoted definition of an insurance contract.

However, many accepted definitions eliminate reference to a peril and substitute "an unknown or contingent event" therefor. Vance, in his work on Insurance, Vol. 1, page 2, lists five elements of an insurance contract. (1) An insurable interest; (2) The risk by loss of a designated peril or perils; (3) The assumption of the risk of loss by the insurer; (4) Distribution of losses among large groups bearing similar risks; and (5) A premium paid by the insured. Devices which are commonly mistaken for insurance include guaranty, endorsement and warranty on sale of goods or service. These are not contracts of insurance but merely risk-shifting devices. See 29 Am. Jur., Insurance, page 47.

Our statutes do not provide a definition of insurance and it would be very difficult to provide a definition which would include every conceivable case. As a result it has been necessary for your department to consult this office on numerous occasions as to our opinion regarding whether given fact situations constitute the business of insurance.

In 15 O.A.G. 368, your department was advised that an agreement whereby a company agreed to indemnify the

owner of machinery against damage caused by breakdown of the machinery was a contract of insurance. In that case the contract construed was called a "service agreement". On page 371 it was pointed out:

"That the contract is purely a contract of indemnity and not a contract for repairing machinery is established by one of the provisions in subdivision D in section II of the agreement wherein the company has an option to 'repair, restore or replace serviced property damaged or destroyed or *pay the loss in money* as the company may elect.'

"Subdivision G of section II of the contract provides "that the Company shall be subrogated to all rights of the Serviced against any person, firm, corporation or estate as respects any payment or replacement made by the Company hereunder and Serviced shall execute all papers required to secure to the Company such rights.'" (Emphasis supplied)

Indemnification by payment of money and subrogation provisions appear to be the determining factors in that opinion.

In 25 O.A.G. 192, your department was advised that a plan of prepayment at a fixed yearly or a monthly rate for future medical services did not constitute insurance. That opinion was requested by your department after several physicians contemplated the establishment of a clinic providing a prepayment plan for medical services. The patients were to be charged a monthly or annual rate payable in advance, payments being made irrespective of the amount of medical services rendered. Your department was advised that the plan did not appear to be one of indemnity and that an insurance company could not be organized for the purposes stated because such a plan was not included under sec. 201.04. On page 193 paragraphs 3 and 4 read as follows:

"It seems to us that the plan merely involves payment in advance on a retainer basis for future medical services. As far as we know the plan is a relatively new one in medical practice in this country, and it may raise questions of professional ethics and social policy, which it is not the function of this office to discuss here. However, the principle of payment for professional services on a yearly or other periodic basis regardless of the amount of service rendered is of long standing in the legal profession. Many of the leading and most ethical lawyers of this and other states have been accepting annual retainers for years from corporations and

individuals. Under these arrangements the lawyer is obligated in advance to furnish all legal service that may be required by the client during the course of the year. Such service may range from practically nothing on the one hand to situations where on the other hand very heavy demands may be made upon the lawyer's time and energy. Thus the retainer may amount to what is practically a gratuity in the one instance, to compensation which is entirely inadequate in other instances.

"Apparently neither the legislature nor the insurance department has ever considered such transactions to constitute insurance, nor do we believe that such construction should be implied in the case of physicians furnishing medical or surgical care on some periodic retainer basis irrespective of the amount of services rendered."

It should be noted that since the above opinion was written the legislature has provided specific statutory authority under ch. 148 for a nonprofit physicians' service known as Blue Shield within the state medical society.

In 39 O.A.G. 509, your office was advised that two plans for protection against dishonest checks and money orders cashed by merchants were contracts of insurance. In that well-considered opinion it was pointed out that the plans presented contained all of the attributes of insurance including a peril, plan for indemnification, and a "distribution of the risk" as Mr. Vance terms it.

If a contract is made for a general purpose other than insurance, the mere fact that it contains an incidental provision under which an added benefit may accrue to one of the contracting parties does not make it one of insurance and thereby subject it to regulations under insurance statutes. In a Georgia case, *Evans and Tate v. Premiere Refining Co.*, (1923) 31 Ga. 303, 120 S.E. 553, a dealer in auto lubricants who agreed to replace broken auto gears in cars which used his lubricant, was held not to be operating an insurance company. In *Commissioner ex rel. Hensely v. Provident Bicycle Association*, (1897) 178 Pa. 636 36 At. 197, a bicycle association, upon receiving a certain yearly membership fee contracted to clean members' cycles twice a year, repair tires or bicycles when damaged by accident, and to loan bicycles to members whose cycles were stolen and not recovered in a stated time. This was held by the court not to be a contract of insurance, apparently on the ground

that since the statute in question was phrased entirely in terms of money and regulation could not have been contemplated by the legislature to apply to service contracts. The court also felt that the consideration paid was not simply for assuming a risk, but was proportioned to the services expected in return.

In *Commissioner v. Community Health Services, Inc.*, (1943) 129 N.J.L. 427 30 A 2d 44, the court held that a corporation which made contracts with licensed physicians for professional services for the general public who contracted for the services through the corporation was not engaged in the insurance business. The court reasoned that the subscribers were entitled to a physician's services whether or not they were needed and since the corporation did not undertake to pay such debt as the subscriber might incur for medical services, but only to *provide* such service, that therefore the contract was not one of indemnification.

Practically all forms of insurance, with the exception of life insurance, are contracts of indemnity. However, all contracts of indemnity are not contracts of insurance. Two obvious exceptions are contracts of guaranty and warranty. It has also been said that contracts of indemnity obligate the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability, *but never directly* to perform the obligation indemnified. *New Amsterdam Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826. Words and Phrases, "Indemnity", Pocket Supplement.

It has become increasingly apparent that courts which have been presented with these problems as to whether certain business activity constitutes insurance, in recent years, are inclined not to interfere with legitimate business enterprises even though an incidental element of risk distribution or assumption may be present in their operation. The Federal Court of Appeals for the District of Columbia in *Jordon v. Group Health Association*, 107 Fed. 2d 239, 247, 71 App. D.C. 38, had the following to say in regard to a case where medical services and drugs were offered in a plan alleged to be insurance:

"* * * There is, therefore, a substantial difference between contracting in this way for the rendering of service,

even on the contingency that it be needed, and contracting merely to stand its cost when or after it is rendered.

“That an incidental element of risk distribution or assumption, may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element, to the exclusion of all others present, or their subordination to it. The question turns not on whether risk is involved or assumed, but on *whether that or something else to which it is related in a particular plan is its principal object and purpose.* * * *” (Emphasis supplied)

Vance, in his text, pages 60–62, suggests that the real problem before the courts, in cases of this type, is to determine whether the primary and intrinsic purpose of the contract is insurance—indemnification—or service. This appears to be the test applied by the court in *Jordon v. Group Health Association* case, *supra*, and I subscribe to such a method of evaluation.

The courts have recognized that contracts which call for performance of necessary mechanical repairs can be treated as contracts for service only as distinguished from contracts of indemnity against risk of loss from stated perils. See *Transportation Guarantee Co. v. Jellins*, (1946) 29 Cal. 2d 242, 156 P. 2d 271.

As you were advised in 47 O.A.G. 242, in regard to used-car “warranty” plans, “* * * the determination of whether a transaction is to be classified as insurance is not on the basis of a consideration of each contract by whatever label it may be designated, as an isolated transaction. Rather, the determination is to be made upon viewing the entire conduct of the business issuing such contracts as a whole. * * *”

It follows that it is not only necessary to examine the substance of the contract in each instance, but to closely examine the nature of the business and to determine the intrinsic objective of the contract. This subject has been

adequately covered in the opinion in 47 O.A.G., quoted from above, and will not be repeated here.

Where the one offering the contract is not engaged in the television service business, but contracts with others to provide such service, *or* indemnifies the owner for expenses incurred in securing service or parts, *or* where the contract covers only the replacement of parts, it is not a service contract. Therefore, the first contract, where provision for inspection of the picture tube is made and in consideration of a fee a warranty is given to provide for repair or replacement of a faulty picture tube for a period of a year, is in fact a contract of insurance, regardless of whether the issuing organization is in the TV repair business or not.

In the second contract, the service company agrees to provide service and parts and to adjust and maintain the set in perfect operating condition for a period of one year for a stated fee, with a maximum number of service calls provided for and an additional charge of three dollars for each service call over the number agreed to by the parties. However, parts are to be provided without extra cost regardless of the number of service calls during the period of the contract. The contract does not include electrical work incidental to the television set nor repair or replacement of cabinet dials, antenna, nor service, repair or replacement of parts covered by warranty of the manufacturer or supplier, nor to any set damaged by accident, misuse, neglect, theft, fire or water. The contract further provides that in the event of default in service on the part of the service company within a reasonable time after the request by the customer, the customer may cancel the contract and the charges paid by him will be refunded, prorated proportionate to the value of the services performed during the period when the contract was in force.

In contrast to the basis of the above conclusion as to the first contract, where the service company is actually in the business of repairing television sets, *and* service alone or both service and parts are included and are provided by the service company, *and* the consideration bears a reasonable proportion to the services rendered, then the contract is not one of insurance but of service. Accordingly, the second contract submitted appears to be a legitimate "service con-

tract" if the organization issuing it is actually engaged in the TV repair business.

It is my further opinion that an insurance company could not be organized for carrying out the purposes of the first mentioned contract, as such a plan does not come within any of the provisions in sec. 201.04. The failure of a TV picture to operate because of a wearing out or depreciation in function by use is not a casualty.

LLD

Retirement Systems—Legislature—Under sec. 66.902 (3) (n) circuit judges under Wisconsin retirement fund are entitled to prior service credit for service as full-time judges of courts of record, municipal or inferior in Milwaukee county, even though credit was received under another public employe retirement system.

July 7, 1959.

THE HONORABLE, THE SENATE.

Section 66.902 (3) (n), Wis. Stats., relates to prior service credit for judges under the Wisconsin retirement fund and provides as follows:

"Each supreme court justice and circuit judge who makes the election pursuant to s. 66.901 (5) (i) shall be given prior service credit as of January 1, 1952, in accordance with s. 66.904 (1) (a) 1 for service prior thereto as supreme court justice, circuit judge or county judge, or as full-time judge of a court of record, municipal or inferior, at the rate of 2 times the municipality credit for current service. Prior service credit for service as county judge, or as full-time judge of a court of record, municipal or inferior, shall be based only upon his salary as such judge (excluding fees and salary as juvenile judge) computed on the basis of the earnings for the last 3 years of service as such judge (or less if the total be less), and such prior service credit shall be reduced by an amount equal to the accumulated prior service credit theretofore granted to such participating employe for service as such judge and by an amount equal to the accumulation of all normal and municipality matching credits for service as such judge, including interest which has been credited."

The italicized material was inserted by ch. 379, Laws 1957, which became effective July 24 of that year. Said ch. 379, Laws 1957, was introduced as Bill No. 60, S.

Subsequent to the passage of said act, four circuit judges requested the board of trustees of the Wisconsin retirement fund to give them prior service credit under the Wisconsin retirement fund for service prior to January 1, 1952 which they had rendered as a full-time judge of a municipal or inferior court of record located in Milwaukee county and for which service they had previously received credit under either the Milwaukee county employes system or the employes retirement system of the City of Milwaukee. Their request was not granted.

In the adjourned session of the Wisconsin legislature, held in the fall of 1957, Bill 654, S. was introduced. It proposed to amend sec. 66.902 (3) (n) of the statutes, as amended by ch. 379, Laws 1957, so that it would have excluded from the prior service credit to which circuit judges might be entitled under said statute "service for which retirement credits have been earned or granted under a public retirement system other than the Wisconsin retirement fund". This bill was passed unanimously by both the Senate and Assembly but received a "pocket veto".

On March 25, 1958, the following resolution was adopted unanimously by the board of trustees of the Wisconsin retirement fund:

"WHEREAS, during the entire history of the Wisconsin Retirement Fund it has been definite that this retirement system does not cover service included under either the Milwaukee County employes retirement system or the Employes Retirement System of the City of Milwaukee, and,

"WHEREAS, ever since public employe retirement systems were first established in this state there appears to be no precedent where the legislature ever intended that an individual would receive duplicate credit under two retirement systems established pursuant to state law for the same period of public service, and,

"WHEREAS, the official report of the Joint Survey Committee on Retirement Systems on Bill 60S (Chapter 379 of the Laws of 1957) indicates definitely that there was no legislative intent that the above basic precedents be overturned and it was believed that the bill would only affect a single Racine judge, and,

"WHEREAS, the committee record of the hearing on Bill 60S at the 1957 session of the legislature clearly discloses from the appearances for the bill that there was no contemplation that the bill would apply to any person other than a Racine judge, and,

"WHEREAS, the court precedents on legislative intent reveal that great weight is given to what the legislature obviously intended to do, and,

"WHEREAS, it is plain that the 1957 Wisconsin legislature did not give consideration to the question of whether it would be good public policy for taxpayers to finance duplicate credit under two retirement systems, established pursuant to state law, now therefore be it

"RESOLVED, by the board of trustees of the Wisconsin Retirement Fund that in applying the provisions of Chapter 379 of the Laws of 1957 it will assume that such will not apply to service covered by the Milwaukee County employees retirement system or the retirement system of the City of Milwaukee unless the contrary is finally established in the courts."

On April 2, 1958 the circuit judges asked the board of trustees of the Wisconsin retirement fund to request an opinion from the attorney general upon the question at issue. The said board of trustees has declined to request such an opinion.

On May 14, 1958 the four circuit judges presented certain facts relative to the aforesaid matter to the committee for review of administrative rules. In its report to the governor for 1958, the committee for review of administrative rules made the following statement and recommendation:

"Circuit Judge Myron Gordon appeared before the committee in regard to prior service credit for full-time judges of statutory courts under 66.902 (3) (n), Wis. Stats. (Chapter 379, Laws 1957. A later bill 654S was vetoed by the governor.) He said that 4 Milwaukee circuit judges were affected. An attorney general's opinion was requested, and a letter was directed to the Retirement Board. The attorney general appeared at the meeting of September 24 to discuss the matter with the committee and to give his views. He indicated that he was in accord with the views of the Rules Committee.

"It was the judgment of the committee that the reference in 66.902 (3) (n), to 'a full-time judge of a court of record, municipal or inferior' included the complainants, Circuit Judges Myron L. Gordon, Leo B. Hanley, Harvey L. Neelen and Robert C. Cannon, for purposes of prior service credits,

and recommended that the directors of the Retirement Fund modify or recede from the position taken concerning these judges and certify them for these retirement benefits pursuant to the statute."

The board of trustees of the Wisconsin retirement fund again declined to give the prior service credit which was requested by the judges.

Your chief clerk has submitted to me a copy of Resolution No. 11, S. adopted April 8, 1959 in which you recited the aforesaid statement and recommendation made by the committee for review of administrative rules and in which your honorable body resolved:

"That the attorney general be and he is hereby requested to render to the senate his official opinion whether the finding and judgment of the administrative rules committee as above stated is correct."

I believe that it was the intention of Senate Resolution No. 11, S. to request an opinion which would reach the merits of the controversy between the circuit judges and the board of trustees of the Wisconsin retirement fund. Accordingly this opinion will be confined to that issue and will disregard any question of administrative procedure which might be raised under the language of said resolution.

The resolution adopted by the board of trustees of the Wisconsin retirement fund on March 25, 1958 and reaffirmed in March of this year in substance recites:

(a) That Bill 60, S. which became ch. 379, Laws 1957, was introduced and passed for the primary purpose of benefiting one judge.

(b) That the primary purpose of said ch. 379, Laws 1957, was indicated by the report of the joint survey committee on retirement systems.

(c) That it would be contrary to previous legislative policy to grant prior service credit under the Wisconsin retirement fund to an individual for the same service for which credit was given to him under another public employe retirement system of this state.

(d) That the legislature did not actually consider the question of whether it would be good public policy for taxpayers to finance credit under 2 public employe retirement systems for one period of service rendered by an individual.

Although not indicated by said resolution, it has also been contended that the judges are not entitled to the credit which they have requested because the service in question was rendered in Milwaukee County which is ineligible to participate in the Wisconsin retirement fund.

The report of the joint survey committee on retirement systems which considered Bill 60, S. was published in the Senate Journal on March 21, 1957. That report contained a section entitled "Probable Cost" which read:

"It appears that only one person would be affected by this bill initially. This individual was a municipal judge for about 10 years up to 1952, and since then he has been a circuit judge. The cost to the state for prior service credits for the time served as a municipal judge by this individual would be \$2,963.

"Additional costs could result if additional persons who had been judges of such courts prior to January 1, 1952, and had not previously received such credit subsequently became circuit judges or supreme court justices. It is impossible to estimate the cost of such potential credits."

However, that report also contained a section entitled "Purpose of Bill" which read:

"Under this bill any supreme court justice or circuit judge who has previously served as a full-time judge of a court of record, municipal or inferior, would be granted prior service credits as of January 1, 1952, under the Wisconsin Retirement Fund for such service, at state expense, in addition to the state prior service credits already granted. If he had served as such a full-time judge in a county not under the Wisconsin Retirement Fund the full credit for all prior service would be completely new for such judge. If such service was in a county under the system the prior service credits would be recomputed at the rate of 7% instead of 5%, and on the full salary as such judge (excluding fees and compensation as juvenile judge) instead of being limited to \$4,200, and the other special treatment for judges would also be applicable."

Although it may have been represented, and appeared to the joint survey committee, that only one person would be affected by the bill, the aforesaid report indicates clearly that other persons might benefit thereby. In view of the foregoing I do not believe that it can be said rightfully that

the legislature was wholly unaware of the fact that more than one judge might benefit from the bill.

The aforesaid report specifically points out that the bill would authorize prior service credit for service "in a county not under the Wisconsin Retirement Fund" in which case "the full credit for all prior service would be completely new for such judge". This language contained no exception whatever with respect to prior service which may have been rendered in Milwaukee county. Sec. 66.902 (3) (n), as amended by ch. 379, Laws 1957, does not by its terms purport to restrict the service as a full-time judge of a court of record, municipal or inferior, for which a circuit judge is entitled to prior service credit to such service which is rendered either in a county which is under the Wisconsin retirement fund or in a county which could come under the Wisconsin retirement fund. The language of the statute is all-inclusive.

It is contended that the statute should not be construed to cover service rendered in Milwaukee county because it provides that prior service credits should be given in accordance with s. 66.904 (1) (a) 1 which reads:

"(a) For the purpose of determining the amount of any annuity or benefit to which an employe or beneficiary shall be entitled, each participating employe shall be credited with the following amounts, as of the dates specified:

"1. For prior service, each participating employe who is an employe of a participating municipality on the effective date, shall be credited, as of such date, with a prior service credit of an amount equal to the accumulated value, as of such date, of the contributions which would have been made during the entire period of prior service of such employe, in accordance with s. 66.902 (3) * * *."

Sec. 66.902 (3) referred to in 66.904 (1) (a) 1 reads in part:

"(3) Municipalities other than the state of Wisconsin electing to participate may also elect to provide prior service credits at rates equal to 2, 1½ or one times the rates of municipality credits for current service provided such basis is specifically designated in the notice of election to participate in the fund, as being applicable to all employes included as of the effective date. * * *"

It is argued that because:

(a) sec. 66.902 (3) (n) provides that credit shall be given "in accordance with s. 66.904 (1) (a) 1",

(b) sec. 66.904 (1) (a) 1 states that prior service shall be given "in accordance with s. 66.902 (3)",

(c) 66.902 (3) refers to "Municipalities * * * electing to participate",

(d) 66.902 (1) provides that "Any municipality, except * * * a county having a population of 500,000 or more * * * shall be included * * * by so electing * * *",

service as a full-time judge of a court of record, municipal or inferior, in Milwaukee county should be excluded.

It is my opinion, however, that reference to 66.902 (3) which is made in 66.904 (1) (a) 1 is only for the purpose of indicating that prior service credit shall be given at the rates which are specified in 66.902 (3)—namely 2, 1½ or one times the rates of municipality credits for current service.

It is claimed that Bill 654, S. of the 1957 session was introduced for the purpose of indicating that ch. 379, Laws 1957, was not intended to grant duplicate credit. The fact remains, however, that although Bill 654, S. was unanimously adopted in both houses of the legislature, it never became law.

It may be contended that notwithstanding the fact that it did not become law, the unanimous support which it received in both houses of the legislature indicated the intent of the individual legislators.

In the case of *Northern Trust Co. v. Snyder*, (1902) 113 Wis. 516, 530, 89 N. W. 460, the court said:

"* * * It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. When it is permissible for such a body to construe one of its enactments at all, it is under such circumstances that its action may reasonably be considered either as the making of a new law or the change of an old one. Its members have no more right to construe one of its enactments retroactively than has any private individual. * * *"

It was said in the case of *Papke v. American Automobile Ins. Co.*, (1945) 248 Wis. 347, 21 N.W. 2d 724:

“A large portion of appellant’s brief is devoted to the understanding of the legislative committee of the purpose of the amendment under consideration, as shown by communications from members of the committee. We realize the sincerity of the effort put forth to obtain this information, but question its value in view of the rule of law that what the framer of an act meant by the language used cannot be shown by testimony—much less can it be shown by mere statements by the framer or anyone else. *Moorman Mfg. Co. v. Industrial Comm.* (1942) 241 Wis. 200, 5 N. W. (2d) 743; *Robinson v. Krenn* (1940), 236 Wis. 21, 294 N. W. 40; *Casper v. Kalt-Zimmers Mfg. Co.* (1915) 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101; *Northern Trust Co. v. Snyder* (1902), 113 Wis. 516, 89 N.W. 460.”

“* * * The meaning of a legislative act must be determined from what it says—not by what the framer of the act intended to say or what he thought he was saying. The question always is what did the legislature mean, not what the framer meant * * *.”

Moorman Mfg. Co. v. Industrial Comm., (1942) 241 Wis. 200, 208, 5 N.W. (2d) 743. See also: *Estate of Matzke*, (1946) 250 Wis. 204, 26 N.W. (2d) 659.

“* * * Legislatures by a later act cannot establish or affect the construction of a former act.

Northern Trust Co. v. Snyder, 113 Wis. 516, 530, 89 N.W. 460.” *Moorman Mfg. Co. supra.*

The fact remains that the language in Bill 654, S. which would have denied the judges the credit now claimed by them, if such language had been in ch. 379, Laws 1957, did not become law. From the foregoing cases it would appear that even if Bill 654, S. had become law it would have been ineffective as a guide for construing ch. 379, Laws 1957, but might have been regarded by the courts as evidence of a change in the attitude of the legislature which occurred after the passage of said act.

“Appellants call our attention to a large number of rules of statutory construction, and particularly to the rule that if the language of the statute is clear and unambiguous there is no room for construction, and that it is not a function of the court to add language to the statute or to make

exceptions because the statute may to the court seem unwise; that if a statute, standing by itself, without resort to rules of interpretation, conveys a definite and clear impression when applied to the subject matter regulated thereby, this is the best evidence of the meaning of the statute; that if the statute is clear on its face, prior statutes may not be consulted to create ambiguity * * *. To each of these propositions numerous cases are cited and they undoubtedly declare the law as it exists. * * **

State ex rel. Morgan v. Dornbrook, (1925) 188 Wis. 426-428, 206 N. W. 55.

* * * While the primary purpose of interpretation and construction is to ascertain and give effect to the intention of the legislature, it must be borne in mind that this intention and meaning is to be determined, if possible, primarily from the language of the statute itself. * * **

Julius v. Druckrey, (1934) 214 Wis. 643-649, 254 N.W. 358.

* * * It may be that some such limited purpose was in the minds of the legislators; but, where words are plain and not absurd, courts must be guided thereby, and not by extrinsic facts and circumstances, in ascertaining the legislative intention. * * **

Smith v. Burlington, (1906) 129 Wis. 336-340, 109 N. W. 79.

“When the written law is plain there is no room for construction even if results do not seem to be in accordance with exact justice. *Mellen L. Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187.”

Wisconsin Lakes I. & C. Co. v. Industrial Comm. (1918) 167 Wis. 122-124, 166 N. W. 664.

It is my opinion that the language of sec. 66.902 (3) (n) is clear and unambiguous and provides that the judges shall receive the prior service credit which they have requested. It is immaterial that this conclusion may be interpreted as a departure from previous public policy.

* * * Public policy is to some extent a creation of the legislature. The statutes embody much of the public policy of the state, and that policy may be one thing today and the opposite tomorrow, as the legislature in its wisdom may enact. * * **

In re Staff: Habeas Corpus, (1885) 63 Wis. 285-294, 23 N. W. 587.

“* * * As the public policy of the state is to some extent the creation of the legislature, it is within its province * * * to embody such changes in legislation enacted from time to time (*In re Staff*, 63 Wis. 285, 294, 23 N. W. 587) ; providing no constitutional inhibition is violated thereby.
* * *”

State v. McNitt, (1943) 244 Wis. 1, 6, 11 N. W. (2d) 671.

Therefore, it is my opinion that under sec. 66.902 (3) (n), the four circuit judges are entitled to prior service credit for service prior to January 1, 1952, which they had rendered as a full-time judge of a municipal or inferior court of record located in Milwaukee county and for which service they had previously received credit under either the Milwaukee county employes retirement system or the employes retirement system of the City of Milwaukee.

JRW

Statutes—Town Officers—Bill No. 491, A., amending sec. 66.05, regarding ordering removal, repair, or razing of buildings by town board or officers in counties of less than 15,000 population, if enacted would result in statute of doubtful constitutionality. Art. IV, sec. 23, Wis. Const.

July 8, 1959.

THE HONORABLE, THE SENATE.

Senate Resolution No. 15 requests my opinion as to the constitutionality of the provisions of Bill No. 491, A., relating to the razing of old, dilapidated, dangerous, unsafe or insanitary buildings.

Bill No. 491, A., provides :

“SECTION 1. 66.05 (1) of the statutes is amended to read :

“66.05 (1) The governing body or the inspector of buildings or other designated officer in every municipality, *except in towns situated in a county of less than 15,000 population upon complaint of a majority of the members of the*

town board the circuit court, may order the owner of premises upon which is located any building or part thereof within such municipality, which in ~~his or their~~ its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option; or where there has been a cessation of normal construction of any building or structure for a period of more than 2 years, to raze and remove such building or part thereof. The order shall specify a time in which the owner shall comply therewith and specify repairs, if any. It shall be served on the owner of record or his agent where an agent is in charge of the building and upon the holder of any encumbrance of record in the manner provided for service of a summons in the circuit court. If the owner or a holder of an encumbrance of record cannot be found the order may be served by posting it on the main entrance of the building and by publishing in the official newspapers of the municipality for 2 consecutive publications at least 10 days before the time limited in the order commences to run.

"SECTION 2. 66.05 (7) of the statutes is created to read:

"66.05 (7) The action provided in sub. (1) for razing or removing a building on premises in a town situated in a county of less than 15,000 population shall be commenced by serving summons and complaint upon the owner and occupant of and any holder of an encumbrance of record against the premises and procedure shall be the same in all respects as the procedure in other civil actions so far as applicable. Subsection (3) shall not apply to such actions except the court may, upon a showing of hardship or other good cause, restrain for reasonable periods of time the razing or removal of a building or part thereof and the removal, sale or destruction of any personal property or fixtures therein. Costs shall be in the discretion of the court except as to persons found by the court to be acting maliciously in or about the commencement or prosecution of such action."

A challenge as to the constitutionality of sec. 66.05 as it existed in 1953 was made in *Baker v. Mueller*, (C.A. 1955) 222 F. 2d 180. At page 182 it is stated:

"1. In Wisconsin it is the law that the inhabitants of a municipal corporation hold their property subject to a rea-

sonable exercise of the police power, and that property may be destroyed to protect the public welfare when such property becomes a nuisance or dangerous to public safety. *Miller v. Foster*, 244 Wis. 99, at page 103, 11 N.W. 2d 674, at page 676, 153 A.L.R. 845, announces this rule. * * *

The court held that the statute was a clear exercise of the police power of the state, provides for a judicial review of actions of the officials involved and does not violate the 14th Amendment to the Constitution of the United States. The court held that the statute did not violate plaintiff's right to a trial by jury as the statute grants a new remedy, in equity, where none existed, and there is no right to trial by jury in equity.

The major change to be effected by Bill No. 491, A., would take the power of "ordering" the owner to repair, remove or raze the building away from the town board, or other designated town officer, and require that such order be made by the circuit court after complaint by a majority of the members of the town board, and after notice to the owner, his agent, and holders of encumbrances of record.

A town has only such powers as are conferred on it by statute or are necessarily implied therefrom and the officers of a town have only such powers as are conferred upon them by statute. *Pugnier v. Ramharter*, (1957) 275 Wis. 70, 81 N.W. (2d) 38.

Art IV, sec. 23, Wis. const. provides:

"Uniform town and county government. SECTION 23. The legislature shall establish *but one system of town and county government*, which shall be *as nearly uniform as practical*."

Counties may be classified according to population, *State ex rel. Milwaukee County v. Buech*, (1920) 171 Wis. 474, 177 N.W. 781, however, where the law is in its terms general and provides for a class of counties, *reasonable departure will be upheld where conditions justify a departure from absolute uniformity*, where it is not practicable to carry on such government in that particular class of counties in the same manner in which it is carried on in other counties outside of that class. *State ex rel. Busacker v. Groth*, (1907) 132 Wis. 283, 112 N.W. 431.

Deviation from the constitutional provisions for uniform town and county government is permissible only where the circumstances compel it. *Hjelming v. La Crosse County*, (1926) 188 Wis. 581, 206 N.W. 885.

The question of fact which is presented and which can be only determined by a court in a proper action is whether the conditions in towns in counties having a population of less than 15,000 are so different from the conditions in towns in counties having a population in excess of 15,000 so that a departure from uniform town government in this instance would be reasonable.

While there is a strong presumption of constitutionality as to a duly enacted statute, it appears to me that the provisions of Bill No. 491, A., if enacted, would result in a statute of doubtful constitutionality under Art. IV, sec. 23, Wis. const. Neither the bill nor the drafting record give any indication as to the reason for the departure from uniformity. If the bill were enacted, a town of scant population in a populous county would be authorized to exercise different powers in regards to removal, repair or razing of unfit buildings than would be permitted in a town of scant population located in a county having a population of less than 15,000.

In *Paul v. Town of Greenfield*, (1930) 202 Wis. 257, 232 N.W. 770, it was held that the uniform town government requirement of the state constitution is not violated by a statute authorizing the town board to fix the limits of an unincorporated village located therein, and to make the same a taxing district; however, in that case the provisions of the statute applied to all towns within the state having unincorporated villages. Such uniform treatment is not possible under the provisions of Bill No. 491, A.

From a procedural point of view, the bill provides for notice, hearing, and judicial review, which, if properly followed, would comply with due process requirements.

RJV

Legislature—Amendments—Joint Resolutions 22, S., and 43, S., of 1959 legislature discussed as to compliance with requirement of Art. XII, sec. 1, Wis. const., relating to separate submission of more than one amendment to voters for approval.

July 8, 1959.

THE HONORABLE, THE SENATE.

By Joint Resolutions 48, S., and 49, S., adopted by the senate and concurred in by the assembly, the 1959 legislature has requested the attorney general for an opinion on the validity of steps initiated for the amendment of the Wisconsin Constitution by Joint Resolutions 22, S., and 43, S.

Joint Resolution 22, S., is for the amendment of Art. V, secs. 1 and 3, and Art. VI, sec. 1, Wis. Const. relating to the terms of office of all constitutional officers. It is proposed that beginning in 1963 the governor, lieutenant governor, secretary of state, treasurer, and attorney general, serve four year terms.

Joint Resolution 43, S., is for the amendment of Art. IV, sec. 4, Art. VI, sec. 4, and Art. VII, sec. 12, Wis. Const., and the proposal is to provide for four year terms for assemblymen, county officers, and clerks of circuit court.

The questions with respect to each of these resolutions is whether they are dual in character, and if so, what is the legal significance, particularly as to whether such joint resolutions can be legally approved or disapproved by the vote of the electors on such proposals.

Art. XII, sec. 1, Wis. Const, sets forth the procedure to be followed in amending the constitution. It provides among other things "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately".

While this language is clear and simple as to wording and would seem to be so understandable as to be beyond dispute, it is nevertheless difficult to apply in specific situations.

The purpose of such a constitutional provision is to prevent voters from being required to vote for something

which they disapprove in order to register approval of other propositions tied up therewith. 11 Am. Jur. "Constitutional Law" § 31, p. 635, and 94 A.L.R. 1510 annotation.

It is within the discretion of the legislature to submit several distinct propositions to the people as "one amendment" to the constitution within the meaning of this section if they relate to the same subject, and are all designed to accomplish one purpose. *State v. Timme*, (1882) 54 Wis. 318, 11 N.W. 785.

Thus the question we have to decide here with respect to Joint Resolution 22, S., is whether this is "one amendment" relating to the terms for all constitutional officers or whether we have five amendments because the change affects the terms of office of five separate and distinct officers. Likewise we must determine whether Joint Resolution 43, S., is in conformity with the above constitutional provision.

While there are many cases from other states in which the "one amendment" question has been considered, none of them touch upon the precise problems presented by either of the two joint resolutions considered here.

The latest Wisconsin case is that of *State ex rel. Thomson v. Zimmerman*, (1953) 264 Wis. 644, 60 N.W. 2d 416. Here the court took a rather strict view in holding that Art. XII, sec. 1, had been violated where a proposed amendment provided for (1) the apportionment of senate districts on the basis of area as well as population, and of assembly districts according to population, (2) the removal of the prohibition against counting untaxed Indians and the military in calculating the population base, and (3) the changing of the provision relating to the boundaries of assembly districts. It was considered that these were separate matters or amendments having different objects or purposes.

For purposes of comparison attention is called to *State v. Lockhart*, (1953) 76 Ariz. 390, 265 P. 2d 447, where it was held that an amendment providing that the state senate should consist of two members from each county and that the house of representatives should be composed of not to exceed 80 members to be apportioned to the counties, relates to the same general subject of composition of the state legislature and hence constituted but one amendment.

A review of a few of the tests applied by the courts from time to time may be of some interest.

In *People ex rel. Elder v. Sours*, (1903) 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34, the test was said to be whether the propositions submitted are germane to the general subject of the amendment or if they are of such a character that it may not be desirable that one be adopted and not the other.

In *Kerby v. Luhrs*, (1934) 44 Ariz. 208, 36 P. 2d 549, 94 A.L.R. 1502, 1509, the court laid down a rule which it expressly stated was in clarification of the test announced in *State ex rel. Hudd v. Timme*, (1882) 54 Wis. 318, 11 N.W. 785, *supra*. The rule reads as follows :

“If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition. * * *”

In *McBee v. Brady*, (1909) 15 Idaho 761, 100 Pac. 97, the court stated the true test to be,—“Can the change or changes proposed be divided into subjects distinct and independent, and can any one of them be adopted without in any way being controlled, modified or qualified by the others? If not, then there are as many amendments as there are distinct and independent subjects, and it matters not whether the proposed change affects one or many sections or articles of the constitution”.

Likewise in *State ex rel. McClurg v. Powell*, (1900) 77 Miss. 543, 27 S. 927, 48 L.R.A. 652, it was said that if the propositions are separate, one in no manner dependent upon the other, so that the voter may intelligently vote for one and against the other,—one being able to stand alone, disconnected wholly from the others,—then such amendments are many, and not one. They do not become one by the mere

blanketing of a name, such as "amendments relating to the judicial department", or "amendments relating to the executive department", or to "the legislative department".

The courts seem to be pretty well agreed that the difficulty is not with the test, but with its application.

In its final analysis the question of determining whether an attempted constitutional amendment is proposed in the manner provided by the constitution is a judicial and not a political question *State v. Marcus*, (1915) 160 Wis. 354, 152 N.W. 419. Nevertheless, it is for the legislature to determine in the first instance whether a proposed amendment complies with the constitutional requirement that no amendment may relate to more than one subject. *Funk v. Fielder*, (Ky. 1951) 243 S.W. 2d 474.

The propriety of Joint Resolutions 22, S., and 43, S., will be considered in the light of the foregoing discussion.

Joint Resolution 22, S.

At the outset there would appear to be no serious question as to the propriety of covering the offices of governor and lieutenant governor in one amendment. While the lieutenant governor has some separate and independent duties as president of the senate under Art. V, sec. 8, of the constitution, the provisions of that section as well as sec. 7 of Art. V, are directed primarily to his exercise of the powers and duties of the governor in case of the governor's impeachment, removal from office, death, inability from mental or physical disease, resignation, or absence from the state. In other words, the constitutional provisions relating to the governor and lieutenant governor are concerned basically with the discharge of the duties of the state's chief executive office. In a sense the lieutenant governor is the *alter ego* of the governor, and it would seem to be both incongruous and inconsistent to conclude that an opportunity should be afforded the electors to vote separately on whether each office should be limited to a two-year term as at present or extended to four years.

Hence, it appears to be entirely proper to leave in one resolution the provision of Joint Resolution 22, S., relating to the extension of the terms of both the governor and lieu-

tenant governor to 4 years. This would appear to be but "one amendment" for all practical purposes.

However, there is no such relationship or affinity between the remaining constitutional officers and the office of chief executive of the state as that discussed above relating to the office of governor and lieutenant governor.

The chief executive officer of the state is concerned with policy and traditionally he has exercised leadership in carrying out the political program of his party, whereas the duties of the secretary of state and treasurer are largely clerical and custodial, and the duties of the attorney general are professional and technical as attorney for the state and involving discretion in the exercise of powers peculiar to the nature of the office.

Because of such variance it might well be that a voter could entertain different views as to what should be a proper term of office for the state's chief executive as contrasted with what he might feel to be a proper term of office for the other constitutional officers, and he ought not to be required to take a "package deal" which would require him to vote for something of which he disapproved in order to register his approval of a part of the "package".

Applying some of the traditional tests it can be said here that the changes proposed are capable of being divided into distinct and independent subjects. The propositions are separate and in no manner dependent upon each other (except in the case of the combination of the governor and lieutenant governor). The voter could intelligently vote for one and against another, and it matters not whether the proposed change affects one or several sections or articles of the constitution.

It is accordingly concluded that the amendment relating to the governor and lieutenant governor must be submitted separately and that none of the other constitutional officers should be included therein.

A more difficult and more doubtful question is presented in considering whether the offices of secretary of state, treasurer, and attorney general, can be combined in one amendment of Art. VI, sec. 1, as is done on p. 2 of Joint Resolution 22, S., lines 12 to 18.

There does appear, however, to be sufficient reasons for requiring that the amendment relating to the term of the attorney general be presented in such a manner as to permit the people to vote for that amendment separately.

As previously indicated, the duties of the attorney general are quite different in character from those of any other constitutional officer. As an officer of the court he is connected with the judicial department of state government. His duties are neither clerical nor custodial as is true of the secretary of state, and state treasurer. Nor are his duties of an executive nature like those of the governor. He must give legal advice to his "clients", the various state officers, boards, commissions, the legislature, and the district attorneys of the state. In a sense he is a *quasi-judicial* officer, and he is the chief law officer of the state. While it is true that under Art. X, sec. 7, the attorney general along with the secretary of state and treasurer constitute a board of commissioners of public lands, such activity, although it is important, is a minor one so far as the over-all duties of any of these three officers are concerned.

No sound reason suggests itself why the proposed amendment as to the term of office of the attorney general should not stand alone under the various tests that the courts have announced, and you are therefore advised that it would be well to cover this proposition in a separate amendment.

Much more difficult in considering Joint Resolution 22, S., is the question of whether the proposed change in the respective terms of office of secretary of state and state treasurer can be combined in one amendment. Admittedly, there are less basic differences in character between these two offices than between any of the other offices heretofore discussed. However, it can be argued that extending the term of the secretary of state is one objective while extending the term of the treasurer is another, and neither one is incidental to the other. The two propositions can be readily separated, and it would appear to be wiser so to do rather than to invite expensive litigation and the uncertainties and inconveniences incident thereto if the two matters are to be combined. You are so advised.

Joint Resolution 43, S.

It should be noted at the outset in discussing this resolution that unlike Joint Resolution 22, S., this resolution covers three separate proposed amendments, whereas Joint Resolution 22, S., according to the resolution contained therein is to be submitted as one amendment.

Since the amendment of Art. IV, sec. 4, relating to the terms of assemblymen is set up as one amendment, and since the amendment of Art. VII, sec. 12, relating to the term of the clerk of the circuit court is set up separately, these two parts of Joint Resolution 43, S., present no difficulty under Art. XII, sec. 1. They are no doubt intended to be covered in separate questions on the ballots.

Thus, there is but one real problem under this resolution and that is the one presented by the second part of the resolution relating to sheriffs, coroners, registers of deeds, district attorneys, and all other county officers except judicial officers under Art. VI, sec. 4.

This is by all odds the most difficult question to be considered in this opinion, but the only absolutely safe advice under the circumstances is to submit the questions as to each office separately. For instance, the voters of Wisconsin have shown a marked interest in voting on the matter of the term of office for sheriff and at different times have defeated attempts to amend Art. VI, sec. 4, so as to permit the sheriff to serve more than two terms in succession. Conceivably their position with respect to the term of office of sheriff might for good reasons well be different than their position as to other county officers. Also much of what has heretofore been said about the attorney general on the state level would apply to the district attorney on the county level with the distinctions becoming less significant in the case of other county offices.

However, in view of all that has heretofore been said on the subject you are advised that each office covered in Art. VI, sec. 4, should be covered by a separate amendment in order to be on the safe side.

CONCLUSION

By way of recapitulation it is concluded:

Joint Resolution 22, S.

(a) The proposed amendment of Art. V, sec. 1, relating to the governor and lieutenant governor is proper if submitted to the voters in a separate question.

(b) The proposed amendment of Art. VI, sec. 1, relating to the secretary of state, treasurer, and attorney general is probably improper and should be separated into three amendments.

Joint Resolution 43, S.

(a) The proposed amendments of Art. IV, sec. 4, relating to assemblymen and of Art. VII, sec. 12, relating to the clerk of circuit court are proper if submitted to the voters as separate questions.

(b) The proposed amendment of Art. VI, sec. 4, relating to county officers generally may be improper and should be broken down into separate amendments relating to each office.

WHR

Taxation—Legislature—Bill No. 363, S., providing for general property taxation of mobile homes on a monthly payment basis would be invalid under sec. 1, Art. VIII, Wis. Const.

July 9, 1959.

THE HONORABLE, THE SENATE.

By resolution an opinion has been requested as to the application of the tax uniformity clause and other related provisions of the constitution to section 6 of Bill No. 363, S.

The bill proposes the abandonment of the system now in sec. 66.058 of the payment by owners of mobile homes of a monthly permit fee for parking in mobile home parks, but the retention of the regulatory portions of that statute

which provide for the licensing of mobile home parks. In lieu of the monthly parking permit fee, the bill proposes that mobile homes, as defined in sec. 66.058 (1) (e), be subjected to the general ad valorem taxation of real and personal property.

It would authorize a city, village or town to adopt an optional plan of monthly assessment, taxation and collection of the personal property tax on mobile homes. Other personal property, including mobile homes in any city, village or town not adopting such optional monthly plan, liable to annual ad valorem property taxation would be taxed only if located or customarily kept in the city, village or town at the close of May 1 each year, assessed at the market value thereof at that time, and subjected to a full year's tax, which is payable on or before the last day of February.

Sec. 1, Art. VIII, Wis. Const, reads, so far as here material:

"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 may prescribe.
* * *"

The requirements of this uniformity of taxation provision as respects general ad valorem property taxation were discussed in 46 O.A.G. 156 in concluding that a proposal to assess certain personal property on an average monthly inventory basis would violate such provision. It was there pointed out that the supreme court, early in the history of the state, said in *Knowlton v. Supervisors of Rock County*, (1859) 9 Wis. *410, that the laying of a tax on property consists of several distinct steps, such as the assessing of the value of the property, the establishing of the rate, etc., and in order not to violate this provision each step must be such that the tax has equal impact and operates alike upon all the taxable property within the taxing unit. In that case the valuation of classes of real estate upon a different basis was held violative of this rule of uniformity. In a later case, *State ex rel. Baker Mfg. Co., v. Evansville*, (1952) 261 Wis. 599, 53 N.W. 2d 795, it was held that the assessment of

personal property on a different basis than real property violated this uniformity provision.

More recently, in *Barnes v. West Allis*, (1957) 275 Wis. 31, 81 N.W. 2d 75, the validity of the mobile home park licensing statute, sec. 66.058, and the exaction thereunder of the flat monthly parking permit fee from the owners of all mobile homes coming within its provisions, were attacked as violating the rule of uniformity because the mobile homes would be of different values. The court there said that under said sec. 1, Art. VIII, where a *property tax* is levied there can be no classification which interferes with substantial uniformity of rate based upon value. The validity of the statute was there sustained, as was also the imposition of the flat monthly fee, upon the ground that such permit fee was an *excise tax* on the parking of occupied trailers and not a tax on them as property, and as to excise taxation uniformity of taxation means simply taxation which acts alike on all persons similarly situated.

It follows that, if kinds of real property cannot be assessed and taxed on a different basis for general property taxation, all personal property subjected to general property taxation likewise must be assessed and taxed upon the same basis so that the impact of the tax falls with equality. The proposal in Bill No. 363, S., does not conform to such requirement.

It is not clear but apparently the intent of the proposal in this bill is to provide a plan under which a mobile home would not be assessed and liable to general property taxation as of May 1 each year as is done with personal property generally. A mobile home would be assessed as of the first day of the first month after any month in which it is located in the city, village or town in excess of 15 days. It would then be subject to a monthly property tax, payable at the end of each month it remains therein, of 1/12 of the amount of the annual property tax which otherwise would be payable thereon if assessed and taxed as other personal property was assessed and taxed in the previous year. Such plan would be applicable only in such cities, villages and towns as elected to adopt it.

As such, the attempted plan would be an optional method of general taxation of mobile homes that would not be ap-

plicable to other personal property and entirely different as respects bearing the burden of general property taxation from that provided in respect to other personal property. It would also provide a divergence in that respect from the general property taxation applicable to mobile homes not coming under such plan because located under similar circumstances and at the same times in a city, village or town which did not elect to use such optional plan. There would be a clear discrimination against other personal property in favor of mobile homes which would be subjected to a lesser amount of tax under the attempted plan. The very purpose of the uniformity provision is to prevent such unequal property taxation.

As stated, the plan set out in the provisions of the bill are not too clear. Sec. 6 seems to read that any city, village or town adopting the plan of payment of property taxes on mobile homes on a monthly basis under the authorization in the proposed new 74.031 (14) shall assess all mobile homes, as defined in sec. 66.058 (1) (e), which are located or customarily kept therein, as of May 1 each year. But then it would provide that any mobile home which is moved in after said May 1 in a year and is located or customarily kept therein in excess of 15 days in any calendar month, is to be assessed as of the first day of the first month after it is so located therein and liable on the last day of the month in which it is assessed, and monthly thereafter, for 1/12 of the annual property tax that would otherwise have been payable if it had been located therein on May 1 of the preceding year. It is not specified if such monthly tax on a mobile home coming into the taxing district after May 1 is to continue only for the months thereafter during which it remains therein or how long the monthly tax will continue. If the proposed provisions were to be construed as providing that the monthly payments would continue into the succeeding calendar year, and that some other mobile home coming into that taxing district for the first time in the early months of the succeeding calendar year but which was moved out before May 1 of such year, would not be subjected to the payment of any property tax by reason of its physical presence in the tax district during such early months, then a mobile home coming under the plan and re-

maining in the taxing district into such succeeding calendar year but which was moved out at the same time as the other one would be subjected to payment of the monthly tax by reason of its presence in the same taxing district during the same time whereas the first mentioned one would not. As so construed, the proposed provision would clearly provide for different general property taxation on mobile homes similarly situated, which would be invalid even under the uniformity previously mentioned as applicable to excise taxes.

Furthermore, sec. 11 of the bill which proposes a new sec. 74.031 (14) to provide for an optional monthly payment plan of general property taxes on mobile homes would violate the rule of uniformity required by said sec. 1, Art. VIII, in providing an optional method of monthly payment of property taxes on mobile homes that would not be applicable to property taxes on other personal property. Not only that, but any optional plan of payment of property taxes on personal property would violate said provision. By the specific language in said sec. 1, Art. VIII, the optional methods of collection of property taxes that are permitted as not violating the rule of uniformity are optional methods of collection of property taxes on real estate. Prior to the adoption of the amendment to said sec. 1, Art. VIII, in 1941, no optional methods of collection of either real estate taxes or personal property taxes were permissible. The amendment removed the prohibition thereof only to the extent of authorizing the legislature to provide optional methods of collection of real estate taxes and the prohibition against optional methods of collection of personal property taxes continues and still exists.

It is therefore my opinion that Bill No. 363, S., if enacted would be invalid as violative of the provisions in sec. 1, Art. VIII, of the Wisconsin Constitution.

HHP

Legislature—Statutes—Discussion of effect of enactment of Bill No. 750, A., repealing 15-day credit restrictions on purchases of beer by retailers and 30-day credit restrictions on purchases of intoxicating liquor by retailers, on Wisconsin statutes and federal regulations.

July 13, 1959.

THE HONORABLE, THE ASSEMBLY.

This will acknowledge receipt of Resolution No. 27, A., wherein your honorable body requests my opinion

“* * * as to the effect of Bill No. 750, A., relating to repealing certain credit restrictions on retailers’ purchases of fermented malt beverages and intoxicating liquors, with particular attention to the question as to whether said bill would directly or indirectly repeal all or any part of any statute not referred to in the Bill, especially s. 176.17, commonly referred to as the ‘Tied House Law’ * * *.”

Bill No. 750, A., would repeal s. 66.054 (8a) (a), (c), and (f) relating to fermented malt beverages. It would also repeal sec. 176.05 (23) (a), (c), (e) and (f) relating to intoxicating liquors.

Considering first the effect of the bill upon the law regulating fermented malt beverages, the portions of sec. 66.054 (8a) to be repealed are:

“(8a) RETAIL PURCHASE RESTRICTIONS. (a) No retail licensee under sub. (7) or (8) shall receive, purchase or acquire fermented malt beverages directly or indirectly from any licensee except upon terms of cash or credit for not exceeding 15 days.

“* * *

“(c) No retail licensee shall receive, purchase or acquire fermented malt beverages directly or indirectly from any licensee if at the time of such receipt, purchase or acquisition he is indebted to any licensee for fermented malt beverages received, purchased, acquired or delivered more than 15 days prior thereto.

“* * *

“(f) No class ‘A’ or class ‘B’ retailer’s license shall be issued for a term beginning on or after July 1, 1956, to any person having any indebtedness to any licensee of more than 15 days’ standing. In each application for a license for a term beginning on or after July 1, 1956, the applicant shall state whether or not he has any indebtedness to any licensee which has been outstanding more than 15 days.”

The portions of sec. 66.054 (8a) remaining after the proposed repeal are:

“(b) No retail licensee shall receive any malt beverages on consignment or on any basis other than a bona fide sale.
** * *

“(d) For the purpose of this subsection, a person holding both a wholesale and retail license is deemed a retailer.
** * *

“(g) No brewer, bottler or wholesaler shall be subject to any penalty as the result of any sale of fermented malt beverages to a retail licensee, when purchased by said retail licensee in violation of this subsection.

“(h) Any retail licensee who violates this subsection shall be subject to the suspension or revocation of his retail license under sub. (17) and the penalties prescribed in sub. (15) (a), except that he shall not be imprisoned.”

There is a provision in sec. 66.054 (4) 5. which reads:

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

This language has been in the statute for many years and was not specifically amended by ch. 545, Laws 1955, which created 66.054 (8a), even though the obvious intent and impact of the legislation was to restrict extension of the “usual and customary commercial credits”.

With respect to sec. 66.054 (8a), then, the effect of Bill No. 750, A., if enacted into law, would be to restore the status of extension of the usual and customary commercial credits in connection with fermented malt beverages which prevailed prior to the enactment of ch. 545, Laws 1955, except for consignments and transactions other than a bona fide sale prohibited in sec. 66.054 (8a) (b).

This does not mean, however, that credit may be extended for an unlimited period in connection with the sale and delivery of these goods. As indicated in an earlier opinion from this office, due to federal regulation the *maximum* period of credit ordinarily extended to retailers of intoxicating liquors, wines and malt beverages is prescribed as thirty days from date of delivery. 41 O.A.G. 35, 37. The effect of ch. 545, Laws 1955, was to reduce this maximum from 30 to 15 days and the proposed repeal thereof would

have the effect of restoring the 30 day maximum credit period subject to the authority vested in the state commissioner of taxation by sec. 176.43 (2). It must be assumed that the legislature took into account the applicable federal statute and regulation.

Considering next the effect of the bill upon the law regulating intoxicating liquors, the portions of sec. 176.05 (23) to be repealed are:

“(a) No retail licensee under this section shall receive, purchase or acquire intoxicating liquors directly or indirectly from any permittee except upon terms of cash or credit for not exceeding 30 days.

“* * *

“(c) No retail licensee shall receive, purchase or acquire intoxicating liquors directly or indirectly from any permittee if at the time of such receipt, purchase or acquisition he is indebted to any permittee for intoxicating liquors received, purchased, acquired or delivered more than 30 days prior thereto.

“* * *

“(e) Until July 1, 1958, this subsection shall not apply to any indebtedness incurred before June 23, 1957.

“(f) No retailers' license shall be issued for a term beginning on or after July 1, 1958, to any person having any indebtedness for intoxicating liquors to any permittee under this chapter of more than 30 days standing. In each application for a license for a term beginning on or after July 1, 1958, the applicant shall state whether or not he has any indebtedness for intoxicating liquors to any such permittee which has been outstanding more than 30 days.”

The portions of sec. 176.05 (23) remaining after the proposed repeal are:

“(b) No retail licensee shall receive any intoxicating liquors on consignment or on any basis other than a bona fide sale.

“* * *

“(d) For the purposes of this subsection, a person holding both a wholesale and retail license is deemed a retailer.

“* * *

“(g) Any retail licensee who violates this subsection shall be subject to the suspension or revocation of his retail license under s. 176.121 and the penalties prescribed in s. 176.41, except that he shall not be imprisoned.

“(h) The cost of administering this subsection shall be borne by the permittees. The commissioner of taxation shall

determine such cost and shall by rule establish the procedure and method for apportioning such cost against the permittees, and provide for the method of its payment to or collection by the commissioner.”

Ch. 233, Laws 1957, created sec. 176.05 (23) and also amended sec. 176.17 (2). Prior to this law, the pertinent part of sec. 176.17 (2) provided:

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

After the passage of ch. 233, Laws 1957, that part of sec. 176.17 (2) underscored above read:

“* * * Nothing herein contained shall affect the extension of commercial credits for the products of the industry sold and delivered in compliance with s. 176.05 (23). * * *”

There is no provision in Bill No. 750, A., which amends the language of s. 176.17 (2). That section prohibits a manufacturer, rectifier or wholesaler from furnishing, giving or lending money *or any other thing of value* to any person engaged in selling the products of the industry. Prior to the enactment of ch. 233, Laws 1957, there was an exception to this prohibition which allowed “extension of usual and ordinary commercial credits”. The 1957 legislation in effect abolished that exception and substituted therefor the extension of commercial credits “in compliance with 176.05 (23)”.

Under Bill No. 750, A., there is substantially nothing left in sec. 176.05 (23), and clearly nothing pursuant to which commercial credits may be extended. That the extension of

commercial credits is a "thing of value" within the meaning of the statute is beyond doubt. In fact, it can safely be said that the value of the credit extended is a function of the amount of the credit, the time within which the debt is payable and the rate of interest, if any, charged. However, the reference in sec. 176.17 (2) to "extension of commercial credits * * * in compliance with sec. 176.05 (23)" is a reference to a specific statute, not to the general law on a subject. In such a case, i.e., where a statute adopts a specific statute by reference, the rule is that the adopting statute is not affected by subsequent amendments to the adopted statute. *George Williams College v. Williams Bay*, (1943) 242 Wis. 311, 316, 7 N.W. 2d 891. See also: *Will of Yates*, (1950) 259 Wis. 263, 266, 48 N.W. 2d 601.

Thus, in answer to your question, it is my opinion that although the enactment of Bill 750, A., would not repeal any statute not referred to in the bill, it would have the effect of requiring that sec. 176.17 (2) be construed pursuant to the doctrine of "legislation by reference" set forth above, as authorizing extension of credit for thirty days (as provided in sec. 176.05 (23), Stats. 1957) even though sec. 176.05 (23) *as amended* would no longer provide for such credit.

JEA

Highway Commission—Bonds—Sec. 4, Bill 827, A., attempting to authorize highway commission to issue bonds for highway construction, payable from appropriations of highway funds, is probably unconstitutional because it would authorize creation of state debt contrary to secs. 4 and 10, Art. VIII, Wis. Const.

July 14, 1959.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 23, A., you have requested my opinion "as to the constitutionality of the proposal in Bill No. 827, A., to permit the state highway commission to issue revenue bonds for the construction of highways".

Bill No. 827, A., provides in part:

“SECTION 2. 84.01 (23) of the statutes is amended to read:

“84.01 (23) The commission is exempt from the provisions of s. 20.902 to the extent that it may obligate estimated revenues from imposts on motor vehicles and motor vehicle owners for ~~any immediately ensuing period of 12 months~~ and any federal highway aid funds allotted to this state pursuant to any applicable act of congress which under the law are to be appropriated to the commission upon their receipt and deposit [deposited] in the state highway fund. *Without restriction because of enumeration the commission is authorized to obligate such funds in a sum sufficient to defray payment of the principal and interest on revenue bonds issued as provided by s. 84031.*

“* * *

“SECTION 4. 84.031 of the statutes is created to read:

“84.031 STATE HIGHWAY COMMISSION, CONSTRUCTION BONDS; PLEDGING OF HIGHWAY REVENUES. The state highway commission may borrow money and issue bonds for the purpose of paying all or any portion of the cost of any construction or reconstruction of highways including limited access highways, expressways, state trunk arterial highways and highways on the interstate defense highway system, which by law it is authorized to construct, reconstruct or participate with other governmental units in the construction or reconstruction of, including the construction, enlargement, reconstruction or relocation of existing highways, and the acquisition of necessary rights of way thereof and all interests in land pertinent thereto, and all work incidental thereto. Such bonds shall be issued only upon the written resolution of the commission and after specific approval of such issue by the governor. The resolution shall briefly describe the contemplated highway construction or reconstruction project, the estimated cost thereof, and the amount, maximum rate of interest and maturity dates of the bonds to be issued and the form thereof. The resolution shall contain an irrevocable pledge providing for the payment of the principal and interest thereof from the moneys received or to be received by the state highway commission from the appropriation in s. 20.420 (82) and (83) (a). The total aggregate amount of bonds that may be issued under this section shall not exceed such amount as will be serviced as to the maximum annual principal and interest requirements by a sum equal to 50 per cent of the total amount of moneys received by the state highway commission from the appropriation in s. 20.420 (82) and (83) (a) during the fiscal year immediately preceding the issuance of the bonds

after first deducting from the total amount the maximum amount of annual contributions and pledges made by the state highway commission for such bond issuance immediately preceding the issue of any series of such bonds. Bonds may be issued under this section as separate issues or series with different dates of issuance but the aggregate thereof shall be subject to the limitations herein set forth."

Sec. 20.420 (91) (Intro. par.) provides:

"STATE HIGHWAY FUND. All moneys collected as motor vehicle registration fees, operator's license fees, motor vehicle fuel taxes, and motor carrier fees and taxes and all federal aid for highways and other funds received in connection with highway operations or for highway purposes shall be deposited in and constitute the separate nonlapsible trust fund which is created and designated the state highway fund."

Sec. 20.420 appropriates money from the state highway fund to the state highway commission. Subsecs. (70), (82) (a) and (b) and (83) (a) of said section provide:

"(70) SOURCE OF FUNDS. There is appropriated to the state highway commission as received in the state highway fund the surplus of the motor vehicle registration fees, operator's license fees other than chauffeur's license fees, motor vehicle fuel taxes, and motor carrier fees and taxes, after deducting the amount paid or transferred for the costs of administration and operation of the motor vehicle department (exclusive of costs paid by the appropriation made by s. 20.560 (79)), department of taxation, and public service commission in performing their functions under chs. 78, 110, 129, 194, 218 and 341 to 349 and ss. 40.53 (7), and the costs paid from the appropriation made by ss. 20.520 (71) and 20.822 (71). The amount thereof collected in each fiscal year and appropriated by this section shall be apportioned and allotted by the commission in the amounts and on the dates hereinafter provided; and if no date is specified, then at such times during the fiscal year as the commission determines.

"* * *

"(82) STATE FUND FOR CONSTRUCTION AND MAINTENANCE. To carry out the purposes as provided in ss. 20.420 (91) (b), 84.01 (7) and (21), 84.03 (9), and 84.07:

"(a) The amount remaining after the allotments provided by subs. (71) to (81) have been set aside; but the allotment under this subsection shall not exceed \$10,700,000.

"(b) The amount added by sub. (83) (a).

“(83) APPROPRIATIONS SUPPLEMENTAL. On June 30, the amount remaining after the allotment provided by subs. (71) to (82) (a) and (84) have been set aside, which shall be apportioned and allotted as follows:

“(a) *State fund, supplemental.* Forty per cent shall be added to the allotment provided by sub. (82).”

Art. VIII, secs. 4, 6, 7 and 10, Wis. Const., provide:

“Section 4. The state shall never contract any public debt except in the cases and manner herein provided.

“* * *

“Section 6. For the purpose of defraying extraordinary expenditures the state may contract public debts (but such debts shall never in the aggregate exceed one hundred thousand dollars). Every such debt shall be authorized by law, for some purpose or purposes to be distinctly specified therein; and the vote of a majority of all the members elected to each house, to be taken by yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt and the principal within five years from the passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed, nor the taxes be postponed or diminished, until the principal and interest of such debt shall have been wholly paid.

“Section 7. The legislature may also borrow money to repel invasion, suppress insurrection, or defend the state in time of war; but the money thus raised shall be applied exclusively to the object for which the loan was authorized, or to the repayment of the debt thereby created.

“* * *

“Section 10. 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. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways or the development, improvement and construction of airports or other aeronautical projects or the acquisition, improvement or construction of veterans' housing. Provided, that the state may appropriate moneys for the purpose of acquir-

ing, preserving and developing the forests of the state; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment."

Art. XI, sec. 3, Wis. Const., provides:

"* * * No county, city, town, village, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained, other than for school districts, by the last assessment for state and county taxes previous to the incurring of such indebtedness and for school districts by the value of such property as equalized for state purposes; except that for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not exceed in the aggregate eight per centum of the value of such property as equalized for state purposes; the manner and method of determining such equalization for state purposes to be provided by the legislature. Any county, city, town, village, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same; except that when such indebtedness is incurred in the acquisition of lands by cities, or by counties having a population of one hundred fifty thousand or over, for public, municipal purposes, or for the permanent improvement thereof, the city or county incurring the same shall, before or at the time of so doing, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within a period not exceeding fifty years from the time of contracting the same. Providing, that an indebtedness created for the purpose of purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility of a town, village or city, and secured solely by the property or income of such public utility, and whereby no municipal liability is created, shall not be considered an indebtedness of such town, village or city, and shall not be included in arriving at such five or eight per centum debt limitation."

"There is nothing particularly technical about the meaning of the word 'debt' as used in the constitution. It includes

all absolute obligations to pay money, or its equivalent, from funds to be provided, as distinguished from money presently available or in process of collection and so treatable as in hand. *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964; *Doon Tp. v. Cummins* 142 U. S. 366, 376, 12 Sup. Ct. 320."

State ex rel. Owen v. Donald, (1915) 160 Wis. 21, 59, 151 N. W. 331.

The terms "debt" and "indebtedness" as used, respectively, in the prohibition of this section and Art. XI, sec. 3, against the state's incurring debts and municipalities' incurring indebtedness have the same meaning. *State ex rel. Thomson v. Giessel* (1954) 267 Wis. 331, 65 N. W. 2d 529.

Our court has been very strict and conservative in its interpretation of Art. XI, sec. 3. *Hebard v. Ashland County*, (1882) 55 Wis. 145, 12 N. W. 437, *Earles v. Wells*, (1896) 94 Wis. 285, 68 N. W. 964, *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Common Council*, (1897) 96 Wis. 73, 71 N. W. 86, *Rice v. The City of Milwaukee*, (1898) 100 Wis. 516, 73 N. W. 341, *Balch v. Beach*, (1903) 119 Wis. 77, 95 N. W. 132, *Riesen v. School District*, (1927) 192 Wis. 283, 212 N. W. 783, *Walker v. Joint School District*, (1949) 255 Wis. 475, 39 N. W. 2d 382.

And in construing Art. VIII, sec. 3, the court held that a proposed transaction whereby the state would lease land to a private corporation which was to construct thereon an addition to the state office building, to mortgage its leasehold interest in the existing state office building and the addition, and to re-lease the entire property to the state, would violate said section because property of the state would be pledged as security. *State ex rel. Thomson v. Giessel, supra*.

In *State ex rel. Morgan, v. City of Portage*, (1921) 174 Wis. 588, 184 N. W. 376, the court held that under a statute which authorized a city to acquire and construct public utilities and to issue bonds payable only from the revenues thereof and secured by statutory mortgage liens thereon bonds so issued and secured did not create a corporate indebtedness within Art. XI, sec. 3, Wis. Const., but that if the city executed a mortgage upon an entire public utility or a part thereof to make additions and improvements thereto such mortgage would create a liability not in the

nature of a purchase money lien and would create an indebtedness within the meaning of said constitutional provision.

In *Riesen v. School District*, *supra*, the court said :

“The district had made some temporary loans for which it had anticipated its revenues for the ensuing year. These amounts were likewise indebtedness within the constitutional limitation.”

In construing Art. VIII, sec. 10, of Wis. Const. when said section contained only what is now the first sentence thereof, the court said in *Sloan, Stevens & Morris v. The State*, (1881) 51 Wis. 623-629, 8 N. W. 393 :

“The constitution provides that ‘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.’ But over this grant of power, controlling and inflexibly limiting it, is the prohibition, ‘the state shall never contract any debt for works of internal improvement.’ Section 10, *supra*.”

In 1908 the following amendment to Art. VIII, sec. 10, Wis. Const., was adopted :

“Provided that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways.”

It is apparent, however, that this amendment did not create an exception to the prohibition against the contraction by the state of a debt for internal improvement; it only provided that the legislature could appropriate money which it had on hand or which it would thereafter raise by taxation for the construction or improvement of public highways.

In *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 185, 60 N. W. 2d 873, the court upheld the validity of ch. 186, Laws 1953, which created the Wisconsin turnpike commission and under certain circumstances authorized said commission to form a turnpike corporation which would have the right to issue bonds for the purpose of constructing a toll road, which bonds would be retired from toll road reve-

nues. In that case, however, the court held that the bonds would be issued by a private corporation and not by an agency of the state. Therefore such case may not be cited in support of the constitutionality of section 4 of Bill 827, A.

Furthermore, in the case of *McDonald v. State*, (1931) 203 Wis. 649, 235 N. W. 1, it was held that the state highway commission is an agency of the state. It is equally clear that the state highway fund is a state fund.

An examination of the provisions of section 4 of Bill No. 827, A., discloses that said section is deficient in that it:

1. Does not purport to appropriate any funds.
2. Does not provide that the bonds shall not be a general obligation of the state.
3. Does not provide that the bonds shall not create a state debt.
4. Does not provide that the full faith and credit of the state shall not be pledged for the payment of said bonds.
5. Does not provide that the bonds shall be denominated revenue bonds.
6. Does not provide that the bonds shall be payable solely from the appropriation made by sec. 20.420 (82) and (83) (a).
7. Does not specify the form of the bond.
8. Does not provide that the bonds themselves shall state:
 - (a) That they are revenue bonds.
 - (b) That they are payable solely from the appropriation made by sec. 20.420 (82) and (83) (a), Stats.
 - (c) That they do not constitute a general obligation of the state.
 - (d) That the full faith and credit of the state is not pledged for their payment.

In the final analysis, however, regardless of recitations in the statute or in the bond itself, the question of whether a bond constitutes an indebtedness of the state within any constitutional limitation remains a judicial one. *People ex rel. Chicago v. Barrett*, (1940) 373 Ill. 393, 26 N. E. 2d 478. See also *Boswell v. State*, (1937) 181 Okla. 435, 74 P. 2d 940.

Although section 4 of Bill No. 827, A., is subject to the infirmities pointed out above, said section states:

“The resolution shall contain an irrevocable pledge providing for the payment of the principal and interest thereof from the moneys received or to be received by the state highway commission from the appropriation in s. 20.240 (82) and (83) (a).”

From this language it is apparent that the bill contemplates that the bonds which would be issued by the state highway commission would be paid from state highway fund revenues derived from gasoline tax, motor vehicle registration fees, operator's license fees, motor carrier fees and taxes, federal aid for highways and other funds received in connection with highway operations or for highway purposes.

The bill evidently intends that there shall be “an irrevocable pledge” of some of these funds for the retirement of the bonds. In *State ex rel. Fletcher v. Executive Council of the State of Iowa*, (1929) 207 Ia. 923, 223 N. W. 737 at 740, it was said:

“The purport of the foregoing is to pledge irrevocably the fund arising from gasoline taxes and motor vehicle licenses to the payment of the bonds. The plaintiff challenges the validity of these sections. The act as a whole is one for the creation of an indebtedness in excess of \$250,000. The power of the Legislature to create it is circumscribed by the limitations of the Constitution. Within the limitations of the Constitution, and pursuant to its procedure, the 42d General Assembly had power to create the debt and to render its enactment thereof irrevocable by any future General Assembly. It had the constitutional power to impose a ‘direct tax’ for the payment of the debt it had created. No future General Assembly could repeal the levy of such tax while the debt remained. But this is so because the Constitution makes it so. In the absence of any constitutional provision to such effect, no General Assembly has power to render its enactment irrevocable and unrepealable by a future General Assembly. No General Assembly can guarantee the span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation is always upon the existing General Assembly. One General Assembly may not lay its mandate upon a future one. Only the Constitution can do that. It speaks as an oracle and stands as a monitor over every General Assembly. The funds resulting from license fees and gasoline taxes are within the legislative power, and are necessarily subject to the control of the existing General Assembly. Its enactment in relation thereto will continue in

force until repealed. The power of a subsequent General Assembly either to acquiesce or to repeal is always existent. It must be held, therefore, that sections 13 and 15, above quoted, were and are wholly ineffective and void."

See also *Billeter v. State Highway Commission*, (1924) 203 Ky. 15, 261 S. W. 855.

In *People ex rel. Chicago v. Barrett*, *supra*, the court stated:

"* * * Counsel for petitioner point out that the portion of the motor fuel tax fund out of which these notes are to be paid has been designated and allotted by the general assembly as a fund belonging to the City of Chicago as a road fund. The fact, however, that the general assembly has provided that this tax, or any tax, when collected, shall be paid into a certain fund or allotted to municipalities or subdivisions of the state does not preclude a later general assembly from ordering it paid into another fund or abolishing such fund altogether . . . Bonds and notes secured by and to be paid from revenues derived from the specific income-bearing property for which the bonds are issued differ very materially from notes issued in anticipation of the collection of the public revenue for the construction of highways which return no revenue but are a constant liability for maintenance and repair. In the latter case the state is pledging its faith that revenues paid to it, which may be used for general governmental purpose . . . if the general assembly should so direct, shall, however, be used to pay such notes. An essential element of a debt is the obligation to pay. This obligation the state, by guaranteeing that the source or allocation of state revenues to such purpose shall not be altered or reduced, assumes under this act. An instrument that is to be paid through a tax levied by the state is a state debt. . . . The special fund doctrine, which, in cases of water and electric light utilities and bridge tolls, constitutes an exception to the debt-limitation provision, is based on the theory that an obligation incurred in the acquisition, construction, or extension of income-bearing property and payable solely from the income of that property is not a debt of the state or municipality. Such doctrine does not, in our opinion, extend to obligations payable from taxes, which, in whatever form the legislature may collect them, are state revenues. As we have seen, the limitation by the Constitution of this state upon the creation of debts by the state includes not only debts payable from a tax on property but also debts payable "from other sources of revenue." "

In the case of *State v. Griffith*, (1939) 135 Ohio 604, 22 N. E. 2d 200, the state proposed to turn hospital properties over to a public institutional building authority as lessee for the purpose of having said authority construct additions thereto from the proceeds of bonds which the authority would issue. The authority would lease the property to the department of public welfare which agreed to pay rent for the purpose of retiring the bonds. The court, in condemning this plan, made the following statements which are particularly applicable to this matter:

“It must be conceded that the hospital properties involved are owned by the state. They have been built, maintained and operated by the public funds arising from taxation. The Department of Public Welfare is the state agency through which they are so maintained and operated. The authority of the department to deal with these properties belonging to the state, as contemplated by the legislation under consideration, is granted by the state through this and other authoritative legislation. The department must still be the agency of the state so far as the state acts with respect to such properties under this program.

“When, as contemplated by this legislation, the state turns over to the authority, as lessee, so much of these properties as the latter may select for a period of twenty-five years in consideration for the additions to be constructed by the authority from the proceeds of the bonds which the authority proposes to issue, and in turn the department is made the sub-lessee of the properties to carry on the responsibility of the state in caring for its wards, and in this connection enters into an absolute and unconditional obligation to pay the authority, not the profits or some other contingent sum arising from the operation of the hospitals but a definite and specific sum annually to service the bonds and thus ultimately redeem the properties of the state, the department is still acting as the agent of the state and it seems to inescapably follow that its debt to the authority is the debt of the state. The fact that the department hopes to receive compensation for the support of the wards of the state with which to pay such obligation does not change the legal aspect because such fees are at all times public funds of the state. The simple fact is that the debt of the department incurred for the benefit of the state must be the debt of the state.

“A default on the bonds of the authority, or on the promise of the welfare department to service such bonds through rentals for its use of the hospital properties, may never

occur. But in determining the validity or constitutionality of any legislation, the court must consider what may or might happen under the legislative grant of power.

"As we see it, a default is not beyond the realm of possibility. Such eventuality was in the mind of the General Assembly in the enactment of Section 2332-8, General Code, and in the mind of the authority in providing elaborate provisions for such contingency in its resolution authorizing the bonds. The Department of Public Welfare is dependent for its resources upon legislation to provide the revenues from pay-patients in its hospitals or otherwise and to turn such revenues over to its use. These are public funds, at all times subject to legislative control. That this is true is shown by the legislation now under consideration which assumes to divert a portion of such funds to the servicing of these bonds.

"A future general assembly may revoke this grant and divert these funds to other purposes. Nothing but a constitutional inhibition could prevent such action. No general assembly can guarantee the continuity of its legislation or tie the hands of its successors. Who knows what demands for public revenues and public funds may be more pressing within the next quarter-century? Who knows the necessities of future general assemblies, finding the public revenues permanently pledged by their predecessors for the servicing of similar bonds, as to which there is no limit and no constitutional limitation under the claim of the relator? * * *

In the case of *Re Senate Resolution*, (1933) 94 Colo. 101, 31 P. 2d 325, a statute provided that a limited amount be borrowed from the United States for highway purposes, that highway debentures be issued for such amount, that moneys received from an excise tax on motor fuel be transferred from the state highway fund to the state highway debenture redemption fund sufficient to pay such debentures and that all such debentures should be paid solely from such fund and should not constitute a general obligation of the state. The court held that this violated a constitutional provision against the state's contracting "a debt by loan in any form". The court said that a debt by loan was created, since the state allocated to the payment of the debt not anticipated revenue from an improvement or industry created by the act nor even revenues from a source first tapped by it but revenue already provided in past years and at present flowing into the state treasury.

In 92 A.L.R. 1299, 100 A.L.R. 900 and in 134 A.L.R. 1399, there are many cases cited in which courts have approved plans similar to the one outlined in Bill No. 827, A. It would extend this opinion unduly to discuss all of those cases. Many of these cases have arisen in jurisdictions in which the court has said that the debt contemplated by the constitution is one repayable solely from property taxation. Our court has never adopted this view.

Many of the other cases have arisen in jurisdictions which accept the theory that obligations may be created without violating the debt provisions of the constitution if an appropriation is made at the time, even though such appropriation anticipates future revenues. This doctrine was rejected by our court in the *Riesen case, supra*.

In the case of *State Highway Commissioner v. Detroit City Controller*, (1951) 331 Michigan 337, 49 N. W. 2d 318, the supreme court of that state upheld an act which authorized the state highway commissioner to issue bonds for the construction of highways, which bonds were to be payable from revenues from taxes on motor vehicles and fuels. The statutory plan involved in that case was quite elaborate and not subject to the infirmities of section 4 of Bill 827, A., as pointed out above. Moreover, Art. 10, sec. 22, of the constitution of the state of Michigan provided:

“All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor vehicles upon the highways of this State, and on all motor vehicles registered in this State, shall * * * be used exclusively for highway purposes, including the payment of public debts incurred therefor.”

It is apparent from the language of some of the cases cited herein that one of the principal weaknesses of the plan proposed by Bill 827 A., is the absence of a constitutional provision segregating highway fund revenues for specific purposes, including debt retirement.

Joint Resolution No. 69, S. proposes to amend Art. VIII, sec. 10 to segregate certain moneys which now go into the state highway fund for the construction of public highways and the repayment of bonds issued to defray the cost of such highway improvements. Substitute Amendment No. 1, S., to Joint Resolution No. 69, S., was introduced to broaden and

clarify the proposed amendment. It is my understanding that these resolutions were introduced as a part of the plan contemplated by sec. 4 of Bill 827, A., for the financing of highway construction by the issuance of bonds. However, at the present time it appears that Joint Resolution No. 69, S., has been rejected.

Although very eminent and respectable authorities have sustained the constitutionality of highway construction financing similar to that proposed by Bill 827, A., it is my view that the supreme court of this state probably would hold that such plan would attempt to create a state debt in violation of the provisions of secs. 4 and 10 of Art. VIII, Wis. Const.

JRW

Counties—Forestry—County treasurer may be employed to serve as secretary to forestry committee and may be paid extra compensation without violating sec. 946.13.

July 21, 1959.

JAMES H. WHITING,
District Attorney,
Langlade County.

You have asked whether the county treasurer can serve as the secretary of the forestry committee of the county board and whether he can receive extra compensation from the county for doing this work. You have indicated that the secretary is referred to as the administrator and that as such administrator he attends forestry committee meetings, takes down the minutes of such meetings and acts more or less as the supervisor of the forestry committee. You have furnished us with a copy of the county forestry ordinance. Section IV, paragraph 3 of that ordinance authorizes the committee to designate a county forest administrator as its agent and to employ other necessary personnel.

It is clear that the committee may employ an administrator. See sec. 28.11, Stats. The only question is whether the county treasurer can serve in that capacity and whether he

can receive extra compensation from the county for these services in addition to his salary as county treasurer.

The county treasurer can not be a member of the county board nor can he be a member of the forestry committee of such board. See sec. 59.18 which provides:

“No person holding the office of sheriff, undersheriff, county judge, district attorney, clerk of the circuit court, county clerk or member of the county board shall be eligible to the office of county treasurer or deputy county treasurer.”

The duties of the secretary or administrator, as he is called, may not be added to the official duties of the county treasurer. Sec. 59.20 (12) requires the treasurer to perform all other duties required of him by law; but this means by statute, and sec. 28.11 authorizing the county board to specify the duties of county officers relative to the administration of county forests does not confer upon the county board the power to require that county officers, such as the county treasurer, perform extra duties in their official capacities which are unrelated to the usual functions of their offices. The county board can not load up the county treasurer with the extra work of the forestry committee as a part of the treasurer's official duties.

The county board can employ the county treasurer as secretary or administrator of the forestry committee and he can agree to serve in that capacity. However, it is clear that, in so doing, the board or committee is making a contract of employment with him in his individual capacity, and, in performing such work, he is serving in such individual capacity and not in his official capacity as county treasurer. As a part of this contract of employment the parties can agree as to what compensation he is to receive for his work as secretary or administrator. The county can pay such compensation, in addition to the salary he receives as county treasurer. In other words, the county treasurer may serve the county in two capacities, one in his official capacity as treasurer, and one in his individual capacity as administrator of the forestry committee, and he can be paid for both jobs. Since in his official capacity as county treasurer, he has no responsibility for hiring or supervising himself as forestry committee administrator, it appears that sec.

946.13, relating to malfeasance in office, would not be violated.

Before permitting the county treasurer to serve as forestry committee administrator, the county board and the members of the forestry committee should satisfy themselves that the treasurer will in no way neglect his official duties as treasurer and that his serving as administrator will not interfere with the operation of the treasurer's office.
AH

Licenses and Permits—Revocation—Person subject to financial responsibility law must file proof at all times during the three-year period after expiration of revocation in order to be entitled to operator's license or to register vehicle in his name. Subsequent revocation during such three-year period does not require financial proof unless vehicle is registered in his name.

July 28, 1959.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You ask whether you may enforce a revocation of an automobile registration under the provisions of sec. 344.40 (1) where the registrant has allowed his financial responsibility to be cancelled by the insurance company at a time when his driving privileges are under revocation by court order. The answer to your question is yes.

The following statutes are material to this opinion:

“341.10 GROUNDS FOR REFUSING REGISTRATION

“(4) The applicant has had his registration suspended or revoked and such suspension or revocation still is in effect; * * *

“343.38 (1) LICENSE AFTER REVOCATION * * *

“(c) Unless 3 years have elapsed since the expiration of the period of revocation, files with the department proof of financial responsibility in the amount, form and manner specified in ch. 344. Such proof of financial responsibility shall be maintained at all times during such 3-year period when the license is in effect. No such proof shall be required

for a vehicle subject to the requirements of s. 40.57, 194.41 or 194.42 or a vehicle owned by or leased to the United States, this state or any county or municipality of this state.

"344.01 (2) WORDS AND PHRASES DEFINED.

"(d) 'Proof of financial responsibility' or 'proof of financial responsibility for the future' means proof of ability to respond in damages for liability on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance or use of a motor vehicle in the amount of \$10,000 because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, in the amount of \$20,000 because of bodily injury to or death of 2 or more persons in any one accident and in the amount of \$5,000 because of injury to or destruction of property of others in any one accident.

"(e) 'Registration' means, in the case of a person whose vehicle is registered under ch. 341, the registration so issued; in the case of a person whose vehicle is not so registered, it means the privilege to register a vehicle in Wisconsin and the reciprocal privilege granted a nonresident to operate in Wisconsin a vehicle not registered in Wisconsin.

"344.26 REVOCATION TO CONTINUE UNTIL JUDGMENT PAID AND PROOF OF FINANCIAL RESPONSIBILITY GIVEN.

"(1) Subject to the exceptions stated in ss. 344.25 (2) and 344.27 (2), any operating privilege or registration revoked pursuant to s. 344.25 shall remain revoked until every judgment mentioned in s. 344.25 is stayed, satisfied or discharged and, unless 3 years have elapsed since the date of entry of the judgment which was the cause for revocation, until the person whose operating privilege and registration was revoked furnishes proof of financial responsibility for the future and maintains such proof at all times during such 3-year period when the operating privilege or registration is in effect.

"344.29 PROOF OF FINANCIAL RESPONSIBILITY REQUIRED FOR EACH REGISTERED VEHICLE.

"Proof of financial responsibility for the future shall be furnished for each motor vehicle registered by any person required to give such proof.

"344.40 SUSPENSION FOR FAILURE TO MAINTAIN PROOF; OTHER PROOF MAY BE REQUIRED.

"(1) Whenever any person who has furnished proof of financial responsibility fails to maintain such proof at any time during the period when proof of financial responsibility is required, the commissioner shall *revoke* such person's operating privilege and registration for a period of time running from the date of *revocation* until such time as ei-

ther satisfactory proof of financial responsibility is again furnished or the period during which proof was required to be furnished has expired."

You have pointed out that the operator of a motor vehicle was convicted in 1956 on a charge of negligent homicide, which resulted in the mandatory revocation of his driver's license for a period of one year and after the period of revocation was served, the operator was reinstated subject to the financial responsibility law which requires future financial responsibility filing for a period of three years from the expiration of the period of revocation.

On January 21, 1958, the operator was convicted of reckless driving and the court ordered a revocation of his driving privileges for a period of six months. Effective February 15, 1958, the insurance company cancelled his proof of financial responsibility. In accordance with sec. 344.40 (1) you issued a new order, effective February 15, 1958, revoking the operator's license and registration until such time as satisfactory proof of financial responsibility is again furnished or the period during which proof is required to be furnished has expired.

You explain that the operator refused to surrender his registration plates on advice of his attorney who maintains that surrender is not required because the court order of revocation made on January 21, 1958, voided any effect of your department order. Their position is based on sec. 343.38 (1) (c) which requires proof of financial responsibility to be maintained when the license is in effect, and accordingly, they contend that a revocation under sec. 344.40 (1) can be enforced only when the driver's license is in effect.

There is an elementary principle of statutory interpretation that where the words of the statute express clearly its sense and intent, there is no room for the application of rules of construction. However, where ambiguity does exist and construction is necessary, the proper course is to gather intent from the language of the statute which appears from the evil to be cured or change to be accomplished, and then to follow the intent and adopt that sense which harmonizes best with the context and promotes in fullest manner, apparent policy and objects of the legislature. See *Standard*

Oil Company v. Industrial Comm., (1940) 234 Wis. 498; 291 N.W. 826. Also applicable is the general rule that a statute must be construed according to its manifest intent which must be derived from the statute as a whole and not from any single clause therein. See *Sutherland Statutory Construction*, 3rd. Ed. pars. 4703-4705.

To apply the interpretation given by the operator's attorney would be to take one phrase out of context and disregard the intents and purposes of the financial responsibility law. This division of our statutes takes effect when an operator has had his driver's license *revoked* for any cause or has failed to pay a judgment arising out of an automobile accident. Such a person may not be licensed as an operator under ch. 343 unless such financial proof is provided in accordance with sec. 343.38 (1) (c), nor can such person have a car registered in his name unless such financial responsibility filing is maintained as provided in sec. 344.29. This is a reasonable exercise of the police power by the state in regulating privileges granted by the state. See *State v. Stehlek*, (1953) 262 Wis. 642; 56 N.W. 2d 514.

Accordingly, whenever proof of financial responsibility is required of an operator or a registrant and such person fails to maintain such proof at any time during that period, the commissioner is required by sec. 344.40 (1) to revoke both the operating privileges and the registration. This revocation continues until proof of financial responsibility is again furnished or until the period during which proof was required to be furnished has expired. It should be noted that each new period of *revocation* extends the period for three more years during which proof of financial responsibility must be filed. In the instant case, the period during which financial proof will be required, will extend to three years beyond the date when the revocation presently in force under sec. 344.40 is lifted. If a person suffers a second revocation during the three year financial responsibility period, filing proof would not be required during such revocation unless he wished to have a vehicle registered in his name during such time. Sec. 344.26 (1) gives a clear picture of the legislative intent in regard to requiring financial proof after revocation to entitle a person to a driver's license or to register a vehicle.

To give any other interpretation to these provisions of the statutes would be to create the situation whereby the operator could be relieved of filing proof of financial responsibility when his driver's license is revoked, whereas the obvious purpose of the financial responsibility law is to protect the public from possible damages by a person who has previously conducted himself on the highway in such a manner as to require revocation of his operator's license. In addition, the law requires protection to the public in the form of ability to respond in damages for liability arising out of his *ownership* of a vehicle. See sec. 344.01 (2) (d). As a practical matter, we know that there are many drivers who have their operator's license revoked, who continue to operate their vehicles upon the highway. This is easily demonstrated by the vast number of reports of convictions received by your department for driving after revocation.

Were the law to permit such a person to discontinue proof of financial responsibility, but retain an automobile registration, after a second revocation, the effect would be to expose the public to an uninsured driver or owner who has already demonstrated that he is an unsafe driver or is financially irresponsible.

LLD

Optometry—Advertising—Sec. 153.10 applies to newspapers which print advertisements and it is immaterial that the optometrist who places the ad conducts his business in a state which does not prohibit price advertising of eyeglasses.

July 30, 1959.

A. N. ABBOTT, *President*,
State Board of Examiners in Optometry.

You have inquired whether it is legal for a newspaper published in Wisconsin to carry an advertisement of an out-of-state optometrist which violates sec. 153.10. A somewhat related question appears also to have arisen in this connection,—namely, whether an optometrist who is licensed both

in Wisconsin and in an adjoining state may advertise prices in a Wisconsin newspaper if the advertisement is limited to his optometric practice in the adjoining state which does not prohibit price advertising of eyeglasses.

Sec. 153.10 reads:

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

This section has been before the supreme court of Wisconsin for consideration on several occasions. Also it was before the United States Supreme Court recently, and it has been the subject of an official opinion by the attorney general which touches upon the question raised here.

See: *Ritholz v. Johnson*, (1944) 244 Wis. 494, 12 N.W. 2d 738; *Ritholz v. Johnson*, (1945) 246 Wis. 442, 17 N.W. 2d 590; *Bedno v. Fast*, (1959) 6 Wis. 2d 471, 95 N.W. 2d 396, (Certiorari denied by United States Supreme Court, June 29, 1959.) 44 O.A.G. 23.

In 44 O.A.G. 23 the conclusion was reached that sec. 153.10 is not applicable to the Wisconsin distributor of an out-of-state newspaper which carries the price advertising of a concern located in another state where such price advertising is permitted.

There is, of course, nothing improper in the advertising of prices of eyeglasses by an optometrist in a newspaper of the state where he is practicing if the laws of such state do not prohibit such advertising. Such were the facts under consideration in 44 O.A.G. 23, and the only question, a very narrow one, which called for any extended discussion there was whether a Wisconsin distributor or newsboy delivering such out-of-state papers in Wisconsin could be said to be in violation of sec. 153.10. It did not appear to the attorney general that the local distributor or newsboy delivering in Wisconsin an out-of-state newspaper containing an advertisement, lawful where published, of an optometric practice

lawful in such other state, could be said to be "advertising" in Wisconsin, and a distinction was drawn as to those cases where the advertisement itself was of an obscene, or indecent character such as to preclude its circulation regardless of the place of publication.

There can be no question as to the broad application of the statute here. It applies literally to "any person" who advertises prices of eyeglasses. The scope of the words "any person" in this statute was given careful consideration by the court in the case of *Bedno v. Fast, supra*, where it was contended by the plaintiffs, Anna Bedno, Jacob Bedno, Samuel J. Ritholz, Sylvia Ritholz, Morris I. Ritholz, Fanny Ritholz, Benjamin D. Ritholz, and Sophie Ritholz, co-partners doing business as King Optical Company (substantially the same plaintiffs as in the prior Ritholz cases) that the words "any person" in sec. 153.10 were intended to be limited in their application to persons practicing optometry. The trial court in its opinion stated that there was nothing ambiguous in the language used by the legislature and that there was no reason why the legislature could not require the licensing of optometrists and, in the same chapter bar *all persons* from certain types of advertising relating to eyeglasses. The supreme court in affirming the decision of the lower court stated at p. 476:

"* * * As observed by the learned trial court, the words 'any person' are clear and unambiguous and there is no room for construction. * * *"

Since the words "any person" in sec. 153.10 are all inclusive, it can scarcely be contended seriously that the statute excludes the newspaper which carries the advertisement and includes only the person who pays for the advertisement. An "advertisement" according to the American College Dictionary is "a printed announcement, as of goods for sale, in a newspaper, magazine, etc.", and "to advertise" is "to give information to the public concerning; make public announcement of, by publication in periodicals, by printed bills, by broadcasting over the radio, etc." To say that a newspaper is not advertising when it prints a price advertisement of eyeglasses is to indulge in a contradiction of terms.

An attempt was made in the 1959 legislature to amend sec. 153.10 so as to make it less restrictive. Bill No. 243, A., and Amendment No. 1, A., thereto would have eliminated the price advertising prohibition in the case of persons filling eyeglass prescriptions of optometrists or physicians provided the advertising was truthful and did not mislead or deceive the public. However, the bill was indefinitely postponed by the assembly on June 3, 1959, by a 78 to 10 vote.

The next question which must be considered is whether the statute if construed as applicable to a Wisconsin newspaper publishing a price advertisement of an optometrist would constitute an improper burden on interstate commerce if the practice of such optometrist is conducted in a state where price advertising is permissible, and lastly whether the statute invades a field of interstate commerce which has been taken over by the Federal Trade Commission under federal statutes.

So far as the optometrist himself is concerned no interstate commerce would appear to be involved, since his activities are of an intrastate character. He examines the eyes of his patient in the state where his office is located. He may or may not do his own laboratory work, but in any event after the lenses have been ground and fitted into frames it is necessary for the optometrist to make various minor adjustments of the bridge, bows and frames in order to assure comfort to the patient as well as to see that the lenses are properly centered over the eyes of the patient. Otherwise eye strain and fatigue can be caused the patient by putting on a lens that is not properly centered, in that by bending the rays of light, the eye would have to turn itself to meet the rays of light as they enter the eye with resultant discomfort and possibly even injury to the eye if the patient continued to wear such eyeglasses for a long period of time. See *Price v. State*, (1919) 168 Wis. 603, 605-6, 171 N.W. 77.

Thus the contacts of the optometrist with his patient from the time of the eye examination to the final delivery and adjustment of the eyeglasses to the patient takes place in the state where he is licensed and maintains his office. He is, therefore, in no position to claim that he is engaged in interstate commerce.

However, this is not true of the newspaper which prints his advertisement. Most newspapers, and especially those located near the border of any state, are engaged in interstate commerce. See *State v. Salt Lake Tribune Publishing Co.*, (1926) 68 Utah 187, 249 Pac. 474, 48 A. L. R. 553. It was held there that a state could not prohibit the publication of advertisements of cigarettes or tobacco so far as it concerns a newspaper circulating in interstate commerce carrying the advertisement of a newspaper advertiser, where the sale of such article was not prohibited in the state, but merely regulated. The decision turned, in part at least, upon the proposition that cigarettes and tobacco constitute articles of commerce and are protected by the interstate commerce clause of the constitution, the same as all other articles of interstate commerce.

It should perhaps also be noted in passing that there is a distinction between state statutes which in effect *prohibit* interstate commerce and those which operate so as merely to *regulate* it, on the same basis as local business is regulated. The latter may be permissible whereas the former is not. See *Panhandle Co. v. Mich. P.S.C.*, (1951) 341 U.S. 329, 336-7, 95 L. Ed. 993. Sec. 153.10 does not prohibit eyeglass advertising but rather prohibits price advertising of eyeglasses.

Moreover, the furnishing of prescription eyeglasses designed to fit a particular patient is not the sale of merchandise but it is the supplying of a service pertaining to health and safety so as to be subject to the exercise of the state's police power whether or not interstate commerce is involved. In *Williamson v. Lee Optical of Okla., Inc.*, (1955) 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461, the United States supreme court upheld a statute applying to "any person" and which among other things prohibited any advertising soliciting the sale of eyeglasses. In so doing the court said at p. 573:

"We see no constitutional reason why a state may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

In *Semler v. Oregon State Board of Dental Examiners*, (1935) 148 Or. 50, 34 P. 2d 311, 294 U.S. 608, 612, 55 S. Ct.

570, 79 L. Ed. 1086 the court upheld a state statute prohibiting advertising of dental prices, and the court pointed out that the legislature was not dealing with traders in commodities, but with the vital interests of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. In commenting on this case in *Ritholz v. Johnson, supra*, the Wisconsin Supreme Court applied the same reasoning to optometry and said: "Furnishing glasses as much affects the public health as does furnishing dentures". As a matter of fact our court carried this reasoning a step further in *Bedno v. Fast, supra*, and said at p. 479:

"* * * In fact, it seems to us that a person's health may be more gravely endangered by wearing improper glasses than by wearing improper dentures.

"Articles such as clothing or shoes are merchandise, purchased by the consumer for comfort and warmth. Eyeglasses are worn for correctional purposes. The customer himself knows whether a suit or a pair of shoes fit him and will serve the purposes for which he intends them; and if they do not, he suffers no harm. But he must rely on the word of the optician or optometrist that the glasses sold to him contain the proper correction for his vision; and if the correction is wrong he may very well sustain lasting injury to his eyes. This is clearly a matter of public health."

The argument was made in *Ritholz v. Ammon*, (1942) 240 Wis. 578, 4 N.W. 2d 173, as well as in *Bedno v. Fast, supra*, that any attempt by the state to exercise control over the eyeglass industry constituted an interference with the operation of the federal act, 15 U.S.C.A. 45, et seq., prohibiting unfair or deceptive methods of competition in business practices in interstate commerce, the Wheeler-Lea Amendment to the Federal Trade Commission Act. This contention was rejected in both cases. It was pointed out in the latest case, *Bedno v. Fast*, that the federal statute prohibits only false advertising as an unfair or deceptive act in commerce and that congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. In reaching this conclusion the court at p. 479 quoted from *Metropolitan Finance Co. v. Matth-*

ews, (1953) 265 Wis. 275, 278, 61 N.W. 2d 502, 503, as follows:

“ ‘If plaintiff’s business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless congress has, by appropriate legislation, pre-empted the field with reference thereto.’ ”

The appellants in *Bedno v. Fast*, subsequently petitioned the supreme court of the United States for a writ of certiorari. This office opposed the petition contending that the writ should be denied for the following reasons:

1. A state is free in the interests of public health to prohibit ALL price advertising of eyeglasses, and a federal statute designed to prevent only unfair and deceptive acts or practices in commerce does not constitute a pre-emption of the entire field of eyeglass advertising.

2. The federal statutes are aimed at fraudulent advertising only and cannot be invoked to prohibit truthful price advertising.

3. Congress was not required to occupy the whole field and its intention to do so is not to be inferred from the fact that it has seen fit to occupy a limited field.

On June 29, 1959, I was advised in a telegram by the clerk of the United States Supreme Court that the court had denied the application for the writ of certiorari on that date.

This is consistent with the rule that where there has been only a partial exercise by the federal government over the power to regulate interstate commerce, the state may legislate freely on those phases of the commerce which are left unregulated by the federal government, but, where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application. See *Cloverleaf Butter Co. v. Patterson*, (1942) 315 U.S. 148, 86 L. Ed. 754, 62 S. Ct. 491.

Mention has previously been made of 15 U.S.C.A. §§ 45 to 52 prohibiting false advertising in the optical industry. An illustration of the fact that newspaper advertising is

subject to control as interstate commerce where congress elects to enter the field is to be found in the case of *Lorain Journal Co. v. U.S.*, (1951) 342 U.S. 143, 72 S. Ct. 181, where the Sherman anti-trust law was held to be applicable to a newspaper publisher who attempted to monopolize interstate commerce by forcing advertisers to boycott a competing radio station. The court had no difficulty in concluding that the local dissemination of national advertising as well as news involved interstate commerce within the meaning of the Sherman act making it a misdemeanor to monopolize any part of the trade or commerce among the several states.

Also reference might be made to the case of *Sunbeam Corp. v. Wentling*, (1950 Third Circuit Court of Appeals) 185 F. 2d 903, where the court held that the Pennsylvania fair trade act could not, by reason of the Miller-Tydings act (15 U.S.C.A. § 1, et. seq.), be applied to a Pennsylvania retailer doing an interstate mail order business nor to his purchase of advertising space in a publication published in another state and of national circulation in interstate commerce. Thus both the business involved and the advertising thereof in a publication from another state involved interstate commerce. The court pointed out that the line between permissible and state regulation is not a clear one stating that what is apparently the presently accepted approach was voiced in *Sou. Pac. Co. v. Ariz.*, (1945) 325 U.S. 761, 770, 89 L. Ed. 1915, by Chief Justice Stone when he said that there has been left to the states wide scope for the regulation of matters of local concern even though it in some measure affects interstate commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Here, neither the Miller-Tydings act nor any other federal legislation prohibits price advertising of eyeglasses so as to conflict with or take over the area occupied by sec. 153.10 nor is any interstate commerce on the part of the optometrist involved, as has been pointed out above.

So far as the newspaper is concerned its advertising, though interstate commerce be involved, is subject to the

limitations discussed above. In other words, the state in the exercise of its police power, may incidentally affect interstate commerce when the object of the state regulation is not to that end, but is a legitimate attempt to protect the people of the state or the welfare of intrastate business, and where the exercise of such power is not inconsistent with, or in obstruction of, federal regulations. *Ritholz v. Ammon*, *supra*. See also *Hall v. Geiger-Jones Co.*, (1917) 242 U.S. 539, 61 L. Ed. 480, and *Smith v. St. Louis and S.W. Ry. Co.*, (1901) 181 U.S. 248, 45 L. Ed. 847.

In view of the foregoing discussion it is concluded that a Wisconsin newspaper may not print an advertisement that is in violation of sec. 153.10 regardless of whether the optometrist placing the advertisement practices in Wisconsin or in another state where price advertising of eyeglasses is permissible.

WHR

Counties—Schools—Counties have no power to undertake excavating, filling, landscaping, or any other construction work in connection with the building of a school, public or private.

August 11, 1959.

DON W. JIRTLE,
District Attorney,
Kewaunee County.

You have asked my opinion on the following question: may a county lawfully undertake excavating, filling and landscaping work in connection with the construction of a high school by a union high school district?

By way of background for such question, you state that the Luxemburg Union Free High School District, partly situated in Kewaunee county, has let contracts and undertaken the construction of a high school. It appears that Kewaunee county, through its highway department, has undertaken some excavating, filling and landscaping for such school and school district, with the county charging the

school district for that work on an hourly basis. This situation has given rise to the question answered herein.

It is my opinion that a county in this state is powerless to undertake work of the above-described nature in connection with the construction of a union high school or, for that matter, any school, public or private. It is fundamental that counties can exercise only such powers as are conferred upon them by statute, or such as are necessarily implied therefrom. *Spaulding v. Wood County*, (1935) 218 Wis. 224, 228, 260 N.W. 473; *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 557, 11 N.W. 2d 348. Upon a search of the statutes applicable to the powers of a county I am unable to find any statute expressly conferring the power to perform the acts in question, nor do I find any statute from which such power must be implied.

You have directed my attention to the case of *Heimerl v. Ozaukee County*, (1949), 256 Wis. 151, 40 N.W. 2d 564, for such bearing as it may have herein. That case dealt with the constitutionality of a statute which, *inter alia*, authorized counties to contract with municipalities to build, grade, drain, surface and gravel private roads and driveways. Such statute was held unconstitutional on the grounds that it would result in the appropriation and expenditure of public funds for a private purpose without any direct advantage accruing to the public and would authorize municipalities to engage in private business. In reaching its decision, at p. 160, the court said:

“Enterprises that exercise the police power of a municipality to deal and act for the preservation of the public health and the general welfare of the community may be engaged in by a municipality. In order for a municipality to employ taxes to carry on a competitive business, such business must involve a public function or be concerned with some element of public utility.”

This language might lend support to a contention that a county can properly engage in construction activities involved in the building of a public school, but *only* where statutory authorization, express or implied, exists for carrying on such activities. The above-quoted language very clearly lends no support to an untenable proposition that a county may employ taxes to carry on a competitive busi-

ness, absent statutory authority to do so, so long as the business involves a public function or is concerned with some element of public utility.

Although you have made no claim that the activity here in question was authorized under sec. 66.30, it is perhaps advisable here to point out that it was not. Under sec. 66.30 (1), a county may enter into an agreement with a school district "for the joint or cooperative exercise of any power or duty *required or authorized by statute*", but it is clear that under this statute the contracting power thereby given may be exercised only with regard to powers or duties "required or authorized by statute". Where, as here, the county has neither statutory power or duty, express or implied, to act as it did, it can find no sanction for its *ultra vires* conduct in a statute which merely confers the power upon it to contract with regard to powers or duties it may lawfully exercise or perform. As to sec. 66.30 (2) it only empowers a city and school district, as well as other named governmental units, to "contract jointly * * * for any joint project, wherever each portion of the project *is within the scope of the authority*" of the contracting units. If the activity here in question may properly be viewed as a "joint project" within the meaning of this statute, it is nevertheless manifestly not "within the scope of authority" of the county, and therefore it cannot be the subject of a valid agreement under sec. 66.30 (2), between a county and a school district.
JHM

Words and Phrases—Motor Vehicle Department—The use of the word “nonuniformed” in sec. 110.07 (3) precludes the motor vehicle department from prescribing and purchasing a standard type of work clothing for inspector personnel.

August 11, 1959.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You have asked for my opinion as to whether the word “nonuniformed” in sec. 110.07 (3), precludes the possibility of the department prescribing and purchasing a standard type of work clothing for Inspector I personnel.

This statute reads as follows:

“110.07 Traffic officers; powers and duties.

“(3) The commissioner of motor vehicles may employ not to exceed 70 nonuniformed inspectors whose duties shall be to enforce and assist in administering s. 110.10 (11) and chs. 340 to 345 and chs. 347 to 349 of the motor vehicle code and chs. 129 and 194. Such inspectors, in the performance of these duties, shall have the powers and authority of state traffic officers. Inspectors shall not enforce ch. 346 relating to the rules of the road. For the purpose of death, disability and retirement coverage, such inspectors shall be subject to ss. 66.191, 66.90 to 66.918 in the same manner as members of the state traffic patrol.”

The answer to your question is in the affirmative.

This section of the statutes became law by ch. 673, Laws 1957. As the section reads at this time, it is a change from ch. 652, Laws 1957, which was in effect from the regular legislative session until the fall session of that year. When the legislature returned for the fall session, the motor vehicle department was instrumental in introducing the legislation which presently exists in order to give the inspectors the powers and authority of state traffic officers as regards those chapters enumerated and thus specifically excluding Chapter 346, The Rules of the Road. It is also evident from the legislative reference library's file on this particular chapter that the motor vehicle department and the other sponsors of the legislation were concerned lest the legislature become disturbed that an additional 70 mem-

bers of the state patrol were being added by a "backdoor" method. Accordingly, it is clearly understandable why the authors of the bill included the word "nonuniformed" in the language which was presented for consideration by the legislature.

Words in a statute are to be construed in the sense in which they are understood in common language, unless ambiguity exists. *Sutherland, Statutory Construction*, (3rd Ed) § 4919. It is clear and unambiguous when reading this statute that the legislature intended that inspector personnel should not be classified as "uniformed" officers. It naturally follows that the legislature intended that these inspectors are not to be identified as law enforcement officials by any type of uniform.

Accordingly, I must advise you that your inspector personnel may not wear any type of uniform for purposes of identification. This opinion would preclude the wearing of identification shoulder patches, or metal badges, since some courts have interpreted the wearing of even a badge as being "in uniform". See *Montgomery Light and Traction Company vs Avant*, 202 Ala. 404, 80 So. 497, 3 A.L.R. 384. Therefore you may not prescribe a standard type of work clothes for such personnel nor require them to purchase and wear such clothing while on duty. Of course, a pocket-size folder in which identifications are kept would not constitute a uniform.

LLD

Words and Phrases—Waters—Regarding the regulation of motor boats, sec. 30.06 (1) to (5a) is inapplicable to some waters; subsecs. (6) and (7) are applicable to some boundary waters; and subsecs. (8) and (10) are applicable to full width of boundary waters.

August 24, 1959.

KENNETH H. HAYES,
District Attorney,
St. Croix County.

LEROY J. HAGEMANN,
District Attorney,
Pierce County.

You have asked the following question relative to the enforcement of boating safety regulations on the St. Croix river: "Where the boundary of the state of Wisconsin consists of a navigable river, can the provisions of sec. 30.06, Stats., be enforced upon the waters of such river?"

It is my opinion that the provisions of sec. 30.06 (1) through (5a) cannot be enforced upon the St. Croix river because it is a river over which the state of Wisconsin has concurrent jurisdiction, and sec. 30.06 (1) to (5a) by its own language is applicable only to waters over which the state has exclusive jurisdiction.

However, sec. 30.06 (8) can be enforced on the Wisconsin side of the middle of the main channel of the St. Croix river, since it refers to "inland waters" without specifying exclusive jurisdiction. And sec. 30.06 (10) can likewise be enforced on the Wisconsin side of the middle of the main channel of the St. Croix river, since this subsection refers without restriction to the "waters of the state", and hence would include all waters within the legal boundaries of the state.

Subsecs. (6) and (7) appear to be in an ambiguous class since they do not contain the same reference back to 30.06 (1) in a specific form, but appear to apply to the inland waters of the state, and in subsec. (7) the expression "such vessels and equipment" is used without a well defined antecedent. In any event since the St. Croix river is an inland water of the state, as will hereinafter be discussed, it would

appear that these subsections of 30.06 should be regarded as applicable to the St. Croix waters in Wisconsin in the absence of any court decision to the contrary.

Sec. 30.06 (1) states the jurisdiction for subsecs. (1) through (5) and reads in part as follows:

“Every boat * * * operated upon any waters under the exclusive jurisdiction of the state of Wisconsin, shall * * *.”

Subsecs. (2), (3), (4) and (5), do not repeat the words “exclusive jurisdiction”, but use the words “such” and “described in subsection (1)” to denote that those subsections are applicable only to boats operated upon waters under the exclusive jurisdiction of Wisconsin.

Our state does not have exclusive jurisdiction over the St. Croix river. The Act of Congress admitting Wisconsin into the Union, Act of August 6, 1846, 9 * S. Stats. at Large 57, contains the following provisions:

“* * * the said State of Wisconsin shall have concurrent jurisdiction on the Mississippi, and all rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; * * *.”

Likewise Wis. const., Art. IX, sec. 1, provides in part:

“The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state * * *.”

Precise meaning has been given to the words “concurrent jurisdiction” by the United States supreme court in *Nielson v. Oregon*, (1909) 212 U. S. 315. It was indicated there that each state has jurisdiction across the river’s entire width as to criminal acts which are *malum in se*, but that each state did not have jurisdiction across the entire width as to acts which are *malum prohibitum* unless such acts are *malum prohibitum* by the laws of both states.

Sec. 30.06 (6) and (7) apply by their terms to “inland waters of the state”. These subsecs. read as follows:

“(6) Inspection. Every city, town and village is hereby empowered to inspect at least once in every year the hull,

boiler and machinery of every vessel propelled by steam, gasoline, naphtha, electricity or any other power other than hand power, *which is used within its boundaries upon inland waters of the state* and is not subject to the laws of the United States.

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

The words “such vessels” of subsec. (7) have two possible antecedents. Either they relate to the words “water craft * * * operated upon any water under the exclusive jurisdiction of the state of Wisconsin” of subsec. (1), or they relate to the vessels “used within its boundaries upon inland waters of the state” of subsec. (6). It is logical that the words of subsec. (7) refer to their immediate precedent in subsec. (6).

Hence, in my opinion, these two subsections apply to the vessels described in (6) upon all inland waters of the state, including the St. Croix river.

Sec. 30.06 (8) is applicable to “outlying or inland waters” in this state, and reads in part:

“* * * It shall be unlawful to operate any such boat, so propelled by gasoline or other similar motive power, with the muffler off or cut-out open on *outlying or inland waters in this state* as defined in section 29.01 * * *.”

Sec. 29.01 (4) provides:

“All waters within the jurisdiction of the state are classified as follows: Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer’s harbor, and the Fox river from its mouth up to the dam at De Pere are ‘outlying waters.’ All other waters, including the bays, bayous and sloughs of the Mississippi river bottoms, are ‘inland waters.’”

In my opinion, the definition of “all other waters” as inland waters clearly includes the St. Croix river and the other interstate boundary rivers, the Menominee, the Brule, the Montreal, the St. Louis, and the Mississippi.

Because sec. 30.06 (8) is a prohibition applicable to inland waters, and because the St. Croix river is properly

classed as an inland water, it is my opinion that (8) may be enforced on it.

Sec. 30.06 (10) sets forth its own jurisdiction just as 30.06 (8) does, and reads as follows:

“RECKLESS MOTOR BOATING. Any person who shall drive, operate or use a motor boat *on the waters of the state* in a careless, negligent, or reckless manner so as to endanger the life, property or persons of others, shall upon conviction be subject to the fine or imprisonment provided by paragraph (b) of subsection (8).”

We note that this language is different from that of sec. 30.06 (1). This subsection prohibiting the careless or reckless use of boats does not contain the restriction that it be enforced only on waters over which the state has exclusive jurisdiction. The extent of the applicability of subsec. (10) is throughout the “waters of the state”. It is sweeping in its scope.

Further, (10) stands in contrast to subsections (1), (2), (3), (4) and (5) with respect to the harmfulness of the acts prohibited. While the first five subsections prohibit the use of unsafe boat equipment, (10) involves conduct of greater culpability—reckless driving. Subsec. (10) prohibits the kind of conduct which the legislature would not permit on any waters over which it had any jurisdiction whatever. This intention is not only expressed by the language of the statute itself, but is also manifested by the greater penalty which attaches to the act. The fine for a violation of (10) is twice the amount of the fine for a violation of any subsection from (1) through (5). Moreover, imprisonment is provided for in sub. (10). Also in contrast is the provision whereby conservation wardens may assist in the enforcement of sub. (10). It would seem clear that reckless operation of a motor boat is an offense *malum in se* rather than *malum prohibitum*.

The St. Croix river is part of the waters of the state. Art. II, sec. I, Wis. Const., which defines the boundaries of the state, provides with reference to the St. Croix River:

“* * * thence due south to the main branch of the river St. Croix; thence down the main channel of said river to the Mississippi; thence down the center of the main channel of that river * * *.”

Thus this section of the constitution declares that the waters of Wisconsin include the Wisconsin side of the main channel of the St. Croix river. The following cases are consistent with that proposition. *Roberts v. Fullerton*, (1903) 117 Wis. 222, 93 N.W. 1111; *Franzini v. Layland*, (1903) 120 Wis. 72, 97 N.W. 499; *State v. Bowen*, (1912) 149 Wis. 203, 135 N. . 494. In the latter case the court held that jurisdiction to enforce game laws extends to the state boundary, even though that boundary may be the bed of a navigable stream over whose waters an adjacent state has concurrent jurisdiction for other purposes.

Accordingly, it would appear unquestionable that subsec. (10) can be enforced on the Wisconsin side of the St. Croix river.

Moreover, sec. 939.03 (1) (a) declares that a "person is subject to prosecution and punishment under the law of this state * * * if he commits a crime, any of the constituent elements of which takes place in this state". Sec. 939.03 (2) expressly defines *state* to include any "area over which the state exercises concurrent jurisdiction under Article IX, section 1, Wisconsin constitution".

Accordingly it would appear that subsec. (10) can be enforced on the full width of the St. Croix river.

You are advised that a new bill regulating boating on all Wisconsin waters, Bill No. 172, S., as amended by the 1959 legislature, has now passed both houses of the legislature and is awaiting signature by the governor. If this bill is signed into law, the statute under consideration herein will be superseded and boating will be regulated in accordance with the terms of the new bill.

RGT

Counties—Members of the county highway committee need not be members of the county board. Discussion of 83.015, its history and interpretation.

September 2, 1959.

JOHN P. SANTERRE,
District Attorney,
Barron County.

You have asked my opinion as to whether or not members of a county highway committee must be members of the county board; and as to whether or not members of that committee, who are members of the county board, can continue to serve as committee members where they lose their board memberships during their terms as committee members.

Since 1915 my predecessors in office have been of the uniform and oft-reiterated opinion that members of the county highway committee, and its predecessor, the county state road and bridge committee, need not be members of the county board. See 4 OAG 1048, 1049; 9 OAG 569; 12 OAG 40, 41; 14 OAG 218, 220; 15 OAG 318, 319; 16 OAG 372; and 19 OAG 302, 303. Since 1930, no court decision has been rendered or statutory change made which would cause me to dissent from this opinion. It is based on what I believe to be a sound construction of a provision of subsection (8) (1) of sec. 1317m-5, Stats., 1915, which reads as follows:

“Each county board, at or before the annual meeting held next after the passage and publication of this act and at each succeeding annual meeting thereafter, shall by ballot elect, or by resolution instruct the chairman of said board to appoint, a committee of not less than three or more than five persons, of which the chairman may be one, who shall hold their offices for one year and until their successors are elected and have qualified * * * .”

The current version of this provision appears as part of sec. 83.015 (1) (a), and reads as follows:

“* * * 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. * * * *”

It will be observed that the provision here in question, insofar as membership on the county highway committee is concerned, is substantially the same now as in 1915, so that what was said of the committee membership aspect of the 1915 statute would be true also of such aspect of the 1957 statute. I therefore view as applicable to such aspect of the 1957 statute what was said in 4 OAG 1048, 1049, in answering the question of whether the county state road and bridge committee, predecessor of the county highway committee, would have to be composed of members of the county board or whether it could be comprised of any qualified electors of the county. In that opinion it was said:

“* * * * Whatever uncertainty may appear upon the face of the statute [subsec. 8, sec. 1317 m-5, Stats., 1915] it is at once removed by considering the legislative history of the bill. As drafted, substitute amendment No. 3 S to Bill No. 556 S. which was enacted substantially as ch. 533, Laws of 1915, provided that the county board ‘shall by ballot elect, or by resolution instruct the chairman of said board to appoint *from its members* a committee of not less than three or more than five *members*’. It appears upon the face of this bill that the words ‘from its members’ were stricken out and the word ‘members,’ being the last word above quoted, was stricken out, and the word ‘persons’ inserted instead. It thus appears that the first proposal was to select this committee from the members of the board, but the words limiting the members of the committee to the membership of the board were deliberately stricken out before the substitute was reported to the senate. This is conclusive of the legislative intent that the members of this committee might be chosen from the electors of the county generally.”

In answer to your second question, I need only state my concurrence in the opinion frequently and clearly given by my predecessors since 1916, namely, that a member of the county board who is a member of the county highway committee may serve out his unexpired committee membership even though not re-elected to the county board. See 5 OAG 339, 340; 15 OAG 318, 319; 19 OAG 302, 303; 20 OAG 241; and 46 OAG 175, 176. In my judgment the reasoning

supporting this opinion is sound, and is well stated at 5 OAG 339, 340, where it was said :

“* * * * The membership of this committee [county state road and bridge committee] is not confined to the membership of the county board. See Vol. IV, Op. Atty. Gen. p. 1048. If a person not a member of the county board were elected or appointed a member of this committee, there would be no thought that his term of office expired at the spring election, because he was not elected a member of the county board. There is no greater reason for assuming that the term of office of a person who is elected or appointed to this committee from the membership of the county board expired because he was not reelected.”

In giving you the foregoing opinions, I am aware of the position taken that under the opinion reported at 26 OAG 349 the county highway committee is a committee of the county board, and that such committee must therefore be composed of members of the county board, so that when a member of the board fails to be re-elected, he loses his committee membership at the expiration of his term as supervisor. That position, I believe, is grounded on a misunderstanding of 26 OAG 349. It is true that in the caption of such opinion it is stated that, “County highway committee appointed under sec. 82.05, subsec. (1), Stats., is committee of county board”. But nowhere in the body of the opinion, or in the caption, is there a statement that the county highway committee must be composed of county board members only, nor is there any statement implying that idea. The caption statement above mentioned, and the language in the body of the opinion which it was intended to summarize, were inspired by the fact that, “In XXII Op. Atty. Gen. 308 it was said in effect that the county highway committee * * * is not a committee of the county board * * *”. P. 350. With reference to 22 OAG 308, 26 OAG 349 went on to state that, “* * * * In so far as such opinion holds that the highway committee is not a committee of and acting for the county board in highway matters, we feel it is erroneous * * *”. In support of its repudiation of that part of 22 OAG 308 indicated, 26 OAG 349 states the opinion of the then attorney general that the county highway committee is “an agency of the county”, acting “for and in the place of the county board with reference to

certain matters”, and as “a representative and agent of the county board.” P. 351. In this connection, it was emphasized that the county board had authority to delegate certain powers to the county highway committee; that action of the county board was required before some of the powers of the committee could be exercised; and that the county board elected the committee members. In sum, all these statements show the belief of the then attorney general that the county highway committee is a committee of the county board in the sense that it is the agent of the latter, subject in some measure to its control and deriving part of its powers from the board, but not in the sense that it is a committee made up of county board members only. To clinch his contention that the county highway committee was a county board committee, the then attorney general, had he believed it to be so, would surely have asserted that the county highway committee was clearly a county board committee because it had to be composed of board members—but this, significantly, is an assertion he did not make.

It may be asserted that 26 OAG 349 implied that a county highway committee must be made up of county board members, because the opinion of 22 OAG 308 that the county highway committee is not a committee of the county board, overruled by 26 OAG 349, contained the observation that “it has been held by this department that the members of such committee need not be composed of members of the county board”. But this observation, not essential at all to any of the conclusions reached in 22 OAG 308, is clearly not the part of such opinion overruled by 26 OAG 349. The second of the questions dealt with in 22 OAG 308 was whether or not a member of the county board could be lawfully employed in a position created by the board prior to the beginning of his term of office, the selection of which was vested in a county committee elected by the board prior to the beginning of his term of office. In response to this question, it was said: “The answer to your second question must be in the affirmative *as the action of the committee cannot be considered the action of the board. The right has not been delegated to them by the county board, but is a power that the committee exercises by virtue of the statute*”. (Emphasis added). It was this answer, insofar as it indi-

cated that the county highway committee was "not a committee of and acting for the county board in highway matters", which 26 OAG 349 overruled. And since such answer obviously does not turn on the matter of the membership of the county highway committee, it is readily understandable, I believe, why 26 OAG 349 does not, expressly or by implication, assert that such membership must be confined to members of the county board under the governing statute.

It should be noted, too, that had it been the intent of 26 OAG 349 to overturn the well-established opinion that members of the county highway committee need not be members of the county board, the repudiation of the numerous preceding opinions of the attorney general so holding would surely have received express mention, with citations of the overruled opinions being given. This, of course, was not done.

The observation should also be made that in 46 OAG 175, cited *supra*, my immediate predecessor said, "If members of the [county] board are elected as such [county highway] committee members, they serve for full time without reference to termination of their office as board members". He could not have made the foregoing statement, in which I concur, had he believed that 26 OAG 349 had established that county highway committee members must be county board members.

My attention has also been directed to sec. 83.015 (2), which grants certain powers to the county highway committee; and it was then suggested that if such powers were to be delegated to a county highway committee containing members not also members of the county board, an unconstitutional grant of power to the committee might exist, violative of sec. 22, Art. IV, Wis. Const. Such section provides that, "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe". It is further suggested that since sec. 83.015 (2) might constitute an unconstitutional grant of power to the county highway committee so composed, then sec. 83.015 (1) (a), which deals with the

creation and membership of the committee, might also be unconstitutional.

In *Rinder v. Madison*, (1916) 163 Wis. 525, decided the year following the enactment of s. 1317m-5, it was contended that sub. 8 (2) thereof delegated powers and authority to the county state road and bridge committee which were conferred by the constitution on county boards and county clerks. Sub. 8 (2) of sec. 1317m-5 was the predecessor of the present sec. 83.015 (2). One of the arguments made by the city of Madison was,

“That Portion of the Law included in Subsection 8 of Section 1317m-5 Relating to the Power and Authority of the County Committee is Void under Section 22 of Article IV and Section 4 of Article VI of the Wisconsin Constitution for the Reason that the Law Delegates to the County Committee Power and Authority Which by the Constitutional Provisions Must be Vested in the County Clerk and County Board.” P. 26, Brief for City of Madison and Carl Moe, City Treasurer, Defendants and Appellants, in *Rinder v. Madison*, Vol. 1225, Cases and Briefs.

In support of this argument, it was said :

“The power vested in this county committee where its exercise is subject to the control of the county board might not be objectionable under our decisions, such as power to purchase and sell county road machinery as authorized by the county board. Where it is given authority to enter into contracts for the construction and maintenance of highways and to direct expenditure of funds whether derived from automobile licenses or by a tax and where it is vested with the power of audit, all of which authority is given without being subject to any supervision by the county board, it is submitted that such authority is beyond the power of the legislature to delegate to this committee under the provisions of the constitution above referred to.” P. 29, *Idem*.

In answer to this argument, the court said :

“* * * * It is contended that this subsection delegates powers and authority to such committee which are conferred by the constitution on county boards and county clerks. These powers and duties of this committee are clearly administrative in their nature and in no way conflict with the duties imposed by law on county clerks. The committee can only carry out the road improvement authorized by the county board and perform administrative features connected

therewith. It is suggested that they have the ultimate power to pass on the legality of claims for services and material furnished for the construction of roads and bridges. The duty to 'audit' such claims as provided by par. 3 (e) of this subsection is not to be interpreted as abrogating the duties imposed by law on county clerks, nor is it to be considered that such 'audit' implies that the committee is given power to finally pass on the allowance or disallowance of claims against the county. It is evident that their duties under this part of the act are to examine claims to ascertain whether or not they pertain to and properly itemize the charges for material furnished and work done, and to check the items as to their correctness in these respects to assist the county clerk and the county board to determine whether they are just and legal claims. * * * *” P. 533.

It may be argued that the foregoing statements of the court do not squarely meet and dispose of the constitutional challenge based on sec. 22, Art. IV, Wis. Const., which the city of Madison laid down to the delegation of powers at issue in the *Rinder* case. But whether or not that is so, it is apparent that the court gave consideration to that challenge, which was in accord with the suggestions above-mentioned, and did not find it persuasive, else it would not have held as it did.

Though I believe that the *Rinder* case establishes the constitutionality of the delegation of powers effected under sec. 83.015 (2), it seems to me that, regardless of the constitutionality of that delegation of powers or the want of it, the meaning of sec. 83.015 (1) (a), in the light of the legislative history of its predecessor statute, sub. (8) of sec. 1317m-5 Stats., 1915, is beyond cavil—i.e., the county highway committee may be chosen from electors of the county, and its membership is not confined to county board members. And even if the legislature, in creating sub. 8, sec. 1317m-5, Stats., 1915, had provided for a committee which could not be constitutionally delegated certain powers, their attempted delegation to such committee would not render it an “unconstitutional” body; nor would it show that an opinion of the attorney general as to the meaning of sub. (8), sec. 1317m-5, Stats., 1915, was erroneous, when such opinion was based on the intent of the legislature discernible from the legislative history of such statute.

JHM

Paternity—Proceedings—Discussion of sec. 328.39 and 52.21 to 52.45 regarding paternity proceedings and settlement agreements, wherein child is born to a married woman.

September 29, 1959.

JOHN PEYTON,
Assistant District Attorney,
Racine, County.

You submit a number of questions as to a paternity proceeding under sec. 52.21 to 52.45, Stats., where the child involved was born to a married woman.

In the factual situation with which you are concerned, a warrant was issued under sec. 52.26 upon complaint of a married woman. The defendant was arraigned and proceedings postponed. Later, the complainant and defendant entered a settlement agreement under sec. 52.28, under which the defendant admitted paternity.

I

Your first question is whether sec. 328.39 applies to paternity proceedings, so as to make it necessary that the child be made a party.

Sec. 328.39, Stats., reads in part:

“(1) (a) Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting the illegitimacy of the child in such action or proceeding shall have the burden of proving beyond all reasonable doubt that the husband was not the father of the child. * * * The court or judge shall in such cases order the child made a party and shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned.”

Subsec. (1) (b), relating to fees of a guardian ad litem in such cases, refers expressly to “illegitimacy proceedings”, the designation by which proceedings under secs. 52.21 to 52.45 were generally known prior to enactment of ch. 296, Laws 1957.

Even before enactment of ch. 296, Laws 1957, the supreme court in *State ex rel. Briggs v. Kellner*, (1945) 247

Wis. 425, 20 N.W. 2d 106, had applied sec. 328.39 to an illegitimacy proceeding, so as to render the mother's testimony competent; and also pointed out that "the most clear and conclusive proof of non-access is required to bastardize a child" born in wedlock.

If any doubt could exist under the foregoing authorities that sec. 328.39 applies to proceedings under secs. 52.21 to 52.45, that doubt was resolved when ch. 296, Laws 1957, created sec. 52.355, Stats. As amended by ch. 298, Laws 1959, the section reads:

"The complainant shall have the burden of proving the issues involved by clear and satisfactory preponderance of the evidence; provided that if the child whose paternity is at issue was born to the complainant while she was the lawful wife of a specified man the complainant shall then have the burden of proving that the husband is not the father of such child as required in s. 328.39."

The section establishes that the legislature intended a higher standard of proof to establish that the mother's husband is not the father than is required to establish who the father is.

You indicate that a part of the doubt which led to your question arose because sec. 52.45 classifies a paternity proceeding as a "civil special proceeding", whereas sec. 328.39 is made applicable "in an action or proceeding". Since the same enactment (ch. 296, Laws 1957) which provided that a paternity suit is a civil special proceeding also created sec. 52.355, it is clear that the legislature did not intend the difference in designation to change the rule as to applicability of sec. 328.39. The drafting request in the files of the legislative reference library indicates that the designation "civil special proceeding" was intended primarily to call attention to the supreme court's rulings that the proceeding is civil rather than criminal in nature. The following is an excerpt from the request:

"* * * because of the criminal procedure that is applicable to this type of civil action there exists much confusion as to whether the civil or criminal law applies. Our supreme court, in *Ray v. State*, (1939) 231 Wis. 169, has clearly stated that an illegitimacy proceeding is a civil action, but nevertheless the confusion as to procedure continues to exist. * * *"

II

You indicate that further doubt has arisen as to applicability of sec. 328.39 in such a case as you have reported because:

“* * * in many cases where the defendant admits paternity and agrees to support the child, * * * should the state fail to meet the burden of proof with respect to the illegitimacy of the child, the defendant, though willing, would be precluded from supporting the child. It would be difficult to construe such a happening as being to the *protection and welfare* of the child involved.”

The defendant would not be *precluded* from supporting the child in such a case, because the legislature has made specific provision for both agreement and judgment covering the child's support without either admission, proof, or adjudication of illegitimacy. Sec. 52.28 provides that “the alleged father may deny paternity” in a settlement agreement. If judgment is entered on such an agreement, the requirement of sec. 52.37 (1) for adjudication of paternity expressly excepts cases where paternity is denied.

Since sec. 52.28 requires all settlement agreements to be drawn by the district attorney, he is in a position to see that an agreement provides support without the child's being labeled illegitimate, and probably should do so in cases where paternity is in sufficient doubt that illegitimacy cannot be established by the “clear and conclusive proof of nonaccess * * * required to” establish the illegitimacy of a child. *Briggs case, supra.*

III

The legislature's provision of a method for enforcing support agreements, without adjudicating a presumptively legitimate child to be illegitimate, should probably obviate the need for discussion of the more explicit question how sec. 328.39 affects proceedings where the defendant admits paternity. If the child involved had a previously illegitimate status, no proof would be required to support an adjudication of paternity if admitted by the accused. The question whether an adjudication may name as father a man other than the mother's husband, without any proof other than

the admission of such other man and without the child being made a party, presents the different question whether the legislature intended that such an admission should be sufficient to overcome the presumption of legitimacy.

Since your case does involve an agreement admitting paternity, and you indicate there have been differences of opinion as to procedure in others of a similar nature, I will discuss the effect of sec. 328.39 on such situations; although I would recommend that such cases be handled by agreement for support with denial of paternity where illegitimacy could not otherwise be proven.

You state that in a case similar to the one you report, a court held that paternity could not be adjudicated on the basis of the defendant's admission, without the child's being made a party and without compliance in other respects with sec. 328.39.

A literal reading of sec. 52.37 (1), standing alone, would seem to require an adjudication of paternity in accordance with the defendant's admission in a settlement agreement, since it provides that if the defendant "admits the truth of the allegation, or enters into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement". The provision has existed in approximately its present form for many years for application to paternity proceedings in general, most of which involve children whose prior status was illegitimate. To the extent that sec. 52.37 conflicts with other statutes applicable to the specific situation of a legitimate child, it must be read with such other statutes.

Sec. 328.39 (1), read literally, would preclude disposition of *any* proceeding involving a legitimate child wherever illegitimacy is "asserted", without "proof beyond all reasonable doubt that the husband was not the father", and without an order making the child a party. In the case you report, complaint, warrant and arraignment preceded the agreement, so that there can be little question that a "proceeding" is involved. It would seem in any case, however, that authority exercised by a district attorney or judge under secs. 52.21 to 52.45 presupposes the existence of a proceeding. The application of sec. 328.39 is not in terms

limited to cases in which paternity is denied by the asserted father.

The terms of the proviso in sec. 52.355 (which was added to the paternity statutes by ch. 296, Laws of 1957), making special provision for burden of proof as to the child of a married woman, are not expressly limited to cases in which paternity is denied, although such limitation might be inferred if there were no other indication of legislative intent.

Also in conflict with a literal interpretation of sec. 52.37 as applied to a child born during marriage, is the amendment to sec. 69.29 (1) made by ch. 296, Laws 1957. By such 1957 revision, sec. 69.29, relating to standard birth certificates, was amended by adding the following proviso:

“* * * provided that whenever a child is born to a woman while she is the lawful wife of a specified man, the certificate of birth for such child shall list the name of the husband as the father of such child unless and until the illegitimacy of such child is proven beyond all reasonable doubt in accordance with law and in any proceeding under ss. 52.21 to 52.45 such birth record shall not be admissible in evidence.”

Sec. 52.37 (3) obligates the registrar of vital statistics to issue new birth certificates in accordance with adjudications under sec. 52.37. If sec. 52.37 were interpreted to permit an adjudication that a man other than the mother's husband is the father, without proof, a literal compliance with sec. 69.29 (1) would seem to require vital statistics officers to review the court proceedings to determine whether “the illegitimacy of such child is proven beyond all reasonable doubt”. Such a result is so absurd that it seems more probable that the legislature intended sec. 69.29 (1) as an additional mandate to the court making the adjudication.

The legislature has given to the court rather than to administrative officers the function of adjudging paternity under sec. 52.37. While this is a special proceeding in which the court's jurisdiction emanates from the statute, the use of the term “adjudged” in sec. 52.37 (1) indicates that the legislature did not attempt to restrict the court to wholly ministerial functions. Terms used in statutes are ordinarily construed in accordance with their common usage (sec.

990.01 (1)). The term "adjudge" is defined in Webster's New International Dictionary, Unabridged, 2d ed. as:

"to determine in the exercise of judicial powers."

It has long been recognized that Wisconsin statutes for determination of paternity could be applied with respect to children of married women alleged to have been born out of wedlock. *State ex rel. Reynolds v. Flynn*, (1923) 180 Wis. 556, 561, 193 N.W. 651, and *Mink v. State*, (1884) 60 Wis. 583, 19 N.W. 445. The mere fact that the question of such applicability was argued in the first case cited, however, was an indication that the primary application of the statutes was intended to be with respect to children who had no fathers according to official records. When applied to designate a different father from the mother's husband, the courts recognized even before enactment of secs. 328.39 (ch. 39, Laws 1949), and secs. 52.355 and 69.29 (1) (ch. 296, Laws 1957) that special rules should apply on the basis of judicial precepts formulated to protect the legitimate status of children. See, for example, *State ex rel. Reynolds v. Flynn*, *supra*, and *Mink v. State*, *supra*. The judicially created presumption of legitimacy was characterized in *Estate of Lewis*, (1932) 207 Wis. 155, 158, 240 N.W. 818, as "one of the strongest presumptions known to the [common] law". The nature of proof required to overcome it was there described.

The legislature has stressed, rather than repudiated, the rule in secs. 52.355, 69.29 (1) and 328.39. Did it, at the same time, mean in sec. 52.37 that the presumption must be considered as overcome by a settlement agreement to which neither the child nor the mother's husband were parties, so that the courts must adjudge the child illegitimate on the say-so of the mother and a man other than her husband.

An adjudication of paternity in such a case involves not only the designation of the father admitting paternity but, at least impliedly, a determination that the mother's husband is not the father. The existence of two separate issues in proceedings under secs. 52.21 to 52.45, as applied to legitimate children, was recognized by the legislature in the following excerpt from the amendment to sec. 52.35, effected by ch. 298, Laws 1959:

“Upon the trial of the proceedings the main issue shall be whether the defendant is or is not the father of complainant’s child, but if the child was born to the complainant while she was the lawful wife of a specified man there shall first be determined the prior issue of whether the husband was not the father of such child. * * *”

While the admission by the asserted father might overcome the necessity of proof on the “main issue”, it could not overcome the statutory and common law presumptions as to the “prior issue”.

Sec. 52.45 provides that secs. 52.21 to 52.45 “shall be so interpreted and construed as to effectuate the protection and welfare of the child involved”.

It seems clear from secs. 52.355, 69.29 (1) and 328.39 that the legislature regarded the status of legitimacy as of value to the child, and regarded the provisions for safeguarding that status primarily as a protection for the child.

Because of the many indications of legislative intent, it is not deemed necessary to investigate the extent to which an adjudication of paternity under sec. 52.37 would be binding on the child. The application of the doctrine of *res adjudicata* involves so many ramifications as to who are the parties and their privies bound by the adjudication, and related questions, that they would not be easy to anticipate before a specific attack.

As revised by ch. 31, Laws 1953, secs. 52.21 to 52.45 were included with others “for the purpose of revising the statutes relating to support of dependents”. Under that bill the right to, and obligation for, immediate support may have been deemed paramount. The revision made by ch. 296, Laws 1957 “for the purpose of revising the paternity statutes as a supplement to the 1955 children’s code” placed greater stress on the aspect of child welfare. It was in that revision that the legislature enacted sec. 52.355, which specifically incorporated the provisions of sec. 328.39, relating to the procedure and proof required to overcome the presumption of legitimacy.

The presumption, to the extent that it is for the benefit of the child, cannot be waived by agreement of third parties.

The provisions of sec. 52.37 make admission by the defendant a sufficient basis for adjudicating him the father

where that would not have the effect of bastardizing a legitimate child. I am of the opinion that such provision is superseded by secs. 52.355 and 69.29 (1) and 328.39 in the special circumstances where the child was born while the mother was married to another man. There can be no adjudication of the defendant's paternity in such a case without full compliance with secs. 52.355 and 328.39, which would require more proof than the mere admission by the defendant of sexual relations with the mother.

IV

You also ask whether the mother's husband should be made a party to the proceedings, if an adjudication of paternity is to be made. There is no specific provision in the statutes above discussed requiring that the mother's husband be made a party to paternity proceedings, or that notice be given to him. Apparently the legislature contemplated that an adjudication of paternity might be made which would be effectual for the purpose of enforcing support without notice to the husband.

The supreme court has held, however, that no adjudication can be effective to terminate parental rights without notice. It was said in *Lacher v. Venus*, (1922) 177 Wis. 558, 568, 570, 188 N.W. 613, 24 A.L.R. 403:

"Before such extinguishment of the rights of the natural parents and creation of rights in the adoptive parents there must be an abandonment thereof by the natural parents by conduct or written consent, or else due notice to them of the proceedings wherein such transformation is to take place. Such are the clear and explicit directions of the statutes, secs. 4022 *et seq.*, quoted above. *Such would be the result in the absence of statutory provisions.* Such are the repeated rulings of this court, from which we have no desire to recede, nor to the vigor with which they are expressed could we add. *Schultz v. Roenitz*, 86 Wis. 31, 40, 56 N.W. 194; *Estate of McCormick*, 108 Wis. 234, 238, 84 N.W. 148; *Guardianship of Knoll*, 167 Wis. 461, 467, 167 N.W. 744. It is so held elsewhere, and almost everywhere. *Bell v. Krauss*, 169 Cal. 387, 391, 146 Pac. 874; *Sullivan v. People*, 224, Ill. 468, 476, 79 N. E. 695; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653; *People ex rel, Riesner v. New York N. & C. Hosp.* 230 N. Y. 119, 122, 129 N. E. 341; *In re Knott*, 138 Tenn. 349, 354, 197 S. W. 1097; 1 Ruling Case Law, 603; 1 Corp. Jur. 1384.

“That such is a right of substance though based on sentiment is the recognized doctrine of this state. *Markwell v. Pereles*, 95 Wis. 406, 416, 69 N.W. 798; *Guardianship of Bare*, 170 Wis. 543, 548, 174 N.W. 906.

“* * *

“If a man’s money shall not be legally taken away from him save by due process of law, much less shall his child.” (Emphasis supplied)

Accordingly, an adjudication of paternity in a proceeding of which the mother’s husband had no notice would not be effective to cut off his parental rights. In case the child should later be involved in adoption proceedings, it would be necessary to terminate the husband’s parental rights to insure validity of the adoption, if that had not previously been done. It might be that some courts would feel that a “completed determination of the controversy”, as provided in secs. 260.12 and 260.19 (1), would require the presence of the mother’s husband in proceedings under secs. 52.21 to 52.43.

V

Questions as to procedure for such matters as notice and joinder of parties, where procedure is not specifically outlined in secs. 52.21 to 52.45, appear to be governed by the following provisions of secs. 52.45 and 260.01.

Sec. 52.45:

“* * * Such proceedings shall be commenced and conducted * * * according to the provisions of these statutes with respect to civil actions and civil proceedings in courts of record, as far as applicable except as otherwise provided in this chapter * * *.”

Sec. 260.01:

“Title XXV relates * * * to special proceedings in such courts except where its provisions are clearly inapplicable or inappropriate to special proceedings.”

It would not be inappropriate to special proceedings to apply general rules of civil procedure with respect to notice to, or joinder of, parties whose presence is needed for a conclusive determination.

BL

County Boards—Sheriff's Fees—Ch. 618, Laws 1957, requires sheriff to charge higher fees specified and to turn over such increase to county treasury until December 31, 1959, such increase may be retained by sheriff thereafter if he is entitled to do so.

October 13, 1959.

JACK D. STEINHILBER,
District Attorney,
Winnebago County.

You have asked three questions which arise in connection with ch. 618, Laws 1957, published August 29, 1957 which modified sec. 59.28, Stats., relating to sheriff's fees. This chapter raised the fees which the sheriff is entitled to receive for services and provides that the sheriff may require advance payment if the county board approves of advance payment.

You state that your sheriff adhered to the old fee schedule until the county board instructed the county auditor to make an accounting of the increase in sheriff's fees beginning July 1, 1959 regarding Winnebago county's share. You state that the sheriff interpreted this action by the county board as a direction to him to charge the increased fees which were authorized, and accordingly the sheriff has billed his fees for July on the basis of the new schedule.

Under the terms of the statute the amounts in excess of the old fee schedule are to be paid into the county treasury until December 31, 1959 at which time the provisions of sec. 59.15 (1) (a) shall prevail. Your sheriff is under a salary, plus fees, and after December 31, 1959 most of the increase in fees will be retained by the sheriff and will result in an increase in his compensation. The applicable statutes read as follows:

"59.15 Compensation, fees, salaries and traveling expenses of officials and employes. (1) ELECTIVE OFFICIALS. (a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county (other than supervisors and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid him (exclusive of reimbursements for expenses out-of-pocket

provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board."

and

"59.28 Sheriff; fees.

"(38) Any increase in fees under this section authorized by legislative act during the year 1957 shall be payable to the county treasury and shall not be reserved by any sheriff whose annual compensation is fixed by county board resolution or ordinance on the basis of straight salary, fees, or part salary and fees notwithstanding any other statutory provision to the contrary. This subsection shall remain in effect until December 31, 1959, after which time the provisions of s. 59.15 (1) (a) shall prevail."

Your first question is whether the word "entitled" has any mandatory connotation or whether the statute only fixes a limitation upon the amounts to be charged as fees for certain services of the sheriff. There is authority to the effect that the sheriff may not charge more than the statutory amounts but practically none in the reported cases in regard to the authority of the sheriff to charge less than the fees prescribed by statute. In the case of *Crocker vs. Supervisors of Brown County*, (1874) 35 Wis. 284, the court said:

"****Where a statute gives a fee to the sheriff or other officer for the service of process, and there is nothing in the same or some other statute showing a different intention, the fee so given is the sole compensation to the officer for the performance of the service, and *no other* or further can be charged or obtained." (Emphasis supplied)

I construe this language to mean that the sheriff must charge what the statute provides—no more and no less.

Where the statute provides for payment of the fees to the county as in the instant situation, the duty to charge

the full amount set out in the statute is even more explicit. Under sec. 59.28 (38) the increase in fees authorized by ch. 618, Laws 1957, is to be paid to the county treasury until December 31, 1959. Accordingly, if the sheriff has failed to charge the fees that are authorized by statute where the increase over previous fees is for the benefit of the county, he has been violating a clear duty by charging less than that authorized by statute. This is especially so in view of sec. 59.15 (1) (b), which requires that the officer collect the full fees that are authorized by law. The second sentence in this paragraph reads as follows:

“****Any officer on a salary basis or part fees and part salary shall collect *all fees authorized by law* appertaining to his office and shall remit all fees not specifically reserved to him by enumeration in the compensation established by the board pursuant to par. (a) to the treasurer at the end of each month unless a shorter period for remittance is otherwise provided.”

See sec. 946.12 (5) and sec. 271.41 (1), Stats.

Further, it is my conclusion that it is against public policy to allow the sheriff or any other public official who is paid wholly or in part by fees to charge less than the statutory amount set out for services performed. Such a procedure could conceivably result in the office of the sheriff being held by the lowest bidder and the mischief resulting from such a situation need not be further belabored.

Accordingly, my answer to your first question is that the sheriff does not have any discretion but must charge the fees set out in sec. 59.28 for services enumerated therein.

Your second question is whether the sheriff may retain the extra fees to be collected after December 31, 1959 as a part of his compensation.

The county board has previously fixed the sheriff's compensation as a salary, plus certain fees, under sec. 59.28, which the board anticipated would be adequate compensation. You point out that these provisions were adopted by the county board on March 31, 1950 and amended October 23, 1956. However, it appears that in the absence of any provision in the county board's regulations for changing the method of compensating the sheriff where the state statute authorizes an increase in the fees to be charged, the extra

fees may be retained by the sheriff as part of his compensation. The board could have amended its own provisions prior to the filing of nomination papers in 1958 to provide that the increase in fees be paid to the county. In the absence of such action by the county board and in view of the fact that they have already provided that the sheriff may retain his fees with certain exceptions, the new higher fees authorized by Ch. 618, Laws 1957, may be retained by the sheriff after December 31, 1959.

Your third question inquires as to whether the county board has authority under sec. 59.15 (1) (a), to provide that a *portion* of a given fee collected shall be payable to the county treasury and the remainder to be retained by the sheriff.

In view of the clear language of that section which authorizes the board to decide the compensation to be paid for any elective office in the county, there would seem to be no question but that the board could, if it so chose, after the present term expires limit the sheriff to fees prescribed under the old statute and require that the excess fees charged be turned over to the county treasury.

LLD

Witnesses—Prisons—Subpoena to prisoner is ineffectual since he cannot respond to it and the warden has no authority to produce him. Writ of habeas corpus ad testificandum pursuant to secs. 292.44 and 292.45 is only process to secure attendance.

October 15, 1959.

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

You have inquired whether a subpoena issued by a Milwaukee county deputy medical examiner, served upon the warden of the state prison but directed to a prisoner therein, commanding him to appear as a witness at a coroner's inquest in Milwaukee county, is authority for the warden to deliver the prisoner at the time and place specified. You in-

quire further whether the applicable principles would apply to county jails and mental hospitals.

It is stated in 97 C. J. S. 415, Witnesses, §30:

“Where a person whose attendance as a witness is desired is lawfully restrained of his liberty, as where he is in *prison*, or in an *insane asylum*, his attendance is secured by means of a writ of habeas corpus ad testificandum, which is directed to the custodian of the witness, and requires him to have the body of the witness in the court at the time of the trial in order that such witness may give his testimony. * * *” (Emphasis supplied.)

Sec. 292.44, Stats., does not affect the problem. It reads as follows:

“This chapter does not restrain the powers of courts to issue a writ of habeas corpus, to bring before them any prisoner for trial or as a witness.”

This statute merely recognizes the inherent power of courts to issue writs of *habeas corpus ad testificandum* and *ad prosequendum*. With immaterial exceptions, it was quoted in 10 O.A.G. 339, 340, and following the quotation appeared this statement:

“I know of no other way in which a prisoner can be secured in court for the purpose of testifying, and a subpoena issued to an inmate of an institution cannot be complied with for the reason that there is no statutory authority for such procedure. You are therefore advised that unless a writ of *habeas corpus ad testificandum* is secured, it will not be necessary for Mr. Coles to produce the two inmates in court.”

Apparently the identical question you now raise was previously presented by the director of a state penal institution in 22 O.A.G. 939. There it was pointed out that the inclusion of the word “subpoenas” in sec. 292.45, which deals primarily with the expenses incurred in bringing a prisoner into court, was merely to provide that if a prisoner should happen to be brought into court by a subpoena, the expenses thereof were to be paid according to the statute. This same opinion quoted no less an authority than 4 Wigmore, Evidence, 2d., §2199, p. 666, for this statement:

“* * * If the desired witness is *confined in jail*, a subpoena would be of no avail, since he could not obey it and his

custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony; this writ of 'habeas corpus ad testificandum,' grantable in discretion at common law, is now usually authorized by statute as a matter of course."

That opinion concluded that "the *only* manner in which a person *in legal confinement* can be brought into court to give testimony is by a writ of *habeas corpus ad testificandum*."

The subpoena referred to in your question does not require the warden to do anything. He may of course serve it on the prisoner as provided in sec. 53.02 (4) (b), but this would be of no practical effect. The prisoner is excused from attending since it is physically impossible for him to do so. He is therefore not in default when he fails to appear, and it follows that there is no ground for issuing an attachment for him pursuant to sec. 325.12, (passing over the problem of attempting to serve an attachment on a person already in confinement).

In closing I want to point out the very material reasons which underly the policy of the law that prisoners in custody cannot respond to subpoenas and the custodians of those prisoners are neither authorized nor required to recognize such subpoenas.

While a writ of *habeas corpus ad testificandum* can only be issued by a court of competent jurisdiction, under the provisions of sec. 325.01, a subpoena which need not even be sealed may be signed and issued by any of a large number of officials, boards and agencies, all of course acting on matters which are within their jurisdiction. The disruption in the discipline and routine of our penal institutions which could occur if only a few of them should choose to exercise a subpoena power which would be valid as against prisoners is readily apparent. It is for this reason that the law sensibly leaves the decision of the question of whether or not the calls of justice demand the production of a prisoner as a witness in a judicial proceeding to a court of competent jurisdiction.

The answer to your second question is that the foregoing authorities show the same principles apply to jails and mental hospitals.

JWR:WAP

Counties—Soil Conservation—County highway personnel and equipment may be used for performing soil conservation work under sec. 66.34. However, if the ruling in *Heimerl v. Ozaukee County* were to be applied in full, the same might be declared invalid.

October 23, 1959.

DAVID H. BENNETT,
District Attorney,
Columbia County.

You ask whether county highway equipment operated by county highway employees may be used in "soil conservation projects which include the construction of terraces, water diversions and retaining dams".

Ch. 92 of the statutes pertains to soil conservation. Counties may elect by resolution of the county board to become a "soil conservation district" (sec. 92.03) which "shall constitute a governmental subdivision and a public body corporate and politic" (sec. 92.08). The soil conservation law is quite comprehensive but nowhere in it could I find any provision for using county highway personnel and equipment to perform work either for it or any property owner. It is important to keep in mind that the soil conservation district is a separate body corporate and does not have county facilities available unless some statutory provision exists. In my opinion, highway personnel and equipment may not be employed by a soil conservation district.

The question of whether or not work may be done for individuals poses a further question because of the existence of sec. 66.34, which provides as follows:

"Soil conservation. Any county, city, village or town by its governing body or through a committee designated by it for the purpose, may contract to do soil conservation work on privately owned lands, but no such contract shall involve more than \$200 for any one person."

The leading case on the proper and improper use of highway equipment is that of *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151, 153, 40 N.W. 2d, 564. That case con-

cerned the construction of sec. 86.106, which read as follows:

“*Private road work by municipalities and counties.* Any town, city, or village, by its governing body, may enter into contracts to build, grade, drain, surface, and gravel private roads and driveways. Any county, by its governing body, may enter into agreements with a municipality to perform for it any such work.’ ”

The court found the statute to be unconstitutional, primarily because the building of private roads was not a public purpose. The court said at page 157:

“* * * The construction of private roads does not tend to the preservation of the public health or the general welfare. No one is benefited except the owner of the land. * * *”

Soil conservation has been deemed to be a public purpose by both the state and federal governments as evidenced by the soil conservation programs which now exist. True, the operation of these programs may in a particular instance benefit one person more than another or more than the general public. However, the carrying out of the over-all plan is obviously for the benefit of the general welfare, since it conserves a natural asset necessary to everyone. In my opinion, therefore, soil conservation work is not for a private purpose within the prohibition of the *Heimerl case*.

There were, however, other considerations stated by the court in that case at pages 160-161:

“2. No structure is set up for charges and disbursements so that all taxpayers may be equally protected. The Ozaukee county board has set up a regular price structure for work to be done on any contract agreements; however, this is not a requirement of the statute in question. Nothing in the statute requires such a charge structure, and we cannot read such a requirement into it.

“3. No restriction is made as to those counties, towns, cities, and villages where private road builders are equipped to operate, as in the present case. Thus it competes with private persons and takes away from them the opportunity for a livelihood or a right to work. The right to engage in work is a property right. This property right cannot be infringed upon.

Based on the above, it is my opinion that sec. 66.34 authorizes conservation work to be done, if such work does not exceed \$200 per person. However, if the statute were tested by all the rules set forth in the *Heimerl case*, it may be held to be invalid.

REB

Veterans Affairs—Liens—Wisconsin department of veterans affairs as a junior lien holder, which has been a party in a mortgage foreclosure action, has right to offer proof with respect to priority or the amount due it in the distribution of surplus without having answered or appeared prior to the confirmation of sale.

October 26, 1959.

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

You have requested an opinion as to whether the Wisconsin department of veterans affairs has the right to prove either the amount due it or the priority of its junior mortgage for the distribution of the surplus from a judicial sale when it filed no pleadings and made no proof at the time judgment of foreclosure was entered by a prior mortgagee. The question arises because lien holders junior to the department's often file cross-complaint or answer and establish their priority, and the department's priority is not specifically stated in the judgment. By the time the plaintiff mortgagee moves for confirmation of sale and disposition of surplus, over a year has elapsed since entry of judgment.

Sec. 278.102, renumbered sec. 278.162 in ch. 19, sec. 53, Laws 1959, is applicable. This reads:

"If there shall be any surplus paid into court by the sheriff or referee, any party to the action or any person not a party who had a lien on the mortgaged premises at the time of sale, may file with the clerk of court into which the surplus was paid, a notice stating that he is entitled to such surplus money or some part thereof, together with the nature and extent of his claim. The court shall determine the rights of all persons in such surplus fund by reference or by

testimony taken in open court, but no such hearing shall be had in court or before a referee except upon 8 days' notice to all persons that have appeared in the action or filed notice of claim to such surplus money. If any such claimant shall not have appeared by attorney, notice of such hearing may be served by mail directed to the claimant at the place of his residence as stated in his notice of claim."

The history and application of this section is very adequately spelled out by the supreme court in *Kienbaum v. Haberny*, (1956) 273 Wis. 413, 78 N.W. 2d 888. In that case the first mortgagee foreclosed, joining the second mortgagee, third mortgagee, judgment creditor and holder of a mechanic's lien, respectively. The mechanic's lien was filed subsequent to the third mortgage, but materials were delivered prior to the execution of the third mortgage. Only the third mortgagee answered, and the judgment directed that the surplus from the sale was subject "to further order of the court". At the hearing for confirmation of sale, the holder of the second mortgage and holder of a mechanic's lien, both made application for the surplus. A hearing for distribution was held and the trial court ruled against the holder of the mechanic's lien because it failed to appear and establish the face amount of its claim or priority in the foreclosure proceedings and was barred in fully sharing in the surplus.

The consideration in the deciding of the issue was whether the provisions appearing in sec. 278.095 (4) (1933), were in existence and pertinent to the cause in 1955 when the order appealed from was rendered. It was identical to sec. 278.162 cited above.

On appeal the court held that sec. 278.095 (4) (1933) was in effect during the course of litigation and the claims of the junior lien holders were timely filed and ought to have been allowed, and reversed the decision of the trial court.

This decision makes it apparent that where there is a surplus from the sale, all the lien claimants are entitled to offer proof for the distribution thereof at confirmation of sale or hearing for that purpose.

The supreme court cites *Kienbaum v. Haberny*, *supra* as authority in *Builder's Lumber Co. v. Stuart*, (1959) 6 Wis. 2d 356 which held that a judgment creditor at a foreclosure

of a prior mechanic's lien, who filed no cross-complaint, had right to offer proof of judgment to establish priority.

The Wisconsin department of veteran's affairs, when made a party defendant is not required to serve a cross-complaint, nor appear in a foreclosure case prior to the confirmation of sale, since no duty arises to assert a claim for the surplus until such time as it has been determined that a surplus exists.

RGM

County Board—Private Clinics—Discussion of provisions of secs. 20.670 (24), and 51.36, as created by ch. 317, Laws 1959, regarding appropriation of county funds, as well as state grants-in-aid.

October 26, 1959.

ALEXANDER HOPP,
Corporation Counsel,
Sheboygan County.

You have inquired whether a county board may appropriate funds to be paid to a private nonprofit corporation organized to operate a community mental health clinic under the provisions of ch. 317, Laws 1959.

For the purposes of this opinion we assume that the payment of funds would be on a voluntary, lump-sum, non-contractual basis and not in payment of treatments on a per case basis. You advise that the private corporation in question anticipates receiving 40 per cent matching funds from the state and the major portion of 60 per cent of needed funds from Sheboygan county.

Chapter 317 was an outgrowth of Bill No. 2, S., and was drafted by the legislative reference library at the request of the legislative council. As originally drafted the bill provided for state aids to clinics governed by private organizations as well as to clinics established by cities, counties, towns, villages or combinations thereof. The legislative council recommended that the provisions for state aid to clinics operated by private nonprofit organizations be de-

leted but the legislature finally approved the bill in approximately its original form.

Sec. 2, ch. 317, creates sec. 20.670 (24) of the statutes as follows:

"20.670 (24) COMMUNITY MENTAL HEALTH CLINIC SERVICES. On July 1, 1959, \$185,000 and annually, beginning July 1, 1960, \$211,000 together with any funds that may be received from the federal government or any other source, to be used for financing state aid for mental health clinic services provided under s. 51.36. *Because the work of privately sponsored community guidance clinics tends to reduce the population of our state institutions, the legislature finds that the expenditure of funds for the support of such clinics is for a public purpose.*"

Sec. 3, ch. 317, creates sec. 51.36 which provides in part as follows:

"51.36 COMMUNITY MENTAL HEALTH CLINIC SERVICES. (1) CREATION. The state department of public welfare shall create a program relating to the establishment of community mental health clinic services and providing for state grants-in-aid to local communities to encourage and assist them in the development and operation of preventive, educational, diagnostic treatment and rehabilitative services for mental health.

"* * *

"(3) PURPOSE. It is the purpose of this section to: (a) Foster preventive, educational, diagnostic treatment and rehabilitative services through the establishment and improvement of *public and private* mental health clinic services at the community level.

"(b) Stimulate and assist communities to develop and support such clinic services according to individual community needs.

"(c) Provide state consultative staff services to communities to assist in planning, establishing and operating community mental health clinic services.

"(d) Provide a permanent system of state grants-in-aid to match local funds used to establish and operate local mental health clinic services.

"(e) Authorize the director of the state department of public welfare, hereafter known as the director, to establish standards relating to the establishment and operation of community mental health clinics under state grants-in-aid.

"(4) COMMUNITY MENTAL HEALTH CLINIC SERVICES. The director is authorized to make grants *to assist cities, counties, towns, villages, or any combination thereof, or any*

nonprofit corporations in the establishment and operation of local mental health clinic programs to provide the following services:

* * *

"(5) ESTABLISHMENT OF CLINICS. *Any county, city, town or village or any combination thereof, or any nonprofit corporations* representing an area of over 50,000 population, or upon consent of the director less than 50,000 population, *may establish community mental health clinic services* and staff them with persons specifically trained in psychiatry and related fields.

"(6) COMMUNITY MENTAL HEALTH CLINIC BOARD. (a) *Representative board of directors.* Except in counties having a population of 500,000 or more *every county, city, town or village, or combination thereof, or any nonprofit corporation establishing and administering a community mental health clinic program* shall, before it may qualify under this section, establish a representative governing and policy-making board of directors which shall be charged with the operation and administration of the clinic program concerned * * *.

* * *

"2. When any combination of the political subdivisions referred to in this section establishes such a program, a representative board of directors, as defined in this section, shall be appointed and be subject to the review and approval of the governing bodies of such political subdivisions in a manner acceptable to all concerned. The director shall not authorize the granting of funds to any combination of political subdivisions, until such political subdivisions have drawn up a detailed contractual agreement defining the program and the plans for operation. If in the opinion of the director the contractual agreement is not adequate, he may deny the granting of funds.

"3. When any nonprofit corporation establishes and administers a mental health clinic program, the corporation shall appoint a representative board of directors as herein defined, and this board shall be responsible for the operation and administration of the clinic program.

* * *

"(7) POWERS AND DUTIES OF THE COMMUNITY MENTAL HEALTH CLINIC BOARD. Subject to the provisions of this section and the rules of the director, each board of directors shall have the following powers and duties:

* * *

"(e) *Assist in arranging and promoting local financial support for the program from private and public sources.*

"(f) *Assist in arranging co-operative working agreements with other health and welfare services, public and*

private, and with other educational and judicial agencies.

“(g) Establish patient fee schedules based upon ability to pay. If a person who can afford private care applies for clinic services, consultation and diagnostic services may be offered but any needed treatment services must be obtained from other sources, providing private service is reasonably available.

“* * *

“(8) GRANTS-IN-AID. (a) *Formula*. The director is authorized to make state grants-in-aid which shall be based upon 40 per cent state and 60 per cent local sharing of the total expenditures for: 1. salaries; 2. contract facilities and services; 3. operation, maintenance and service costs; 4. per diem and travel expense of members of community mental health boards; and 5. other expenditures specifically approved and authorized by the director. *The grants may not be used to match other state or federal funds which may be available to clinics.* No grants shall be made for capital expenditures.

“(b) *Eligible to apply*. Any county, city, town or village, or any combination thereof, or nonprofit corporation administering a mental health clinic established under sub. (5), may apply for the assistance provided by this section by submitting annually to the director its plan and budget for the next fiscal year. No program shall be eligible for a grant hereunder unless its plan and budget have been approved by the director.

“* * *”

The act makes provisions for cooperation between municipalities in the establishment of centers, but in all instances treats nonprofit corporations separately.

Subsec. (7) (e) does provide that the clinic board shall assist in promoting *local* financial support for the program from private and *public* sources, and subsec. (7) (f) provides that the clinic board shall assist in arranging cooperative working agreements with other health and welfare services, public and private. Neither of these subsections would authorize a county board to make a voluntary, unrestricted donation to such nonprofit corporation and we find no other language in ch. 317 which would authorize an appropriation for such a purpose.

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, (1957) 1 Wis. 2d 384, 84 N.W. 2d 76.

In enacting ch. 317, Laws 1959, the legislature expressly provided that the expenditure of funds for the support of privately sponsored community guidance clinics is for a public purpose *as far as the state funds are concerned*, but has not empowered county boards to make an appropriation for such a purpose. The statute is concerned with *state grants-in-aid*.

If the board has power to appropriate funds for such purpose, it must be grounded on some other statute. A review of the provisions of ch. 59, as amended by various laws of 1959 published to date reveals no enabling authority.

We have also reviewed the provisions of secs. 46.22, 48.57 and 48.80 and find that they do not grant the necessary authority for the contemplated appropriation. These sections were carefully considered in relation to a somewhat similar problem in 45 O.A.G. 44, 45 O.A.G. 133, and 45 O.A.G. 235, and we deem it unnecessary to repeat a detailed discussion here

RJV

Crime Laboratory—Counties—Discussion of charge back to counties for work by state crime laboratory as affected by ch. 454, Laws 1959.

October 26, 1959.

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

Chapter 454, Laws 1959, substantially amended sec. 165.01 (8), Stats., and provides as follows:

“165.01 (8) The board shall * * * *charge the county \$10 per manhour up to 50 manhours per case referred to it by a county for services performed by the laboratory.* * * * The charges applicable to cases referred to the laboratory by a county upon its request and when the service is rendered, shall be collected from the county, along with other state taxes and charges, in the next apportionment of state special charges. 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 county for services provided by the laboratory in the pre-

ceding 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 (401). *All charges in excess of \$500 on any one case referred to the laboratory by the county shall be paid by the state.*

“Section 2. This act shall take effect July 1, 1959.”

The legislative bill creating the act was signed by the Governor on September 14, 1959 and was published on September 23, 1959.

You inquire whether the provisions of the act apply to charges to be made for work done during the period July 1, 1959 through September 23, 1959 and you also inquire as to the application of the law to cases accepted prior to July 1, 1959 on which work had not been completed as of that date.

Sec. 21, Art. VII, Wis. const. provides:

“The legislature shall provide by law for the speedy publication of all statute laws, * * * And no general laws shall be in force until published.”

Sec. 35.64, Stats., provides:

“35.64 Publication of all laws. Every law shall be published in the official state paper immediately after its passage and approval, * * * and until so published shall not take effect.”

Sec. 990.05, Stats., provides:

“990.05 Laws and acts; time of going into force. Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication.”

A legislative act not remedial in its nature will not be construed to act retrospectively unless the language used clearly evinces such a purpose. *State ex rel. Kieckhefer v. Cary*, (1925) 186 Wis. 613, 615, 203 N.W. 397. *State ex rel. Teweles v. Public S.T.A. & R.F. Trustees*, (1940) 235 Wis. 385, 389, 291 N.W. 775.

The mere fact that an act requires something to be done as of a prior date does not make it retroactive. *Mineral Point v. Davis*, (1948) 253 Wis. 270, 273, 34 N.W. 2d 226,

State ex rel. Prahlow v. Milwaukee, (1947) 251 Wis. 521, 530, 30 N.W. 2d 260.

Sec. 165.01 (8), as amended by ch. 454, Laws 1959, became effective the day after its publication. The intent of the legislature is clearly expressed however to the effect that the law is to be *applied* to charges to be made to the various counties from and after July 1, 1959. The law was in full force and effect prior to October 1, 1959 which is the date set for the director of the laboratory to certify to the director of budgets and accounts the amounts due from each of the counties for services provided in the preceding fiscal year.

It is my opinion that the charge to the county of \$10 per man-hour up to 50 man-hours per case is applicable for work performed by the laboratory from and after 12:00 A.M., July 1, 1959, whether such work was performed in connection with cases received prior to July 1, 1959 or subsequent thereto. Charges in excess of \$500 on any one case referred by a county are to be paid by the state.

Cases on which work was done in the prior fiscal year are subject to charge back in accordance with the former law, however, it is my opinion that the \$500 limitation is also applicable to these cases.

The \$500 limitation applies per case, without regard to the fiscal year involved. If a case were referred to the laboratory in the prior fiscal year and \$300 in charges were applicable to said case as of June 30, 1959 under the old charge back statute, that amount should be certified to the director of budgets and accounts on October 1, 1959. If \$300 worth of further work were performed on the same case during the fiscal year July 1, 1959 to June 30, 1960, applying the new rate, that amount should be certified to the director of budgets and accounts on October 1, 1960 indicating that only \$200 thereof could be charged back to the county.

RJV

Counties—School Districts—Transportation—County school committee must disallow claims for cost of transporting nonresident high school pupils under secs. 40.53 (1), 40.56 (2), and 40.04 (1), where transportation to nearest available school was provided.

November 11, 1959.

S. RICHARD HEATH,
Corporation Counsel,
Fond du Lac County

You have submitted the following fact situation:

Families of Mr. W and Mr. S live in an area in Fond du Lac county not within any school district operating a high school. Although both families live substantially closer to Oakfield high school than to Fond du Lac high school, they transport their children to the Fond du Lac high school. Both families live on the approved route traveled by the bus serving the Oakfield high school. Pursuant to contracts made respectively with Mr. S and Mr. W, the town board of the Town of Oakfield paid Mr. S at the rate of \$2.00 per week for providing such transportation to Fond du Lac high school and also paid Mr. W in the amount of \$172.00 for providing transportation. Subsequently the Town of Oakfield filed its claims for the above amounts with the county clerk and the county school committee voted to disallow both of these claims. The county school committee based its disallowance of these claims upon the fact that both families live much nearer to the Oakfield high school than to Fond du Lac, and also live on bus routes approved for Oakfield high school.

You have requested my opinion as to whether the county school committee was authorized to disallow these claims. You have raised the question whether a pupil is entitled to go to a high school other than the one nearest to his residence, assuming, of course, that the pupil does not live within any school district operating a high school. This is answered by sec. 40.91 (1), which provides as follows:

“The board shall admit to the high school, when facilities will warrant, any person of school age who resides in the

state, but not within any high school district, and who has complied with the entrance requirements. * * *

Fond du Lac high school district did not provide transportation for the pupils in question and, therefore, the arrangements made between the town board of the Town of Oakfield and the parents if authorized were authorized under sec. 40.53 (1), Stats.

In part sec. 40.53 (1) provides :

“* * * school boards of all school districts operating public * * * high schools *shall* provide transportation to and from school for all pupils residing in the district and 2 miles or more from the nearest public school they may attend. * * * In districts operating high schools, the board *may* also provide transportation for nonresident high school pupils residing 2 miles or more from the school within areas served by the school by bus routes approved by the county school committee and the state superintendent. If the district operating the high school does not provide transportation for nonresident high school pupils, the municipality in which the nonresident pupils reside *shall* arrange for such transportation and such municipality shall make claim to the county clerk for the cost of transportation so provided in the manner specified in s. 40.56 (2). * * *

In other words, in the case of a school district operating a high school, the law requires the district to furnish transportation for pupils residing in the district 2 miles or more from the nearest public (high) school they may attend and permits such a district to furnish transportation to pupils residing outside the district 2 miles or more from the school on approved bus routes. It is discretionary with the school district as to whether it will provide transportation to nonresident high school pupils. If the school district does elect to so provide transportation, it can only do so by bus routes approved by the county school committee and state superintendent. The language used in the statute is “If *the* district operating *the* high school does not provide transportation etc.” This is indicative that the legislature had in mind not only a *particular* school district but also a *particular* high school, and not just *any* school district operating any high school which nonresident pupils may attend. This statutory language must be read in conjunction with that portion of the statute which reads “* * * the board may

also provide transportation for nonresident high school pupils residing 2 miles or more from *the school * * **” Also to be taken into account is the first sentence of sec. 40.53 (1) which deals with pupils residing “* * * 2 miles or more from *the nearest public school they may attend.*” Notwithstanding the fact that nonresident pupils may attend one of several public high schools, as shown above, yet to come within the intended scope of the school transportation law, the nonresident high school pupils must attend the *nearest* public high school open to him.

Sec. 40.56 (2) provides:

“* * * The cost of transporting nonresident public high school pupils, or the cost of board and lodging for such pupils furnished in lieu of transportation, shall be borne by those municipalities, or portions thereof, within the county which lie outside of districts operating high schools. Claims for transportation provided nonresident public high school pupils, or for board and lodging provided in lieu of transportation, shall be made to the county clerk and a tax levied for the payment of the same * * *. Claims in excess of state aids for the transportation provided nonresident high school pupils shall not exceed \$36 per year per pupil except that a greater amount may be allowed when a certificate of approval of the same has been filed with the county clerk by the county school committee. * * *”

The power of the county school committee is specified in sec. 40.04 (1), which provides:

“The county school committee shall: (1) Determine the amount to be allowed in excess of the established maximum on claims for transportation of nonresident high school students as provided in s. 40.56 (2).”

Clearly, it was never contemplated by the legislature that the circumstance of residing outside of any school district operating a high school should enable a parent to send a child to any high school in the state, no matter how remote, and make the cost of transportation therefor a public expense borne by the municipalities in the county lying outside of districts operating high schools. In the case of transportation furnished nonresident pupils pursuant to a contract, the statutes give the county school committee authority only to act upon such claims as are based upon

valid contracts. In these cases, the contracts were invalid, at least within the scope of secs. 40.53 (1) and 40.56 (2), because the contracts covered the furnishing of transportation when transportation to the nearest high school was already available.

It is my opinion, therefore, that inasmuch as these claims for recovery of the cost of transporting nonresident public high school pupils were based upon invalid contracts between the parents and the municipality within the meaning of the school transportation laws described above, the county school committee acted properly and, in fact, took the only lawful course of action open to it, i.e., complete disallowance of the claims.

JEA

Licenses—Salvage Dealers—Ch. 485, Laws 1959, which amends sec. 342.35 and creates sec. 342.37 (4), does not exempt existing salvage dealers from operation of the act. Discussion of "location", and auto dealer licensing, as affected by the act.

November 18, 1959.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You have asked for my opinion in regard to a number of specific questions which have arisen in connection with your administration of the salvage dealers' law in view of the amendments to that law which became effective with the passage of ch. 485, Laws 1959.

Your first question is whether present salvage dealers are exempt from the provisions of the law as amended because of "grandfather rights". Your question is directed to sec. 2 of the act which reads as follows:

"Section 2. 342.37 (4) of the statutes is created to read:
"342.37 (4) No salvage dealer licensed under ss. 342.35 to 342.38 shall be licensed as a dealer under s. 218.01 (2) at his salvage dealer location."

A motor vehicle salvage dealer's license is issued for the period from January 1 to December 31 of each calendar year, in accordance with sec. 342.37 (2). A motor vehicle dealer is also licensed for the period running from January 1 to December 31 of each calendar year, under sec. 218.01 (2). This means that each salvage dealer and each motor vehicle dealer will be required to renew his license before the end of this calendar year. You are directed under the provisions of this act to deny the license as a motor vehicle dealer to any licensed salvage dealer who proposes to operate as a motor vehicle dealer at the same location where he carries on his salvage business. The legislature has made no provision for exception, and since the statute is clear and unambiguous, I must conclude that there is no room to construe the statute to allow "grandfather rights" to any existing salvage dealers. You must enforce the statute as directed beginning with the next licensing period. Those construing and administering statutes cannot add language or add exceptions. That is a function of the legislature. *State ex rel. U. S. Fidel. & Guaranty Co. v. Smith*, (1924) 184 Wis. 309, 199 N.W. 954.

Your next question asks for my interpretation of the word "location" used in sec. 2 of the act.

The word "location" is used in other provisions in the motor vehicle statutes. (Sec. 341.54 (1), and 218.01 (2) (e).) However, our court has never had occasion to pass upon the proper interpretation of this word as it is used in a regulatory statute. Courts in other jurisdictions have given interpretations of this word, but in each case the courts point out that the meaning of a word such as this depends almost entirely upon the subject matter and the context of the statute or instrument within which the word appears.

The statute under consideration was introduced in the assembly as Bill No. 647, A, sponsored by the Wisconsin Automotive Trades Association, and, although the file in the Wisconsin legislative reference library contains no information as to which specific evil was designed to be remedied by this legislation, the act itself is clear evidence that the legislature did not want a combination salvage dealer and new or used car dealer operating at the same site. Remedial

statutes are to be construed most liberally to suppress the mischief and advance the remedy which they were intended to afford. *Stone v. Inter-state Exchange*, (1930) 200 Wis. 585, 229 N.W. 26; *Baumann v. West Allis*, (1925) 187 Wis. 506, 526, 204 N.W. 907.

This law must be construed reasonably, and if by one construction it will be effective, and by another, ineffective, considering the legislative intent with regard to the evils to be corrected, the construction giving effect to the statute must be adopted by the agency administering the law.

You must administer the statute in such a way as to effectively separate the operation of a motor vehicle salvage dealer from the business of selling new or used automobiles in any given situation. That is the obvious purpose of the statute. This will involve a question of fact which must be determined in each situation which arises in connection with your licensing of a motor vehicle dealer who is also licensed as a salvage dealer. As to your example where the applicant has separate addresses and a physical barrier, such as a wall with no ingress or egress between the two businesses, such an arrangement would be permissible providing you determine that there will be two business locations in fact. The ultimate determination must be made by you in each case, considering all of the circumstances presented.

Your next questions inquire whether a person may operate on separate locations with the same name and joint office facilities or a joint business with separate locations. Both of these proposals would be obvious violations of the spirit of the provisions, since the auto dealer business is actually carried on where the office facilities are located. Sec. 218.01 (2) (e) requires that the license specify the location of the office and the license must be displayed at the office. The only conclusion is that the salvage dealer must operate a completely separate business at a separate location, and office facilities must not be shared. However, this is not to say that joint bookkeeping, record keeping or other office functions could not be combined, but that the businesses which the person carries on with the public may not be intermingled at one location.

Your next question is in regard to sec. 1 of the act which amends sec. 342.35 to except from the salvage dealer pro-

visions motor vehicle dealers licensed under ch. 218 who remove parts of motor vehicles prior to sale of such vehicles to motor vehicle salvage dealers. This section reads as follows:

“Section 1. 342.35 of the statutes is amended to read:

“342.35 No person shall carry on or conduct the business of wrecking or dismantling any motor vehicle or selling parts thereof unless licensed to do so by the department. Any person violating this section may be fined not less than \$25 nor more than \$200 or imprisoned not more than 60 days or both. *This section shall not apply to motor vehicle dealers licensed under s. 218.01 (2) who remove parts of motor vehicles prior to sale of such vehicles to motor vehicle salvage dealers.*”

Your question is twofold; is there any limit on the number of parts that the dealer may remove from the vehicle, and may he sell the parts only to salvage dealers?

This provision is an exception to a general regulatory provision. As such, it must be construed strictly, but reasonably, in conformity with the purpose and meaning of the principal statute. 82 C.J.S. 891. The fact that the exception was considered necessary shows that the legislature felt that the conduct now excepted would be within the general provisions had not the exception been made. 82 C.J.S. 894.

This exception allows a licensed motor vehicle dealer to *remove* parts from motor vehicles prior to salvage operations. However, it does not permit the *business* of selling such parts to the public in the same manner that a salvage dealer is permitted to sell parts to the public, under the principal statute.

I construe the exception to allow a licensed dealer to remove parts from an automobile which is being junked where such parts are being added to the stock of the dealer for the purpose of carrying on his business as an *auto dealer*. The number of parts which can be taken from an individual vehicle is obviously not set, but would depend upon whether the parts are being added to the stock of the dealer.

LLD

Words and Phrases—Industrial Commission—Highway Commission—It is within the authority of the industrial commission, under sec. 103.50, to consider wage changes to become effective on May 1, under collective bargaining contracts previously negotiated, in determining the prevailing wage rate to be certified to the highway commission prior to such date.

November 30, 1959.

INDUSTRIAL COMMISSION.

You request an opinion whether the industrial commission may, under sec. 103.50 (4), consider wage increases which go into effect on May 1 under labor contracts previously negotiated, in determining the prevailing wage rate for labor on highway projects to be certified to the highway commission prior to such date.

The following is an abridgement of the statutory provisions most pertinent to your inquiry :

103.50 "Highway Contracts. (1) HOURS OF LABOR. No laborer * * * in the employ of the contractor, or * * * other person doing * * * the work under a contract based on bids as provided in section 84.06 (2) to which the state is a party for the construction or improvement of any highway, * * * shall * * * be paid a lesser rate of wages than the prevailing rate of wages * * * determined, [pursuant to this section] for the area in which the work is to be done; * * *.

"(2) DEFINITIONS. * * * By the term 'prevailing wage rate' is meant the rate of pay per hour paid to the largest number of workmen engaged in the same class of labor within * * * [the] area. In no event, however, shall the prevailing wage rate for any class of labor be deemed to be less than a reasonable and living wage. By the term 'area' is meant the locality from which labor for any project within such area would normally be secured.

"(3) INVESTIGATIONS; DETERMINATIONS. It shall be the duty of the industrial commission to conduct such investigations as may be necessary to define classes of laborers and mechanics and to inform itself as to * * * wage rates prevailing in all areas of the state for all classes of labor and mechanics commonly employed in highway construction work, with a view to ascertaining and determining prevailing * * * rates accordingly. The commission, after public hearing, shall adopt rules prescribing * * * prevailing wage

rates for the various classes of laborers and mechanics in the various areas of the state.

“(4) CERTIFICATION OF PREVAILING * * * WAGES. The industrial commission shall prior to May 1 of the current calendar year certify to the highway commission the prevailing * * * wage rate for all such classes of laborers and mechanics in each area. * * *

“(5) APPEALS TO GOVERNOR. In the event that the highway commission shall deem any determination of the industrial commission as to the * * * prevailing wage rates in an area to have been incorrect, it may appeal to the governor, whose determination shall be final.”

There has been no judicial interpretation of the above provisions, perhaps because the statute provides no appeal except by the highway commission to the governor, which indicates that the legislature intended primarily to effectuate a public policy rather than to create private causes of action.

The Wisconsin law differs, for example, from New York's Labor Law, sec. 20, under which specific provision is made for complaint, and for appeal by parties adversely affected by an administrative determination, as illustrated in *Smith v. Joseph*, (1949) 88 N.Y.S. 2d 818.

An interpretation of sec. 103.50, was given by this office in 22 O.A.G. 492, to the effect that the “prevailing rate” is the *minimum* to be paid on highway projects, and that the rate certified by the industrial commission does not prevent payment of a higher wage. The United States supreme court held in *U.S. v. Binghamton Construction Co.*, (1954) 347 U.S. 171, 178, 74 S. Ct. 438, 98 L. ed. 594, that a law providing for a minimum wage on public work is no guarantee to contractors that they will not have to pay more, saying:

“* * * On its face, the Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay ‘not less’ than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation in computing its bid cannot be said to have been justified.”

Instead of fixing a minimum wage by direct action, the legislature delegated that function to an administrative agency. Delegation of authority to fill in details of a statute by administrative regulation has long been held permissible. See *State ex rel. Wis. Inspection Bureau v. Whitman*, (1928) 196 Wis. 472, 220 N. W. 929.

When the legislature delegates authority to an agency to carry out a statutory plan by administrative action, it may give the agency sufficient leeway so that it has a choice of a number of alternatives, any of which would be a valid exercise of the power. For example, the court said in *Wisconsin Telephone Co. v. Public Service Comm.*, (1939) 232 Wis. 274, 329, 287 N. W. 122, 287 N. W. 593, that there is more than one rate which may be fixed by the public service commission under its delegated power to fix "reasonable" rates for utility service :

"It is evident that the reasonable rate to be found by the commission lies somewhere between the lowest rate that is not confiscatory and the highest rate that is not excessive or extortionate. In other words, despite what was said in *Minneapolis, St. P. & S.S.M.R. Co. v. Railroad Comm.* (1908) 136 Wis. 146, 116 N. W. 905, it is apparent that there is more than one rate that may be a just and reasonable rate. * * *"

Similarly, an administrative agency exercising a quasi-judicial fact-finding function may often choose between a number of alternatives, as in the case of *St. Joseph's Hospital v. Wisconsin E. R. Board*, (1953) 264 Wis. 396, 402, 59 N. W. 2d 448, where the court pointed out that the agency might have reached either of two opposite results and still have been within the scope of its delegated power.

The authority of your commission under sec. 103.50 (3) is to be carried out by adopting "rules prescribing * * * wage rates". One of the functions of an administrative agency as enumerated in 42 Am. Jur. 329 is "rule making by the construction and interpretation of a statute being administered". See, also, sec. 227.014 (2) (a), which reads :

"(2) Rule-making authority hereby is expressly conferred as follows:

"(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered

by it as it considers to be necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation.”

Interpretations by a department charged with enforcement of a statute have been given weight by the courts of this state. *Industrial Comm. v. Woodlawn Cemetery Asso.*, (1939) 232 Wis. 527, 287 N. W. 750; *Mauel v. Wisconsin Automobile Ins. Co. Ltd.*, (1933) 211 Wis. 230, 248 N. W. 121; *State v. Johnson*, (1925) 186 Wis. 59, 202 N. W. 319.

Your request states that your commission has followed the policy of giving consideration in the prevailing wage rate to increases which will become effective as of May 1 each year, under collective bargaining contracts. The interpretation implicit in that policy is entitled to weight in a judicial determination of the meaning of the statute, under the foregoing authorities.

Your specific question is whether the definition of “prevailing rate” in sec. 103.50 (2) as the rate “paid” precludes your interpretation, and requires instead that your commission fix the rate according to what has been paid in the past.

The term “paid” is used in the definition in the sense of a participial adjective rather than to designate a specific time. Such use of a participle is discussed in the definition of that term in Webster’s *New International Dictionary* (3d ed). Had the legislature desired to fix a specific date as the basis for your determination, it could have adopted some such definition as “the rate being paid on or before May 1 of the current calendar year”.

The rate to be fixed under sec. 103.50 is the one to be observed in the ensuing year, and the legislative policy to insure to workers on highway projects a wage at least equivalent to that paid other workers is best effectuated by considering known elements which will affect the rates during the period in which the wage is to be paid. See 20 O.A.G. 496. The requirement that the certification be made before May 1 is to meet the practical necessity of enabling the highway commission to put the rate into effect in specifications for bids. The law provides a safeguard against a minimum so high as to encroach upon state funds or to interfere with the improvement program, by authorizing the highway commission to appeal to the governor.

The authority of your commission under sec. 103.50 (3) to conduct such investigations "as may be necessary" gives you the discretion to determine what facts should be considered to effectuate the legislative purpose.

BL

Words and Phrases—Motor Vehicle—The running of the statute of limitations upon a damage suit judgment based upon a finding of negligent operation of a motor vehicle constitutes a discharge of such obligation as that term is used in sec. 344.26 (1).

December 1, 1959.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You asked for my interpretation of sec. 344.26 (1) which reads as follows:

"344.26 Revocation to continue until judgment paid and proof of financial responsibility given. (1) Subject to the exceptions stated in ss. 344.25 (2) and 344.27 (2), any operating privilege or registration revoked pursuant to s. 344.25 shall remain revoked until every judgment mentioned in s. 344.25 is stayed, satisfied or discharged and, unless 3 years have elapsed since the date of entry of the judgment which was the cause for revocation, until the person whose operating privilege and registration was revoked furnishes proof of financial responsibility for the future and maintains such proof at all times during such 3-year period when the operating privilege or registration is in effect."

The first statutory provision enacted in this state providing for the revocation of operating privilege and registration for nonpayment of a judgment arising out of an automobile accident was enacted in 1935 and was sec. 85.135, until the enactment of the Safety Responsibility Law by ch. 375, Laws 1945, when it became sec. 85.09 (14). The language was changed at that time to provide that the revocation should continue until every judgment "is stayed, satisfied, or discharged." The previous statute had required that the revocation continue until the judgment "is fully paid and satisfied."

In the revision of the motor vehicle laws by ch. 260, Laws 1957, the language of the 1945 act was preserved in sec. 344.26 (1).

In 32 O.A.G. 309 your department was advised by this office that a discharge in bankruptcy did not satisfy the requirement of the statute that the judgment be fully paid and satisfied because of the unambiguous statutory provision to such effect. We find no occasion to change that ruling at this time.

In 39 O.A.G. 490 your department was advised that the judgment must be "fully paid and satisfied" as a condition precedent to restoration of the driving privileges of one whose operator's license has been suspended for nonpayment of such a judgment and that running of the statute of limitations would not justify return of the driving privilege. At the time of the latter opinion, the change in the wording of the statutory provisions had already taken place. It should be noted that the words "fully paid" were deleted from the statute and the words "stayed" and "discharged" were added as conditions under which your department was empowered to return revoked licenses and registrations.

You ask a specific question as to whether the adding of the words "stayed" and "discharged" should have changed the opinion which was given to your department in 1950 with regard to reinstatement of driving privileges, specifically where the damage judgment has remained unsatisfied for a complete period of twenty years and has now run the statute of limitations. I must conclude that the legislature changed the law significantly by adding the words "stayed" and "discharged" to the statute under consideration.

Black's Law Dictionary, 4th ed., defines "stay" as: "* * * the act of arresting a judicial proceeding, by the order of a court;" 3rd ed. "to hold it in abeyance, or refrain from enforcing it;" and 4th ed. "stopping or arresting of execution on a judgment". The same source defines "discharge" as follows: "To release; liberate; annul; unburden; disincumber; * * * To discharge a person is to liberate him from the binding force of an obligation, debt, or claim".

The statute is clear and unambiguous, and our only problem is to apply the ordinary conceptions of the words as they are used in the statute. Accordingly, it is my opinion

that the running of the statute of limitations upon a damage suit judgment based upon a finding of negligent operation of a motor vehicle constitutes a "discharge" of such obligation as the term is used in sec. 344.26 (1).

The opinion in 39 O.A.G. 490 is hereby specifically disapproved insofar as it holds that an unsatisfied judgment arising out of an automobile accident must be *fully paid and satisfied* as a condition precedent to restoration of driving privileges to one whose operator's license has been suspended for nonpayment of such judgment.

If you are satisfied that either the court has stayed execution on the judgment, the judgment has been satisfied by payment or performance, or the judgment has been discharged by operation of law *other than a discharge in bankruptcy*, as provided in sec. 344.26 (2), you may reinstate the driving privileges providing the judgment debtor furnishes proof of financial responsibility for the future and maintains such proof if the reinstatement occurs within three (3) years after the date of entry of the judgment which was the cause for revocation.

LLD

Permits—Words and Phrases—Restaurant—Discussion of fraternal organizations as used in sec. 160.01 (2) and the need for permits to occasionally serve or sell meals.

December 3, 1959.

DR. CARL N. NEUPERT,
State Health Officer.

You have recently requested my opinion as to how you should "interpret sec. 160.01 (2) of the Wisconsin statutes as it applies to labor unions, and in addition such organizations as The Farmers' Union".

You state that you have specific requests from both these types of organizations for advice as to whether or not they are exempt from the provisions of the restaurant licensing law. It is our understanding that The Farmers' Union organization frequently operates restaurant booths at county

fairs and that labor unions also engage in the same or similar activities.

As you know, sec. 160.02 (1) reads in part as follows:

"160.02 Permit. (1) No person shall conduct, maintain, manage or operate a hotel, restaurant or tourist rooming house as defined in s. 160.01 which has not been issued an annual permit by the state board of health."

Sec. 160.01 reads in part as follows:

"160.01 Definitions. As used in this chapter: * * * (2) * * * The term 'restaurant' does not apply to churches, religious, fraternal, youths' or patriotic organizations, service clubs and civic organizations which occasionally prepare or serve or sell meals or lunches to transients or the general public nor shall it include any private individual selling foods from a movable or temporary stand at public farm sales."

As you will note, the essence of the question here under consideration is whether or not labor unions and The Farmers' Union organization, occasionally preparing or serving or selling meals or lunches to transients or the general public, fall within the exceptions to the term "restaurant" as set forth in subsec. (2) of sec. 160.01.

In my judgment, The Farmers' Union organization or labor unions occasionally preparing or serving or selling meals or lunches to transients or the general public at a fair or at some other location do fall within the exceptions above mentioned, inasmuch as it appears that The Farmers' Union organization or a labor union may fairly be viewed as a "fraternal" organization as that term is employed in sec. 160.01 (2). In the case of *In Re Mason Tire and Rubber Co.*, (1926) 11 F. 2d 556, 557, the court said:

"Any society organized for the accomplishment of some worthy object through the efforts of its members working together in brotherly union, especially if it be organized not for selfish gain, but for the benefit of the membership or for the benefit of the membership and men in general, is a fraternal organization in the popular acceptance of the word."

This same language was cited with approval in *Alpha Rho Alumni Association v. City of New Brunswick* (1941), 126 N.J.L. 233, 18 A 2d 68, 70. In my opinion, the foregoing

definition of a fraternal organization enunciated by one federal circuit court of appeals and cited with approval by a state appellate court may properly be applied to a labor union or to The Farmers' Union organization, for it seems clear that in creating the exceptions here in question to the term "restaurant" our legislature used the term "fraternal organization" in its popular ordinary sense, i.e., in the sense in which it is defined in the *Mason Tire and Rubber Co.* case. As you know, our statutes provide that all words and phrases used therein shall be construed according to common and approved usage, unless such a construction would produce a result inconsistent with the manifest intent of the legislature. See sc. 990.01 (1). There is nothing in subsec. (2) of sec. 160.01 to show or indicate on the part of the legislature a manifest intent which would conflict with the construction of the term "fraternal organization", according to its common and approved usage, as used therein. It therefore seems apparent to me, as I have indicated above, that the "fraternal organization" exception to the restaurant permit requirement of sec. 160.02 (1) does apply to labor unions and The Farmers' Union organization when they occasionally prepare or serve or sell meals or lunches to transients or the general public.

It seems desirable to me to make the further observation that it was the readily discernible intent of the legislature, in providing the exceptions above mentioned to the term "restaurant", to bring within the scope of those exceptions a broad variety of organizations, so long as such organizations did no more than "occasionally prepare or serve or sell meals or lunches to transients or the general public" in the area of restaurant operation. And this intent of the legislature, manifested by its specific reference to all sorts of organizations in setting up the exceptions in question, clearly indicates, I think, an intent on the part of the legislature to bring labor unions and The Farmers' Union organizations within the scope of the exceptions even though such organizations are not specifically mentioned in subsec. (2) of sec. 160.01.

Let me emphasize that this opinion goes no further than to say that The Farmers' Union organization and labor unions are "fraternal organizations" *within the meaning of*

that term as employed in sub. (2), sec. 160.01. It does not pass upon the question of whether the term "fraternal organization", or an equivalent term, is in any way applicable to The Farmers' Union organization or labor unions, where that term or its equivalent is used in a Wisconsin statute other than sec. 160.01 (2), or in an administrative rule, in a sense narrower than its meaning in sec. 160.01 (2), or in a special sense differing from such meaning.

JHM

*Discrimination—Employment—*Mention of age or date of birth in connection with application for employment is not per se discrimination. Discussion of fair employment practices law, employers, and insurance contracts.

December 7, 1959.

INDUSTRIAL COMMISSION.

You submit a number of questions as to the interpretation of the Wisconsin Fair Employment Practices Law as amended by ch. 149, Laws 1959.

In the definition of discrimination the word "age" was added to the phrase "race, creed, color, national origin or ancestry", and the definition of employer was also changed.

Sec. 111.32 (5) (a), as amended, reads as follows:

"The term 'discrimination' means discrimination because of age, race, color, creed, national origin or ancestry, by an employer individually or in concert with others against any employe or any applicant for employment in regard to his hire, tenure or term, condition or privilege of employment, and by any labor organization against any member or applicant for membership, and also includes discrimination on any of said grounds in the fields of housing, recreation, education, health and social welfare."

Sec. 111.32 (3), as amended, reads as follows:

"The term 'employer' shall not include any law enforcement or fire fighting department or organization, nor any person who employs individuals in any other hazardous oc-

cupation, nor a social club or religious association, nor organization not organized for private profit.”

Your first question is whether the following organizations are excluded from the effects of the Wisconsin Fair Employment Practices Law as to age, race, creed, color, national origin or ancestry:

1. Law enforcement or fire fighting departments
2. Persons who employ individuals in any other hazardous occupation, and
3. Many organizations not organized for private profit. (Example: Red Cross, Community Fund, Schools, etc.)

Under the new definition of employer these groups are not subject to the law at all.

The organizations or persons employing individuals in “hazardous occupations” have been excluded, and are not bound by any of the requirements, even with respect to other employees in non-hazardous occupations.

Your second question is whether sec. 111.36 (4), which reads as follows, applies to discrimination on account of age:

“It is unlawful for any organization or person referred to in s. 111.32 (1), (2) and (3) or for any employment agency which undertakes to procure employes or opportunities to work, to engage in any discrimination pursuant to this subchapter.”

The answer is yes. Sec. 111.32 (5) (b), as created, defines discrimination because of age to include:

“1. For an employer, labor organization, or person in the fields of housing, recreation, education, health and social welfare, or any licensing agency, because an individual is between the ages of 40 and 65, to refuse to hire, employ, admit or license, or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment;

“2. For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or dis-

crimination respecting individuals between the ages of 40 and 65, or any intent to make such limitation, specification or discrimination;

“* * *”

You ask whether specific practices fall within the prohibition of discriminations on account of age.

The insertion of age or date of birth in an employment application form would, alone, not be discrimination under the statute.

The legislature did not intend to eliminate all inquiries as to age or date of birth, as such information is often essential to the application of other provisions of the law such as determining whether an applicant is a minor, for retirement or pension purposes, and other legitimate reasons. It is permissible to secure information as to age provided it is not used or intended to imply any discrimination. In the absence of specific facts, mention of age is merely an item of evidence with other facts which may constitute discrimination.

You also ask whether such advertisements as “not over 39”, “recent college or high school graduate”, “young women”, and “18 to 25” are prohibited.

Sec. 111.32 (5) (c) as created, makes certain exceptions for particular types of employment where information as to age is essential:

“Nothing in this subsection shall be construed to prevent termination of the employment of any person physically or otherwise unable to perform his duties, nor to affect any retirement policy or system of any employer where such policy or system is not a subterfuge to evade the purposes of this subsection, nor to preclude the varying of insurance coverage according to an employe’s age; nor to prevent the exercise of an age distinction with respect to employment of persons in capacities in which the knowledge and experience to be gained might reasonably be expected to aid in the development of capabilities required for future advancement to supervisory, managerial, professional or executive positions.”

It would be largely a question of fact for the administrative agency to decide in a particular case whether advertisements are for the purpose of discriminating or to effectuate requirements related to the duties of a particular job.

You further ask whether limiting apprentices to an age under 30 by an industrial concern having an apprenticeship program is unlawful discrimination as to age. Here again the same reasoning given above is applicable.

You ask whether it would be unlawful discrimination for an employer to comply with the terms of an insurance contract covering pensions which provides that no one shall be hired over age 40.

The answer is yes. It would be discrimination under the statute and complying with the terms of a contract would not be a defense. The United States Supreme Court in *Home Building and Loan Associations v. Blaisdell*, (1934) 290 U.S. 398, 78 L. ed. 413, 54 S. Ct. 231 and *East New York Savings Bank v. Hahn*, (1945) 326 U.S. 230, 90 L. ed. 34, 66 S. Ct. 69, has ruled that future legislation is to be treated as an implied condition of every contract as though it were written into it, provided such legislation is within the police powers.

RGM

Licenses—Real Estate Brokers' Board—Real estate broker board is required to renew the license of an applicant who complies with the provisions of sec. 136.063 as created by ch. 87, Laws 1959.

December 28, 1959.

ROY E. HAYS, *Secretary*,
Wisconsin Real Estate Brokers' Board.

You have inquired whether sec. 136.063, Stats., as created by ch. 87, Laws 1959, requires the renewal of a license issued under ch. 136, upon compliance with the conditions therein specified or whether the real estate brokers' board may reinvestigate the qualifications of the applicant as though he were an original applicant and deny the renewal for reasons such as untrustworthiness or incompetency.

Sec. 136.063 reads:

"136.063 Renewal of Lapsed Licenses. (1) In addition to the renewal of the licenses of real estate brokers and sales-

men and business opportunity brokers and salesmen under other provisions of this chapter, the board shall renew the license of any broker or salesman who within one year after the effective date of this section (1959) makes and files a verified application for renewal of his license and who files with the application:

“(a) An affidavit that he had such a license within the 6 years prior to the effective date of this section (1959) and that his license was not renewed because of the board’s rule which required the applicant to rewrite and pass a new examination for license if he failed to file his application for renewal with the board before the expiration of the old license year or that he took the examination pursuant to the requirement of the board under this rule and failed to pass it, and

“(b) The license fee of the year of application plus a late filing fee of \$10.

“(2) This section does not apply to any applicant whose license was revoked subsequent to the adoption of the rule referred to in sub. (1) (a).”

Sec. 136.05 (1) sets up the requirements for licensing in the first instance. Among other things the board is required to determine the trustworthiness and competency of each applicant.

Sec. 136.06 (3) was renumbered 136.06 (6) by ch. 364, Laws 1959, and reads:

“(6) In the case of applications for renewals of licenses the board may dispense with such matters contained in s. 136.05 (1) as it deems unnecessary in view of prior applications.”

The board has adopted rules, Wis. Adm. Code R.E.B. 2.04 (1) and (3) which provide in part:

“REB 2.04 Renewal of license. (1) Real Estate. Applications for renewal of the license of real estate salesmen or brokers shall be filed * * * on or before the 31st day of December of each year. * * * In the event an application for renewal of a real estate salesman’s or broker’s license for the ensuing calendar year is not filed with the board on or before the 31st day of December of each year, the board shall immediately after January 1st of the new license year, send a notice by registered mail to the last known address of each individual who has failed to renew his license. * * * It shall further advise that in the event the individual does not file his application and fee within 20 days from date of

notice, a renewal will not be granted unless applicant takes and passes the written examination. * * *

“* * *

“(3) Waiver. Each applicant for a broker’s or salesman’s license, who has not been the holder of such a license at any time during the preceding license year immediately preceding the date of such application or who has failed to renew said license prior to the end of the previous licensing year, shall be considered a new applicant.”

By sec. 136.063, quoted above the legislature has stated the requirements to be met on renewal of a license which the holder has permitted to lapse during the six-year period prior to the effective date of ch. 87, Laws 1959.

This is a peculiar provision in that it creates a closed class of ex-licensees who permitted their licenses to lapse during a particular six-year period only. Anyone who permits his license to lapse more than one year after the effective date of ch. 87, Laws 1959, will not qualify for its benefits nor could anyone qualify whose license lapse occurred more than six years prior to the enactment of this section.

Moreover, the class is still further narrowed under subsec. (1) to those who apply for renewal within one year from the effective date of ch. 87.

Whether such provisions can be said to be discriminatory and deny due process and equality before the law under Sec. 1, Amend. XIV, United States Constitution, and sec. 1, Art. I, Wis. const., is a question which will not be discussed here, but see *State ex rel. F. W. Woolworth Co. v. State Board of Health*, (1941) 237 Wis. 638, 298 N.W. 183, 136. A.L.R. 204.

Thus, we are concerned here with a very limited class, and as to such class the legislature has spelled out the requirements to be met for license renewal with the directive that “the board shall renew the license” of one who falls within that class and who files the required affidavit along with the payment of the required fee. This gives rise to the application of the doctrine of *expressio unius est exclusio alterius*,—i.e., the expression of one thing results in the implied exclusion of others. Also the word “shall” normally means “must” when used in statutes. There are many cases on this point in 39 Words and Phrases at p. 143 and following. This is particularly true where the rights of third persons depend upon the exercise of the power or perform-

ance of the duty to which the word "shall" refers. See *School Tp. 76 of Muscatine County v. Nicholson* (1939) 227 Iowa 290, 288 N.W. 123, and *State ex rel. Firemen's Fund Ins. Co. v. Hoppmann*, (1932) 207 Wis. 481, 483, 240 N.W. 884, 84 A.L.R. 249.

This is not to say that the board is powerless to protect the public in the case of a person who takes advantage of the renewal provision of sec. 136.063, but who is believed by the board to be untrustworthy or incompetent or who is otherwise subject to license suspension or revocation for any of the reasons specified in sec. 136.08. The board could honor his renewal application under sec. 136.063 and immediately institute proceedings for license suspension or revocation under sec. 136.08 upon any of the grounds therein specified. In other words, sec. 136.063 is mandatory so far as renewal is concerned, but it does not deprive the board of any of the powers which it has to suspend or revoke a license for any of the statutory grounds therefor, upon proper investigation, notice, complaint and hearing.

WHR

District Attorneys—Court Commissioner—A district attorney cannot be appointed to the office of family court commissioner created by ch. 595, Laws 1959, and continue to serve as district attorney.

December 28, 1959.

HENRY F. RENARD,
District Attorney,
 Washington County.

You inquire whether a district attorney may also be appointed and serve as family court commissioner.

The office of family court commissioner was created by ch. 595, Laws 1959, which amended sec. 247.13, and subsec. (1) provides in part:

"(1) * * * Such commissioner shall, by virtue of his office and to the extent required for the performance of his duties, have the powers of a court commissioner. Such court commissioner shall be in addition to the maximum number of court commissioners permitted by s. 252.14. * * *"

The office of court commissioner is judicial in nature. Art. VII, sec. 23, Wis. Const.

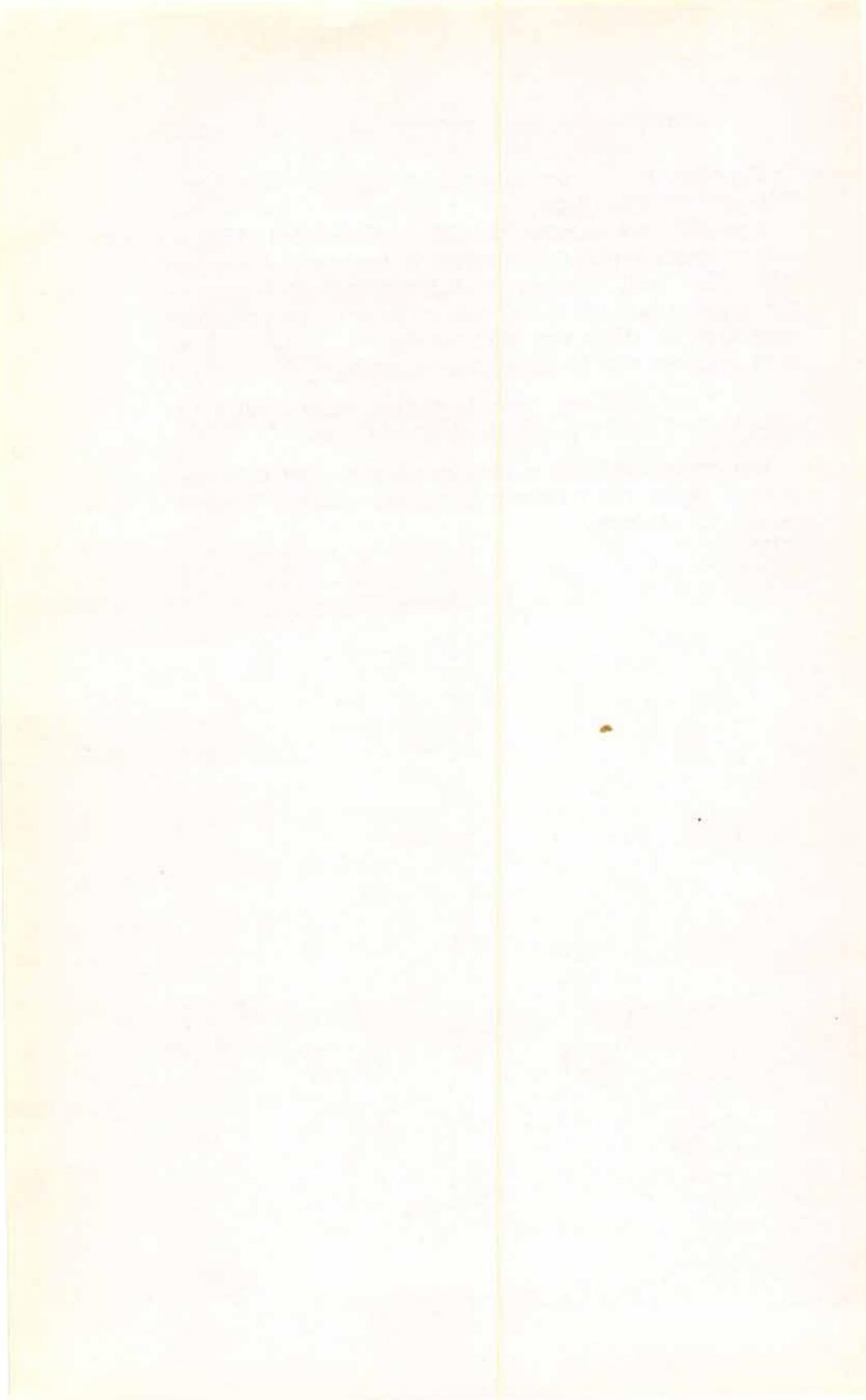
Two offices are incompatible if there is a conflict of interests or duties, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. A review of the duties of both offices leaves one with no other conclusion than that the offices are incompatible.

In addition, sec. 59.49 provides in part:

“* * * nor shall any district attorney while in office be eligible to or hold any judicial office whatever, * * *.”

You are advised that a district attorney cannot be appointed family court commissioner and continue to serve as district attorney.

RJV



**STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION
LAWS, LEGISLATIVE BILLS AND RESOLUTIONS,
REFERRED TO AND CONSTRUED**

U. S. CONST.	Page	SESSION LAWS	Page
Art. I, sec. 10	79	1915, Ch. 469	113
Amendment I, sec. 1	122	1917, Ch. 4575h	71-72
XIV, sec. 1	295	1919, Ch. 113	72
XVIII	63	1925, Ch. 279	143
		1927, Ch. 425, sec. 87	88
		1929, Ch. 454	155
		1939, Ch. 140	165
		395	29
		1941, Ch. 121	109
		139	90
		1943, Ch. 315	35
		516	167
		1945, Ch. 365	59
		375	285
		433	59
		1947, Ch. 206, sec. 26	24
		1949, Ch. 39	253
		570	155
		1951, Ch. 436	155
		1953, Ch. 31	254
		90	90, 91, 92
		186	210
		328	140
		1955, Ch. 281	140
		509	59
		545	201
		1957, Ch. 95	17
		149	149, 150
		233	203
		260	155, 286
		296	252, 253, 254
		379	176, 178
		618	180, 181
		652	257, 259, 260
		673	234
		1959, Ch. 19, sec. 53	265
		87	293, 295
		149	290
		298	253
		317	267, 271
		364	294
		454	271, 273
		485	277
		595	296
			BILLS
		1931, No. 79	139
		1945, No. 439, A	131

BILLS		Page	STATS. (1898 and since)	Page
1953, No.	1, S.	90, 92	16.275 (4)	58, 59, 60
1957, No.	60, S.	176, 178, 179	16.276	58, 59, 60
	654, S.	176, 181	16.31-16.44	100
1959, No.	2, S.	267	17.03	23, 24, 25
	14, A.	421	(10)	24
	37, S.	77, 79, 80, 81	20.350 (45)	100, 103
	129, A.	113, 120	20.420 (70)	206
	172, A.	240	(82) (a) and	
	243, A.	226	(b)	206
	281, A.	121, 122	(83) (a)	206, 207
		123, 130, 131	(91)	206
		132, 133, 134	20.650 (41)	84, 86
		135, 136	20.670 (24)	267, 268
	363, S.	195, 197, 199	20.951 (1)	34, 35
	491, A.	184-185	20.953 (1)	36
		186, 187	28.11	217, 218
	647, A.	278	29.01 (4)	238
	750, A.	200, 201	20.06 (1)	236, 239
		203, 204	(1) to (5a)	236
	827, A.	204	(1), (3), (4)	
		211-212	and (5)	239
		216, 217	(6) and (7)	236
				237
			30.06 (6)	238
			(7)	238
			(8)	236, 238, 239
			(10)	236, 239, 240
			35.64	272
			35.93 (6) (g)	39-40
			38.	92, 93
			38.23	92, 93
	No. 43, S.	188, 189	40.04 (1)	274, 276
		191, 194, 195	40.04 (1) and (2)	5
	No. 48, S.	188	40.22 (13)	138
	No. 49, S.	188	40.29 (1)	138
	No. 69, S.	216, 217	40.34 (2)	138
	No. 69, S.,		40.50 (3)	90, 91, 92, 93
	Amdt. No. 1, S.	216	40.53 (1)	274, 275, 277
1959, Res.	No. 7, S.	46	40.56	4, 15, 17, 19
	No. 8, S.	136		20, 21, 22
	No. 10, S.	77	(2)	5, 274
	No. 11, S.	178		276, 277
	No. 16, A.	113	(2a)	6, 17, 22, 23
	No. 23, A.	204	40.77 (1)	121
	No. 27, A.	200	(1) (a)	121
			(c)	121
			40.80	87, 90, 91, 92
			40.801	88, 91
			40.827	87, 90, 92
			40.91	4, 15, 17, 19
				20, 21, 22
			(1)	274
			(4) (c)	6, 17, 22, 23
			(5) (a)	5, 15, 19
			46.22	271
			48.57	271
			48.80	271
			49.01 (5)	41, 42
			49.10 (4)	41, 42, 43
			(7)	44

RESOLUTIONS				
1959, Jt. No.	5, A.	60, 62-63		
	No. 10, A.	121		
	No. 15, S.	184		
	No. 22, A.	143		
	No. 22, S.	88, 189		
		191-193		
		194, 195		
	No. 43, S.	188, 189		
		191, 194, 195		
	No. 48, S.	188		
	No. 49, S.	188		
	No. 69, S.	216, 217		
	No. 69, S.,			
	Amdt. No. 1, S.	216		
1959, Res.	No. 7, S.	46		
	No. 8, S.	136		
	No. 10, S.	77		
	No. 11, S.	178		
	No. 16, A.	113		
	No. 23, A.	204		
	No. 27, A.	200		

STATS. (1898 and since)				
Sec.	11.32 (5) (c)	292		
	14.53 (5a)	28		
	15.06, <i>et seq.</i>	47		
	15.09, <i>et seq.</i>	46, 47		
	15.11	47-48		
	15.60 (1)	105		
	15.61	105		
	15.845 (1) and (2)	103		
	15.845 (2)	104		
	(3) (b)	102		
	(j)	100		
		102, 103		
	(6)	104		

STATUTES CITED

301

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page	
	(11) -----	42, 43	66.054 (8a) -----	200, 201
	(12) -----	42	(a), (c), and	
49.11	-----	44, 45	(f) -----	200
	(2) -----	45	(b) -----	201
	(3) (h) -----	45	(b), (d), (g),	
	(7) -----	45	(h) -----	201
49.15	(2) -----	41, 44	66.058 -----	195
49.171 <i>et seq.</i>	-----	27	(1) (e) -----	196, 198
51.25 (1)	-----	27	66.191 -----	161
51.36	-----	267, 268	66.30 -----	233
	(7) (e) and (f)	270	66.30 (1) -----	159, 233
52.21 to 52.45	-----	248	(2) -----	233
		251, 253	66.315 (2) -----	161
		254, 256	66.34 -----	263
52.26	-----	248	66.90 (1) -----	25
52.28	-----	248, 250	(9) -----	23
52.35	-----	253	66.902 (1) -----	181
52.355	-----	252, 253	(3) -----	180, 181
		254, 255	(n) -----	175, 176
52.37	-----	252, 253, 254		180, 181
	(1) -----	250, 251		183, 184
	(3) -----	252	66.904 (1) (a) 1	180, 181
52.43	-----	256	66.906	23, 26
52.45	-----	254, 256	(1) -----	23, 24
53.02 (4) (b)	-----	262	(a) -----	25
56.65 (3)	-----	57	67.02 (3) -----	29
59.	-----	271	67.03 (1) -----	29
59.01	-----	43	67.04 (1) -----	27, 29
59.15 (1) (a)	-----	257-258	(a) -----	26, 29
		260	(q) -----	29
	(b) -----	259	68.01 <i>et seq.</i>	15
	(2) (d) -----	53	69.29 (1) -----	252, 253
59.18	-----	218		254, 255
59.20 (12)	-----	218	70.11 (1) -----	30
59.21 (8) (a)	-----	98, 99, 100	74.03 (5) -----	137
59.23 (1)	-----	99	74.031 (8) -----	137
59.28	-----	257, 259	(14) -----	198, 199
	(38) -----	258, 259	74.64 -----	15, 19, 22
59.49	-----	297	74.73 -----	15, 19, 20, 21, 22
59.51	-----	84	76.13 -----	137
	(1) -----	54, 56, 82	76.27 -----	137
	(11) -----	84	76.28 -----	137, 138
59.61	-----	57	(3) -----	136, 137
59.62	-----	54, 57		138, 139
59.65 (4)	-----	57	83.015	241
59.87	-----	53	(1) (a) -----	241, 242
	(3) (b) -----	49, 53		245, 247
59.97	-----	66	83.015 (2) -----	245, 246
59.97 (2)	-----	65-66	84.01 (23) -----	205
	(3) -----	65, 66, 68	84.031 -----	205-206
	(g) -----	65, 66	85.09 (14) -----	285
		67, 68	85.45 (1) -----	155
62.23 (1) (e)	-----	103	85.90 (3) (a) -----	155
66.021 (7) (c)	-----	94	85.135 -----	285
66.05	-----	184, 185	86.106 -----	264
66.054 (4)	-----	109	92.	263
66.054 (4) (a)	-----	109, 112	92.03 -----	263
	1 -----	112	92.08 -----	263
	2 -----	112	97.39 (3) -----	143
(5) 5	-----	201	97.42 -----	143

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
(1) (a) -----	144	176.05 (23) ---	202, 203, 204
97.44 -----	143	(a), (c), (e),	
97.47 -----	143	and (f) ---	200, 202
97.72 (2) -----	143	176.17 (2) -----	203, 204
101.31 -----	73	176.43 (2) -----	202
(2) -----	75	180.825 -----	6, 12
(7) -----	77	(3) -----	11
(a) -----	75, 76	180.847 -----	12
(b) -----	75-76, 76	181.04 -----	1, 3
101.345 -----	84, 86	181.04 <i>et seq.</i> -----	1
102.52 -----	140	(14) -----	1, 3
(17) -----	140	181.31 (2) -----	4
(18) -----	140	181.50 -----	2
102.555 -----	140-141	181.54 -----	1, 3
(4) (e) -----	142	182.025 (1) -----	83, 84
(7) -----	142	186. -----	162, 163
103.50 -----	281, 282, 284	186.05 -----	163
(2) -----	284	(2) -----	163
(3) -----	283, 285	186.16 -----	162
(4) -----	281	186.27 -----	163-164
110.065 -----	159	201.04 -----	170, 175
110.07 (1) -----	161	215.52 (7) -----	164, 166
(2) -----	159, 161	215.60 (8) -----	168
(3) -----	234	215.67 -----	166
111.32 (3) -----	290-291	(1) -----	164, 166
(5) (a) -----	290	(b) -----	167
(b) -----	291-292	(4) -----	165-166
111.36 (4) -----	291	218.01 (2) -----	278
133.25 -----	12	(e) -----	278, 279
136. -----	6, 10, 293	218.04 -----	8
136.01 (2) (a) and (b) -----	7	227.014 (2) (a) -----	283-284
136.02 -----	7-8	236. -----	54, 55, 56, 57
136.05 (1) -----	294	236.01 -----	55
136.06 (3) -----	294, 295	236.02 (4) -----	55
(6) -----	294	(7) -----	55
136.063 -----	293, 296	236.03 (1) -----	56, 57
136.08 -----	296	236.21 -----	55
136.16 (1) -----	8	236.25 (2) -----	55
147.225 -----	113	241.10 -----	83, 84
(1) -----	115	241.11 -----	83
(2) -----	115	247.13 -----	296
(3) -----	113, 114, 115	256.28 -----	33
149.06 -----	117, 119, 120	256.31 -----	31, 35
(4) -----	149	260.01 -----	256
149.09 (4) (c) -----	147, 151	260.12 -----	256
149.12 -----	150	260.19 (1) -----	256
(1) -----	147, 150	262.08 -----	14
153.10 -----	151	262.09 (4) -----	6, 11, 12, 13, 14
-----	223, 224	262.12 -----	14
-----	225, 226	262.13 -----	14
156.12 (3) -----	227, 230, 231	271.41 (1) -----	259
(7) -----	95-96, 97, 98	278.095 (4) -----	266
156.15 -----	95, 96, 97, 98	278.102 -----	265
157.07 -----	98	278.162 -----	265-266
159.02 (2) -----	82	281.30 (1) -----	77, 80, 81
160.01 (2) -----	106	(2) -----	80, 81
-----	287, 288	(4) -----	80
-----	289, 290	292.44 -----	260, 261
160.02 (1) -----	288, 289	292.45 -----	262
165.01 (8) -----	271, 273	307.02 (1) (a) -----	70

STATUTES CITED

303

STATS. (1898 and since)	Page	STATS. (1898 and since)	Page
325.01	262	348.02 (3)	155, 156
325.12	262	348.15	152, 153, 154
328.39	248, 250, 251	348.16	153, 154
	253, 254, 255	348.17	152, 154
(1)	251	(1)	152
(a)	248	348.20	154
(b)	248	(1)	152, 155
330.18	139		156, 158
330.19	139	348.21	154
340.01 (42)	155	348.479	72
341.10 (4)	219	349.	153
341.54 (1)	278	349.15	153, 154
342.35	277, 279, 280	349.16	152-153, 153, 154
342.37 (2)	278	(2)	152, 153, 154
(4)	277	352.365	143
343.	222	939.03 (1) (a)	240
343.38 (1)	219	(2)	240
(c)	219, 221, 222	946.06	71, 72
344.01 (2)	220	(2)	72
(d)	223	946.12 (5)	259
344.26 (1)	220, 222, 285	946.13	217, 218-219
(2)	286, 287	957.26	70
	287	957.27	70, 71
344.29	220, 222	959.055 (2)	<i>et seq.</i> 70, 71
344.40	222	990.001 (7)	90-91
(1)	219, 220-221	990.01 (1)	253, 289
	221, 222	990.05	272
345.05	160	1317m-5 (8)	247
346.	234	(1)	241
346.06	72	(2)	246
348.	153		
348.01 (2)	62		

INDEX

ADVERTISING

Page

- Optometry—Sec. 153.10 applies to newspapers which print advertisements and it is immaterial that the optometrist who places the ad conducts his business in a state which does not prohibit price advertising of eyeglasses ---- 223
- Words and phrases—Discussion of sec. 66.054 (4) relative to the difference between signs as advertising matter and utilitarian material ----- 109

AGRICULTURE

- County—Where county agricultural committee has entered into cooperative extension service contracts in agriculture and home economics under sec. 59.87 (3) (b), it cannot decrease its share if the university increases its share -- 49

AMENDMENT

- Legislature—Joint resolutions 22, S. and 43, S. of 1959 legislature discussed as to compliance with requirement of Art. XII, sec. 1, Wis. const., relating to separate submission of more than one amendment to voters for approval ----- 188

ANNEXATION

- School districts—When there is annexation of territory to a city operating under the city school plan, such territory automatically becomes a part of the city school district and is detached from the school district or districts of which it was formerly a part ----- 87

APPROPRIATIONS

- Public instruction—Under U. S. Public Law 85-864 state superintendent of public instruction is state education agency within meaning of federal statutes. Under sec. 101.345 governor may accept federal funds, and under sec. 20.650 (41) funds are paid into state treasury and appropriated to state superintendent for authorized expenditures ----- 84
- School district—School district may bring proceedings to enforce payment by a town, city or village of unpaid utility taxes to which it is entitled under sec. 76.28 (3) in prior years. Six-year statute of limitation applies thereto ---- 136
- Statutes—Sec. 15.09 et seq. contemplates that the executive budget bill sets forth a statement of the proposed expenditures for each of the fiscal years of the succeeding biennium. An executive budget bill which sets forth the same amounts for the several appropriations in both of the fiscal years complies therewith and when enacted into law will be controlling for the biennium unless later changed by appropriate legislative action ----- 46

ASSOCIATION	Page
Stock—Resolution of cooperative association providing that shares of stock may be applied on cost of a funeral of deceased stockholder does not constitute violation of sec. 156.12 (3) or (7), where no provision of burial benefits or rebates is made to association operating funeral establishment -----	95
BANKING	
Credit unions—Credit union under ch. 186 may issue only one class of stock. Sums deposited by mortgagors for purpose of paying real estate taxes and insurance are not share capital on which dividends may be paid -----	162
BOARD OF HEALTH	
Words and phrases—Discussion of rule H 12.03 of board of health relative to number of full-time instructors in school of cosmetology -----	106
BONDS	
Highway commission—Sec. 4, Bill 827, A., attempting to authorize highway commission to issue bonds for highway construction, payable from appropriations of highway funds, is probably unconstitutional because it would authorize creation of state debt contrary to secs. 4 and 10, Art. VIII, Wis. const. -----	205
CIVILIAN DEFENSE	
Survey of structures for civil defense under contract requires services of registered professional engineer or architect -----	73
CIVIL SERVICE	
County—County board may, under sec. 59.21 (8), enact ordinance placing deputy sheriffs under civil service and providing for various classes of deputy sheriffs -----	98
Military service—Under sec. 16.275 (4) a state employe shall be allowed military leave of absence with pay during his two week reserve encampment; under sec. 16.276 he shall be allowed leave of absence without pay while serving the six month active duty required by his reserve program -----	58
CONTRACTS	
Insurance—Contract entered into by company actually engaged in television repair, for service, for service and parts for stated price which bears reasonable proportion to services rendered, is not insurance. Company not in service business but contracts with others to provide service, offers indemnification, or covers only replacement of parts; a prohibited insurance contract would be in effect -----	168
CORPORATIONS	
Real estate brokers' board—Foreign corporations or individual soliciting sales of out-of-state lands by advertisement in Wisconsin newspapers and by literature mailed directly to Wisconsin residents are probably not required to comply with the provisions of ch. 136; nor do they appear to be amenable to service of process under the provisions of sec. 262.09 (4) and 180.825 -----	6

CORPORATIONS—Continued

Page

Secretary of state—Nonstock nonprofit corporation organized under ch. 181 may by virtue of secs. 181.04 (14), 181.31 (2) and 181.54, file amendment to its articles providing that the corporation shall not be dissolved without the approval of the FHA as long as such agency holds an outstanding mortgage of the corporation ----- 1

COUNTIES

Crime laboratory—Discussion of charge back to counties for work by state crime laboratory as affected by ch. 454, Laws 1959 ----- 271

Forestry—County treasurer may be employed to serve as secretary to forestry committee and may be paid extra compensation without violating sec. 946.13 ----- 217

Members of the county highway committee need not be members of the county board. Discussion of 83.015, its history and interpretation ----- 241

School districts—Transportation—County school committee must disallow claims for cost of transportation of non-resident high school pupils under secs. 40.53 (1), 40.56 (2), and 40.04 (1), where transportation to nearest available school was provided ----- 274

School—Counties have no power to undertake excavating, filling, landscaping, or any other construction work in connection with the building of a school, public or private 231

Soil conservation—County highway personnel and equipment may be used for performing soil conservation work under sec. 66.34. However, if the ruling in *Heimerl v. Ozaukee County* were to be applied in full, the same might be declared invalid ----- 263

COUNTY

Agriculture—Where county agricultural committee has entered into cooperative extension service contracts in agriculture and home economics under sec. 59.87 (3) (b), it cannot decrease its share if the university increases its share ----- 49

Civil service—County board may, under sec. 59.21 (8), enact ordinance placing deputy sheriffs under civil service and providing for various classes of deputy sheriffs ----- 98

Municipal court—Municipal court act of Racine county discussed relative to difference between maintenance of court and cost of litigation ----- 68

Words and phrases—A “county nursing home” for the care and treatment of the aged infirm and chronic invalids would be a “county building” under sec. 67.04 (1) (a) which the county could provide by the issuance of its general obligation bonds ----- 26

Zoning ordinance—Revision of an existing county zoning ordinance can be accomplished only by amendment to sec. 59.97 (3). Towns may adopt the amendatory ordinance only in the manner provided in sec. 59.97 (3) (g) 65

COUNTY BOARDS

Private clinics—Discussion of provisions of secs. 20.670 (24) and 51.36 as created by ch. 317, Laws 1959, regarding appropriation of county funds, as well as state grants-in-aid ----- 267

COUNTY BOARDS—Continued	Page
Sheriff's fees—Ch. 618, Laws 1957, requires sheriff to charge higher fees specified and to turn over such increase to county treasury until December 31, 1959, such increase may be retained by sheriff thereafter, if he is entitled to do so -----	257
COURT COMMISSIONERS	
District attorneys—A district attorney cannot be appointed to the office of family court commissioner created by ch. 595, Laws 1959, and continue to serve as district attorney -----	296
CREDIT UNIONS	
Banking—Credit union under ch. 186 may issue only one class of stock. Sums deposited by mortgagors for purpose of paying real estate taxes and insurance are not share capital on which dividends may be paid -----	162
CRIME LABORATORY	
Counties—Discussion of charge back to counties for work by state crime laboratory as affected by ch. 454, Laws 1959 -----	271
CRIMINAL LAW	
Flag—Sec. 946.06 prohibits the printing of the United States flag as part of an advertisement including an advertisement of the sale of the flag itself -----	71
DISCRIMINATION	
Employment—Mention of age or date of birth in connection with application for employment is not per se discrimination. Discussion of fair employment practices law, employers, and insurance contracts -----	290
DISTRICT ATTORNEYS	
Court commissioners—A district attorney cannot be appointed to the office of family court commissioner created by ch. 595, Laws 1959, and continue to serve as district attorney -----	296
EMPLOYMENT	
Discrimination—Mention of age or date of birth in connection with application for employment is not per se discrimination. Discussion of fair employment practices law, employers, and insurance contracts -----	290
FLAG	
Criminal law—Sec. 946.06 prohibits the printing of the United States flag as part of an advertisement including an advertisement of the sale of the flag itself -----	71
FORESTRY	
Counties—County treasurer may be employed to serve as secretary to forestry committee and may be paid extra compensation without violating sec. 946.13 -----	217
FUNDS	
Regional planning—Funds received under federal housing act of 1954 are received by bureau of engineering pursuant to sec. 20.350 (45) and paid into general fund and appropriated for purposes of regional planning under sec. 15.845 (3) (j). Contracts and reimbursements by cities discussed -----	100

HIGHWAY COMMISSION

Page

Bonds—Sec. 4, Bill 827, A., attempting to authorize highway commission to issue bonds for highway construction, payable from appropriations of highway funds, is probably unconstitutional because it would authorize creation of state debt contrary to secs. 4 and 10, Art. VIII, Wis. const. ----- 205

Words and phrases—Industrial Commission—It is within the authority of the industrial commission, under sec. 103.50, to consider wage changes to become effective on May 1, under collective bargaining contracts previously negotiated, in determining the prevailing wage rate to be certified to the highway commission prior to such date ---- 281

HIGHWAYS AND BRIDGES

Weights and measures—In a prosecution under sec. 348.15 to 348.17 state need not show actual knowledge on part of owner where it is evident vehicle was operated on behalf of and in connection with owner's business. Class of highway immaterial ----- 152

HOSPITALS

Physicians and surgeons—Under sec. 147.225 (3) agreement may properly be made between hospital, medical specialists, and physicians for billing of services provided the statements for respective services are segregated and professional autonomy is removed from lay control. Bill No. 129, A., would change law only with respect to separate billing requirement ----- 113

INDUSTRIAL COMMISSION

Words and phrases—Highway Commission—It is within the authority of the industrial commission, under sec. 103.50, to consider wage changes to become effective on May 1, under collective bargaining contracts previously negotiated, in determining the prevailing wage rate to be certified to the highway commission prior to such date -- 281

INSURANCE

Contracts—Contract entered into by company actually engaged in television repair, for service, for service and parts for stated price which bears reasonable proportion to services rendered, is not insurance. Company not in service business but contracts with others to provide service, offers indemnification, or covers only replacement of parts; a prohibited insurance contract would be in effect ----- 168

LEGISLATURE

Amendments—Joint resolutions 22, S. and 43, S., of 1959 legislature discussed as to compliance with requirement of Art. XII, sec. 1, Wis. const., relating to separate submission of more than one amendment to voters for approval ----- 188

Retirement systems—Under sec. 66.902 (3) (n) circuit judges under Wisconsin retirement fund are entitled to prior service credit for service as full-time judges of courts of record, municipal or inferior, in Milwaukee county, even though credit was received under another public employe retirement system ----- 175

LEGISLATURE—Continued	Page
Statutes—Under sec. 35.93 (6) (g) a member of the legislature is entitled to but one copy of the Wisconsin administrative code plus current service. His re-election does not entitle him to an additional copy -----	39
Statutes—Discussion on referendum to license bingo for charitable organizations. Legislative mechanics explained	60
Statutes—Discussion of effect of enactment of Bill No. 750, A., repealing 15-day credit restriction on purchases of beer by retailers and 30-day credit restrictions on purchase of intoxicating liquor by retailers, on Wisconsin statutes and federal regulations -----	200
Taxation—Bill No. 363, S., providing for general property taxation of mobile homes on a monthly payment basis would be invalid under sec. 1, Art. VIII, Wis. const. ----	195
 LICENSES	
Real estate brokers' board—Real estate brokers' board is required to renew the license of an applicant who complies with the provisions of sec. 136.063 as created by ch. 87, Laws 1959. -----	293
Salvage dealers—Ch. 485, Laws 1959, which amends sec. 342.35 and creates sec. 342.37 (4) does not exempt existing salvage dealers from operation of the act. Discussion of "location", and auto dealer licensing, as affected by the act -----	277
 LICENSES AND PERMITS	
Revocation—Person subject to financial responsibility law must file proof at all times during the three-year period after expiration of revocation in order to be entitled to operator's license or to register vehicle in his name. Subsequent revocation during such three-year period does not require financial proof unless vehicle is registered in his name -----	219
 LIENS	
Veterans affairs—Wisconsin department of veterans affairs as a junior lien holder, which has been party in a mortgage foreclosure action, has right to offer proof with respect to priority or the amount due it in the distribution of surplus without having answered or appeared prior to confirmation of sale -----	265
 MILITARY SERVICE	
Civil service—Under sec. 16.275 (4) a state employe shall be allowed military leave of absence with pay during his two week reserve encampment; under sec. 16.276 he shall be allowed leave of absence without pay while serving the six months active duty required by his reserve program -----	58
 MORTGAGES	
Register of deeds—Mortgages and trust deeds referred to in sec. 182.025 (1) need only be recorded by the register of deeds as he would a real estate mortgage -----	83

	Page
MOTOR VEHICLE	
Words and phrases—The running of the statute of limitations upon a damage suit judgment based upon a finding of negligent operation of a motor vehicle constitutes a discharge of such obligation as that term is used in sec. 344.26 (1) -----	285
MOTOR VEHICLE DEPARTMENT	
Words and phrases—The use of the word “nonuniformed” in sec. 110.07 (3) precludes the motor vehicle department from prescribing and purchasing a standard type of work clothing for inspector personnel -----	234
MUNICIPAL COURT	
County—Municipal court act of Racine county discussed relative to difference between maintenance of court and cost of litigation -----	68
MUNICIPALITIES	
Traffic patrol—State traffic patrol may permit local law enforcement personnel to ride in state patrol squad cars for training purposes, providing municipality requests that the officers participate in such training -----	159
NURSES	
Statutes—Any person not a registered nurse who displays caduceus with D. N. superimposed or who represents self as “D. N.” or “Doctor’s Nurse” violates sec. 149.06 (4) and is subject to penalty of sec. 149.12 -----	147
OPTOMETRY	
Advertising—Sec. 153.10 applies to newspapers which print advertisements and it is immaterial that the optometrist who places the ad conducts his business in a state which does not prohibit price advertising of eyeglasses -----	223
PATERNITY	
Proceedings—Discussion of sec. 328.39 and 52.21 to 52.45 regarding paternity proceedings and settlement agreements, wherein child is born to a married woman -----	248
PERMITS	
Words and phrases—Restaurant—Discussion of fraternal organizations as used in sec. 160.01 (2) and the need for permits to occasionally serve or sell meals -----	287
PHYSICIANS AND SURGEONS	
Hospital—Under sec. 147.225 (3) agreement may properly be made between hospital, medical specialists, and physicians for billing of services provided the statements for respective services are segregated and professional autonomy is removed from lay control. Bill No. 129, A. would change law only with respect to separate billing requirement -----	113
POOR RELIEF	
Words and phrases—Legal settlement of employe and inmate who resides in a county home discussed. Secs. 49.10 (4) and 49.15 (2) discussed -----	41

PRISONS	Page
Witnesses—Subpoena to prisoner is ineffectual since he cannot respond to it and the warden has no authority to produce him. Writ of habeas corpus ad testificandum pursuant to secs. 292.44 and 292.45 is only process to secure attendance -----	260
PRIVATE CLINICS	
County board—Discussion of provisions of secs. 20.670 (24) and 51.36 as created by ch. 317, Laws 1959, regarding appropriation of county funds, as well as state grants-in-aid -----	267
PROCEEDINGS	
Paternity—Discussion of secs. 328.39 and 52.21 to 52.45 regarding paternity proceedings and settlement agreements, wherein child is born to a married woman -----	248
PUBLIC INSTRUCTION	
Appropriation—Under U. S. Public Law 85-864 state superintendent of public instruction is state education agency within meaning of federal statute. Under sec. 101.345 governor may accept federal funds, and under sec. 20.650 (41) funds are paid into state treasury and appropriated to state superintendent for authorized expenditures -----	84
PUBLIC OFFICERS AND EMPLOYEES	
Retirement systems—An elected county official having elected to be included under Wisconsin retirement fund cannot withdraw therefrom. Compulsory retirement under sec. 66.906 produces vacancy in office in purview of sec. 17.03. Officer holding over after term is de facto officer and entitled to compensation until successor is elected or appointed -----	23
Statutes—Register of deeds should accept for recording under sec. 59.51 (1) maps of subdivisions which do not comply with the requirements of ch. 236 provided the parcels of land in such subdivisions exceed 1½ acres in area, and the surveys comply with sec. 59.62. Descriptions by metes and bounds and numbered parcels in survey should also be accepted -----	54
REAL ESTATE	
Statutes—Constitutionality of amendment of sec. 281.30 by Bill No. 37, S., and amendment No. 1, S., discussed relative to retroactive enforcement -----	77
REAL ESTATE BROKERS' BOARD	
Corporation—Foreign corporations or individuals soliciting sales of out-of-state lands by advertisement in Wisconsin newspapers and by literature mailed directly to Wisconsin residents are probably not required to comply with the provisions of ch. 136; nor do they appear to be amenable to service of process under the provisions of secs. 262.09 (4) and 180.825 -----	6
Licenses—Real estate brokers' board is required to renew the license of an applicant who complies with the provisions of sec. 136.063 as created by ch. 87, Laws 1959 -----	293

	Page
REGIONAL PLANNING	
Funds—Funds received under federal housing act of 1954 are received by bureau of engineering pursuant to sec. 20.350 (45) and paid into general fund and appropriated for purposes of regional planning under sec. 15.845 (3) (j). Contracts and reimbursements by cities discussed --	100
REGISTER OF DEEDS	
Mortgages—Mortgages and trust deeds referred to in sec. 182.025 (1) need only be recorded by the register of deeds as he would a real estate mortgage -----	83
Under sec. 157.07 cemetery plat must be divided into lots to qualify for recording by the register of deeds -----	82
RELIGION	
Schools—Discussion of Bill 281, A., relative to released time for religious instruction and its constitutionality -----	121
RESTAURANT	
Permits—Words and phrases—Discussion of fraternal organizations as used in sec. 160.01 (2) and the need for permits to occasionally serve or sell meals -----	287
RETIREMENT SYSTEMS	
Legislature—Under sec. 66.902 (3) (n) circuit judges under Wisconsin retirement fund are entitled to prior service credit for service as full-time judges of courts of record, municipal or inferior, in Milwaukee county, even though credit was received under another public employe retirement system -----	175
Public officers and employes—An elected county official having elected to be included under Wisconsin retirement fund cannot withdraw therefrom. Compulsory retirement under sec. 66.906 produces vacancy in office in purview of sec. 17.03. Officer holding over after term is de facto officer and entitled to compensation until successor is elected or appointed -----	23
REVOCAION	
License and permits—Person subject to financial responsibility law must file proof at all times during the three-year period after expiration of revocation in order to be entitled to operator's license or to register vehicle in his name. Subsequent revocation during such three-year period does not require financial proof unless vehicle is registered in his name -----	219
SALVAGE DEALERS	
Licenses—Ch. 485, Laws 1959, which amends sec. 342.35 and creates sec. 342.37 (4) does not exempt existing salvage dealers from operation of the act. Discussion of "location", and auto dealer licensing, as affected by the act --	277
SAVINGS AND LOANS	
Statutes—A state chartered savings and loan association can be converted into a federal chartered association only by compliance with sec. 215.67 (1). Commissioner may act on request within 90 days. Failure to do so, approval is deemed granted by sec. 215.52 (7). If statutory requirements for conversion have been complied with commissioner has no authority to disapprove request -----	164

SCHOOL DISTRICTS	Page
Annexation—When there is annexation of territory to a city operating under the city school plan, such territory automatically becomes a part of the city school district and is detached from the school district or districts of which it was formerly a part -----	87
Appropriations—School district may bring proceedings to enforce payment by a town, city or village of unpaid utility taxes to which it is entitled under sec. 76.28 (3) in prior years. Six-year statute of limitation applies thereto -----	136
Counties—Transportation—County school committee must disallow claims for cost of transportation of nonresident high school pupils under secs. 40.53 (1), 40.56 (2), and 40.04 (1), where transportation to nearest available school was provided -----	274
 SCHOOLS	
Counties—Counties have no power to undertake excavating, filling, landscaping, or any other construction work in connection with the building of a school, public or private	231
Religion—Discussion of Bill 281, A., relative to released time for religious instruction and its constitutionality --	121
 SCHOOLS AND SCHOOL DISTRICTS	
Taxes—Errors in the filing of claims or in the apportionment of nonresident high school tuition and transportation taxes under secs. 40.56 and 40.91, are correctible by the county clerk in the certifications of taxes thereunder in a subsequent year. Secs. 74.64 and 74.73 are not applicable thereto -----	15
Taxes—County school committee has no jurisdiction or authority to make adjustments in the apportionment and certification of nonresident high school tuition and transportation taxes provided by secs. 40.56 and 40.91 to correct errors in such claims in a prior year -----	4
 SECRETARY OF STATE	
Corporations—Nonstock nonprofit corporation organized under ch. 181 may by virtue of secs. 181.04 (14), 181.31 (2) and 181.54, file amendment to its articles providing that the corporation shall not be dissolved without the approval of the FHA as long as such agency holds an outstanding mortgage of the corporation -----	1
 SHERIFF'S FEES	
County boards—Ch. 618, Laws 1957, requires sheriff to charge higher fees specified and to turn over such increase to county treasury until December 31, 1959, such increase may be retained by sheriff thereafter, if he is entitled to do so -----	257
 SOIL CONSERVATION	
Counties—County highway personnel and equipment may be used for performing soil conservation work under sec. 66.34. However, if the ruling in <i>Heimerl v. Ozaukee County</i> were to be applied in full, the same might be declared invalid -----	263

STATE BAR

Page

Taxation—The state bar of Wisconsin is an arm or agency of the state and its property, real and personal, is exempt from taxation by virtue of sec. 70.11 (1) ----- 30

STATUTES

Appropriation—Sec. 15.09 et seq. contemplates that the executive budget bill sets forth a statement of the proposed expenditures for each of the fiscal years of the succeeding biennium. An executive budget bill which sets forth the same amounts for the several appropriations in both of the fiscal years complies therewith and when enacted into law will be controlling for the biennium unless later changed by appropriate legislative action ----- 46

Legislature—Under sec. 35.93 (6) (g) a member of the legislature is entitled to but one copy of the Wisconsin administrative code plus current service. His re-election does not entitle him to an additional copy ----- 39

Legislature—Discussion on referendum to license bingo for charitable organizations. Legislative mechanics explained 60

Legislature—Discussion of effect of enactment of Bill No. 750, A., repealing 15-day credit restriction on purchases of beer by retailers and 30-day credit restrictions on purchase of intoxicating liquor by retailers, on Wisconsin statutes and federal regulations ----- 200

Nurses—Any person not a registered nurse who displays caduceus with D. N. superimposed or who represents self as “D. N.” or “Doctor’s Nurse” violates sec. 149.06 (4) and is subject to penalty of sec. 149.12 ----- 147

Public officers and employes—Register of deeds should accept for recording under sec. 59.51 (1) maps of subdivisions which do not comply with the requirements of ch. 236 provided the parcels of land in such subdivisions exceed 1½ acres in area, and the surveys comply with sec. 59.62. Descriptions by metes and bounds and numbered parcels in survey should also be accepted ----- 54

Real estate—Constitutionality of amendment of sec. 281.30 by Bill No. 37, S., and amendment No. 1, S., discussed relative to retroactive enforcement ----- 77

Savings and loans—A state chartered savings and loan association can be converted into a federal chartered association only by compliance with sec. 215.67 (1). Commission may act on request within 90 days. Failure to do so, approval is deemed granted by sec. 215.52 (7). If statutory requirements for conversion have been complied with commissioner has no authority to disapprove request 164

Taxation—The taxation and regulation of oleomargarine and other butter substitutes as provided by sec. 97.39 (3) et al. would probably be held to be constitutional ----- 143

Town officers—Bill No. 491, A., amending sec. 66.05 regarding ordering removal, repair, or razing of buildings by town board or officers in counties of less than 15,000 population, if enacted would result in statute of doubtful constitutionality. Art. IV, sec. 23, Wis. const. ----- 184

Workmen’s compensation—Where an award was made on claim for compensation under the 1951 statutes, additional injury due to subsequent exposure constitutes a new and separate claim under sec. 102.555 ----- 140

STOCK	Page
Association—Resolution of cooperative association providing that shares of stock may be applied on cost of a funeral of deceased stockholder does not constitute violation of sec. 156.12 (3) or (7), where no provision of burial benefits or rebates is made to association operating funeral establishment -----	95
TAXATION	
Legislature—Bill No. 363, S., providing for general property taxation of mobile homes on a monthly payment basis would be invalid under sec. 1, Art. VIII, Wis. const.-----	195
State bar—The state bar of Wisconsin is an arm or agency of the state and its property, real and personal, is exempt from taxation by virtue of sec. 70.11 (1) -----	30
Statutes—The taxation and regulation of oleomargarine and other butter substitutes as provided by sec. 97.39 (3) et al. would probably be held to be constitutional -----	143
TAXES	
Schools and school districts—County school committee has no jurisdiction or authority to make adjustments in the apportionment and certification of nonresident high school tuition and transportation taxes provided by secs. 40.56 and 40.91 to correct errors in such claims in a prior year -----	4
Schools and school districts—Errors in the filing of claims or in the apportionment of nonresident high school tuition and transportation taxes under secs. 40.56 and 40.91, are correctible by the county clerk in the certifications of taxes thereunder in a subsequent year. Secs. 74.64 and 74.73 are not applicable thereto -----	15
TOWN OFFICERS	
Statutes—Bill No. 491, A., amending sec. 66.05 regarding ordering removal, repair, or razing of buildings by town board or officers in counties of less than 15,000 population, if enacted would result in statute of doubtful constitutionality. Art. IV, sec. 23, Wis. const. -----	184
TRAFFIC PATROL	
Municipalities—State traffic patrol may permit local law enforcement personnel to ride in state patrol squad cars for training purposes, providing municipality requests that the officers participate in such training -----	159
TRANSPORTATION	
Counties—School districts—County school committee must disallow claims for cost of transportation of nonresident high school pupils under secs. 40.53 (1), 40.56 (2), and 40.04 (1), where transportation to nearest available school was provided -----	274
VETERANS AFFAIRS	
Liens—Wisconsin department of veterans affairs as a junior lien holder, which has been a party in a mortgage foreclosure action, has right to offer proof with respect to priority or the amount due it in the distribution of surplus without having answered or appeared prior to confirmation of sale -----	265

WATERS	Page
Words and phrases—Regarding the regulation of motorboats, sec. 30.06 (1) to (5a) are applicable to some waters; subsecs. (6) and (7) are applicable to some boundary waters; and subsecs. (8) and (10) are applicable to full width of boundary waters -----	236
WEIGHTS AND MEASURES	
Highways and bridges—In a prosecution under secs. 348.15 to 348.17 state need not show actual knowledge on part of owner where it is evident vehicle was operated on behalf of and in connection with owner's business. Class of highway immaterial -----	152
WITNESSES	
Prisons—Subpoena to prisoner is ineffectual since he cannot respond to it and the warden has no authority to produce him. Writ of habeas corpus ad testificandum pursuant to secs. 292.44 and 292.45 is only process to secure attendance -----	260
WORDS AND PHRASES	
Advertising—Discussion of sec. 66.054 (4) relative to the difference between signs as advertising matter and utilitarian material -----	109
Board of health—Discussion of rule H 12.03 of board of health relative to number of full-time instructors in school of cosmetology -----	106
County—A "county nursing home" for the care and treatment of the aged infirm and chronic invalids would be a "county building" under sec. 67.04 (1) (a) which the county could provide by the issuance of its general obligation bonds -----	26
Industrial commission—Highway commission—It is within the authority of the industrial commission, under sec. 103.50, to consider wage changes to become effective on May 1, under collective bargaining contracts previously negotiated, in determining the prevailing wage rate to be certified to the highway commission prior to such date -----	281
Motor vehicle—The running of the statute of limitation upon a damage suit judgment based upon a finding of negligent operation of a motor vehicle constitutes a discharge of such obligation as that term is used in sec. 344.26 (1) -----	285
Motor vehicle department—The use of the word "nonuniformed" in sec. 110.07 (3) precludes the motor vehicle department from prescribing and purchasing a standard type of work clothing for inspector personnel -----	234
Permits—Restaurant—Discussion of fraternal organizations as used in sec. 160.01 (2) and the need for permits to occasionally serve or sell meals -----	287
Poor relief—Legal settlement of employe and inmate who resides in a county home discussed. Secs. 49.10 (4) and 49.15 (2) discussed -----	41
Waters—Regarding the regulation of motor boats, sec. 30.06 (1) to (5a) are applicable to some waters; subsecs. (6) and (7) are applicable to some boundary waters; and subsecs. (8) and (10) are applicable to full width of boundary waters -----	236

WORKMEN'S COMPENSATION

Page

Statutes—Where an award was made on claim for compensation under the 1951 statutes, additional injury due to subsequent exposure constitutes a new and separate claim under sec. 102.555 ----- 140

ZONING ORDINANCE

County—Revision of an existing county zoning ordinance can be accomplished only by amendment to sec. 59.97 (3).
 Towns may adopt the amendatory ordinance only in the manner provided in sec. 59.97 (3) (g) ----- 65